No. 07-1216

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the
Supreme Court of Oregon

BRIEF OF PUBLIC JUSTICE, P.C.; THE TOBACCO LEGAL CONTROL CONSORTIUM; THE TOBACCO PRODUCTS LIABILITY PROJECT; THE TOBACCO CONTROL RESOURCE CENTER; PUBLIC HEALTH ADVOCACY INSTITUTE; THE TOBACCO TRIAL LAWYERS ASSOCIATION; AND THE AMERICAN ASSOCIATION FOR JUSTICE, AS *AMICI CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Public Justice, P.C., is a national public interest law firm that marshals the skills and resources of attorneys to create a more just society. Public Justice has pioneered cases advancing consumers' rights, preserving the environment, upholding civil rights and liberties, and safeguarding the civil justice system. Public Justice seeks to vindicate individual rights by holding wrongdoers accountable for their misconduct. Punitive damages are a vital weapon in this effort. If punitive damages awards are arbitrarily restricted, without allowing for flexibility as warranted by the facts of each case, the purposes these damages are meant to serve—to punish unlawful conduct and deter its repetition—will be thwarted. That is particularly true in an exceptional case such as the present, where the Petitioner and other tobacco companies, working together, have carried out an extended campaign of fraud and deceit, with disastrous consequences for the public health.

The **Tobacco Control Legal Consortium** ("TCLC") is a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a 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 contribution to its preparation or submission. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. TCLC grew out of collaboration among specialized legal resource centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others. TCLC also prepares legal briefs as amicus curiae in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. It has submitted amicus briefs in recent cases before this Court; and, *inter alia*, the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, South Carolina, and Washington.

The **Tobacco Products Liability Project** ("TPLP") of the **Public Health Advocacy Institute, Inc.** ("PHAI") is a non-profit, public interest organization dedicated to protecting the health of the public. The goal of PHAI is to support and enhance a commitment to public health in individuals and institutions that shape public policy through law. PHAI is committed to research in public health law, public health policy development, providing legal technical assistance and collaborative work at the intersection of law and public health. PHAI has unusual depth and breadth of experience in tobacco control issues generally, as well as longstanding and specific expertise in the legal and policy issues relating to tobacco control. Since 1979, PHAI has provided legal information in support of tobacco control through the publication of research scholarship and direct legal and policy assistance to

public health organizations, governmental agencies and individuals. TPLP and PHAI are based at Northeastern University School of Law in Boston, Massachusetts.

The **Tobacco Control Resource Center** ("TCRC"), founded in 1979 at the Northeastern University School of Law, is a division of the PHAI devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

The **Tobacco Trial Lawyers Association** ("TTLA") is a national organization of approximately 80 lawyers, law firms and non-profit organizations who specialize in tobacco litigation; more specifically, handling personal injury, death and consumer claims against the manufacturers and sellers of tobacco products. Injury, death and economic loss from tobacco products represent the greatest public health challenge in history and the number of victims increases each year. Public health estimates implicate tobacco in over 500,000 deaths annually in the United States and many times that worldwide. TTLA's mission is to provide collaborative resources to help its attorney members and others hold the tobacco industry fully accountable for this public health disaster. TTLA members have special expertise and experience in the litigation strategy employed by Philip Morris and the tobacco industry in general and special interest in educating the courts and the public in this area.

The **American Association for Justice** ("AAJ") is a voluntary national bar association whose approximately 50,000 members primarily represent

plaintiffs in personal injury actions and other civil litigation. AAJ believes that punitive damages serve as a vital tool both in deterring wrongful conduct and in promoting public safety. In addition, it is AAJ's belief that state supreme courts properly exercise broad authority to administer state tort law and state procedural rules to serve the ends of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Philip Morris contends that the Oregon Supreme Court's restoration of the jury's punitive damage verdict should be overturned by this Court because Philip Morris had no notice that its proposed jury instruction had to be "correct in all respects" in order to constitute a proper request under well-settled Oregon law.

In seeking to be excused from compliance with established Oregon jury instruction law, Philip Morris claims to be as victimized and disadvantaged as a *pro se* litigant defending itself blindly in a system with which it has no experience, and for which it lacks adequate resources to compete with a sophisticated adversary. But Philip Morris is a seasoned and sophisticated litigant. After years of skilled litigation in both the Oregon system and this Court, Philip Morris invokes ignorance of the law as an excuse for a completely new trial. This amicus brief is respectfully submitted to defuse any residual impression that Philip Morris may or should, consistent with fundamental due process principles, be excused from its responsibilities under Oregon law and treated as an outgunned litigant who needs or deserves special help from this Court.

Delay denies justice, and our system struggles to minimize the delay that occurs as a side effect of due process. Delay is a necessary evil, not a positive virtue, and no party has a legitimate interest in creating or increasing it as a litigation tactic. Jesse Williams died in 1997. In 2008, Petitioner wants a new trial. Yet Petitioner is no litigation novice, humbly begging a second chance after its first brush with an unfamiliar system has gone awry. Petitioner has an active legal history of exploiting litigation cost and delay as a bludgeon to punish and deter plaintiffs in smokers' actions like this one.

The history of tobacco litigation demonstrates the aggressive use of every available delaying tactic, and the investment of vast resources, by Philip Morris and its fellow cigarette manufacturers in a relentless and devastating strategy of attrition. Philip Morris has become accustomed, by virtue of its repeated success, to the presumption that this is a legitimate strategy, entitled to enforcement by this Court "on request," regardless of its own undeniable failure to follow longstanding Oregon rules. Petitioner ignores state rules with impunity when it suits Petitioner's strategy of attrition, only to invoke them when it loses. The principle of due process, which accords to both sides, in every tribunal, the "just, speedy, and inexpensive determination of every action and proceeding[2] should prohibit, not reward, such tactics.

The implications of Petitioner's strategy are especially ominous for those, like the Williams, who

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[2] *See, e.g.* Fed. R. Civ. P. 1. Oregon, like many other states, has adapted and enforced the identical rule.

suffer significant harm that generates low compensatory damages: retirees, homemakers, and those who are aged or impecunious when they suffer injury or death from a defendant's purposeful and profitable wrongful conduct. The States have an abiding interest in applying their procedural rules to protect such victims from litigation abuse that should be honored and enforced by this Court. This Court's entry into the traditional States' province of punitive damages was not intended to serve as yet another instrument of attrition. It should not be stretched beyond due process bounds, by honoring untimely requests for exemption from long-established State rules, simply to accord well-heeled litigants as many appellate and trial opportunities as they can afford, to the ultimate prejudice of their adversaries.

ARGUMENT

I. PHILIP MORRIS IS A SOPHISTICATED LITIGANT WHO NEITHER NEEDS NOR IS ENTITLED TO THE EXTRAORDINARY INTERVENTION OF THIS COURT

As Petitioner's website homepage, "Philip Morris USA," states: "We are the largest tobacco company in the U.S. . . .Philip Morris USA is the nation's leading cigarette manufacturer and for more than 20 consecutive years has had the highest revenues, income, volume and market share in the U.S. cigarette business."[3]

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[3] http://www.philipmorrisusa.com/en/cms/Company/Corporate_Structure/default.aspx (last visited October 18, 2008).

At the trial of this matter, Petitioner Philip Morris gambled – and lost – on a proffered jury instruction that materially misstated Oregon law. When its requested jury instruction No. 34 was rejected, it failed to submit a correct one. Philip Morris, an experienced and well-funded litigant, was represented by experienced Oregon trial counsel, who made a tactical decision whose consequences were clear to them under Oregon law.[4] Philip Morris now asks this Court, years after the trial, to intervene on its behalf, and order the State of Oregon to expend its fiscal and judicial resources on a new trial. Such extraordinary "relief" not only rewards Petitioner, but punishes the plaintiff, an elderly widow who followed Oregon's trial rules and met her burden of proof, by requiring her to spend more money, and abide additional years, on a new trial (and to endure the cost or delay of Petitioners' own predictable additional appeals).

Sometimes, under rare circumstances, the enlightened application of due process bestows upon unsophisticated or impoverished litigants a fresh start, a second chance at recasting their defense

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[4] Oregon's courts have uniformly held that there is no error in refusing the requested instruction if it is not "clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors"). Oregon practice manuals advise trial counsel they should not intermix different legal propositions within a single requested jury instruction. Oregon State Bar, APPEAL AND REVIEW §§ 9.23; 14.74 (2002 Supplement) This authoritative treatise was co-authored by Jay Beatty, who argued the jury instruction issue for Petitioner at trial. J.A. 11a-29a.

strategy. But Philip Morris is no Gideon, and its trumpet blows off-key. Gideon had no counsel, and no defense strategy. Philip Morris had excellent trial counsel, well-versed in Oregon law.[5] Philip Morris has refined its defense strategy over decades, and seeks from this Court that which the Oregon Court correctly denied: a reward for being too clever by half.

Philip Morris is a seasoned litigant who has utilized every rule of procedure available in every jurisdiction – properly and improperly – to prevent any smoker's case from reaching final judgment. Few cases – only a handful – including the *Williams* case now (and again) before this Court, have survived the Petitioner's litigation gauntlet to reach – and win – a trial.

Litigation against the tobacco industry began in 1954. The industry faced a collective crisis – a great cancer scare – that threatened its existence. Together, the tobacco companies, including Petitioner Philip Morris USA ("Philip Morris"), fought back with a campaign of deceit and deception. Part of that campaign was the early decision – reaffirmed over the decades – to wage a war of attrition in courtrooms around the nation, abusing the legal process and concealing evidence.[6]

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[5] *See Estate of Schwartz v. Philip Morris, Inc.*, 135 P.3d 409 (Ore. Ct. App. 2006), in which Petitioner's counsel's correct presentation of single-sentence jury instructions under established Oregon procedure won it a reversal of a 2002 trial verdict.

[6] The cigarette industry's successful litigation history derives from an early decision to fight all lawsuits at any cost. The industry considered that if any case were settled, there would

For year after year, decade after decade, individual smokers sued tobacco companies, including Petitioner.[7] The industry beat them back with aggressive, no-money-spared litigation. This strategy was widely publicized in the media and entered the popular culture.[8] For decades, the

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be tens of thousands of potential claimants to whom payment – no matter how small – would be prohibitive. *See, e.g.*, E.J. Jacob & Jacob Medinger, *Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation*, http://tobaccodocuments.org/bliley_rjr/504681987-2023.html, at 50468-1997 (June 27, 1980). The industry demanded "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount." J.F. Hind, *Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee*, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

[7] The federal judge presiding over the Department of Justice ("DOJ") tobacco litigation recently found that Petitioner and the industry engaged in a 50-year scheme in violation of racketeering laws – "with little, if any, regard for individual illness and suffering . . . or the integrity of the legal system" – and further found that the racketeering continues to this day. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) .

[8] Hill & Knowlton, Background Material on the Cigarette Industry Client (Dec. 15, 1953), http://legacy.library.ucsf.edu/tid/wvc34c00. A central strategy for the cigarette industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, Wall St. J., Apr. 29, 1987, at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco

industry paid not one penny, by way of judgment or settlement.

Petitioner has had 54 years to hone its litigation strategy and refine its defense.

In the early 1950s, several scientific studies linking smoking and lung cancer were published. This caused a public sensation, termed "the Big Scare" by the tobacco companies.[9] In response, in December 1953, the leaders of the tobacco companies – including the president of Philip Morris – met in New York's Plaza Hotel to formulate a plan of action; the first meeting of the industry executives in years, as "criminal convictions" under antitrust laws had led them to keep their distance. But with the death toll from lung cancer at 25,000 a year and rising, the "very existence" of the tobacco industry was threatened, and the same corporations who battled each other for market share banded together to protect and promote the total market from their common product.[10]

As a result of the Plaza Hotel meeting, the industry – including Philip Morris – published a full-

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industry's "overwhelming strength and prowess at every turn." *Id.*

[9] *Tuosto v. Philip Morris USA Inc.*, 2007 U.S. Dist. LEXIS 61669, *4 (S.D.N.Y. 2007).

[10] This meeting, and the events, agreements, and conduct surrounding it, are detailed in Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853, 858 (1992); and in *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 36-39 (D.D.C. 2006), describing the creation of a conspiratorial RICO "enterprise" among Philip Morris and its competitors.

page advertisement in newspapers around the country on January 4, 1954, titled "A Frank Statement to Cigarette Smokers."[11]

The "Frank Statement" raised doubts about the causal link between smoking and disease: "For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence."[12]

The "Frank Statement" announced the creation of the Tobacco Industry Research Committee, later re-named the Council for Tobacco Research, which the industry proclaimed would conduct research under the direction of "a scientist of unimpeachable integrity," but which in fact served as a foundation of the industry's conspiracy. [13]

The "Frank Statement" propounded misrepresentations and false promises: "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health." [14]

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[11] The Frank Statement reset out in its entirety in *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 at 39-40.

[12] *Id.* at 40.

[13] *Id.*

[14] *Id.*

That same year, 1954, saw the filing of the first personal injury cancer case against the tobacco industry. Rabin, *supra*, at 857. For decades, Philip Morris and the other companies worked together to rebuff claims against cigarettes and preserve their market.[15] The industry's self-proclaimed litigants' strategy was unleashed: aggressive, scorched-earth tactics, no offer of settlement (not "a penny," in the words of Philip Morris's general counsel),[16] and concealment of internal documents evidencing the industry's admissions that its product caused death and disease. This strategy was "unique in the annals of tort litigation." Rabin, *supra*, at 857. "From the beginning, the cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals." *Id.*

This "endless appeal" strategy has characterized tobacco litigation in every decade. For example, *Green v. American Tobacco* wound through 12 years of litigation, two trials, five appeals, and two unsuccessful petitions for certiorari to this Court. Rabin, *supra*, at 861.[17] *Ross v. Philip Morris* lasted 10 years, from 1954 through 1964. At trial, six physicians testified for Philip Morris that cigarettes did not cause the plaintiff's throat cancer,

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[15] The Oregon Supreme Court's 2006 decision in this case includes references to industry-wide cooperation. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-70 (Or. 2006)).

[16] *See Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 n.13 (D.N.J. 1993).

[17] *Green v. American Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962); *Green v. American Tobacco Co.*, 391 F.2d 97, 101-02 (5th Cir. 1968); *Green v. American Tobacco Co.*, 409 F.2d 1166, 1167 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

with some also testifying that alcohol was a suspected cause. *Ross v. Philip Morris & Co. Ltd.*, 328 F.2d 3, 4-5 (8th Cir. 1964).

Thayer v. Liggett & Myers Tobacco Co., 1970 U.S. Dist. LEXIS 12796 (D. Mich. 1970), ended in a jury verdict for defendant. Afterwards, the trial court – disturbed by the defendant's "overwhelming superiority in resources" and "insatiable appetite for procedural advantage" – detailed the abuses. *Id.* at 18, 19. Among other things, the court noted that the defendant was evasive in discovery, *id.* at 5-6, 9-10; "confidently risk[ed] tactics" knowing that the plaintiff "could not afford the luxury of a mistrial," *id.* at 18, and obtained a sweeping protective order, "on grounds which later proved largely illusory," to isolate plaintiff's counsel. *Id.* at 16; *see also id.* at 10-14. Meanwhile, defense counsel freely engaged in extensive cooperation with other industry attorneys. *Id.* at 15 & n.8, 16, 17 n.10, 101-02.

As the *Thayer* court concluded:

> The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial.
>
> This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.

Id. at 59.

II. PHILIP MORRIS HAS DEPLOYED A LITIGATION STRATEGY OF ATTRITION FOR 50 YEARS THAT HAS DENIED DUE PROCESS TO PLAINTIFFS IN TOBACCO LITIGATION

The *Green*, *Ross*, and *Thayer* cases described in Section I above, and many others, enabled Petitioner to hone its defensive craft. As Petitioner became a successful veteran of trials in both federal and state courts, these remained unsuccessful for plaintiffs, regardless of their merit. As a result of the tobacco companies' concerted deployment of an unwavering strategy of attrition, the suits were, as predicted, simply too expensive to win this. This striking success at eroding judicial constraints on litigation abuse gave Petitioner's industry bragging rights. As R.J. Reynolds' general counsel put it:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his. [18]

Ironically, *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, (D.N.J. 1993), a notorious example of due process defeated by attrition, also stands as a

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[18] *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing April 29, 1988 memo from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co.).

rare instance in which a trial court, alarmed by the threat of this unchecked litigation-as-war strategy to due process, finally called the tobacco defendants (including Petitioner) out. The *Haines* case was filed in 1984. By 1992, plaintiffs' counsel (a well-respected and experienced firm) was forced to file a motion to withdraw, exhausted by interminable delays and mounting expenses, including $500,000 in deposition transcript costs alone. Judge Lechner, reluctantly permitting the withdrawal, wrote:

> *Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of the weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants . . . Litigation costs have become intolerable, and they cast a threatening shadow over the basic fairness of our legal system.*

814 Supp. at 424.

Plaintiffs did not *always* lose. The *Cipollone* case itself survived the pretrial costs and delays, and reached trial. The result was the first verdict for a plaintiff in a smoker's case. The judgment survived, in part, on review by this Court, and was remanded for further proceedings. [19]

Yet, following this Court's decision, which vindicated their claims, the *Cipollone* plaintiffs, after a decade of litigation, consented to a dismissal with prejudice. *See Haines*, 814 F. Supp. at 417 n.4.

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[19] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Their attorneys – recognized at the time as "the leading law firm" in tobacco litigation – also moved to withdraw from related tobacco cases, citing the "unreasonable financial burden." *Id.* at 418, 425. In 10 years, not a single of the firm's tobacco cases had been resolved on the merits. *Id.* at 421 n.14. Given this record, no lawyer was willing to take over these cases. *Id.* at 425. This was a familiar theme. As two other attorneys from the era wrote:

> The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their case, no matter how hard they look. . . . [B]y making the cost of litigation so high, the cigarette manufacturers have closed the courthouse doors to most people who have gotten sick or died from using their products.
>
> They have done this by resisting all discovery aimed at them. . . . They have done it by getting confidentiality orders attached to the discovery materials they finally produce, . . . forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering . . . every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting

> plaintiffs' counsel in the position of taking numerous expensive depositions or else not knowing what the witness intends to testify at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.[20]

Other plaintiffs' lawyers described similar tactics: "[T]he Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived," "[T]he cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial," "Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection was made, the explanation was that he might have had a health course in the elementary grades."[21]

In the end, this era of individual smokers' litigation concluded with the tobacco industry's undefeated record intact. After almost 40 years of litigation, and 300 cases filed since the 1950s, there

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[20] William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 276-77 (1989).

[21] *Id* at 297-299.

still had not been a single judgment – or penny paid – to plaintiffs. *Haines,* 814 F. Supp. at 428 n.31.

The tobacco industry's record of attrition is not merely a matter of historical interest. Petitioner's product continues to kill thousands of smokers (such as Jesse Williams himself, who began smoking in the early 1950s as the industry conspiracy took hold.[22] This Court has remarked upon the uniquely tragic public health crisis caused by smoking, and the tobacco industry's successful resistance to regulations.[23] Citing FDA documentation, this Court recited the tragic litany of smoking statistics. One in three regular smokers dies from cigarette-caused disease.[24] That amounts to more than 400,000 deaths each year in the United States from tobacco-related illnesses, including cancer, respiratory illnesses, and heart disease.[25] With approximately half of the domestic market

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[22] *See Williams*, 127 P.3d at 1168.

[23] As this Court wrote in 2000, cigarette smoking is "one of the most troubling public health problems facing our Nation today. . . ." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (Petitioner, a party to the *FDA* case, was one of those seeking exemption from FDA regulations for its product). "A striking irony emerges when one considers that the industry that markets the most dangerous product sold in America is the only industry that has been completely sheltered from the storm of twentieth-century product liability." Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423, 1424 (1980).

[24] 539 U.S. at 135.

[25] *Id.* at 127-28.

share, Philip Morris products cause 200,000 of those deaths.

In August 2006, the district court in the DOJ tobacco litigation[26] found that the companies – including Petitioner – "violated and continue to violate" the Racketeer Influenced and Corrupt Organizations Act ("RICO") and that "[t]here is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past."[27]

The *Philip Morris* RICO order was entered after seven years of litigation, the production of millions more pages of documents, and a bench trial of nine months. *Id.* at 28. The district court found "overwhelming evidence," *id.*, at 27, and summarized the industry's scheme as follows:

> [O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction . . . and they abused the legal system in order to achieve their goal –

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[26] *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

[27] 449 F. Supp. 2d at 911.

> to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.[28]

Repeatedly, the *Philip Morris* court cited the industry's abuse of the legal system, stating that, "At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes."[29] The court found that these actions furthered the RICO enterprise's goals, which included "avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation." [30]

The industry documents that were concealed from the public for 40 years, and withheld from the plaintiffs in *Haines*, *Cipollone*, and many other cases, were ultimately produced by Liggett, which broke ranks with Petitioner to precipitate the Attorneys General settlement in the 1990s. They are now available to potential plaintiffs, but many thousands of smokers are long dead and have lost the opportunity, contrary to Petitioner's recommended jury instruction in this case, to "bring lawsuits of their own." When plaintiffs do attempt such suits, they meet the identical strategy that still confronts Respondent in this case: appeal after appeal, and multiple petitions to this Court. Petitioner has sought to exploit and distract this Court's legitimate concern with punitive damages,

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[28] 449 F. Supp. 2d at 852.

[29] *Id.* at 28.

[30] *Id.* at 866.

and has turned due process on its head. This Court should not allow its due-process-derived punitive damages jurisprudence to be exploited and distorted into a further deterrent and punishment against plaintiffs who seek to vindicate their states' interests in the public health and safety.[31]

III. THE EVEN-HANDED APPLICATION OF DUE PROCESS IS NECESSARY TO UPHOLD STATE INTERESTS IN PUNISHMENT AND DETERRENCE AGAINST A CONCERTED STRATEGY OF LITIGATION ABUSE

Philip Morris' conduct caused Jesse Williams' death. Jesse Williams was a human being who died in 1997; Philip Morris is a limited liability corporation with the potential for immortality. The law of Oregon, as elsewhere, treats both as legal persons, and does not discriminate[32], despite the many "peculiar characteristics of corporations as distinguished from natural persons."[33]

The reality that, apart from legal fiction human and corporate persons are different creates a profound challenge in applying punitive damages to fulfill the express and legitimate deterrent and retributive functions this Court has repeatedly

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[31] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of N. Am., Inc. v. Gore*, 517 US. 559, 576-77 (1996).

[32] *Behnke-Walker Business College v. Multnomah County*, 146 P.2d 614, 617-18 (Or. 1944).

[33] *Nelsen v. Davidson Industries, Inc.*, 360 P.2d 307, 310 (Or. 1961).

acknowledged.[34] Human beings feel shame, fear, and pain. Sanctions involving death, imprisonment, or dishonor thus serve as powerful deterrents. Corporations may not be killed and themselves feel no inhibitory emotions. Human beings are held personally accountable for their crimes and torts. In contrast, corporate responsibility is merely economic, and is dispersed among thousands or millions of shareholders, none of whom is at risk in excess of her investment.[35] If punitive damages are to effectively punish and deter corporate misconduct, they must be imposed at a level sufficient to modify the behavior of the corporation's officers, directors and shareholders.

Optimal deterrence is achieved by confronting defendants with damages equal to the aggregate tortious loss, or by requiring disgorgement of all profits from reprehensible conduct. The *Williams* award itself, either alone or in combination with those handful of other smokers have obtained, does not present such a confrontation; the *Williams* award itself reflects only a week or two of Petitioner's yearly profits. Petitioner's reprehensible conduct, in Oregon and elsewhere, remains economically profitable. No unconstitutional level of punitive damages has been reached with *Williams*. Such awards are necessary to overcome the strategy of attrition that, while now exposed, is still at work

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[34] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *State Farm*, 538 U.S. at 416.

[35] *See U.S. v. Philip Morris*, 449 F. Supp. 2d at 28 (finding, *inter alia*, that Petitioner deceptively marketed "lethal" products with "single-minded focus on financial success" "without regard for the human tragedy or social costs that success exacted.")

in tobacco litigation and is evident in the instant case.

In its *Cipollone* decision, this Court rejected the tobacco industry's plea for preemption, and enabled smokers' tort claims to continue against tobacco companies, recognizing that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[36] But not potent enough. The *Cipollone* litigation itself was protracted, both before and after its trip, at Petitioner's behest, to this Court.[37]

While the verdict in *Cipollone* was $400,000, plaintiffs incurred over $500,000 in out-of-pocket costs and over $2 million in lawyer and paralegal time to accomplish this result, while an astounding $50 million was spent by Petitioner and its fellow defendants on the case.[38] Tobacco company attorneys were quoted in the press as stating, "This verdict sends a message to all plaintiffs' attorneys that these cases are not worth pursuing."[39]

Until 2001, despite over 40 years of litigation, no tobacco company had paid a nickel to settle a

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[36] *Cipollone*, 505 U.S. at 521.

[37] The verdict was followed by more appeals to the Court of Appeals, and to this Court, which affirmed and reversed in part. *See Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

[38] *See* Andrew Blume, "*Will Next Round of Smoking Challenges be Worth Pursuing?*," The National Law Journal, June 21, 1988.

[39] *Id.*

smokers' case, or satisfy a smokers' judgment.[40] The strategy of attrition was absolute. The lesson has been well learned by would-be plaintiffs, and their lawyers. While the tobacco tragedy is certainly, in the words of a California Court of Appeal, "the quintessential mass tort,"[41] there is no quintessential mass tort tobacco litigation. The 1999 *Williams* verdict did not precipitate a wave of smokers' suits in Oregon. Past and pending tobacco suits number in the high hundreds or low thousands, not the hundreds of thousands or millions that public health statistics would predict. The tobacco companies' misconduct is open, obvious, and notorious – scarcely hidden at this point – but nonetheless undetected, unpunished, and undeterred.

Petitioner and its *amici* have expressed concern that the *Williams* award will be replicated in future Oregon suits, inflicting multiple punishment for the same harm. The Oregon statute protects against this outcome.[42] Moreover, Petitioner has

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[40] The first payment, $1 million, came in March 2001, to 70 year old Grady Carter. His years-long battle is described in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932 (Fla. 2000) and was concluded by this Court's denial of certiorari to defendants. *Brown & Williamson Tobacco Corp. v. Carter*, 533 U.S. 950 (2001).

[41] *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429, 1478 (Cal. App. 2004), *cert. denied*, 544 U.S. 920 (2005) ("Plaintiff's claims …rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct *directed at the entire public* and maliciously injuring …an entire category of persons to which plaintiff squarely belongs.").

[42] Oregon law prevents replication of the *Williams* verdict. Philip Morris will not be punished again for its conduct toward Jesse Williams, and will be punished less, next time, for its

repeatedly resisted the legitimate procedural solution (suggested by this Court in *State Farm)* of "inclusion" of all similarly injured persons before one court for binding determination of all punitive damages toward the group.[43]

Rule 1 of the Federal Rules of Civil Procedure embodies due process, announcing the overarching mandate of the federal courts themselves, and the lawyers who practice in them: "to secure the just, speedy, and inexpensive determination of every

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conduct toward another Oregon smoker. Oregon law provides for consideration of past punitive damage awards. Or. Rev. Stat. § 30.925(2)(g).

[43] 538 U.S. at 421-22. Petitioner has persistently opposed every effort to bring any class or group action against any aspect of tobacco industry conduct. *See, e.g.*, *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006); *cert. denied sub nom R.J. Reynolds v. Engle*, 128 S.Ct. 96. *reh'g denied*, 128 S.Ct. 694 (2007) (describing Florida smokers' protracted class action efforts). Classwide punitive damage calculations could nonetheless provide conformity and predictability within each similarly-situated group, while ensuring against overdeterrence and preventing multiple punishment. *State Farm* allows "inclusion" of all who claim compensatory and punitive damages from the same defendant for the same conduct, and other courts have noted "the safeguards against duplicative punishment that inhere in the class action procedure" as "mechanisms . . . for punishing defendants" where "there has been a pattern of illegal conduct resulting in harm to a large group of people." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (citing *State Farm*). Yet Petitioner does not request that the entirely new trial it seeks here include all Oregon smokers, a procedure arguably "superior to other available methods" to secure the "fair and efficient adjudication" of Philip Morris' punitive damages liability to Oregon smokers under established Oregon law. ORCP 32D; ORCP 1.

action and proceeding."[44] This Court has dubbed these goals "the touchstones of federal procedure."[45] Oregon Courts follow the identical rule, and pursue the identical policies.[46]

Petitioner, true to its history as a scorched earth litigant, advocates further cost and delay by seeking this Court's indulgence to start over, in a proceeding that, with two trips each to this Court and the Oregon Supreme Court, is already the antithesis of speedy and inexpensive, and, given Petitioner's superior resources and corporate longevity, is palpably unfair to Respondent.

Litigation tactics or motions that are technically correct, or arguably appropriate in some circumstances, may be unfair -- and sanctionable - in others. Under the Federal Rules, and Oregon's

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[44] Fed.R.Civ.P. 1. Rule 1 has the force of law and implements Article 3, Section 2 of the Constitution. The policies that underlie the Federal Rules, quintessentially those articulated in Rule 1, apply expressly to the Courts of Appeals. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989).

[45] *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). "The lawyer's role extends beyond filing motions and being an unquestioning mouthpiece for his client: His role is to engage in the adversarial process in good faith and in accordance with" the precepts of Rule 1. *Reebok Int'l v. Sebelen*, 959 F.Supp. 553, 558 n. 1 (D.P.R. 1997). Litigants have an obligation to refrain from conduct that frustrates Rule 1. *Hill v. McMillan McGraw-Hill Sch. Publ'g Co.*, 1995 WL 317054 (N.D. Cal. 1996), *appeal dismissed*, 102 F.3d 422 (9th Cir. 1996).

[46] "ORCP 1B states that the Oregon Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Dotson v. Smith*, 307 Ore. 132, 137, 764 P.2d 540, 543 (Ore. 1988).

identical Rule, motivation matters. Fed.R.Civ.P. 11 and ORCP 17(c) prohibit filing motions for "any improper purposes, such as to harass or cause unnecessary delay or needless increase in the cost of litigation," and empower the courts to punish such transgressions. It is little exaggeration to characterize Petitioner's chosen litigation strategy as a pattern and practice of ongoing Fed.R.Civ.P. 11/ORCP 17 violations.[47]

Petitioner seeks not due process, but its polar opposite: undue and undeserved exemption from the procedural rules that govern every other litigant, every day, in all Oregon civil trials.

As observed in *In re Tobacco Litigation*,[48] every litigant is entitled to due process, consistent

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[47] Tobacco defendants are infamous in the tobacco litigation bar for filing a bewildering array of motions. This is no coincidence. One internal industry document instructs that "it is critical to file a series of motions *in limine* before each trial," to gain the "slight tactical advantage found in forcing plaintiff's counsel, on the eve of trial to respond to such motions and to formulate alternative trial strategies in the event that any of defendants' motions are granted." Jones Day, *Smoking and Health Litigation Tactical Proposals*, http://tobaccodocuments.org/ness/38741.html, (Aug. 10, 1985).

[48] *In re Tobacco Litig.*, 624 S.E.2d 738, 744 (W. Va. 2005) (Starcher, J., concurring). The *In re Tobacco Litigation* court was asked to determine whether the Due Process Clause, as interpreted by this Court in *State Farm v. Campbell*, precluded a bifurcated trial procedure for the personal injury and punitive damages claims of 1,000 individual smokers. The West Virginia high court analyzed the due process implications, and determined that a Phase I/Phase II proceeding that subjected every plaintiff's punitive damages claim to an individual calculation, based on the compensatory damages awarded to each, comported with due process and *State Farm*. 624 S.E.2d at 739, 740-43.

with the court's "duty to afford *all* parties due process." In other words, due process is not the monopoly of one side or the other, the consideration of "what process is due" depends upon the facts and procedural posture of each case, and a grant of "due process" to one party that unduly frustrates its opponent's Rule 1 entitlements is not due process, but injustice. Due process is shared between contending litigants, and is calibrated on a "sliding scale" that balances the circumstances of each.[49]

Petitioner has dishonored due process by treating every procedural opportunity as a weapon of attrition, and procedure as its private property, for five decades. Now it wants a break - a dispensation from the evenhanded application, by the Oregon courts, of jury instruction rules it established nearly a century ago.[50]. This brief does not suggest this Court apply the Golden Rule with a vengeance, and let be done unto Petitioner what it has done unto its adversaries for 50 years. The Oregon Supreme Court's ruling is far fairer than that. It simply

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[49] 624 S.E.2d 744, 748 (Starcher, J., concurring).

[50] It has long been "fundamental that a request for an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and substance, and unless it is altogether clear from error." *Beglau*, 536 P.2d at 1256 (collecting cases). There is not a quirk of Oregon procedure that could have caught Petitioner off guard. It is consistent with our adversary system's principle of party presentation, as recognized by this Court. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008). This Court's history of denying relief to those who disregard their responsibility to prepare clear and correct instructions extends nearly 150 years. *See Beaver v. Taylor*, 93 U.S. 46 (1876); *Harvey v. Tyler*, 69 U.S. 328 (1864).

enables the Williams' legal journey to be done, while Mrs. Williams, at least, still lives.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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