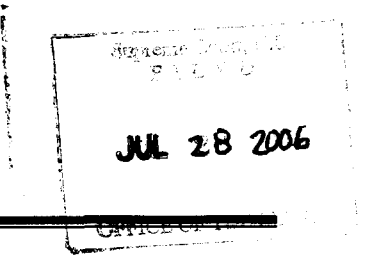

No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF FOR *AMICI CURIAE* R.J. REYNOLDS TOBACCO COMPANY AND LORILLARD TOBACCO COMPANY IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL STATUTES

STATE STATUTES

FEDERAL ADMINISTRATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page

MISCELLANEOUS

STATEMENT OF INTEREST[1]

R.J. Reynolds Tobacco Company and Lorillard Tobacco Company manufacture and sell cigarettes. Reynolds, which now includes the U.S. cigarette and tobacco business of the former Brown & Williamson Tobacco Corporation, is the second-largest tobacco company in the United States. Its brands account for approximately 33% of U.S. cigarette sales. Lorillard is the third-largest tobacco company in the country. Its brands account for approximately 9% of U.S. cigarette sales.

Reynolds and Lorillard face a large volume of tobacco-related personal injury litigation, and as a result are regularly at risk of suffering large punitive damages awards based on claims closely resembling the claims at issue in this case. In addition, Reynolds and Lorillard, as repeat players in high-stakes tort litigation, are at risk of being punished repeatedly (and excessively) for one and the same course of conduct. For that reason, they have an interest in seeing that the constitutional limits on the size of punitive awards are not undermined, and that juries in a single case not be permitted to punish a defendant broadly for conduct affecting other alleged victims.

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than the undersigned *amici* and their counsel, has made a monetary contribution to this brief's preparation and submission. Both parties have consented to the filing of briefs *amicus curiae* in this case. Letters of consent are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

I. The reprehensibility of a defendant's conduct is an important guidepost by which to judge punitive damages, but only if it guides the jury's or court's discretion in settling on an amount *within* the boundaries established by other, more objective guideposts (most notably the proportionality or "ratio" guidepost). If, however, a court is allowed to *override* the other guideposts upon finding that the defendant's conduct is unusually or "extraordinarily reprehensible"—as happened in this case (Pet. App. 23a, 33a)—then the guideposts cease to constrain a jury's or court's discretion and thus cease to protect against arbitrary behavior.

The experience of Petitioner and *amici* shows just how standardless the notion of extraordinary reprehensibility is. The very same behavior that the Oregon Supreme Court found to be so thoroughly reprehensible as to justify overriding this Court's limits on punitive damages—namely, an alleged fraudulent scheme to obscure the link between smoking and disease—has been found in the great majority of similar cases not even to give rise to liability, let alone punitive damages. A number of courts have gone so far as to rule as a matter of law that cigarette manufacturers could not possibly have defrauded smokers because the link between smoking and disease has long been "common knowledge."

The Oregon Supreme Court's notion that a finding of extraordinary reprehensibility alone can justify overriding normal constitutional limitations is also flawed in that it completely ignores the need—or lack of need—for deterrence: in the present case, it allowed that court to overlook the many existing impediments to future repetition of the alleged misconduct, including: (1) a settlement agreement with the States that requires Petitioner and *amici* to pay hundreds of billions of dollars in perpetuity and gives State attorneys general the power to enforce a variety of prohibitions; (2) required warning labels for all cigarette

packages and advertisements; (3) strict oversight by the FTC; and (4) cigarette manufacturers' public statements recognizing that smoking causes disease and is addictive. This highlights a serious problem with the Oregon Supreme Court's approach, given that deterrence of future misconduct is one of the two legitimate purposes that punitive damages serve.

II. By permitting a jury in an individual tort case to award punitive damages to punish a defendant for all the harm it has allegedly caused within the State, Oregon violates procedural due process. This "statewide" approach to punitive damages effectively guarantees two types of error. First, by allowing multiple juries each to punish a defendant for an entire statewide course of conduct, that approach creates a system skewed toward duplicative and excessive total punishment. Second, since a defendant almost always will have a good defense to at least some plaintiffs' claims, an award that punishes the defendant for every harm allegedly inflicted on every resident of the State is bound to end up punishing the defendant for conduct that is found not to be culpable.

Nor does historical practice ratify statewide or multiple punishment. The threat of multiple punishment is overwhelmingly the product of mass tort litigation, which is a relatively recent phenomenon. To the extent common law courts ever had occasion to consider multiple punishment—as they occasionally did in lawsuits for the torts of seduction and breach of contract to marry—the consensus was that punitive damages should be confined to punishing the defendant for the harm to the particular plaintiff.

ARGUMENT

Respondent is the widow of Jesse Williams, who began smoking Marlboro cigarettes in the 1950s. She sued Petitioner (the manufacturer of Marlboros) after her husband died of lung cancer in 1997. Among other things, she brought a claim for fraud and alleged "a massive, continuous, near-half-century scheme to defraud" Mr. Williams "and many others." Pet. App. 33a. Her attorney repeatedly claimed that cigarette smoking was responsible for hundreds of thousands of deaths in the United States each year. *See* Transcript, Vol. 9-B, at 138, *Williams v. Philip Morris Inc.*, No. 9705-03957 (Or. Cir. Ct.); *id.* Vol. 11-B, at 41; *id.* Vol. 17-A, at 138. In his closing argument, he performed a rough calculation intended to show that Marlboro cigarettes were responsible for more than 30% of all fatal smoking-related lung cancers in Oregon, and suggested to the jury that "[w]hen you determine the amount of money to award in punitive damages against Philip Morris . . . [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been." *Id.* Vol. 24-C, at 97; *id.* Vol. 23-B, at 91.

The jury found for Respondent on her fraud claim and awarded $821,485 in compensatory damages (later reduced to $521,485) and $79.5 million in punitive damages. After a lengthy series of proceedings that included a remand by this Court, the Oregon Supreme Court affirmed the full punitive damages award, despite this Court's admonition that punitive damages exceeding a "single-digit ratio" to compensatory damages will rarely pass constitutional muster. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). The lower court reasoned that it could overstep the usual constitutional limits because, in the court's view (no specific jury finding was made on the issue) Petitioner's conduct was "extraordinarily reprehensible." Pet. App. 23a, 33a. The court also rejected Petitioner's argument that the jury should have been required to punish only for harm to Mr. Williams

(rather than harm to all Oregon Marlboro smokers), noting that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus." Pet. App. 18a n.3.

This brief focuses on two key points. First, this case illustrates that allowing a jury or court to ignore the usual limits on punitive damages whenever a defendant's conduct strikes it as "extraordinarily reprehensible" is so loose an approach that it would undermine the constraints recognized by this Court in cases like *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm*. Among other things, the contrast between the Oregon Supreme Court's determination and the more usual determinations of juries and judges in *favor* of cigarette manufacturers demonstrates the inherent subjectivity of any standard satisfied by a finding that conduct was "extraordinarily reprehensible." Second, the holding that a jury should be allowed to punish a defendant for harm to non-parties violates procedural due process both by exposing defendants to multiple punishment for the same conduct and by punishing them for conduct determined in other cases not to be culpable at all.

I. ALLOWING A SUBJECTIVE FINDING OF "EXTRAORDINARY REPREHENSIBILITY" TO OVERRIDE THE RATIO GUIDEPOST WOULD RENDER THAT GUIDEPOST MEANINGLESS AS A CONSTRAINT ON ARBITRARY PUNITIVE DAMAGES

This Court has repeatedly recognized constitutional limits on the size of punitive damages awards, and has identified three "guideposts" by which to judge such awards: (1) "the degree of reprehensibility" of the defendant's conduct; (2) "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award"; and (3) "the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *BMW*, 517 U.S. at 574–75. Standards like these "offer some

kind of constraint upon a jury or court's decision, and thus protection against purely arbitrary behavior." *Id.* at 588 (Breyer, J., concurring).

One of the key elements of this system of constraints—rooted both in this Court's prior cases and in history "dating back over 700 years" (*State Farm*, 538 U.S. at 425)—is the second guidepost, which imposes a presumptive upper limit on punitive damages awards of nine times compensatory damages. As this Court emphasized in *State Farm*, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* Moreover, while the single-digit limitation is not a "rigid benchmark[]," this is true only in the sense that a higher award "*may* comport with due process" in certain specified circumstances: *i.e.*, "where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id.* (emphasis added) (quoting *BMW*, 517 U.S. at 582).[2] Indeed, "[w]hen compensatory damages are substantial, then a *lesser* ratio, perhaps only *equal* to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* (emphasis added).

As argued in detail by Petitioner, the decision below—approving punitive damages amounting to 97 times the (very substantial) compensatory award solely because the court termed Petitioner's conduct "extraordinarily reprehensible" (Pet. App. 23a, 33a)—is flatly inconsistent with *State Farm* and *BMW*.

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[2] In addition, a higher ratio "*might*" be appropriate in other specific circumstances: "where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" *Id.* (emphasis added) (quoting *BMW*, 517 U.S. at 582).

However, even if this Court's prior cases had not foreclosed the Oregon Supreme Court's approach, that approach would have to be rejected because it would render the ratio guidepost effectively optional. Allowing a massive punitive award to evade constitutional review whenever a reviewing court deems the defendant's conduct "extraordinarily reprehensible" would give courts a way to sidestep the constitutional constraints articulated in *BMW* and *State Farm* through little more than semantic manipulation. Although the "degree of reprehensibility" (517 U.S. at 575) is an important check on judicial discretion in setting the appropriate level of punitive damages *within the constraints provided by the other guideposts*, it is simply too subjective a determination to serve as a basis for *overriding* or ignoring this Court's other guideposts.

Indeed, the present case provides a perfect illustration of how "extraordinar[y] reprehensib[ility]" is in the eye of the beholder. Pet. App. 23a, 33a. As detailed below, the Oregon Supreme Court found that Petitioner's conduct was extraordinarily reprehensible despite numerous facts casting serious doubt on that characterization and on whether Petitioner's conduct justified punitive damages at all, including:

- Petitioner and other cigarette manufacturers *win* the vast majority of personal injury cases brought to trial against them, and, even when they lose, their conduct is often found not to merit punitive damages;
- Many courts have found fraud claims against cigarette manufacturers insufficient *as a matter of law* even to establish liability;
- A variety of factors, including the Master Settlement Agreement between the States and the major cigarette manufacturers and continuing federal oversight of the tobacco industry, establish that there is no risk that the conduct at

issue will be repeated in the future, and hence no conduct to deter.

In short, these factors make clear that the lower court's extraordinary reprehensibility test provides neither an objective and meaningful constraint on runaway punitive damages nor a basis for identifying those cases in which the purposes of punitive damages might justify an award that exceeds the normal constitutional ratio.

A. Petitioner's Historic Conduct Normally Does Not Even Give Rise To Liability, Let Alone Punitive Damages

As Justices O'Connor, White, and Souter noted in calling for "objective criteria" in this field—a call answered in *BMW*—"[o]ne judge's excess very well may be another's moderation." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 480–81 (1993) (O'Connor, J., dissenting).[3] Perhaps the surest sign that the Oregon Supreme Court's extraordinary reprehensibility test is inherently subjective is the fact that the majority of relevant cases have reached conclusions very different from the one reached by the Oregon Supreme Court: far from yielding large punitive damages awards, personal injury lawsuits alleging the ill effects of smoking ("smoking-and-health lawsuits") overwhelmingly end in findings of no liability or liability without punitive damages.

Since 1954, when the earliest smoking-and-health lawsuit was filed, 83 individual cases involving allegations broadly

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[3] This same passage in Justice O'Connor's *TXO* dissent argues for several of the "objective indicators" that later became the *BMW* guideposts. *See id.* at 481.

similar to Respondent's have gone to trial.[4] Defendants have prevailed in 63 of those cases (76% of the total), mostly by obtaining defense verdicts (57 cases, or 69% of the total) but occasionally as result of post-trial or appellate rulings (six cases, or 7% of the total). Plaintiffs have prevailed in 20 cases (24% of the total), although 12 of those verdicts (14% of the total) are subject to further review. Nine cases (11% of the total) have resulted in punitive damages that have not been overturned, but in only three of those cases (4% of the total) have defendants exhausted their appeals and satisfied the judgments. In other words, based on several decades' experience, defendants have won at trial or on appeal about 75% of the time and avoided punitive damages about 90% of the time. In addition, most cases against cigarette manufacturers are dismissed prior to trial. Available records show that approximately 2,500 cases filed by individual plaintiffs have been dismissed since 1954. The gulf between these results and the Oregon Supreme Court's conclusion that Petitioner's conduct was extraordinarily reprehensible shows just how subjective that court's approach is.

Further underscoring the subjectivity and unpredictability of the Oregon Supreme Court's approach is the fact that in several jurisdictions, courts have rejected claims based on essentially the same alleged conduct at issue in this case, and have done so *as a matter of law*, on the ground that the health dangers associated with smoking are common knowledge and that no rational jury could find that the plaintiffs were defrauded into believing smoking was safe. *See, e.g.*, *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486,

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[4] A list of these cases appears in Appendix A to this brief.

490 (5th Cir. 1999) (dismissing Texas-law fraud claim of smoker who began smoking in 1957 because tobacco has long been "known to be unsafe"); *Prado-Alvarez v. R.J. Reynolds Tobacco Co.*, 313 F. Supp. 2d 61, 77 (D.P.R. 2004) (dismissing fraud claim in part because "reliance would be unreasonable in light of ... the long-standing common knowledge of the health risks, including cancer, associated with smoking"), *aff'd*, 405 F.3d 36 (1st Cir. 2005); *White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 429 n.5 (D. Md. 2000) ("Even if plaintiffs had evidence that Mr. White relied on any misrepresentations, they could not show such reliance was reasonable, in light of the overwhelming evidence of the widespread knowledge that cigarettes were dangerous even as early as 1950.").

The fact that the same alleged conduct is found in one case to create no liability as a matter of law and in another case to require extraordinary punitive damages highlights both the need for meaningful constraints on the size of punitive damages awards and the *lack* of constraint inherent in a test that turns on whether the defendant's conduct strikes the jury or court as "extraordinarily reprehensible." A standard so irremediably dependent on the eye of the beholder is "vague and open ended to the point where [it] risk[s] arbitrary results." *BMW*, 517 U.S. at 588 (Breyer, J., concurring). If permitted to override this Court's ratio guidepost, the Oregon Supreme Court's standard would fatally undermine that guidepost as an independent constraint on punitive damages.

B. Petitioner And Other Cigarette Manufacturers Have Changed The Conduct That Forms The Basis For The Punitive Damages Award Below And Are Subject To Constant Governmental Oversight

The Oregon Supreme Court did not try to justify its extraordinary reprehensibility approach in terms of deterrence, and indeed its approach authorizes departure from this Court's ratio guidepost without regard to whether

the defendant is likely to continue engaging in the conduct at issue in the future. Given that "deterring [the] repetition" of "unlawful conduct" is one of the two "legitimate interests" that punitive damages serve (*BMW*, 517 U.S. at 568), this is a serious omission.

In short, any rational approach to justifying extraordinary punitive damages would necessarily address the need for deterrence of future misconduct, but the extraordinary reprehensibility approach does not even attempt to do so. Had this factor been taken into account, it would have been clear that there is no meaningful need for extraordinary deterrence of Petitioner or other major cigarette manufacturers.

1. The Major Cigarette Manufacturers Are Parties To Enforceable Settlement Agreements With The States That Prohibit Them From Engaging In A Broad Range Of Conduct

In 1998, 46 States, the District of Columbia, and several U.S. territories entered into the "landmark" Master Settlement Agreement ("MSA") "with major manufacturers in the cigarette industry," including Petitioner and its *amici*. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001).[5] "The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief." *Id.* In particular, the companies agreed to subject themselves to constant oversight

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[5] A copy of the MSA can be found at the website of the National Association of Attorneys General: http://www.naag.org/backpages/naag/tobacco/msa.

by State attorneys general and to pay billions of dollars in perpetuity to the settling States (estimated to amount to more than $200 billion over the course of the first quarter century). In addition, the companies agreed to pay $1.45 billion for a "coordinated program of public education and study." MSA §§ VI(b), VI(c), IX(c). Separate agreements with the other four States also call for strict governmental oversight and for payments in perpetuity (amounting to approximately $40 billion over the first 25 years). These agreements likely represent the largest redistribution of wealth through litigation in world history. *See* Michael E. DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 Seton Hall L. Rev. 563, 564 (2001).

The MSA directly prohibits cigarette manufacturers from engaging in various forms of conduct. Some of these prohibitions, such as a near ban on outdoor advertising of cigarettes, could not be constitutionally imposed without cigarette manufacturers' consent. Most relevant for present purposes, the MSA prohibits any "material misrepresentation of fact regarding the health consequences of using any Tobacco Product." MSA § III(r). And it expressly prohibits suppression of information about smoking's health effects:

> No Participating Manufacturer may enter into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products . . . .

Id. § III(q).

The MSA is enforceable in the courts of signatory States, which retain jurisdiction over enforcement actions brought by State attorneys general. *See id.* § VII(a). The MSA also provides for the National Association of Attorneys General ("NAAG") to coordinate and facilitate the MSA's implementation and enforcement by the states. *See id.* § VIII. The cigarette manufacturers themselves have placed $50 million in escrow to fund this enforcement apparatus. *See id.* § VIII(c) & Ex. J. NAAG and the State attorneys general actively monitor the signatory cigarette manufacturers' compliance with the MSA. The parties often are able to resolve concerns without having to resort to the courts, but NAAG and the States have not hesitated to pursue formal enforcement action when they deemed it appropriate. *See, e.g.*, *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 820 N.E.2d 910 (Ohio 2004) (holding, in context of enforcement action by Ohio attorney general, that the MSA prohibits cigarette advertising on matchbooks).

2. Federal Regulation Requires Specific Disclosures By Cigarette Companies

Federal legislation has required warning labels on cigarette packages since 1966. *See* 15 U.S.C. §§ 1331–41. The Federal Cigarette Labeling and Advertising Act ("FCLAA") of 1965 established "a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The FCLAA presently requires cigarette manufacturers to place one of the following four warning labels in a specific format on cigarette packages and in most related advertising:

> SURGEON GENERAL'S WARNING: SMOKING CAUSES LUNG CANCER, HEART DISEASE, EMPHYSEMA, AND MAY COMPLICATE PREGNANCY.

> SURGEON GENERAL'S WARNING: QUITTING SMOKING NOW GREATLY REDUCES SERIOUS RISKS TO YOUR HEALTH.
>
> SURGEON GENERAL'S WARNING: SMOKING BY PREGNANT WOMEN MAY RESULT IN FETAL INJURY, PREMATURE BIRTH, AND LOW BIRTH WEIGHT.
>
> SURGEON GENERAL'S WARNING: CIGARETTE SMOKE CONTAINS CARBON MONOXIDE.

The Federal Trade Commission also regulates cigarette manufacturers' speech about smoking and health. Congress created the FTC in 1914 to redress every "unfair method of competition or unfair or deceptive act or practice in or affecting commerce." 15 U.S.C. § 45(b). This extends to "regulation of unfair and deceptive tobacco advertisements." *Watson v. Philip Morris Cos.*, 420 F.3d 852, 855 (8th Cir. 2005). The FTC also has a long and continuing history of vigilance in this field:

> Since [1955], the Commission has maintained a close and continuous scrutiny of cigarette advertising practices, and has been deeply attentive to the progress of medical research into the health aspects of smoking. The Commission's staff has monitored all cigarette advertising during this period, and continues to monitor it today. Close contact has been maintained with the officials of the cigarette industry and with the public and private bodies that have been engaged in scientific research in this field.

Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8325 (July 2, 1964). In addition, "the FTC itself conducted the entire testing process [to determine the tar and nicotine content of light cigarettes] for twenty years and now requires the cigarette

manufacturers to conduct the testing to its specifications. The FTC continues to inspect the industry labs, independently verify the results, and publish the ratings." *Watson*, 420 F.3d at 858.

The FTC has not hesitated to use its authority to police cigarette manufacturers' advertising practices. For example, the Commission undertook an investigation of *amicus* Reynolds's former Joe Camel advertising campaign to determine whether it had the effect of promoting Camel brand cigarettes to children. The FTC scoured tens of thousands of Reynolds's documents, enlisted multiple experts, and conducted numerous market surveys, before concluding that the Joe Camel campaign did not lead children to smoke. *See In re R.J. Reynolds Tobacco Co.*, No. 9285, 1997 WL 281337 (FTC May 28, 1997) (attaching June 1994 joint statement of Commissioners Azcuenaga, Owen, and Starek). Subsequently, the FTC reopened and then dismissed the investigation on the ground that the MSA's prohibitions rendered the investigation moot. *See In re R.J. Reynolds Tobacco Co.*, No. 9285, 1999 WL 33912978 (FTC Jan. 4, 1999).

3. Petitioner And Its *Amici* Recognize That Cigarette Smoking Causes Disease

Petitioner and its *amici* each expressly recognize that smoking can cause various diseases, including lung cancer, and is addictive. For example, Petitioner states on its website that "Philip Morris agrees with the overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other

serious diseases in smokers."[6] Similarly, Petitioner states that it agrees "with the overwhelming medical and scientific consensus that cigarette smoking is addictive."[7]

* * * * *

In short, there is no prospect of a continuing scheme to defraud smokers by "creat[ing] in the public mind the impression that there were legitimate reasons to doubt the danger of smoking" (Pet. App. 3a, 33a)—even assuming for the sake of argument that there was such a prospect at any time in recent memory. This greatly reduces the need for punitive damages, since it removes one of the two reasons for awarding them. The failure of the Oregon Supreme Court's "extraordinary reprehensibility" approach even to take this into account makes clear that that approach—aside from its subjectivity and manipulability—provides an inadequate basis for distinguishing cases meriting extraordinary punishment from those meriting only "ordinary" levels of punishment.

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[6] Philip Morris USA, Smoking and Health Issues: Cigarette Smoking and Disease, http://www.philipmorrisusa.com/ en/ health_issues/ cigarette_smoking_and_disease.asp; *see also* Martin L. Owalsky, Chairman, Lorillard Tobacco Co., Statement on Smoking and Health Issues, http://www.lorillard.com/index.php?id=32; R.J. Reynolds Tobacco Co., Smoking and Health: Summary of Opinions, http://www.rjrt.com/smoking/summaryCover.aspx.

[7] Philip Morris USA, Smoking and Health Issues: Addiction, http://www.philipmorrisusa.com/en/health_issues/addiction.asp; *see also* Martin L. Owalsky, Chairman, Lorillard Tobacco Co., Statement on Smoking and Health Issues, http://www.lorillard.com/index.php?id=32; R.J. Reynolds Tobacco Co., Smoking and Health: Addiction and Quitting, http://www.rjrt.com/smoking/quittingCover.aspx.

II. THE OREGON SUPREME COURT'S APPROACH OF PUNISHING HARM TO ALL AFFECTED NON-PARTIES IN THE STATE IN A SINGLE INDIVIDUAL CASE VIOLATES PROCEDURAL DUE PROCESS

In the present case, Respondent's counsel urged the jury to punish Petitioner for the alleged harm to all Marlboro smokers in Oregon. After saying several times during trial that smoking kills between 300,000 and 500,000 Americans each year, and arguing in closing that one in ten smokers dies of lung cancer and 30% of Oregon smokers smoke Marlboros, he suggested to the jury that "[w]hen you determine the amount of money to award in punitive damages against Philip Morris . . . [i]t's fair to think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been." *See supra* at 4 (citing trial transcript).

Exacerbating this appeal for statewide punishment, the trial court rejected Petitioner's request for an instruction that it should not "punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit." Pet. App. 17a–18a. The Oregon Supreme Court likewise rejected this instruction as "incorrect under state law" and "federal due process law." *Id.* at 18a, 21a. The court reasoned that if a jury can "'consider' harm to others" within the State, it must be able to punish for that harm. Pet. App. 18a & n.3.

This sort of appeal for statewide punishment is not an isolated phenomenon. To take just one recent example, Petitioner and *amici* are facing the same problem in Missouri in connection with a series of dozens of cases based on essentially the same course of conduct at issue here—an alleged multi-decade fraudulent scheme designed to obscure the link between cigarette smoking and disease. In one recent case on behalf of the survivors of a deceased smoker, the plaintiffs' lawyer asked the jury to award punitive damages based on the purported effect of

Brown & Williamson's conduct on thousands of Missouri smokers over a ten-year period, despite the fact that in a whole series of recent cases—including an earlier federal lawsuit by the smoker himself, *see Smith v. Brown & Williamson Tobacco Corp.*, No. 96-459-CV-3, 1999 U.S. Dist. LEXIS 21990 (W.D. Mo. Jan. 29, 1999)—cigarette manufacturers had prevailed:[8]

> [A]s a cost of their business, a thousand Missourians die every year. It's just part of their business. And you've already found that they're conscious of it, and they are indifferent to it. In other words, they don't care about that.
>
> Ten thousand people died during the time that [the smoker] was sick. Ten thousand people died. Their sales are $80 million a year. During the time that [the smoker] was sick, that's $800 million . . . over 10 years, over the decade, $800 million is how much that they sold in this state.

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[8] Missouri juries rejected plaintiffs' claims in their entirety in four recent smoking-and-health cases. *See Mash v. Brown & Williamson Tobacco Corp.*, No. 4:03-CV-485-TCM (E.D. Mo. Sept. 30, 2004); *Steele v. Brown & Williamson Tobacco Corp.*, No. 4:97-CV-961-ODS (W.D. Mo. May 13, 1999); *VanDenBurg v. Brown & Williamson Tobacco Corp.*, No. 03CV237238 (Mo. Cir. Ct. Feb. 22, 2006); *Welch v. Brown & Williamson Tobacco Corp.*, No. 00CV209292 (Mo. Cir. Ct. June 16, 2003). Another Missouri jury awarded modest compensatory damages in one of the cases, but rejected a claim for punitive damages. *See Thompson v. Brown & Williamson Tobacco Corp.*, No. 00CV220555 (Mo. Cir. Ct. Nov. 3, 2003), *appeal docketed*, No. WD 63897 (Mo. Ct. App. Mar. 9, 2004). Other Missouri courts have rejected similar claims as a matter of law. *See, e.g., Ross v. Philip Morris & Co.*, 328 F.2d 3, 10 (8th Cir. 1964); *Coleman v. R.J. Reynolds Tobacco Co.*, No. 4:01-CV-1698-ERW (E.D. Mo. Aug. 5, 2003).

> And their profit in just one year nationally is a billion dollars.
>
> . . .
>
> . . . I'm asking you to assess the damages at $200 million so that they will understand clearly, when they read this transcript, what you were doing; that you said we're going to take away the profit of what you did in this state for the 10 years that [the smoker] was sick.
>
> . . . [Take] away the profit from Brown & Williamson Tobacco Company because they killed 10,000 of our citizens.

Transcript on Appeal, Vol. 5, at 3318–23, *Brown & Williamson Tobacco Corp. v. Smith*, No. WD 65542 (Mo. Ct. App. June 2, 2005). The jury responded favorably to this argument—the plaintiff won a $20 million punitive award.[9]

As Petitioner argues in detail, this type of "statewide" course-of-conduct approach, which contemplates that a jury can use a single punitive damages award in an individual lawsuit to punish a defendant for the harm it has done to non-parties throughout the State, is inconsistent with *State Farm*. *See* 538 U.S. at 423 ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts . . . to adjudicate the merits of other parties' hypothetical claims against a defendant under the guide of

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[9] Brown & Williamson has appealed this verdict. *See* Notice of Appeal, *Brown & Williamson Tobacco Corp. v. Smith*, No. WD 65542 (Mo. Ct. App. June 1, 2005).

the reprehensibility analysis . . . . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . . .").

Amici believe it is important to recognize that even though excessive punitive damages are sometimes regarded as being contrary to principles of substantive due process, statewide punishment also violates basic principles of *procedural* due process.

A. The Oregon Supreme Court's Statewide Approach Invites Systematic Over-Punishment And Punishment Of Conduct That Does Not Give Rise To Liability

Under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), "identification of the specific dictates of due process generally requires consideration of three distinct factors," with a particular focus on "the risk of an erroneous deprivation" of a protected interest and "the probable value, if any, of additional or substitute procedural safeguards." *Id.* There is no dispute that a defendant has an interest in not being "unjustly punished," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994), including an interest in avoiding a punitive damages award that is excessive in relation to "the State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW*, 517 U.S. at 568. A defendant also has an interest in not being punished for conduct that does not give rise to legal liability. *See id.* at 573 n.19 ("'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.'" (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978))). Oregon's statewide approach to punitive damages creates a near-certainty that defendants will be erroneously deprived of these interests.

First, a system like Oregon's that permits juries in a single case to punish a defendant for an entire course of conduct throughout the State is all but certain to produce excessive punishment, even by the State's own measure of what

punishment is optimal. If the first jury to award punitive damages for a particular course of conduct awards the amount appropriate to achieve the State's goals of punishing and deterring the entire course of conduct, any succeeding award necessarily results in total punishment for the course of conduct that *exceeds* the appropriate amount. A system that allows successive juries to impose course-of-conduct punishment is therefore necessarily skewed toward punishing excessively. In *Mathews*' terms, such a system's "risk of error" (424 U.S. at 344) in imposing appropriate punishment approaches 100%.

To avoid this error, a State could impose a limit of one award of punitive damages for any given course of conduct.[10] But Oregon law does not offer that protection. *See infra* at 24–25. Without any effective impediment to the entry of multiple punitive damages, a statewide punishment approach is inherently biased toward excessive punishment. As Judge Friendly once noted, "[t]he legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so

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[10] A system that simply banned multiple statewide awards would still have other procedural defects, including: (a) the near-certainty that a statewide award would violate the defendant's rights by punishing it for conduct that does not give rise to liability, *see infra* at 22–24; (b) the impossibility of giving what amounts to class action treatment to allegations implicating numerous individual issues; and, relatedly, (c) the impossibility of ensuring that the defendant will not be deprived of defenses, such as lack of reliance or assumption of risk, that can be addressed only in individual cases.

administered as to avoid overkill." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Second, the Oregon procedure irrationally permits the jury to punish the defendant even for harm to individuals to whom it may have no liability—including individuals as to whom its conduct is vindicated by another jury, or found not worthy of a punitive sanction. As the discussion in Part I.A demonstrates, there is ample precedent in lawsuits asserting claims resembling Respondent's for defense verdicts or plaintiffs' verdicts without punitive damages. But the Oregon Supreme Court's statewide approach (coupled with Respondent's counsel's argument to the jury) allowed the jury to punish Philip Morris on the assumption that *every* harm to every Oregonian who smoked Marlboro cigarettes was worthy of punishment. Thus, even one statewide punitive damages award in Oregon deprives a defendant of much of the benefit of prior and subsequent defense verdicts arising out of the same course of conduct.

The Missouri example discussed earlier provides an excellent illustration of this problem. The Missouri jury that awarded $20 million in punitive damages did so in response to counsel's express invitation to punish the defendant for harm to an estimated 10,000 Missourians who died from smoking cigarettes, despite the defendant's consistent record of *winning* or (avoiding punitive damages) in previous Missouri cases based on the same course of conduct. *See supra* at 18–20 & n.8.

This error is inherent in the very notion of statewide course-of-conduct punishment. Unless the defendant entirely lacks valid defenses, a statewide award is bound to punish conduct that does not give rise to liability. Thus, in this respect, too, the risk of error inherent in a statewide approach is overwhelmingly high.

In short, statewide course-of-conduct punishment violates due process both because it is systematically skewed toward

excessive punishment through multiple penalties for the same conduct and because it results in punishment for conduct that is not even wrongful (and often has been adjudicated to give rise to no liability). To avoid this violation of procedural due process, an instruction like the one Petitioner proposed in this case should have been given: *i.e.*, that while jurors "may consider the extent of harm suffered by others" in evaluating the harm *to the plaintiff*, they should not "punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit." Pet. App. 17a–18a.

The Oregon Supreme Court's objection to this instruction—that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus" (Pet. App. 18a n.3)—makes little sense in light of longstanding criminal sentencing doctrine. It has long been understood that a court may consider uncharged conduct in judging the blameworthiness *of the crime of conviction*, but may not *punish* for uncharged conduct. *See Williams v. New York*, 337 U.S. 241, 245–46, 251 (1949) (although judge could not sentence defendant for prior uncharged crimes, judge could *consider* defendant's other conduct as bearing on the appropriate punishment for the crime before the court). The same principle applies equally here: a jury may consider the defendant's broader course of conduct in determining how severely to punish the defendant for the harm to the plaintiff, but the jury may not be asked—as it was here—to *punish* the defendant for that harm to others.

B. Oregon's Limited Statutory Protections Do Not Redeem Its Supreme Court's Statewide Approach To Punishment

Oregon's limited statutory protections against excessive punishment do not obviate the constitutional problem created

by its statewide approach. Oregon has two relevant statutory provisions: One calls for the fact-finder imposing punitive damages to consider "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including ... punitive damage awards to persons in situations similar to the claimant's." Or. Rev. Stat. § 30.925(2). The other directs reviewing courts to "consider the amount of any previous judgment for punitive damages entered against the same defendant for the same conduct giving rise to a claim for punitive damages." *Id.* § 31.730(3). Neither of these provisions purports to preclude excessive multiple punishment or punishment of lawful conduct, and there is no reason to expect Oregon courts to interpret them that way. *See Schwarz v. Philip Morris Inc.*, 135 P.3d 409, 443 n.4 (Or. Ct. App. 2006) (Armstrong, J., dissenting) (statement by four judges from nine-judge *en banc* panel that Section 31.730(3) did not require reduction of a $150 million punitive award against Petitioner in fraud lawsuit brought by the estate of Oregon smoker who died of lung cancer).[11] Indeed, Section 30.925(2) arguably exacerbates the problem by bringing to the second jury's attention the fact that an earlier jury considered defendant's conduct reprehensible enough to warrant punitive damages. In many instances, this could act as an incitement to multiple punishment rather than a check upon it.

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[11] The majority in *Schwarz* vacated the punitive damages award on other grounds and so did not reach the question whether Section 31.730(3) might require reducing or vacating the punitive award.

C. Historical Practice Does Not Validate A Statewide Approach To Punitive Damages

It is also worth emphasizing that the course-of-conduct approach to punitive damages has none of the historical pedigree that has helped to validate some traditional aspects of punitive damages practice that would otherwise be constitutionally suspect. *See, e.g.*, *TXO*, 509 U.S. at 457 (relying on historical practice); *Haslip*, 499 U.S. at 24–25 (Scalia, J., concurring) (*only* historical pedigree justifies standardlessness of typical punitive damages instructions to jury); *id.* at 40 (Kennedy, J., concurring) ("Jury determination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary."). Indeed, if any approach has an historical pedigree, it is the one championed by Petitioner and *amici* that limits punishment to the amount appropriate to the harm visited on the injured party before the court.

Until after the middle of this century, mass torts affecting hundreds or thousands of individuals were essentially unknown to the law. *See, e.g.*, *In re School Asbestos Litig.*, 789 F.2d 996, 1003 (3d Cir. 1986) ("In an era when most tort suits were 'one-against-one' contests, a single act triggered a single punishment."); *Roginsky*, 378 F.2d at 838 ("[W]hat strikes one is not merely that these torts are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter.").

Common law courts thus had little occasion to address the unique issues of overkill and punishment of lawful conduct presented by a single course of conduct affecting large numbers of people. But the issue of multiple punishments arose occasionally, and when it did, courts generally took the view that an award of punitive damages should address harm to the plaintiff alone. As Professor Thomas Colby explains, "the earliest decisions to raise the specter of multiple punishment" are "those addressing the question whether, in

cases involving seduction and breach of a promise to marry, it was permissible for both the seduced woman and her father to obtain punitive damages from the seducer for the same wrongful conduct." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 623 (2003). In most cases, the answer was yes, provided the award to the woman punished only for the harm she suffered and the award to her father punished only for the harm he suffered. *See, e.g.*, *Tullidge v. Wade*, 95 Eng. Rep. 909, 910 (C.P. 1769) (Bathurst, J.) (affirming punitive damages award in favor of father but explaining that it would have been improper for the jury to have punished the defendant, in the father's suit, for harm to the daughter); *Stevenson v. Belknap*, 6 Iowa 97, 101 (1858) (holding that "if actions are brought by both the father and daughter," the jury should confine itself to awarding "damages resulting to the plaintiff alone, and not to another"); *Phelin v. Kenderdine*, 20 Pa. 354, 362 (1853) ("[T]he only instruction which the defendant has a right to require in regard to such evidence [concerning the seduction] is, that the jury must not award *to the father* any part of the damages which belong to the daughter, by reason of the breach of the contract of marriage.").

As Colby notes, the Michigan Supreme Court confronted the issue of multiple punishment squarely in a case arising under a statute authorizing "every wife, child, parent, guardian, husband, or other person" injured by an intoxicated person to recover "actual and exemplary damages" from the vendor who sold the alcohol to the intoxicated person. The court concluded that any punitive damages award given under this statute should focus exclusively on the wrong to the plaintiff:

> The foundation of exemplary damages . . . rests on the wrong done willfully to the complaining party, and not to wrong done

> without reference to that party. Otherwise, every one entitled under the statute to bring an action might bring his or her separate action for the same wrong, and while each would recover as his own actual damages no more than his own injury, the same exemplary damages would be multiplied and recoverable in addition to actual damages in every one of those actions. No such consequence can have been intended.

Ganssly v. Perkins, 30 Mich. 492, 495 (1874).

Similarly, the few modern courts that identify any purportedly "traditional manner" of assessing punitive damages in the mass-tort context have spoken of jurors' "confining their consideration of the appropriate punishment to the injury inflicted upon the plaintiffs in [the] particular litigation." *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 281 (2d Cir. 1990); *see also King v. Armstrong World Indus., Inc.*, 906 F.2d 1022, 1030 (5th Cir. 1990).

Thus, to the extent historical practice has anything relevant to say in this case, it is that punitive damages should focus on the harm to the plaintiff before the court and not the harm to absent parties.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted,

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