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IN THE SUPREME COURT OF THE UNITED STATES

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PHILIP MORRIS USA, :

Petitioner, :

V. : No. 05-1256

MAYOLA WILLIAMS. :

-----X

Washington, D.C.

Tuesday, October 31, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

ANDREW L. FREY, ESQ., New York, N. Y.; on behalf of
the Petitioner.

ROBERT S. PECK, ESQ., Washington, D.C.; on behalf of
the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Philip Morris v. Williams.
5 Mr. Frey.

6 ORAL ARGUMENT OF ANDREW L. FREY

7 ON BEHALF OF THE PETITIONER

8 MR. FREY: Mr. Chief Justice, and may it
9 please the Court: This case is here following this
10 Court's remand to the Oregon courts to reconsider their
11 decision in light of State Farm, a task at which we
12 submit the Oregon courts completely failed. It presents
13 two independent but thematically interrelated issues,
14 both of which implicate what the Court said in State
15 Farm, which is that, and I quote, "courts must ensure
16 that the measure of punishment is both reasonable and
17 proportionate to the amount of harm to the plaintiff and
18 to the general damages recovered."

19 Now significantly, Respondent defends
20 neither -- oh, I should stop for a minute and describe
21 the issues. So the first issue is whether the Oregon
22 Supreme Court properly held that Philip Morris was
23 correctly denied an instruction which would have told
24 the jury that it was not to punish for harm to
25 nonparties. The Oregon Supreme Court held that that

1 instruction was legally incorrect, it was proper for the
2 jury to punish for harm to nonparties, and therefore the
3 instruction was correctly denied.

4 JUSTICE GINSBURG: Mr. Frey, are you talking
5 about what is numbered, is it number 34?

6 MR. FREY: Yes.

7 JUSTICE GINSBURG: That's the --

8 MR. FREY: Yes. The key paragraph from
9 number 34 which is set forth at page 4 of our brief, as
10 well as numerous other places in the materials. It
11 says, the size of any punishment should bear reasonable
12 relationship to the harm caused to Jesse Williams by the
13 defendant's punishable misconduct. Although you may
14 consider the extent of harm suffered by others in
15 determining what that reasonable relationship is, you're
16 not to punish the defendant for the impact of its
17 alleged misconduct of other persons who may bring
18 lawsuits of their own, etc.

19 JUSTICE GINSBURG: You don't think that
20 would confuse the jury if they are first told that they
21 may consider the extent of harm suffered by others, and
22 then the next instruction seems to say they can't?

23 MR. FREY: I don't. First of all, I don't
24 think that's what it says, and I don't think it would
25 confuse the jury, and I'm confident that with that

1 instruction, counsel could explain it. But let me stop
2 here, because I know this was something that Justice
3 Scalia expressed some uncertainty about in the State
4 Farm argument, and that the Oregon Supreme Court said
5 they didn't clearly understand.

6 To consider the conduct means to evaluate it
7 in connection with assessing the blameworthiness of the
8 conduct being punished.

9 JUSTICE SOUTER: Isn't that the problem? If
10 the instruction had said that, you would have a very
11 different instruction, and I'm bothered by the
12 instruction too for just that reason. It says you may
13 consider, and if I were a juror parsing the instruction,
14 I would say, "why? You've just told me I'm not supposed
15 to punish them."

16 MR. FREY: Well, the second part of it is,
17 what punishment means is what would be done in a class
18 action, for instance, to impose punishment for all the
19 harm suffered by Oregon smokers.

20 JUSTICE SOUTER: Okay. This is an argument
21 you're making to us, but I don't know how a juror
22 is supposed to figure this out.

23 MR. FREY: Well, let me say a couple of
24 things about that. First of all, the Oregon Supreme
25 Court did not rely on this aspect. It held that it was

1 proper to punish for harm to nonparties. Now this, in
2 our view, this instruction, and there's always a danger
3 when you add words to an instruction that you will add
4 something that a court will find was incorrect and
5 therefore deny the instruction, even though the essence
6 of it was correct.

7 JUSTICE GINSBURG: Where did the Oregon
8 Supreme Court say it was proper to punish for harm to
9 nonparties? Your brief quotes something to that effect,
10 but -- the sentence on page 18(a) of the appendix to
11 the petition. It says, what the Oregon court said is,
12 Philip Morris asserts that Campbell prohibits the State
13 acting through a civil jury from using punitive damages
14 to punish a defendant for harm to nonparties. The
15 Oregon Supreme Court on its own, I think, didn't put it
16 in terms of harming particular nonparties, but to
17 exposing Oregon residents to the risk of a deadly
18 disease.

19 MR. FREY: Well, I would refer the Court to
20 pages 20(a) to 21(a) of the appendix, where the court
21 discusses, comes to its conclusion on this point. And
22 it says, the instruction would have prohibited the jury from
23 punishing the defendant for the impact of its alleged
24 conduct on other persons even if those persons were
25 Oregonians who were harmed. But on 28(a) it says,

1 because the proposed jury did not accurately reflect
2 the law, this is not a statement about Philip Morris's
3 position, the trial court did not commit reversible
4 error when it refused to give it. So I think the court
5 was quite clear in saying -- let me complete my answer,
6 because I think considering it moves the needle along
7 the scale of allowable punishment for the harm to Jesse
8 Williams, but it does not abandon the principle of
9 proportionality to that harm, whereas punishing for it
10 is what you would do in a class action. You would
11 punish for all the harms to all the Oregonians. This is
12 a one-way class action in which Philip Morris was
13 exposed to global punishment by the jury without any of
14 the protections of a class action. So --

15 JUSTICE SOUTER: Let me -- let me -- let me
16 focus the problem that I have right now this way. If
17 I look at the Oregon Supreme Court opinion, and
18 particularly at the point that you mention in 20 and 21,
19 I have to say I, I read the opinion the way you read the
20 opinion. I read them the same, just what you claimed
21 they were saying. The difficulty that I have is because
22 I think the instruction that was proposed on behalf of
23 your client was not a clear instruction, I have great
24 difficulty in seeing how I could find that it was error
25 to refuse to give the instruction.

1 MR. FREY: Well --

2 JUSTICE SOUTER: So my problem is, if I
3 think they really did have the wrong view of the law but
4 the issue was focused at the trial court by a request
5 for an instruction which I think was properly denied,
6 what do I do? Do I concentrate on what they said in the
7 opinion or do I concentrate on what I think was the
8 deficiency of the instruction?

9 MR. FREY: Well, I think what you do is
10 decide the Federal issue, which I think is whether they
11 were correct in the legal proposition that they
12 asserted.

13 JUSTICE SOUTER: But then they would
14 respond, when they made that, when they gave that
15 explanation in the Oregon Supreme Court, they were
16 responding to a claim of error which was focused and
17 raised at the trial level by the request for an
18 instruction, which strikes me as probably an unsound
19 instruction, an unsound request.

20 JUSTICE SCALIA: Well, I guess we could
21 leave it up to them whether they want to disallow the
22 instruction for a different reason, but the fact is they
23 disallowed it for the reason that you say.

24 MR. FREY: That's correct.

25 JUSTICE SCALIA: And we can say that is

1 error and remand it to them. That might not make you
2 very happy, but it would be up to them whether or not
3 --

4 MR. FREY: That's correct.

5 JUSTICE SOUTER: In effect, it would give
6 you another chance in Oregon.

7 MR. FREY: But I do want to question the
8 premise. First of all, the instruction says basically
9 what this Court said in BMW, which is where it drew
10 precisely that distinction.

11 JUSTICE SOUTER: It was a good thing we
12 weren't instructing a jury.

13 MR. FREY: Well, I don't think there is --
14 the concept may be abstract, the difference between
15 considering and punishing, but it's quite clear in this
16 Court's jurisprudence and I think it can be made quite
17 clear to the jury with the benefit of the proper
18 instruction, and I don't -- I don't have any --

19 JUSTICE SOUTER: Oh, I do too. I don't have
20 any trouble with the distinction.

21 MR. FREY: If we had this instruction, if we
22 had this instruction which I believe is correct, there
23 is nothing incorrect about this instruction. It is
24 correct that the jury may consider. We are not
25 challenging that the jury may consider the conduct and

1 may determine that the conduct --

2 JUSTICE SOUTER: But it doesn't answer the
3 question, if the juror were to speak up. It doesn't
4 answer the question. Consider for what? How? Why am I
5 supposed to be considering it when you've just told me
6 not to punish?

7 MR. FREY: Well, I think the instruction
8 said --

9 JUSTICE SOUTER: Or not punish for other --

10 MR. FREY: I think the instruction says that
11 you are to consider it in connection with
12 determining the reprehensibility of the conduct.

13 JUSTICE SCALIA: No. If it had said that, I
14 would have no trouble with it. What it says is, you may
15 consider it in determining what the reasonable
16 relationship is between the harm caused to Jesse
17 Williams and the amount of punitive damages assessed. I
18 don't see how injury to others can have any bearing upon
19 whether the punitive damages bear a reasonable
20 relationship to Jesse Williams' harm. That's my problem
21 with it.

22 MR. FREY: Well, they do, because conduct
23 that is more blameworthy, in terms of determining, as
24 this Court has said in all its cases, and I know you
25 don't agree with the whole inquiry --

1 JUSTICE SCALIA: I don't.

2 MR. FREY: But as this Court has made quite
3 clear, the reprehensibility of the conduct is an
4 important factor in determining where along the scale of
5 reasonable relationships in a particular case you might,
6 the relationship might be reasonable. So, more conduct
7 that is calculated to harm large numbers of people can
8 be found more blameworthy as to warrant a higher
9 proportion, a higher relationship between the punitive
10 and compensatory damages.

11 CHIEF JUSTICE ROBERTS: And when you do
12 that, counsel, aren't you punishing the defendant for
13 the harm to others? You're going to award a higher
14 multiple with respect to the damages --

15 MR. FREY: No.

16 CHIEF JUSTICE ROBERTS: -- based on the
17 conduct to others. Why wouldn't a normal juror think --

18 MR. FREY: I think you are --

19 CHIEF JUSTICE ROBERTS: Excuse me. Why
20 wouldn't a normal jury view that as punishing the
21 defendant for the harm to others?

22 MR. FREY: Well, I think that the semantical
23 quibbling is not something that the jury would have
24 difficulty with, in my opinion. But let me try to
25 explain the difference this way. If you're considering

1 the conduct in relation in determining what is the proper
2 punishment for the harm to Jesse Williams, you should come
3 up with a number that can be properly replicated in case
4 after case if other juries arrived at the same conclusion
5 about the conduct. If you are punishing for the
6 conduct, you should come up with a number that precludes
7 further punishment for the same, punishing for the harm,
8 further punishment for the same harm, for the same
9 causes of action for punitive damages that various
10 Oregonians had. So there's a fundamental difference in
11 that respect between considering and punishing for it,
12 and the Court has said repeatedly, and I don't think
13 we can contest this, that the character of the conduct
14 can be considered in determining the proper level or
15 allowable level of punitive damages, that included the
16 character of the conduct is the intended scope of the
17 harm, if it's an isolated incident, if it's a consistent
18 pattern of misconduct.

19 So, I don't think we could properly have told
20 the jury that they may not consider the conduct without
21 getting ourselves in serious trouble. So -- and I
22 don't, I don't think, and the difference is potentially
23 enormous. If you think about a jury that was deciding a
24 punitive damages class action and a jury that was told
25 that they had to punish for the harm to the particular

1 plaintiff in the, in the particular case, it's, it's
2 obvious that the results would be vastly different in
3 those cases. And the problem we were worried about was
4 that the jury would think of itself as the punishment
5 agency to impose statewide punishment for the harms to
6 all Oregon smokers who were deceived by Philip Morris --

7 JUSTICE STEVENS: But, Mr. Frey, let me
8 ask you a question. Suppose this was a criminal case
9 and the defendant was being punished for crime A and the
10 judge in working out the sentence realizes he also
11 committed crimes B, C, D, and E. He could take those
12 into account in determining the extent of the sentence
13 given for crime A. Why isn't that similar?

14 MR. FREY: It is similar, but what he can't
15 do is punish for crimes B, C, D, and E. Suppose we had
16 a mail fraud prosecution --

17 JUSTICE STEVENS: And if there was a second
18 -- the same defendant got convicted again for crime X.
19 At that sentencing the judge could again take into
20 account the harm to defendants B, C, and D.

21 MR. FREY: That's true. That's certainly
22 true. That's why our point is that it's one thing to
23 produce a punishment that can properly be replicated in
24 case after case without producing an excessive total
25 punishment. It's another thing to punish in case after

1 case for the same harms.

2 JUSTICE STEVENS: That's not the same harm
3 if it's a different defendant or a different plaintiff
4 in the second case. You're punishing him for the harm
5 to be this time, and you can -- just as in a criminal
6 case, why can't you in both cases take into account
7 that, the harm to the class, to the public at large?

8 MR. FREY: If this was a mail fraud
9 prosecution for defrauding Jesse Williams into buying
10 cigarettes and the punishment was five years for that,
11 the judge could consider in setting the punishment
12 between zero and five the fact that this was part of a
13 scheme that was intended to or may have deceived large
14 numbers of other people in setting the punishment
15 between zero and five. What the judge cannot do and
16 what we were worried the jury would do here and what we
17 think the size of its verdict may suggest it actually
18 did here is to think that they could punish it that time
19 not just 5 years, but 10 or 15 or 20 for all of the
20 other punishments, for all the other wrongs that they
21 find to have been done.

22 JUSTICE KENNEDY: In that respect, how does
23 the -- there may not be a definitive authority by this.
24 Oregon says that if a corporation commits
25 manslaughter it's required to pay up to twice the amount

1 the corporation gained by committing the offense --

2 MR. FREY: Yes.

3 JUSTICE KENNEDY: -- is my understanding.

4 Suppose a corporation in a hypothetical case commits
5 five manslaughters. Would they be liable -- and gained
6 for \$1 million. Would they be liable for twice a million
7 dollars in every manslaughter case?

8 MR. FREY: No. But I think the disgorgement
9 argument that has been made by the other side suffers
10 from exactly the same problem as the global punishment
11 problem. That is, you can't -- if you disgorged in
12 every case all the profits that were earned from selling
13 cigarettes to Oregonians and to Oregonians became who
14 sick --

15 JUSTICE GINSBURG: But Mr. Frey, we don't
16 know what Oregon law is on that point. They do
17 have a law that the Oregon court thought meant that they
18 must adjust in the next case. And how would you deal --
19 would it be different if Oregon, as many States, said
20 part of that punitive award goes not to the plaintiff,
21 but to some State fund?

22 MR. FREY: I don't, I don't think that --
23 our complaint is not that the plaintiff is getting the
24 money. Our complaint is with how much we're being
25 punished and what the procedural regime is that has led

1 to punishing us.

2 JUSTICE GINSBURG: But if the law in Oregon
3 were, plaintiff number two, you don't get punitive
4 damages or you can get only the difference between what
5 the jury awarded you and what Philip Morris has already
6 paid out in punitive damages?

7 MR. FREY: Well, first of all, that's not
8 the law in Oregon.

9 JUSTICE GINSBURG: We don't know what it is.
10 We haven't had the second case.

11 MR. FREY: Well, we have no -- well, the
12 Oregon Supreme Court did not rely on this, on this
13 statute, for purposes of dealing with the harm to
14 others, harm to nonparties problem. The statute does
15 not require giving credit, only consideration. Even if
16 it, even if it did, it operates as a one-way ratchet.
17 That is, you keep making awards until you've reached the
18 maximum that would be allowable for all the conduct even
19 though juries, properly instructed, might have awarded
20 substantially less and even though many juries might
21 exonerate the defendant totally, as many juries have in
22 tobacco cases. So the Oregon regime is, is a formula
23 for having what amounts to excessive punishment or at
24 least unfair punishment.

25 And finally, the, the 30.925, which was

1 referred to by the court of appeals, requires submitting
2 this evidence to the jury and, as the trial court said
3 in this case at page 195a of the joint appendix, there
4 is no telling whether submitting the prior awards to the
5 jury would produce higher or lower awards in this case.
6 So I think it's an entirely illusory protection to rely
7 on that.

8 JUSTICE BREYER: Can I ask you -- are you
9 finished?

10 MR. FREY: Yes. I was going to say that
11 because our concern is structural with the design of the
12 Oregon system as it's been approved by the Oregon
13 Supreme Court, I don't think this inadequate remedy can
14 save that system.

15 JUSTICE BREYER: I wanted to know what you
16 think about a suggestion that I got from something that
17 Justice Scalia said. I don't know whether he was making
18 it or not, but I'll make the suggestion and see what you
19 think. Suppose that this case -- suppose we were to
20 say, there are many issues in this case, some of them
21 very difficult, but one thing we're certain about: You
22 cannot in a trial consistent with the due process clause
23 in a trial of plaintiff versus defendant take money from
24 the defendant and give it to the plaintiff for the
25 purpose of punishing the Defendant for something he did

1 to a different person who wasn't there. Now -- so he
2 couldn't defend against him. That person didn't present
3 a claim. So we are certain of that.

4 Now, we're not certain whether that's what
5 happened here. It may have done. There is certainly a
6 lot of language to suggest it, and there is some
7 language the other way. So we remand it to the court
8 with that instruction that they cannot permit this to
9 have happened if it happened. Whether it happened and
10 what happened is a matter of Oregon law in large part
11 and things about instructions, etc. Now, what's your
12 view of that kind of disposition?

13 MR. FREY: Well, I think the first part of
14 your premise is clearly correct and totally consistent
15 with the position we are taking. Whether it happened
16 here or not is an interesting question. It is in the
17 nature of a limiting instruction, which was basically
18 what this was. You can use the evidence for one
19 purpose, legitimate purpose, but don't use it for an
20 illegitimate purpose. But we can't tell ordinarily,
21 because jury deliberations are secret and we can't probe
22 what they have decided, we can't probe whether they have
23 imposed global punishment or not.

24 But we anticipate the problem. We proposed
25 an instruction which would as best we could at the time

1 address the problem. Maybe it could be edited up to be
2 a little sharper. But I think it contains the essential
3 point that we're driving at here today.

4 JUSTICE BREYER: Maybe, but it's possible
5 the Oregon court would say: Well, no instructions are
6 perfect, but -- and no set of jury instructions is
7 perfect. But if we look at the jury instructions
8 without the suggested one that was rejected and then we
9 look at the suggested one, we find the suggested one had
10 many things wrong with it, not just, you know, problems,
11 confusion, et cetera. We find the instructions weren't
12 perfect but, given Oregon evidentiary law, we think the
13 trial judge made reasonable decisions, therefore okay.

14 MR. FREY: You're raising a question whether
15 that would be an adequate --

16 JUSTICE BREYER: I don't know. That's what
17 worrying me, what's worrying me about this is I see as
18 we try to determine what this instruction said, whether
19 it was good enough, whether the instructions without it
20 are good enough, that we're going to be in a kind of bog
21 of mixtures of constitutional law, unclear Oregon State
22 law, not certain exactly what was meant by whom in the
23 context of the trial, et cetera.

24 MR. FREY: Well, I think this is a pretty
25 fundamental principle. I believe the instruction fairly

1 captured it. I don't think there would be an adequate
2 and independent State ground for refusing the
3 instruction. Keep in mind that in State Farm the Court
4 said the defendant upon request would have been entitled
5 to an instruction on the subject of extraterritorial
6 punishment. Now, this is conceptually not really
7 different from extraterritorial punishment. We wouldn't
8 --

9 CHIEF JUSTICE ROBERTS: Mr. Frey, I suppose
10 your theory here depends on the nature of the underlying
11 tort, I suppose, in that there are, you argue, defenses
12 that might be available with respect to other, other
13 individuals who are harmed.

14 MR. FREY: Certainly.

15 CHIEF JUSTICE ROBERTS: So this argument
16 wouldn't apply in a case if the underlying tort weren't
17 susceptible to those sorts of defenses.

18 MR. FREY: It would still apply because
19 different factfinders, different juries, might reach
20 different conclusions on the same evidence, assuming
21 that a summary judgment for the plaintiff is not proper.
22 What you're doing is preempting, you're allowing a
23 potentially aberrational verdict, which there could be
24 in many cases, to preempt the work of other juries. The
25 whole essence of the idea that we were trying to convey

1 here and the legal principle that we are arguing today
2 is to confine the jury to its proper domain and its
3 domain is the case before it.

4 JUSTICE SCALIA: The jury can't really find
5 that other people were harmed. The jury doesn't have
6 evidence before it except as to this person. The most
7 the jury can find, it seems to me, is that the, the
8 activity engaged in bore a very serious risk of harming
9 other people. I think a jury could find that. And
10 therefore, the activity is more heinous and should be
11 punished more severely. But I -- you don't --

12 MR. FREY: Accepting the premise, accepting
13 the premise, we don't disagree with your conclusion.
14 That is, if the jury could find that they could punish
15 this more severely. What they cannot do is punish it
16 globally.

17 JUSTICE SCALIA: Yes, but I don't think I'm
18 quibbling, but you seem to be conceding that this jury
19 can decide that other people have been harmed and take
20 into account the harm that it found other people
21 suffered in deciding the penalty. And I don't think
22 this jury has any basis for finding that other people
23 were harmed. It could say there was a serious risk of
24 it.

25 MR. FREY: It can certainly consider the

1 scope of the intended scheme. The fact that it didn't
2 have evidence didn't stop the Oregon Court of Appeals
3 from finding and the Oregon Supreme Court from endorsing
4 the finding that many Oregonians were deceived, even
5 though --

6 JUSTICE STEVENS: Isn't there a distinction
7 between actual harm to others and the risk of harm?
8 Supposing a defendant fired a machine gun into a crowd
9 of people.

10 MR. FREY: Right.

11 JUSTICE STEVENS: And he killed one, at
12 least one. And that one sued and said: I want extra
13 punitive damages because all these other people were
14 subjected to the same risk. Wouldn't that be a proper
15 consideration?

16 MR. FREY: I think it is. I think in TXO
17 the Court --

18 JUSTICE STEVENS: Would it be a proper
19 consideration even if a second person brought the same
20 action?

21 MR. FREY: Well, if there were more, if
22 there were other people who had causes of action, then
23 I think there is a problem. In your hypothesis if only
24 one person is injured --

25 JUSTICE STEVENS: But you're not asking to

1 recover for the actual harm to the others. You're
2 saying there was a general risk of harm to many, many
3 people, which is similar to what we have here. We don't
4 know whether they're harmed or not, but that can be
5 taken into account in fixing the ultimate verdict.

6 MR. FREY: Well, that's what the Court said
7 in BMW in effect, that the jury could consider even out
8 of State conduct insofar as it revealed something about
9 the blameworthiness of the defendant's conduct, the
10 defendant's state of mind, the defendant's intentions.
11 We're not saying that these things can't be considered
12 for that purpose. What we are saying is that other
13 people can bring their own lawsuits and punishment in
14 those lawsuits -- If \$79.5 million is right for Jesse
15 Williams --

16 JUSTICE STEVENS: Isn't the time to
17 determine what to do with the second lawsuit is when the
18 second lawsuit is brought?

19 MR. FREY: No, because the problem is a
20 problem with the design. If you punish in the beginning
21 -- if you have A, B, C, and D who are potentially
22 injured and you punish in A's case for the harm to B, C,
23 and D and then the defendant --

24 JUSTICE STEVENS: But can't I punish for the
25 risk of harm to B, C, and D?

1 MR. FREY: Well, if you're punishing for the
2 risk of harm then the same punishment would be
3 appropriate in B's case and C's case and D's case.

4 JUSTICE GINSBURG: But part of this award,
5 at least according to the trial -- there's a footnote
6 referring to an Oregon statute that provides for the
7 distribution of punitive damages between prevailing
8 parties and the State of Oregon. Is -- was this award
9 shared?

10 MR. FREY: Well, it hasn't been paid yet.

11 JUSTICE GINSBURG: But would it be?

12 MR. FREY: I think it would be subject to
13 that statute. Now, there's a question whether under the
14 master settlement agreement it would have to be paid
15 back to the companies. But that's a separate question
16 that's not before the Court. But our position --

17 JUSTICE GINSBURG: But if the State law
18 provides that part of the recovery goes to the State,
19 then at least as to the part that goes to the State you
20 can say, well the State has recovered and you can't --

21 MR. FREY: But we have no protection for
22 that. We have no protection. First of all, this
23 verdict --

24 JUSTICE GINSBURG: But then you can object
25 in the next case if you're subjected to --

1 MR. FREY: And if we win the next case and
2 we win the case after that and we win the case after
3 that, when do we get credit?

4 JUSTICE GINSBURG: No, I mean when you lose
5 the case on the merits and there's a determination of
6 damages, Oregon says, we adjust for having a prior
7 award. We don't know what that adjustment will be.

8 MR. FREY: Right, but the regime is flawed
9 in its structure because it's a ratchet to get up to the
10 highest possible level even though juries who understood
11 the underlying constitutional principle might award
12 less.

13 So I'd like to save, if I may, the balance
14 of my time for rebuttal.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr. Frey.
16 Mr. Peck.

17 ORAL ARGUMENT OF ROBERT S. PECK,
18 ON BEHALF OF THE RESPONDENT

19 MR. PECK: Mr. Chief Justice, and may it
20 please the Court:

21 I'll start with the proposed
22 instruction because that is where Philip Morris began
23 and the Oregon courts properly treated that as an
24 enigma. It told the jury, it would have told the jury,
25 both that they could consider the extent of harm and not

1 consider the extent of harm with respect to a reasonable
2 relationship. That's the disparity guide post.
3 Clearly, that is not what this Court has said. And
4 what, it's not what the Oregon Supreme Court did. It's
5 also significant if you look at the actual proposed
6 instruction, which is, starts on page 240, 279(a) of the
7 joint appendix, the, the proposed instruction says you
8 may consider whether the imposition of punitive damages
9 is necessary to punish and deter similar misconduct by
10 defendant and others in the future. Now, that's part of
11 a calculation that considers harm to others in the
12 future as a potential harm. So that is one of the
13 things that the Oregon Supreme Court discussed when it
14 said that this does not reflect our law.

15 It's also significant that they said that
16 you could consider financial condition and you cannot
17 consider financial condition which is part of the Oregon
18 statute. Now Philip Morris in their reply brief says
19 that we have conflated an alternative instruction with
20 one that they offered but if you look at page 280(a) --

21 JUSTICE SCALIA: You're losing me,
22 counsel. What, what specifically is wrong with the
23 instruction proposed here?

24 MR. PECK: This instruction --

25 JUSTICE SCALIA: As briefly as possible,

1 one, two, three.

2 MR. PECK: This instruction basically
3 advises the jury to do precisely what Philip Morris
4 argues before this Court it cannot do and that is to
5 take into account the harm suffered by others in
6 determining this disparity.

7 CHIEF JUSTICE ROBERTS: -- you object to in
8 this instruction. I mean, and I thought our cases
9 clearly established that you can consider the harm to
10 others in assessing the reprehensible nature of the
11 conduct. You don't disagree with that?

12 MR. PECK: We don't disagree with that and
13 that's precisely what the Oregon Supreme Court did.

14 CHIEF JUSTICE ROBERTS: On the other hand,
15 you cannot -- on the other hand you cannot punish the
16 defendant for those harms particularly in a case where
17 the defendant might have defenses available with respect
18 to those others. So I understood what the instruction
19 sought to do is simply try to draw, it's a fine line but
20 the reason it's a fine line is because of our prior
21 cases, and it tried to draw that distinction between
22 assessing reprehensibility and punishing for harm to
23 others.

24 MR. PECK: We submit that it was
25 unsuccessful in conveying properly what this Court has

1 held and that is sufficient grounds for the Oregon
2 Supreme Court to uphold the trial court's decision.

3 JUSTICE SCALIA: Would it have been a proper
4 instruction if the second sentence had read, although
5 you may consider the extent of harm suffered by others in
6 determining what the -- what that reasonable
7 relationship is, although you may consider the extent of
8 harm suffered by others in determining how heinous the
9 crime, the action of the defendant was, and hence --
10 what, what that reasonable relationship is? If you had
11 just added in that additional thought.

12 MR. PECK: Justice Scalia, if that --

13 JUSTICE SCALIA: It seems to me that's all
14 that's left out of it. Now does leaving that out of it
15 make it erroneous?

16 MR. PECK: Leaving that out made it
17 erroneous because it said, not with respect to
18 reprehensibility analysis but with respect to reasonable
19 relationship. That was erroneous.

20 JUSTICE SCALIA: Yes but reprehensibility
21 analysis is part of the reasonable relationship. The
22 more reprehensible it is the higher the ratio can be,
23 according to our cases as I understand it.

24 MR. PECK: Let me take a step back because I
25 think there is a confusion here over also the word

1 punishment. Punitive damages do not punish for harm,
2 they punish misconduct. And this is an important
3 distinction because harm is a compensatory concept. You
4 compensate others for harm and of course you cannot
5 compensate others for harm in the course of this case.
6 But you can consider the potential risks, the potential
7 harm and the future harm if this course of misconduct is
8 not deterred.

9 JUSTICE SCALIA: You're saying this
10 instruction was too favorable to you --

11 MR. PECK: No, I'm saying --

12 JUSTICE SCALIA: -- because it allowed them
13 to consider harm.

14 MR. PECK: --this instruction -- -

15 JUSTICE SCALIA: And you don't think they
16 should have been allowed to consider harm, correct?

17 MR. PECK: This instruction as the Oregon
18 Supreme Court said, you know, doesn't provide the
19 clarity that Philip Morris hoped to provide to the jury.
20 And it says and they can't see how this summarizes
21 Philip Morris' interpretation of Campbell. That's in
22 footnote 3 of the court's opinion.

23 JUSTICE BREYER: Why, why -- why though?
24 I'm having the same problem. As I read the sentence
25 that we have just been quoted it seems to me

1 at first blush that it's completely right. You may
2 consider the harm, the extent of harm suffered by others
3 in determining what the reasonable relationship is. Now
4 you have to be sophisticated in this. Don't ask me how
5 the jury is, but assuming that they are, that means that
6 the more severely awful the conduct, the higher the
7 ratio between the damage award and the injury suffered
8 by this victim in court. And if it's really bad, you're
9 going to maybe have a hundred times this compensation
10 instead of only ten times or five times.

11 So -- we take it into account, the extent of
12 the harm that could be suffered, in deciding what that
13 ratio should be. That means it goes to the evilness of
14 the conduct. But you are not to punish the defendant
15 for the impact of its alleged misconduct on other
16 persons who aren't here in court. In other words, what
17 you aren't to do is to look at good old Mrs. Smith who
18 has really suffered terribly, she happens not to be in
19 court, think about her suffering, which is real and
20 serious, and then say I'm going to punish this defendant
21 because of what he did to her. Which would be a natural
22 human reaction, and perhaps admirable, but regardless,
23 the law is that that's what you're not supposed to do.

24 So reading it as I just read it naturally,
25 it seems to describe what our cases have said is the

1 law. Why isn't that right? I'm looking for a real
2 answer to the question. I'm posing it in a hostile way
3 and hope I'll get an answer.

4 [Laughter.]

5 MR. PECK: Justice Breyer, if the
6 instruction had been given the way you have just stated
7 it we would have --

8 JUSTICE BREYER: I --

9 MR. PECK: -- had no problems. But it's not
10 how it reads.

11 JUSTICE BREYER: Yes.

12 MR. PECK: And it's not what it does. It
13 starts out saying that reasonable relationship is about
14 the harm to Jesse Williams and then it says you may
15 consider the harm suffered by others in determining that
16 reasonable relationship. Well, how does harm to others
17 help you figure out what the relationship to Jesse
18 Williams is? It doesn't compute.

19 CHIEF JUSTICE ROBERTS: Well, because the
20 instructions indicate and juries often do this that
21 punitive damages are certain multiple of the
22 compensatory damages, and therefore that's what they are
23 saying. In determining what that multiple should be you
24 consider whether they have harmed others. And this
25 instruction would make all the difference to the world

1 in terms of what lawyers are going to be arguing about.
2 If you're allowed to punish for harm to others, you say,
3 well, there is however many, a thousand other people in
4 the plaintiff's position, so a thousand times would be
5 perfectly reasonable but you wouldn't say that the
6 conduct is a thousand times more reprehensible. There
7 is a more, there is a more natural limit on the multiple
8 when you get this kind of instruction.

9 MR. PECK: But, but juries don't look at
10 punitive damages in terms of a multiple. They are not
11 asked to multiply anything and they shouldn't be. They
12 are looking at the misconduct. They are looking at how
13 you deter others from similar misconduct. They are
14 looking at profitability here which is a statutory
15 requirement to them.

16 JUSTICE SCALIA: Counsel, it seems to me the
17 point you're making is not the basis on which the
18 Supreme Court of Oregon said the instruction was
19 properly disallowed. The Supreme Court of Oregon said
20 it was properly disallowed because you can take into
21 account directly the harm to other people, isn't that
22 the case?

23 MR. PECK: That is not the case.

24 JUSTICE SCALIA: Okay. Why not?

25 MR. PECK: As Justice Ginsburg pointed out

1 earlier, the citations that they have used in their
2 brief are to the characterization of Philip Morris'
3 argument. But if you look at 30(a) in the petition --
4 and that second paragraph there starts out with "using
5 harm to others as part of the ratio may have been correct
6 under the plurality opinion in TXO" --and then you jump
7 down to, "however, it no longer appears to be
8 permissible if it ever was."

9 JUSTICE ALITO: And what about footnote 3, on
10 page 18(a)? On the last sentence says, if the jury cannot
11 punish for the conduct which is harming others, then it is
12 difficult to see why it may consider it at all.

13 MR. PECK: And that's because of the nature
14 of this conduct. This is not conduct that was directed
15 at Jesse Williams and he was the sole recipient of what
16 Philip Morris did here. This was a massive market
17 directed fraud driven by their rational and deliberate
18 decisions at the highest levels of the company to
19 deceive customers and knowingly endanger their health.
20 They knew that this would have a special impact on those
21 who are highly addicted, as Jesse Williams was. And so
22 this is the misconduct that Oregon is seeking to deter.
23 And how is a State, given the considerable flexibility
24 that this Court has recognized, going to deter that kind
25 of misconduct if instead society's interest has to be

1 fractionalized on an individual case-by-case basis
2 knowing that the majority of those cases will never take
3 place and in fact in Oregon will not?

4 JUSTICE BREYER: Because you read it's about
5 harm. You say look here is the person doing something
6 absolutely awful, I mean really awful. And look at how
7 awful it is. It's the kind of thing that would have
8 hurt X number of people badly, maybe kill them.

9 MR. PECK: Right.

10 JUSTICE BREYER: Now I think we all agree
11 that that's an appropriate thing to say. And as long as
12 you can say that why can't you create serious damages
13 for that type of conduct?

14 MR. PECK: Well, that is precisely what we
15 believe the Oregon Supreme Court did here. When it
16 talked about how highly reprehensible this was,
17 extraordinary by any measure, it said those concerns
18 override ratio by which they meant single digit ratios.

19 JUSTICE SOUTER: What do you say, I mean
20 Justice Alito asked you a question about the footnote.
21 And I, in all candor I think you told us more about the,
22 your case than about the footnote, but let me ask you
23 basically the same question about what the Oregon
24 Supreme Court meant in the passage that runs from the
25 bottom of 20(a) up to 21. It says "Philip Morris's

1 proposed jury instructions would have prohibited the
2 jury from punishing the defendant for the impact of its
3 alleged misconduct on other persons even if those other
4 persons were Oregonians who were harmed by the same
5 conduct that had harmed Williams, and in the same way.
6 As we noted that is not correct as an independent matter
7 of Oregon law," and so on.

8 That is not a totally unambiguous statement.
9 I will concede that, but isn't the most obvious
10 reasoning, reading of that a reading that says you can
11 punish for harm to others, so long as those others are
12 Oregonians and not people in other States?

13 MR. PECK: I believe, Justice Souter that
14 what the court was doing there which is somewhat similar
15 to the analysis below in the Oregon Court of Appeals,
16 was to talk about the prospective future victims of this
17 fraud, that if it were not deterred which is a
18 consideration that the Oregon statute makes clear, if it
19 was not deterred then this kind of consideration for the
20 same acts having the same effect on others then doesn't
21 allow you to make sure that on that scale that this is
22 at the high end of what we are --

23 Justice SOUTER: That's a, that's a, I will
24 assume that's a legitimate reading in your favor. But
25 the answer, I mean, I think the response has to be after

1 listening to you, I don't know. I don't know whether
2 that's what they really had in mind here. And if, if I
3 really can't figure out what they had in mind, and if I
4 go back to the footnote that Justice Alito mentioned
5 before, isn't perhaps the better, the better course to
6 send this back to them and say, "We don't know what you
7 mean. Were you saying you can punish for these others
8 as distinct from considering risk to others for, on
9 reprehensibility?" And let them tell us clearly. Isn't
10 that the better course?

11 MR. PECK: Well, you know, perhaps that's
12 one way to determine what the court meant. But I would
13 suggest --

14 CHIEF JUSTICE ROBERTS: One way to look at
15 what it meant is what you argued below, I'm looking at
16 the joint appendix page 199(a), the plaintiff's counsel
17 in Oregon to the jury: "How many people do you see
18 outside driving home smoking cigarettes?" Now, that
19 type of argument is perfectly appropriate to assess
20 reprehensibility. On the other hand, with the
21 instruction that was offered the defense counsel could
22 have warned the jury keep in mind you can't punish for
23 those other people. We only have one plaintiff before
24 us and we are assessing the reprehensibility with
25 respect to that plaintiff. But without the instruction

1 you're allowed to argue how many people do you see in
2 Oregon smoking cigarettes?

3 MR. PECK: Let me suggest that both the
4 Oregon Supreme Court and the instructions that were
5 actually given to the jury helped answer this by looking
6 at the statutory criteria. Oregon has taken
7 extraordinary steps since this Court's decision in Oberg
8 to enact a statute that guides the courts on the, guides
9 the juries and the courts in the assessment of punitive
10 damages.

11 You know, first there is a threshold.
12 Before you can even plead punitive damages you must meet
13 that threshold and you must demonstrate to the court by
14 admissible evidence that there was a reckless and
15 outrageous indifference to a highly unreasonable risk of
16 harm, that they've acted with a conscious indifference
17 to the health and safety and welfare of others. Now,
18 this is part of what infuses it with public purpose.
19 Then --

20 JUSTICE GINSBURG: May I just ask you what
21 is the division? How much of this --

22 MR. PECK: 60 percent of an award by statute
23 goes to a crime victims fund of the State of Oregon and
24 as soon as the judgment is rendered then the State
25 becomes a judgment creditor.

1 CHIEF JUSTICE ROBERTS: That has no
2 relevance to the question of the extent to which the
3 defendant is being punished, does it?

4 MR. PECK: No, but the statutory criteria
5 which requires that the jury find by clear and
6 convincing evidence the following factors, which was
7 given to this jury in the fashion that I'm about to tell
8 you, constrains this award and I think properly makes it
9 reasonable.

10 First, you have to consider whether there is
11 a likelihood that serious harm would arise from the
12 defendant's misconduct. Second, the degree of the
13 defendant's awareness of that likelihood. Three,
14 profitability in the State of Oregon. Four, duration of
15 the misconduct and concealment of it. Five, the
16 attitude and the conduct of the defendant upon discovery
17 of the misconduct. And then finally, financial
18 condition of the defendant, which cuts both ways. It
19 protects a defendant from being bankrupted by punitive
20 damages while at the same time assures that punitive
21 damages are enough to have that deterrent effect.

22 Now even after that, the defendant could opt
23 to have the jury address whether they had been
24 previously punished for this misconduct or choose not
25 to, which you would expect most defendants to choose,

1 and instead post verdict, present that to the trial
2 judge.

3 JUSTICE BREYER: The trouble with the more
4 basic question, I don't know if you can answer it, but
5 it is a problem, that when I -- most States have factors
6 like that, or many do. Alabama did. You know, not
7 quite as good as that, and we saw the patent fraud, you
8 know. And there are other cases that would bring up
9 products liability. And it's pretty hard to think of a
10 products liability case where the jury found negligence,
11 where they might not also find these factors. Because
12 in a typical case, you'll get competing memos within the
13 company. Somebody will have been hurt and likely
14 seriously, and when you start thinking about the victim
15 in front of you, it all looks pretty bad, and it often
16 is, at least in this instance. And now you read these
17 five factors, and the difficulty for me has always been,
18 well, you read the jury factors like that and they can
19 do almost anything. And it's that, it's that fact that
20 anything goes that I found disturbing.

21 MR. PECK: But this last factor that I was
22 about to get to, which I think provides a constraint
23 that's unlike the ones that you've seen in other cases,
24 and that is the total deterrent effect of other
25 punishment imposed in any remedial measures the

1 defendant has taken. Now this can be presented first to
2 the trial judge, saying okay, we have this huge award,
3 but, you know, we have been fined by the government, we
4 have had punitive damages assessed against us in other
5 cases, and as a result we have taken the following
6 measures which assure that we will not engage in this
7 kind of misconduct again, and as a result also, this
8 award should be cut.

9 JUSTICE KENNEDY: Do you say this after the
10 fact? The jury doesn't hear this?

11 MR. PECK: The jury does not. You have the
12 option of presenting it to the jury but you do not have
13 to present it to the jury. You can present it first to
14 the trial judge and you can also present it at the
15 appellate level.

16 JUSTICE KENNEDY: It seems very odd that a
17 major argument for constraint is something that the jury
18 can't hear. It just goes to show, really, the
19 irrational nature of the exercise.

20 MR. PECK: I would suggest it's not
21 irrational because what you do is, you've given the
22 defendant the option as a strategic matter either to
23 present it to the jury or if they think that will
24 guarantee an award of punitive damages against them,
25 they can withhold it and present it only to the trial

1 judge. This is a protection to the defendant rather
2 than, you know, an oddity, I think.

3 JUSTICE STEVENS: May I ask this question?
4 Assuming there's a distinction, and the instruction
5 does, between taking into account the extent of harm to
6 others on the one hand and punishing for the extent of
7 harm on the other. As I understand what you recited
8 about the five parts of the instructions, none of them
9 really authorized punishment for harm to others.

10 MR. PECK: That is correct, and --

11 JUSTICE STEVENS: And is it also true that
12 the part the Chief Justice quoted from 199(a), it seems
13 to me that could be an argument that you should take
14 into account the extent of harm to others, but it does
15 not seem to me to be an argument that you can punish on.
16 And the question I want to ask, are there other parts
17 of the closing argument in which plaintiff's counsel
18 argued that you should take into account, that you
19 should punish for harm to others?

20 MR. PECK: There is not. The only argument
21 that was made in closing was that you can think about
22 the others, which was clearly intended to go towards
23 that reprehensibility analysis. You know, certainly in
24 the criminal law context, an attempted crime is punished
25 as badly as an actual crime when all the elements that

1 are required to, to accomplish that crime have occurred.
2 And in the context of this very unusual long in duration
3 misconduct, what you had to do was you had to look at
4 that broad attempt to effect Oregon --

5 JUSTICE ALITO: Do you think juries can,
6 Oregon juries or juries anywhere can understand what
7 they are told if they are told, you can take into
8 account conduct directed at other people for the purpose
9 of assessing how reprehensible the conduct is, but you
10 can't punish for the harm that is caused other people?

11 MR. PECK: I believe they can. This -- this
12 jury did a very good job. First of all, if they --

13 JUSTICE ALITO: They can understand that
14 distinction and --

15 MR. PECK: I believe they can.

16 JUSTICE ALITO: And you would have them
17 apply that principle in this case?

18 MR. PECK: They understood contributory or
19 comparative negligence, and gave no award on the basis
20 of negligence. They made a distinction in, in the fraud
21 claim by only awarding a little bit more than \$21,000,
22 even though the request was much higher.

23 CHIEF JUSTICE ROBERTS: Well, if they can
24 understand that distinction, why wasn't the defense
25 counsel entitled to argue to the jury just as you

1 argued, you can consider the harm to others in assessing
2 reprehensibility, why couldn't the defense counsel say,
3 but, you can't punish for the harm to others, if as you
4 answered to Justice Alito, a jury can understand that
5 distinction?

6 MR. PECK: I believe the defense counsel
7 would have been entitled to make such an argument. I
8 don't think there would have been any need for
9 corrective instruction. But what they proposed, which
10 was conflicting in two different respects, just did not
11 meet the muster.

12 CHIEF JUSTICE ROBERTS: So you think it
13 would have been, putting aside what they proposed, if
14 they had proposed an instruction that said, you may
15 consider the harm to others in assessing how
16 reprehensible the conduct is but you may not punish
17 Philip Morris for the harm to others, you would have had
18 no objection to that instruction?

19 MR. PECK: I would have had no objection.

20 JUSTICE SCALIA: So your only objection is
21 that they left out the reason why it is relevant to
22 determining what the ratio should be? They just didn't
23 say you can consider it in connection with
24 reprehensibility. Why is that crucial?

25 MR. PECK: I think it was critical and of

1 course, you know, Oregon is entitled to run its court
2 system as it has for more than 30 years.

3 JUSTICE SCALIA: But why was it critical?

4 JUSTICE SOUTER: Why was it critical?

5 MR. PECK: Why was it corrected?

6 JUSTICE SOUTER: Yeah. Justice Scalia said,
7 you know, they left out this one little bit. Why was
8 that critical? What's the answer.

9 MR. PECK: Well, the answer is because,
10 again, it was not directed for the specific purpose for
11 which harm to others may be considered, and that's in
12 the reprehensibility analysis. There is no disagreement
13 between the parties on that.

14 JUSTICE SOUTER: You're saying, I think
15 you're saying the jury couldn't have figured that out
16 without somebody telling them?

17 MR. PECK: But what this instruction told
18 him --

19 JUSTICE SOUTER: Isn't that what you're
20 saying?

21 MR. PECK: No, I'm not saying that. What
22 the instruction told them is to consider it with respect
23 to the reasonable relationship. That means the ratio.
24 That means proportionality. And that would suggest, as
25 Justice Stevens suggested, that they might multiply it

1 by how many people are out there, because I think this
2 instruction was an enigma and was confusing.

3 JUSTICE SCALIA: Too favorable to you. Too
4 favorable to you again, right?

5 (Laughter.)

6 MR. PECK: You know, perhaps so. But you
7 know, the fact of the matter is that, you know, we did
8 not advocate that the jury punish for harm to others.
9 We do not believe the Oregon court upheld this judgment
10 for that reason.

11 If I can go on to the, some of the other
12 points that are made by Philip Morris. They talk about
13 this Court's decision in State Farm as if it were
14 nothing more than a ratio, so they reduce the decision
15 to ratio. They transform the most important indicium,
16 reprehensibility, into a subsidiary role in the ratio
17 analysis.

18 CHIEF JUSTICE ROBERTS: Can I make, just to
19 get the ground rules here, you're not asking us to
20 reconsider either State Farm, BMW, any of our punitive
21 damages precedents?

22 MR. PECK: No, we are not asking you to do
23 that. We think that this, this judgment is valid under
24 those precedents. They denigrate the State's interest
25 which this Court has said is the first consideration,

1 the State's interest in deterrence to this
2 fractionalized sort of passenger on each individual
3 lawsuit, even though the State's interest here when we
4 get to the punitive damages phase, it's infused with
5 public purpose, that State interest is in deterring
6 misconduct, not in figuring out how many dollars might
7 be additionally awarded to the plaintiff or even into
8 its crime victims fund. It removes the State's
9 flexibility and ability to experiment with different
10 ways to address the concerns that this Court has stated
11 with respect to punitive damages.

12 JUSTICE GINSBURG: It depends when you say
13 something about duplicative recoveries, because that
14 seems to be a major concern.

15 MR. PECK: This total deterrent effect
16 requirement is the key here, that this is a part of a
17 State statute that says that to the extent that there
18 had been prior punitive damage awards that have operated
19 to affect that deterrence that the State is interested
20 in, to the effect that there have been other
21 punishments, to the effect that there had been remedial
22 measures taken to prevent such misconduct again in the
23 future, then the judge is to reduce this award. The
24 Oregon Supreme Court has said that this fully addresses
25 the concern with multiple awards, duplicative awards,

1 and that authoritative construction by that court
2 should, should weigh heavily with this Court. But at
3 the same time, the fact of the matter is --

4 JUSTICE SCALIA: But what if -- your friend
5 says, what if we never get assessed for any other case?
6 Where do we make up this money?

7 MR. PECK: Well, you know --

8 JUSTICE SCALIA: Suppose they win every
9 other case in Oregon.

10 MR. PECK: Well, as a practical matter, they
11 have been, they have lost both, the only two cases that
12 have gone to a trial in Oregon. And as a practical
13 matter, the statute of ultimate repose practically
14 prevents any future Oregon plaintiff from bringing such
15 a lawsuit. They would have to show that they contracted
16 cancer or a disease from smoking within the repose
17 period, which is eight years, if one were filed
18 tomorrow, eight years ago, and that indeed that the
19 fraud was a substantial factor in contracting that
20 disease. That is what we were put to prove in this
21 case, the relevant date being 1988.

22 Now imagine, that window is rapidly closing
23 on eight years, because it was after this case that
24 Philip Morris decided that they were no longer going to
25 deny that smoking causes cancer and they were no longer

1 going to deny that nicotine was addictive. So that
2 window is rapidly closing, and it's highly unlikely that
3 a smoker can point to eight years ago as the point at
4 which their cancer basically became active. So as a
5 practical matter, there is going to be no awards, future
6 awards in Oregon. And as a legal matter, doctrinal
7 matter, I believe that Oregon has taken the step
8 necessary to prevent multiple awards.

9 You know, six States do not permit punitive
10 damages in most instances. Another 20 or so cap
11 punitive damages. And then 12, of which Oregon is one,
12 has chosen a method like this to address that
13 duplicative award approach. I think that kind of
14 experimentation which is done in good faith, which has
15 been authoritatively construed by the courts to address
16 this question, is sufficient to address any concerns
17 with due process.

18 But let's, let's remember also, that while
19 the Constitution contains many places where numbers are
20 important, the President must be 35 years of age, it has
21 implied in other places numbers, like in one person, one
22 vote. But the due process clause in its spaciousness
23 and majesty doesn't talk about numbers, and that is
24 where the concern is only about reasonableness. It's
25 about fairness. And here the Oregon legislature,

1 supplemented by the Oregon courts, have taken those
2 steps to properly constrain awards.

3 Since the decision in Oberg, there have been
4 only 14 punitive damage decisions in Oregon. Four of
5 them have been overturned entirely by the Oregon Supreme
6 Court, so no punitive damages awarded. There are only
7 two out of all those awards that exceed single digits,
8 and this is one of them. So I think that the courts
9 have done a good job there of trying to address these
10 concerns.

11 And one of the areas of agreement between
12 our opponents and us is that the statement in their
13 brief that, reprehensibility ensures that the greater
14 wrong receives the greater punishment. But the regime
15 that they are suggesting, one that has a categorical
16 ratio limit and atomizes this kind of consideration so
17 you don't look at the broader societal and public
18 purpose, that one guarantees a regime of
19 underdeterrence. And Oregon has, as it is their right,
20 opted for optimal deterrent effect. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, Mr. Peck.
22 Mr. Frey, you have four minutes remaining.

23 REBUTTAL ARGUMENT OF ANDREW L. FREY

24 ON BEHALF OF PETITIONER

25 MR. FREY: Thank you, Mr. Chief Justice.

1 Let me, let me start with, let me start with the
2 observation that Mr. Peck has argued as though this was
3 a class action, as though total deterrence,
4 disgorgement, and all these things were all to be
5 achieved in this case, which is the heart of our problem
6 here with the denial of the instruction. He referred to
7 this other case in Oregon, which is the Schwarz case, as
8 finding liability also, but what he didn't mention was
9 that on the issue of the fraud relating, involving the
10 relationship between cancer, between smoking and health,
11 the jury found for the defendant. They found liability
12 on a different issue, but not on this issue. So it
13 hardly proves that we would lose all cases. It's also
14 true that in that case, where the jury did not
15 receive -- we asked for but we didn't get an instruction
16 like this -- the jury actually came back and said: Does
17 our award have to be reasonably related to the injury to
18 Mrs. Schwarz? And the judge refused to tell them the
19 answer to that. So juries do understand this problem
20 and they do think about this problem.

21 The suggestion was made that you can
22 present prior awards to the trial judge. Now, I, I hope
23 during my opening argument I covered the reasons why
24 there's a structural deficiency in the system if the
25 system even called for getting credit, which the

1 statutes don't require. But you should know that the
2 Oregon plaintiffs' lawyers have argued that under the
3 Oregon Constitution it must be presented to the jury or
4 is it may not be considered by the court. So while here
5 he wants to assure you that it can be presented to the
6 court, that's not the position they are taking below.

7 On the question by Justice Souter about
8 whether you should send it back and what the Oregon
9 Supreme Court meant by its discussion, if it didn't
10 mean what we say it meant they should have reversed
11 and said were entitled to the instruction or identified
12 some other reason why we're not entitled to the
13 instruction. Now, there may be some independent State
14 ground that you're not aware of, but you ought to say
15 at a minimum that they were wrong and that a defendant
16 in a punitive damages case is entitled to an instruction
17 of this general nature, and then we can let the Oregon
18 courts on remand address whether there is some other
19 problem which we frankly don't see, but that would be
20 for them.

21 Now, if Mr. Peck is right about the
22 nature of the conduct, there should be plenty of
23 lawsuits and plenty of liability. If there isn't, the
24 Court can't speculate that we ought to punish Philip
25 Morris more in this case because other people are not

1 sufficiently aggrieved to sue. That seems to me totally
2 impermissible speculation.

3 On the question of harm versus conduct,
4 the unit of prosecution is the cause of action, so that
5 it's not, it's not, you can repeatedly -- in our, in our
6 submission you can repeatedly punish a defendant for the
7 same conduct, for the impact of the same conduct causing
8 injury to different people. What we are basically
9 saying is that there are, there are potentially many
10 causes of action out there for this conduct and the
11 punishment in this case should be limited to the cause
12 of action that is being tried before the jury in this
13 case.

14 Let's see if I -- if I have anything
15 else. Justice Stevens talked about the ambiguity of the
16 closing argument and I agree it's not clear what
17 plaintiff's counsel was exactly saying. It could be
18 interpreted in different ways. But that is a reason to
19 have a cautionary instruction, not a reason to forgo
20 one, to make sure the jury understands the applicable
21 principles.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you, Mr. Frey.

24 The case is submitted.

25 (Whereupon, at 11:04 a.m., the case in the

1 above-entitled matter was submitted.)

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