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May 22, 2008

Via Federal Express

Honorable Ronald M. George, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Buell-Wilson v. Ford Motor Co.*,
Supreme Court of California Case No. S163102

Dear Chief Justice George and Associate Justices :

The Chamber of Commerce of the United States of America (hereinafter Chamber) respectfully submits this amicus curiae letter pursuant to rule 8.500, subdivision (g) of the California Rules of Court in support of petitioner Ford Motor Co.'s petition for review filed April 28, 2008.

I. Interest of the Amicus Curiae

The Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every sector of business, and in every region of the country. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of vital concerns. In fulfilling that role, the Chamber has appeared many times before the California appellate courts.

Business such as those the Chamber represents are frequently subjected to punitive damages claims, which carry with them an enormous potential for abuse, as the U.S. Supreme Court has repeatedly emphasized. (*State Farm Mut. Auto Ins. v. Campbell* (2003) 538 U.S. 408, 417 ["Punitive damages pose an acute danger of arbitrary deprivation of property."], citation omitted.) Among other things, a State's "punitive damages system may deprive a defendant of 'fair notice'"; "it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but a 'decision maker's caprice'"; and "it may impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public choices." (*Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, 1062, citations omitted.) For that reason, over the past 19 years, the Chamber has filed a brief in every punitive damages case before the U.S. Supreme Court. The Chamber also filed a brief in the Court of Appeal in this matter.

Ford's petition presents three issues relating to punitive damages, each of which presents an important question of statewide concern. We focus this letter, however, on the first issue presented: the procedural protection that state courts must provide in light of the U.S. Supreme Court's holding in *Williams* that due process forbids the imposition of punitive damages for harm caused nonparties and the remedy required when a court fails to provide such protection.

II. The Court Should Grant Ford's Petition And Address The Scope Of The Due Process Protection Provided by *Williams*

A. The Court Of Appeal's Forfeiture Ruling Erodes The Due Process Protections Afforded By *Williams*

Williams forbids a jury from imposing punitive damages to punish a defendant for harm caused to nonparties. (Court of Appeal's Opinion ("Opinion") at p. 70.) At the same time, *Williams* acknowledged that "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few" and that "a jury consequently may take this fact into account in determining [the] reprehensibility" of the conduct that injured the plaintiff. (*Williams*, 127 S.Ct. at p. 1065.) The Supreme Court placed on state courts the burden to ensure that

juries are not confused as to the purposes for which they may consider harm to nonparties and do not "seek[] to punish the defendant for having caused injury to others." (*Ibid.*) Specifically, the Court held that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." (*Ibid.*) "[W]here the risk of that misunderstanding is a significant one -- because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury -- a court, upon request, must protect against that risk." (*Ibid.*)

1. Ford did all that it needed to do to invoke the due process protection ultimately afforded by *Williams*. Three years before *Williams* was decided, Ford requested that the trial court instruct the jury that, "[i]n determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiffs. . . . [I]f you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiffs in this lawsuit." (Opinion at p. 71.) The Court of Appeal held that this requested instruction was insufficient -- and that Ford forfeited its due process rights under *Williams* -- because the instruction would have told the jury that it "may consider *only* the harm to the plaintiffs" in awarding punitive damages and did not mention that the jury could consider the extent to which Ford's conduct presented a risk of harm to the public in assessing the reprehensibility of Ford's conduct. (Opinion at p. 78.)

This forfeiture ruling threatens to erode the very due process protections that the Supreme Court set forth in *Williams*. Contrary to the Court of Appeal's decision, the due process right recognized in *Williams* is not simply the right to have the jury properly instructed as to the elements of a claim or defense. *Williams* instead established a broader right that prohibits state courts from adopting "procedures that create an unreasonable and unnecessary risk" that the jury will impose punishment for harm to nonparties and requires courts to provide "some form of protection" against the risk of unconstitutional punishment. (127 S.Ct. at p. 1065.)

Because a defendant's due process rights under *Williams* are not limited to jury instructions or evidentiary rulings, a defendant does not "forfeit" its rights by

requesting an instruction that is "incomplete or erroneous" (Opinion at p. 78) or by objecting "belated[ly]" to opposing counsel's argument (*id.* at pp. 85-86). Rather, a defendant's rights under *Williams* are fully preserved as long as the defendant requests from the trial court protection against the risk of such jury confusion -- which is precisely what Ford did here. Once a request is made, the trial court is obligated to take some action to protect against the risk of unconstitutional punishment. (*Williams*, 127 S.Ct. at p. 1065.) "Although the States have some flexibility to determine what kind of procedures they will implement, *federal constitutional law obligates them to provide some form of protection* in appropriate cases." (*Ibid.*, italics in original.)

Furthermore, even if Ford's proposed instruction were "incomplete or erroneous," the trial court had a duty to instruct the jury because the right not to be punished for harm to others arises out of the "fundamental due process concerns" about the "risks of arbitrariness, uncertainty, and lack of notice." (*Williams*, 127 S.Ct. at p. 1063.) It is well established that a trial court has a duty to instruct the jury on such "controlling legal principles," regardless of the instructions proposed by the parties. (See *Orient Handel v. United States Fid. & Guar. Co.* (1987) 192 Cal.App.3d 684, 698; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951.) The duty to instruct on controlling legal principles encompasses the duty to instruct on the proper measure of damages (*Blake v. Thompson Petroleum Repair Co.* (1985) 170 Cal.App.3d 823, 834; *Pepper v. Underwood* (1975) 48 Cal.App.3d 698, 708-09), and applies "even though faulty or inadequate instructions were submitted by the parties." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 157-58.)

The Court of Appeal's narrow view of *Williams* departs from a line of decisions by state and federal courts in California, all of which have reversed punitive damages verdicts because the trial court failed to provide protection against the risk of punishment for harm to nonparties upon request. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 693; *Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 933; *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. 2007) 500 F.3d 1007, 1016; *White v. Ford Motor Co.* (9th Cir. 2007) 500 F.3d 963, 972-73.)

2. The Court of Appeal also misconstrued *Williams* and misapplied California law in holding that a defendant forfeits its rights by failing to include in any proposed instruction a statement that the jury may consider harm to nonparties in assessing the reprehensibility of the defendant's conduct. (Opinion at p. 78.) Nothing in *Williams* requires the defendant to request such an instruction as a condition precedent to exercising its due process rights. Rather, *Williams* makes clear that the defendant need only request protection from punishment for harm to nonparties. (127 S.Ct. at p. 1065; see also *Bullock*, 159 Cal.App.4th at p. 693 ["The fact that [the defendant's] proposed instruction . . . did not include the qualification that evidence of harm caused to others could be considered to determine the reprehensibility of the conduct that harmed Bullock did not render the instruction incomplete or misleading."]; Report from Advisory Committee on Civil Jury Instruction to Members of the Judicial Council at pp. 2-3 ["*Williams* requires that the jury be instructed on when harm to others cannot be considered, but not necessarily on when it can."].)

Nor is there any state-law requirement that the defendant include the plaintiff's reprehensibility theory in any proposed instruction. Although it is generally the case that "California law provides that incorrect or misleading jury instructions may be rejected by the courts" (Opinion at p. 78), it is well established that a party need not propose jury instructions on its opponent's theory of the case. (See, e.g., *Valentine v. Kaiser Foundation Hosps.* (1961) 194 Cal.App.2d 282, 290 [defendant under "no duty to propose instructions upon the plaintiff's theory of the case"], overruled on other grounds, (1962) 57 Cal.2d 834.)[1]

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[1] See also *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825 ["Each party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary."]; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 951 ["In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation."].); *Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 601, fn.1 ["It is the parties' responsibility to request instructions that address each theory of their case."].

Accordingly, it is the plaintiff's obligation to request an instruction on reprehensibility if he or she wishes the jury to consider harm to nonparties for that purpose. (*Bullock*, 159 Cal.App.4th at p. 693 [concluding that including reprehensibility instruction was not necessary because "[e]ach party in a civil case has a duty to propose instructions that accurately state the law supporting its own theory of the case, and need not qualify its proposed instructions for the benefit of an opposing party."].) The Court of Appeal's holding that Ford was required to request an instruction on reprehensibility to preserve its due process rights is contrary to every California decision on this issue. (See *Bullock*, 159 Cal.App.4th at p. 693; *Holdgrafer*, 160 Cal.App.4th at p. 933; see also *White*, 500 F.3d at pp. 972-73; *Merrick*, 500 F.3d at pp. 1017-18.)

3. Finally, the Court of Appeal's decision places far too high a burden on the exercise of a litigant's federal constitutional rights. As this Court's cases establish, important rights, such as the constitutional due process rights at issue here, are not so readily lost. Although a party may forfeit its constitutional rights in certain circumstances by failing to comply with a state procedural rules, this Court's cases make clear that "inflexible adherence to [procedural] rule[s] cannot be tolerated." (*People v. Taylor* (1982) 31 Cal.3d 488, 496; see also *Henry v. Mississippi* (1965) 379 U.S. 443, 447 [failure to comply with state procedure can result in forfeiture of constitutional right only if application of procedure is reasonable under the circumstances].)

The Court of Appeal's requirement that a litigant perfectly predict -- three years before a new principle of law is announced by the Supreme Court[2] -- the exact contours of a future Supreme Court decision is precisely the type of "inflexible adherence" to procedural rules that cannot be invoked to deny a party its constitutional rights. "As Justice Holmes warned us years ago, '[w]hatever

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[2] The Supreme Court expressly noted that *Williams* was the first case in which it had held that the Constitution forbids the imposition of punishment for nonparty harm. (127 S.Ct. at p. 1065 ["We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now."].)

springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" (*Osborne v. Ohio* (1990) 495 U.S. 103, 125, quoting *Davis v. Wechsler* (1923) 263 U.S. 22, 24.)

B. The Violation Of A Defendant's Procedural Due Process Rights Requires A New Trial And Cannot Be Cured Merely By Reducing A Punitive Damages Award

The Court of Appeal also departed from established law in its alternative holding that it had remedied any error in the trial court's failure to instruct the jury on harm to nonparties by reducing the size of the punitive damages award, rather than ordering a new trial. (Opinion at pp. 101-02.) Where, as here, the jury was not properly instructed, the error cannot be cured by reducing the amount of damages. (See, e.g., *Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 454 [remittitur is "uniformly confined to cases in which an excessive damage award was the *only* error in the jury's verdict."].) A new trial is required. (E.g., *Bullock*, 159 Cal.App.4th at pp. 695-96.)

The only circumstance in which courts may remedy instructional error by reducing the size of an award is where it is possible to identify the amount of damages attributable to the error and to deduct it from the award. (See *Salstrom v. Orleans Bar Gold Min. Co.* (1908) 153 Cal. 551, 559; *Conger v. White* (1945) 69 Cal.App.2d 28, 42-43.) Here, however, there was no way for the Court of Appeal to unscramble the egg and figure out what amount of punitive damages, if any, the jury would have awarded if it had been properly instructed. The Court of Appeal's conclusion that its reduction of the punitive damages award eliminated any prejudice to Ford (Opinion at p. 101) was constitutionally impermissible conjecture.

The Court of Appeal's substitution of its judgment for that of a properly instructed jury denies Ford its right to a jury trial on the issue of punitive damages because every "jury has the discretion not to award punitive damages." (*Chavez v. Keat* (1995) 34 Cal.App.4th 1406, 1415.) In fact, every court to consider the issue has agreed that an instructional error relating to harm to nonparties cannot be

cured through a remittitur. (See *Bullock*, 159 Cal.App.4th at pp. 695-96 ["[W]e cannot determine how the instructional error that we have found affected the amount of the punitive damages award and we cannot substitute our own assessment of the appropriate amount of punitive damages for that of a jury (or a judge on a new trial motion). We therefore conclude that a remittitur by this court would be inappropriate."]; *Holdgrafer*, 160 Cal.App.4th at p. 934; *Merrick*, 500 F.3d at pp. 1017-18; *White*, 500 F.3d at pp. 972-73.)

For these reasons, the Chamber respectfully requests that this Court grant review to settle these important issues of federal constitutional and California law.

Respectfully submitted,

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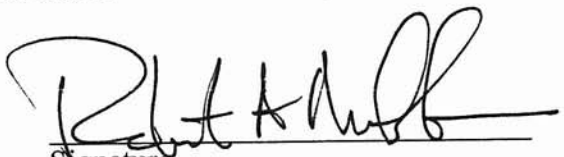

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