No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Whether due process allows a jury to punish a defendant for unadjudicated harm to individuals not before the court.

2. Whether, in reviewing a punitive damage award for excessiveness, an appellate court may assume as true any fact that arguably supports the award, even where the jury made no specific factual findings.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

OTHER AUTHORITIES

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of the petition for a writ of certiorari in this case. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of the petition for a writ of certiorari because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decisions in *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), which they viewed as providing much-needed guidance on the scope of conduct for which punitive damages may be imposed and the standard of review of punitive damages awards. Many state and lower federal courts, however, have failed to adhere to the principles set forth in those decisions and in earlier punitive damages cases de-

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the Chamber and its members, made a monetary contribution to the preparation and submission of this brief.

cided by this Court. The decision of the Oregon Supreme Court in this case is illustrative of the problem. The Chamber submits that this case is an ideal vehicle for bringing some measure of clarity to the chaos that continues to roil punitive damages jurisprudence in federal and state courts throughout the nation.

REASONS FOR GRANTING THE WRIT

Well before this Court began reviewing punitive damages awards for substantive excessiveness, the Court's punitive damages opinions "strongly emphasized the importance of the procedural component of the Due Process Clause." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994). These opinions expressed special concern with two procedural aspects of punitive damages awards. First, the Court recognized the problem of inadequately guided juries, which invites "extreme results that jar one's constitutional sensibilities." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Absent sufficient guidance on how to determine appropriate punitive awards, juries can do "little more than . . . what they think is best," and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring). In particular, the failure to tether a jury's discretion closely to the proper function of punitive damages creates a grave risk that they "will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432. Accordingly, this Court has long emphasized the importance of providing "adequate guidance" to jurors charged with the societal function of meting out civil punishment on behalf of the community. *Haslip,* 499 U.S. at 18; *see State Farm*, 538 U.S. at 418.

Second, this Court's punitive damages opinions have acknowledged from the outset the importance of meaningful judicial scrutiny of punitive damages awards. Its early opin-

ions "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review" as essential to the legal process that is due before punitive damages may be imposed. *Oberg*, 512 U.S. at 420 (quoting *Haslip*, 499 U.S. at 20); *see id.* at 421 ("Judicial review . . . has been a safeguard against excessive verdicts for as long as punitive damages have been awarded."). Meaningful judicial review is crucial, the Court explained, because *even where juries are given adequate guidance* through proper instructions, there remains "the possibility that a jury will not follow those instructions and . . . return a lawless, biased, or arbitrary verdict." *Oberg*, 512 U.S. at 433. Accordingly, this Court has held that due process requires "[e]xacting appellate review" of a punitive damages award, to ensure that the award "is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted); *see Cooper Indus.*, 532 U.S. at 436 (due process requires *de novo* review of trial court's application of substantive guideposts).

The petition in this case implicates both of the procedural due process issues created by "the imprecise manner in which punitive damages systems are administered" in this country. *State Farm*, 538 U.S. at 417. On the one hand, the trial court allowed the jury to consider evidence of unadjudicated harm to non-parties in deciding how much punitive damages to award respondent. Thus unmoored from the facts and conduct at issue in respondent's own case, the jury – quite predictably – awarded punitive damages in an amount out of all reasonable proportion to the harm inflicted on Mr. Williams.[2]

Then, on appeal, the Oregon Supreme Court not only re-

[2] The punitive damages award of $79.5 million was almost 97 times the $821,485 the compensatory damages awarded by the jury for wrongful death, and 152 times the $521,485 statutory maximum for wrongful death damages applicable here.

fused to correct that error, it compounded the error by also refusing to conduct the meaningful review of the award compelled by due process and this Court's precedents. Rather than conducting a *de novo* review of the record to ensure that the $79.5 million award was consistent with constitutional limitations on the state's power to inflict punishment through civil jury awards, the Oregon Supreme Court reviewed the record as if the award were presumptively valid, assuming as true any fact adverse to petitioner that was arguably supported by the evidence, even though no facts at all were specifically found by the jury.

The punitive damages award ultimately affirmed in this case was, in short, the product of the jury's punishment for conduct not adjudicated and the appellate court's reliance on facts not found. If the "due process" to which petitioner was entitled means anything, it must bar the deprivation of property through a punitive damages award in a case like this. Unfortunately, however, the decision below does not stand alone – too many other courts are imposing and affirming punitive damages awards using similarly flawed trial and appellate procedures. Certiorari should be granted to clarify – and reinforce – the vitally important procedural standards that govern the administration of punitive damage awards in state and federal courts.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT JURIES MAY NOT PUNISH DEFENDANTS FOR HARM TO NON-PARTIES

The Oregon Supreme Court in this case squarely held that a defendant may be punished not only for conduct that injured the plaintiff, but also for conduct that injured others not before the court. In the Oregon Supreme Court's words, the massive award was justified because "Philip Morris harmed a much broader class of Oregonians," Pet. App. 23a, and "the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Mor-

ris was prepared to inflict on the smoking public at large," Pet. App. 18a.

The Oregon Supreme Court's holding that a punitive damages award may be based on unadjudicated harm to non-parties directly conflicts with this Court's admonition in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423; *see id.* ("A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."). The decision below also conflicts with decisions of the Eighth Circuit, the California Supreme Court and several intermediate appellate courts holding that a punitive damages award may not be based on hypothetical harms to others not actually adjudicated by the court. *See Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004); *Johnson v. Ford Motor Co.*, 113 P.3d 82, 93 (Cal. 2005); Pet. 20 (citing other appellate court precedents).

Certiorari is warranted for the foregoing reasons, as the petition ably demonstrates. In this brief the Chamber seeks to emphasize the serious due process problems for defendants created by judicial decisions allowing the imposition of punitive damages for harm to non-parties. The approach endorsed by such decisions implicates two due process concerns in particular: it denies the defendant the right to mount a defense to non-parties' claims, and it risks multiple punishment for the same conduct. These due process concerns, both individually and together, amply justify review and reversal of the decision below.

A. Punishing A Defendant For Harm To Non-Parties Denies The Defendant Its Due Process Right To Defend Claims Against It

By permitting the jury to punish petitioner for harm to non-parties, the trial court allowed respondent's lawsuit to

become a vehicle for vindicating the rights of a "broader class of Oregonians" purportedly harmed by petitioner's conduct. Pet. App. 23a. In other words, the court effectively turned this individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device.

The class action procedure allows the claim of a single plaintiff to represent the claims of hundreds or thousands or millions of other individuals only when the representative plaintiff's claim has so much in common with all the other claims that the defendant fairly can be made simultaneously liable (or absolved of liability) to all claimants in a single, all-or-nothing proceeding. The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim.

The very essence of "due process," of course, is the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). This includes the "opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *accord Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Accordingly, standard class action rules preclude class litigation on behalf of absent parties *unless* the plaintiff first proves

that all such parties are situated so similarly that litigation of one claim is effectively and fairly the litigation of all other claims as well.

It is impossible to contend that this case could have satisfied the requirements for proceeding as a class action, given that each claimant would be required to prove the extent of his or her personal reliance on various statements made by petitioner over the course of many years (most of which Mr. Williams himself never heard or was exposed to). Indeed, the courts have uniformly denied class certification in other tobacco-safety-misrepresentation cases for precisely that reason. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492 (S.D. Ill. 1999); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 599 (App. Div. 1998), *aff'd*, 698 N.Y.S.2d 615 (1999).

Respondent in this case nevertheless was effectively allowed to circumvent basic class action requirements – and the due process protections they are designed to provide – by proceeding with her case individually and then seeking punishment on behalf of what the Oregon Supreme Court referred to explicitly as a "broader *class* of Oregonians." Pet. App. 23a (emphasis added). That approach plainly denied petitioner any opportunity to challenge the existence, cause, or magnitude of any supposed injuries of the non-parties – overlooking the obvious possibility that many of the other ostensibly injured non-parties "may not have been able to establish specific elements – or that the defendant may have been able to establish unique affirmative defenses – related to their individual claims." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). Indeed, the non-parties were not even identified at trial, making it literally impossible for petitioner to defend against their claims, which thus remained purely hypothetical for purposes of assessing punitive damages. The

due process violation could hardly be more flagrant:

> If due process will not permit a defendant to be tagged with compensatory damages for the wrongs that it visited upon a large number of people without being afforded the opportunity to contest individual elements of each alleged victim's claim and to raise victim-specific affirmative defenses, it cannot tolerate the imposition of punitive damages in these circumstances, especially given that punitive damages for each wrong are expressly contingent upon an entitlement to compensatory damages. The defendant can be punished through the mechanism of punitive damages for the harm caused to third parties only if it committed legal wrongs against all of those parties. The only way to establish that it did so is through individual tort suits (or a collective proceeding in which the defendant is afforded the opportunity to defend against each allegation), not litigation in which the plaintiff effectively strips the defendant of all of its defenses.

Id. at 657.

In any other legal context, the suggestion that due process allows a person to be punished by a court for unproven, unadjudicated conduct affecting unidentified non-parties would be met with derision. This approach not only violates due process, it contradicts the most basic Anglo-American understanding of the *judicial* function, which is "intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 & n.10 (1974). The judicial function stands in "sharp contrast" to the *legislative* role, *id.*, which is to address the general welfare of the broader public. When individual courts and lay juries are called upon to issue broad, quasi-legislative pronouncements on matters they have not adjudicated – and could not rationally adjudicate in a single judicial proceeding – they are per-

forming a function they simply are not designed or equipped to handle. It should come as no surprise when such proceedings produce arbitrary and irrational results, as they so often do.

This case proves the point. The jury below, denied the guidance necessary to understand how it should limit a punitive award to address only the harm caused to Mr. Williams, issued an award that far exceeded any constitutionally reasonable amount for the conduct actually adjudicated in respondent's case. *See supra* note 2 (noting highly disproportionate ratio of punitive damages to compensatory damages); Pet. 1-2 (describing undisputed facts establishing that decedent was aware of risks associated with cigarette use). And unless the decision below is reviewed and reversed, it will *necessarily* lead to other such indefensible awards, as other plaintiffs' lawyers follow the decision's lead and invite juries to punish defendants for unproven, unadjudicated harms to non-parties. The excessive and irrational awards that will inevitably result will place greater strain not only on the defendants unfairly subjected to such awards, but also on the increasingly challenged capacity – and credibility – of the nation's civil justice system.

B. Punishment For Harm To Non-Parties Also Invites Unjust And Socially Wasteful Multiple Punishment

The *de facto* class action punitive damages award issued below not only stripped petitioner of its right to defend against non-parties' claims, it also subjects petitioner to the direct and substantial risk of being punished repeatedly for the exact same conduct causing the exact same harm to the exact same people. Although the award in this case was unambiguously intended to punish petitioner for harms it caused to non-parties, nothing prevents those non-parties from now bringing their own actions seeking duplicative punishment for the selfsame harm. Indeed, the massive size

of the award in this case all but guarantees that other potential claimants, for whose injuries petitioner was already punished, will file their own lawsuits seeking to collect their own payouts for the harms to a "broad[] class of Oregonians." Pet. App. 23a.

An essential function of a true, *de jure* class action is to ensure that, when a classwide proceeding is appropriate, a judgment for or against the defendant will preclude subsequent actions by class members seeking to establish the same liability. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). The *de facto* class punishment imposed below affords no such protection. "Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure." *Williams*, 378 F.3d at 797. The law of *res judicata* also affords no protection, since it binds only persons who were actually parties to a prior judgment. *See Richards v. Jefferson County*, 517 U.S. 793, 800-02 (1996). In short, as Judge Friendly observed in his seminal opinion examining the multiple punishment risk posed by punitive damage awards based on harms to non-parties, there is "no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments." *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

Accordingly, petitioner faces the manifestly unjust prospect of being punished, over and over again, for the same harm to the same broad class of people, essentially guaranteeing that the final tally will far exceed the maximum amount that permissibly could be imposed for such harm in any one case. *See Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 51 (Tex. 1998) ("[I]f a single punitive damages award becomes unconstitutional when it can fairly be categorized as 'grossly excessive' in relation to a

state's legitimate interests in punishment and deterrence, it follows that the aggregate amount of multiple awards may also surpass a constitutional threshold.").

It is no comfort to defendants that some jurisdictions – including Oregon – allow future juries to consider the punishment already imposed against a defendant in determining the amount of punitive damages to award.[3] Such rules simply place a defendant in the untenable position of arguing that it should not be liable or punished for alleged wrongdoing while simultaneously introducing evidence that the same conduct caused a prior jury to award large punitive damages. Logic and experience tell us that evidence of a prior large award is unlikely to persuade a subsequent jury to issue a small award or no award. As Judge Friendly observed, "we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare." *Roginsky*, 378 F.2d at 840. Indeed, the more likely effect is the opposite: when a defendant introduces evidence that it has already been subject to punitive damages for the same course of conduct, a jury is almost certain to use the prior award as an "anchor" for its own award or as justification for imposing an even higher punitive damages award. *See* Cass R. Sunstein et al., *Punitive Damages: How Juries Decide* 216-19 (2002) (discussing empirical research demonstrating "anchor effects" in juries' punitive damages deliberation).

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[3] *See*, *e.g.*, Or. Rev. Stat. § 30.925(2)(g) (listing as one of many criteria for consideration in determining punitive damages award: "The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.").

The reality is that permitting a defendant to be punished for collective harm to non-litigants substantially increases the likelihood that corporate defendants will be subjected to repeated – and oxymoronic – "take all" lawsuits. And the opportunity to get future "credits" certainly is of no use to a defendant that *wins* subsequent cases brought against it. Similarly, even if a defendant were to prevail in the lion's share of individual cases brought against it (and therefore be punished for harms for which a later jury absolves the defendant), a single punitive award based on harm to others could essentially wipe out all of its previous or subsequent victories. This very case exemplifies that danger. Although petitioner has prevailed in numerous other lawsuits brought by individual smokers invoking theories similar to respondent's, this single verdict punishes petitioner for *all* such conduct in the State of Oregon. This approach allows a single (possibly aberrational) jury to impose state-wide sanctions against a corporate defendant for injuries that never need be proven in court. The fear of such an outcome distorts the legal process by placing "insurmountable pressure on defendants to settle . . . even when the probability of an adverse judgment is low." *Castano*, 84 F.3d at 746; *see In re Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293, 1298-99 (7th Cir. 1995).

This inordinate pressure to settle has severe ramifications beyond the injustice to the defendant itself. As several prominent scholars have explained, exposing companies to multiple, massive punitive damages awards can result in overdeterrence, causing firms to take precautions that may be socially wasteful. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 882 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-27 (1998). When the risks attending the introduction of a product or service or business practice appear unacceptably high, the prudent actor stays out of the game – to society's detriment. Although all

litigation carries a risk of erroneous results, punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk unnecessarily, and increases the prospect that the defendant will be deterred from engaging in socially beneficial activities. *See* Colby, *supra*, at 612 n.98.

The multiple punishment problem created by the approach endorsed below is thus not only a due process problem – it is an economic and social problem of broad dimension. This Court should grant review to make clear that punitive damages may be awarded to punish the defendant only for harms *to the plaintiff*, and not for unadjudicated harms to non-parties.

C. Jury Instructions Of The Kind Rejected Here Are Necessary To Mitigate The Risks Of Punishing For Harm To Non-Parties

In every punitive damages case, "proper jury instruction is a well-established and, of course, important check against excessive awards." *Oberg*, 512 U.S. at 433. In the nuanced context of considering harm to non-parties, clear jury instructions are particularly important. As explained above, this Court in *State Farm* rejected the notion that juries may punish a defendant for harm to individuals not before the court. But the Court did not categorically bar all *consideration* of "other similar act" evidence; rather, the Court emphasized that such evidence might be relevant, but only to the extent it demonstrates the "deliberateness and culpability" of the defendant's conduct. *State Farm*, 538 U.S. at 422; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 n.21 (1996). The distinction is critical, but there is no doubt that, absent clear guidance as to the proper role of such evidence, it is a distinction easily enough lost on lay juries, creating a serious risk that evidence will be misused in the punitive damages determination.

The specific danger is that evidence introduced ostensi-

bly to demonstrate the reprehensibility of the defendant's conduct toward the plaintiff will be used for the impermissible purpose of punishing the defendant directly for harm to parties not before the court. This danger is illustrated by *State Farm* itself. In that case, the plaintiffs had introduced evidence of State Farm's nationwide claims adjustment policy for the stated purpose of establishing State Farm's motive against its insured, the plaintiff in that case. 538 U.S. at 422. Notwithstanding the asserted purpose of such evidence, this Court found that the lower courts had used the "reprehensibility analysis" as a "guise" to punish the defendant for harm to non-parties. *Id.* at 423 ("Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the Campbells.").

State Farm thus exemplifies the need to maintain, during trial and jury deliberation, a clear distinction between permissible and impermissible uses of evidence of harm to non-parties. As the Court recognized in *State Farm*, "concerns over the imprecise manner in which punitive damages systems are administered" are "heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded." *Id.* at 417-18. This circumstance demands clear instructions "to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* at 418. And as the Court made clear, evidence of harm to non-parties has at best a limited bearing on basic punitive damages analysis. Such evidence may be relevant, for example, in a product liability case if it demonstrates the manufacturer's knowledge of a product's design defect.[4] Evidence of harm to others is *not*

[4] In this context, evidence of the defendant's conduct *prior to* the specific conduct or transaction at issue may be relevant to the defendant's knowledge, while the defendant's actions subsequent to the conduct or transaction causing the plaintiff's injury would not bear on the defendant's knowledge. *See Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439,

relevant to assessing the scope of the harms for which the defendant may be punished, i.e., the harms suffered by the individual plaintiff in the case.

Even after *State Farm*, however, lower courts have continued to provide inadequate guidance to juries as to the permissible uses of evidence of harm to non-parties and have allowed them to punish defendants directly for such harms. *See*, *e.g.*, *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 606 (8th Cir. 2005) (Bye, J., concurring in the result) (calling into question trial court's refusal to provide jury instruction limiting consideration of harm to others where plaintiff had introduced evidence of widespread, nationwide deaths caused by smoking); *Henley v. Philip Morris, Inc.*, 9 Cal. Rptr. 3d 29, 72 (Ct. App. 2004), *cert. denied*, 544 U.S. 920 (2005) (allowing jury to punish defendant for plaintiff's claims which "rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct *directed at the entire public* and maliciously injuring, through a system of interconnected devices, an entire category of persons to which plaintiff squarely belongs"); *see generally* Rachel M. Janutis, *Reforming Reprehensibility: The Continued Viability of Multiple Punitive Damages After* State Farm v. Campbell, 41 San Diego L. Rev. 1465 (2004) (collecting cases and observing that reprehensibility factor has been used to allow decisionmakers to increase amount of punitive damages awards based on harm to non-parties).

The rejected instruction in this case may not have *guar-*

451-52 (4th Cir. 2001) (reversing punitive damages award on the ground that post-design evidence does not demonstrate defendant's contemporaneous knowledge of wrongdoing); *Wohlwend v. Edwards*, 796 N.E.2d 781, 787 (Ind. Ct. App. 2003) (concluding that any relevance of defendant's subsequent acts was substantially outweighed by the danger that the jury would use this evidence to punish defendant for his subsequent acts instead of the conduct which gave rise to the plaintiffs' actual damages).

anteed that the jury punished petitioner only for the harms at issue in this case, but it would at least have provided the jury with a tool necessary to perform its task. Absent the instruction, an excessive award was essentially inevitable, as explained above, especially when coupled with counsel's argument urging the jury to impose broad punishment for unadjudicated harms to non-parties. And unless this Court grants review and explains – again – the need for such clarifying instructions, other excessive awards will be equally inevitable.

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE APPROPRIATE STANDARD FOR REVIEWING THE TRIAL RECORD ON APPEAL OF A PUNITIVE DAMAGES AWARD

As noted above, in *Cooper Industries* and then again in *State Farm*, this Court emphasized the procedural due process significance of exacting, *de novo* appellate review of punitive damages awards. The Oregon Supreme Court in this case did not employ such a standard. Rather, relying on one of its own precedents that pre-dated *Cooper Industries* and *State Farm*, the Oregon Supreme Court deferred to "findings" it had no way of knowing whether the jury in fact made and reviewed the trial record searching for evidence to uphold the award. Many other courts have adopted a similar approach, while still others have adhered to this Court's precedents and engaged in a searching, independent review of the record in assessing the constitutionality of punitive damages awards. Pet. 23-26 (describing conflict among federal circuits and state high courts). This Court should grant review to resolve this conflict and reassert the importance of a truly *de novo* appellate review of punitive damages determinations.

The approach adopted by the Oregon Supreme Court, in reliance on its earlier decision, cannot be squared with *Cooper Industries* and *State Farm* or with the procedural due

process principle those decisions enforce. The earlier Oregon decision, *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001), treated a jury's punitive damages award as a factual finding as to the amount socially necessary to punish and deter the defendant's conduct. *Id.* at 485 ("the amount necessary to punish what has occurred and deter its repetition is a question for the jury"). Accordingly, the *Parrott* court held that the appellate court's only review function is to determine whether there is "evidence in the record to support" whatever facts the plaintiff claims justify the jury's award, and then to decide whether, on those facts, the award "violates the legal standard of gross excessiveness." *Id.*

That reasoning squarely conflicts with this Court's recognition that a punitive damages determination "does not constitute a finding of 'fact.'" *Cooper Indus.*, 532 U.S. at 437. As this Court explained, "[u]nlike the measure of actual damages, which presents a question of historical or predictive fact, the level of punitive damages is not really a fact tried by the jury," but rather an "expression of its moral condemnation." *Id.* at 432, 437 (internal citations omitted). For that reason, "the deterrent function of punitive damages" also is not "a 'fact' to be found by the jury" (*id.* at 438), contrary to *Parrott*'s explicit reasoning.[5]

Because a punitive damages award often simply reflects a jury's moral judgment about the socially appropriate level of retribution, it is impossible to identify what facts the jury found in issuing the award – or whether it found any facts at all other than the minimum required to establish underlying liability. There are, in other words, no discernible factual findings to which the appellate court can defer, even in the-

[5] This Court made clear that reviewing courts should defer to *specific* findings of fact made by the jury via special interrogatories. *See Cooper Indus.*, 532 U.S. at 439 n.12 (Seventh Amendment would not permit reviewing court to disregard "specific findings of fact" made by the jury). There were no such findings here.

ory. By contrast, in reviewing a general-verdict liability determination, the appellate court can properly assume that the jury found the facts necessary to establish the elements of liability; the question on appeal will simply be whether there is substantial evidence to support those factual findings.

That approach cannot logically work for review of a general punitive damages verdict that is ultimately moral and non-factual. Nobody knows what facts the jury found (beyond those relevant to basic liability), nor does anybody know what facts the jury considered significant to the moral judgment its punitive damages verdict is supposed to represent. All the appellate court knows, beyond the award itself, is what the record shows. And in order to fulfill its duty to ensure that the award constitutes the "application of law" rather than of arbitrary moral factors such as "caprice" or disdain for big businesses, *State Farm*, 538 U.S. at 418, the appellate court cannot simply draw from that record hypothesized (and cherry-picked) facts the jury *could have found* simply to justify the award after the fact. Rather, the court must exercise its own independent judgment as to whether the record, viewed through the lens of the guideposts set forth in *Gore* and *State Farm*, legally justifies an award as high as the jury's award.

That is the approach this Court itself followed in *Gore*, *Cooper Industries*, and *State Farm*. *See* Pet. 26-27. And it is the only approach consistent with the Constitution's fundamental promise that property will be deprived only through *due process of law* – not the exercise of judicial imagination.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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