IN THE SUPREME COURT OF THE STATE OF OREGON

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased, Plaintiff-Appellant, Cross-Respondent, Respondent on Review, v. PHILIP MORRIS INCORPORATED, Defendant-Respondent, Cross-Appellant, Petitioner on Review, and RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC., Defendants.	Multnomah County Circuit Court No. 9705-03957 CA No. A106791 SC No. S51085

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

On Petition for Review of the Decision of the Oregon Court of Appeals
On Appeal from the Judgment of the Multnomah County Circuit Court
Honorable Anna J. Brown, Judge

Opinion Filed: June 9, 2004
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INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses 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.

This Court has not addressed issues pertaining to the amount of punitive damages since its decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 17 P3d 473 (2001). In the intervening years, the U.S. Supreme Court has held that the amount of punitive damages awarded by the jury must be subjected to "[e]xacting appellate review" (*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 US 408, 418, 123 S Ct 1513, 155 L Ed 2d 585 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 US 424, 121 S Ct 1678, 149 L Ed 2d 238 (2001)), and has significantly refined the three guideposts for evaluating whether a punitive award is unconstitutionally excessive (*State Farm*, 538 US at 419-29). The lower courts of this State have struggled to apply those guidelines, with often conflicting results. Compare *Waddill v. Anchor Hocking, Inc.*, 190 Or App 172, 182-83, 78 P3d 570 (2003) (determining that 4:1 ratio was "the maximum constitutionally permissible award" even though "Defendant's actions caused significant physical harm to plaintiff"); *Bocci v. Key Pharms., Inc.*, 189 Or App 349, 360, 76 P3d 699 (2003) (approving 7:1 ratio despite recognizing that "4-to-1 ratio that apparently is something of a benchmark for the United States Supreme Court").

Because this Court has not yet had the opportunity to interpret the Supreme Court's guidance, and the lower courts of Oregon are in conflict, the present case will be of extraordinary importance to the administration of punitive damages in this State. It no doubt

will be the pole star for the lower courts of Oregon to follow in this area for years to come. Accordingly, the Chamber has a strong interest in sharing with the Court its views on the various issues presented in this case. Moreover, because the Chamber has participated in virtually the entire spectrum of cases in which punitive damages have been imposed against American businesses (from product liability to consumer fraud to business torts to employment discrimination), we respectfully submit that its perspective can be of substantial assistance to the Court in resolving those extraordinarily important issues.

ARGUMENT

In this amicus brief, the Chamber will address three issues of overriding importance to the administration of punitive damages in this State (and indeed nationally). The first issue involves the constitutionally permissible ratio of punitive to compensatory damages. As we explain in Part I of this brief, *State Farm* embraces a sliding-scale approach, under which the constitutionally permissible ratio of punitive to compensatory damages varies directly with the degree of reprehensibility of the defendant's conduct and inversely with the amount of compensatory damages and other costs borne by the defendant as a result of its conduct toward the plaintiff. The second issue involves the Court of Appeals' holding that "potential injury" to non-parties can justify the jury's disproportionate punitive award. As we explain in Part II of this brief, the U.S. Supreme Court definitively rejected that rationale in *State Farm* – and for good reason. Because this case is not a class action, due process prohibits treating it as if it were. Part III of this brief addresses the role that corporate financial condition may constitutionally play in setting and reviewing awards of punitive damages. The U.S. Supreme Court's punitive damages cases hold that a defendant's net worth cannot be used to justify an award of punitive damages that is unconstitutionally excessive under a proper application of the Supreme Court's identified guideposts. Yet that is exactly what the Court of Appeals did here.

I. THE COURT OF APPEALS' DECISION AFFIRMING A PUNITIVE DAMAGES RATIO OF 152:1 IS INCONSISTENT WITH *STATE FARM.*

State Farm effected a sea-change in the law of punitive damages. Although the Supreme Court had held seven years earlier in *BMW of N. Am., Inc. v. Gore*, 517 US 559, 116 S Ct 1589, 134 L Ed 2d 809 (1996) that punitive awards must be evaluated against three "guideposts" — (i) the degree of reprehensibility of the conduct; (ii) the ratio of the punitive damages to the harm to the plaintiff; and (iii) the legislatively established penalties for comparable conduct — it had provided only modest direction about when those guideposts dictate that an award is unconstitutionally excessive. In particular, other than holding that the 500:1 punitive/compensatory ratio before it was indicative of an excessive punishment, the Court gave lower courts little guidance for discerning the constitutionally permissible ratio in any particular case. The result was predictable: disarray. Some courts held that very low ratios were the constitutional maximum, while others treated *BMW* as nothing more than a blip on the radar screen, upholding ratios in the triple digits. The Utah Supreme Court was in the latter category, reinstating a 145:1 ratio of punitive to compensatory damages in an insurance bad-faith case against State Farm. That prompted the Supreme Court to re-enter the picture.

In *State Farm*, the Supreme Court undertook to provide lower courts with more detailed guidance regarding the ratio guidepost than it had supplied in previous cases. Specifically, the Court stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"; reiterated that a punitive award of four times compensatory damages generally "might be close to the line of constitutional impropriety"; indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive"; and explained that, although a higher ratio may be permissible when "a

particularly egregious act has resulted in only a small amount of economic damages," "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 US at 425. Applying these guidelines to the facts of the case, the Court observed that, even though State Farm's conduct was "reprehensible" and "merit[ed] no praise" (*id.* at 419-20), "a punitive damages award at or near the amount of compensatory damages" — *i.e.*, a 1:1 ratio — was likely the constitutional maximum. *Id.* at 429.

Although the Supreme Court declined "to impose a bright-line ratio which a punitive damages award cannot exceed" (*id.* at 425), the specific guidance the Supreme Court provided and the spirit beneath that guidance suggests certain basic principles.

First, ratios in excess of 9:1 are presumptively unconstitutional. *State Farm*, 538 US at 425. Such ratios will be permissible only if the compensatory damages are "small" and the defendant's conduct is "particularly egregious." *Id.* Because the award in this case was unquestionably substantial, *cf. Greist v. Phillips*, 322 Or 281, 291, 906 P2d 789 (1995) (holding "[t]he remedy for wrongful death is substantial" and stating "100 percent of economic damages plus up to $500,000 in noneconomic damages is a substantial amount"), an award above a single digit ratio must be found unconstitutional.

Second, when the compensatory damages are "substantial," ratios of 1:1 to 4:1 will be the most that is constitutionally permissible, even where the defendant's misconduct is highly reprehensible. *See State Farm*, 538 US at 420, 429 (strongly suggesting that "a punitive damages award at or near the amount of compensatory damages" was the most that constitutionally could be permitted for intentionally deceitful conduct that the Supreme Court freely acknowledged was "reprehensible"); *cf. Lane v. Hughes Aircraft Co.*, 22 Cal 4th 405, 423, 993 P2d 388 (2000) (Brown, J., concurring) (3:1 ratio "is an *uppermost limit*, and most punitive damages awards should fall well *below* that limit") (emphasis in original). A recent

example is *Williams v. ConAgra Poultry Co.*, 378 F3d 790 (8th Cir 2004). In *Williams*, a case involving racial harassment in the workplace, the U.S. Court of Appeals for the Eighth Circuit held that a $6,063,750 punitive award that was just over ten times the plaintiff's $600,000 compensatory award was unconstitutionally excessive and ordered a remittitur to the amount of compensatory damages, explaining:

> Mr. Williams's large compensatory award * * * militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Mr. Williams received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on Mr. Williams's harassment claim be remitted to $600,000.

Id. at 799 (citation omitted).

Application of these principles here requires reversing the Court of Appeals' reinstatement of a punitive award that is more than 152 times the amount of compensatory damages.[1] The Court of Appeals suggested that the $79.5 million award was permissible under *State Farm* because "it is difficult to conceive of more reprehensible misconduct."[2] However, the constitutional analysis articulated in *State Farm* does not allow a court to ignore the principle of proportionality by simply determining that the conduct at issue was reprehensible. Following the U.S. Supreme Court's guidance, the size of the compensatory award is a major factor in determining the constitutionally permissible ratio. In the words of the U.S. Supreme Court, "[w]hen compensatory damages are substantial * * * a lesser ratio,

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[1] The Court of Appeals described the ratio as 96:1. However, the court did not take into account that the compensatory damages awarded by the jury were decreased by $300,000 per Oregon's statutory cap on noneconomic damages. The resulting compensatory award was $521,484.80, and the resulting ratio of punitive damages to compensatory damages is approximately 152:1.

[2] But see Petitioner's Brief at Part V.C.3.

perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 US at 425. This is true even where the misconduct at issue might be characterized as reprehensible. For these reasons, as well as the reasons stated in the petitioner's brief, a 1:1 ratio is appropriate in this case.

II. A PUNITIVE AWARD THAT IS DISPROPORTIONATE TO THE COMPENSATORY AWARD CANNOT BE UPHELD BASED ON THE ALLEGATION THAT THE DEFENDANT'S MISCONDUCT CAUSED "POTENTIAL INJURY" TO NON-PARTIES.

In justifying its reinstatement of the $79.5 million punitive award in this case, the Court of Appeals recognized that

> [t]here is no doubt that, under the holding in *State Farm*, there is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96-to-1 ratio between the compensatory and punitive damages awarded to plaintiff.

Williams v. Philip Morris Inc., 193 Or App 527, 560, 92 P3d 126 (2004). However, in order to uphold the jury's disproportionate punitive award, the court indulged the fiction that Williams was the named plaintiff in a certified class action on behalf of hundreds of Oregonians who proved to a jury's satisfaction that each one of them was treated in the same way and suffered an injury of the same magnitude. Recharacterizing the case in that fashion "would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary." *Id.* at 562. That argument is identical to one invoked by the Utah Supreme Court as a basis for reinstating the $145 million punitive award in *State Farm*. *See* 538 US at 423 (quoting Utah Supreme Court's statement that "[e]ven if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: 'the harm is minor to the individual but massive in the aggregate'"). The U.S. Supreme Court squarely rejected it, explaining: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant * * * . Punishment on these bases creates the

possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.* That holding, obviously, is binding here. In the discussion that follows, we explain in detail why the limitation announced in *State Farm* is clearly correct as a matter of fundamental fairness. We also explain why it is important for the jury to be informed of this limitation, especially given the deference Oregon courts give to jury awards.

A. The Court of Appeals' Decision Unfairly Subjects Defendants To All The Risks Of A Class Action, While Affording Them None Of The Safeguards.

In affirming the jury's award of $79.5 million on the basis of harms allegedly suffered by other cigarette smokers who may have been misled by petitioner's alleged fraudulent statements, the Court of Appeals essentially turned this individual case into a class action ***after the fact*** without affording petitioner any of the protections associated with such a procedure. For example, "typicality" is a core threshold requirement for class certification (see ORCP 32), yet there is no evidence in the record from which this Court can conclude that Williams' situation is typical of that of any other cigarette smoker, much less hundreds or thousands of them. As noted in petitioner's brief (Part V.B.2.), at most there is evidence that smokers were harmed by the inherently dangerous but legal act of smoking itself. But there is no evidence that any other non-party smoker sustained injuries in reliance on the alleged fraudulent statements made by petitioner. The Court of Appeals' blithe conclusion that "it would have been reasonable for a jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme," conclusively demonstrates the danger of allowing defendants to be punished by harms to non-parties without the procedural safeguards of the class action system.

The prerequisites to valid class actions are important because they reflect the practical impossibility of defending in a single case against disparate allegations of misconduct. *See,*

e.g., *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F3d 331, 345 (4th Cir 1998) (recognizing procedural unfairness of having to defend against "fictional composite" plaintiff whose claims might be "much stronger than any plaintiff's individual action would be" in class action in which plaintiffs are allowed to "strike [defendant] with selective allegations, which may or may not have been available to individual named plaintiffs"). The provision of an adequate opportunity to defend is, of course, an essential component of due process. *See, e.g.*, *Logan v. Zimmerman Brush Co.*, 455 US 422, 433, 102 S Ct 1148, 71 L Ed 2d 265 (1982); *Lindsey v. Normet*, 405 US 56, 66, 92 S Ct 862, 31 L Ed 2d 36 (1972); *United States v. Armour & Co.*, 402 US 673, 682, 91 S Ct 1752, 29 L Ed 2d 256 (1971).

As one law professor who has exhaustively explored — and refuted — the very rationale invoked by the Court of Appeals explains:

> Because punitive damages are properly recoverable for each individual injury only if all of the elements of the underlying cause of action are present and there are no affirmative defenses, ***the defendant must be permitted to contest causation and other elements of the alleged tort on an individual basis with respect to each victim and to raise all affirmative defenses that it might have against particular victims.***
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> * * *
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> [C]ourts have held that, even if a class action were certified on behalf of all victims of a mass tort, "the jury would still be required to determine for each class member whether he or she was injured, and, if so, whether defendants caused that injury." According to these courts, allowing the entire plaintiff class to recover without permitting the defendant to question the elements of each individual claim would violate the defendant's due process rights. So too would allowing recovery without permitting the defendant to raise all defenses that it may have against individual victims.
>
> * * *
>
> In other words, under current law, if all of the victims were to join together in a class action, the defendant would be spared the expense of paying either compensatory or punitive damages for any class members who could not individually establish their underlying cause of action. ***It is difficult to see why the result should be any different where only a single victim seeks to punish the defendant for the individual wrongs to the entire class.***

Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn L Rev 583, 654-56 (2003) (footnotes and alterations omitted; emphasis added).

Another critical safeguard, especially relevant to the excessiveness inquiry and absent from this type of pseudo-class action, is the right to bind the class members. In a class action, the members of the class who do not opt out are bound by the outcome of the case — win or lose — and no additional punitive damages are recoverable by any member of the class. By contrast, "because it can only be applied to bind litigants that were actually parties to the prior dispute, res judicata has no direct role to play where different plaintiffs are seeking the same punitive damages." Colby, 87 Minn L Rev at 597 (footnote omitted). Here, for example, Williams' representative endeavors to collect for herself the punishment that she believes all smokers would collect, if victorious, while at the same time leaving other potential plaintiffs free to try to hit the jackpot themselves.[3] As we discuss in greater detail below, and as the Supreme Court has recognized, it is fundamentally unfair to place any defendant, even an unpopular defendant like petitioner, in such a position.

B. The Court Of Appeals' Decision Engenders a Grave Risk of Excessive, Multiple Punishment.

1. Because non-parties are not bound by the judgment in this case, the Court of Appeals' decision engenders a grave risk of excessive, multiple punishment for the same conduct causing the exact same harms. That risk is not merely hypothetical. Many plaintiffs have filed suit against petitioner, seeking punitive damages on theories substantially similar to those brought by Williams.[4] Yet the Court of Appeals' decision already punishes

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[3] As explained below, it is no answer to rely on the Oregon statute allowing future juries to consider past punitive awards. See pages 11-14, *infra*.

[4] As noted below, very few of these plaintiffs are successful.

petitioner for conduct involving those same individuals. That kind of double punishment is plainly unconstitutional.

As the U.S. Supreme Court explained in the context of an *in rem* action in which the Commonwealth of Pennsylvania claimed entitlement to certain funds under its escheat statute, a property owner "is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment." *Western Union Tel. Co. v. Pennsylvania*, 368 US 71, 75, 82 S Ct 199, 7 L Ed 2d 139 (1961); *see also Ex Parte Lange*, 85 US (18 Wall) 163, 168-69, 21 L Ed 872 (1873) (describing as "the maxim" in civil cases "that no man shall be twice vexed for one and the same cause").

More recently, the U.S. Court of Appeals for the Eighth Circuit, applying *State Farm*, made very much the same point, explaining:

> If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. ***Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.***

ConAgra Poultry, 378 F3d at 797 (emphasis added); *see also Roginsky v. Richardson-Merrell, Inc.*, 378 F2d 832, 839-40 (2d Cir 1967) (Friendly, J.) (describing multiple-punishment problem); *Juzwin v. Amtorg Trading Corp.*, 718 F Supp 1233, 1235-36 (D NJ 1989) (observing that multiple awards of punitive damages violate the defendant's due process rights). That is precisely the situation when a jury in an individual case imposes punitive damages with a view toward punishing the defendant for alleged misconduct involving individuals who are not before the court.

2. It is no answer to say, as the Court of Appeals did (193 Or App at 556), that the threat of excessive, multiple punishment can be dealt with in subsequent cases by means of jury instructions or "credits" for prior punitive awards. The statute relied on by the Court of Appeals requires juries to consider "other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's * * * ." ORS 30.925(2)(g). However, this statute does not ameliorate the potential unfairness of allowing alleged harms to non-parties to form the basis of excessively large punitive awards. As Professor Colby points out:

> [T]his simple solution [is] unfair to defendants, insofar as it would do nothing to ameliorate a deeper potential unfairness [that] * * * inheres in the practice of punishing defendants for the harm allegedly caused to an entire mass of people in a lawsuit brought by only one person. When a defendant engages in a course of conduct that allegedly harms a large number of people, ***many of the alleged victims, if they bring their own lawsuits, will not prevail***, or perhaps will be unable to convince the jury that the defendant's conduct was sufficiently malicious to warrant the imposition of punitive damages.

Colby, 87 Minn L Rev at 596 (emphasis added; footnote omitted). In that event, there will be no occasion for the defendant to receive "credit" for the earlier punitive award; nor can there be any justification for allowing a single jury to punish for harm to others for which other juries have exonerated the defendant. Indeed, in the context of punitive damages, few procedures could be more fundamentally unfair:

> [F]rom the point of view of the defendant, there is no difference between allowing subsequent plaintiffs to preclude the defendant from re-litigating the issue of liability for punitive damages and allowing the first successful plaintiff to collect punitive damages for the harm caused to all of the victims. Either way, ***the defendant is punished for the harm allegedly done to all of the victims in circumstances in which most of the other alleged victims, had they been given the opportunity to pursue their own punitive damages claims, would have been unsuccessful.***

Id. at 599.

Moreover, while ORS 30.925 requires juries to consider evidence of past punitive awards, the statute does not require juries to limit their awards on account of such evidence.

Thus, the court that upholds the first large verdict generally has no way of ensuring that other courts will adequately protect the defendant from excessive punishment deriving from multiple unapportioned judgments. Indeed, the "pay now get credit (maybe) later" approach turns a blind eye to the practical reality that courts in one part of the state will often be unwilling to limit the recovery to a local plaintiff because a plaintiff in another part of the state already received a punitive verdict that disgorged the profits from the overall course of conduct. As Judge Friendly colorfully put it when considering the same problem on a national basis, "whatever the right result may be in strict theory, 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 F2d at 840.

On the other hand, if courts were to deprive subsequent plaintiffs of the right to pursue punitive damages, that would both trigger unseemly races to the courthouse (or, more accurately, to final judgment) and foster inequities among otherwise similarly situated plaintiffs. As Professor Colby puts it, if courts adopt the punish-now-credit-later approach, "then allowing a third party to vindicate the victim's personal interest in seeking punishment might well preclude the victim from doing so herself, which would be a wholly nonsensical result under the historical conception of punitive damages." Colby, 87 Minn L Rev at 651-52. Indeed, this Court has definitively rejected a "first comer" rule with regard to punitive damages, holding that "[t]his Court cannot endorse a system of awarding punitive damages which threatens to reduce civil justice to a race to the courthouse steps." *State ex rel Young v. Crookham*, 290 Or 61, 67, 618 P2d 1268 (1980).[5]

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[5] This Court in *Young* made various statements rejecting the unfairness of having multiple juries determine punitive damages against one defendant for some conduct affecting multiple

In any event, requiring the defendant to invoke prior punitive judgments as a basis for lenity in later trials is unfair.[6] If a defendant introduces evidence that it already has been subjected to punitive damages for the same course of conduct, it is wholly unpredictable what use juries might make of such evidence; they could, for example, use the prior award as a benchmark for their own award — or, worse, as a justification for imposing a higher punitive damages award on the ground that the first one evidently didn't accomplish the job.

Finally, the "credit" approach is inherently unworkable. How are subsequent courts and juries to know whether prior juries intended their punishment to be for the full course of the defendant's conduct, part of that conduct, or only the conduct with respect to the particular plaintiff? This is particularly the case because, typically, plaintiffs' counsel will simply invoke the full course of the defendant's conduct, while suggesting a punishment that is a percentage of the defendant's net worth, profits, or revenues. Distilling the punishing jury's intentions under such circumstances is impossible. Therefore, the requirement, articulated in *BMW* and further refined in *State Farm*, that punitive damages be reasonably related to the injury sustained by the plaintiff is the only rule that meets the demands of due process.

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persons. However, that decision was based on the assumption that the amount of punitive damages to be awarded in any case was solely a question of fact to be determined by the jury. *Young*, 290 Or at 71 ("Under the present state of the law, because punitive damages are to be determined by the trier of fact, the court may neither reexamine nor withhold from the jury such an issue unless there is no evidence to support a finding of malicious or wanton conduct."). That view has been decisively rejected by the U.S. Supreme Court. *See, e.g.*, *State Farm*, 538 US at 418 (holding that courts must subject a jury's award of punitive damages to "[e]xacting appellate review"). The U.S. Supreme Court's recent guidance on the issue of proportionality and the unfairness of subjecting defendants to "multiple punitive damage awards for the same conduct," *id.* at 423, overrules any contrary inference that might be drawn from *Young*.

[6] The unfairness of the "credit" approach to multiple claims for punitive damages is exacerbated when, as is common place in Oregon, liability and punitive damages are determined in a unitary trial. In that situation a defendant is put in the untenable position of arguing that it is not liable while simultaneously introducing evidence that a prior jury awarded punitive damages for the same conduct.

C. The Court Of Appeals' Approach Is A One-Way Ratchet That All But Guarantees Corporate Defendants Will Be Subjected To At Least One Disgorgement-Based Punishment No Matter How Many Times They Are Exonerated By Other Courts And Juries.

The Court of Appeals' approach also fails to account for the fact that other juries (or judges) considering precisely the same conduct might conclude that the defendant did nothing wrong at all or, at least, that the conduct did not warrant punishment. Because the judgment in an individual case is not binding on anyone other than the plaintiff, the "punish-for-everything" approach guarantees that sooner or later every corporate defendant will be held liable for one and, more likely, multiple disgorgement-based punishments, no matter how many times it succeeds in fending off that cataclysmic outcome before and after it finally happens. Indeed, under the Court of Appeals' approach a defendant could win the first 99 cases, only to have all of its victories wiped out by a punitive award in the one-hundredth case that punished for harms to all non-parties.

This is more than a mere hypothetical concern. As noted in petitioner's brief, in 2003, verdicts were returned in ten lawsuits by individual smokers seeking to hold petitioner liable for their injuries. These suits were based on the same theory, essentially the same evidentiary record, and often even the same expert witnesses as in Williams' trial. Eight of those ten individual suits resulted in defense verdicts. Yet the Court of Appeals would punish the defendant for the alleged harm in all ten cases. Due process cannot countenance such an unfair outcome.[7]

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[7] To take another example, consider the facts of *In re Rhone-Poulenc Rorer Inc.*, 51 F3d 1293 (7th Cir 1995). In that case, the U.S. Court of Appeals for the Seventh Circuit issued a writ of mandamus and directed a federal district court to decertify a class of hemophiliacs who had contracted HIV after receiving the defendants' blood solids. In the course of holding both that the standard for mandamus was satisfied and that the standards for class certification were not, the Seventh Circuit found it significant that the defendants had prevailed in twelve of the thirteen individual cases that had gone to trial. *Id.* at 1296, 1298. The court observed that if, notwithstanding their success rate in the individual cases, the defendants were to lose on liability in a class action, they could then "easily be facing $25

D. It Is Grossly Unfair To Expect A Defendant In An Individual Case To Fend Off Allegations Of Misconduct Affecting Individuals Who Are Not Before The Court.

The unfairness of the one-way ratchet approach adopted by the Court of Appeals is magnified by the burden to which it subjects a defendant in an individual case to defend against not just the underlying cause of action but also allegations that hundreds or even thousands of individuals not before the court have been subjected to similar misconduct. Most civil trials are conducted under strict time limitations, and for good reason: most civil juries don't have the time or patience to sit through a six-month or year-long trial. Yet that is what would be required for petitioner to have a reasonable chance of rebutting Williams' facile assumption, adopted by the Court of Appeals, that hundreds of Oregon smokers were injured by relying on the alleged fraud in this case:

> In a case brought by a single victim, the evidence at trial will, of course, focus on the wrong done, and the harm caused, to the plaintiff. The other wrongs allegedly resulting from the same course of conduct will be treated only peripherally and painted with a very broad brush. The plaintiff will probably be permitted to introduce some very general, most likely statistical, evidence about these other wrongs, but, because the trial must necessarily center on the plaintiff's case, no evidence will be introduced about the specifics of any of them. In all likelihood, no effort will be made to determine, for instance, how many of the other acts were genuinely wrongful, or how many of the other supposed injuries were legitimate, and were in fact caused by the defendant. If the jury were given the opportunity to inquire into these allegations of peripheral harms, it might well find that many of them were not what they seemed. But, as a practical matter, no attempt can be made to do that in most cases without unacceptably fragmenting the proceeding into an endless series of "mini-trials," distracting the jury from the primary focus of the dispute.

Colby, 87 Minn L Rev at 654 (footnote omitted).

Professor Colby could have been writing about this case. Plaintiffs' counsel was permitted to make broad-brush allegations about harms to whole classes of persons not

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billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle." *Id.* at 1298. The same prospect would exist if this Court were to adopt the approach to punitive damages taken by the Court of Appeals.

before the court. "Yet, even though the other harms [were] not * * * proven, the jury [was] permitted to punish the defendant for the whole lot of them." Colby, 87 Minn L Rev at 654. "This the Constitution will not bear, for it contravenes the most basic principles of procedural due process." *Id.*

E. The Court Of Appeals' Approach Threatens To Turn Every Case Into A "Bet-The-Company" Event, Thereby Distorting The Legal System By Creating Inordinate Pressure To Settle Even Weak Cases.

Finally, allowing what may be an aberrational jury verdict to punish a defendant for alleged misconduct against masses of people not before the court would expose almost any large corporation to at least one and possibly several immense punitive exactions. That would be so even if the majority of juries — as well as regulators — would conclude that the defendant did not act reprehensibly or that its conduct was not tortious at all. Moreover, by converting almost any case against a large institutional defendant into a "bet-the-company" proceeding, exposure in individual cases to company-wide, state-wide sanctions at the hands of a single, unpredictable jury severely distorts the legal process. Because of the risk of an enormous punitive damages judgment predicated largely on allegations of misconduct having nothing to do with the plaintiff before the court, plaintiffs and their attorneys can force substantial settlements from corporate defendants — regardless of the existence or gravity of any actual wrongdoing. *See, e.g., Rhone-Poulenc Rorer*, 51 F3d at 1298 (observing that aggregating the claims of multiple alleged victims in a single case can place a defendant that has won the lion's share of individual cases "under intense pressure to settle" rather than "roll these dice" and risk potentially bankrupting liability); *Castano v. American Tobacco Co.*, 84 F3d 734, 746 (5th Cir 1996) ("[a]ggregation of claims * * * makes it more likely that a defendant will be found liable and results in significantly higher damage awards," which in turn "creates insurmountable pressure on defendants to settle" because the prospect of "an

all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

Such pressures have broad and harmful ramifications. "As the modern lawsuit grows more complex and as large classes of plaintiff-victims bring suits against companies and even industries, the threat of punitive damages looms larger over defendants." *Developments, The Paths of Civil Litigation*, 113 Harv L Rev 1752, 1783 (2000) (footnote omitted). The sheer unpredictability of the current system results in overdeterrence, causing firms to discontinue products and to decide against introducing new products, regardless of their safety or value. A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv L Rev 869, 878-81 (1998); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo LJ 285, 322-27 (1998).

And few possibilities could increase the *in terrorem* effect of punitive damages more than the prospect of facing multiple, repetitive trials in which judges and jurors seek to punish the defendant for an allegedly wrongful practice that allegedly affected thousands of individuals who are not before the court, unconstrained by any requirement that a punitive award be reasonably related to the harm to the one plaintiff who is before the court. When the stakes attending the introduction of a product or service or business practice may be unbearably high, the prudent actor stays out of the game — to society's detriment. It is true that "litigation always carries a risk of erroneous results, but punishing an entire course of conduct on the basis of a single potentially wrongful decision inflates that risk — and therefore increases the prospect that the defendant will be deterred from engaging in socially beneficial activities." Colby, 87 Minn L Rev at 613 n 98.

For all of these reasons, this Court should reject the Court of Appeals' attempt to embrace a pseudo-class action approach under which a single plaintiff can collect punitive

damages for injuries allegedly done to individuals who are not before the court, are not bound by the judgment, and who therefore can pursue their own claims for punitive damages.

F. The Jury Must Be Told That It May Not Impose Punitive Damages For Alleged Harm to Non-Parties.

Because punishing a defendant for the harms allegedly caused to non-parties violates fundamental notions of due process, evidence of the defendant's conduct toward non-parties will not be relevant at trial and, if offered, should generally be excluded. *Cf. State Farm*, 538 US at 409-10, 420-22. Accordingly, in the vast majority of cases, there would be no need for any instruction informing the jury how to treat such evidence. However, *State Farm* allows that sometimes the defendant's conduct toward non-parties may be so closely related to the misconduct that harmed the plaintiff that it has some "relevance in the calculation of punitive damages." *Id.* at 423-24. In such cases, evidence regarding non-parties would be admissible only to aid the jury's evaluation of the reprehensibility of the defendant's misconduct toward the plaintiff, but could not be used by the jury to punish the defendant for any harm to those non-parties. As explained above, the defendant may only be punished for harms suffered by the plaintiff himself.

Where evidence of a defendant's conduct toward non-parties is admitted, the jury must be instructed as to the proper use that the jury can make of that evidence and, equally important, what use it should ***not*** make of that evidence. The Supreme Court's observations in *State Farm* make plain the importance – indeed, the constitutional necessity – of providing jurors with guidance on the use of this type of evidence. As the Court stated:

> [D]efendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered. We have admonished that "[p]unitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts * * *. * * * ***Vague instructions * * * do little 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 417-18 (emphasis added). *See also BMW*, 517 US at 587 (Breyer, J., concurring) ("Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."). Moreover, the Court specifically held in *State Farm* that "a jury ***must be instructed*** * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." 538 US at 422 (emphasis added).

The broader point is that due process requires that the jury be informed about the key legal principles that should guide the jury's broad discretion in determining the amount of punitive damages. As this Court earlier noted, "The [U.S. Supreme] Court has indicated that the Due Process Clause imposes both procedural and substantive limits on punitive damages awards. Procedural due process requires 'adequate guidance from the court' ***in the form of procedural safeguards to ensure that juries do not impose punitive damages in an arbitrary manner.***" *Parrott*, 331 Or at 550 n 9. Post-verdict judicial excessiveness review of a punitive damages award plays an important part in ensuring that a defendant's constitutional right to a fair proceeding is respected. However, such review cannot substitute for a properly instructed jury. Where a jury has relied on impermissible factors in granting a specific award, such as alleged harm to non-parties, a reviewing court will not ordinarily be able to determine what portion of that award resulted from improper considerations. It will, therefore, be impossible for the court to excise the tainted portion of the award through the traditional remittitur remedy. And a reviewing court will have no way of knowing what amount of punitive damages a jury would have chosen to impose if it had been armed with proper instructions as to the criteria that should guide its decision. Therefore, a remittitur to

the highest constitutionally permissible award deprives the defendant of the potential that the jury would have elected to impose less than the maximum amount.

As the Ninth Circuit recently explained in ordering a new trial after determining that the jury had been improperly instructed on the constitutional permissibility of extraterritorial punishment:

> Possibly the jury would have chosen as large an award had it been told to vindicate only the rights of Nevadans, but possibly it would have chosen a substantially lower award. For all we know, the jury would have applied a much lower ratio than the thirty to one the court chose, or the sixty-six to one the jury chose, had it been told that it should limit its scope to the interests of Nevadans. A punitive award that encompasses a defendant's extraterritorial conduct may be unconstitutional even if the size of the award itself, as compared to the compensatory damages, is not outside the bounds of due process.

White v. Ford Motor Co., 312 F3d 998, 1016 (9th Cir 2002). *See also* 2 J.G. Sutherland, *Sutherland on Damages* § 459, at 1504 (4th ed. 1916) ("where the erroneous part of the damages found by the jury cannot be ascertained, and it is impossible to tell what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error and arrive at the amount they should have given, justice between the parties cannot be done by a remittitur").

Because it will be impossible for reviewing courts to cure the prejudicial effect of a jury's reliance on evidence of harm to non-parties in awarding punitive damages, jury's should be properly instructed in the first instance. This is especially important in Oregon given that judicial review of a punitive damages verdict proceeds under the deferential "rational juror inquiry." *See Parrott*, 331 Or 555 ("A jury's punitive damages award is not 'grossly excessive' – and, therefore, will not be disturbed on review – if it is within the range that a rational juror would be entitled to award in light of the record as a whole."). Such deference to the decision of the jury is only warranted where that decision has been made based on the proper use of the evidence before it. Indeed, decreasing a punitive award to the

highest amount that a "rational juror" could have awarded is no substitute for the jury's reasonable and guided judgment in the first instance.

* * *

Because the jury's award of $79.5 million in punitive damages against petitioner was based on the unconstitutional consideration of hypothetical harms to non-parties, a new trial to determine the proper amount of punitive damages is the only adequate legal remedy. As noted above, it is impossible for this Court, or any reviewing court, to properly determine the portion of the punitive award that resulted from the jury's improper consideration of such harm. Therefore, a remititur could not excise the constitutionally tainted portion of the award and a new trial is required.

III. EVIDENCE OF AN ORGANIZATIONAL DEFENDANT'S FINANCIAL CONDITION IS NOT A VALID BASIS FOR JUSTIFYING A HIGH PUNITIVE AWARD AND IS RELEVANT (AND HENCE ADMISSIBLE) ONLY IF THE DEFENDANT CONTENDS THAT A LARGE PUNITIVE AWARD WOULD BE DISPROPORTIONATE TO ITS ABILITY TO PAY.

The Court of Appeals relied on petitioner's substantial net worth and its profits in the most recent year to affirm the excessive $79.5 million punitive award.[8] The court held that evidence of petitioner's net worth could be properly considered because "the jury could have found that a large award was necessary in order to punish defendant adequately because it would treat a small award as no more than an insignificant nuisance and part of the cost of doing business." 193 Or App at 563.[9] This use of petitioner's wealth was erroneous.

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[8] ORS 30.925 includes "[t]he profitability of the defendant's misconduct" and "[t]he financial condition of the defendant" as relevant criteria in determining an amount of punitive damages.

[9] The court also held that the jury could determine based on the petitioner's wealth that "a large award would require defendant to disgorge some of the profit that it gained over a number of decades by its misconduct directed at decedent and other Oregonians." 193 Or App at 563. It is entirely unclear how a jury could determine the amount of profit petitioner earned from its alleged fraud based solely upon evidence of net worth and overall annual

Although the wealth of a defendant may be considered in some circumstances not applicable here, *State Farm*'s holding that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award," 538 US at 427, precludes juries and courts from relying on a defendant's substantial wealth to award or sustain a disproportionate punitive award. Petitioner's "net worth" (however measured) should not have been considered as a basis for upholding the excessive award in this case.

A. The U.S. Supreme Court Has Now Decisively Rejected The Core Assumption Underlying The Use Of Wealth To Justify Large Punitive Damages.

While evidence of poor financial condition is occasionally presented by the defendant to seek lenience against a substantial punitive award, evidence of wealth has far more often been proffered by plaintiffs as a ground for ***enhancing*** punitive damages, especially when the defendant is a large corporation. That was certainly the case here. See Petitioner's Brief at Part V.B.4. Moreover, as explained above, that evidence was also relied on by the Court of Appeals in reinstating the jury's excessive verdict. The U.S. Supreme Court has made clear that an otherwise unconstitutionally excessive punitive damages award cannot be justified by considering the defendant's wealth.

Evidence of corporate financial condition has been the centerpiece of many a punitive damages trial and the fuel that has ignited many an explosive verdict, so much so that the United States Supreme Court has been prompted to express concern about the prejudicial impact of such evidence on repeated occasions. *See, e.g., State Farm*, 538 US at 417 ("'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences'") (quoting *Honda Motor Co. v. Oberg*, 512 US 415, 432, 114 S Ct 2331, 129 L

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profits. Moreover, the relevance of this evidence requires the jury to consider harms caused to non-parties, the impropriety of which has already been discussed.

Ed 2d 336 (1994)); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 US 443, 464, 113 S Ct 2711, 125 L Ed 2d 336 (1993) (plurality op.) (agreeing with defendant that "the emphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident").[10] As a result of this oft-repeated concern, the Supreme Court has consistently refrained from including financial condition as a factor to be considered in reviewing a punitive damages award for excessiveness. In its most recent decision in *State Farm*, the Court decisively rejected the proposition that a defendant's financial condition is a valid basis for upholding a large punitive award.

The evolution of that holding began in *BMW*. The U.S. Supreme Court there identified three guideposts for evaluating the permissible size of a punitive damages award: the degree of reprehensibility of the defendant's conduct; the relationship between the punitive damages and the actual and/or potential harm to the plaintiff; and the disparity between the punitive damages and the legislatively established fine for comparable misconduct. Significantly, the Court did not include corporate financial condition as a factor — even though the respondent had argued that the $2 million punishment in that case should be sustained on the ground that it was small in relation to BMW's substantial finances. See Brief of Respondent at 39, *BMW of N. Am., Inc. v. Gore*, 517 US 559 (1996), No.94-896,

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[10] Empirical studies consistently show that allowing plaintiffs' counsel to suggest a specific amount of punitive damages significantly skews jurors' ultimate awards. *See* W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J Legal Stud 313, 329 (2001) (describing mock juror study showing that allowing plaintiff's attorney to suggest a punitive damages range produced awards highly concentrated within the suggested range because jurors "base[d] their judgments largely on the anchoring influence [of counsel's suggested amounts]"); see also Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 Law & Hum Behav 445 (1999) (demonstrating "anchor-and-adjust" phenomenon whereby jurors use award suggested by plaintiff's counsel as starting point and set punitive awards at a compromise figure based on the suggested amount). Of course, as this case well illustrates, a defendant's net worth is invariably the jumping off point for the plaintiff's suggestion of a skewed range.

1995 WL 330613, at *37-*39. To the contrary, the Court observed that "[t]he fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 US at 585.

In *Cooper Industries*, the Court reiterated the three *BMW* guideposts (532 US at 435, 440, 441-43) but again omitted corporate financial condition as a relevant consideration — even though the lower courts had relied on the defendant's finances as the primary basis for upholding the $4.5 million punitive verdict. *See Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 1999 WL 1216844, at *1 (9th Cir Dec. 17, 1999) ("The district court specifically found that the punitive damage award was proportional and fair, given the nature of the conduct, the evidence of intentional passing off, and the size of an award necessary to create deterrence to an entity of Cooper's size and assets. Those findings were supported by the evidence, such that the award did not violate Cooper's due process rights.") (emphasis added), vacated by *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 US 424 (2001).

Finally, in *State Farm* the Court not only declined to add financial condition to the guideposts but went substantially further, holding that the lower courts' reliance on "State Farm's enormous wealth" constituted "a departure from well-established constraints on punitive damages." 538 US at 426-27. Accordingly, it stated unequivocally that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427.

That the U.S. Supreme Court has repeatedly rejected exhortations to include financial condition as a guidepost is not surprising, because the use of financial condition to justify a high punitive award is affirmatively inconsistent with the three guideposts that the Court has embraced. With regard to the first guidepost, varying punishment with the defendant's wealth conflicts with the well-established, constitutionally-based principle that punishment

should fit the offense. *BMW*, 517 US at 575; *Solem v. Helm*, 463 US 277, 284, 103 S Ct 3001, 77 L Ed 2d 637 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."); *Weems v. United States*, 217 US 349, 366-67, 30 S Ct 544, 54 L Ed 793 (1910) (it is "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to offense"); *see also Massachusetts Bonding & Ins. Co. v. United States*, 352 US 128, 133, 77 S Ct 186, 1 L Ed 2d 189 (1956) ("[b]y definition, punitive damages are based upon the degree of the defendant's culpability"). Put simply, "having a large net worth" is not "the wrong to be deterred." *Zazu Designs v. L'Oreal, S.A.*, 979 F2d 499, 508 (7th Cir 1992) (Easterbrook, J.).

As to the second guidepost, the Supreme Court has expressly observed that the defendant's financial condition "bear[s] no relation to the award's reasonableness or proportionality to the harm." *State Farm*, 538 US at 427. Finally, consideration of net worth is even more inconsistent with the comparative fines guidepost because neither the fines considered in *State Farm* and *BMW* nor most other criminal or administrative fines vary with the wealth of the defendant. *See Kemezy v. Peters*, 79 F3d 33, 36 (7th Cir 1996) (Posner, C.J.) ("[t]he usual practice with respect to fines is not to proportion the fine to the defendant's wealth").

In short, after *State Farm* it should be clear that corporate financial condition is not a fourth guidepost and may not be used as a basis for upholding a large punitive damages award.

B. The Use Of Corporate Finances As A Punishment Enhancer Does Not Reasonably Advance The Deterrent and Retributive Purposes That Justify Imposition Of Punitive Damages.

In *State Farm*, the Supreme Court expressed "concerns over the imprecise manner in which punitive damages systems are administered" — concerns that are "heightened when

the decisionmaker is presented * * * with evidence that has little bearing as to the amount of punitive damages that should be awarded." 538 US at 417, 418. In so doing, it reiterated its belief that "'the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.'" *Id.* at 417 (quoting *Honda*, 512 US at 432).

When combined with the Court's observations that a defendant's financial condition "bear[s] no relation to the award's reasonableness or proportionality to the harm" and that reliance upon a defendant's wealth is "a departure from well-established constraints on punitive damages" (*id.* at 427), the concerns expressed by the Court in *State Farm* are a strong signal to reviewing courts not to consider a defendant's wealth to justify exacting a large punitive award.[11] That is not to say that a defendant's financial condition should not be considered in any circumstances. In particular, if a defendant intends to argue that a large punitive award would be disproportionate to its ability to pay and hence excessive as a matter of law, its financial condition remains both relevant and essential.

However, scholars who have considered the subject generally agree that a corporate defendant's wealth is irrelevant in determining the amount of punitive damages needed to deter alleged misconduct. As one pair of commentators explains it:

> [A] potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. * * * ***The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct*** * * *.

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[11] In a related context, courts reviewing the admissibility of evidence of a defendant's financial condition have received the Supreme Court's signal. The Kentucky Supreme Court, for one, pointedly reminded a trial court on remand that the Court in *State Farm* "frowned upon the presentation of evidence of a defendant's net worth." *Sand Hill Energy, Inc. v. Smith*, 142 SW3d 153, 167 (Ky 2004) (internal quotation marks and alterations omitted).

Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J Legal Stud 415, 417 (1989) (emphasis added).[12]

Because large companies no less than small ones wish to avoid losses, the overall size of a business has little bearing on the way its employees behave. As Judge Easterbrook has explained:

> General Motors is much larger than Chrysler, and so makes more defective cars, but the goals of compensation and deterrence are achieved for both firms by awarding as damages the injury produced per defective car. Corporate size is a reason to magnify damages only when the wrongs of larger firms are less likely to be punished; yet judges rarely have any reason to suppose this * * *.

Zazu, 979 F2d at 509; *see also Kemezy*, 79 F3d at 35 (explaining that as applied to individual conduct "losing $1 is likely to cause less unhappiness (disutility) to a rich person than to a poor one," but also noting that "***[t]his point * * * does not apply to institutions as distinction from natural persons***" (emphasis added)).

Moreover, pegging punitive damages to corporate financial condition is in actuality inconsistent with one of the principal reasons asserted for doing it. Those who advocate the use of financial condition in setting punitive damages argue, as the Court of Appeals did here (193 Or App at 563), that large companies must suffer proportionately larger punishments in order to feel the same sting as smaller companies. That assumption is mathematically disprovable when, as here, the defendant's conduct allegedly affects multiple individuals. Consider, for example, the product liability context. Suppose that two manufacturers make precisely the same dangerously defective product (with precisely the same degree of

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[12] *Accord* 2 Am. Law Inst., *Reporters' Study, Enterprise Responsibility for Personal Injury*, at pp. 254-55 (1991); Bruce Chapman & Michael Trebilcock, *Punitive Damages: Deterrence in Search of a Rationale*, 40 Ala L Rev 741, 824-26 (1989); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala L Rev 1143, 1176-77 (1989); Polinsky & Shavell, 111 Harv L Rev 869 at 910-12; Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala L Rev 919, 950-52 (1989); *Symposium Discussion, Punitive Damages*, 56 S Cal L Rev 155, 190-91 (1982) (comments of Malcolm Wheeler & Jack Carr).

disregard for safety), but one manufacturer is ten times the size of the other and, consequently, makes ten times as many units of the product. If each is punished 0.5% of its net worth each time it is held liable for punitive damages (the low end of the range that plaintiffs' lawyers typically suggest), the larger company not only will have to pay ten times as much each time, but also will have to pay that ten times as often. In other words, its total liability would be 100 times more than that of the smaller company even though their conduct is posited to be identical. If, in fact, the objective is to make the two companies feel the same sting, making them pay equal amounts in each case in which they are punished is sufficient to accomplish that because the larger company, having produced 10 times as many units of the product, is apt to be subject to 10 times as many punishments.

In sum, the U.S. Supreme Court's statements in *State Farm* about the minimal relevance of corporate financial condition, combined with the substantial body of scholarship concluding that a defendant's wealth is not relevant to deterrence, dictate that a reviewing court consider a defendant's financial condition only in two limited circumstances: (i) when the defendant is arguing that a large punitive award would be disproportionate to its ability to pay; and (ii) when the defendant is an individual accused of a non-economically motivated tort. Because the present case involves neither of those circumstances, *State Farm* compels the conclusion that petitioner's financial condition should not have been used by the Court of Appeals as a basis for upholding the excessive punishment exacted in this case.

CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that this Court reverse the decision of the Court of Appeals and grant petitioner a new trial on punitive damages.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing brief of amicus curiae Chamber of Commerce of the United States of America on February 1, 2005, by causing the original and 12 copies thereof to be mailed by First Class Mail on that date to the State Court Administrator for the State of Oregon, and that I served the same February 1, 2005, by causing by causing two copies thereof to be mailed by First Class Mail on that date as follows:

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