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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 07-1216, Philip Morris v. Williams.

Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO

ON BEHALF OF THE PETITIONER

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court:

We are here today because the Oregon court failed to follow this Court's directions on remand and because the ground it gave is not adequate to show a forfeiture of due process rights.

This -- this Court vacated after finding that the Oregon Supreme Court applied the wrong constitutional standard, and it remanded with directions to apply the standard that the Court laid out. But the Oregon court didn't do that. It never even addressed the constitutional issue. The Oregon court, of course, refused to follow this Court's direction because it believed there were mistakes in another paragraph in our instruction request dealing with what the court referred to as "unrelated issues."

But that isn't what this Court mandated.

1 And the specific forfeiture theory adopted here for the
2 first time after nine years of appellate litigation is
3 completely inadequate to avoid this mandate.

4 JUSTICE GINSBURG: Mr. Shapiro, we are
5 dealing with a State supreme court, and our bottom line
6 always reads "for further proceedings not inconsistent
7 with this opinion." And it was my understanding that a
8 State court can resolve a case on an alternate State law
9 ground, if there is such a ground in the case.

10 MR. SHAPIRO: Yes, Your Honor. We believe
11 that this disposition is quite inconsistent with what
12 the Court mandated. The Court heard arguments in this
13 case about the "correct in all respects" rule, but it
14 still mandated an application of the constitutional
15 standard, including the prohibition on punishment for
16 harm to nonparties, and that standard simply was never
17 applied. We say that's inconsistent with this Court's
18 opinion.

19 JUSTICE SOUTER: But it seems to me the
20 problem with the argument is that to say it's
21 inconsistent with the opinion we implicitly have to say
22 that the Oregon Supreme Court has to confront State law
23 issues in a certain sequence, and that if it does not do
24 so, those issues are waived, as it were, not only by the
25 court but by the party who raised it. And the

1 difficulty, I think, with your position here is that on
2 the assumption, which I do make, that the -- that the
3 issue, "correct in all respect" issue, was properly
4 raised by the other side, if we accept your position, we
5 in effect are saying the other side is not going to have
6 an opportunity to argue that before the Oregon Supreme
7 Court. And that's, it seems to me, kind of a steep hill
8 for you to climb.

9 MR. SHAPIRO: Well, we don't say that the
10 court can never adopt a State law standard after remand
11 from this Court, but we say that this disposition is
12 inconsistent with --

13 JUSTICE SOUTER: Well, I know you are saying
14 that but why -- why does the disposition that you are
15 asking for not entail what I just said, and that is, in
16 effect you cut off the claim by a party raised before
17 the Oregon Supreme Court, not considered by the Oregon
18 Supreme Court, and you cut off that claim simply because
19 the Oregon Supreme Court chose to approach the issues in
20 the case in a certain sequence? What business do we
21 have to do that?

22 MR. SHAPIRO: Well, because the preservation
23 issue was debated before this Court, and it adopted a
24 specific order here saying on remand now consider the
25 constitutional standard, which is the prohibition on --

1 JUSTICE SOUTER: I know the language that
2 you are referring to.

3 MR. SHAPIRO: Yes.

4 JUSTICE SOUTER: But referring to that
5 language simply skips over the issue that I am trying to
6 raise. Isn't there a problem that we should be
7 concerned with if we accept your position in cutting off
8 the claim made by one party to the case which was never
9 heard by the Oregon Supreme Court?

10 MR. SHAPIRO: Well, Your Honor, this is very
11 similar to what occurred in the Sullivan case in this
12 Court, where the issue of preservation was debated
13 before this Court at the cert stage in the cert papers,
14 and the Court said: We sub silentio passed on the
15 adequacy of the State ground when we GVR'ed the case.

16 JUSTICE GINSBURG: Didn't -- did the
17 Court -- I mean, that's -- suppose the -- what is it
18 called -- "correct in all respects" had been raised and
19 decided by the Oregon Supreme Court in the first
20 instance. Suppose it had said, well, we don't have to
21 deal with whether Instruction 34 was right or wrong in
22 this particular, because it was wrong in other respects.
23 Suppose that had been the first time around what the
24 Oregon Supreme Court said. Would that have offended any
25 Federal due process? Would that have been an

1 appropriate disposition for the Oregon Supreme Court to
2 make?

3 MR. SHAPIRO: Well, that takes us to our
4 second and principal argument, which is that that ground
5 would not be adequate under this Court's criteria for
6 adequacy. And we say that -- that there are really
7 three reasons why that would not be an adequate ground
8 for forfeiting this valuable constitutional right. It's
9 an ambush. It was a surprise ruling that we couldn't
10 anticipate. It's an exercise in futility because, even
11 if we submitted a perfect instruction that complied with
12 that rule, we would have been rejected anyway by the
13 trial court that simply believed that this instruction
14 wasn't required by due process --

15 JUSTICE SOUTER: Isn't the place to make
16 that argument in the Oregon Supreme Court?

17 MR. SHAPIRO: Well, no. The Oregon Supreme
18 --

19 JUSTICE SOUTER: Wouldn't it have been
20 appropriate to -- to hear the -- the issue that they are
21 raising and for you to make the reply that you have just
22 made?

23 MR. SHAPIRO: Your Honor, this Court has
24 said repeatedly that adequacy is a Federal law question
25 for this Court to decide.

1 JUSTICE SOUTER: I realize it's a Federal
2 law question, and in approaching that question, I keep
3 asking the question which I think I have now put to you
4 three times and have yet to hear an answer on the merits
5 on: Why is it appropriate for us to have a rule here
6 that cuts off the right of a party that properly raised
7 an issue in the Oregon Supreme Court and has yet to be
8 heard on the merits in the Oregon Supreme Court?

9 MR. SHAPIRO: Well, there are two reasons.
10 First under the adequacy decisions of this Court,
11 including Lee v. Kemna, if it takes years and years
12 after the trial to articulate a forfeiture rule like
13 this, that counts heavily against the adequacy of the
14 State ground. This Court held that in Lee v. Kemna very
15 recently.

16 And then secondly, this is a point that was
17 argued to this Court four -- three -- four separate
18 times now, and when the Court remanded with explicit
19 directions to apply the constitutional standard, that's
20 something that had to be done on remand. The Court did
21 not invite the lower court to get into the question of
22 whether this request was made. The Court found that the
23 request was made.

24 JUSTICE SOUTER: Maybe -- maybe this Court
25 insufficiently appreciated the significance of the issue

1 which is now before us. And I still want to know, is
2 there a good reason on the merits why it is fair for us
3 to cut off the right of the other side to raise an issue
4 that they raise or to argue an issue that they raised in
5 a timely fashion?

6 MR. SHAPIRO: Yes, there is a good reason,
7 because this is -- adequacy is ultimately a Federal
8 question for this Court to decide. The issue was
9 debated here four separate times at great length. The
10 Court remanded for a specific decision by the lower
11 court. That wasn't done. And if we turn to the
12 adequacy doctrine --

13 JUSTICE SCALIA: Excuse me. What -- what
14 issue was debated here four times?

15 MR. SHAPIRO: Whether or not there was an
16 adequate State ground because of the "correct in all
17 respects" rule. That was debated in the merits brief,
18 in the cert oppositions twice. It was debated again in
19 the cert opposition this time around. But the Court has
20 never accepted it.

21 JUSTICE STEVENS: But the State court hadn't
22 ruled on it at that time.

23 MR. SHAPIRO: That's correct, and --

24 JUSTICE STEVENS: So how do we rule on it as
25 a matter of first impression?

1 MR. SHAPIRO: Well, because, Your Honor, the
2 Court considered -- just as it did in Sullivan, it
3 considered these issues in the cert papers and then
4 remanded the case for a different issue to be decided by
5 the lower court.

6 But we don't hesitate from debating the
7 adequacy issue.

8 JUSTICE SCALIA: Did our opinion decide that
9 -- that question? Did our opinion say that that
10 question was decided against your opponent?

11 MR. SHAPIRO: No. What the Court said in
12 Sullivan was that it was a sub silentio determination.

13 JUSTICE GINSBURG: How could we have
14 determined it when the Oregon Supreme Court itself
15 hadn't made any determination?

16 MR. SHAPIRO: Because the parties debated
17 this extensively in their briefs, just as they did in
18 Sullivan.

19 JUSTICE GINSBURG: But we don't decide
20 questions, particularly questions of State law, that may
21 have a Federal check. But we don't decide them in the
22 first instance.

23 And there's one point, Mr. Shapiro, that I
24 think is -- affects this concern of fairness to the
25 party who raised this "correct in all respects" from the

1 beginning. This Court had not clarified, had it, until
2 the Williams case itself, the rule about harm to others?
3 In State Farm, we were talking about harm to
4 nonresidents. So if I recall correctly, Williams was
5 the first time we ever clarified that harm to others
6 included people within the same State; is that correct?

7 MR. SHAPIRO: Yes. That's true.

8 This -- this, as the Court expressed it, was
9 a slight extension of the previous decisions. But Your
10 Honor, if the Court feels that this adequacy issue
11 hasn't been dealt with previously by this Court, it's
12 presented squarely here. It is a Federal question,
13 which this Court says has to be decided by this Court.
14 And we don't hesitate from --

15 CHIEF JUSTICE ROBERTS: I suppose one reason
16 -- one reason to think it may not have been decided is
17 that, unlike the other situations you have discussed, it
18 would not have been a bar to our consideration of this
19 case the last time because, just as you raised the
20 question in your second question presented that whether
21 the award complies with due process, we may have thought
22 there might have been an adequate and independent State
23 ground on a procedural question, but we were going to go
24 ahead. We granted cert on the substantive question of
25 whether the damages award was unconstitutional.

1 MR. SHAPIRO: Well, Your Honor, if -- if
2 we're not right about the decision resolving the
3 adequacy issue already, we're happy to turn to it now
4 and address it as we do in our briefs. This is not an
5 adequate State ground under this Court's decisions. The
6 first reason for that is that this is a futile gesture
7 that the State court requires of us.

8 JUSTICE STEVENS: I want to ask you about
9 that. That's a thrust of your argument: It would have
10 been futile to comply with the specific -- drafting a
11 perfect -- perfect instruction "correct in all
12 respects." But I have to think the trial -- the record
13 is subject to the reading that the trial judge thought
14 the issue had already been adequately taken care of,
15 rather than it would be an incorrect instruction.

16 MR. SHAPIRO: Well, the trial judge asked,
17 is there any authority that requires me to give this
18 instruction on harm to nonparties? And we said, in our
19 view it's the BMW case. And she said, well, if there is
20 not an authority right on point I'm not going to give
21 this instruction. She said that very clearly. So if we
22 submitted a separate piece of paper, it would have made
23 no difference; and if we had taken out the two mistakes
24 --

25 JUSTICE STEVENS: Where in the record is the

1 portion of the colloquy about the instructions most
2 clearly stated in your view, on your side of that issue?

3 MR. SHAPIRO: Let's see. It's the
4 instruction conference. This begins on page 17a, where
5 Mr. Beatty starts discussing the second prong of this
6 paragraph. He says -- he quotes the language, and the
7 judge -- the judge says, well, I think that that's
8 covered by giving an instruction that punitive damages
9 are not compensatory. And he says: No, no, that is not
10 -- that is not the point of this instruction. This is
11 pages 17 and 18a.

12 JUSTICE STEVENS: But that's exactly the
13 point I make. I think that the trial judge was saying,
14 I think it's already covered, which is very different
15 from saying, no matter how you phrase it, I won't give
16 it.

17 MR. SHAPIRO: Well, she said she just
18 disagreed with the idea that there should be protection
19 against punishment for harm to nonparties. And she said
20 unless there's a case requiring that, I'm not going to
21 give that instruction. And she said --

22 JUSTICE SOUTER: Didn't she also say that
23 she was going to give, and ultimately did give an
24 instruction, to the effect that punitive damages are
25 punitive, they are not for the compensation of this

1 person or any other person, and to -- she then turned to
2 Philip Morris's counsel and said: What about that? And
3 Philip Morris's counsel said okay.

4 MR. SHAPIRO: What he was saying when he
5 said okay was: I understand your ruling, and I'm not
6 going to continue to argue a point that I've already
7 lost. But he pressed that point --

8 JUSTICE SOUTER: It doesn't sound like much
9 of an objection.

10 MR. SHAPIRO: Well, the -- the State courts
11 both held -- both of the appellate courts held our
12 instruction was rejected. And this Court said it was
13 rejected, too, in its opinion. And that's exactly
14 right. You can't antagonize the trial judge by arguing
15 and arguing after your position has been rejected.

16 JUSTICE BREYER: But -- but the -- the
17 problem that I am having at the moment is that they did
18 -- from your point of view, is that they -- the other
19 side listed 28 cases in which they said the Oregon
20 courts have followed this rule of the instruction has to
21 be good as a whole.

22 Now, I have looked up those 28 cases, and
23 they do -- they do say that. They do say it, or they
24 imply it, or they apply it. They are not completely on
25 point, but they are not completely out of point, either.

1 And -- and so I suppose what happened is that the judge
2 there just looked at this instruction on 32a. It looks
3 like sort of it's all together. It really does look
4 like it's all together, the (1) and the (2). And he ran
5 his eye down the page and he said, well, here are two
6 other ways in which it's no good, and so that's the end
7 of it. You can't raise your objection. Maybe you
8 should have had four instructions instead of one, but
9 you did just have one.

10 And under Oregon law, unless every part of
11 it is right, the judge is correct in not giving it, even
12 if he never mentions the other part. And that 28 -- it
13 does seem as if that's what those 28 cases do say. So
14 what do we say about that?

15 MR. SHAPIRO: The -- the reason we say that
16 those 28 cases did not give us reasonable notice that we
17 had to submit a separate piece of paper or change
18 another paragraph in the instruction request is that
19 none of them dealt with a situation where you have
20 separately numbered requests --

21 JUSTICE BREYER: Well, I mean -- please, I
22 -- I don't want to appear skeptical, but I am. And --
23 and that's because I have looked up in some of those
24 cases, and then I sort of looked at the -- which doesn't
25 -- most of them don't give you the instructions, so it's

1 a little hard to say. But then I looked on page 32a of
2 this appendix and looked at what your instructions
3 looked like.

4 And -- and if I were sitting there as a
5 judge, I would think, well, gee, that looks like a
6 single thing there. They have it indented, and they
7 have a (1) and a (2), and it just looks like it's one
8 ball of wax. So can I really fault this Oregon court
9 for just doing what I said?

10 MR. SHAPIRO: Well, I -- I think so, because
11 the pattern instruction here told both parties to
12 include all their paragraphs pertaining to punitive
13 damages in one numbered instruction, 34.

14 JUSTICE BREYER: Well, they have some other
15 handbook that says beware of that.

16 MR. SHAPIRO: Yes.

17 JUSTICE BREYER: Because you are going to
18 run into this rule that says if there's any part of a
19 single instruction that is wrong, goodbye, even if the
20 trial judge never mentioned it.

21 MR. SHAPIRO: But that handbook came out in
22 2006. And after all, that was a practice tip. It was
23 not a State court ruling saying you had to organize your
24 instruction this way.

25 We had separate paragraphs, separately

1 numbered. They dealt with different issues. One was
2 the Constitution and the other was the State statute.
3 And there's no Oregon case that said that in that
4 situation you have to break it out into a separate piece
5 of paper.

6 JUSTICE GINSBURG: I thought the notion was
7 one issue, one charge. And it wasn't in just one
8 practice manual. There were a few cited in the brief
9 that the charge should be limited to one issue, one
10 point of law.

11 MR. SHAPIRO: Well, the pattern instructions
12 told us to put every point pertaining to punitive
13 damages in Instruction number 34. Both sides did that.
14 And the court was working with plaintiffs' instruction,
15 taking their --

16 JUSTICE BREYER: I mean, it would be pretty
17 odd. Did the person who wrote that read these 28 cases
18 or some share thereof? And if you were going to do that
19 -- it wasn't you, I know -- why -- why wouldn't you
20 just, if you have one instruction, copy the -- the model
21 instruction? Then you won't make errors in the other
22 parts.

23 MR. SHAPIRO: Well, you see, the -- the
24 pattern -- the pattern instruction didn't include the
25 due process point. We --

1 JUSTICE BREYER: True, but you could add
2 that to the pattern.

3 MR. SHAPIRO: That's what we tried to do,
4 and the judge invited us while dealing with the other
5 side's instruction to go through this one by one. She
6 -- she was asking us: Now, what's your next addition?

7 And we -- we got to the due process point,
8 and she said: What is your authority? And we told her,
9 and she said: I don't think that instruction is
10 necessary.

11 It was separately argued. It was separately
12 decided by the State courts in the prior decisions,
13 decided by this Court as -- as a separate matter, and
14 that is exactly how the trial court approached this.
15 Her request was to go through this item by item.

16 She wasn't taking an all-or-nothing approach
17 to this instruction. She started with plaintiff's
18 document and asked what from our menu of additions
19 was necessary.

20 JUSTICE BREYER: I'm not speaking of this
21 from the point of view -- I mean I -- when I read that
22 petition for cert, I thought this is a run-around, and
23 I'm not sure that I think that now. That is, in the --
24 the reason is because I put myself in the position of
25 not the trial judge. The person to put yourself in the

1 position of is the Oregon Supreme Court justice. And
2 what he is doing is he's reading that instruction. And
3 -- and what can you say in response to what -- what he
4 might have thought?

5 He knows this rule. The rule is if an
6 instruction is -- is unfavorable in any part, if it's
7 wrong, you are out.

8 MR. SHAPIRO: Well --

9 JUSTICE BREYER: He knows that rule, because
10 there have been a lot of cases on it. And then he reads
11 your instruction, and as I looked carefully -- I didn't
12 know this the first time when it was here, but he said
13 because it's right in paragraph 1 -- I mean, it's wrong
14 in paragraph 1, where he was wrong -- I don't have to go
15 to the rest of it.

16 MR. SHAPIRO: Yes.

17 JUSTICE BREYER: Now we send it back, so he
18 says: Okay, now I've got to go to the rest of it.

19 MR. SHAPIRO: You know, Justice Breyer, this
20 is very similar to what was at issue in the Flowers case
21 which reached this Court. The Alabama Supreme Court had
22 said if you intermix different appeal points in your
23 brief, we are not going to consider any of them if there
24 are any errors to be found in any of the paragraphs in
25 that brief.

1 JUSTICE GINSBURG: But I thought that the
2 whole thing about -- this is the NAACP case you that
3 you're discussing?

4 MR. SHAPIRO: Yes.

5 JUSTICE GINSBURG: -- that this was
6 something that the Alabama Supreme Court really sprung
7 at the last minute, that it was not like this rule.
8 There were not 28 cases in the Alabama Supreme Court
9 applying the rule. It seemed to be quite a novel rule.

10 MR. SHAPIRO: Well, what -- what the State
11 argued there was that for 60 years the "correct in all
12 respects" rule was in effect in Alabama, and they cited
13 dozens of cases applying it. But this Court unanimously
14 held that that approach was pointless severity. Even
15 though the State supreme court there said, we can't
16 disentangle these arguments, it's too complicated, it's
17 too much of a burden on the State supreme court, this
18 Court unanimously found that was pointless severity.
19 And if that's pointless severity --

20 JUSTICE STEVENS: There was a basis for
21 questioning the good faith of the court in that case, I
22 think.

23 MR. SHAPIRO: Well --

24 JUSTICE STEVENS: And I don't think that's
25 true here.

1 MR. SHAPIRO: I -- I -- we don't question
2 the good faith of the court, but we say that this is
3 pointless severity, a rule that this Court has applied
4 more recently in Lee v. Kemna where there was no issue
5 of bad faith. The Court thought that it was pointlessly
6 severe and unnecessarily severe to insist on a perfect
7 proposal in that case. The --

8 JUSTICE BREYER: The best you have come up
9 with -- and I think you have researched this pretty
10 thoroughly -- and the best you have come up with to find
11 a case where they didn't apply the rule is that Georgia
12 case, right? "George," I think, is the name of it.

13 And there, there is an alternative ground
14 which is that the judge had to -- had to give the
15 instruction himself, and it's a criminal case. And we
16 Shepardized it, and it has only been cited twice. And
17 -- and so I'm slightly at sea, to tell you the truth.
18 And -- and what is the standard I'm supposed to use to
19 decide whether that State ground is adequate as a matter
20 of Federal law or not?

21 MR. SHAPIRO: Well, there is an earlier case
22 that is interesting, State v. Brown, which comes several
23 years before. It's cited in our brief. In that case an
24 imperfect instructional request was made, and the Court
25 still found that there was a duty to give the

1 instruction based on due process. And the reason was
2 that the parties, during the charge conference, had
3 debated the issue. It was a fair-enough exposition for
4 the trial court to understand the need for the charge.

5 And here this really is much like the
6 Osborne case. You know, in the Osborne case the
7 defendant didn't make any instructional proposal, and
8 this Court still reversed and required a new trial with
9 the correct instruction. It said due process required
10 that. And the Court said that we -- that the party had
11 sufficiently brought this to the attention of the trial
12 judge for Federal adequacy purposes even though no
13 instruction was -- was proposed.

14 The lawyer there merely moved to dismiss the
15 proceeding, never proposed an instruction, but this
16 Court required a retrial with a correct set of
17 instructions for the jury. That's an a fortiori case, I
18 think; and also the Flowers case, I believe, is a
19 fortiori. There really was a strong and compelling
20 State interest there in having the lawyers break their
21 arguments up into separate headings and subheadings so
22 the appellate court could follow the argument.

23 But here there wasn't any burden placed on
24 the trial judge at all by our request. She was going
25 through these one by one, and she asked us: What's your

1 next point that you want added? We proposed it. It was
2 on a silver platter. She didn't have to retype it. She
3 could have simply read it to the jury in that form. It
4 didn't have to be edited or amended. There literally
5 was no burden on the trial judge at all. And so we --

6 JUSTICE GINSBURG: She didn't get to the --
7 the other grounds, because I think it was all about that
8 paragraph and whether that paragraph was adequate under
9 our then precedent. And I don't think that -- that the
10 -- the incorrect portions of the charge that have now --
11 are now before us were -- were even reached then.

12 MR. SHAPIRO: Well, she did look at the
13 illicit profits point. And she said: I'm not going to
14 give that; that's unnecessary. She did -- she didn't
15 address the "may versus shall" issue because she was
16 working with plaintiffs' proposal. So all -- really she
17 just had before her our request for this due process
18 instruction. She analyzed it separately. It was
19 debated before her.

20 And this is much more specific than what the
21 lawyers did in the Osborne case. They didn't even
22 propose an instruction. We served it up on a silver
23 platter. She could have used it, and indeed there was
24 no work for the trial judge at all because she was
25 simply telling the lawyers, make this change, make that

1 change that we've discussed, so there is zero burden on
2 the court.

3 And you have to ask in this situation, what
4 is the legitimate State interest that would support this
5 massive forfeiture of a very important due process
6 right? The plaintiff says the State interest here is
7 that it promotes affirmance of jury verdicts whether or
8 not there has been a due process violation. But think
9 about that. That's hardly a State interest. It's --

10 JUSTICE BREYER: The State interest in the
11 rule in general, I take it, is to require the lawyers,
12 if they are going to object to the instructions that the
13 judge is going to give, to produce an instruction that
14 is a correct instruction of the law. That's -- that's
15 why, I guess, they have this rule.

16 MR. SHAPIRO: Oh, yes.

17 JUSTICE BREYER: And -- and you'd better get
18 it right, because if you don't get it right, you're
19 going to lose your ability to claim that the judge was
20 wrong in refusing to give any part of it.

21 Now, if that's the reason they have that
22 rule, that would seem to apply as much in this case as
23 in any other case. Why wouldn't it?

24 MR. SHAPIRO: Well, please recall that in
25 both Osborne and in the Lee case, there was a general

1 State purpose of that kind that supported the rule, but
2 the Court said it was an exorbitant or unnecessarily
3 severe application of the rule. And that's what we
4 contend here, that this is exorbitant, it serves no
5 legitimate purpose. It is truly a game of gotcha that
6 just nullifies the defendant's due process rights.

7 And that precedent I think would be of great
8 concern in various fields of law. This is a rule of law
9 that will apply in civil rights cases in the future,
10 criminal cases, all sorts of cases.

11 So I -- I think if this Court does apply its
12 own criteria here, it will see that this was an exercise
13 in futility, it was an ambush as a practical matter. We
14 didn't have any reason to think we had to submit this
15 again on a separate piece of paper.

16 JUSTICE STEVENS: Could you just tell me,
17 well, why was it an exercise in futility? That's what I
18 don't quite understand.

19 MR. SHAPIRO: Oh, because the judge had
20 ruled as a matter of substantive law that she wasn't
21 going to give this instruction. It wouldn't matter if
22 we separated it.

23 JUSTICE STEVENS: I thought she said she
24 thought it was already covered. That's what I -- on that
25 very page you pointed me to.

1 MR. SHAPIRO: Well, she -- she said that was
2 all she was going to say about the point. And we said,
3 well, that doesn't cover our point, because we want
4 protection against punishment for harm to nonparties.
5 And she said: I'm not going to give that instruction; I
6 deny the rest of your request, number 34.

7 JUSTICE GINSBURG: And where is this
8 colloquy? I mean, we went through the parts, she said I
9 think it's covered and then it was okay. You seem to be
10 saying more than was included in that colloquy.

11 MR. SHAPIRO: Well, I -- I think if -- if
12 you look at the whole colloquy, that's the gist of it.
13 I've -- I've paraphrased it, but --

14 JUSTICE GINSBURG: You've made it much
15 clearer than it was.

16 MR. SHAPIRO: Perhaps --

17 (Laughter.)

18 MR. SHAPIRO: -- perhaps I did. But I -- I
19 would just point out that in Osborne the lawyer didn't
20 make it clear at all. The lawyer didn't even propose an
21 instruction.

22 We proposed a good instruction that this
23 Court has quoted from emphasizing our language,
24 saying -- saying it correctly captures the due process
25 principle. So that is enough to satisfy Federal

1 criteria of -- of adequacy, and that is sufficient to
2 preserve the point. There's no dispute that this was
3 preserved for appellate purposes in Oregon.

4 Unless the Court has further questions, I --
5 I would reserve the balance of our time.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Shapiro.

8 Mr. Peck.

9 ORAL ARGUMENT OF ROBERT S. PECK

10 ON BEHALF OF THE RESPONDENT

11 MR. PECK: Mr. Chief Justice, and may it
12 please the Court:

13 This Court's constitutional mandate in this
14 case is conditioned in several significant respects, and
15 it invites the discretion and judgment of a State court
16 that's applying it. First of all, it says that States
17 have flexibility in coming up with a procedure to
18 address this procedural due process issue.

19 It also says that it has to be an
20 appropriate case; there has to be a significant risk of
21 juror confusion, and a request. There's no indication
22 in the opinion that this Court intended to federalize
23 the State procedure over how that request occurs. It --

24 CHIEF JUSTICE ROBERTS: Well, you don't
25 dispute that it's a Federal question whether that

1 procedure is adequate and independent?

2 MR. PECK: I do not, but I also submit that
3 it is more than adequate. Exist -- what the Oregon
4 Supreme Court decided was that the existing procedure
5 permitting a limiting instruction to be requested -- in
6 Oregon it's Rule 105, the same language as in the
7 Federal rule -- and such a request has to be timely, it
8 has to be specific, it has to be on the record. And
9 Oregon precedent says that when we mean specific, the
10 proponent has to give us the exact language -- this is
11 part of the party presentation principle -- the exact
12 language that they are asking us to use.

13 And that means that we also apply our
14 traditional 92-year-old rule that requests for
15 instruction must be clear and correct in all respects.

16 JUSTICE STEVENS: The problem --

17 JUSTICE BREYER: I would say the 28 cases
18 are not quite as clear as I suggested. That is, I
19 couldn't find in those 28 cases really a comparable
20 situation.

21 MR. PECK: Well --

22 JUSTICE BREYER: In each instance it seemed
23 as if one of two things was the case: Either (a) where
24 the instruction was in error, it really was the matter
25 brought up in the first place, or the court said, but he

1 gave the essence of the instruction you wanted anyway.

2 Now, which of those cases do you think -- I
3 am leading up to, what of -- what of those cases do you
4 think is your best support, because I couldn't -- they
5 are not perfect.

6 MR. PECK: I would look first at
7 Reyes-Camarena, which is a 2000 -- a 2000 decision
8 involving the death penalty. And there, there were two
9 parts of this request, in a single request. The request
10 asked for a mitigating factors instruction, which the
11 court found was correct on the law and -- and would have
12 been given had it been asked for separately.

13 But it also asked the jury to consider
14 sympathy for the defendant, which they found to be
15 contrary to Oregon law, and therefore, it was not error
16 for the trial court to have refused this.

17 JUSTICE BREYER: What -- what you can't tell
18 from that is what was the part of the sympathy
19 instruction that they thought was wrong, and was the
20 part that they thought was wrong really part and parcel
21 of the part that the -- that the appellant was
22 complaining about.

23 MR. PECK: Well, the court, though, did cite
24 a prior decision that talked about a sympathy
25 instruction and claimed that this one was no different

1 than that. It was contained in a single instruction.
2 It makes clear, the opinion does, on that.

3 Owings v. Rose is that another case which
4 both parties have cited. And in Owings, it's very
5 clear. There you have two different parts of an
6 instruction that are offered at the same time, and --
7 and one part is right. And this -- this one deals with
8 third-party liability.

9 JUSTICE BREYER: Yes, but that's another --
10 I remember that, because they said on that one -- some
11 floor covering thing, wasn't it, that they had some
12 liability for bad floors or designing the floors
13 wrong --

14 MR. PECK: If --

15 JUSTICE BREYER: If that's the case, what
16 they said was: Don't worry about it because basically
17 he did give the instruction that you wanted, though in a
18 different way --

19 MR. PECK: But --

20 JUSTICE BREYER: -- and besides that, they
21 added --

22 MR. PECK: And besides that --

23 JUSTICE BREYER: Yes, I know you're right.

24 MR. PECK: -- this was an alternate ground.
25 Then in Hotelling v. Walther, a 1944 case,

1 the proposed instruction consisted of three separate
2 sentences, and the court does reprint that instruction.
3 And each of those sentences had a different legal
4 proposition in it. And it was only the last sentence,
5 the third proposition, that the court found to be in
6 error and, therefore, found that there was no error in
7 failing to give this instruction because it was not
8 clear and correct in all respects.

9 I -- I think that that is --

10 JUSTICE BREYER: Well, in the last one, what
11 I have here is that the court said the so-called
12 requested instruction was never requested at all --

13 MR. PECK: But --

14 JUSTICE BREYER: -- at all.

15 MR. PECK: But I do not believe that that
16 was the ground --

17 JUSTICE BREYER: What is the -- what is the
18 -- I will go look at that again. But what is the
19 standard? I mean, remember, what I think your brother
20 said at the end is correct. Imagine that yours is a
21 death case, and we have said as a matter of Federal law
22 that this execution is unconstitutional, and then we
23 send it back. And the court then says: Oh, we forgot;
24 there are a couple of matters of State law here that bar
25 the Federal consideration of the death question. And

1 here they are. And then they come up with just this.

2 Is this -- is this a situation where you
3 would be equally -- that's my problem. And so, put
4 yourself in my shoes and -- and tell me what you would
5 do if this is a death case and not the case that you
6 have?

7 MR. PECK: Well, you know, it's -- it's hard
8 to get my arms around your hypothetical, because I don't
9 know the grounds on which you've ruled that the
10 execution is unconstitutional --

11 JUSTICE BREYER: I'm just imagining that
12 what has happened is that the instruction that they have
13 given for the defendant in the death case violates
14 Federal law, and then we send it back, and what happens
15 is that the State court says, oh, it may violate Federal
16 law all right, but it's -- the Federal court is blocked
17 from considering it because there are these two other
18 State grounds that mean that the lawyer --

19 MR. PECK: I understand.

20 JUSTICE BREYER: Yes. Okay.

21 MR. PECK: But -- but the question would be
22 then, why would that be a situation like this, where the
23 trial judge -- contrary to your assumption,
24 Justice Ginsburg -- the trial judge did find that there
25 were other parts of the instruction offered by Philip

1 Morris that were incorrect on the law, and the illicit
2 profits was one of them.

3 JUSTICE SCALIA: Why didn't the trial judge
4 just stop there? I mean, if this is the rule in the
5 State --

6 MR. PECK: Justice --

7 JUSTICE SCALIA: -- once the trial judge
8 found that one of the other instructions was bad, he
9 could have just said, I throw the whole thing out. Why
10 did he go to all the trouble of going into this, the
11 governing one?

12 MR. PECK: This is -- this is a process.
13 Counsel in the case in a trial in Oregon can offer an
14 instruction -- a proffered instruction up to the point
15 when the jury is instructed under their law. So Philip
16 Morris had the opportunity to correct it. The practical
17 nature of a charge conference is that the parties come
18 in with their proposed instructions. The plaintiffs
19 followed the pattern instruction, which by the way does
20 not require enumeration.

21 JUSTICE SCALIA: You -- you are
22 acknowledging that the trial court did not apply the
23 rule --

24 MR. PECK: The -- it's not a rule of trial
25 procedure. It's a rule of appellate review.

1 CHIEF JUSTICE ROBERTS: Well, I -- yes,
2 that's exactly right. And I think the purpose for the
3 rule is to avoid confusion about the ground of decision
4 for the trial court. If you have got two errors, and
5 she says the instruction's no good, on appellate review
6 you don't know which basis was at issue. There's no
7 doubt here the basis on which the trial court was
8 ruling, is there?

9 MR. PECK: I believe there's -- there's --
10 first of all, the trial judge rejected this instruction
11 on multiple grounds and made it clear that she -- the
12 illicit profits request was contrary to the Oregon
13 statute that sets up the criteria. She found other
14 parts confusing and contradictory. But -- and -- but
15 there are two things that I think are significant here.

16 You have to look at what was discussed
17 here. The trial judge, if you turn to 21a of the joint
18 appendix: "We are not here to punish for other
19 plaintiffs' harms. We are here to punish, if we are
20 here to punish at all, for the conduct that caused harm
21 to Jesse Williams on or after September 1, 1988." This
22 sounds very much like an acceptance of the rule that
23 Philip Morris was advocating.

24 On 19a, she said: "These punitive damages
25 are not designed to compensate for other plaintiffs who

1 are not here." On 20a, there is a colloquy; she
2 expresses her belief that the risk is adequately guarded
3 against, suggests language to express that, and asks:
4 "Does that get you where you need to be?"

5 That's when Philip Morris's counsel says
6 "Okay." She had every reason to believe that she had
7 satisfied it. She then follows up.

8 JUSTICE KENNEDY: Do we give any weight in
9 the case to the fact that the instruction that the
10 Petitioners now request and the rule had not really been
11 announced clearly as of the time of this trial? It's
12 not exactly a new rule, but let's -- for our sake we'll
13 call it a new rule. Does that have any weight?

14 MR. PECK: I don't think it does. And
15 here's the reason why --

16 JUSTICE KENNEDY: But it does -- but it does
17 in our cause and prejudice jurisprudence. In habeas,
18 which is also a civil action --

19 MR. PECK: I understand.

20 JUSTICE KENNEDY: -- we say there is an
21 overarching Federal principle that allows -- because of
22 cause and prejudice, we can consider the Federal issue.
23 We do that all the time. Those cases weren't raised by
24 the Petitioner, but it seems to me they're quite
25 relevant here, especially when we consider the

1 importance of the constitutional issue, which was not
2 really -- let's face it -- clear to counsel on either
3 side of the aisle or to the trial judge.

4 MR. PECK: Well, here's the reason why I
5 think in the context of this record and -- and this
6 litigant, it is not significant. And that is, if you
7 look at 21a, the appendix in our -- our merit brief,
8 there we have Philip Morris in another smoker trial in
9 Oregon offering up a requested instruction on this
10 issue. This is in 2002, so it's well before this
11 Court's decision in this case.

12 It's even before State Farm v. Campbell, and
13 the requested instruction says, one sentence: "You are
14 not to impose punishment for harms suffered by persons
15 other than the plaintiff before you."

16 JUSTICE KENNEDY: But the trial judge didn't
17 have the benefit of -- of the ruling that this Court has
18 subsequently made on that point. The trial judge in
19 fact here said: Now, if you can give me a case, then
20 I'll give the instruction; you can't give me a case.
21 And she was right.

22 MR. PECK: But she -- but that's actually
23 not the same issue that she asked that on. Counsel
24 cited page 17a of the joint appendix for that question.
25 And if you look at the bottom of 16a, her question is:

1 "Let me stop first and go back to the proportionality
2 point you are making." This is the ratio point, the
3 second guidepost of BMW v. Gore. She says: "Is there
4 case law that says the trial court shall, in order to
5 have a constitutional instruction, tell the jury about
6 proportionality?" And this is where he says: It's
7 addressed post-verdict. She asks: Is there any case
8 law; and she says: No, I'm not going to go there. I'm
9 not going to go where no judge has gone before --
10 because she did not want to be reversed.

11 So she is trying to be careful, and I think
12 you have to credit the Oregon --

13 JUSTICE KENNEDY: Well, but I -- it sounds
14 to me like that you are confirming my concerns.

15 MR. PECK: No. I -- I think that what she
16 said is as to the proportionality issue. On the other
17 issue, she even returns to it later when Philip Morris
18 brings up a different issue with respect to punitive
19 damages.

20 JUSTICE KENNEDY: Oh. Oh, you're -- you're
21 saying that if our law had been clear at the time, that
22 she still wouldn't have given the instruction? That's
23 worse.

24 MR. PECK: No. I'm saying that she thought
25 she was complying with that. She stated on the record

1 that we are not here to punish for other plaintiffs'
2 harms. Later on that other issue, if you look at 28a --

3 JUSTICE KENNEDY: So your -- your contention
4 is, is that this trial court and the counsel in the case
5 had all the guidance necessary to give the correct
6 instruction --

7 MR. PECK: She seemed to accept --

8 JUSTICE KENNEDY: -- before -- before we
9 even announced the rule?

10 MR. PECK: She accepted the point before you
11 announced the rule, and the Oregon Court of Appeals,
12 ruling in the Estate of Schwarz case where they offered
13 that one-sentence instruction, reversed the verdict in
14 part because that instruction, they said, should have
15 been given. So they anticipated this Court's rule. I
16 think --

17 CHIEF JUSTICE ROBERTS: To move -- to move
18 from the trial court to the appellate court, if you are
19 correct that there's this routine, clear rule of State
20 procedure, why would the appellate court say, in its
21 head, well, I could rely on that, but I want to decide
22 this complicated, difficult rule of Federal
23 constitutional law instead?

24 MR. PECK: Well, in fact, the -- the court
25 thought it was relying on it. In each of the previous

1 iterations in the Oregon Court of Appeals and in the
2 Oregon Supreme Court, they cited this rule, "clear and
3 correct in all respects," in order to reject the "harm
4 to others" instruction because they said it was
5 inconsistent with State law. This point --

6 CHIEF JUSTICE ROBERTS: So you think we just
7 made a mistake in going ahead and reaching the Federal
8 procedural rule that we reached because it was barred by
9 this adequate and independent State ground that the
10 Oregon courts had relied upon?

11 MR. PECK: No. What I'm saying is that they
12 went further then, and this is what gave this Court the
13 authority to rule on that substantive issue. They said
14 that that request was inconsistent with the Oregon
15 statute. And they did so on page 48a of the petition,
16 where they say: "In Williams I, the Court of Appeals
17 concluded that the instruction was incorrect under State
18 law. We agree."

19 And then again on page 52a, they note that:
20 "That is not correct as an independent matter of Oregon
21 law respecting the conduct of jury trials and
22 instructions" --

23 CHIEF JUSTICE ROBERTS: Well, then I think
24 your --

25 MR. PECK: But --

1 CHIEF JUSTICE ROBERTS: I think your answer
2 -- go ahead with your "but."

3 (Laughter.)

4 MR. PECK: But then they went on to say:
5 "And nothing in due process requires us to look at this
6 differently." That's where they made their error. That
7 was the constitutional mistake that the Oregon court
8 made. They thought they were wrong on a State ground.
9 They thought there was no Federal issue addressing that,
10 and so they decided that they didn't have to reach any
11 other State law issues. And they ignored the
12 well-preserved objections that Mrs. Williams made to the
13 other parts of this unified instruction on punitive
14 damages.

15 CHIEF JUSTICE ROBERTS: Well, I'm sorry. I
16 still don't see that answer. You are saying they said,
17 yes, there was this rule of Oregon law, but you can
18 still reach -- there might still be a Federal due
19 process issue, so we can't just rely on that. And if
20 that's true, then that seems to me to be a concession
21 that this is not an adequate and independent State
22 ground that would bar consideration of a Federal
23 constitutional issue.

24 MR. PECK: What was not an adequate and
25 independent State ground was their decision that the

1 Oregon statute which permits you to punish a misconduct
2 in order to deter others from doing that allowed
3 punishment for harm to nonparties.

4 That part was their interpretation of the
5 statute, and if there were no due process equation here,
6 that would have been an independent State ground. It
7 was wrong as a matter of due process.

8 But there are other grounds, other mistakes,
9 substantive mistakes, avoiding law in this instruction.
10 And any trial court that gave instruction number 34,
11 which was objected to as a whole, would have committed
12 reversible error because they failed to follow the
13 Oregon statute.

14 CHIEF JUSTICE ROBERTS: I guess I think it's
15 the more routine practice for a court, if you have a --
16 again, as you argue -- a clear procedural rule that bars
17 addressing the substantive issue, to go ahead and rely
18 on that. Now, if the procedural rule is difficult and
19 of uncertain application, maybe you go ahead and say,
20 well, we we're going to decide the merits anyway.

21 But it seems to me, under your presentation,
22 it's the other way around. It's a clear and easy
23 procedural rule, difficult Federal and State intertwined
24 constitutional rule, and yet the court says, well, I'm
25 going to do the hard work rather than the easy work.

1 MR. PECK: I think it was natural for the
2 court to do that. That was the issue presented to them
3 by Philip Morris. And courts do not reach out to do
4 other issues. They reach -- they were being solicitous
5 of Philip Morris, and they were addressing the arguments
6 that Philip Morris made. And when they decided that
7 that inured to Mrs. Williams' benefit, not to Philip
8 Morris's benefit, then they said we don't need to
9 address your other questions. And I think you have to
10 look at the Oregon Supreme Court as noting in their own
11 decision that there was no futility here. In fact, the
12 last time we were here Philip Morris said the reason
13 they needed this instruction was because of what was
14 said at closing argument.

15 JUSTICE BREYER: All right. So, what are
16 the elements? Imagine -- I'm trying to get help, if I
17 were to try to put pen to paper on this. Suppose they
18 win in this. Then we'll be back at the State law issue
19 that I thought was going to be there, which was the
20 issue of -- you are talking about the colloquy. Did
21 they give the essence of the Federal mandated
22 instruction, or didn't they? And then look how
23 cooperative the judge was, et cetera. But that isn't
24 before us now.

25 What's before us now is something that

1 blocks our consideration of that or anybody's
2 consideration of that. And imagine this is not your
3 case; imagine it is the most, you know, striking case,
4 that's why I used a death example, and we go through
5 exactly the same thing. And then the court does exactly
6 the same thing, the State court, that happened here.
7 And now what are the words that distinguish whether the
8 court is in essence, to be colloquial, giving everybody
9 the runaround or whether the court is applying a -- an
10 absolute, clear, you know, fair, standard of State law?
11 Which really they should have gone into first and saved
12 everybody a lot of trouble.

13 MR. PECK: I think the easiest way to look
14 at this --

15 JUSTICE BREYER: Yes.

16 MR. PECK: -- is imagine that the statute of
17 limitations, which now bars any such suit in Oregon,
18 were brought today, after this Court's decision in
19 Williams, and imagine that Philip Morris is the
20 defendant, and at the end of the trial they offer their
21 number 34 as it was before saying, "This Court said that
22 they had made the right choice in asking for this
23 instruction."

24 A trial court clearly would engage in
25 reversible error if they gave that instruction because

1 it materially departs from Oregon law. At the same
2 time, they could deny that instruction. They could deny
3 that instruction, and the Oregon Supreme Court would not
4 violate the mandate of this Court's decision by saying
5 that that is a correct decision on the part of the trial
6 law court because it was not clear and correct in all
7 respects.

8 And that is part of what distinguishes this.
9 This is still a rule that has to apply to its
10 instruction --

11 JUSTICE BREYER: Well, what they say is --
12 look at the two errors they found. One is in saying
13 "may" instead of "shall," and the other is in saying
14 "illicit profit" instead of "profit." And they are
15 pretty picky. So, this is -- this is very picky, they
16 say. And moreover, not only are they being picky, but
17 they are being picky after the event. And they could
18 have raised it first, and they have 28 cases supporting
19 them, but none of these cases is right on point because
20 the subject matter is, you know, closer, bound up. And
21 so they put all this together and say it's an
22 unreasonable application of a rule that was there. And
23 you say --

24 MR. PECK: I would urge you, Justice Breyer,
25 to look at the original case in 1916, the Sorenson case.

1 There the court was faced with the question: If there
2 is the kernel of a correct instruction in there, is that
3 adequate to ask the court to give that instruction or
4 should we insist on what they thought at the time was
5 the majority rule in the United States, that we should
6 insist on an instruction that is clear and correct in
7 all respects, and that the -- that the counsel has the
8 responsibility to provide that? And they decided to go
9 with the clear and correct rule. That was the debate
10 that they had, and that debate informs this one.

11 JUSTICE BREYER: Sorenson was the agent and
12 the principal, the broker who was selling some land.

13 MR. PECK: Right.

14 JUSTICE BREYER: And I think in that case
15 they also said: By the way, you've got basically the
16 instruction that you wanted, and you overlooked -- no,
17 that was the case where they said: You overlooked in
18 your instruction an important allegation of fact, which
19 allegation was that the guy had been rehired as a
20 broker.

21 MR. PECK: And there's a similar distinction
22 that makes Osborne irrelevant, which counsel had
23 suggested was a -- an exemplar here.

24 In Osborne, an element of the crime had not
25 been instructed upon. That's why there didn't have to

1 be the offer of an instruction. But the party
2 presentation principle puts the onus on counsel to do
3 so, and Philip Morris showed, in 2002, well before this
4 Court's decisions that they know how to do it when they
5 want to.

6 JUSTICE SCALIA: Mr. Peck, are you -- are
7 you asserting that our remand order was in error? After
8 all, it did say, "We remand this case so that the Oregon
9 Supreme Court can apply the standard we have set forth."

10 MR. PECK: And I -- I contend, Your Honor,
11 that the --

12 JUSTICE BREYER: You can say it was in
13 error. I mean, there is nothing wrong with that.

14 (Laughter.)

15 MR. PECK: Well, I think --

16 JUSTICE SCALIA: If you say it's in error,
17 my next question is going to be --

18 MR. PECK: I think the Oregon Supreme Court
19 read that decision --

20 JUSTICE SCALIA: -- can -- is it up to a
21 State court to sit in judgment about whether our remand
22 orders are in error or not?

23 MR. PECK: Well, I'm prepared to say that
24 the Oregon Supreme Court took that remand order to mean
25 that they had to have in place -- this was a procedural

1 due process decision -- that they had to have a
2 procedure that was fair, outcome neutral, applied --

3 JUSTICE SCALIA: If that's what they took it
4 to mean, they -- they were just wrong. I mean, that's
5 not what it says.

6 MR. PECK: Well, if you look --

7 JUSTICE SCALIA: The opinion concludes, "As
8 the preceding discussion makes clear, we believe the
9 Oregon Supreme Court applied the wrong constitutional
10 standard when considering Philip Morris's appeal." And
11 it goes to the constitutional issue we are talking
12 about.

13 MR. PECK: When considering --

14 JUSTICE SCALIA: "We remand so that the
15 Oregon Supreme Court can apply the standard we have set
16 forth," which has nothing to do with the issue we have
17 been discussing this morning.

18 MR. PECK: Your Honor --

19 JUSTICE SCALIA: So it was wrong?

20 MR. PECK: No, it was not wrong. I don't
21 think it was wrong, and here's the reason why I don't
22 think it was wrong: You corrected the Oregon Supreme
23 Court when they thought that due process does not inform
24 the analysis on harm to nonparties. You corrected that
25 substantive error, and that part is what they got wrong.

1 Much of this opinion said that they got lots
2 of other things right. And so Oregon looked at it and
3 said, "Okay, we got that issue wrong, but there are
4 other problems with this instruction that are adequate
5 and independent grounds for --

6 JUSTICE SCALIA: That's very nice, but
7 that's not what we remanded for.

8 MR. PECK: You did not remand for that, but
9 when this Court decides a constitutional issue of one
10 part, it doesn't necessarily tell the court anything
11 different. What -- the essence of this Court's opinion
12 is that where there's a significant risk of jury
13 confusion, the State has to provide a procedure and has
14 flexibility in designing that procedure. There is no
15 indication that the procedure for limiting instructions
16 does not satisfy that.

17 JUSTICE SOUTER: The -- the problem that I
18 think we all have is how do we guard, in effect, guard
19 against making constitutional decisions which are simply
20 going to be nullified by some clever device raising a
21 procedural issue or an issue of State law when the case
22 goes back? Is there any way for us to ensure against,
23 in effect, a bad faith response to our decision except
24 by purporting to require the State courts to follow a
25 certain order of battle in the -- in the decision of

1 issues before them so that when the case gets to us, we
2 can be assured that there is no lurking issue that has
3 not yet been decided as a matter of State law that in
4 effect could then be resurrected to nullify our
5 decision? Is there any way to guard against that except
6 by telling the State courts what the sequence is in
7 which they have to make decisions?

8 MR. PECK: I believe there is. And I
9 believe that it would be error to suggest to the State
10 supreme court that they must, even though prudent,
11 follow a particular sequence, simply because that would
12 mean that they would have to necessarily decide every
13 State law issue in the case --

14 JUSTICE SOUTER: I -- I see the problem. I
15 mean, that's why I raised the question, how do we ensure
16 --

17 JUSTICE KENNEDY: But we do that all the
18 time in cause and prejudice cases. We do it all the
19 time --

20 MR. PECK: Yes.

21 JUSTICE KENNEDY: -- because of the
22 importance of the constitutional right.

23 MR. PECK: I understand that, but I think
24 the adequate and independent State law ground provides
25 all the protection. You assume, and I think properly

1 so, that State supreme courts will operate in good
2 faith. Even in Flowers, after the fourth trip to the
3 U.S. Supreme Court, were -- Alabama Supreme Court was
4 still trusted to apply the decision.

5 JUSTICE SOUTER: Okay. Your -- your answer
6 is there is -- there is no way to guard against it
7 except --

8 MR. PECK: Except --

9 JUSTICE SOUTER: -- by reviewing the good
10 faith of what the court does on remand.

11 MR. PECK: Well, by -- by accepting that if
12 the rule that has been imposed was invoked properly by
13 the party that invoked it at the right time --

14 JUSTICE SOUTER: Yes.

15 MR. PECK: -- that it is firmly established
16 and regularly followed, then it should satisfy the
17 Court --

18 JUSTICE KENNEDY: But it -- but it serves
19 very little interest. Nothing the trial judge would
20 have done, nothing the plaintiffs' counsel would have
21 done below, nothing the intermediate appellate court
22 would have done, would have -- would have been different
23 if they had submitted -- what's it called -- the
24 "correct in all respects" rule. If they had filed the
25 "correct in all respects" rule and submitted that,

1 saying, excuse me, judge, I want to type a little piece
2 of paper, everything would have been the same.

3 MR. PECK: I suggest that it would be
4 different. I think the Oregon Supreme Court decided,
5 when they decided that there was no futility in offering
6 another one, that it would be different. And the fact
7 of the matter is that --

8 JUSTICE KENNEDY: I excluded the Oregon
9 Supreme Court from my list of -- of participants who
10 would have done something differently.

11 MR. PECK: But -- but -- but the fact of the
12 matter is, if after closing arguments, which was the
13 trigger that Philip Morris urged upon this Court for
14 needing this substantive rule, if that -- if after that
15 Philip Morris's counsel had returned to the judge -- you
16 know, they said a few things that we think would tell
17 the jury to punish for harm to others. We don't think
18 the instruction is adequate. We will give you the same
19 instruction, that one-sentence instruction like we gave
20 in Estate of Schwarz. I believe the court would have
21 given it.

22 CHIEF JUSTICE ROBERTS: There is, of course,
23 another way to protect our constitutional authority in
24 this case. We are talking about procedures for
25 addressing the substantive due process challenge to

1 a punitive damages award. That's the second question
2 presented here.

3 If we went and granted that question and
4 considered that issue, we would have protected our
5 authority to reach that question despite the procedural
6 objections alone. Why don't we just do that?

7 MR. PECK: Well, Your Honor, of course, the
8 last time we were here you had a full briefing and even
9 some argument on that. And I -- I believe that we are
10 prepared to stand on that briefing and argument.

11 We do not believe the Due Process Clause is
12 an exercise in elementary school mathematics. It does
13 not tell you something about this. Here you have to
14 look at the enormity of the misconduct. And that
15 dictates --

16 CHIEF JUSTICE ROBERTS: I'm not asking you
17 to argue here today the second question presented.

18 MR. PECK: I understand.

19 CHIEF JUSTICE ROBERTS: But if we have some
20 concern, that there's something malodorous about the
21 fact that the Oregon Supreme Court waited until the last
22 minute to come up with this rule that was before it all
23 the time, which was a State court rule that you would
24 expect the State court to be addressing as a matter of
25 course, then -- then we -- we can avoid having to

1 address what we do in a situation, having to
2 characterize the nature of that -- that consideration,
3 simply by saying: Look, we are going to go ahead. The
4 question is presented. We can decide it in this case,
5 and to avoid having to reach that, we will go ahead and
6 do it.

7 MR. PECK: Well, it's -- it's certainly
8 within this Court's power to do that. Philip Morris has
9 made a very harsh accusation in this case of bad faith
10 on the part of the Oregon Supreme Court. There was no
11 sandbagging here. The Oregon court did not act in bad
12 faith.

13 Mrs. Williams raised these State-law issues
14 at every opportunity, which is something that Philip
15 Morris denied in their petition but then conceded in
16 their merit brief. And the fact is it was before the
17 Oregon Court of Appeals. It was before the Oregon
18 Supreme Court. We even raised it before this court.

19 JUSTICE GINSBURG: You -- in answer to the
20 Chief Justice, you are not suggesting that we should go
21 ahead and decide the second question when there has been
22 no briefing on it?

23 MR. PECK: I -- I am not suggesting that you
24 decide the question, but I recognize the Court has the
25 power to do so. Mapp v. Ohio came to this Court as a

1 First Amendment case and came out as a Fourth Amendment
2 case.

3 CHIEF JUSTICE ROBERTS: I thought -- just to
4 follow up, I thought you just told me that there has
5 been full and adequate briefing on that question.

6 MR. PECK: I believe we had full and
7 adequate briefing. We may not have had the opportunity
8 to fully argue the case, and it's for you to decide
9 whether or not you -- you have enough on that.

10 I thank you.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 Mr. Shapiro, you have three minutes
13 remaining.

14 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO

15 ON BEHALF OF THE PETITIONER

16 MR. SHAPIRO: Thank you, Mr. Chief Justice.

17 Justice Breyer asked about these various
18 cases from Oregon, and whether they provided guidance
19 and a warning here. And counsel referred to three
20 cases, Reyes, Owings, and then Sorenson. If you look at
21 those cases, you'll see there were simple instructions
22 proposed on a single topic that were infected with an
23 error throughout.

24 And the court said if there is any valid
25 proportion of this instruction, it was covered by

1 something that was said to the jury already. So there
2 was no harm in not giving that instruction.

3 That is certainly not our case. We have a
4 separately numbered paragraph dealing with the
5 Constitution, which is quite apart from the statutory
6 factors.

7 Now, counsel referred to the charge actually
8 given by the court as if it provided some protection
9 against punishment for harm to nonparties. If you read
10 that instruction, far from providing the protection that
11 the -- this Court said was obligatory, it invited global
12 punishment. It told the jury that they could return any
13 punitive damage award up to \$100 million. Lo and
14 behold, they come up with \$80 million, right within the
15 suggested range of this charge. And there was no
16 statement --

17 JUSTICE GINSBURG: Which portion of the
18 charge specifically are you referring to?

19 MR. SHAPIRO: This is page 37a of our joint
20 appendix. The -- the court concludes the amount of
21 punitive damages you assess may not exceed the sum of
22 \$100 million. And that, of course, was the zone of
23 reasonableness that the jury inferred from this,
24 suggesting a global punishment to the jury with no
25 protection.

1 Now, this Court said that that protection
2 has to be provided. The Court said the State must
3 insist, that the State must give assurance, and it's an
4 important constitutional right, as Justice Kennedy said.
5 And I don't think the State court --

6 JUSTICE BREYER: What is -- what is your
7 response to the Chief Justice's suggestion that maybe we
8 should reach the issue of due process on the amount?

9 MR. SHAPIRO: Well, we wouldn't oppose that
10 because this is clearly excessive under what the Court
11 said in State Farm: Where there is substantial
12 compensatory damages, one to one is something of a norm.

13 CHIEF JUSTICE ROBERTS: I wasn't asking you
14 to argue it either, but I mean I suppose the procedure
15 the parties would prefer, if we were interested in that,
16 would be for us to grant the second question and then
17 have the normal briefing in consideration.

18 MR. SHAPIRO: Oh, that -- that -- yes,
19 certainly, that -- that -- that is true. I -- I would
20 comment, too, on Justice Breyer's question about what is
21 the ultimate test here.

22 The Court has stated various criteria and
23 opinions over the last century, but the -- the key ideas
24 are: Was it an ambush, something that couldn't be
25 anticipated?

1 JUSTICE BREYER: I mean, I'll tell you my
2 subjective reaction going through these 38 cases is they
3 are not quite in point, but I really take away the idea
4 of the bad faith, particularly because the first time
5 what the judge said, which I didn't understand its
6 significance then, was the judge said: Well, since the
7 first part of that paragraph (1) was in -- was in error
8 anyway, I don't have to reach the questions of whether
9 there were other mistakes under State law in the rest of
10 the instruction. They did say that the first time, I
11 think.

12 MR. SHAPIRO: Oh, yes, but this is the first
13 time the court has ever taken this "correct in all
14 respects" rule and extended it to a completely different
15 topic, U.S. constitutional law, in a separately numbered
16 paragraph. And we had no notice that this had to be
17 broken out on a separate piece of paper. If we did, we
18 would have broken it out on a separate piece of paper.
19 It's just like Lee against Kemna where the Court said --

20 JUSTICE GINSBURG: What about the point that
21 was made that in 2002 that's exactly what Philip Morris
22 did, gave one simple, precise instruction?

23 MR. SHAPIRO: Well, no, that instruction was
24 not harm to nonparties. That was harm for out-of-State
25 injuries. It was a different issue. And it's true the

1 lawyers there did break up their instructions
2 differently, but the pattern instruction --

3 JUSTICE GINSBURG: Is it -- is it true that
4 they gave one simple sentence stating their position on
5 -- on what harm to others, how that --

6 MR. SHAPIRO: No. That's not true. That
7 case did not accept our instruction. It did not. It
8 accepted the State Farm instruction, which said that
9 there can't be punishment for out-of-State harm.

10 JUSTICE GINSBURG: But -- but was the
11 instruction stated in a -- in a single paragraph, but
12 all the other requests to charge broken out?

13 MR. SHAPIRO: Yes. This -- this State Farm
14 instruction was broken out. That's an option for
15 lawyers. But under the pattern instruction, it's quite
16 proper to put them all in one instructional basket.
17 That's what the form instructions said. That's what
18 both parties here did.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 MR. SHAPIRO: We thank the Court.

22 (Whereupon, at 11:03 a.m., the case in the
23 above-entitled matter was submitted.)

24
25

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