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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: I know you are saying that  
14 but why -- why does the disposition that you are asking  
15 for not entail what I just said, and that is, in effect  
16 you cut off the claim by a party raised before the  
17 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 the --

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 George  
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: But she said she thought  
24 it was already covered. That's what I -- on that very  
25 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 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 he 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 --

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

18 MR. PECK: I understand.

19 JUSTICE BREYER: Yes. Okay.

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



1 profits was one of them.

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

5 MR. PECK: Justice --

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, I -- yes,

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

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

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

23 On 19a, she said: "These punitive damages  
24 are not designed to compensate for other plaintiffs who  
25 are not here. " On 20a, there is a colloquy; she

1 expresses her belief that the risk is adequately guarded  
2 against, suggests language to express that, and asks:  
3 "Does that get you where you need to be?"

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

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

13 MR. PECK: I don't think it does.

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

17 MR. PECK: I understand.

18 JUSTICE KENNEDY: -- we say there is an  
19 overarching Federal principle that allows -- because of  
20 cause and prejudice, we can consider the Federal issue.  
21 We do that all the time. Those cases weren't raised by  
22 the Petitioner, but it seems to me they're quite  
23 relevant here, especially when you consider the  
24 importance of the constitutional issue, which was not  
25 really -- let's face it -- clear to counsel on either

1 side of the aisle or to the trial judge.

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

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

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

20 MR. PECK: But she -- but that's actually  
21 not the same issue that she asked that on. Counsel  
22 cited page 17a of the joint appendix for that question.  
23 And if you look at the bottom of 16a, her question is:  
24 "Let me stop first and go back to the proportionality  
25 point you are making." This is the ratio point, the

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

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

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

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

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

22 MR. PECK: No. I'm saying that she thought  
23 she was complying with that. She stated on the record  
24 that we are not here to punish for other plaintiffs'  
25 harms. Later on that other issue, if you look at 28a --

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

5 MR. PECK: She seemed to accept --

6 JUSTICE KENNEDY: -- before -- before we  
7 even announced the rule?

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

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

22 MR. PECK: Well, in fact, the -- the court  
23 thought it was relying on it. In each of the previous  
24 iterations in the Oregon Court of Appeals and in the  
25 Oregon Supreme Court, they cited this rule, "clear and

1 correct in all respects," in order to reject the "harm  
2 to others" instruction because they said it was  
3 inconsistent with State law. This point --

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

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

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

21 CHIEF JUSTICE ROBERTS: Well, then I think  
22 your --

23 MR. PECK: But --

24 CHIEF JUSTICE ROBERTS: I think your answer  
25 -- go ahead with your "but."

1 (Laughter.)

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

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

22 MR. PECK: What was not an adequate and  
23 independent State ground was their decision that the  
24 Oregon statute which permits you to punish a misconduct  
25 in order to deter others from doing that allowed



1 punishment for harm to nonparties.

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

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

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

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

24 MR. PECK: I think it was natural for the  
25 court to do that. That was the issue presented to them

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

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

23 What's before us now is something that  
24 blocks our consideration of that or anybody's  
25 consideration of that. And imagine this is not your

1 case; imagine it is the most, you know, striking case,  
2 that's why I used a death example, and we go through  
3 exactly the same thing. And then the court does exactly  
4 the same thing, the State court, that happened here.  
5 And now what are the words that distinguish whether the  
6 court is in essence, to be colloquial, giving everybody  
7 the runaround or whether the court is applying a -- an  
8 absolute, clear, you know, fair, standard of State law?  
9 Which really they should have gone into first and saved  
10 everybody a lot of trouble.

11 MR. PECK: I think the easiest way to look  
12 at this --

13 JUSTICE BREYER: Yes.

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

22 A trial court clearly would engage in  
23 reversible error if they gave that instruction because  
24 it materially departs from Oregon law. At the same  
25 time, they could deny that instruction. They could deny

1 that instruction, and the Oregon Supreme Court would not  
2 violate the mandate of this Court's decision by saying  
3 that that is a correct decision on the part of the trial  
4 law court because it was not clear and correct in all  
5 respects.

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

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

21 MR. PECK: I would urge you, Justice Breyer,  
22 to look at the original case in 1916, the Sorenson case.  
23 There the court was faced with the question: If there  
24 is the kernel of a correct instruction in there, is that  
25 adequate to ask the court to give that instruction or

1 should we insist on what they thought at the time was  
2 the majority rule in the United States, that we should  
3 insist on an instruction that is clear and correct in  
4 all respects, and that the -- that the counsel has the  
5 responsibility to provide that? And they decided to go  
6 with the clear and correct rule. That was the debate  
7 that they had, and that debate informs this one.

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

10 MR. PECK: Right.

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

18 MR. PECK: And there's a similar distinction  
19 that makes Osborne irrelevant, which counsel suggested  
20 was a -- an exemplar here.

21 In Osborne, an element of the crime had not  
22 been instructed upon. That's why there didn't have to  
23 be the offer of an instruction. But the party  
24 presentation principle puts the onus on counsel to do  
25 so, and Philip Morris showed, in 2002, well before this

1 Court's decisions that they know how to do it when they  
2 want to.

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

7 MR. PECK: And I -- I contend, Your Honor,  
8 that the --

9 JUSTICE BREYER: We didn't say it was in  
10 error. I mean, there is nothing wrong with that.

11 (Laughter.)

12 MR. PECK: Well, I think --

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

15 MR. PECK: I think the Oregon Supreme Court  
16 read that decision --

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

20 MR. PECK: Well, I'm prepared to say that  
21 the Oregon Supreme Court took that remand order to mean  
22 that they had to have in place -- this was a procedural  
23 due process decision -- that they had to have a  
24 procedure that was fair, outcome neutral, applied --

25 JUSTICE SCALIA: If that's what they took it

1 to mean, they -- they were just wrong. I mean, that's  
2 not what it says.

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

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

10 MR. PECK: When considering --

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

15 MR. PECK: Your Honor --

16 JUSTICE SCALIA: So it was wrong?

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

23 Much of this opinion said that they got lots  
24 of other things right. And so Oregon looked at it and  
25 said, "Okay, we got that issue wrong, but there are

1 other problems with this instruction that are adequate  
2 and independent grounds for --

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

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

14 JUSTICE SOUTER: The -- the problem that I  
15 think we all have is how do we guard, in effect, guard  
16 against making constitutional decisions which are simply  
17 going to be nullified by some clever device raising a  
18 procedural issue or an issue of State law when the case  
19 goes back? Is there any way for us to ensure against,  
20 in effect, a bad faith response to our decision except  
21 by purporting to require the State courts to follow a  
22 certain order of battle in the -- in the decision of  
23 issues before them so that when the case gets to us, we  
24 can be assured that there is no lurking issue that has  
25 not yet been decided as a matter of State law that in



1 effect could then be resurrected to nullify our  
2 decision? Is there any way to guard against that except  
3 by telling the State courts what the sequence is in  
4 which they have to make decisions?

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

11 JUSTICE SOUTER: I -- I see the problem. I  
12 mean, that's why I raised the question, how do we ensure  
13 --

14 JUSTICE KENNEDY: But we do that all the  
15 time in cause and prejudice cases. We do it all the  
16 time --

17 MR. PECK: Yes.

18 JUSTICE KENNEDY: -- because of the  
19 importance of the constitutional right.

20 MR. PECK: I understand that, but I think  
21 the adequate and independent State law ground provides  
22 all the protection. You assume, and I think properly  
23 so, that State supreme courts will operate in good  
24 faith. Even in *Flowers*, after the fourth trip to the  
25 U.S. Supreme Court, were -- Alabama Supreme Court was

1 still trusted to apply the decision.

2 JUSTICE SOUTER: Okay. Your -- your answer  
3 is there is -- there is no way to guard against it  
4 except --

5 MR. PECK: Except --

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

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

11 JUSTICE SOUTER: Yes.

12 MR. PECK: -- that it is firmly established  
13 and regularly followed, then it should satisfy the  
14 Court --

15 JUSTICE KENNEDY: But it -- but it serves  
16 very little interest. Nothing the trial judge would  
17 have done, nothing the plaintiffs' counsel would have  
18 done below, nothing the intermediate court would have  
19 done, would have -- would have been different if they  
20 had submitted -- what's it called -- the "correct in all  
21 respects" rule. If they had filed the "correct in all  
22 respects" rule and submitted that, saying, excuse me,  
23 judge, I want to type a little piece of paper,  
24 everything would have been the same.

25 MR. PECK: I suggest that it would be

1 different. I think the Oregon Supreme Court decided,  
2 when they decided that there was no futility in offering  
3 another one, that it would be different. And the fact  
4 of the matter is that --

5 JUSTICE KENNEDY: I excluded the Oregon  
6 Supreme Court from my list of -- of participants who  
7 would have done something differently.

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

19 CHIEF JUSTICE ROBERTS: There is, of course,  
20 another way to protect our constitutional authority in  
21 this case. We are talking about procedures for  
22 addressing the substantive due process challenge to  
23 a punitive damages award. That's the second question  
24 presented here.

25 If we went and granted that question and

1 considered that issue, we would have protected our  
2 authority to reach that question despite the procedural  
3 objections alone. Why don't we just do that?

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

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

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

15 MR. PECK: I understand.

16 CHIEF JUSTICE ROBERTS: But if we have some  
17 concern, that there's something malodorous about the  
18 fact that the Oregon Supreme Court waited until the last  
19 minute to come up with this rule that was before it all  
20 the time, which was a State court rule that you would  
21 expect the State court to be addressing as a matter of  
22 course, then -- then we -- we can avoid having to  
23 address what we do in a situation, having to  
24 characterize the nature of that -- that consideration,  
25 simply by saying: Look, we are going to go ahead. The

1 question is presented. We can decide it in this case,  
2 and to avoid having to reach that, we will go ahead and  
3 do it.

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

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

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

20 MR. PECK: I -- I am not suggesting that you  
21 decide the question, but I recognize the Court has the  
22 power to do so. Mapp v. Ohio came to this Court as a  
23 First Amendment case and came out as a Fourth Amendment  
24 case.

25 CHIEF JUSTICE ROBERTS: I thought -- just to

1 follow up, I thought you just told me that there has  
2 been full and adequate briefing on that question.

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

7 I thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. Shapiro, you have three minutes  
10 remaining.

11 REBUTTAL ARGUMENT OF STEPHEN M. SHAPIRO  
12 ON BEHALF OF THE PETITIONER

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

21 And the court said if there is any valid  
22 proportion of this instruction, it was covered by  
23 something that was said to the jury already. So there  
24 was no harm in not giving that instruction.

25 That is certainly not our case. We have a

1 separately numbered paragraph dealing with the  
2 Constitution, which is quite apart from the statutory  
3 factors.

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

14           JUSTICE GINSBURG: Which portion of the  
15 charge specifically are you referring to?

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

23           Now, this Court said that that protection  
24 has to be provided. The Court said the State must  
25 insist, that the State must give assurance, and it's an

1 important constitutional right, as Justice Kennedy said.  
2 And I don't think the State court --

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

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

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

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

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

23 JUSTICE BREYER: I mean, I'll tell you my  
24 subjective reaction going through these 38 cases is they  
25 are not quite in point, but I really take away the idea



1 of the bad faith, particularly because the first time  
2 what the judge said, which I didn't understand its  
3 significance then, was the judge said: Well, since the  
4 first part of that paragraph (1) was in -- was in error  
5 anyway, I don't have to reach the questions of whether  
6 there were other mistakes under State law in the rest of  
7 the instruction. They did say that the first time, I  
8 think.

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

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

20 MR. SHAPIRO: Well, no, that instruction was  
21 not harm to nonparties. That was harm for out-of-State  
22 injuries. It was a different issue. And it's true the  
23 lawyers there did break up their instructions  
24 differently, but the pattern instruction --

25 JUSTICE GINSBURG: Is it -- is it true that

1 they gave one simple sentence stating their position on  
2 -- on what harm to others, how that --

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

7 JUSTICE GINSBURG: But -- but was the  
8 instruction stated in a -- in a single paragraph, but  
9 all the other requests to charge broken out?

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
17 The case is submitted.

18 MR. SHAPIRO: We thank the Court.

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

21

22

23

24

25

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