

No. 07-1216

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IN THE SUPREME COURT OF THE UNITED STATES

PHILIP MORRIS USA,  
*Petitioner,*

v.

MAYOLA WILLIAMS,  
*Respondent.*

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On Petition For A Writ Of Certiorari To  
The Supreme Court Of Oregon

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BRIEF OF ASSOCIATED OREGON INDUSTRIES,  
NATIONAL FEDERATION OF INDEPENDENT  
BUSINESS/OREGON CHAPTER, NORTHWEST  
GROCERY ASSOCIATION, OREGON FOREST  
INDUSTRIES COUNCIL, OREGONIANS FOR  
FOOD & SHELTER, OREGON METALS  
INDUSTRIES COUNCIL, OREGON RESTAURANT  
ASSOCIATION, AND STRATEGIC ECONOMIC  
DEVELOPMENT CORPORATION  
AS *AMICUS CURIAE* IN  
SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI

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## QUESTION PRESENTED

This *amicus* brief addresses the first question that petitioner Philip Morris USA (Philip Morris) has asked the Court to accept for review.

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**BRIEF OF ASSOCIATED OREGON INDUSTRIES,  
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**I. INTRODUCTION**

**A. Statement of Interest of *Amici Curiae*<sup>1</sup>**

Associated Oregon Industries (AOI) originated in 1895 as an organization to promote Oregon products. Today, AOI is a nonprofit, statewide business and lobbying organization representing the interests of Oregon businesses. AOI has more than 1600 members, employing approximately 200,000

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<sup>1</sup> Pursuant to Rule 37, these *amici* state: (1) all parties have consented to this brief; (2) notice of intent to file this brief was given to plaintiff on April 16, 2008, three days less than the time required by Rule 37, but plaintiff nevertheless consents to the filing of this brief; (3) no counsel for any party has authored this brief; and (4) no party or entity, other than the Oregon *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

people. Member companies include manufacturing, retail, agriculture, technology, healthcare, and construction located throughout Oregon. As an advocate for business, AOI represents its members before Oregon's legislature, courts of law, and rule making agencies on matters dealing with education, the environment, health care, employment and labor law, natural resources, taxation, transportation, workplace safety and workers' compensation, and other issues important to Oregon business.

The National Federation of Independent Business/Oregon Chapter (NFIB/Oregon) represents over 12,000 independently owned Oregon businesses. NFIB/Oregon's purpose is to impact Oregon public policy and be a key business resource for small and independent businesses.

Since 1980, the not-for-profit Northwest Grocery Association (NWGA) has been working for the state's grocery trade as its legislative watchdog, public relations agency and news and information resource. The NWGA serves as the spokesperson for Oregon's grocery industry by promoting the common interests and issues of its membership, and by providing communications, leadership and member services. The NWGA represents the retailers, wholesalers, brokers, manufacturers and suppliers

that support the state's \$30 billion dollar grocery industry - one of Oregon's biggest assets.

Oregonians for Food & Shelter (OFS) is a non-profit, proactive, member-funded, grass roots coalition which works to protect the rights of natural resource based businesses in Oregon. Its grassroots base includes over 13,000 individuals and businesses. Its primary focus is protecting those who responsibly use pest management products, soil nutrients and biotechnology from government over-regulation. OFS also regularly becomes involved in a variety of other issues impacting farmers, foresters, and urban businesses relating to natural resources.

OFS has served the natural resource and business communities since 1980. Its key missions are to provide technical expertise and scientifically sound information to the public and policymakers; and to provide education and organization to the agrichemical user community.

The Oregon Forest Industries Council (OFIC) was founded in 1975 to represent and promote Oregon's forest products industry. OFIC is a nonprofit trade association whose 59 members own and manage approximately 5 million acres of private forestland and manufacture a wide array of forest products. Oregon's forest sector directly accounts for over 85,000 jobs statewide which generate \$3.5 billion in wage income. As an advocate for the

Oregon forest industry, OFIC represents its members before the Oregon legislature, the Oregon Board of Forestry, rule making agencies, and in courts of law on matters dealing with natural resource management, manufacturing, environmental issues, taxation, and other important concerns of Oregon's forest sector businesses.

The Oregon Metals Industries Council (OMIC) is a trade organization that has represented the interests of Oregon metal manufacturers for over 20 years. Oregon's metal manufacturers employ over 60,000 workers throughout the state. OMIC represents its members before Oregon's legislature and state agencies on a variety of issues, including issues involving product liability, taxation, environmental, and labor.

The Oregon Restaurant Association (ORA) is the leading business association for the restaurant industry in Oregon. Comprised of more than 9,000 restaurant and foodservice outlets, the industry employs a work force of more than 110,000, and creates a total economic impact of \$9.7 billion. The ORA represents and protects Oregon's restaurant and hospitality businesses and their suppliers at local, state, and national levels.

The Strategic Economic Development Corporation (SEDCOR) is the lead economic development agency for Marion and Polk Counties in

Oregon. SEDCOR is a private, non-profit membership organization, composed of over 450 business and community leaders, whose mission is to enhance and diversify the economy of the Mid-Willamette Valley by supporting and enhancing the performance of existing businesses and recruiting new businesses to Marion and Polk Counties. Over the past 10 years, SEDCOR has been pivotal in developing over \$1 billion in new investment in the Mid-Willamette Valley, creating or maintaining over 5,000 basic sector jobs.

Several Oregon business interest groups, including most of those supporting this brief, joined together as *amici* to support Philip Morris when this case was last before the Court during the 2005 Term, because they were very concerned with the Oregon Supreme Court's failure to understand and follow this Court's existing punitive damages jurisprudence. That concern has significantly deepened for AOI, NFIB/Oregon, NWGA, OFIC, OFS, OMIC, ORA, and SEDCOR (collectively, the Oregon *amici*) since the case was last in this Court because of the Oregon Supreme Court's refusal on remand to follow the Court's mandate.

The Oregon *amici* urge this Court to again accept review and then reject the Oregon Supreme Court's reason for not addressing the due process rule this Court directed the Supreme Court to apply. Only then can Oregon businesses (and, indeed, all

Oregonians) be sure that Oregon courts will not improperly use state law procedural rules to avoid implementing this Court's constitutional decisions.

## **B. Summary of Argument**

In its 2006 opinion in this case, the Court decided that an instruction that Philip Morris had requested, but the trial court refused to give, correctly stated a due process principle prohibiting the jury from punishing Philip Morris for harm to non-parties, and the Court decided that giving such an instruction, or some comparable protection, was constitutionally required. Consistent with that holding, the Court remanded the case for the Oregon Supreme Court to apply that requirement. Instead of doing that, Oregon's high court affirmed its prior decision on the basis that other, unrelated portions of Philip Morris's requested instruction contained perceived errors of state law. And the Court did that by: (1) ignoring its own well-settled error preservation rules; (2) misapplying its own decisional hierarchy rule; (3) creating a wholly new "correct in all respects" rule for requested jury instructions that applied to defects contained in separate subparts of a requested instruction that cannot fairly be reconciled with *State v. George*, 337 Or. 329, 97 P.3d 656 (2004); and (4) reaching a conclusion that cannot be justified based on the court's well-settled "right for the wrong reason" jurisprudence. This Court needs to take this case to ensure that Oregon courts (and, indeed, all

state courts) do not improperly use state law procedural rules to evade the Court's decisions.

## II. ARGUMENT

### A. This Court's Decision<sup>2</sup>

When this case was last before the Court, it ruled that “[t]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injuries that it inflicts upon those who are, essentially, strangers to the litigation.” *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007). The Court explained that, although a jury may consider harm to nonparties in evaluating the reprehensibility of a defendant’s conduct, the jury may not “go further than this and use a punitive damages award to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” *Id.* at 1064. Accordingly, the Court concluded that “it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one,” and “it is particularly important that States avoid procedure that unnecessarily

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<sup>2</sup> The relevant procedural history for the case before the Court’s decision during the 2005 Term is set out in Philip Morris’s petition for writ of certiorari, which the Oregon *amici* adopt.



deprives juries of proper legal guidance.” *Id.* And, finally, the Court noted that where the risk of jury confusion is “a significant one, \* \* \* a court, upon request, must protect against that risk. Although States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases.” *Id.* at 1065 (emphasis in original).

As to Philip Morris’s requested instruction prohibiting harm to nonparties (the requested instruction),<sup>3</sup> this Court observed that it “distinguishes between using harm to others as part of the ‘reasonable relationship’ equation (which it would allow) and using it directly as a basis for punishment.” *Id.* at 1064. Additionally, the Court noted that Philip Morris had argued below that the Constitution prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties, and that the

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<sup>3</sup> The requested instruction was actually comprised of several different topics concerning punitive damages. (Petition For Certiorari Appendix [Pet. App.] 159a-160a). Each of the topics was presented as a separately numbered and lettered paragraph. (*Id.*) Some of the topics concerned state law; others concerned federal constitutional issues. After reviewing the requested instruction, the trial court went through each subsection with the parties, solicited comment, and decided whether to give the instruction in each subsection. (*Id.* at 155a-162a).

Oregon Supreme Court had rejected that argument on its merits. *Id.* Because the Oregon Supreme Court had thus applied the wrong constitutional standard, the Court vacated the judgment and remanded “so that the Oregon Supreme Court *can apply* the standard we have set forth.” *Id.* at 1065 (emphasis added).

**B. The Oregon Supreme Court’s Decision on Remand**

On remand, the Oregon Supreme Court declined completely to address the constitutional standard that this Court articulated in its decision. Instead, the Supreme Court affirmed its prior decision by finding that other, unrelated subsections of the requested instruction contained errors of state law. *Williams v. Philip Morris USA*, 344 Or. 45, 176 P.3d 1255 (2008). Specifically, the court found that the requested instruction contained two other sections that it decided did not correctly reflect Oregon statutory law on punitive damages – paragraph (2) would have informed the jury that Oregon’s statutory criteria for awarding punitive damages in a product liability action could be considered, when the court viewed them as mandatory, and paragraph (2)(c) would have instructed the jury to consider Philip Morris’s motivation to earn “illicit profits.” *Id.* at 57, 176 P.3d at 1261-62. In light of those conclusions, the court determined that, under Oregon law, the trial court

correctly rejected the requested instruction, thus providing “an independent and adequate state ground for affirming the trial court’s ruling.” *Id.* at 61, 176 P.3d at 1263-64.

**C. The Oregon Supreme Could Not Ignore This Court’s Direction On The Basis of Its Claimed “Adequate State Ground”**

**a. Introduction**

Surely, state courts can rely on their procedural rules to decide cases and, when properly invoked, those rules can preclude consideration of inadequately presented federal claims. *See James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (expressing and applying principle). But a state procedural rule cannot bar the protection of federal rights unless the rule serves a legitimate state interest. *Lee v. Kemna*, 534 U.S. 362, 382-83, 122 S. Ct. 877 (2002). And for that to happen, the state rule must be well-settled and consistently applied. *James*, 466 U.S. at 348-49; *see also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (“We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review.”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) (“Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in

state courts of their federal constitutional rights.”); *see also Ford v. Georgia*, 498 U.S. 411, 423 (1991) (following principle expressed in *Patterson*).

Here, in reinstating the judgment for plaintiff, the Oregon Supreme Court: (1) ignored its own well-settled error preservation rules; (2) misapplied its own decisional hierarchy rule; (3) created a wholly new “correct in all respects” rule for jury instructions that applied to defects contained in separate subparts of a requested instruction and that cannot be principally reconciled with *State v. George*, 337 Or. 329, 97 P.3d 656 (2004); and (4) reached a conclusion that cannot be justified based on the court’s well-settled “right for the wrong reason” jurisprudence. For all of these reasons, the Oregon’s Supreme Court’s refusal to follow this Court’s mandate does not constitute an “independent and adequate” state ground supporting the judgment for plaintiff.

**b. Failure to apply well-settled procedural rules**

Under well-established state law, Oregon’s appellate courts will not consider an argument on appeal if it was not first raised in the trial court. *Brokenshire v. Rivas & Rivas Ltd.*, 327 Or. 119, 121-22, 957 P.2d 157, 158-59 (1998); *State v. Hickman*, 273 Or. 358, 360, 540 P.2d 1406, 1407 (1975); *Stotts*

*v. Johnson*, 192 Or. 403, 420, 234 P.2d 1059, 1066 (1951); *see also Edwards v. Hoebet*, 185 Or. 284, 297, 200 P.2d 955, 960-61 (1948) (“A familiar rule of appellate practice restricts the appellant to the theory he pursued in the trial court. He can not in this court raise issues that he did not present and rely upon in the circuit court.”); Or. R. App. Pro. 5.45(1) (“No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court”). Neither will the Oregon Supreme Court consider an argument that was raised in the trial court, but not made in the Court of Appeals. *Burke v. Oxford House of Oregon Chapter V*, 341 Or. 82, 88, 137 P.3d 1278, 1280 (2006); *Beall v. Transport Equip. Co. v. So. Pac. Transp. Co.*, 335 Or. 130, 136, 60 P.3d 530, 532 (2002); *Tarwater v. Cupp*, 304 Or. 639, 643-45 & n. 5, 748 P.2d 125, 127-28 & n.5 (1988)<sup>4</sup>; *see also* Or. R. App. Pro. 5.45(1) (“No matter claimed as error [preserved in the trial court] will be considered on appeal unless the claimed error [is assigned as error in the opening brief]”); Or. R. App. Pro. 9.20(2) (issues before Supreme Court are only those issues raised in Court of Appeals).

Here, plaintiff raised the first supposed deficiency in the requested instruction in the trial

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<sup>4</sup> In fact, the Oregon Supreme Court applied that very principle in an earlier decision in this case as a reason for not reviewing one of Philip Morris’s arguments. *Williams*, 340 Or. at 54, 127 P.3d at 1176.

court, but did not raise it on appeal until the case was before the Oregon Court of Appeals for the second time. And she did not raise the second problem identified by the Oregon Supreme Court until the case was before that court on remand from this Court. Inexplicably, the Oregon Supreme Court ignored these facts, although they show clearly that, under well-settled Oregon procedural rules, plaintiff did not appropriately preserve either objection for consideration by the Oregon Supreme Court.<sup>5</sup>

**c. Improper reliance on the court's  
decisional hierarchy**

Like courts elsewhere, Oregon's appellate courts regularly decide statutory or common law issues before reaching constitutional issues, and they decide state constitutional issues before reaching federal constitutional issues. *See State v. Acremant*, 338 Or. 302, 321, 108 P.3d 1139, 1151 (2005) (court considers all questions of state law before reaching federal constitutional claims); *see also Zockert v.*

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<sup>5</sup> Indeed, in the Oregon *amici's* view, both the Oregon Supreme Court's failure to rely on *any* independent state ground until remand *and* its disregard for the Court's mandate, support the Court not only taking this case but, as Philip Morris argues, summarily reversing and remanding it. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (supporting first reason given for conclusion); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam) (supporting second reason given for conclusion); *Stanton v. Stanton*, 429 U.S. 501, 502 (1977) (per curiam) (same).

*Fanning*, 310 Or. 514, 520, 800 P.2d 773, 776-77 (1990); *Planned Parenthood Ass’n v. Dep’t of Human Res.*, 297 Or. 562, 654, 697 P.2d 785, 787 (1984) (also reflecting decisional hierarchy). And the Oregon Supreme Court cited this hierarchy as the justification – indeed, the requirement – for its reliance on state-law grounds in its decision on remand. *Williams*, 344 Or. at 55, 176 P.3d. at 1260; *see also* (Pet. App at 13a, 16a).

But, in their *three* prior decisions in this case, Oregon’s appellate courts *never* found that this hierarchy precluded consideration of Philip Morris’s constitutional claim; indeed, each time, the courts reached and decided whether a jury may impose punitive damages to punish for harm to nonparties without *any* mention of perceived state law errors regarding other parts of the requested instruction. Thus, the only reasonable conclusion to be drawn from the prior decisions in this case is that, when the case was previously before Oregon’s appellate courts, the “mandatory” decisional hierarchy rule did not exist.

**d. Creation of new “correct in all respects rule”**

In its decision on remand, the Oregon Supreme Court held that the trial court properly refused the requested instruction because of errors it decided existed in other, separate portions of the proposed instruction. 344 Or. at 57, 176 P.3d at 1261-62; *see*

*also* (Pet. App. at 16a). Although the “correct in all respects” rule for jury instructions has been a part of Oregon law for at least 90 years, the Oregon Supreme Court has *never* found that an instruction on one topic was not “correct in all respects” because it was submitted as part of a larger requested instruction that contained some unrelated error. Indeed, in every previous case in which the court has applied this procedural rule, it has considered the correctness of instructions topic by topic. *See e.g. Sorenson v. Kribs*, 82 Or. 130, 161 P. 405 (1916) (adopting the “correct in all respects” rule and applying it to a requested instruction regarding termination of a broker’s employment); *Hooning v. Henry*, 106 Or. 605, 213 P. 139 (1923) (instruction regarding warranty versus opinion of value); *Hotelling v. Walther*, 174 Or. 381, 148 P.2d 933 (1944) (instruction regarding less satisfactory evidence); *Schultz v. Shirley*, 189 Or. 363, 220 P.2d 86 (1950) (various related instructions regarding negligence and duties of care); *Wiebe v. Seely*, 215 Or. 331, 335 P.2d 379 (1959) (instruction regarding weight of circumstantial evidence); *Brooks v. Bergholm*, 256 Or. 1, 470 P.2d 154 (1970) (instruction regarding consideration of wealth in setting compensatory damages); *Owings v. Rose*, 262 Or. 247, 497 P.2d 1183 (1972) (instructions regarding sole proximate cause); *Beglau v. Albertus*, 272 Or. 170, 536 P.2d 1251 (1975) (instructions regarding statutory requirements for headlights); *Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 957 P.2d 147 (1998) (instruction regarding comparative fault); *State v.*



*Reyes-Camarena*, 330 Or. 431, 7 P.3d 522 (2000) (sympathy instruction); *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or. 138, 26 P.3d 785 (2001) (instruction regarding mutual assent). This case, then, unquestionably reflects a wholly new application of the “correct in all respects” rule.

**e. The new “correct in all respects rule” conflicts with *State v. George***

Additionally, the new “correct in all respects” rule announced by the Oregon Supreme Court on remand cannot be reconciled with that court’s decision in *State v. George*, 337 Or. 329, 97 P.3d 656. There, the court held that where a trial court rejects a proposed instruction because it concludes that the jury should not be instructed at all on the subject—and not because it finds fault with the precise wording of the instruction— there is no need to submit a revised instruction, because “[o]ur requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures.” *Id.* at 339, 97 P.3d at 661-62.

The Oregon Supreme Court never mentioned *George* in its decision on remand. But it certainly was aware of its rule, as reflected by the following colloquy at oral argument:

MR. GARY: The Court—the Supreme Court will defer to state court

procedural rules, so long as the rules are consistently applied, and so long as they serve a legitimate state purpose. I think that's exactly consistent with what this court has said in its own preservation rulings; that is, in *George* you recognize the application of the correct-in-all-respects rule would not make any sense in terms of the purposes that preservation is designed to serve –

JUSTICE GILLETTE: Our interpretation as to whether *George* is binding, useful or irrelevant, however, is an interpretation which, given any of those three possibilities, the United States Supreme Court wouldn't care about for one second. That is to say, it assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on\* \* \* *George*, for the Court to assume anything different nor for you to claim anything different, Mr. Gary.

MR. GARY: I can't really say that I agree with that until I see what the Court has to say. But of course the Supreme Court has presumed that this court acted in good faith, as do we – [.]

(Pet. App. at 180a-181a).

The rule imposed by the Oregon Supreme Court on remand in this case — that a proposed instruction must be “*correct in all respects* \*\*\* [and] altogether free from error” in order to preserve the defendant’s argument for appeal, *even if the court rejects on the merits the defendant’s substantive legal basis for requesting the instruction* — is logically inconsistent with *George*.<sup>6</sup> No other conclusion credibly exists.

**f. Inapplicability of the “right for the wrong reason” rule**

Finally, the Oregon Supreme Court misapplied its well-established procedural rule dictating when

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<sup>6</sup> Indeed, application of the rule in such a context is also plainly inconsistent with the general principles underlying the broader preservation rule adopted by Oregon’s high court, *see State v. Wyatt*, 331 Or. 335, 343, 15 P.3d 22, 28 (2000); *State v. Hitz*, 307 Or. 183, 188-89, 766 P.2d 373, 375-76 (1988) (the purpose of the preservation rule is to ensure that parties’ positions are presented to the trial court in a way that enables it to understand them and avoid or correct the asserted error), including instructional error cases. *See Flint v. Snow*, 249 Or. 510, 512, 439 P.2d 610, 611 (1968) ( the “real vice” in an instruction not preserved for review is that the problem with the instruction was “not called to the trial court’s attention in any way [so] the trial court was given no opportunity to rule on the issues argued here.”). Philip Morris clearly articulated its federal constitutional objection in this case, thus satisfying Oregon’s instruction error preservation rule.

an appellate court can affirm a lower court, but for different reasons than those upon which the lower court relied. *See State v. Rogers*, 330 Or. 282, 295-96, 4 P.3d 1261,1269-70 (2000) (reflecting the “right for the wrong reason” principle). Affirming on that basis is *not* proper if, among other things, the other party “*might* have created a different record below had the prevailing party raised that issue, and that record could affect the disposition of the issue.” *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or. 634, 659-60, 20 P.3d 180, 195-96 (2001) (emphasis added); *see also Atwood v. Int’l Realty Ltd.*, 266 Or. 595, 596, 514 P.2d 553, 554 (1973) (court declined to consider issue raised by one party for first time on appeal when, had the issue been raised at trial, the other party could have produced relevant evidence); *Landers v. Landers*, 226 Or. 380, 383, 360 P.2d 552, 554 (1961) (same). And even when all the conditions for the “right for the wrong reason” rule are properly met, the rule is a discretionary, and not a mandatory, rule. *Outdoor Media Dimensions, Inc.*, 331 Or. at 659, 20 P.3d at 195.

Here, had plaintiff argued at trial that the court should reject *every* separately discussed section of the requested instruction if *any* separately discussed section was incorrect, Philip Morris could have resubmitted the proposed instructions on punitive damages as separately numbered requested instructions. Moreover, relying on the “right for the wrong reason” rule in such a circumstance –

especially given the procedural history of this case – would be wholly unreasonable because doing so would result in the failure to consider important due process rights. Thus, this could not be an appropriate case for applying the “right for the wrong reason” rule.

As the Oregon Supreme Court acknowledged, Philip Morris submitted various distinct instructions in the requested instruction, including one on the topic of punishment for harm to non-parties. The parties and trial court reviewed each separate subsection independently, and the court separately decided the merits of each of the requested instruction’s topics. In the face of this record, no legitimate state interest is possibly furthered by either ignoring well-settled preservation requirements or by applying the “correct in all respects” rule in an entirely new (and nonsensical way), as the Oregon Supreme Court did, to require Philip Morris to submit its instruction on each topic as a separately numbered requested instruction. In short, this is an unfair and, more importantly, wholly inadequate basis for refusing to rule upon Philip Morris’s meritorious and correctly asserted federal constitutional claim.

**g. Summary**

In summary, the Oregon Supreme Court ignored its well-settled procedural preservation

principles, inconsistently applied its decisional hierarchy rule, and applied its “correct in all respects” rule in an entirely new and unjustifiable way that cannot be reconciled with *State v. George*. The Oregon *amici* can find no principled reasons for why Oregon’s high court did any of those things. So, the conclusion they reach, is that the court was just unwilling to accept this Court’s view that due process required protection against the risk of punishment for harm to nonparties and decided to avoid this Court’s mandate by creating and invoking a supposed “independent and adequate state ground.” In the circumstances of this case, then, the Oregon Supreme Court misapplied the “adequate and independent state ground” principle as established in this Court’s jurisprudence.

### III. CONCLUSION

When this case was last before the Court, the Oregon business groups who joined together as *amici* at that time observed that it was “time for the Court to [set] clear standards and clear limits on punitive damages awards that Oregon courts (particularly, its high court) cannot ignore or avoid.” The Oregon Supreme Court’s decision on remand in this case only reinforces that point. State courts cannot be allowed to improperly ignore this Court’s mandates in punitive damages cases recognizing important federal constitutional rights. Accordingly, the Court should take this case and dispose of it in a way that

ensures that the Oregon Supreme Court complies with the Court's prior mandate.

DATED this 23<sup>rd</sup> day of April, 2008.

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