

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**BETTY BULLOCK,**

**Respondent,**

**v.**

**PHILIP MORRIS USA INC.,**

**Petitioner.**

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**PETITION FOR REVIEW**

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Of the Decision of the Court of Appeal, Second Appellate District, Division  
Three, Nos. B164398 & B169083 (Consolidated), Affirming in Part and  
Reversing in Part the Judgment of the Superior Court of Los Angeles County, No.  
BC 249171 The Honorable Warren L. Ettinger, Presiding

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**TO THE HONORABLE CHIEF JUSTICE AND HONORABLE  
ASSOCIATE JUSTICES OF THE SUPREME COURT OF  
CALIFORNIA:**

Petitioner Philip Morris USA Inc. (“Philip Morris”) seeks review of a published opinion by the Court of Appeal filed April 21, 2006, and modified on May 17, 2006. The Court of Appeal’s opinion is appended to this Petition as Appendix A (“App. A”). The court’s modification order is appended as Appendix B (“App. B”).

Two of the three issues presented for review are identical to issues now pending before the United States Supreme Court in a case based on the same course of conduct at issue here. (*Philip Morris USA Inc. v. Williams* (May 30, 2006) No. 05-1256, 2006 WL 849676.) At the very least, the Court should grant review and hold this case pending the United States Supreme Court’s disposition of those related issues. (*Balboa Island Village v. Lemen* (2004) 22 Cal.Rptr.3d 517, 102 P.3d 904 [deferring further action pending decision by United States Supreme Court on related issues].)

**ISSUES PRESENTED FOR REVIEW**

This case presents three issues for review:

1. Whether the punitive damages award, which significantly exceeds a nine-to-one ratio, violates due process, especially in light of the substantial compensatory damages award.

The panel below, over a dissent, upheld a \$28 million punitive damages award that was more than 33 times greater than the \$850,000 in compensatory damages awarded by the jury. Citing the “extreme” reprehensible nature of the defendant’s conduct, the court departed from the single-digit ratio presumption that this Court recognized in *Simon v. San*

*Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, failed to consider the substantial \$850,000 compensatory award, and, in so doing, expressly disagreed with a published decision by the Court of Appeal in another case. (App. A at p. 60.) Earlier this week, the United States Supreme Court granted certiorari to consider a virtually identical issue: “[w]hether, in reviewing a jury’s award of punitive damages, an appellate court’s conclusion that a defendant’s conduct was highly reprehensible and analogous to a crime can ‘override’ the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.” (Petition for Writ of Certiorari, *Philip Morris USA Inc. v. Williams* (Mar. 30, 2006) No. 05-1256, 2006 WL 849860, at \*i; *Philip Morris USA Inc. v. Williams* (May 30, 2006) No. 05-1256, 2006 WL 849676.)

2. Whether, upon request, the jury must be instructed, per *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, that it may not impose punitive damages to punish the defendant for the effects of its conduct on nonparties.

The jury returned a verdict of \$28 *billion* after Bullock’s counsel urged it to impose \$1 million in punitive damages for each of 28,000 unidentified smokers who he claimed could have, but did not, file a claim against Philip Morris. Philip Morris sought to preclude the jury from imposing punishment based on these hypothetical nonparty claims by requesting that the trial court instruct jurors that they were “not to impose punishment for harms suffered by persons other than the plaintiff before you,” but the trial court refused. (App. A at p. 50.) The United States

Supreme Court recently granted certiorari to consider a virtually identical issue: “[w]hether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.” (Petition for Writ of Certiorari, *Philip Morris USA Inc. v. Williams*, 2006 WL 849860, at \*i; *Philip Morris USA Inc. v. Williams*, 2006 WL 849676.)

3. Whether, in conducting the constitutionally required de novo review of a punitive damages award, an appellate court must consider the punitive and deterrent effect of the defendant’s payment of punitive damages in other cases involving the same course of conduct.

This issue concerns the continued validity and scope of the ten-year-old decision in *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, which held that an appellate court should not consider punitive payments in other cases where such payments were not presented to the jury in the first instance. *Stevens* was decided before *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, in which the United States Supreme Court held that reviewing courts must review the constitutional excessiveness of a punitive damages award on a de novo basis. The payment of other punitive damages judgments for the same course of conduct is relevant to excessiveness and must, therefore, be considered by a reviewing court.

**SUMMARY OF THE CASE AND  
WHY REVIEW SHOULD BE GRANTED**

After being diagnosed with lung cancer, plaintiff Betty Bullock sued Philip Morris, the manufacturer of the cigarettes that she smoked from 1956 to 2001. The jury found in Bullock's favor on claims of deceit and product liability and awarded her \$850,000 in compensatory damages and \$28 billion in punitive damages. On post-trial motions, the trial court reduced the punitive damages to \$28 million, an amount Bullock accepted.

Philip Morris appealed the judgment. In a published opinion filed April 21 and modified on May 17, 2006, the Court of Appeal affirmed the jury's liability findings and compensatory damages award. Over a dissent, the court also affirmed the \$28 million in punitive damages, expressly disagreeing with the Court of Appeal's decision in *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640. (App. A at p. 60.) Philip Morris petitioned the Court of Appeal for rehearing. (Appellant's Petition for Rehearing, filed May 5, 2006.) The Court of Appeal modified its decision, but denied Philip Morris' petition by a 2-1 vote. (App. B.)<sup>1</sup>

This case presents an opportunity for this Court to resolve recurring legal questions that will continue to arise whenever plaintiffs seek punitive damages from the same defendant based on a common course of conduct. All three of the issues involve confusion among the courts below and present serious due process issues that implicate concerns of fair notice and

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<sup>1</sup> The only modification germane to this petition related to the third issue presented and is discussed in Section III *infra*.

duplicative punishment. The first two questions raises issues relating to those currently pending before the United States Supreme Court in *Philip Morris USA Inc. v. Williams*, a case based on the same course of conduct here.

**1. Whether the punitive damages award, which significantly exceeds a 9-to-1 ratio, violates due process, especially in light of the substantial compensatory award.** The first question involves the circumstances under which a court may depart from the due process-based presumption against punitive damages ratios that exceed single digits. (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 425; *Simon*, 35 Cal.4th at p. 1182.) There is an express conflict on this issue among the Courts of Appeal and the three justices who decided this case.

By a two to one vote, the court below ruled that the \$28 million punitive damages award, which is 33 times greater than the compensatory damages, was not constitutionally excessive. The majority found that Philip Morris' conduct was "extremely reprehensible" and, on that basis alone, without considering the size of the jury's compensatory award, the majority held that a ratio well in excess of single digits was constitutionally acceptable. (App. A at pp. 59-62.)

The majority expressly acknowledged that its decision created a conflict with the Court of Appeal's decision in *Boeken v. Philip Morris Inc.* (2005) 127 Cal.App.4th 1640, a case that involved "the same defendant, same causes of action, same counsel, and much of the same conduct as this

case.” (App. A at p. 60.) Unlike the majority below, the *Boeken* court, in analyzing the ratio guidepost, considered *both* the reprehensibility of the defendant’s conduct *and* the size of the jury’s compensatory damages award -- and, as a result, reduced the punitive award there to a single-digit ratio despite the court’s conclusion that the conduct was extremely reprehensible. (*Boeken*, 127 Cal.App.4th at pp. 1696-1703.) The majority’s decision also conflicts with the Court of Appeal’s recent decision in *Century Surety Co. v. Polisso* (2006 No. C045334) 2006 WL 1382359, at p. \*25, where the court also considered *both* reprehensibility *and* the size of the compensatory damages in reviewing a punitive damages award for constitutional excessiveness.

The dissent below believed that an award of \$28 million “constitutes a grossly excessive punishment” that “violates the Due Process Clause of [the] Fourteenth Amendment of the United States Constitution.” (App. A, dissent, at p. 1.) Like the court in *Boeken* and unlike the majority here, the dissent concluded that *State Farm* requires a reviewing court to consider not only the reprehensibility of the defendant’s conduct, but also the size of the jury’s compensatory damages award, among other factors. (App. A, dissent, at p. 3.) The dissent noted that reprehensibility and the size of the compensatory award pull in opposite directions, with evidence of highly reprehensible conduct tending to increase the ratio and a large compensatory award tending to reduce it. Considering both factors, the dissent believed that here, as in *Boeken*, due process precluded a ratio

greater than nine to one. (App. A, dissent, at p. 1.) This Court should resolve the conflict among the Courts of Appeal on this issue.

2. **Whether a defendant is entitled to an instruction that the jury should not punish for nonparty harm.** The second question presented seeks this Court's guidance as to the instructions juries should be given to ensure that they do not seek to punish a defendant for harms incurred by nonparties. In *Johnson*, this Court rejected the theory that a jury may punish the defendant for its conduct toward nonparties by imposing punitive damages that disgorge all of the defendant's profits from a common course of conduct. The Court held that such an approach would violate due process by imposing duplicative punishment and effectively turning the case into a quasi-class action with none of the due process safeguards that the class action rules provide. (*Johnson*, 35 Cal.4th at pp. 1209-10.)

At trial in the present case, Philip Morris requested an instruction that anticipated this Court's decision in *Johnson*. Its proposed instruction would have told jurors that they may not impose punitive damages to punish Philip Morris for conduct that harmed smokers other than Bullock. (App. A at p. 50.) The trial court refused this instruction and the Court of Appeal affirmed that ruling. (*Ibid.*) The Court of Appeal agreed with the legal principle contained in Philip Morris' proposed instruction -- that "the jury may not award punitive damages to punish a defendant for its conduct toward others." (*Ibid.*) The court held, however, that no new trial was warranted because the instruction was "incomplete and misleading" in that

Philip Morris had the duty to include language on *Bullock's theory* that Philip Morris' conduct toward others was relevant to the reprehensibility of its conduct toward her. (App. A at pp. 50-51.) The court rejected Philip Morris' argument that it had no duty to propose an instruction on a theory advanced only by Bullock. This case presents the Court with an opportunity to clarify how *Johnson* affects the instructions that govern juries' punitive-damages deliberations.

**3. Whether a reviewing court must consider the defendant's payment of other punitive damages awards.** The third question presented concerns whether, in reviewing a punitive damages award, an appellate court must consider the defendant's post-trial payment of punitive damages in other cases involving the same course of conduct. The Court of Appeal held that, in evaluating the excessiveness of the \$28 million punitive award, it would be improper to take into account the punitive damages judgments that Philip Morris paid in other cases.

At the time of trial, Philip Morris had not yet paid any punitive awards and therefore could not have presented the jury with any such evidence. After trial, Philip Morris paid \$59 million in punitive damages to two California smokers based on the very same course of conduct alleged in this case. The Court of Appeal acknowledged that a defendant's payment of punitive damages in other cases "is directly relevant to the amount necessary to punish and deter." (App. A at p. 49.) However, following *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, the court ruled that it would be improper to consider

Philip Morris' punitive damages payments because those payments were not presented to the jury. (App. A at p. 49.)

This case demonstrates the unworkable and unfair nature of the *Stevens* rule. Philip Morris' payment of \$59 million in punitive damages is relevant to the extent to which the imposition of additional punitive damages is necessary to punish and deter. But evidence of those payments could not have been presented to the jury because they were not made until after trial. In refusing to consider Philip Morris' punitive damages payments, the Court of Appeal abdicated the responsibility to engage in a de novo review of the punitive damages award in this case. This Court should grant review to provide guidance as to whether and how reviewing courts should consider the defendant's payment of punitive damages in other cases.

### **DISCUSSION OF THE LEGAL PRINCIPLES**

#### **I. The Court Should Grant Review On the Issue Whether *State Farm* Permits Reprehensibility -- Even Where The Jury Awarded Substantial Compensatory Damages -- To Justify A Punitive Damages Ratio Substantially In Excess Of Single Digits**

This Court should grant review on the issue whether the reprehensibility of a defendant's conduct can justify a punitive damages ratio far in excess of single digits, especially where the jury awarded substantial compensatory damages. The United States Supreme Court recently granted certiorari to consider a similar issue, "[w]hether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can 'override' the constitutional requirement that

punitive damages be reasonably related to the plaintiff's harm.” (Petition for Writ of Certiorari, *Philip Morris USA Inc. v. Williams*, 2006 WL 849860, at \*i.)

In *Simon*, this Court addressed the framework that courts should apply when enforcing the limitations “that the due process clause of the Fourteenth Amendment to the United States Constitution places on state courts’ awards of punitive damages.” (*Simon*, 35 Cal.4th at p. 1171.) The Court’s opinion, however, has resulted in conflicting decisions by the Courts of Appeal, and a split vote among the justices in this case, as to whether and how a reviewing court must consider a substantial compensatory award in determining whether a double-digit ratio of punitive to compensatory damages is constitutionally permissible. (Compare App. A at p. 60 [considering only reprehensibility and not the size of the compensatory damages award] with App. A, dissent, at p. 9 [considering both reprehensibility and the size of the compensatory award]; *Boeken*, 127 Cal.App.4th at pp. 1696-1703 [same]; *Century Surety*, 2006 WL 1382359, at pp. \*25-27 [same].)

This Court noted in *Simon* that, “[i]f in [*BMW of North America v. Gore* (1996) 517 U.S. 559, 580], the high court threw a lasso around the problem of what it had previously identified as punitive damages awards “run wild,” in [*State Farm*] it tightened the noose considerably.” (*Simon*, 35 Cal.4th at p. 1181, quoting *Bardis v. Oates* (2004) 119 Cal.App.4th 1, 19.) The Court concluded that *State Farm* “establish[ed] a type of presumption: ratios between the punitive damages award and the plaintiff’s

actual or potential compensatory damages significantly greater than nine or 10 to one are suspect and, absent special justification . . . , cannot survive appellate scrutiny under the due process clause.” (*Simon*, 35 Cal.4th at p. 1182.)

In outlining the types of circumstances that could constitute a “special justification” for departing from this presumption, this Court noted that a departure from this presumption might be warranted “when ‘a *particularly egregious act* has resulted in only a *small amount of economic damages.*’” (*Ibid.*, quoting *State Farm*, 538 U.S. at p. 425, italics added.) Conversely, the Court found that, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” (*Ibid.*) Later in its opinion, the Court re-emphasized the importance of *both* reprehensibility *and* the size of the compensatory award. (*Simon*, 35 Cal.4th at p. 1186.) These two factors work at cross-purposes, with higher reprehensibility supporting a higher ratio and higher compensatory damages supporting a lower ratio.

The court below ignored this guidance and instead based its decision on another sentence in *Simon*, in which this Court stated that a departure from the single-digit presumption might be justified by “extreme reprehensibility *or* unusually small, hard-to-detect or hard-to-measure compensatory damages.” (*Simon*, 35 Cal.4th at p. 1182, italics added.) The court below read this sentence as suggesting that extreme reprehensibility -- viewed in isolation from all other potential factors -- could justify a ratio

well in excess of single digits. The court therefore held that a high compensatory damage award could be ignored in cases involving “extreme reprehensibility.” (App. A at p. 60.)

The dissent, by contrast, relied on this Court’s discussion in *Simon*, taken as a whole, to conclude that a reviewing court must consider *both* the reprehensibility of the defendant’s conduct *and* the size of the compensatory award. (*See* App. A, dissent, at pp. 1-4.) The dissent observed that, under *State Farm* and *Simon*, “the amount of compensatory damages awarded to the plaintiff is an important factor to consider” in determining the proper punitive-to-compensatory damages ratio. (*Id.* at p. 3.) The dissent further explained that *Simon* “did not alter the due process parameters set forth in *State Farm* for purposes of determining whether an award of punitive damages comports with due process.” (*Id.* at p. 9.) Although *Simon* identified reprehensibility as the most important indicium of reasonableness, the dissent pointed out that this Court also “acknowledged that other factors, like the amount of compensatory damages, play a critical role in whether an award of punitive damages comports with due process.” (*Ibid.*, citation omitted.)

The dissenting opinion also was in accord with the Court of Appeal’s decision in *Boeken*, a case that the majority explained “involved the same defendant, same causes of action, same counsel, and much of the same conduct as this case.” (App. A at p. 60.) In *Boeken*, the Court of Appeal held that even “exceptionally extreme” reprehensibility would not justify a departure from the single-digit presumption where the jury had

also awarded significant compensatory damages. (127 Cal.App.4th at pp. 1696-1703.) The court recognized that *State Farm* contemplated higher ratios in cases involving both high reprehensibility and a low compensatory award, but lower ratios in cases involving a substantial compensatory award. (*Ibid.*) Based on this principle, the court distinguished a case approving a double-digit ratio on the ground that the compensatory damages award in that case was very small. (*Ibid.*, discussing *Mathias v. Accor Economy Lodging, Inc.* (7th Cir. 2003) 347 F.3d 672.) Thus, the *Boeken* court read *State Farm* to require a reviewing court to consider the reprehensibility of the defendant's conduct in tandem with the amount of the compensatory damages award. (*Ibid.*)<sup>2</sup>

The majority of the Court of Appeal below expressly rejected *Boeken's* holding, creating a conflict among the Courts of Appeal:

Because we conclude that the extreme reprehensibility of Philip Morris's conduct is more than sufficient to overcome that presumption [against an award exceeding a single-digit ratio] . . . we decline to apply the limitations apparently recognized in *Boeken*.

(App. A at p. 62.) The majority's decision also conflicts with the Ninth Circuit's decision in *Planned Parenthood v. American Coalition of Life*

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<sup>2</sup> In another tobacco case, the Eighth Circuit Court of Appeals (like the Court of Appeal here) found that a tobacco company engaged in highly reprehensible conduct, but reduced the punitive damages award to a one-to-one ratio in light of the size of the compensatory award. (*Boerner v. Brown & Williamson Tobacco Co.* (8th Cir. 2005) 394 F.3d 594, 603.) Consistent with *State Farm*, other courts have similarly imposed a one-to-one ratio where compensatory damages were substantial. (See, e.g., *Williams v. ConAgra Poultry Co.* (8th Cir. 2004) 378 F.3d 790, 799.)

*Activists* (9th Cir. 2005) 422 F.3d 949. There, the Ninth Circuit, like the court in *Boeken* and the dissent below, noted the importance of *both* reprehensibility *and* a substantial compensatory award and held that a single-digit ratio would be the maximum permissible level where compensatory damages are substantial, even in cases involving extreme reprehensibility. (*Id.* at pp. 962-63.)<sup>3</sup>

The decision below threatens to undermine the efforts of the United States Supreme Court and this Court to “tighten the noose considerably” on punitive damages run wild. (*Simon*, 35 Cal.4th at p. 1181.) By disregarding the substantial compensatory award, the Court of Appeal removed from consideration a factor that was intended to prevent constitutionally excessive awards. This Court should grant review to clarify this important point of law and resolve the disagreement among the Courts of Appeal. In the alternative, the Court should grant and hold the case pending the United States Supreme Court’s disposition of this issue in *Philip Morris USA Inc. v. Williams*.

**II. The Court Should Consider Whether Juries Should Be Instructed Not To Impose Punitive Damages As Punishment For Conduct Toward Nonparties**

This Court should grant review to clarify the instructions that should be used to advise a jury that it may not impose punitive damages to punish the defendant for allegedly causing harm to persons who are not parties in

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<sup>3</sup> The conflict between the decision below and *Planned Parenthood*, if not addressed by this Court, may lead to forum shopping by plaintiffs expecting to get a larger punitive damages award in state court than in federal court.

the lawsuit. Under *State Farm* and *Johnson*, the defendant should be entitled to an instruction on this point when requested and necessitated by the evidence offered at trial. The United States Supreme Court earlier this week granted certiorari to consider a virtually identical issue. (*Philip Morris USA Inc. v. Williams*, 2006 WL 849676; Petition for Writ of Certiorari, *Philip Morris USA Inc. v. Williams*, 2006 WL 849860, at \*1 [raising “[w]hether due process permits a jury to punish a defendant for the effects of its conduct on non-parties”].)

In *State Farm*, the Supreme Court held that “[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis.” (*State Farm*, 538 U.S. at p. 423.) The Court explained that it would be fundamentally unfair to impose punitive damages based on hypothetical nonparty claims because “[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct.” (*Ibid.*) The Court, however, did not entirely forbid juries from considering evidence of conduct directed at nonparties. The Court held that the plaintiff could choose to argue to the jury that it should consider evidence of a defendant’s similar wrongs in weighing the *reprehensibility* of the defendant’s conduct. (*State Farm*, 538 U.S. at pp. 422-23.)

In *Johnson*, this Court addressed *State Farm*’s distinction between punishing a defendant for its conduct toward nonparties and considering that conduct for the purposes of gauging reprehensibility. (*Johnson*, 35

Cal.4th at pp. 1209-11.) The plaintiffs there had advanced an “aggregate disgorgement” theory whereby the jury was asked to impose a punitive damages award that would force the defendant to “disgorge” all of the profits it had purportedly derived from an alleged scheme to defraud thousands of customers. (*Id.* at pp. 1196, 1201.) This Court squarely rejected the theory because imposing punitive damages to punish for harm to nonparties “creates possibilities for unfairness . . . which may be of constitutional dimension.” (*Id.* at pp. 1208-09.) Such an award would allow the individual plaintiff to recover without ever proving the specifics of these “hypothetical claims.” (*Ibid.*) It also would unfairly expose the defendant to multiple punitive damages awards based on the same conduct, as nonparties would not be bound by the judgment; turn the case into a quasi-class action, imposing punishment on behalf of all California residents purportedly injured by the conduct while affording the defendant none of the due process safeguards associated with a true class action;<sup>4</sup> and deprive the defendant of “the benefit of all previous victories against the same claim of misconduct.” (*Id.* at p. 1210.) Thus, consistent with *State*

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<sup>4</sup> As *Johnson* explained, in an actual class action setting, once issues common to the class have been tried, a defendant is allowed to contest each individual claim on any ground not resolved in the trial of common issues. (*Id.* at p. 1210.) For example, a defendant may contest causation and other elements of the alleged tort and raise all affirmative defenses it may have against any plaintiff. By contrast, in a single-plaintiff case such as this, the plaintiff generally offers proof as to his or her claims only and seeks punitive damages based on supposed harm to millions of other individuals without presenting any evidence relating to whether those individuals were actually injured by any wrongful conduct. (*Ibid.*)

*Farm*, the Court held that due process allows the jury to consider evidence of similar wrongs, but only when weighing the reprehensibility of a defendant's conduct, and not to punish for harms to other persons. (*Ibid.*)

The distinction between gauging reprehensibility and imposing punishment is thus central to this Court's punitive damages jurisprudence. It is a critical protection against duplicative punishment. Due process allows a range of permissible punishments in any given case -- a range that is generally limited by the ratio guidepost. In determining where within the permissible range a punitive damages award should fall, juries can appropriately take into account whether the specific conduct that injured the plaintiff is more blameworthy because it also endangered others. However, the jury may *punish* the defendant only for the harm that its misconduct inflicted on the plaintiff in the case before it. (E.g., *United States v. Watts* (1997) 519 U.S. 148, 154 ["[S]entencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."].)

Indeed, as this Court recognized in *Johnson*, any other rule would allow a single jury to punish for harm to other plaintiffs as to whose claims other juries have exonerated the defendant. (*Johnson*, 35 Cal.4th at p. 1210.) This problem is not just hypothetical. In a majority of smoking and health cases that have gone to trial, juries have ruled in Philip Morris' favor. The impropriety of nonetheless allowing a single jury to punish Philip Morris as if it were legally liable to other potential plaintiffs is plain.

In anticipation of *State Farm* and *Johnson*, Philip Morris requested that the trial court instruct jurors that (1) “You are not to impose punishment for harms suffered by persons other than the plaintiff before you;” and (2) “You are not to punish defendant for the impact of its conduct on individuals in other states or countries.” (App. A. at p. 50.)<sup>5</sup> These instructions were necessary in light of Bullock’s argument that the jury should impose \$1 million in punitive damages to punish Philip Morris for each of the 28,000 people who supposedly were injured by smoking but never sued Philip Morris on their own (a theory that the jury endorsed by awarding \$28 billion in punitive damages).<sup>6</sup> Philip Morris’ proposed instructions were legally correct statements of the law and the Court of Appeal erroneously affirmed the trial court’s refusal of the instructions.

The Court of Appeal affirmed the trial court’s ruling on the ground that the proposed instructions were “incomplete and misleading” because

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<sup>5</sup> California’s current standard jury instructions state that “[t]he purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future,” but do not inform jurors that they may not seek to punish the defendant for harm to nonparties. (CACI 3945, 3947, & 3949.)

<sup>6</sup> Examples abound in Bullock’s counsel’s closing argument. There, for instance, he estimated that for every one smoker who sues PM USA, 28,000 have died from cigarette smoking. (RT 4191-92.) Bullock’s counsel then urged the jury to use its punitive damage award to vindicate the rights of those tens of thousands of people because in counsel’s view, other smokers may not bring suit. (RT 4146, 4191-92.) Bullock’s counsel also emphasized that there are “40,000 deaths per year” in California from smoking-related illnesses, and that “1 million,” “one and three quarter million Californians” have died since the 1950s. (RT 3685, 3692, 3693.) “More than 100 a day” die from smoking-related illnesses in California. (RT 3685.)

they did not instruct on *Bullock's* theory that “conduct toward others is a proper consideration in evaluating the reprehensibility of the defendant’s conduct.” (App. A at p. 51.) The court’s ruling, however, was legally incorrect because it was *Bullock's* burden to suggest an instruction on reprehensibility if she wanted the jury to consider the evidence for that purpose. California law does not require a party to offer jury instructions that advance its opponent’s arguments. (*Valentine v. Kaiser Found. Hosps.* (1961) 194 Cal.App.2d 282, 290 [“[I]t has repeatedly been held that a defendant has no duty to propose instructions upon the plaintiff’s theory of the case.”]; *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825 [“Each party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary, and having no duty respecting them he has no responsibility for the latter’s mistakes.”].)

The Oregon Court of Appeals, sitting en banc, recently held that a trial court committed instructional error in refusing to accept a similar instruction proposed by Philip Morris that also did not mention the plaintiff’s reprehensibility theory. (*Schwarz v. Philip Morris Inc.* (May 17, 2006 No. 0002-01376) --- P.3d ---, 2006 WL 1330862.) Like the Court of Appeal here, the court found that “[d]efendant’s requested instruction was a correct statement of law as to the subject that it actually addressed” -- i.e., out-of-state conduct. (*Id.* at p. \*23.) However, unlike the court below, the Oregon Court of Appeals rejected the argument that the proposed instruction was incomplete or misleading because it did not mention

reprehensibility. The Oregon court held that “it is important to keep in mind that trials in Oregon are adversarial proceedings” and that it would be improper to fault Philip Morris for not mentioning the plaintiff’s reprehensibility theory because it “would effectively require defendant to include in its requested jury instruction provisions that would have benefited only plaintiff.” (*Ibid.*) The court concluded that finding the instruction defective on the ground that it failed to mention reprehensibility would violate the rule that “[n]o party is required under Oregon law to make an argument for another party or to propose a use of evidence that benefits an adversary.” (*Ibid.*) As noted above, California law on this point is the same.

This Court should grant review to provide guidance as to how juries should be instructed on harms to nonparties and out-of-state conduct in light of *State Farm* and *Johnson*. Alternatively, the Court should grant and hold case pending the United States Supreme Court’s disposition of the related issue in *Philip Morris USA Inc. v. Williams*.

**III. The Court Should Decide Whether, In Reviewing A Punitive Damages Award, Courts Should Consider The Defendant’s Payment Of Punitive Damages In Other Cases**

In *Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661, the Court of Appeal held that a reviewing court should not consider the defendant’s payment of punitive damages in other cases unless evidence of those awards had been “presented to the jury in the first instance.” Following *Stevens*, the court below held that it would be improper to consider Philip Morris’ post-trial payment of \$59 million in

punitive damages to other California plaintiffs because evidence of those payments was not presented to the jury. (App. B at pp. 2-3.) The court reasoned that its “review of the correctness of a judgment ordinarily is limited to the record before the trial court at the time the judgment is entered” and that the judgment, if affirmed, “is affirmed as rendered on the date of the judgment, not as of a later date.” (*Id.* at p. 3.) At the same time, however, the court recognized that “a prior punitive damages award for the same conduct . . . is directly relevant to the amount necessary to punish and deter.” (App. A at p. 49.)

This case demonstrates that the *Stevens* rule should be re-examined by this Court. The *Stevens* court did not have the benefit of recent Supreme Court guidance as to an appellate court’s role in reviewing punitive damages award. After *Stevens* was decided, the Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 437, held that “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury” and that an appellate court therefore should engage in de novo review of a punitive damages judgment. This case presents the question whether, in exercising de novo review, an appellate court must consider the payment of punitive damages in other cases, and the deterrent effect of those payments, in deciding whether an additional large punitive award – especially one exceeding a single-digit ratio – is constitutionally permissible.<sup>7</sup>

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<sup>7</sup> *Stevens* should be reconsidered in any event. Even when a prior punitive damages award is paid before trial, a defendant should not have to face the impossible choice of either improperly influencing the jury by

As this Court recognized in *Simon*, an appellate court is “to review the [punitive damages] award de novo, making an independent assessment of the” award’s constitutionality. (*Simon*, 35 Cal.4th at p. 1172.) “[T]he key question before the reviewing court is whether the amount of damages ‘exceeds the level necessary to properly punish and deter.’” (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110, quoting *Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 928.) A defendant’s payment of punitive damages in other cases is “directly relevant to the amount necessary to punish and deter and therefore merits . . . consideration.” (App. A at p. 49; see also *Stevens*, 49 Cal.App.4th at p. 1661 [“Punitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter.”]).<sup>8</sup>

A reviewing court should not ignore the deterrent and punitive effect of other punitive damages payments merely because those payments happened to be made after trial and therefore could not have been presented to the jury. As noted above, the Supreme Court in *Cooper Industries* held

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introducing it into evidence or foregoing the right to have the payment considered by the court post-trial or on appeal.

<sup>8</sup> Other courts are in accord. (See, e.g., *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 812 [“We recognize the fact that multiplicity of awards may present a problem . . . If [the defendant] should be confronted with the possibility of an award in another case for the same conduct, it may raise the issue in that case”]; *Christian v. Workers’ Comp. Appeals Bd.* (1997) 15 Cal.4th 505, 513-517 [a workers’ compensation insurer cannot be punished multiple times for a single course of conduct violating the Labor Code; a “single penalty limitation” is necessary to “‘assure that the employer or carrier is not doubly penalized for what may be essentially a single act of misconduct’”].)

that “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury.” (532 U.S. at p. 437.) An appellate court’s consideration of evidence relating to the excessiveness of the award, therefore, does not implicate the jury’s fact-finding prerogative. (*Ibid.*) Under *Cooper Industries*, it is the reviewing court’s obligation to evaluate whether the punitive damage award exceeds constitutional boundaries based on all relevant information available at that time. If the post-trial payment of punitive damages renders an award constitutionally excessive or creates multiple punishment for the same course of conduct, the defendant has a due process right to have the award reduced to a constitutionally permissible level. The defendant should not be deprived of that constitutional right simply because the prior punitive damage award happened to be paid after the trial of the case.

In a similar context, this Court has held that post-trial judgments that were not presented to the trial court may be considered by appellate courts applying the doctrine of collateral estoppel. (See, e.g., *Domestic & Foreign Petroleum Co. v. Long* (1935) 4 Cal.2d 547, 562; accord *Sutton v. Golden Gate Bridge, Highway & Transp. Dist.* (1998) 68 Cal.App.4th 1149, 1154, fn. 1; *Palm Springs Paint Co. v. Arenas* (1966) 242 Cal.App.2d 682, 689; *Haines v. Pigott* (1959) 174 Cal.App.2d 805, 807-808.) As the court explained in *Haines*, an appellate court is fully capable of noticing the entry of judgment in a different case even where no evidence of the judgment was presented to the trial court. (*Haines*, 174 Cal.App.2d at p. 808.) Any other approach would senselessly require a case to be remanded so that the

trial court could make a determination that the appellate court was just as able to make. (*Ibid.*)

The court below held that a prior punitive damages award must be submitted to the jury in the first instance so the jury could determine “whether the defendant actually paid the awards and whether the awards arose from the same course of conduct.” (App. B at p. 2, citing *Stevens*, 49 Cal.App.4th at p. 1664.) As in the collateral estoppel context, however, both facts are susceptible to judicial notice and, even if disputed, amenable to resolution by an appellate court. In any event, neither fact is in dispute here. Bullock has never disputed that Philip Morris paid \$59 million in punitive damages to two California smokers. Indeed, Bullock’s counsel represented one of the smokers, who received a \$50 million punitive damages payment from Philip Morris. Nor has Bullock contended that this case involved a different course of conduct than that involved in the two cases in which Philip Morris paid punitive damages, *Boeken* and *Henley v. Philip Morris USA Inc.*, No. A086991 (previously published at 114 Cal.App.4th 1429, review granted Apr. 28, 2004, review dismissed, S123023). In fact, the court below found that *Boeken* “involved the same defendant, same causes of action, same counsel, and much of the same conduct as this case.” (App. A at p. 60.)

In its order modifying its decision, the court repeated its holding that it would be improper to consider Philip Morris’ post-trial punitive damages payments, but then noted in cursory fashion that its decision would not be altered by the consideration of those payments. (App. B at p. 3.) The court

stated that Philip Morris' payments of \$59 million in punitive damages did not render the \$28 million award constitutionally excessive because Philip Morris could afford to pay billions of dollars in punitive damages. (*Ibid.*) However, the critical issue is not whether the award would exceed the defendant's ability to pay, but instead whether the award is more than is necessary to punish and deter. (*Adams*, 54 Cal.3d at pp. 113-14.) Corporate defendants are motivated by economic concerns; thus, corporate decision-makers may well be deterred from future misconduct by punishment in amounts far less than that which the corporation can "afford to pay," particularly when the corporation has paid other punitive damages awards for the same conduct and faces additional awards in the future.

Despite the court's cursory statement that its decision would not be affected by the consideration of Philip Morris' punitive damages payments, the decision below, if left intact, will be cited for the proposition that an appellate court reviewing a punitive damages award may not take into account the defendant's post-trial payment of punitive damages. This Court should grant review and consider whether a reviewing court is obligated to take post-trial punitive damages payments into account in conducting the constitutionally mandated independent review of a punitive damages award. Because there is no factual dispute as to these issues, this case presents the Court with the ideal vehicle for considering this important question.

**CONCLUSION**

For the reasons set forth above, this Court should grant review. In the alternative, the Court should grant and hold the case pending the United States Supreme Court's disposition of *Philip Morris USA Inc. v. Williams*.

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