No. 05-1256

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Briefs and Oral Arguments

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed a number of *amicus curiae* briefs in cases before this Court concerning important issues of liability, including the constitutional restrictions on punitive damages awards. ATRA's members have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation.

SUMMARY OF ARGUMENT

For most of this Nation's history, the imposition of punishment without the protections of criminal law has been regarded as constitutionally suspect. And yet broad-based constitutional attacks on the practice of awarding punitive damages in civil cases have always failed, because the remedy has a clear historical pedigree. Given that that pedigree is the only thing that has saved punitive damages, courts must look past the mere label to determine whether a *particular approach* to punitive damages has historical antecedents that exempt it

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[1] All parties have consented to the filing of this brief. The parties' blanket consents have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

from the usual prohibitions on the use of civil procedures to inflict criminal punishments and on the arbitrary deprivation of property.

There is no historical support for punishing a defendant for the effect of its conduct on parties not before the court. From its origins in two English decisions in 1763, through the adoption of the Bill of Rights in 1791, up to and beyond the ratification of the Fourteenth Amendment in 1868, the practice of awarding punitive damages was always understood as a way to vindicate the particular plaintiff before the court, not to punish the defendant for harm done to non-parties.

Cases in which the defendant's action caused harm to multiple persons confirm this understanding. A survey of every reasonably accessible pre-1870 American case brought against a corporation, and dealing with the subject of punitive damages, reveals *not one case* in which a court approved a punitive award that reflected harm to parties not before the court. The authorities that have been cited to this Court in past cases for the proposition that such awards were allowed actually stand for no such thing.

Likewise, there is no historical basis for upholding punitive awards that are many multiples of the compensatory award when the compensatory award itself is substantial. In pre-1870 cases of substantial compensatory awards, punitive awards upheld on appeal were almost never more than one or two times the amount of compensatory damages. And, again, claims made to this Court in recent cases about the historical precedents for high ratios fall apart on examination. Virtually all of the cases that have been cited to this Court either (1) did not involve punitive damages at all, as opposed to compensatory damages for non-economic injury, or (2) concerned situations in which actual damages were insignificant; or (3) were soon disavowed by the same court that approved the award.

ARGUMENT

During oral argument in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Oct. 3, 1990), Justice Scalia noted that the practice of awarding punitive damages has "been going on since 1791, as I understand it," and asked how the practice could be "in violation of due process when it's been going on since 1791 and nobody has thought [the practice violated due process]?"[2] As we demonstrate in this brief, although the punitive damages remedy had recently begun to take shape in 1791, nothing remotely like what the court below approved in this case was going on in 1791, between 1791 and the adoption of the Fourteenth Amendment, or indeed at any time until the late 20th century.

Almost from the Founding, punitive damage awards have been regarded as constitutionally suspect because, among other difficulties, they inflict punishment without the safeguards of the criminal law. See, *e.g.*, *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). In 1851, this Court all but apologized for the availability of exemplary damages in civil cases: "We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). After the ratification of the Fourteenth Amendment, the Court rested its conclusion that punitive awards do not offend the Due Process Clause purely on tradition. *Minneapolis & St. L. Ry.* v. *Beckwith*, 129 U.S. 26, 36 (1889) (citing *Day*).

More recently, this Court has continued to invoke deference to history as the principal constitutional justification for the entire practice of awarding punitive damages. See *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 15-18 (1991); see also

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[2] 1990 WL 601340, at *21-22.

id. at 40-41 (Kennedy, J., concurring in the judgment); *id*. at 37 (Scalia, J., concurring in the judgment) (observing that "nothing but the conclusiveness of history can explain * * * today's decision" approving punitive damage procedures and that "it would surely not be considered 'fair' (or in accordance with due process) to follow a similar procedure outside of this historically approved context").

This emphasis on historical practice is appropriate. As this Court has recognized, "history and widely shared practice" are "concrete indicators of what fundamental fairness and rationality require." *Schad* v. *Arizona*, 501 U.S. 624, 640 (1991). It is true that exemplary awards were a well-recognized feature of the legal landscape by 1868, which this Court has characterized as the "crucial time" for purposes of a Due Process Clause challenge. *Burnham* v. *Superior Court of California*, 495 U.S. 604, 611 (1990); see also *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 n.12 (1994) (looking to 19th-century practice to support holding that a regime governing review of punitive damage awards was unconstitutional); *Pac. Mut. Life Ins. Co.*, 499 U.S. at 25-26 (Scalia, J., concurring in the judgment) (reviewing 19th-century authorities and concluding that "[i]n 1868, therefore, when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts").

What was not familiar in 1868 (for, for that matter, any time before then going back to 1791)—indeed, was entirely unheard of—was the procedure and resulting massive punitive exaction approved by the Supreme Court of Oregon in this case. Our country's legal traditions furnish not the slightest support for awarding to one lucky plaintiff a gigantic penalty designed to punish the defendant for all of the harm it was believed to have caused to thousands of others who were not and never would be party to the lawsuit. Neither does historical practice in American courts sanction the imposition of a

punitive damages award many times greater than an award of substantial compensatory damages.

"The fact that the historical institution of punitive damages has been around for centuries immunizes it from constitutional review, but it does not, of course, mean that any remedy a modern court chooses to call 'punitive damages' is automatically constitutional. If the courts completely change the fundamental nature of the institution of punitive damages, slapping the old label on them will not avoid all questions of constitutional infirmity." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 647 (2003); see also John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) ("[P]unitive damages at least have the warrant of past practice, and that in itself suggests constitutional permissibility. In fact, however, the application of traditional punitive damages doctrine to modern mass tort litigation has produced a situation altogether different from past experience.").

Tradition has always been the primary constitutional justification for punitive damages, and yet the award in this case flies in the face of American legal traditions in several respects. For that reason, the decision of the Oregon Supreme Court should be reversed.

I. Historical Practice Provides No Support For Punishing A Defendant For The Effects Of Its Conduct On Parties Not Before The Court

A. Punitive Damages Historically Were Understood As Vindication For The Particular Plaintiff Before The Court

1. The common law remedy of punitive damages (also known as "exemplary damages," "vindictive damages," and "smart money") originated in a pair of English lawsuits decided in 1763. See, *e.g.*, 1 JOHN J. KIRCHER & CHRISTINE M.

WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE 1-2 (2d ed. 2000); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1262-1263 (1976). Both cases arose out of the issuance by the King's agent of an unlawful general warrant to arrest the printers and publishers of a newspaper that had offended and allegedly libeled the King. Acting on the warrant, the King's officers broke into the house of the publisher, John Wilkes, and rummaged through and seized his papers. Wilkes sued in trespass. The judge instructed the jurors that they "have it in their power to give damages for more than the injury received," and the jury awarded £1000. *Wilkes* v. *Wood*, Lofft 1, 18-19, 98 Eng. Rep. 489, 498 (K.B. 1763).

The officers also detained a printer's assistant, who sued for trespass and false imprisonment. Even though the assistant's actual injuries, according to the court, were small and likely not worth more than £20—the custody lasted only six hours, and the officers "used [the plaintiff] very civilly by treating him with beef-steaks and beer"—he recovered an award of £300. *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763).[3]

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[3] *Wilkes* and *Huckle* continue to animate the law of punitive damages in England. Thus, unless authorized by a statute, exemplary damages are available in England only when either: (1) there is "oppressive, arbitrary, or unconstitutional action by the servants of the government," or (2) "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." *Rookes* v. *Barnard*, [1964] A.C. 1129, 1226 (H.L. 1964); see also 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES 11-14 (5th ed. 2005) (reviewing status of punitive damages in England since *Rookes*).

The remedy soon spread across the Atlantic to the American colonies and States,[4] where, from the time of the ratification of the Constitution and after, it was generally used to achieve vindication in cases of torts like assault, libel and slander, malicious prosecution, false imprisonment, seduction, and intentional interferences with property such as trespass and conversion. Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1007-1008 (1999); *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967) (citing PROSSER, TORTS § 2, at 10-11 (1964)). As Judge Friendly remarked after reviewing this list: "What strikes one is not merely that these torts are intentional but that usually there is but a single victim; a punitive recovery by him ends the matter, except for such additional liability as may be provided by the criminal law." *Roginsky*, 378 F.2d at 838.

Indeed, the tort law itself historically redressed one plaintiff's injuries at a time. As Chief Justice Marshall had occasion to observe: "The province of the court is, solely, to decide on the rights of individuals * * *." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Under the traditional understanding, while a single act committed by a defendant "may violate any number of rights, * * * each such violation would constitute a different wrong," and each "would give rise to different causes of action." *City of Columbus* v. *Anglin*, 48 S.E. 318, 320 (Ga. 1904). Thus, "many causes of action may grow out of a single act or tort, to as many individuals as suffer damages by the wrongful act." *Ill. Cent. R.R.* v. *Slater*, 39 Ill. App. 69, 81

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[4] The earliest reported American case with an exemplary award is believed to be a lawsuit in South Carolina in which the plaintiff was a foreigner tricked by a doctor into drinking poison one evening. The court instructed the jury "that this was a very wanton outrage upon a stranger in the country," and that the plaintiff suffered "a very serious injury," which "entitled him to very exemplary damages." *Genay* v. *Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784).

(1890). As recently as the turn of the last century, multiple plaintiffs were not allowed to join the same suit in actions at law unless they could prove that they were jointly interested in the subject of the injury. See, *e.g.*, SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 227 (William Draper Lewis ed., 1899); *Cleaveland* v. *Grand Trunk Ry. Co. of Canada*, 42 Vt. 449, 458 (1869).

2. Punitive damages, and the reasons for them, have always been a subject of dispute.[5] Courts sometimes spoke of

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[5] One of the most famous disagreements in 19th-century law was that between Harvard professor Simon Greenleaf, who believed damages for any purpose other than compensation did not and should not exist, *e.g.*, Greenleaf, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 289, 289-290, 296 (1848), and treatise author Theodore Sedgwick, who believed that the law of punitive damages "blends together the interest of society and the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender," Sedgwick, *The Rule of Damages in Actions Ex Delicto*, 5 W.L.J. 193, 194 (1848) (emphasis and internal quotation marks omitted). Greenleaf's position had its most forceful exposition in the extraordinarily thorough opinion in *Fay* v. *Parker*, 53 N.H. 342 (1874), which was sprinkled with classical references and consumed with bile. *Fay* renounced non-compensatory damages as a matter of New Hampshire law, which to this day does not recognize them. *E.g.*, *Crowley* v. *Global Realty, Inc.*, 474 A.2d 1056, 1058 (N.H. 1984).

New Hampshire is not alone. Punitive, or non-compensatory, damages are and long have been unavailable under the law of a number of other States, including Michigan and Nebraska, and, unless authorized by statute, Massachusetts and Washington. See, *e.g.*, *Peisner* v. *Detroit Free Press*, 364 N.W.2d 600, 606 (Mich. 1984); *Detroit Daily Post Co.* v. *McArthur*, 16 Mich. 447, 453 (1868); *Distinctive Printing and Packaging Co.* v. *Cox*, 443 N.W.2d 566, 574 (Neb. 1989); *Riewe* v. *McCormick*, 9 N.W. 88, 89 (Neb. 1881); *Flesner* v. *Technical Commc'ns Corp.*, 575 N.E.2d 1007, 1112 (Mass. 1991); *Burt* v. *Advertiser Newspaper Co.*, 28 N.E. 1, 5 (Mass. 1891) (Holmes, J.) ("Vindictive or punitive damages are never

punitive damages as serving the goals of retribution and deterrence,[6] which today are the only recognized reasons for exemplary awards, see, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003). "Just as frequently, however, the courts justified punitive damages as additional compensation for mental suffering, wounded dignity, and injured feelings—harms that were otherwise not legally compensable at common law." Colby, *supra*, 87 MINN. L. REV. at 615; accord 1 SCHLUETER, *supra* note 3, at 8. A particularly clear illustration of this point is *Morse* v. *Auburn & Syracuse R.R.*, 10 Barb. 621 (N.Y. Sup. Ct. 1851), which distinguished between injury remedied by ordinary damages and that remedied by "[e]xemplary or punitory damages, or smart money," and noted that the latter are a punishment in which "the mental suffering, the injured feelings, the sense of injustice, of wrong, or insult on the part of the sufferer, enter largely into the account."

"Until well into the 19th century," this Court has noted, "punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001) (citing Note, *Exemplary Damages in the Law of Torts*, 70

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allowed in this state."); *Dailey* v. *N. Coast Life Ins. Co.*, 919 P.2d 589, 590-591 (Wash. 1996); *Spokane Truck & Dray Co.* v. *Hoefer,* 25 P. 1072, 1075 (Wash. 1891).

[6] See, *e.g.*, *Coryell* v. *Colbaugh*, 1 N.J.L. 77 (N.J. 1791) (jurors told they were "to give damages for *example*'s sake, to prevent such offences in future," and that they "might give such a sum as would mark their disapprobation"); *Porter* v. *Seiler*, 23 Pa. 424, 428 (1854); *Goddard* v. *Grand Trunk Ry. of Canada*, 57 Me. 202, 224 (1869); *Ward* v. *Ward*, 41 Iowa 686, 688 (1875).

HARV. L. REV. 517, 520 (1957)).[7] Exemplary damages were also sometimes used to compensate the plaintiff for litigation expenses. See, *e.g.*, *Welch* v. *Durand*, 36 Conn. 182, 185 (1869); *New Orleans, Jackson & Great N. R.R.* v. *Allbritton*, 38 Miss. 242, 273, 275 (1859).

Although the dominant account of punitive damages came to focus on punishment rather than compensation, the doctrine never lost its focus on the harm done to the plaintiff before the court:

> [T]he early focus of punitive damages awards was on the degree of insult to the victim, and thus the courts tailored the amount of the punitive award to the victim's social status and to the circumstances of the insult. * * * [A]lthough the courts eventually settled upon an understanding of punitive damages as punishment rather than compensation, they did not conceive of them as punishment for some amorphous wrong to society, or as punishment for the malicious act in the abstract; rather, they conceived of them as punishment for the private legal wrong—the insult—done to the individual plaintiff. * * * The vindication of the dignity of the victim was the whole point of punitive damages * * *.

Colby, *supra*, 87 MINN. L. REV. at 619, 634.

3. This conception of punitive damages accounts for several otherwise-inexplicable features of punitive damages doctrine. One is the requirement that the plaintiff prevail on an

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[7] But see Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 204-206 (2003) (arguing that footnote 11 of *Cooper Industries* is inaccurate because punitive damages in the 19th century above all redressed "the injury of insult that wounds or dishonors," which today is not a cognizable form of injury).

underlying cause of action.[8] That requirement would be entirely unnecessary if the doctrine's only purposes were to achieve general deterrence and retribution.

Moreover, in the majority of jurisdictions, punitive damage awards do not violate the double jeopardy prohibition. In the 19th century, a number of courts ruled that punitive damages were unavailable where the conduct in question was a criminal offense. *E.g.*, *Taber* v. *Hutson*, 5 Ind. 322, 325-326 (1854). Others, by contrast, ruled that there was no constitutional problem because the remedy was a form of remuneration, not punishment. *E.g.*, *Chiles* v. *Drake*, 59 Ky. (2 Met.) 146, 151-153 (1859) (object of statute authorizing punitive damage awards was "not to inflict a penalty, but to remunerate for the loss sustained").

What eventually became the majority rule "arose from the decisions of courts that took a more nuanced stance: Punitive damages do not implicate double jeopardy concerns," even though they *are* intended as punishment, "because they are intended as punishment for the wrong to the individual victim," as opposed to the wrong to society generally. Colby, *supra*, 87 MINN. L. REV. at 621. Illustrative of the dominant approach is *Hendrickson* v. *Kingsbury*, 21 Iowa 379 (1866), in which the Court stated that punitive damages did not raise double jeopardy concerns because such awards "have no necessary

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[8] English law also imposes this requirement. As Lord Devlin explained in *Rookes*: "[T]he plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence." [1964] A.C. at 1227. In the decision below, the Supreme Court of Oregon endorsed a similar "absurdity" by holding that respondent could collect a $79.5 million windfall calculated to punish the petitioner for the alleged effect of its behavior on thousands of persons with no connection at all to Williams or her lawsuit.

relation to the *penalty* incurred for the *wrong done to the public*," but are "a punishment for the *wrong done to the individual*." *Id*. at 391 (emphasis in original).[9]

B. Historically, A Plaintiff Was Entitled To Recover Exemplary Damages To Vindicate The Wrong Done Only To Her, Even When The Defendant's Actions Caused Harm To Others

Because punitive damages were never understood as a mechanism for vindicating affronts to society generally (or for that matter to anyone other than the plaintiff), plaintiffs historically were entitled to recover exemplary damages only for the wrong done to themselves, even when an act or course of conduct caused actionable harm to more than one person.

1. The two English antecedent cases arose out of an incident in which the defendants had committed affronts against a number of individuals.[10] There was, however, no suggestion in either of those cases that the punishments could or should reflect the harm done to anyone but the particular plaintiff. On the contrary, in *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768, 769 (K.B. 1763), one of the judges noted that 15

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[9] A difficulty related to the double jeopardy problem—namely, the potential in the mass-tort context for multiple punitive awards for the same conduct, see, *e.g.*, *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-840 (2d Cir. 1967)—would be eliminated if courts returned to the traditional understanding of punitive awards. See generally Colby, *supra*. In that case, each plaintiff would be able to recover only a modest punitive award reflecting only the harm to himself. If, however, this Court holds that a jury may indeed punish a defendant for harms to non-parties, then the problem of multiple punishment will still exist and will have to be addressed in a future case.

[10] Professor Colby appears to be the first to have made this point. See Colby, *supra*, 87 MINN. L. REV. at 628 n.168.

other plaintiffs had brought suit against the same messengers who had imprisoned the printer's assistant, with each suit resulting—after two of the suits were tried and the rest settled—in its own punitive award. And in *Wilkes* v. *Wood*, the Lord Chief Justice's punitive damages instruction was based exclusively on one offense, that against John Wilkes: "Damages are designed not only as a satisfaction *to the injured person*, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury *to the action itself*." Lofft 1, 18-19, 98 Eng. Rep. 489, 498-499 (K.B. 1763) (emphasis added).

Even more clearly illustrative of these principles is *Tullidge* v. *Wade*, 3 Wils. 18, 95 Eng. Rep. 909 (K.B. 1769), which involved an action for assault brought by the father of a woman who had been impregnated by the defendant. The woman was permitted to testify that the defendant had promised her marriage. The court told the jury "over and over again, that, in giving damages in this action, they must *not* consider the injury done to [the daughter] as to the promise of marriage, but must leave that matter quite out of the question, because [the daughter] might have her action for breach of that promise." 95 Eng. Rep. at 909 (emphasis added).

The jury awarded £50 damages, most of which was exemplary, and the trial and appellate judges were satisfied that the jury had not punished the defendant for the broken marriage promise. In other words, even though the defendant's actions caused cognizable harm to two persons—the daughter and her father—the exemplary damages were allowed to punish, and did punish, only the wrong to the party before the court.

A number of American jurisdictions followed *Tullidge*, holding that, in an action by the father for the seduction of his daughter, evidence of a breach of a promise to marry was inadmissible to increase the size of the award, exemplary or

otherwise.[11] *E.g.*, *Robinson* v. *Burton*, 5 Del. (5 Harr.) 335, 340 (Super. Ct. 1851); *Brownell* v. *McEwen*, 5 Denio 367, 368 (N.Y. Sup. Ct. 1848); *Foster* v. *Schofield*, 1 Johns. 297, 299 (N.Y. 1806) ("The law is settled, that in a suit by the father, for debauching his daughter, the daughter cannot be a witness to prove a promise of marriage, in order to increase the damages, for she has herself a right of action against the defendant."); *Stevenson* v. *Belknap*, 6 Iowa (6 Clarke) 97, 1858 WL 120, at *4 (1858).

Even, however, in jurisdictions that did allow evidence of a broken marriage promise to increase damages in a father's seduction action, the focus remained squarely and exclusively on the *injury to the father*, not to the daughter. That is, the existence and breach of the promise were part of the circumstances of the seduction and enhanced the outrage perpetrated on the father. In *Phelin* v. *Kenderdine*, 20 Pa. 354 (1853), for example, the court explained:

> So far as the *promise of marriage* tends to show *the nature of* the *injury to the parent*, or *the means by which it was accomplished*, the evidence is as pertinent as any other circumstance which gives character to the transaction; and the only instruction which the defendant has a right to require in regard to such evidence is, that the jury must not

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[11] The principle that the father's and daughter's claims were separate and that exemplary damages could vindicate only the party before the court is also illustrated by one of the earliest American punitive damages cases, an action seeking exemplary damages for breach of a marriage promise. In *Coryell* v. *Colbaugh*, 1 N.J.L. 77 (N.J. 1791), the court refused to permit the defendant to introduce evidence that the father had already recovered from the defendant an exemplary award in his own action for the seduction. "[I]t was against every rule of evidence," the court explained, "that a verdict between other parties * * * should prejudice a person not party or privy to the record; that * * * the plaintiff could claim no benefit from the other suit. It was her father's action—she is not to be affected by it here."

> award *to the father* any part of the damages which belong to the daughter, by reason of the breach of the contract of marriage.

Id. at 362 (emphasis in original). Accord *White* v. *Campbell*, 54 Va. (13 Gratt.) 573, 574 (Va. 1856) (noting that "[e]vidence of the means by which the seduction was accomplished" aggravates "the offender's wrong, and show[s] the extent of the father's loss").

2. Of course, the traditional common law torts for which punitive damages were usually awarded—catalogued by Judge Friendly in *Roginsky*, 378 F.2d at 838—may not seem analogous to the "mass torts" that became possible only after the Industrial Revolution. A large enterprise arguably is capable of causing harms that are different in kind and in the number of victims from those on which the traditional common law actions were based.

Economists have much to say about how the existence of mass torts bears on calibrating deterrent punishments. From the standpoint of legal history, however, the question of how to analyze post-Industrial Revolution punitive damages depends on their closest historical antecedents. With this in mind, we have examined every reasonably accessible[12] pre-1870 American case brought against a corporation that deals with the subject of punitive damages.

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[12] Our conclusions are based on searches of the Westlaw database, whose holdings for early American law are extensive but not complete. According to Thomson West, the company set out to collect the cases in all the reporters identified in the 16th edition of the Bluebook, but did not complete that objective because tracking down some of the volumes turned out to be impracticable. Sampling—based on testing to see whether cases referenced in the early decisions are available in the Westlaw database—suggests that the database includes the overwhelming majority of reported 19th-century decisions.

a. Analysis of these early decisions reveals *not a single instance* in which a court approved a punitive damage award that reflected harm to other parties not before the court.[13] Far from approving punitive damages awards that reflected harm to non-parties, the early decisions reflect the assumption that it was entirely out of the question to punish a defendant for its general course of conduct or even for acts similar to, but other than, the ones that caused the plaintiff's injury. For example, in *Holyoke* v. *Grand Trunk Railway*, 48 N.H. 541 (1869), the trial court prevented the plaintiff from introducing, in support of his claim for exemplary damages, evidence that the defendants' railroad track was in an unsafe condition at places other than the site of the accident that caused the complained-of injuries. If punitive damages had been understood as a way of punishing a defendant for an entire course of objectionable conduct, there would have been no reason to exclude this evidence.

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[13] The closest thing we have found might be a statement in *Whipple* v. *Walpole*, 10 N.H. 130 (1839), which involved a claim for damages for the loss of horses caused by a defect in a bridge. In justifying an exemplary award, the court noted that the defendants neglected "a duty, in which the public at large have a deep interest. * * * In this very case, * * * three individuals were suddenly destroyed, and others exposed to most imminent peril." 10 N.H. at 132-133. Because the court's opinion otherwise mentions no loss or destruction of human life, it appears that the"three individuals * * * suddenly destroyed" were the *horses* at issue, odd as that locution may seem 167 years later. *Even if* the court was referring to harm to persons not before the court, however, its discussion does not mean that the defendants were punished for harm to others. Rather, the court's discussion reflects the principle that the *reprehensibility* of conduct can be a function of the amount of danger it creates. This distinction—which the Supreme Court of Oregon utterly failed to grasp—is a familiar one both in the criminal law and in this Court's punitive damages cases. See Pet. 16-18 & n.6. *Whipple*, moreover, was later overruled. See note 28, *infra*.

b. In briefs filed in this Court's recent punitive damages cases, parties or *amici* have asserted that historically juries were permitted to take into account a defendant's conduct vis-à-vis other plaintiffs in awarding exemplary damages. That argument, however, has been based on a flatly misleading reference to an 1830 treatise.

The respondents in *State Farm* argued:

> [P]unitive damages have always been imposed on the basis of the totality of a defendant's conduct, including "other acts," not merely according to what the defendant did to the particular plaintiff before the court. As one commentator wrote in 1830, "circumstances *which form no part of the actionable matter of a suit*, may be given in evidence to aggravate damages." Theron Metcalf, *Damages Ex Delicto*, 3 AM. [JUR. &] L. MAG. 270, 287 (1830) (emphasis added).

Br. of Resp., *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, No. 01-1289, at 37-38 (U.S. Oct. 17, 2002) (hereinafter *State Farm* Resp. Br.); see also Br. of Legal Historians in Supp. of Resp., *BMW of N. Am., Inc.* v. *Gore*, No. 94-896, at 18 (U.S. May 31, 1995) (hereinafter *Gore* Historians' Br.) (using identical quotation for similar point).

What Metcalf actually said, however, is that such circumstances may *not* be given in evidence. Here, in pertinent part, is the full passage:

> *It is said by elementary writers and by compilers*, that * * * circumstances, which form no part of the actionable matter of a suit, may be given in evidence to aggravate damages. * * *
>
> The proper meaning, it is apprehended, of the phrase[] * * * 'in aggravation of damages,' is often palpably mistaken. When evidence is given for the purpose of showing that the *injury received* is greater * * * than it

> would appear to be if such evidence were not introduced, it may properly be said to be received in aggravation * * * of damages; and in no other instance. *And it is the purpose of this examination to show that neither on principle, nor by the preponderance of authority, can damages be estimated by any other standard than the actual injury received*—that the extent of the injury is the legal measure of damages.

Metcalf, *supra*, 3 AM. JUR. & L. MAG. at 287-288 (emphasis added in part). In fact, not only did Metcalf squarely reject the idea that juries could take into account circumstances outside the plaintiff's cause of action, he was also an early proponent of the view that punitive damages as we understand them today—an award for a non-compensatory purpose—did not exist.[14]

c. The point that juries historically could not take into account—indeed, probably could not even learn of—harm to non-parties is illustrated by punitive damages cases arising out of accidents that injured additional parties beyond the individual plaintiff. In such cases, court never even contemplated the possibility of awarding punitive damages on the basis of such

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[14] Metcalf wrote:

> Damages are given as a satisfaction *for an injury received by the plaintiff, not by the public*. The term *vindictive*, when applied to damages given by a jury, is unfortunate, and liable to strange misapprehension. * * * [I]t means nothing more, when truly understood, than * * * that damages may be given for insult, contumely, and abuse, not in themselves actionable, when they *accompany* an actionable injury. And that in any other sense, such damages are unknown and unwarranted by the common law.

3 AM. JUR. & L. MAG. at 305-306 (first emphasis added). In fact, Metcalf was said to be the ancestor of Greenleaf's position, see note 5, *supra*. Sedgwick, *supra*, 5 W.L.J. at 193.

injuries. In *Holyoke*, for example, the plaintiff sought exemplary and compensatory damages after the railcar he was riding in, which "was running at an unusually rapid speed," ran off the road, down an embankment, and into a pond, where it came to rest upside-down twelve feet below the track. 48 N.H. at 543. There was no discussion in the case of other victims (which it seems fair to assume there were, since it would have been a miracle if the accident had injured no one else), let alone a suggestion that an exemplary award could reflect harm to them. The same was true of *Taylor* v. *Grand Trunk Railway*, 48 N.H. 304 (1869). There two passenger cars went off the rails and down a bank, turning nearly upside-down, *id*. at 307, but the court did not even contemplate that Taylor's exemplary award could reflect what surely must have been injuries suffered by others. Likewise, in *Weed* v. *Panama Railroad*, 17 N.Y. 362 (1858), the plaintiff obtained a $2000 verdict, which apparently included an exemplary component, for injuries suffered when his train was detained. Four hundred other passengers were stuck on the same train, yet there was no suggestion that Weed's award was based in any way on the harm to the others.[15]

d. Finally, in the few cases in which courts did consider whether a plaintiff could collect punitive damages for other parties' injuries, they answered that question in the negative. In *Black* v. *Carrollton Railroad*, 10 La. Ann. 33 (La. 1855), for example, the plaintiff was the father of a 14-year-old boy whose legs were broken when the railroad car he was riding in flipped over. The father had sought damages for medical

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[15] Other illustrations of this point are *Hopkins* v. *Atl. & St. Lawrence R.R.*, 36 N.H. 9 (1857) (no suggestion that harm to other passengers could be a consideration in calculation of exemplary award in suits for injuries of plaintiff and wife sustained in train collision); *Varillat* v. *New Orleans & Carrollton R.R.*, 10 La. Ann. 88 (La. 1855); *Frink & Co.* v. *Coe*, 4 Greene 555 (Iowa 1854); *Penn. R.R.* v. *McCloskey's Adm'r*, 23 Pa. 526 (1854).

expenses and the neglect of his business, and the court estimated his actual damage at $5000. *Id*. at 37-38. The jury, however, awarded $10,000. The court overturned the verdict because it believed that there was no "right to recover vindictive damages, to others than those who, in their own proper persons, are victims of the misconduct of" a railroad company. *Id*. at 38. Similarly, in *Baltimore & O. S.W. Railway* v. *Keck*, 89 Ill. App. 72 (1899), the court held that a father was entitled to recover "compensation only for the loss he had sustained on account of the negligent act of the railroad company in injuring his boy. He was entitled to nothing on account of the pain and suffering of his son, *or as exemplary damages. Such damages could only be recovered in a suit by the boy*." *Id*. at 77-78 (emphasis added).

Identical principles yielded the opposite outcome in *Bradley* v. *Andrews*, 51 Vt. 525 (1879). There the father was permitted to recover exemplary damages for injuries to the son, but only because the son had initiated his own negligence action before he died, and a Vermont statute transferred a deceased's cause of action to the administrator of his estate, which in this case was the father. Without the statutorily conferred ability to prosecute his son's cause of action, the father could not have recovered exemplary damages, even though he had initiated his own suit to recover for loss of services and the expense of caring for the son.[16]

These patterns continued into the 20th century. For example, in *Tidd* v. *Skinner*, 122 N.E. 247 (N.Y. 1919), the plaintiff sued to recover for loss of the services of her son, who had become addicted to heroin sold by the defendant pharmacists. The court observed that punitive damages when available

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[16] The Supreme Court of Vermont's earlier decision in *Earl* v. *Tupper*, 45 Vt. 275, 288 (1873), contains rhetoric that is in tension with this interpretation, but the holding of that case is entirely consistent with it.

"are allowed to the person directly injured in cases of wrong committed with malice * * *. We are of the opinion that such damages do not in this case come within the reason on which the common-law action in favor of a third person is sustained." *Id*. at 251. See also *Bube* v. *Birmingham Ry., Light & Power Co.*, 37 So. 285, 286 (Ala. 1904) (punitive damages not available to father suing street car company for loss of his son's services); *French* v. *Orange County Inv. Corp.*, 13 P.2d 1046, 1048 (Cal. Dist. Ct. App. 1932) ("Exemplary damages are allowed only to the immediate person receiving the injury, either in a suit prosecuted by himself or by some one for his use." (citation and internal quotation marks omitted)); cf. *Pickle* v. *Page*, 233 N.Y.S. 461, 470 (App. Div. 1929) (allowing parent to recover punitive damages for child's kidnaping because "the injury is primarily and directly, and indeed chiefly, to the parent").

II. There Is No Historical Basis For Upholding Punitive Awards That Are Many Multiples Of The Compensatory Award When The Compensatory Award Itself Is Substantial

A. Before the ratification of the Fourteenth Amendment, so long as actual damages were not trivial, it was extremely rare for a court to approve an award whose punitive component was many multiples larger than the compensatory component.

For one thing, juries were rarely inclined to impose large awards. There are many decisions overturning verdicts because the jury, in response to erroneous instructions or on its own initiative, included an apparently exemplary award in a case that (for want of the requisite wantonness, malice, or gross negligence, or otherwise) did not permit it. Even in those cases,

however, the punitive amount tended to be a modest supplement to the compensatory component.[17]

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[17] See, *e.g.*, *Franz* v. *Hilterbrand*, 45 Mo. 121 (1869) (overturning verdict awarding $200 in punitive damages beyond $300 compensation for killing horses); *Beveridge* v. *Rawson*, 51 Ill. 504 (1869) (award of $1236.72, of which $500 was compensatory, for seizure and sale of house overturned); *Cram* v. *Hadley*, 48 N.H. 191 (1868) (verdict containing $51.98 exemplary award in addition to $42.29 compensatory award for entering land and carrying away logs overturned); *Toledo, Pac. & W. Ry.* v. *Arnold*, 43 Ill. 418 (1867) (verdict containing $30 exemplary award in addition to $411 compensation for livestock killed by railroad cars overturned); *Ackerson v. Erie Ry.*, 32 N.J.L. 254 (N.J. 1867) ($8500 verdict limited to $6500 as compensation for injuries sustained when railway car went off road and down embankment); *Moore* v. *Bowman*, 47 N.H. 494 (1867) (overturning verdict awarding $25 in exemplary damages beyond $115 compensatory award for wrongful attachment of a horse); *Moody* v. *McDonald*, 4 Cal. 297 (1854) (overturning verdict awarding $2500 in "smart money" beyond $2500 compensatory award for injuries caused by negligent blasting); *Singleton's Adm'r* v. *Kennedy, Smith & Co.*, 48 Ky. (9 B. Mon.) 222 (1848) (overturning verdict awarding $173.14 beyond cognizable injury of $684 because vindictive damages not available); see also *New Orleans, Jackson & Great N. R.R.* v. *Moore*, 40 Miss. 39 (1866) (verdict awarding $222, in addition to $528, the value of trunk lost by defendant railroad, overturned because exemplary damages not appropriate in contract action); *Androscoggin R.R.* v. *Richards*, 41 Me. 233 (1856) (overturning award that included $23.69 in addition to compensation of $191.54 for seizure of liquor); but see *Dickinson* v. *Maynard*, 20 La. Ann. 66 (La. 1868) (reducing $885 verdict for wrongful attachment to $101.66, representing actual damages, because exemplary damages not allowed); *Anding* v. *Perkins*, 29 Tex. 348 (1867) (overturning award for breach of warranty in the sale of a certificate for land in which compensatory component was $60 and punitive component was $580 because jury was wrongly instructed); *Palmer, Cooke & Co.* v. *Stewart*, 2 Cal. 348 (1852) (verdict awarding $2500 overturned where cognizable compensatory damages were probably not more than $50).

Where punitive damages were available, and juries did award them, the vindictive component of the award still was expected to bear some kind of correspondence to the compensatory component. See, *e.g.*, *Walker* v. *Martin*, 52 Ill. 347, 351 (1869) (reversing verdict in which punitive component was 40 times larger than compensatory component because vindictive damages must "must bear some sort of proportion to the injury done"); *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (La. 1852) ("exemplary damages allowed should bear some proportion to the real damage sustained"); see also *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 580 n.32 (1996) (citing late 19th-century state-court cases for the same principle); *TXO Prod'n Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 459 n.25 (1993) (plurality opinion); *id*. at 479 n.3 (O'Connor, J., concurring).

The reason for this sort of proportionality is clear. Because, as discussed above, 19th-century jurists understood punitive damages as a particularized punishment for the wrong to the individual before the court, their "notion [was] that the proper amount of punitive damages depends on the severity of the injury to the plaintiff." Colby, *supra*, 87 MINN. L. REV. at 639.

Thus, in practice punitive awards upheld on appeal were almost never more than one or two times the amount of the compensatory award.[18] Multiples higher than this were rare.[19]

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[18] See, *e.g.*, *Welch* v. *Durand*, 36 Conn. 182 (1869) (verdict awarded $200 for the injury received when the defendant fired a gun, plus $150 "smart money" for expenses of litigation due to defendant's wanton misconduct and culpable neglect); *Johnson* v. *Camp*, 51 Ill. 219 (1869) (jury may have awarded $107 "smart money" for taking away $363 worth of wheat and oats); *Andrea* v. *Thatcher*, 24 Wis. 471 (1869) ($200 in exemplary damages in addition to $185.78 compensation for damage to furniture that occurred when plaintiff and his family were ejected from his house); *Garland* v. *Wholeham*, 26 Iowa 185 (1868) ($1700 verdict for damage to property, the total value of which was not more than $1020); *Garland* v. *Wholebau*, 20 Iowa 271 (1866) ($200 exemplary damages in addition to $500 com-

To be sure, some have argued that larger awards are needed to deter or inflict meaningful retribution on a corporation, especially a large one, than on an individual. Whether or not that proposition is sound as an economic or policy matter,[20]

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pensation for shooting horses); *Lynd* v. *Picket*, 7 Minn. 184 (1862) ($168.59 exemplary damages, or $150 plus interest to time of trial, for a wrongful attachment of property worth $267); *Tifft* v. *Culver*, 3 Hill 180 (N.Y. 1842) ($2.52 in exemplary damages beyond $3.37 as compensation for wilfully overturning wagon); *Wort* v. *Jenkins*, 14 Johns. 352 (N.Y. 1817) ($75 verdict for beating to death a horse worth $50 or $60); *Woodman* v. *Nottingham*, 49 N.H. 387 (1870) ($100 exemplary, $578 actual); *Newell* v. *Whitcher*, 53 Vt. 589 (1880) ($225 for mental suffering for a threatening sexual advance made on a young blind woman, plus $100 in punitive damages); *S. Kan. Ry.* v. *Rice*, 16 P. 817 (Kan. 1888) ($71.75 punitive award in addition to $10 for injury to feelings and $35 for costs and fees).

[19] Aside from the cases in which actual damages were truly trivial, see II.B., *infra*, the only pre-1870 American examples we have found in which a multiple clearly higher than 2 was upheld on appeal are *Pendleton* v. *Davis*, 46 N.C. (1 Jones) 98 (1853) ($1100 verdict, of which $1000 was exemplary damages, awarded against a wealthy defendant for a blow to plaintiff's head), *Kountz* v. *Brown*, 55 Ky. (16 B. Mon.) 577 (1855) ($750 verdict; defendant complained on appeal that three-fourths of it was "smart-money"), and *New Orleans, Jackson & Great N. R.R.* v. *Hurst*, 36 Miss. 660 (1859). *Hurst* was disavowed only a decade later by the same court that issued it. See page 29, *infra*.

[20] Trenchant economic analyses conclude that "corporate wealth should not influence punitive damages." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 911 (1998); see also *id*. at 911 n.131 (citing authorities to the same effect). Punishing corporations more because they are wealthy also runs afoul of "the Aristotelian notion of corrective justice, and more broadly of the principle of the rule of law, * * * that sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he

courts and juries have long found it appealing. Many States permit juries to take into account the wealth of the defendant in calculating an exemplary award, on the theory "that a penalty which would be sufficient to reform a poor man is likely to make little impression on a rich one; and therefore the richer the defendant is the larger the punitive damage award should be." Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931). Similarly, some courts around the time of ratification of the Fourteenth Amendment believed that large awards were needed to capture the attention of large corporations.[21]

In our survey of every reasonably available pre-1870 case involving punitive damages brought against a corporation,[22] many cases do not make the relevant ratios clear. In the few that do, however, the punitive awards were modest supplements to the compensatory award. See *Taylor* v. *Grand Trunk Ry.*, 48 N.H. 304 (1869) ($858.50 punitive award for injuries suffered in railroad accident where actual damages were $500); *Vicksburg & Jackson R.R.* v. *Patton*, 31 Miss. 156 (1856) ($660 punitive award in addition to $550 to compensate for horses run over by train). Several verdicts with enormous ratios were upheld on appeal, but these decisions, as explained in II.C., *infra*, either were renounced soon after by the same court or involved very low actual damages.

Nor was there any sharp change after the ratification of the Fourteenth Amendment. Vindictive awards against corpora-

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does, not for who he is, even if the who is a huge corporation." *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (Posner, J.).

[21] *E.g.*, *Williamson* v. *W. Stage Co.*, 24 Iowa 171, 172 (1867); see also *Goddard* v. *Grand Trunk Ry. of Canada*, 57 Me. 202, 223-228 (1869).

[22] See note 12, *supra*.

tions out of all proportion to compensatory damages continued to be reduced or overturned well into the last century. See, *e.g.*, *Flannery* v. *Baltimore & Ohio R.R.*, 15 D.C. (4 Mackey) 111 (1885) ($5000 verdict of which only $500 was compensatory had to be remitted to $1500, for a ratio of 2:1); *Int'l & G.N.R. Co.* v. *Telephone Tel. Co.*, 5 S.W. 517, 518-519 (Tex. 1887) (setting aside, because of "the disproportion between the actual injury sustained and the aggregate sum awarded," $10,000 verdict in which the exemplary damages were almost 50 times larger than the actual damages); *Rider* v. *York Haven Water & Power Co.*, 95 A. 803 (Pa. 1915) (reversing verdict awarding $2700 where actual damages were $1000 and noting that "[w]e know of no case in our own state where punitive damages were allowed in almost treble the amount of the actual damage sustained"); *Hunter* v. *Kansas City Rys. Co.*, 248 S.W. 998, 1003 (Mo. Ct. App. 1923) ("in this case an award of five times the actual damages inflicted is clearly excessive; an award of three times the actual damages, or $1,500, is amply sufficient"); *Hall Oil Co.* v. *Barquin*, 237 P. 255, 276-280 (Wy. 1925) (where actual damages were $1250, sustaining $1088 punitive award against one defendant and reducing award against another from $23,928 to $8000).

B. It is not controversial that, when actual damages are small, a higher multiplier might be appropriate to achieve some of the functions of punitive awards. *E.g.*, *State Farm*, 538 U.S. at 425; *Gore*, 517 U.S. at 582; see also *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676-677 (7th Cir. 2003) (Posner, J.). Thus historic cases with truly gigantic ratios usually involved insignificant actual damages.[23] In *Williamson* v.

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[23] In fact, at least one and probably both of the two antecedent English cases fit this pattern. In *Huckle* v. *Money*, which resulted in an award of £300, the actual injury, according to the Lord Chief Justice, was worth approximately £20, 95 Eng. Rep. at 769, which, in very approximate terms, is equivalent to several thousand dollars today. See *Gore*, 517 U.S. at 597 (Breyer, J., concurring) (deducing

Western Stage Co., 24 Iowa 171 (1867), for example, the court upheld a $375 verdict for injuries resulting from being overturned in a coach. That was many multiples of the plaintiff's actual damages, but those were tiny—he spent no more than $2 on remedies for his injuries. See also, *e.g.*, *Beaudrot* v. *S. Ry.*, 48 S.E. 106 (S.C. 1904) ($1000 exemplary damages where actual damages from trespass were about $2.50); cf. *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 75-76, 78 (1907) (upholding state statute imposing $50 penalty for not timely settling claim for lost shipment valued at $1.75); *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63, 64, 67 (1919) (upholding statutory penalty of $75 plus costs of suit for overcharging two young sisters by 66 cents).

Plainly, this recognized exception has no application here. Respondent's compensatory award alone was $821,485.50, of which 97 percent were *non-economic* damages. It was on *top* of this that respondent was awarded $79.5 million to punish Philip Morris USA for the total harm it was supposed to have inflicted in Oregon. In *Seaboard Air Line*, this Court justified the disparity between the $50 penalty and the $1.75 of actual damages on the ground that, "[i]f a large amount is in controversy, the claimant can afford to litigate. But he cannot well do so when there is but the trifle of a dollar or two in dispute * * *." 207 U.S. at 78. Here that rationale is as irrelevant as can be; there has been no shortage of plaintiffs willing to litigate against tobacco companies. The award approved by the Supreme Court of Oregon, it should be clear, finds no support at all in the historical tradition of using a high multiplier to create a meaningful penalty when the actual damage is slight—or, indeed, in any historical tradition at all.

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that £1 in 1763 is worth between $89.11 and $144.40 in 1995 U.S. dollars). In *Wilkes* v. *Wood*, the plaintiff demanded "large and exemplary damages" because "trifling damages would put no stop at all to such proceedings," 98 Eng. Rep. at 490.

C. In this Court's recent punitive damages cases, defenders of enormous awards frequently have asserted that high ratios of punitive to compensatory awards have a strong historical pedigree.[24] They do not. The early American cases cited in support of that proposition by the respondents and *amici* in this Court's punitive damage cases either (1) did not involve punitive damages at all, as opposed to compensatory damages for non-economic injury,[25] or (2) concerned situations in which actual damages were insignificant;[26] or (3) were soon disa-

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[24] See *Gore* Historians' Br. 3-10; Br. of Resp., *Gore*, at 41 & n.53 (hereinafter *Gore* Resp. Br.); *State Farm* Resp. Br. 14-15 & n.2; Br. of Resp., *TXO Prod. Corp.* v. *Alliance Resources Corp.*, No. 92-479, at 26-28 & nn.24-25 (U.S. Mar. 3, 1993) (hereinafter *TXO* Resp. Br.).

[25] *Reed* v. *Davis*, 4 Pick. 216, 218 (Mass. 1826) (verdict compensated not just for economic harm but for "the mental suffering which must have been endured"), cited in *Gore* Historians' Br. 6, *Gore* Resp. Br. 41 n.53, *State Farm* Resp. Br. 15 n.2, and *TXO* Resp. Br. 27 n.25; *Johnson* v. *Hannahan*, 34 S.C.L. 425, 1849 WL 2662 (S.C. Ct. App. L. 1849) ($3000 verdict where pecuniary harm was $20; surplus "rendered for insult and matter of aggravation"), cited in *Gore* Historians' Br. 6; *Seaman* v. *Dexter*, 114 A. 75, 76 (Conn. 1921) ($318 awarded for economic loss; the rest of the $5000 award was not for punitive damages but "compensation for pain, suffering, and permanent injury and discomfort"), cited in *Gore* Historians' Br. 6 n.2 and *State Farm* Resp. Br. 15 n.2.

[26] *E.g.*, *Cathey* v. *St. Louis & S.F.R. Co.*, 130 S.W. 130, 131 (Mo. Ct. App. 1910) (9:1 ratio in award for an assault that caused injuries worth $50), cited in *Gore* Resp. Br. 41 n.53, *Gore* Historians' Br. 9, and *State Farm* Resp. Br. 15 n.2; *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63 (1919) (discussed above), cited in *State Farm* Resp. Br. 15; *Pelton* v. *General Motors Acceptance Corp.*, 7 P.2d 263 (Or. 1932) (punitive award 19.6 times larger than compensatory award upheld where compensatory damages were $255), cited in *Gore* Historians' Br. 6, *Gore* Resp. Br. 41 n.53, and *State Farm* Resp. Br. 15; *Alcorn* v. *Mitchell*, 63 Ill. 553 (1872) ($1000 exemplary award

vowed by the same court that approved the award. Examples of the first two categories are furnished in the margin. The prime example of the third category is *New Orleans, Jackson & Great Northern R.R.* v. *Hurst*, 36 Miss. 660 (1859), which approved an enormous punitive award where actual damage was limited, and which was cited to this Court by respondents in four recent punitive damages cases, as well as by the self-styled legal historians as *amici* in *Gore*.[27] None of the briefs, however, disclosed that a decade later the very same court, in a case against the same defendant, expressly disavowed its earlier decision: "With all due respect and deference to the opinion of our able and distinguished predecessors, we think the verdict should have been set aside in that case." *New Orleans, Jackson & Great N. R.R.* v. *Statham*, 42 Miss. 607, 628 (1869).[28]

If these are the best cases defenders of high ratios can come up with to "prove" the historical pedigree of high ratios, then the conclusion must be just the opposite: punitive damages in enormous ratio to significant compensatory damages have no

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where the defendant, who had just lost a trespass suit, spat in the face of his adversary in court), cited in *State Farm* Resp. Br. 15, *Gore* Historians' Br. 6, and *Gore* Resp. Br. 41 n.53.

[27] Br. of Resp., *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, No. 99-2035, at 20 n.11 (U.S. Jan. 16, 2001); *Gore* Historians' Br. 7, 19, 21; *Gore* Resp. Br. 41 n.53; *State Farm* Resp. Br. 15; *TXO* Resp. Br. 27 n.25, 32, 38.

[28] Along similar lines, briefs in previous cases cited for support *Whipple* v. *Walpole*, 10 N.H. 130 (1839), as well as at least one other pre-1870 New Hampshire case, *Taylor* v. *Grand Trunk Ry.*, 48 N.H. 304 (1869). See *Gore* Historians' Br. 7 n.3, 8, 12, 16 n.9, 27 n.18, 30 n.23; *TXO* Resp. Br. 27 n.25, 28 n.26. These briefs did not note that *Whipple* was expressly overruled on at least two grounds in *Woodman* v. *Town of Nottingham*, 49 N.H. 387 (1870), and that, several years after that, New Hampshire's high court renounced exemplary damages altogether. See note 5, *supra*.

historical support at all. They are an innovation of the late 20th century, resembling their precursors in name but in no other respect. History is no reason to shield them from exacting constitutional scrutiny, and is in particular no reason to allow the wholly arbitrary imposition of punishment and deprivation of property without traditional due process of law.

CONCLUSION

The judgment of the Supreme Court of Oregon should be reversed.

Respectfully submitted.

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