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VIA UPS OVERNIGHT

Honorable Ronald M. George, Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Bullock v. Philip Morris, USA, Inc.*
Supreme Court of California Case No. S161632

Dear Chief Justice George and Associate Justices:

The Chamber of Commerce of the United States of America (hereafter the Chamber) respectfully submits this amicus curiae letter pursuant to rule 8.500, subdivision (g) of the California Rules of Court in support of petitioner Philip Morris USA, Inc.'s petition for review filed on March 10, 2008.

I. THE INTEREST OF THE AMICUS CURIAE

The Chamber is the world's largest business federation, representing an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every sector of business, and in every region of the country. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world.

The Chamber has thousands of members in California and thousands more conduct substantial business in the State. For that reason, the Chamber and its members have a significant interest in the administration of civil justice in the California courts. The Chamber routinely advocates the interests of the national business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of vital concern. In fulfilling that role, the Cham-

ber has appeared many times before the California appellate courts. Over the past 19 years, the Chamber has also filed a brief in every punitive damages case before the U.S. Supreme Court.

Businesses such as those the Chamber represents are frequently subjected to punitive damage claims, which carry with them an enormous potential for abuse, as the U.S. Supreme Court has repeatedly emphasized. (*State Farm Mut. Auto. Ins. v. Campbell* (2003) 538 U.S. 408, 417 ["'[p]unitive damages pose an acute danger of arbitrary deprivation of property'"], citation omitted (*State Farm*).) Among other things, a State's "punitive damages system may deprive a defendant of 'fair notice'"; "it may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice'"; and "it may impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies." *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, 1062 (*Williams*), citations omitted.) These are "fundamental due process concerns." (*Id.* at p. 1063.)

When the specter of punishment based on harm to *third parties* is introduced into the punitive damages calculus, the due process issues are more troubling still. To address this concern, the Supreme Court in *Williams*, *supra*, laid down a bright-line rule of federal constitutional law—applicable in all punitive damages cases involving claims of third-party harm—under which state trial courts, "upon request, must protect against that risk" of punishment for third-party harm by "provid[ing] some form of protection." (127 S.Ct. at p. 1065.) The Chamber and its members have a significant interest in ensuring that courts provide the "protection" that *Williams* envisaged.

II. THE COURT SHOULD GRANT THE PETITION AND RESOLVE IMPORTANT ISSUES OF LAW AND POLICY

Philip Morris's petition for review presents two issues, the first addressing the proper scope of a retrial required to remedy a constitutional error infecting the original jury's verdict, and the second addressing preemption under the Federal Cigarette Labeling & Advertising Act, section 1334, subdivision (b), of title 15 of the United States Code. (See Philip Morris Petition, p. 1.) The Court should grant review on both of Philip Morris's issues, but the Chamber will focus in this letter on reasons why review of the first question is especially necessary—a proposition with which even *plaintiff* here agrees. (See Bullock Answer Brief, p. 2.) The scope of the new trial ordered and the appropriateness of remedies for constitutional violations relating to punitive damages in general are recurring and important issues that demand this Court's attention.

1. The court of appeal correctly recognized that the Constitution requires a new trial on punitive damages here. But, in limiting the scope of the new trial, the court adopted an unjustifiably parsimonious approach to the due process protections that the U.S. Supreme Court has made clear that all States must provide.

As the Supreme Court explained in one of its first modern punitive damage decisions, "There is . . . a vast difference between arbitrary grants of freedom and arbitrary deprivations of liberty or property. The Due Process Clause has nothing to say about the former, but its whole purpose is to prevent the latter." (*Honda Motor Co. Ltd v. Oberg* (1994) 512 U.S. 415, 434 [drawing analogy between imposition of criminal penalties and punitive damages, and contrasting unreviewability of jury acquittals with necessary judicial review of jury convictions].) Similarly, this Court has previously emphasized that punitive damages are justified only to the extent they serve *public* policies, and that while a defendant has a constitutional right to be free from arbitrary or excessive punishments, a plaintiff has no entitlement to punitive damages at all, which are a "boon" and a "windfall." (*Adams v. Murakami* (1991) 54 Cal. 3d 105, 120.) This public interest in guarding against arbitrary punitive damage awards must weigh powerfully in favor of more expansive, rather than restricted, relief where fundamental due process rights are at stake. Precisely because it is precious, due process is not to be husbanded jealously or sprinkled sparingly, and "[a]lthough the States have some flexibility to determine what *kind* of procedures they will implement" (*Williams, supra*, 127 S.Ct. at p. 1065), they must remain faithful to the injunction to provide full and meaningful protection from the "risk" that juries will punish defendants on unconstitutional bases.

2. In limiting the scope of the relief granted, however, the court of appeal here adopted precisely the opposite approach. Plaintiff put before the jury a myriad of legal theories and wide-ranging factual allegations, and there is no way to know which particular theories and facts the jury found merited imposing punitive damage liability. It would deprive Philip Morris of due process to base the amount of punitive damages upon conduct that the jury in this case rejected as a basis for imposing punitive damages in the first instance. (See *State Farm, supra*, 528 U.S. at p. 421.) Yet, the court of appeal simply brushed aside this fundamental due process problem, concluding that Philip Morris would not be prejudiced because, "if the amount awarded by the jury in the new trial is excessive, an adequate remedy is available by way of a new trial motion and an appeal in which the appellate court must consider de novo the constitutional guideposts." (*Bullock v. Philip Morris, USA, Inc.* (2008) 159 Cal.App.4th 655, 701 (*Bullock*).)

But the fact that a defendant will have the right to spend additional years litigating an unconstitutionally excessive award is not a substitute for providing meaningful protections *before* a grossly excessive award is imposed. Not only is the prospect of appellate relief uncertain, but a punitive damage verdict—even if the award ultimately is overturned or reduced after trial—can damage a company's reputation and business operations. As Justice O'Connor once observed—in an opinion that became a cornerstone of the Supreme Court's seminal decision in *State Farm*, "[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that more than just money at stake. This factor militates in favor of strong procedural safeguards." (*Pac. Mut. Life Ins. Co. v. Haslip* (1991) 499 U.S. 1, 54, O'Connor, J., dissenting (*Haslip*).) The notion that procedural protections at trial are unnecessary or may be relaxed because unconstitutional awards can always be challenged on appeal—akin to a promise that "we'll fix it later"—is an unfortu-

nately common and clearly inadequate response to the need to protect fundamental rights *before* the defendant is burdened with an improper punishment.

Indeed, perhaps the fundamental teaching of *Williams* is the need for States to provide procedural protections guarding against the "risk" of arbitrary, excessive, and unconstitutional punitive damage awards *in advance* of a verdict, precisely because of the difficulty and unfairness defendants and courts confront attempting to divine improper influences after the fact. "How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." (*Williams*, *supra*, 127 S.Ct. at p. 1065.) And the fundamental teaching of this Court's decision in *Adams* is that California's predominate interest in punitive damage awards is getting the result *right*, not simply getting the case over. The limited scope of the relief granted here, however, conflicts with these basic precepts.

3. Given the complexity of the record here, by limiting the new trial to the *amount* of punitive damages, the court of appeal ensured that there will be no meaningful way for the jury to sort out which claims and allegations the original jury accepted as the basis for its punitive damage liability finding. A reviewing court would find this a daunting task, but permitting a second jury in essence to make up its own "implied" findings by the first jury—or worse, allowing the second jury to "assume" that the first jury found in favor of the plaintiff on every theory and "fact" alleged—is especially misguided. Due process precludes even *courts* from indulging in such "inferences." On the contrary, due process requires "[e]xacting" *de novo* of review of punitive damage awards (see, e.g., *State Farm*, *supra*, 538 U.S. at p.418), which requires courts to, among other things, "mak[e] an independent assessment of the reprehensibility of the defendant's conduct" without deference to any "implied" "findings" by the jury. (*Simon v. San Paolo U.S. Holdings, Co.* (2004) 35 Cal.4th 1159, 1172-1173.)

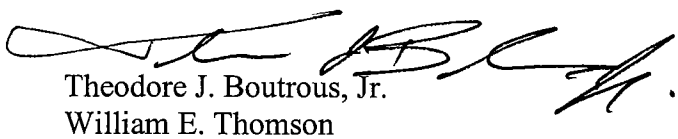
4. The jury here awarded a staggering $28 *billion* in punitive damages—a ratio to the $850,000 compensatory award of almost *33,000-to-1*. The trial court remitted this to a still-enormous $28 *million*—a 33-to-1 ratio that was itself well outside any presumptive constitutional maximum. (See *State Farm*, *supra*, 538 U.S. at p. 425.) The court of appeal concluded that the jury's astronomical verdict did not in and of itself require a new trial, as opposed to a remittitur, based solely on the fact that section 662.5 of the Code of Civil Procedure generally gives trial courts "discretion" to remit excessive verdicts. (See *Bullock v. Philip Morris, USA, Inc.* (2008) 159 Cal.App.4th 655, 688-689) (*Bullock*). But the fact of such a patently excessive and flagrantly unconstitutional verdict cannot simply be brushed aside as though it never happened. Rather, the bare fact that the jury "r[a]n wild" (*Haslip*, *supra*, 499 U.S. at p. 19) in assessing the *amount* of punishment strongly suggests, at a minimum, a significant risk that the jury's decision *whether* to impose punishment was similarly irrational, improper, and unconstitutionally flawed.

5. As the court of appeal below itself pointed out, this Court's decision in *Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 776, which held that Civil Code section 3295, subdivision (d) does not preclude a new trial on punitive damages alone where otherwise proper, has been given conflicting interpretations by various courts of appeal—sometimes even as suggesting that a new trial on punitive damage liability is virtually *never* required. (See *Bullock, supra*, 159 Cal.App.4th at pp. 809-812; see also Philip Morris Petition, pp. 6-11.) Contrary to this interpretation, however, a new trial on both punitive damage liability and the amount would be consistent with deeply rooted principles. (See, e.g., *Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801.)

III. CONCLUSION

This Court should grant review to resolve the conflict over the proper interpretation of *Torres* and clarify the constitutional necessity to "err" on the side of more expansive and meaningful relief for unconstitutionally tainted verdicts.

Very truly yours,



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cc: See attached Proof of Service

CERTIFICATE OF SERVICE

I, **Betty A. Mendelovitz**, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071-3197, in said County and State. On **April 9, 2008,** I served the following document(s):

AMICUS LETTER

on the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

	Michael Joseph Piuze **Attorney at Law** **11755 Wilshire Blvd, #1170** **Los Angeles, CA 90025** **Attorney for Plaintiff and Appellant,** **Jodie Bullock**	**Ronald C. Redcay** **Arnold & Porter** **777 S. Figueroa Street, 44 Fl.** **Los Angeles, CA 90017** **Attorney for Defendant and Appellant** **Philip Morris USA, Inc**
	Marc Goldstein **Attorney at Law** **620 Newport Center Drive, #1100** **Newport Beach, CA 92660** **Attorney for Objector and Appellant** **Michael Piuze**	

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☑ I am employed in the office of **William E. Thomson**, a member of the bar of this court, and that the foregoing document(s) was(were) printed on recycled paper.

☑ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct.

Executed on **April 9, 2008**.

Betty A. Mendelovitz

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