No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has previously addressed issues relating to defendants' due process right to fair notice of the *amount* of punitive damages that may be assessed. This case presents a different and even more fundamental question of procedural due process that this Court has never squarely resolved: the fair notice to which citizens are entitled so they can tailor their conduct to comply with the law and thereby avoid *liability* for punitive damages altogether.

The question presented is:

Whether state law as applied deprives defendants of fair notice if it permits the imposition of punitive damages for conduct that reasonable persons could have concluded was lawful.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The plaintiffs in this case are Benetta Buell-Wilson and Barry Wilson. The defendants are Ford Motor Company and Drew Ford.

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS AND ORDERS BELOW

The court of appeal's opinion (Petitioner's Appendix ("App.") 1a–119a) is reported at 73 Cal. Rptr. 3d 277 (2008).

JURISDICTION

The court of appeal entered its judgment on April 10, 2008. The California Supreme Court granted Ford's timely petition for review on July 9, 2008, and suspended briefing pending this Court's decision in *Philip Morris USA v. Williams*, 129 S. Ct. 1436 (2009). The California Supreme Court dismissed review on April 22, 2009. On June 18, 2009, Circuit Justice Kennedy extended the time for filing a petition for a writ of certiorari to September 4, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1. California's punitive damages statute, Civil Code Section 3294, is reproduced in the Appendix. *See* App. 224a-225a.

STATEMENT OF THE CASE

This Court has held that "[e]lementary notions of fairness enshrined in our constitutional jurispru-

dence dictate that a person receive fair notice" of *both* "the conduct that will subject him to punishment" *and* "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). This Court's recent punitive damages jurisprudence has focused on the second part of the fair notice requirement, recognizing the due process limits on the *amount* of punitive damage awards, ensuring that citizens "can look ahead with some ability to know what the stakes are in choosing one course of action or another." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008).

This petition, by contrast, implicates an even more fundamental issue of due process: the fair notice to which all citizens are entitled under the Due Process Clause so that they can tailor their conduct to comply with the law and avoid punishment altogether. This is purely a question of *procedural* due process. It is a question with historical roots that reach back more than a century, yet is one that arises time and again in punitive damage cases today. As Justice Scalia recently observed in an analogous context, "[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

Massive awards of punitive damages implicate this fundamental due process requirement. This Court's decisions establish that a statute, although not unconstitutionally vague on its face, may nevertheless be unconstitutionally vague *as applied* if it permits punishment for conduct that reasonable people could conclude was lawful. In analogous contexts, this Court has referred to such conduct as "objectively reasonable." Some courts faithfully apply these principles when reviewing as-applied vagueness challenges in the context of punitive damages

awards. Other courts, however, effectively refuse to entertain as-applied vagueness challenges to facially valid punitive damages statutes or permit punitive damages to be imposed for conduct that is objectively reasonable.

This case provides the Court with an ideal opportunity to resolve these conflicts. Although the $55 million punishment here is severe and unprecedented, the California Court of Appeal, following established California precedent, effectively refused to entertain Ford's as-applied vagueness challenge because a 1981 decision had found California's punitive damages statute to be facially valid. The court held, moreover, that punitive damages could be awarded under state law even for conduct that reasonable people could conclude was lawful. The result is that Ford and other product manufacturers in California (and in other states following the same misguided approach) are routinely exposed to massive punitive damage awards without regard to whether they had notice sufficient to allow them to comply with the law and avoid punishment.

1. In January 2002, respondent Benetta Buell-Wilson was driving her four-door 1997 Ford Explorer at freeway speed. App. 7a. She swerved suddenly to avoid a metal object that flew off a motor home in front of her. *Id*. Her vehicle rolled over 4½ times and came to rest upside down. *Id*. She suffered a severe spinal cord injury that rendered her paraplegic. *Id*. at 8a. She and her husband commenced a civil action, alleging that their Explorer was "dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity" and that the roof was "inadequately supported and defectively weak." *Id*. at 11a.

Respondents argued that punitive damages were justified because Ford supposedly knew that the Ex-

plorer's design posed unreasonable risks. Ford, however, showed that the Explorer's roof satisfied Federal Motor Vehicle Safety Standard 216, 49 C.F.R. § 571.216, the standard governing roof strength. RT5145, 5179. Ford also introduced scientific studies establishing that increasing roof strength does not result in a reduction of injuries, because rollover injuries typically occur when the vehicle occupant is thrown into the roof prior to any "crush" occurring. RT5151-5168. Further, Ford showed that the rollover stability standards proposed by Respondents' experts had been considered and rejected by the National Highway Traffic Safety Administration ("NHTSA"), the federal agency responsible for regulating motor vehicle safety. RT3261-3262. Finally, Ford offered to show that the Explorer was among the safest SUVs with respect to rollover accidents, but this evidence was excluded by the trial court. AA26-37, 278-282.

Over Ford's due process and state law objections, RT8128-8136, 8433-8438, 8451-8456, 8461-8462, 8475-8488, 8496-8500, the trial court gave California's standard jury instructions on punitive damages based on Cal. Civ. Code § 3294. App. 80a-81a. California Civil Code section 3294 provides, and the jury was instructed, that punitive damages may be imposed on a defendant who is "guilty of oppression, fraud, or malice." "Malice" — the provision under which Respondents sought punitive damages — was defined for the jury as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." RT8576. The court rejected Ford's proposed additional instruction that would have told the jury that punitive damages could not be imposed to punish objectively reasonable conduct: "You may not award punitive damages if reasonable people could disagree

about whether Ford's conduct was correct or lawful." *See* Proposed Special Jury Instr. No. 15.

Before this trial, eleven Ford Explorer cases involving similar stability claims had gone to judgment, and in all eleven cases judgment was entered in favor of Ford. AA1154-1235. Several of these cases involved alleged roof defects as well. But in this case, the jury found the Explorer had stability and roof design defects, that Ford failed to warn about the roof, and that these were substantial factors in causing Mrs. Buell-Wilson's injuries. App. 79a-83a. The jury awarded $105 million for non-economic loss — five times more than requested — and it awarded Mr. Wilson $13 million for loss of consortium. *Id*. at 4a, 33a-34a, 41a-42a. The jury also found by a 9-3 vote that Ford acted with "malice" warranting punitive damages, and it imposed $246 million in punitive damages — twice the amount Respondents sought. *Id*.

Ford moved for JNOV as to punitive damages on the ground that California's punitive damages statute would be unconstitutionally vague as applied if it permitted an award of punitive damages against Ford in a context where Ford's conduct was, *ex ante*, objectively reasonable. JNOV Mot. at 19 ("[T]his is a case where different people acting in good faith could look at the same underlying facts available to Ford at relevant time periods and reach different conclusions about whether those facts suggested Ford's conduct was unreasonable or its product defective. If section 3294 permits a jury to punish Ford under these facts, then its application is unconstitutional . . . ."). The trial court rejected the vagueness challenge, App. 194a-195a, but held the damages excessive. It reduced Mrs. Buell-Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million, and the punitive damages to $75 million. App. 197a.

2. On appeal, Ford again argued that if California law permitted Ford to be punished in this case, then the California standard for awarding punitive damages was unconstitutionally vague as applied. Ford Br. at 56 ("If California law would allow punishment on this record, then the law is unconstitutionally vague as applied."). The court of appeal rejected this argument based on its prior holding in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981). The court's complete constitutional analysis was as follows:

> Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is unavailing.
>
> Ford made just this argument over 25 years ago in *Grimshaw*. The Court of Appeal rejected it, concluding that "punitive damages are recoverable in a nondeliberate or unintentional tort where the defendant's conduct constitutes a conscious disregard of the probability of injury to others."

App. 61a-62a (citation omitted).

In upholding liability for punitive damages, the court of appeal specifically rejected Ford's argument that California state law did not permit an award of punitive damages based on conduct that was objectively reasonable, *i.e.*, conduct that reasonable persons could believe was lawful. App. 56a. The court also held that "compliance with industry standards or custom was irrelevant . . . to the issue of punitive damages." App. 28a. Nor did the court give any significant weight to the judgments made by NHTSA,

reasoning that "'[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products.'" *Id*. at 57a (quoting *Grimshaw*, 119 Cal. App. 3d at 810).

Finally, although the court found "compelling evidence" that the jury was acting out of "passion or prejudice" and was not a "fair and neutral trier of fact" in assessing damages, App. 42a, it held that these defects could be cured by remitting the compensatory damages to $27.6 million and the punitive damages to $55 million — still the largest punitive damages award affirmed on appeal in California history. App. 5a-6a.

3. Ford sought review in the California Supreme Court, again raising its as-applied vagueness challenge. Pet. for Review at 4 ("[T]he court [of appeal] held that juries are authorized to deem a manufacturer's design decisions malicious, and impose severe punishment, even where undisputed, objective indicators — such as ongoing genuine debate in the engineering community, accident data showing the product is among the safest in its class, and governmental regulatory decisions confirming the manufacturer's judgment — affirmatively refute malice as a matter of law. This ruling contradicts . . . due process."); *id.* at 32 n.5 ("Review is also needed because the Court of Appeal's interpretation of section 3294 renders it unconstitutionally vague as applied in this case . . . ."). The court denied review, and Ford filed a petition for a writ of certiorari in this Court. Ford asked this Court to review the court of appeal's rejection of Ford's as-applied vagueness challenge, as well as its rulings that permitted punitive damages to be assessed against Ford for harm to non-parties. Cert. Pet. at 9. The Court granted Ford's petition, vacated the judgment of the court of appeal, and remanded for further consideration in light of *Philip Morris*

USA v. Williams, 549 U.S. 346 (2007). *See* 550 U.S. 931 (2007) (GVR order).

On remand, Ford once again raised its as-applied vagueness challenge in the court of appeal. Ford Br. at 33. While the court modified its earlier opinion to reject Ford's argument that it was subject to potential punishment for harm to non-parties, it otherwise reinstated its prior opinion, including its rejection of the as-applied vagueness challenge. App. 61a-62a.

4. Ford petitioned for review in the California Supreme Court, presenting its vagueness challenge again. Pet. for Review at 35. The California Supreme Court initially granted review and deferred a decision pending this Court's ruling in *Philip Morris v. Williams* (*Williams II*). When this Court dismissed the writ in *Williams II* as improvidently granted, 129 S. Ct. 1436 (2009), the California Supreme Court denied review. App. 120a.

REASONS FOR GRANTING THE WRIT

This Court has repeatedly warned of the dangers that arise when States permit civil juries to punish defendants based on vague standards, and has insisted on strict procedural safeguards to protect a defendant's due process right to fair notice. In *Williams*, the Court explained that "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice'" and "may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but a decisionmaker's caprice." 549 U.S. at 352 (citation omitted).

This Court has never suggested that these concerns apply only when the issue is the amount of punitive damages and disappear where the issue is li-

ability for punitive damages. On the contrary, the Court has expressly recognized that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice" of *both* the "conduct that will subject him to punishment [and] . . . the severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. Nevertheless, the California Court of Appeal, consistent with a long line of California Supreme Court rulings, effectively refused to consider Ford's argument that fair notice was lacking in this case. Under the California courts' approach, *any* award of punitive damages under California law — no matter how objectively reasonable the underlying conduct of the defendant may be in a particular case — is impervious to an as-applied vagueness challenge because the statute itself is not unconstitutionally vague on its face.

As shown below, California's approach, while misguided, is not unique. This Court should grant review, confirm that the facial validity of a punitive damages statute does not preclude subsequent as-applied challenges, and establish that such as-applied challenges should be sustained if the defendant's conduct in the particular case was objectively reasonable as a matter of law.

THE COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS AND CONFUSION OVER AS-APPLIED VAGUENESS CHALLENGES TO PUNITIVE DAMAGES STATUTES.

A. The California Courts, Like Courts Of Other States — But Contrary To Decisions Of This Court And Others — Have Effectively Precluded As-Applied Vagueness Challenges To Punitive Damages Statutes.

A fundamental requirement of due process is the opportunity to know in advance the conduct that will subject a person to punishment so that the person can tailor his or her conduct to comply with the law. Where a statute fails to provide such fair notice with respect to the defendant's conduct, it is unconstitutional as applied even if it can constitutionally be applied to the clearly egregious conduct of other defendants. But California courts will not even entertain a challenge on this basis. The California approach — which rejects all such challenges simply by pointing to the facial validity of the statute — conflicts not only with *Gore* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), but also with the way this Court resolves as-applied vagueness challenges to statutes generally.

1. The California Court of Appeal resolved Ford's as-applied vagueness challenge by relying solely on its prior decision in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981), which found that the California punitive damages statute was not unconstitutionally vague on its face. But Ford did not challenge the facial validity of that statute in *this* case. Ford argued instead that the statute is unconstitutional as applied in *this* case because Ford's

conduct in *this* case was objectively reasonable as a matter of law. The court of appeal never addressed that argument and, instead, dismissed it as if it were a facial challenge. *See* App. 61a-62a ("Ford made this same argument over 25 years ago in [*Grimshaw*]," and "[t]he Court of Appeal rejected it"); *Grimshaw*, 119 Cal. App. 3d at 811 (rejecting contention that Ford "did not have 'fair warning' that its conduct would render it liable for punitive damages," because of "the long line of decisions in this state . . . holding that punitive damages are recoverable . . . where the defendant's conduct constitutes a conscious disregard of the probability of injury to others").

Grimshaw involved a different vehicle and completely different conduct — and the decision even pre-dated the current version of California's punitive damages statute, App. 57a — yet the court of appeal effectively held that *Grimshaw*'s rejection of a constitutional challenge to a punitive damages award in a different case 28 years ago forever barred future challenges. Indeed, in rejecting Ford's argument, the court deemed even undisputed facts — including the fact that Ford's design complied with federal design standards and industry custom, and the fact that Ford had won the eleven prior trials alleging the same defects in the Explorer — to be utterly irrelevant. The court flatly refused to analyze whether *in this particular case* Ford had notice sufficient to allow it to tailor its conduct to comply with the law.

This misguided approach is consistent with the way the California Supreme Court has instructed the lower courts to resolve vagueness challenges to punitive damage awards under Cal. Civ. Code § 3294. In *Bertero v. National General Corp.*, 13 Cal. 3d 43, 66 n.13 (1974), the court rejected a challenge that § 3294 was unconstitutionally vague by simply observing that an existing body of law "specifically de-

fines when exemplary damages may be awarded" and noting that "on several occasions section 3294 has been held constitutional." Likewise, in *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal. 3d 809, 819 (1979), the court dismissed a vagueness challenge on the ground that the argument that § 3294 was unconstitutional "has been frequently rejected." And in *Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2 (1982), the court rejected yet another vagueness challenge to § 3294 by asserting that "it is not necessary to devote extensive discussion to the question" because "the courts have frequently and uniformly upheld that provision's validity." These decisions effectively preclude California courts from considering as-applied vagueness challenges to California's punitive damages statute.

Other state supreme courts have adopted the same misguided approach and resolve vagueness challenges to punitive damages awards by looking only to the language of the punitive damages statute without regard to whether the defendant in the particular case before it had the fair notice due process requires. *See, e.g.*, *Palmer v. A.H. Robins*, 684 P.2d 187, 214-15 (Colo. 1984); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 46 (Alaska 1979), *overruled on other grounds* by *Dura Corp. v. Harned*, 703 P.2d 396 (Alaska 1985). The North Dakota Supreme Court's analysis in *Stoner v. Nash Finch, Inc.*, is typical of this approach. In that case, the court rejected a vagueness challenge based purely on the text of the statutory terms, without regard to the facts of the case before it:

> We believe that the statutory terms 'oppression, fraud, or malice' have well-established meanings, are sufficiently clear to persons of ordinary intelligence to afford a practical guide to behavior

> and are capable of application in an even-handed manner.

446 N.W.2d 747, 756 (N.D. 1989) (citing *Grimshaw*).

To be sure, the phrase "oppression, fraud or malice" is not unconstitutionally vague on its face, because there is a "hard core" of obviously unlawful conduct to which it clearly applies. *See, e.g.*, *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 & n.7 (1982) (outside the First Amendment context, a facial challenge should be sustained only if the language "has no core" and the law is for this reason "impermissibly vague in all of its applications") (emphasis omitted); *Broadrick v. Oklahoma,* 413 U.S. 601, 608 (1973) (any imprecision in the language of a statute "has little relevance" where defendant's conduct "falls squarely within the 'hard core' of the statute's proscriptions"). For example, in *Angie M. v. Superior Court*, 37 Cal. App. 4th 1217, 1227–29 (1995), the court held that the defendant had fair notice that an intentional tort such as sexual abuse and battery is punishable. But a decision that a statute is not unconstitutionally vague on its face should not forever bar as-applied challenges in other, substantially different contexts where reasonable people could conclude that the defendant's conduct was lawful. *See, e.g.*, *Broadrick,* 413 U.S. at 609 (where the conduct of the defendant is "obviously covered" by a statute, "the statement of Mr. Justice Holmes is particularly appropriate: 'if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns'" (*quoting United States v. Wurzbach,* 280 U.S. 396, 399 (1930))).

2. The approach taken by the California courts, and the other state supreme courts that have followed suit, is erroneous and conflicts with decisions from this and other courts.

"'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of *the conduct that will subject him to punishment*.'" *State Farm*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574) (emphasis added). This Court has repeatedly "insist[ed] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Punishment therefore may not be based on a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997).[1]

This Court has consistently applied due process vagueness principles to laws imposing civil liability where the liability is punitive in nature. *See, e.g.*, *Hoffman Estates*, 455 U.S. at 499 (employing strict vagueness scrutiny of statute that imposed quasi-

[1] At the time of the Founding, punitive damages were generally imposed in cases where the defendant committed an intentional tort or engaged in conduct that was clearly wrongful. *See, e.g.*, *Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769) (sexual assault); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766) (Colonel ordered a common man be stripped and receive 20 lashes "merely out of spite" and revenge against another army official). In the modern era, however, punitive damages are permitted on claims that do not require intentional conduct and have been imposed for conduct that is *not* so clearly wrongful that a defendant would necessarily be on notice that engaging in the conduct could subject him to punishment. In fact, as this case illustrates, they are often imposed in cases where reasonable people could conclude that the conduct in question was lawful and appropriate. If a defendant is subject to punishment that reasonable people could conclude was lawful, the defendant cannot know in advance how to conform his conduct to the law and avoid punishment.

criminal penalties); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) ("[T]his state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"); *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241 (1932) (holding statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment"); *A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239 (1925) (holding statute unconstitutionally vague in civil case); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) ($6,300 civil penalty violated due process).

In considering as-applied vagueness challenges, this Court has repeatedly held that they must be resolved not simply by pointing to the facial validity of a statute but rather by examining whether the defendant in the particular case had the fair notice due process requires. As the Court explained in *Maynard v. Cartwright*, "[v]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis." 486 U.S. 356, 361 (1988); *Hoffman Estates*, 455 U.S. at 494–95 (same); *United States v. Powell*, 423 U.S. 87, 92 (1975) (same); *United States v. Mazurie*, 419 U.S. 544, 553 (1975) ("Given the nature of the [Native American tribe]'s location and surrounding population, the statute was sufficient to advise the [defendants] that their bar was not excepted from tribal regulation by virtue of being located in a non-Indian community.").

The California courts' approach directly conflicts with these decisions. It is inconsistent with *State Farm* and *Gore*, which require an assessment of whether the defendant had fair notice of "the conduct that will subject him to punishment," and it cannot be reconciled with this Court's vagueness jurisprudence, which similarly commands a focus on "the

facts of the case at hand," *Maynard*, 486 U.S. at 361. Under the court of appeal's approach, punitive damage awards in California are forever insulated from as-applied vagueness challenges regardless of the conduct at issue. The consequence is that in jurisdictions that follow the California approach, defendants simply cannot have an as-applied vagueness challenge to a punitive damages statute considered.

The California courts' approach also conflicts with the approach followed by many other courts that *do* examine the particulars of the defendant's conduct to determine whether application of the statute in a particular circumstance is consistent with due process notice requirements. *See, e.g.*, *Arriaga v. Mukasey*, 521 F.3d 219, 224–29 (2d Cir. 2008) (analyzing vagueness challenge by evaluating the defendant's conduct in light of objective standards); *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd.*, 251 F.3d 662, 667–68 (7th Cir. 2001) (same); *Packer v. Bd. of Educ.*, 717 A.2d 117, 128 (Conn. 1998) ("The general rule is that the constitutionality of a statutory provision being attacked as void for vagueness is determined by the statute's applicability to the particular facts at issue.").

In *State v. Scruggs*, 905 A.2d 24 (Conn. 2006), for example, the defendant was prosecuted for placing her son in a situation "likely to injure his mental health." The Connecticut Supreme Court had previously rejected a vagueness challenge to this statute in a case where defendant "forced three young boys to expose themselves and to urinate into a cup," obviously improper conduct which courts had previously found violated the statute. *Scruggs*, 905 A.2d at 33, *discussing State v. Payne*, 695 A.2d 525 (Conn. 1997). But *Scruggs* was different; it involved a defendant who allegedly created a risk of mental injury to her child by maintaining an unhealthy living environment. The court recognized that its prior decision

did not foreclose all vagueness challenges, and explained that its task was to determine if the statutory language provided the defendant "with adequate notice of the line dividing lawful conduct from unlawful conduct *in this context*." *Id*. (emphasis added).

The court held that the defendant did not have adequate notice. The court noted that the state's child services department had investigated the defendant and closed its file, demonstrating that "the only experts in child safety who had knowledge of the conditions in the defendant's home . . . had concluded that they were *not* so deplorable as to pose an immediate threat to [the child's] mental health." *Id*. at 37. It observed that "there is an acceptable range of risk" and that "[n]ot all conduct that poses a risk to the mental or physical health of a child is unlawful." *Id*. (emphasis omitted). Thus, while it may be common knowledge that "a clean and orderly home is preferable to a dirty and cluttered home" — just as it may be common knowledge that "drinking milk is healthier than a constant diet of soft drinks," "large cars are safer than small cars," and "playing computer games is safer than riding a bicycle, and so on" — all of these things "involve virtually infinite gradations of conduct, making it extremely difficult, if not impossible, for an ordinary person to know where the line between potentially harmful but lawful conduct and unlawful conduct lies." *Id*. at 36-37.

If the California Court of Appeal had conducted this type of analysis here, it would have considered the same type of facts and it would have recognized the same type of difficulty in drawing the line between lawful and unlawful conduct. Here, the federal government has been investigating SUV safety for decades; it has never found the Explorer or any SUV to be defective because of the risk of rollover; it has rejected the methods proposed by Respondents' experts in this case for evaluating rollover safety;

and it established specific roof standards with which the Explorer complied.[2]

As the *Scruggs* court recognized, not all risks are unacceptable or unlawful. Cars may be safer than SUVs with respect to rollovers, but SUVs offer advantages that cars do not. Moreover, SUVs provide greater protection than cars in most *other* types of collisions. Thus, it is difficult if not impossible to know when the risk of rollover, when balanced against the benefits of SUVs, becomes too great to be acceptable. David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37 (1982) ("The very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree"); *accord, e.g.*, *Iannacchino v. Ford Motor Co.*, 888 N.E. 2d 879, 888 (Mass. 2008) ("the term 'defect' is conclusory and can be subjective as well").

But the court of appeal considered none of these things in its constitutional analysis. Instead, following the approach mandated by California precedent and utilized by numerous courts in other states, it rejected Ford's vagueness challenge simply because other courts had rejected vagueness challenges in other cases involving different facts. The court ignored altogether the objective factors present *in this case* that would permit reasonable persons to conclude that Ford's conduct was lawful. It simply cannot be the case that all of these factors are irrelevant to an as-applied vagueness challenge, as the Califor-

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[2] Ford is not arguing here for preempting State tort law with respect to liability. The point is simply that federal law allowing certain conduct is highly relevant to any inquiry seeking to determine whether a defendant had fair notice that its conduct would subject it to punishment.

nia court held. Thus, the facts of this case make it an excellent vehicle for this Court to dispel the confusion in the lower courts.

B. The Court Should Clarify The Correct Standard For Resolving As-Applied Vagueness Challenges To Punitive Damages Statutes.

This Court should grant review and clarify the legal standard that courts should apply when deciding as-applied vagueness challenges to punitive damages statutes. In so doing, the Court need not write on a blank slate or develop a new set of guideposts. Rather, the Court can simply apply the same test the Court has historically applied in analogous contexts — whether the defendant's conduct was objectively reasonable.

1. This too is a question that has split the lower courts. In evaluating as-applied vagueness challenges, some courts ask whether reasonable persons could conclude the conduct at issue was unlawful; if so, the challenge fails, even if reasonable persons could also conclude the conduct was lawful. *See, e.g.*, *Barber v. Jefferson County Racing Ass'n*, 960 So. 2d 599, 616 (Ala. 2007); *State v. Thirteenth Dist. Judicial Court*, 208 P.3d 408, 414 (Mont. 2009). Other courts, in contrast, hold that as-applied vagueness challenges fail only where reasonable persons could *not* conclude the conduct was lawful. *See, e.g.*, *Canton Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1029-30 (9th Cir. 2009); *Haggblom v. City of Dillingham*, 191 P.3d 991 (Alaska 2008).

This conflict is illustrated by contrasting the court of appeal's decision in this case with the decisions of the Fifth Circuit in *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978), and *S & H Riggers & Erectors v. OSHRC*, 659 F.2d 1273 (5th Cir. 1981). *B & B Insulation* involved a $90 fine im-

posed on an employer who failed to require the use of safety belts or lifelines by employees engaged in insulating steam pipes at a lumber company. The $90 fine was not based on any statute or regulation that specifically required use of safety belts or lifelines under these circumstances, but on a general regulation that provided that the employer was responsible for the "wearing of appropriate personal protective equipment in all occupations where there is exposure to hazardous conditions." 583 F.2d at 1368. The Fifth Circuit agreed with the employer that the regulation was "unenforceably vague for failure to provide employers with reasonable notice of what is required." *Id*. at 1367.

The court noted that "this case itself was decided with three different written opinions" and that "[i]f the regulation is such that the commissioners themselves cannot agree upon what it demands, it may seem to require different things to different employers." 583 F.2d at 1369. To avoid this due process problem, the Fifth Circuit interpreted the regulation to require "only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances." *Id*. at 1367. The Fifth Circuit vacated the $90 fine because there was no evidence of "customary procedures in the industry." *Id*. at 1372.

S & H Riggers involved the same general OSHA regulation. The court reaffirmed its decision in *B & B Insulation*, observing that the generality of the regulation "mandates that it be applied only in such a manner that an employer may readily determine its requirements by some objective external referent." 659 F.2d at 1280. It was not sufficient, the court determined, that a majority of the Occupational Safety and Health Review Commission were of the opinion that certain safety equipment should be

used if that equipment was not "customarily employed in an industry." *Id.* at 1281. Due process "requires that employers be given more advance notice than this of the requirements of any regulation imposing civil penalties and substantial compliance costs." *Id*. The Fifth Circuit recognized an exception that would permit the government to impose penalties even for conduct that was consistent with industry custom where "the employer has actual knowledge of a hazard requiring the use of personal protective equipment." *Id*. But, the court observed, this standard was not met where the defendant "could reasonably conclude that additional fall protection was not necessary." *Id*. at 1283.

The conflict between these Fifth Circuit opinions and the court of appeal's decision in this case is stark. All three cases involved a general prohibition that did not specifically prohibit the conduct at issue. The Fifth Circuit held that under these circumstances due process ordinarily requires proof of a departure from industry custom and practice; in this case, the court of appeal held that industry custom and practice were irrelevant and that admission of such evidence would be reversible error. The Fifth Circuit held that even a $90 fine could not be imposed for conduct that reasonable people could conclude was lawful; the court of appeal in this case held that a $55 million punitive damage award could be imposed for such conduct.

2. The Fifth Circuit's approach is correct. This Court has long recognized that if reasonable people can disagree about whether particular conduct is prohibited by a statute, the fair notice required by due process is absent. *See, e.g*., *Colautti v. Franklin*, 439 U.S. 379, 401 (1979) (punishment is improper where "experts can — and do — disagree"); *Connally v. Gen. Constr. Co*., 269 U.S. 385, 395 (1926) (penalties violate due process where they depend upon the

"probably varying impressions of juries"); *Danaher*, 238 U.S. at 491 (a $63,000 penalty violated due process where "the company was well justified in regarding the regulation as reasonable and in acting on that belief").

Due process requires an objective standard for imposing punishment; otherwise, even persons and companies with the best of intentions will simply not know how to conduct their affairs so as to avoid a punitive sanction. For example, in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 68-72 (2007), a case involving the Fair Credit Reporting Act, 15 U.S.C. § 1681m(a), the Court noted that, historically, whether conduct could be deemed "reckless" and therefore punishable was based on objective standards.

The Court explained that "[i]t is this high risk of harm, *objectively assessed*, that is the essence of recklessness at common law." *Id*. at 69 (emphasis added) (citing W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 34, p. 213 (5th ed. 1984)). Although the Court "disagree[d]" with Safeco's analysis of its legal obligations, the Court held that Safeco could not be deemed to have acted "willfully" or with "reckless disregard" because Safeco's analysis, "albeit erroneous, was not *objectively unreasonable*." *Id*. at 68-72 (emphasis added). "Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id*. at 70 n.20. *See also Screws v. United States*, 325 U.S. 91, 97, 103 (1945) (interpreting "willful" to include an objective component in order to avoid constitutional problem); *Aronov v. Napolitano*, 562 F.3d 84, 94 (1st Cir. 2009) (en banc) (defendant's actions were "substantially justified"

"even if a court ultimately determines the [defendant]'s reading of the law was not correct," because the defendant's interpretation was objectively reasonable).

While *Safeco* involved an issue of statutory interpretation and not a due process challenge, the Court's historical understanding bears directly on the due process inquiry. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause. As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis.") Moreover, this Court has already recognized that the objective reasonableness of the defendant's conduct provides the touchstone for due process vagueness analysis. *Lanier*, 520 U.S. at 270-71.

In *Lanier*, the Court held that the due process vagueness standard was functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not "clearly established." *Id*. at 270-71. As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the *same* protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id*. (emphasis added).

This Court's opinions establish beyond doubt that public officials are entitled to qualified immunity as long as their conduct is "objectively reasonable" — *i.e*., as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity available

if officers act in "objectively reasonable manner"); *accord Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("The relevant question in this case . . . is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful."). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341. For example, the Court recently held that school officials were immune from liability for an illegal strip search because other courts had reasonably concluded such searches were lawful. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) ("We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case.").

3. Thus, numerous decisions of this Court over the last century, in several different contexts, in civil as well as criminal cases, all establish the fundamental principle that the "fair notice" required to accord due process prohibits punishment for conduct that reasonable people could conclude was lawful — conduct which, in the qualified immunity cases, the Court has called "objectively reasonable."[3] Permit-

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[3] The jury's finding that Ford's product was defective, and that Ford's conduct in selling that product was "malicious," does not establish that Ford's conduct was "objectively unreasonable," as this Court has defined that term. Conduct is objectively reasonable if a reasonable person could conclude that that conduct was lawful, even if other reasonable persons could reach the opposite conclusion, as the jury in this case did. *See*, *e.g.*, *Safeco*, 127 S. Ct. at 2216 n.20; *Redding*, 129 S. Ct. at 2644. The jury in this case was not asked to determine whether reasonable people could conclude that the Explorer was not defective or that Ford's conduct was proper, and evidence relevant to that inquiry was excluded by the trial court. Thus, its findings of "defect" and "malice" are not tantamount to findings that Ford's conduct was objectively unreasonable.

ting punitive damages to be awarded simply because reasonable people can conclude that the conduct is unlawful, without taking into account the reasonableness of an opposing view, exposes individuals and companies to arbitrary punitive damage awards based upon the potentially idiosyncratic whims of individual juries. For example, to say, as the court of appeal did here, that the jury could find malice because "there is substantial evidence that Ford's decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations," App. 54a, is to place no limit whatsoever on the jury's discretion to impose punishment. *All* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs, and utility.

If the court of appeal's approach is correct, all product manufacturers are subject to punishment for designing and marketing products that reasonable people, expert engineers, and federal regulators could conclude — and in fact have concluded — are reasonably safe and not defective. Under a regime that permits punishment under these circumstances, the only way that product manufacturers could tailor their conduct to avoid punishment would be to cease production of products that might be subject to criticism by other reasonable people with differing views. This, in effect, would mean that manufacturers can avoid punishment only if they stop selling any products with any risk of injury, because litigation ex-

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[Footnote continued from previous page]

To the contrary, the fact that the jury was divided as to *all twenty-three* liability and damages questions (counting subparts) it answered on the verdict form, including six separate votes of 9-3, the minimum authorized for a civil verdict under California law, provides additional evidence that Ford's conduct was objectively reasonable. RT8402-8410.

perts — like Respondents' expert in this case, who advocates standards rejected by the federal government — can be retained to criticize almost any aspect of a product that results in injury. The result of the standard applied by the court of appeal here would be that manufacturers "[e]ngaged in . . . lawful business[es] which Congress had in no way sought to proscribe . . . could not [sell any product with] the confidence that it would not be later found unreasonable" and subject to punishment. *Powell*, 423 U.S. at 93.

The California court effectively determined that the objective basis for Ford's conduct was irrelevant to punitive damages, deprived Ford of the opportunity to defend its conduct against civil punishment by demonstrating the objective factors supporting its decision, and left Ford unable to determine what is necessary to conform its conduct to whatever a future jury might retroactively determine it should have done. This is not due process.

Review by this Court is necessary to ensure that all responsible citizens have fair notice — that is, notice sufficient to enable them to tailor their conduct to the law and avoid punishment. The test for fair notice should be the same test that this Court applied in *Safeco* and that courts throughout the country have been applying for decades when resolving claims for official immunity: whether reasonable people could conclude the defendant's conduct was lawful.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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