

No.

IN THE
Supreme Court of the United States

FARMERS INSURANCE COMPANY OF OREGON, ET AL.,
Petitioners,

v.

MARK STRAWN, on his own behalf and as
representative of a class of similarly situated
persons,
Respondent.

**On Petition for a Writ of Certiorari to
The Supreme Court of Oregon**

PETITION FOR A WRIT OF CERTIORARI

THOMAS H. DUPREE, JR.
LAWRENCE VANDYKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

DAVID L. YOHAI
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

THEODORE J. BOUTROUS, JR.
Counsel of Record
THEANE EVANGELIS KAPUR
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioners

QUESTIONS PRESENTED

The Oregon Supreme Court eliminated a key element of liability—reliance—to enable class adjudication of Plaintiffs’ claims that Farmers fraudulently misrepresented aspects of its auto insurance policies in the text of the policies themselves. It also stripped Farmers of its right to defend itself by proving that individual class members did not rely on, or in some cases even read, the challenged representations. As a result, individuals who could not have recovered had they sued individually can now recover because of the class action device. And despite the lack of any evidence of reliance—and the fact that Farmers’ policy was based on a reasonable interpretation of Oregon law that was subsequently adopted by the state legislature—the Oregon Supreme Court reinstated an unconstitutionally excessive \$8 million punitive damages award. To do so, it found that Farmers waived its constitutional challenge to the punitive damages award based on a novel, state-law procedural bar that the court itself acknowledged had never before been applied.

The questions presented are:

I. Whether the Due Process Clause prohibits a state court from relieving class members of their burden to prove a longstanding and fundamental element of liability—here, individual reliance in a fraud claim—thereby depriving the defendant of its right to assert an individualized defense to a class action.

II. Whether this Court’s rule—that only a “firmly established and regularly followed” state-law procedural bar can foreclose consideration of a federal constitutional claim—prohibits a state court

from invoking a concededly unprecedented procedural rule to avoid consideration of a due process challenge to a punitive damages award.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

In addition to the parties named in the caption, petitioners include Mid-Century Insurance Company and Truck Insurance Exchange. Respondent Mark Strawn is a class representative and, as such, purports to represent a class consisting of “all persons who were entitled to PIP benefits from Farmers under Farmers’s standard terms for PIP coverage, whose benefit payments were reduced by Farmers on the basis of codes RC40 or B2 during the period January 26, 1998 to July 21, 1999, and whose claims are not barred.” App. 18a.

Pursuant to this Court’s Rule 29.6, undersigned counsel state that Petitioner Mid-Century Insurance Company is owned by Farmers Insurance Exchange (80%), Fire Insurance Exchange (12.5%), and Petitioner Truck Insurance Exchange (7.5%). Farmers Insurance Exchange, Fire Insurance Exchange, and Petitioner Truck Insurance Exchange are all owned by their policyholders. Farmers Group, Inc., either directly or through wholly owned subsidiaries, provides certain non-claims administrative services to the Exchanges but has no ownership interest in them. Farmers Group, Inc. is a wholly owned indirect subsidiary of Zurich Financial Services Ltd., which is publicly traded on the Swiss Stock Exchange.

Petitioner Farmers Insurance Company of Oregon is owned by Farmers Insurance Exchange (80%) and Petitioner Truck Insurance Exchange (20%).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision on reconsideration of the Oregon Supreme Court (App. 1a–9a) is reported at 256 P.3d 100. That court’s earlier decision (App. 10a–69a) is reported at 258 P.3d 1199. The 2009 decision of the Oregon Court of Appeals (App. 70a–115a) is reported at 209 P.3d 357. The trial court’s February 27, 2006 order (App. 116a–117a) and its March 8, 2006 findings of fact and conclusions of law (App. 118a–138a) are unreported.

JURISDICTION

The decision on reconsideration of the Oregon Supreme Court was entered on July 8, 2011. This Court’s jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”

The relevant portions of the Oregon Rules of Civil Procedure and Oregon Revised Statutes are reproduced at App. 234a–243a.

STATEMENT

The Oregon Supreme Court’s decision is yet another attempt by that court to thwart federal due process protections. This case involves a class action alleging that Farmers somehow committed fraud by evaluating the “reasonableness” of medical charges submitted for payment under auto insurance policies

by comparing those submitted charges to a database of historical charges for the same medical procedure in the same area. Following a trial tainted by repeated violations of Farmers' constitutional rights, the trial court entered judgment against Farmers for \$898,323.80 in compensatory damages, and \$8 million in punitive damages.¹

The Oregon Supreme Court upheld that award only by flouting due process in two important respects. First, it is a fundamental tenet of due process that a defendant will not be held liable without an opportunity to raise "every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). Because class actions are a departure from traditional procedures, they comport with due process only if they adhere to the substantive law and respect a defendant's right to defend itself. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550, 2561 (2011).

Here, the Oregon Supreme Court relieved Plaintiffs of their burden of proving reliance, thereby eviscerating Farmers' ability to defend itself by contesting that important element of liability. The court justified its ruling by concluding that, for this particular type of insurance, reliance need not be proven individually as it is "inherent in the purchase" of such insurance, ignoring the fact that not all class members even "purchase[d]" the insurance. App. 43a. The court's decision is directly contrary to this Court's decision last Term in *Wal-*

¹ The total damages award could be in excess of \$20 million after potential post-judgment interest and attorney's fees are added.

Mart, 131 S. Ct. 2541, and fundamental principles of due process. It also conflicts with numerous decisions of other courts that recognize the need to ensure that the parties' rights are not altered as a result of class treatment.

Second, the Oregon Supreme Court also violated due process by inventing yet another procedural trap for defendants who challenge unconstitutional punitive damages awards in Oregon courts. Like the novel and patently unreasonable procedural bar cited by the Oregon Supreme Court to evade application of this Court's decision in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), see *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (Or. 2008), the procedural rule here is nothing more than a pretext for the court's refusal to protect Farmers' due process rights. The \$8 million punitive damages award reinstated by the Oregon Supreme Court—an award which is almost nine times the compensatory damages—is “grossly excessive” because Farmers' conduct was not reprehensible; the alleged harm was purely economic and involved small amounts of money; many class members suffered no harm whatsoever; and Farmers' policy was based on a reasonable interpretation of Oregon law that was subsequently endorsed by the Oregon Legislature. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

As a result, the Oregon Supreme Court's decision, which contradicts numerous decisions of this Court and others, warrants review.

1. Oregon law requires insurers to include personal injury protection (“PIP”) coverage as an additional component of auto liability policies. Or. Rev. Stat. § 742.520 (1998). PIP benefits must cover “[a]ll reasonable and necessary expenses of medical,

hospital, dental, surgical, ambulance and prosthetic services incurred within one year after the date of the person's injury," up to a statutory limit. *Id.* § 742.524(1)(a) (1998). These benefits extend to insureds, their families, and passengers or pedestrians involved in an accident with the insured vehicle. *Id.* § 742.520(1).

Consistent with these statutory requirements, Farmers' Oregon policies provided PIP benefits for "reasonable and necessary" medical expenses resulting from auto accidents. Before 1998, Farmers evaluated the reasonableness of PIP medical charges in an essentially *ad hoc* manner. Beginning in 1998, however, Farmers contracted with Medical Management Online ("MMO"), an independent bill review vendor with access to a database of roughly 100 million medical charges, to assist it in reviewing PIP claims. MMO's software allowed it to determine where, on a percentile basis, a particular medical charge fell within the range of charges for that same medical procedure in the same geographical area.

Farmers initially selected the 80th percentile as the presumptive benchmark in determining whether the amount of a medical bill was reasonable.² Any submitted bill for an amount equal to or less than the amount at which eight out of ten such procedures were billed (*i.e.*, the 80th percentile) was considered presumptively reasonable. Any submitted bill that exceeded the 80th percentile in MMO's database was

² Farmers later raised the benchmark twice: first to the 90th percentile and then to the 99th percentile. The class period in this case encompasses the year and a half during which the 80th and 90th percentiles were used.

assigned codes RC40 or B2 and, absent additional information from the medical provider or an override by a Farmers claims representative, was paid at the amount corresponding to the 80th percentile. Farmers chose the 80th percentile based on recommendations from MMO, App. 207a, and because the State of Oregon had previously used an even lower benchmark—the 75th percentile—in evaluating the reasonableness of medical charges for workers compensation claims. App. 209a. After this case began, the Oregon Legislature in 2003 mandated the same 75th percentile limit for PIP charges. *See* 2003 Or. Laws, ch. 813, § 4; Or. Rev. Stat. § 742.525 (2004).

2. In August 1999, Mark Strawn filed a class action suit against Farmers challenging its process for determining reasonableness. He alleged, among other things, a claim for fraud based on Farmers' representation in its policies that it would pay "reasonable and necessary" medical expenses. Strawn also sought punitive damages based on the fraud allegations. Over Farmers' objections that individualized issues would preclude class treatment, the trial court certified a plaintiff class of approximately 8,000 members "who were entitled to PIP benefits from Farmers under Farmers's standard terms for PIP coverage, whose benefit payments were reduced by Farmers on the basis of codes RC40 or B2 during the period January 26, 1998 to July 21, 1999." App. 18a. The trial court also refused to allow Farmers to present evidence to the jury that many class members were not injured because the "medical providers had written off the balances of the bills that Farmers had not paid under its percentile reduction procedure." App. 25a; 174a–178a; 201a–203a.

Farmers sought a directed verdict on Plaintiffs' fraud claim, on the ground that Plaintiffs had failed to provide any evidence of reliance. App. 178a. The court denied Farmers' motion for a directed verdict—not because there was any testimony or other evidence that any class member actually relied on Farmers' representations—but because the court simply “presumed that reliance could be found because there was evidence of misrepresentation.” App. 69a n.6 (Balmer, J., dissenting); 204a–205a.

After a trial where Farmers was prevented from defending itself by presenting individualized evidence about reliance or injury to rebut Plaintiffs' class claims, the jury returned a verdict against Farmers for compensatory damages of \$1.5 million and punitive damages of \$8 million. During a post-trial claims administration process, Farmers was permitted for the first time to present some individualized evidence—demonstrating that many of the medical charges at issue were reduced for reasons unrelated to RC40 or B2 codes, and that in numerous cases the codes were overridden.³ Based on this evidence, the trial court entered judgment on November 28, 2005, reducing the compensatory damages to \$898,323.80. App. 148a. But the court left in place the punitive damages award of \$8 million. *Id.*

Farmers filed post-verdict motions seeking remittitur of the punitive damages award as

³ Farmers was never permitted—either during trial or during the claims administration process—to introduce evidence that individual class members did not rely on the supposed misrepresentations in the policy language.

unconstitutionally excessive or, in the alternative, a new trial. Under Rule 64F of the Oregon Rules of Civil Procedure, a motion for a new trial “shall be heard and determined by the court within 55 days from the time of the entry of the judgment, and not thereafter.” Or. R. Civ. P. 64F(1).

On the final day of Rule 64F’s 55-day period—February 27, 2006—the trial court stated orally from the bench that it was denying Farmers’ motion for a new trial. Plaintiffs had argued that Farmers had waived its due process excessiveness arguments by not making those arguments to the jury during the trial. App. 213a. Other than stating that it “accept[ed] Plaintiff’s [waiver] arguments,” however, the court on February 27 explained only that “I intend to sign findings of fact and conclusions of law and they take up waiver.” *Id.* The court then turned to the “underlying issues” of Farmers’ due process excessiveness argument, discussing those issues at some length. *Id.* Relying heavily on *Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Or. 2006)—which this Court reversed in *Philip Morris*, 549 U.S. 346—the trial court rejected Farmers’ argument that the punitive damages were excessive under the Due Process Clause. App. 212a–220a. At the end of the February 27 hearing, the trial court signed a two-page written order denying Farmers’ motion for a new trial, but the written order said nothing about waiver and gave no reasons for its decision. App. 116a–117a.

Nine days later—well after Rule 64F’s 55-day period had expired—the trial court entered findings of fact and conclusions of law setting forth reasons for its denial of a new trial. App. 118a–138a. There, for the first time in writing, the court stated that it

had denied Farmers' motion for a new trial because (1) "due process is not violated by a ratio greater than 1:1," and (2) Farmers had waived its right to challenge the award because it "failed to request that the jury determine punitive damages consistent with any of the *Gore* factors." App. 126a–127a.

3. Farmers timely appealed to the Oregon Court of Appeals. The court acknowledged that Plaintiffs were required to prove reliance, but reasoned that the evidence of Farmers' representations was sufficient to create a jury question on reliance. App. 90a. Based on that evidence about *Farmers'* conduct, the court concluded that the jury could "reasonably infer that *plaintiffs* relied on Farmers' misrepresentation." *Id.* (emphasis added).

With respect to the punitive damages award, Plaintiffs argued that any due process excessiveness challenge was waived on appeal because Farmers had not assigned error in its opening appeals brief to the trial court's belated "finding" of waiver. But in both its opening and reply briefs, Farmers explained that its motion in the trial court was, as a matter of law, "deemed denied as of February 27," and that the trial court's later supposed "finding" of waiver was a "nullity" because it was not entered within the 55-day period allowed by Rule 64F. App. 183a; 192a & n.4. Farmers also explained why the trial court's waiver finding was erroneous in any event. App. 193a–195a. The court of appeals rejected Plaintiffs' claims of waiver, reaching and addressing Farmers' due process excessiveness arguments. App. 98a–111a.

In evaluating whether the \$8 million punitive award violated due process, the court of appeals relied extensively on the Oregon Supreme Court's

then-recent opinion in *Goddard v. Farmers Insurance Co.*, 179 P.3d 645 (Or. 2008) (en banc). Applying *Goddard's* “very general rule of thumb [that] the federal constitution prohibits any punitive damages award that significantly exceeds four times the amount of the injured party’s compensatory damages” for economic harm alone, App. 101a (quoting *Goddard*, 179 P.3d at 662), the court of appeals concluded that “a punitive damages award of \$8 million violates Farmers’ due process rights on the facts of this case.” App. 110a. Accordingly, the court vacated the trial court’s judgment with instructions to grant Farmers a new trial on punitive damages, unless Plaintiffs agreed to a remittitur of punitive damages to four times actual damages. App. 111a.

4. Both parties petitioned the Oregon Supreme Court for review, and the court granted both petitions. In its petition and subsequent briefing, Farmers argued that the courts below had effectively eliminated reliance as a separate element in a class action fraud claim by permitting the jury to presume reliance from representations or omissions alone. Farmers also explained that the court of appeals erred in its analysis of the punitive damages award by treating a 4:1 ratio as the presumptive norm in an economic injury case, rather than as a maximum ceiling reserved for a case of highest reprehensibility.

The Oregon Supreme Court rejected Farmers’ arguments, with a majority of the court upholding the jury’s classwide fraud verdict and reinstating the \$8 million punitive damages award. Acknowledging that an invalid fraud verdict would also eliminate any basis for punitive damages, App. 20a–21a, the majority addressed reliance first. App. 29a. The

majority recognized that under established Oregon law, one of the “essential elements of a common-law fraud claim” is that “the plaintiff justifiably relied on the misrepresentation.” App. 30a (citing *Handy v. Beck*, 581 P.2d 68 (Or. 1978)). The majority also acknowledged that the Oregon Supreme Court in a previous case had rejected the argument that classwide reliance could be shown based on common representations. App. 34a–36a (citing *Newman v. Tualatin Dev. Co.*, 597 P.2d 800 (Or. 1979)).

Even so, the majority concluded that Plaintiffs had shown that the “class as a whole” relied on Farmers’ representations. App. 34a. In so doing, the majority created an irrebuttable presumption of reliance, reasoning that, because PIP coverage is required by Oregon law, “an insured’s reliance . . . is inherent in the purchase of insurance.” App. 43a.

Turning to the punitive damages award, even though the court of appeals had rejected Plaintiffs’ waiver arguments and resolved Farmers’ excessiveness challenge on the merits, the majority nonetheless held that Farmers had lost its right to appeal the unconstitutionality of the award by failing to timely challenge the trial court’s supposed waiver finding in the court of appeals. App. 55a. The majority recognized that the Oregon Supreme Court had consistently characterized Rule 64F’s 55-day deadline as jurisdictional. App. 51a (citing *McCollum v. Kmart Corp.*, 226 P.3d 703 (Or. 2010) (en banc)). It also recognized that by the final day of Rule 64F’s period, the trial court had merely “signed a simple order denying [Farmers’] motions,” which did not mention or address waiver. *Id.* The majority recognized further that the “trial court did not . . . sign and enter its lengthier written findings and

conclusions” that addressed waiver “until after [Rule 64F’s 55-day] period had expired.” App. 52a.

Yet the majority still found waiver based on an unprecedented procedural rule. According to the majority, a trial court can sign a bare order denying the motion with “no written statement of reasons or other explanation in support of the ruling” within the 55-day period, and enter effective findings on the motion after the deadline passed. App. 54a. The majority therefore reversed the court of appeals’ ruling on punitive damages, reinstating the trial court’s \$8 million award.

5. Justice Balmer dissented. He explained that the Oregon Supreme Court’s “rejection of Farmers’s argument regarding the amount of punitive damages” was due in large part to Oregon’s “ever-changing procedural and substantive rules involving punitive damages,” which have “created a variety of traps” for defendants seeking to assert their constitutional rights. App. 58a (Balmer, J., dissenting).

Justice Balmer sharply disagreed with the majority’s treatment of the fraud claim underlying the punitive award—specifically, the majority’s “quite far-reaching conclusion that ‘an insured’s reliance on the PIP coverage that the policy provides is inherent in the purchase of the insurance.’” App. 60a (emphasis omitted). “To put it bluntly,” he stated, “there is scant evidence that any plaintiff *relied*, to his or her detriment, on that representation. And there is virtually no evidence from which a jury could infer that the class of Farmers policyholders who made PIP claims relied on that representation.” App. 59a–60a.

In contrast to settled Oregon law, Justice Balmer explained, the majority effectively created a new presumption of reliance in this case. App. 63a–64a. “The majority’s position,” Justice Balmer continued, “seems to be that it doesn’t really matter whether any of the named plaintiffs (or the class members) either received or relied upon any representations about Farmers’s PIP coverage, either before or after they bought the policies, or before or after they submitted PIP claims.” App. 61a.

Justice Balmer noted that this case was no different than the Oregon Supreme Court’s earlier decision in *Newman*, where it had rejected an effort to prove reliance in a class action based on the defendant’s representation in part because the representation involved “such a small part of the item purchased” and was “interspersed with many other descriptive statements.” App. 64a–65a (quoting *Newman*, 597 P.2d at 804).

6. Several days after it issued its original opinion, the Oregon Supreme Court notified the parties of ex parte email communications about this case between Plaintiffs’ counsel, Ms. Lisa Hunt, and members of the court. The day before the opinion was issued, Ms. Hunt emailed Justice Walters to coordinate an overnight visit with her, expressing anticipation over the release of the court’s decision in this case. App. 233a. The next morning, just after the opinion issued, Justice Walters emailed Ms. Hunt. App. 230a. Ms. Hunt responded, expressing her pleasure with the court’s opinion. App. 229a. Justice Walters replied: “you deserve it!” *Id.* A few hours later, Ms. Hunt emailed Justice Virginia Linder, who authored the court’s opinion, and two other Justices of the court, asking:

Ginnie: Is it inappropriate, unprofessional, unconventional, or downright illegal in some fashion for me to tell you right now how much I love you?? Do I care?? Thank you for making this a day when it is impossible to work. I keep looking for more people to hug or who are not too grown up to skip with me. I will try not to embarrass the Court.

App. 228a.

After disclosure of these ex parte communications, Farmers asked the court to withdraw its decision and rehear the case. The court denied the request. App. 8a–9a.

7. Farmers petitioned for reconsideration. App. 151a–164a. It explained that the court had violated federal due process by overturning settled Oregon law to create a new, irrebuttable presumption of reliance in order to enable classwide adjudication of Plaintiffs’ claims. App. 154a-160a Farmers also argued that the court had violated due process by employing a state procedural rule in a new and irregular manner to find waiver of Farmers’ constitutional challenge to the excessive punitive damages award. App. 161a-163a.

The majority granted reconsideration, but adhered to its prior opinion without modification. On reconsideration, the court denied that its waiver ruling was “novel,” but admitted that it “was an answer to a procedural question that had not been raised or resolved before.” App. 6a–7a. The court also rejected Farmers’ argument that it had violated federal due process by creating an irrebuttable presumption of reliance. App. 4a–5a.

Justice Balmer, joined this time by Justice Landau, dissented again from the majority's decision on the reliance issue. App. 9a.

REASONS FOR GRANTING THE PETITION

I. THE OREGON SUPREME COURT JETTISONED A KEY ELEMENT OF LIABILITY TO ENABLE CLASS TREATMENT, IN VIOLATION OF DUE PROCESS AND IN CONFLICT WITH DECISIONS OF THIS AND OTHER COURTS.

This Court should grant certiorari to halt a dangerous and growing trend among courts of altering the substantive law without any prior notice in violation of due process, simply so that inherently individualized claims can be adjudicated on a classwide basis. In one of the most egregious examples to date, the Oregon Supreme Court here eliminated the longstanding requirement of individual reliance for plaintiffs claiming fraud, opening the door for an award of compensatory and punitive damages where there was *no* evidence that any class member—much less *all* class members—relied on the alleged misrepresentations; indeed, for some class members, it was *impossible* for them to have relied on any representation by Farmers. This Court's review is necessary to reverse this and similar mutations of substantive law that privilege class treatment at the expense of defendants' constitutional right to present every available defense. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

Review is especially warranted because of the deep split between those courts—like the Oregon Supreme Court—that have radically changed

traditional requirements of substantive law in order to facilitate class treatment, and other courts that have emphatically rejected such attempts. This enduring disconnect is a matter of national concern. As Justice Scalia recently observed, “[t]he extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question.” *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers). Multiple courts have recognized that one of the fundamental dangers posed by class actions is that the “systematic urge to aggregate litigation” will, as here, “trump . . . individual justice.” *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (internal quotation marks omitted); see also *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (“Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties’ legal rights may be respected.”). If due process places any limitations at all on a court’s ability to make unprecedented changes to substantive law to enable class treatment—and this Court’s precedents require that it does—this case provides the perfect vehicle in which to make that crystal clear.

This case also presents the relatively rare opportunity to address this vital issue in the context of a state class action tried to final judgment. Unlike federal class actions, where interlocutory review under Federal Rule of Civil Procedure 23 affords a far shorter path to potential review by this Court, state class actions rarely reach this Court until they have been fully and finally litigated. Yet the massive expense and risk of class actions ensure that very few state cases ever reach that stage. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978);

Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006) (“[T]he overwhelming majority of actions certified . . . result in settlements.”).

Moreover, while federal class actions are constrained by the Rules Enabling Act, 28 U.S.C. § 2072(b), state class actions are limited only by due process. Although this Court recently addressed issues similar to those presented here in the context of a *federal* class action involving the Rules Enabling Act, *see Wal-Mart*, 131 S. Ct. at 2560–61, this case presents a rare opportunity to address the due process constraints on state class actions. By doing so, this Court can provide much-needed direct constitutional guidance to state courts, like the Oregon Supreme Court, that have repeatedly refused to protect litigants’ federal due process rights.

A. The Oregon Supreme Court Overturned Settled Law By Eliminating Individual Reliance As An Element Of Fraud Liability In This Class Action.

The elements of a common-law fraud claim in Oregon are clear and well-settled: (1) the defendant made a material misrepresentation that was false; (2) the defendant did so knowing that the representation was false; (3) the defendant intended the plaintiff to rely on the misrepresentation; (4) *the plaintiff justifiably relied on the misrepresentation*; and (5) the plaintiff was damaged as a result. *Handy v. Beck*, 581 P.2d 68, 71 (Or. 1978). Thus, to recover compensatory and punitive damages on their fraud claim in this case, Plaintiffs should have been required to prove that each class member relied on Farmers’ alleged misrepresentations. *See App. 63a*

(Balmer, J., dissenting) (“[E]ach plaintiff must prove reliance to make out a fraud claim.”) (internal quotation marks omitted).

That is precisely what the Oregon Supreme Court previously held in *Newman v. Tualatin Development Co.*, 597 P.2d 800 (Or. 1979). There, the court explained that the element of reliance could not be presumed or otherwise eliminated merely because the case was brought as a class action. *Id.* at 803–04. Although the plaintiffs in *Newman* argued that reliance could be presumed because the same representations were made to all class members, the court rejected that argument, explaining that even if the same representation “was given to all members of the class in this case, that would not establish that every member of the class read, was aware of, and relied upon each of the representations.” *Id.* at 804.

Plaintiffs here nonetheless urged the Oregon courts to eliminate proof of individualized reliance so that Farmers could not “avoid . . . class treatment.” App. 199a. Although Plaintiffs presented no evidence that individual class members relied on Farmers’ representations, a majority of the Oregon Supreme Court simply concluded that “the *class as a whole* relied on misrepresentations that Farmers made to them.” App. 59a (Balmer, J., dissenting) (emphasis altered). Specifically, the court held that “a person who purchases a motor vehicle policy . . . does not need to read the policy to justifiably rely on its provisions” because “reliance . . . is inherent in the purchase of the insurance.” App. 43a (majority opinion).

As Justice Balmer explained in dissent, the majority’s novel holding established an irrebuttable

presumption of reliance in this case, effectively eliminating it as an element of fraud to enable this case to be tried on a class basis. App. 63a–64a (Balmer, J., dissenting). “[W]ithout citation to any case or statute,” the majority reversed long-standing Oregon precedent that “[r]eliance’ . . . is an element of fraud, and must be proved.” App. 60a–61a (internal quotation marks omitted). As Justice Balmer explained, the court’s new holding was flatly inconsistent with its earlier cases, including its decades-old ruling in *Newman*. App. 60a–61a; 64a–65a.

The reason for the Oregon Supreme Court’s elimination of the reliance element is obvious—to ensure the class members’ disparate claims were treated “as a whole” in this class action, irrespective of their differences under existing substantive law. App. 34a (majority opinion). But the “apparent consequence . . . is that individual plaintiffs who could not recover had they sued separately *can* recover only because their claims were aggregated with others’ through the procedural device of the class action.” *Scott*, 131 S. Ct. at 4 (Scalia, J., in chambers).⁴ As Justice Balmer explained in dissent, the majority’s new rule included in the class “any person who had a Farmers policy, whether or not

⁴ Another consequence of eliminating the requirement of individualized proof of reliance is that every ordinary breach of contract claim can now be transformed into a class action for fraud and punitive damages whenever a court concludes that reliance on purported misrepresentations in such policies “is inherent in the purchase of insurance.” App. 43a.

they ever received a copy of it or had any idea of its terms.” App. 62a (Balmer, J., dissenting).

Even beyond that, the majority’s new presumption of reliance allowed class members who clearly did *not* rely on Farmers’ representations to receive not just compensatory damages, but *punitive* damages as well. For example, many of the class members were merely beneficiaries covered by PIP insurance, not policyholders who *purchased* the insurance. *See* App. 18a (majority opinion) (defining class as “all persons who were entitled to PIP benefits,” which includes passengers and pedestrians involved in an accident). Thus, even if “reliance . . . is inherent in the *purchase* of the insurance,” App. 43a (emphasis added), that could not justify the classwide presumption imposed by the Oregon Supreme Court in this case.⁵

⁵ Moreover, a presumption that “all members of the class *detrimentally* relied,” App. 29a–30a (emphasis added), is especially inapplicable in this case, where many of the class members never suffered any actual economic loss. As the California Supreme Court recently explained, for those class members who never paid the difference between Farmers’ reimbursement and the amount billed by their medical provider, they suffered no actual economic loss. *See Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1133 (Cal. 2011).

B. The Oregon Supreme Court's Alteration Of Substantive Law To Allow Class Treatment Conflicts With Decisions Of This And Other Courts And Violates Due Process.

1. A fundamental guarantee of due process is that a defendant will not be held liable and deprived of property without a meaningful opportunity to contest all elements of liability. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972). This concern is especially heightened in the class action context, because class-action procedure is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart*, 131 S. Ct. at 2550 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). As this Court recognized recently in *Wal-Mart*, “[i]n order to justify a departure from that rule, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.” *Id.* (internal quotation marks omitted). Where, as here, proper adjudication of class members’ claims would require “individualized determinations,” courts cannot simply replace those determinations with “Trial by Formula” or some other shortcut to facilitate class treatment. *Id.* at 2560–61.

Instead, the named plaintiffs in a class action must function as true *representatives* of the remainder of the class. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302–03 (1854). This is so because a class action is “a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980).

Thus, class claims are consistent with due process only insofar as the named parties' claims are truly representative of those of the absent class members, such that defending against the named parties' claims adequately defends against the claims of the absent class members. *See, e.g., Hansberry v. Lee*, 311 U.S. 32, 42–45 (1940). As this Court has repeatedly held, the “Due Process Clause . . . requires that the named plaintiff at all times adequately represent the interests of the absent class members.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (emphasis added). This representativeness requirement is critical to the fairness—as well as the constitutionality—of the class-action procedure. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380–81 (2011) (emphasizing the importance of representativeness in class actions). If the absent class members' claims suffer from defects that the class representatives' claims do not, then the defendant has been denied an opportunity to adequately defend and is deprived of property without due process of law. *See Taylor v. Sturgell*, 553 U.S. 880, 891, 894 (2008) (“due process limitations” require “[r]epresentative suits” to rest on actual and direct representation).

2. Here, Plaintiffs' fraud claims required individualized proof of reliance under Oregon law. *Gardner v. Meiling*, 572 P.2d 1012, 1015–16 (Or. 1977); *Kubeck v. Consol. Underwriters*, 517 P.2d 1039, 1042 (Or. 1974). But instead of holding—as *Wal-Mart* teaches—that Farmers was improperly deprived of the opportunity to defend against all of the class members' fraud claims given the absence of individualized evidence of reliance, the Oregon Supreme Court simply eliminated the need for Plaintiffs to prove reliance as to each class member.

App. 43a–44a. Consequently, some individuals who could not have recovered had they sued individually can now recover by virtue of the class action device. That result is directly contrary to this Court’s decision in *Wal-Mart* and fundamental principles of due process. *See Wal-Mart*, 131 S. Ct. at 2561 (“[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.”); *Lindsey*, 405 U.S. at 66 (“Due process requires that there be an opportunity to present every available defense.”) (internal quotation marks omitted).

This “abrogation” of the traditional Oregon common law requirement of individual reliance eliminated a “well-established common-law protection against arbitrary deprivations of property.” *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). Because “traditional practice provides a touchstone for constitutional analysis,” such a deviation “raises a presumption that [the new] procedures violate the Due Process Clause.” *Id.* That presumption is especially applicable here, because “the majority’s reasoning detache[d] ‘reliance’ from any affirmative representation of any kind to a policyholder and from any action or omission by that policyholder.” App. 62a (Balmer, J., dissenting). In short, class members can recover simply because they are members of the class, not because of the merits of their individual claims.

This is all the more troubling because the Oregon Supreme Court’s unprecedented imposition of an irrebuttable presumption of reliance ensured that Farmers would pay *punitive* damages on behalf of class members with no causal link between their alleged injury and Farmers’ supposed

misrepresentation. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (“[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with an ‘opportunity to present every available defense.’”).

3. The Oregon Supreme Court’s invention of a reliance shortcut is directly at odds with the decisions of other courts. The Eleventh Circuit has rejected class certification under such circumstances, holding that it “cannot condone the use of a presumption as a shortcut in resolving issues of injury and damages where such elements are provable by the plaintiffs and are required for recovery.” *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1366 (11th Cir. 2002), *abrogated on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008); see also *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (noting that the fact that a “shortcut was necessary in order for this suit to proceed as a class action should have been a caution signal”).

Similarly, the Second Circuit rejected the argument that plaintiffs could “prove reliance on a class-wide basis,” explaining that “[i]ndividualized proof is needed to overcome the possibility that a member of the purported class purchased . . . for some reason other than” the alleged misrepresentation. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008). Other federal courts have agreed. See *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665–68 (9th Cir. 2004) (refusing to “shortcut” the element of individual reliance because “one motivation does not ‘fit all’” and “reliance provides a key causal link between the . . .

alleged misrepresentations and the Class Representatives' injury"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 434–36 (4th Cir. 2003) (rejecting presumption of classwide reliance); *Andrews v. AT&T*, 95 F.3d 1014, 1025 (11th Cir. 1996) (requiring that plaintiffs “show, on an individual basis, that they relied on the misrepresentations”); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) (“a fraud class action cannot be certified when individual reliance will be an issue”); *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (recognizing that defendants have a due process “right to present a full defense,” including the right to present “any relevant rebuttal evidence” such as that there was no violation “against one or more members of the class”).

Some state courts have similarly rejected attempts to alter substantive law in service of class treatment of claims. In *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. Dist. Ct. App. 2006), the Florida Court of Appeals refused to find classwide reliance because “[w]hat one purchaser may rely upon in entering into a contract may not be material to another purchaser.” *Id.* at 878 (internal quotation marks omitted). Similarly, the California Supreme Court has “decline[d] to alter [a] rule of substantive law to make class actions more available.” *City of San Jose v. Superior Court*, 525 P.2d 701, 711 (Cal. 1974) (“Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.”). That court has emphasized that it is “inappropriate to deprive defendants of their substantive rights merely because those rights are inconvenient in light of the litigation posture

plaintiffs have chosen.” *Granberry v. Islay Invs.*, 889 P.2d 970, 976 (Cal. 1995); *see also Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam) (“[D]ue process requires that class actions not be used to diminish the substantive rights of any party to the litigation.”); *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001) (refusing class treatment because individual proof of reliance was required to show “that a plaintiff suffer[ed] an ascertainable loss as a result of the defendant’s prohibited action”).

While the majority of federal and state courts historically have upheld defendants’ due process rights by refusing to subvert substantive law in order to facilitate class adjudication of claims, some courts have succumbed to the “systemic urge to aggregate litigation” that, left unchecked, can “trump our dedication to individual justice.” *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). Unfortunately, this is not the first case where precisely that has happened. *See, e.g., Alcoser v. Thomas*, 2011 WL 537855, at *8 (Cal. Ct. App. Feb. 16, 2011) (upholding classwide fraud judgment based on “presumption of reliance by the class”), *petition for cert. filed*, No. 11-308 (Sept. 6, 2011); *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 883 (Pa. Super. Ct. 2011) (per curiam) (allowing presumption of reliance to avoid individualized issues and affirming \$187.6 million class action judgment); *Fortis Ins. Co. v. Kahn*, 683 S.E.2d 4, 7–9 (Ga. Ct. App. 2009) (presuming reliance because all “class members allegedly received . . . the same kind of policy”); *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266, 1277 (La. Ct. App. 2007) (holding that “the only question of reliance pertains to the reliance by the class as a whole”); *cf. Richard A. Nagareda, Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97,

101, 103 (2009) (noting the “deep and increasingly important trend” toward battles about revising substantive liability to define away individualized elements of class claims).

The Court should grant review to stop this troubling trend, by underscoring that a class action “is not a one-way ratchet, empowering . . . judge[s] to conform the law to the proof.” *McLaughlin*, 522 F.3d at 220. Precisely because class actions that alter substantive law are far more likely to be improperly certified, they uniquely threaten the type of *in terrorem* settlement pressure that this Court has repeatedly warned about. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (“Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”).

II. IGNORING DUE PROCESS AND THE DECISIONS OF THIS AND OTHER COURTS, THE OREGON SUPREME COURT EMPLOYED A NOVEL PROCEDURAL RULE TO BAR CONSTITUTIONAL REVIEW OF PUNITIVE DAMAGES ON APPEAL.

This Court should also grant review because the Oregon Supreme Court has, once again, conjured up a new and unprecedented procedural bar to block review of an unconstitutionally excessive punitive damages award. The Oregon Supreme Court held that Farmers waived its constitutional challenge in the court of appeals, even though the court of appeals itself had determined that the challenge was *not* waived and proceeded to resolve it on the merits.

Only a few years ago, after the Oregon Supreme Court upheld a \$79.5 million punitive damages verdict, *Williams v. Philip Morris Inc.*, 127 P.3d 1165 (Or. 2006), this Court reversed, holding that the

excessive award violated due process. *Philip Morris*, 549 U.S. 346. Yet on remand—in an obvious end-run around this Court’s decision—the Oregon Supreme Court invented a novel state-law procedural rule, announced that the defendant had waived its due process rights, and upheld the \$79.5 million punitive award, *despite* this Court’s holding that it violated due process. *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1257 (Or. 2008). This Court once again granted review of the case, 553 U.S. 1093 (2008), but later dismissed the writ of certiorari as improvidently granted, 556 U.S. 178 (2009) (*per curiam*).

This Court should grant review here because the Oregon Supreme Court’s waiver ruling is not only unprecedented—a point the majority readily acknowledged—but it is also at odds with existing Oregon precedent, this Court’s minimum requirements for waiver of federal constitutional rights, and other state courts’ application of those requirements.

A. The Oregon Supreme Court Held That Farmers Waived Its Constitutional Rights By Invoking A “Rule” That Was Neither Firmly Established Nor Regularly Followed.

1. The adequacy of a state-law bar to a due process challenge “is itself a federal question.” *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). And this Court’s answer to that question is clear: Only a state practice that is “firmly established and regularly followed” at the time it is applied may be used to foreclose consideration of a federal constitutional claim. *James v. Kentucky*, 466 U.S. 341, 348–49 (1984); *see also Brinkerhoff-Faris Trust*

& *Sav. Co. v. Hill*, 281 U.S. 673, 677–78 (1930) (holding the Supreme Court of Missouri “transgressed the due process clause” by imposing a novel procedural bar to an equal protection challenge for the first time on appeal).

This Court has warned that “[n]ovelty in procedural requirements cannot be permitted to thwart review” by defendants who “seek vindication in state courts of their federal constitutional rights.” *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457–58 (1958)). Even where a newly announced procedural rule appears “in retrospect to form part of a consistent pattern of procedures” applied by the state, it cannot be employed to waive federal constitutional claims when it was “unannounced at the time of . . . trial.” *Id.* at 423–24 (quoting *NAACP*, 357 U.S. at 457). It follows that when a state-law procedural bar is *inconsistent* with a “long line” of prior rulings, it cannot be invoked to thwart federal constitutional rights. *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958).

2. In this case, the Oregon Supreme Court refused to consider Farmers’ constitutional challenge to the punitive damages award on the basis that Farmers had waived that argument in the court of appeals when it did not challenge the trial court’s purported waiver finding. App. 55a.

In holding that Farmers had waived its constitutional challenge, the Oregon Supreme Court rejected Farmers’ argument that the trial court’s purported waiver finding was a nullity because it was made in the March 8 order—which issued well after the deadline established by Oregon rules. See Or. R. Civ. P. 64F (A motion for a new trial “shall be

heard and determined by the court within 55 days from the time of the entry of judgment, *and not thereafter . . .*”) (emphasis added).

For more than half a century, the Oregon Supreme Court has consistently emphasized that Rule 64F’s “requirement . . . that the motion must be ‘heard and determined . . . within 55 days’ is *mandatory*.” *Clark v. Auto Wholesale Co.*, 391 P.2d 754, 755 (Or. 1964) (emphasis added) (quoting *Ernst v. Logan Oldsmobile Co.*, 302 P.2d 220, 221 (Or. 1956) (per curiam)); *McCollum v. Kmart Corp.*, 226 P.3d 703, 705 (Or. 2010) (en banc) (same). Once the 55-day term has expired, the trial court has “lost jurisdiction” because Rule 64F “contemplates a *final* appealable order.” *Ernst*, 302 P.2d at 221 (emphasis added); see *McCollum*, 226 P.3d at 705 (“After that time, the trial court has ‘no jurisdiction over the matter.’”) (quoting *Nendel v. Meyers*, 94 P.2d 680, 681 (Or. 1939)).

The court made no attempt to reconcile its holding with its long line of prior cases characterizing Rule 64F’s 55-day period as “mandatory,” “final,” and “jurisdictional.” Instead, the majority simply declared that so long as a bare order is issued before the 55-day deadline, any written explanation issued by the trial court after the deadline should “be given full consideration by the appellate courts.” App. 54a.

Likewise, the majority simply announced—without any support—that the trial court’s oral statements from the bench about waiver should be treated as part of its summary written order of February 27. App. 7a. But any oral statements by the trial court concerning waiver were irrelevant under settled Oregon law. “[A] statement from the

bench does not constitute an order or a judgment until it appears in a written order or judgment.” *In re Marriage of Conley*, 776 P.2d 860, 861 (Or. Ct. App. 1989).

3. In rejecting Farmers’ challenge, the Oregon Supreme Court minted a new procedural rule: A litigant must specifically appeal a judge’s oral statements from the bench—as well as written orders issued after the trial court has lost jurisdiction—in cases where the oral statements or untimely orders contain what could be deemed an alternative basis for decision.

Far from being “firmly established and regularly followed,” *James*, 466 U.S. at 348, Oregon’s novel rule is—in the Oregon Supreme Court’s own words—“an answer to a procedural question that had not been raised or resolved before.” App. 7a. And the Oregon Supreme Court’s rule is not just new; as explained above, it *contradicts* earlier state cases and is nothing more than a pretext created to avoid protecting Farmers’ due process rights. But even if the new rule were not inconsistent with prior cases, it nonetheless would be “inadequate” to bar constitutional review of the punitive damages award in this case because it was clearly “unannounced at the time of . . . trial.” *Ford*, 498 U.S. at 424.

On reconsideration, the Oregon Supreme Court disagreed that its application of a new procedural rule violated due process, arguing that its ruling “was not novel in the sense that it marked a change of state procedural practice or ran counter to some settled understanding.” App. 6a–7a. This misreading of the “firmly established and regularly followed” requirement puts the Oregon Supreme Court directly at odds with how this Court, as well as

other state and federal courts, have interpreted the requirement.

As this Court explained in *Ford*, where a state rule is “not firmly established *at the time in question*”—that is, where it was “unannounced at the time of . . . trial”—it “cannot be permitted to thwart review.” 498 U.S. at 423–25 (emphasis added) (quoting *NAACP*, 357 U.S. at 457). This is true whether or not the new rule is inconsistent with prior rules. This Court has therefore “declined to apply a state procedural rule, even though the rule appeared ‘in retrospect to form part of a consistent pattern of procedures.’” *Id.* at 423 (quoting *NAACP*, 357 U.S. at 457). The test is whether the state procedural rule is “firmly established,” *id.* at 425, not whether it runs “counter to some settled understanding.” App. 6a–7a.

By holding otherwise, the Oregon Supreme Court has created a split with multiple state and federal courts. The Third Circuit, for example, has recently acknowledged that under the “firmly established” standard, “a state court decision applying ‘a rule unannounced at the time of petitioner’s trial’ . . . is inadequate.” *Kindler v. Horn*, 642 F.3d 398, 405 (3d Cir. 2011), *petition for cert. filed*, No. 11-48 (July 8, 2011); *see also Fields v. Calderon*, 125 F.3d 757, 760 (9th Cir. 1997) (“[T]he proper time for determining whether a procedural rule was firmly established and regularly followed is ‘the time of [the] purported procedural default’”). Likewise, the Nebraska Court of Appeals has recognized that a “new procedural rule that we announce in this case . . . cannot operate to procedurally thwart” the defendant’s constitutional objection. *State v. Covarrubias*, 2 Neb. C.A. 993 (Ct. App. 1993), *rev’d on other grounds*, 507

N.W.2d 248 (Neb. 1993); *see also In re Gallego*, 959 P.2d 290, 303 (Cal. 1998) (Brown, J., concurring and dissenting) (“[A] state may not invoke ‘a rule unannounced at the time of a purported default.’”) (quoting *Ford*, 498 U.S. at 424).

B. The Grossly Excessive Punitive Damages Award Reinstated By The Oregon Supreme Court Violates Due Process.

This Court has held that punitive damages awards that are “grossly excessive’ . . . violate[] the Due Process Clause of the Fourteenth Amendment.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996). The \$8 million punitive damages award allowed by the Oregon Supreme Court here is almost nine times the compensatory damages awarded. That award is grossly excessive, where Farmers’ conduct was not reprehensible; the alleged harm was purely economic and involved very small amounts of money; and Farmers’ policy was based on a reasonable interpretation of Oregon law that was subsequently *validated and endorsed by the Oregon Legislature*. The Oregon Supreme Court compounded the problem by erroneously awarding punitive damages to groups of people who suffered no injury whatsoever. Even assuming that some punitive damages award could be imposed, a 1:1 or lower ratio between punitive and compensatory damages is the constitutional maximum under this Court’s precedent.

This Court has identified three “guideposts”—reprehensibility, ratio, and comparable penalties—that appellate courts should consider when determining whether a punitive damages award comports with due process. *State Farm Mut. Auto.*

Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003). Here, all three guideposts mandate a 1:1 or lower punitive award.

Even the Oregon Court of Appeals recognized in this case that Farmers' conduct was *not* particularly reprehensible. App. 107a–108a. Farmers' implementation of a percentile-based analysis to determine initially whether a medical bill was "reasonable" was a perfectly legitimate and objectively reasonable interpretation of Oregon law. Nor was this analysis a radical departure from the policy language. Farmers' approach was substantially similar to the practice Oregon used to determine the reasonableness of its workers compensation charges, and was the same approach used by many other states, insurers, and vendors to evaluate medical charges. Moreover, the same approach, but using an even *lower* percentile benchmark—75%—was later mandated by the Oregon Legislature for PIP reimbursements. *See* Or. Rev. Stat. § 742.525 (2004). Thus, even assuming *arguendo* that Farmers misinterpreted its obligations under Oregon law and thus somehow committed fraud, its actions were hardly so outrageous or malicious as to warrant punishment.

This Court's discussion and application of maximum ratios likewise shows that this is precisely the type of case where a 1:1 or lower ratio is required. As this Court explained in *State Farm*, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. The \$898,000 compensatory award in this case is substantial. That a 1:1 or lower ratio is the upper limit in this case is

reinforced by *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), where the Court observed that “the median ratio of punitive to compensatory awards has remained less than 1:1.” *Id.* at 498. The Court concluded in *Baker* that “a 1:1 ratio, which is above the median award,” was a “fair upper limit” in that case, *id.* at 513, rejecting a higher ratio as “not directed to cases like this one, where the tortious action was worse than negligent but less than malicious.” *Id.* at 510. So too here.

Courts may also compare the award to “civil or criminal penalties that could be imposed for comparable misconduct.” *Gore*, 517 U.S. at 583. The purpose is to “accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.” *Id.* (internal quotation marks omitted). Here, the most relevant evidence of the Oregon Legislature’s view of Farmers’ conduct is the fact that the Legislature by statute has since adopted the *same* percentile-based reasonableness approach for evaluating PIP payments that Farmers used.

By refusing to apply this Court’s “guideposts” to the punitive damages award in this case, the Oregon Supreme Court approved an award that conflicts with the constitutional limits imposed by other courts in similar cases. In *Roby v. McKesson Corp.*, 219 P.3d 749 (Cal. 2009), for example, the California Supreme Court held that an approximately 8:1 ratio of punitive to compensatory damages violated due process. Based on “the relatively low degree of reprehensibility on the part of [the defendant] and the substantial compensatory damages verdict,” the court held that a 1:1 ratio was the constitutional maximum. *Id.* at 770. *See also, e.g., Bach v. First*

Union Nat'l Bank, 486 F.3d 150, 156–57 (6th Cir. 2007) (reducing punitive damages to equal \$400,000 in compensatory damages); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive damages to equal \$600,000 in compensatory damages).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS H. DUPREE, JR.
LAWRENCE VANDYKE
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500

DAVID L. YOHAI
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

THEODORE J. BOUTROUS, JR.
Counsel of Record
THEANE EVANGELIS KAPUR
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tboutrous@gibsondunn.com

Counsel for Petitioners

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