

No.

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**In the Supreme Court of the United States**

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PHILIP MORRIS USA,

*Petitioner,*

v.

MAYOLA WILLIAMS,

*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

When this case was last before it, this Court reversed the decision of the Oregon Supreme Court and held that due process precludes a jury from imposing punitive damages to punish for alleged injuries to persons other than the plaintiff. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). This Court then remanded the case to the Oregon Supreme Court with directions to “apply the [constitutional] standard we have set forth.” *Ibid.* On remand, however, the Oregon Supreme Court refused to follow this Court’s directive. Instead, the Oregon court “adhered to” the judgment that this Court had vacated because it found that Philip Morris had procedurally defaulted under state law and thereby forfeited its claim of federal constitutional error. App., *infra*, 22a.

The questions presented—the second of which was accepted for review but not reached when this case was last before the Court—are:

1. Whether, after this Court has adjudicated the merits of a party’s federal claim and remanded the case to state court with instructions to “apply” the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

2. Whether a punitive damages award that is 97 times the compensatory damages may be upheld on the ground that the reprehensibility of a defendant’s conduct can “override” the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.

**RULE 29.6 STATEMENT**

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly-held company that owns ten percent or more of Philip Morris USA's stock.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Philip Morris USA (“Philip Morris”) petitions for a writ of certiorari to review the judgment of the Supreme Court of Oregon in this case.

### OPINIONS BELOW

The decision of the Oregon Supreme Court (App., *infra*, 1a-25a) is reported at 176 P.3d 1255. The earlier decision of the Oregon Supreme Court (App., *infra*, 26a-66a) is reported at 127 P.3d 1165. The 2004 decision of the Oregon Court of Appeals (App., *infra*, 67a-114a) is reported at 92 P.3d 126, and the 2002 decision of the Oregon Court of Appeals (App., *infra*, 115a-154a) is reported at 48 P.3d 824. The trial court’s oral ruling on Philip Morris’s proposed instruction (App., *infra*, 155a-165a) is unreported.

### JURISDICTION

The judgment of the Oregon Supreme Court was entered on January 31, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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.”

### STATEMENT

In *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007), this Court held that, “upon request,” a trial court must protect a defendant against the risk that a jury will predicate a punitive damages award on injuries to persons not before the court because punishment on such a basis violates due process. The Court observed that, during the trial, Philip Morris had requested protection against that risk, but that the Oregon courts had rejected that request on the ground that punishment for harms to non-parties was constitutionally permissible. *Id.* at 1061, 1062. Because the Oregon courts had applied an incorrect constitutional standard, this Court “re-mand[ed] this case so that the Oregon Supreme Court can apply the standard we have set forth.” *Id.* at 1065.

On remand, however, the Oregon Supreme Court flatly refused to follow this Court’s directive. Instead, the Oregon court held that Philip Morris had forfeited the federal right recognized by this Court when it failed to comply at trial with a novel and patently unreasonable application of a state-law procedural rule—a rule that had never before been invoked by any Oregon court during the nine years of appellate litigation in this case.

The Oregon Supreme Court’s decision should be summarily reversed for three reasons. First, as an inferior court, the Oregon Supreme Court was bound by this Court’s directive to “apply” the federal consti-

tutional principle announced by this Court and overstepped its authority when it refused to do so. Second, to the extent that a state-law procedural rule impeded consideration of Philip Morris's federal claim, the Oregon courts were required to apply that rule *before*—and not *after*—this Court decided the federal issue. Finally, the waiver rule asserted by the Oregon Supreme Court is not an independent and adequate state ground for the judgment. Rather, that rule is unreasonable, inconsistently applied, and nothing more than a pretext for the Oregon Supreme Court's refusal to protect Philip Morris's due process rights. Summary reversal—or alternatively full review on the merits—is warranted to enforce this Court's mandate in *Williams*, to prevent state courts from deploying state procedural rules to evade this Court's constitutional decisions, and to protect this Court's role as the final arbiter of federal constitutional rights.

This case also presents a second important question, which was accepted for review two years ago but not reached: Whether the jury's \$79.5 million punitive award—an amount 97 times the compensatory damages—is unconstitutionally excessive. This ratio of punitive to compensatory damages far exceeds the “single-digit ratio” that this Court has held will ordinarily be the constitutional limit. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). In the decision below, however, the Oregon Supreme Court left intact its earlier ruling that the other two guideposts identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996), can “override” the constitutional requirement of a reasonable relationship between punitive and compensatory damages. The need for review of that holding is no less pressing now than it was in 2006.

### A. The Trial

Jesse Williams began smoking cigarettes in 1950. App., *infra*, 5a. After 1955, Williams smoked Marlboros, manufactured and marketed by petitioner Philip Morris. *Id.* at 29a. Williams eventually smoked three packs of cigarettes a day. He was diagnosed with cancer in 1996 and died in March 1997. *Ibid.* Alleging negligence and fraud, Williams’s widow (“plaintiff”) sued Philip Morris.

At trial, plaintiff mounted a wide-ranging attack on 50 years of Philip Morris’s conduct. In closing arguments, plaintiff urged the jury to punish Philip Morris not only for the harm caused to Williams, but also for the alleged harms suffered by countless other, unidentified people who were not before the court—people whose individual circumstances were never presented to the finder of fact. 127 S. Ct. at 1061, 1063.

Philip Morris submitted to the trial court Requested Instruction Number 34, which would have instructed the jury “not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims.” App., *infra*, 159a-160a. Philip Morris argued at the charge conference that the federal Constitution mandated an instruction of this kind. *Id.* at 157a-158a, 162a. The trial court, however, determined that such an instruction was *not* constitutionally required. *Id.* at 161a-162a. Instead, the court told the jury that it was free to award any amount of punitive damages up to \$100 million, the amount arbitrarily requested in plaintiff’s complaint.

The jury found for plaintiff on both her fraud and negligence claims and awarded \$821,485 in compensatory damages (reduced to \$521,485 pursuant to Oregon’s statutory cap on wrongful death damages). The jury also awarded \$79.5 million in punitive damages for fraud, but refused to award any punitive damages on the negligence claims.

On post-trial motions, the trial court held that the punitive damages award was “excessive under federal standards” and reduced it to \$32 million—still 39 times the compensatory damages verdict. Both parties appealed.

### **B. Appeal And GVR**

On appeal, the Oregon Court of Appeals rejected on the merits Philip Morris’s contention that the jury should have been instructed not to impose punitive damages to punish for harms to non-parties. App., *infra*, 140a. It further concluded that the jury’s verdict was not unconstitutionally excessive and accordingly reinstated the \$79.5 million award. *Id.* at 152a.<sup>1</sup>

After the Oregon Supreme Court denied discretionary review, Philip Morris petitioned this Court for a writ of certiorari, raising both the punishment for harms to non-parties issue and the excessiveness claim. This Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). See *Philip Morris USA, Inc. v. Williams*, 540 U.S. 801 (2003).

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<sup>1</sup> Including interest, the award now amounts to nearly \$143 million.



### C. Proceedings On The First Remand

On remand, the Oregon Court of Appeals held that *State Farm* had no impact on its analysis or conclusions and again upheld the jury’s \$79.5 million verdict—principally because of alleged harm that Philip Morris purportedly caused to unidentified members of the “Oregon public.” App., *infra*, 112a-113a, 114a. The Court of Appeals once again rejected—on the merits—Philip Morris’s argument that the trial court had committed constitutional error by failing to give the company’s proposed instruction on punishment for harms to non-parties, holding that punishment on that basis was entirely appropriate under the federal Constitution. *Id.* at 102a-105a.

Philip Morris petitioned the Oregon Supreme Court for review, once again presenting (*inter alia*) the question whether the Court of Appeals had unconstitutionally permitted the jury to punish Philip Morris based on alleged harm to non-parties. App., *infra*, 173a-175a. The Oregon Supreme Court accepted discretionary review of that question and affirmed.

According to the court, the jury could have found that Philip Morris’s conduct affected many smokers other than Williams. App., *infra*, 35a. Although the court conceded there was no evidence that anyone other than Williams had relied on, or been injured as a result of, any of Philip Morris’s representations, the court held that reliance and causation could be presumed, based upon the court’s own “assessment of human nature”—an “assessment” that the court also “attributed” to the jurors. *Id.* at 36a n.1.

The Oregon Supreme Court rejected on the merits Philip Morris’s argument that the trial court had violated the federal Constitution by failing to instruct the jury not to punish Philip Morris for harms to non-parties. The court held that nothing in this Court’s decisions prohibited the jury from punishing Philip Morris for injuries to non-parties. App., *infra*, 8a.<sup>2</sup>

Next, the court rejected Philip Morris’s argument that the \$79.5 million punitive damages award was unconstitutionally excessive. It considered the three *BMW* “guideposts” for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of punitive to compensatory damages; and (iii) any relevant legislatively established penalties for comparable conduct. *BMW*, 517 U.S. at 574-75. Taking the evidence in the “light most favorable to the plaintiff,” the court concluded that the record supported a finding that Philip Morris’s conduct was “extraordinarily reprehensible.” App., *infra*, 54a, 66a. As the court interpreted the evidence, the jury could have found that Philip Morris’s misconduct affected “many Oregonians” other than Jesse Williams

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<sup>2</sup> After considering and rejecting *on the merits* Philip Morris’s federal claim that it could not be punished for alleged harm to non-parties, the court briefly noted that Philip Morris had not preserved any challenge other than an assignment of error for failing to deliver Philip Morris’s Requested Instruction Number 34. App., *infra*, 51a-52a. In particular, the court asserted that Philip Morris had not preserved a separate challenge to the instructions “actually given.” *Ibid.* Importantly, the court did not even *suggest* that any failure to object to the instructions “actually given” precluded consideration of Philip Morris’s federal constitutional argument on harm to non-parties—an argument the court had by then rejected on the merits.

who kept smoking and became ill or died. *Id.* at 55a. The court further reasoned that the jury could have concluded that the misconduct harmed “a much broader class of Oregonians”: those who “kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies.” *Ibid.* Therefore, the court concluded, “the first *Gore* guidepost favors a very significant punitive damage award.” *Id.* at 55a.

The court similarly held that the third *BMW* factor—the legislatively established penalties for comparable misconduct—supported a large punitive award: “Viewing the facts in the light most favorable to plaintiff, Philip Morris’s actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter.” App., *infra*, 59a.

Addressing the relationship between the compensatory and punitive awards, the court recognized that “the second *Gore* guidepost is not met.” App., *infra*, 64a. It acknowledged that “[a]ll arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the [United States Supreme] Court has said ordinarily will apply in the usual case.” *Ibid.*<sup>3</sup> Nevertheless, the court explained, “the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.” *Id.* at 66a.

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<sup>3</sup> If the statutorily-capped amount of compensatory damages is used as the denominator, the ratio in this case rises from 97:1 to 152:1.

Philip Morris filed a petition for writ of certiorari in this Court. The petition was granted on May 30, 2006. 547 U.S. 1162.

#### **D. This Court's Decision**

This Court accepted review on two questions: (i) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties; and (ii) whether the constitutional requirement of a reasonable relationship between punitive and compensatory damages is inapplicable in cases where the court determines that the jury could have found the defendant's conduct to be highly reprehensible and equivalent to a crime. See 127 S. Ct. at 1062. The Court found it necessary to rule only on the first of these questions, holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063.

Having held "explicitly that a jury may not punish for the harm caused others," 127 S. Ct. at 1065, the Court drew a critical distinction that was anticipated by Philip Morris's proposed instruction: although a jury may consider harms to non-parties in gauging the reprehensibility of the defendant's misconduct, the jury must *not* "go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. The Court "conclude[d] that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for

harm caused strangers.” *Ibid.* Where the risk of jury confusion is

a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, *federal constitutional law obligates them to provide some form of protection* in appropriate cases.

*Id.* at 1065 (emphases added; emphases of “kind” and “some” in original).

The Court also observed that Philip Morris had requested protection against the risk of punishment for harms to non-parties by proposing an instruction that “distinguish[ed] between using harm to others as part of the ‘reasonable relationship’ equation (which it would allow) and using it directly as a basis for punishment.” 127 S. Ct. at 1064 (quoting Philip Morris’s proposed instruction). The Oregon Supreme Court, like the trial court and the Oregon Court of Appeals before it, had “rejected that claim” on the merits. *Ibid.*

This Court concluded its opinion by telling the Oregon Supreme Court what was to be done on remand:

As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris’ appeal. We remand this case so that the Oregon Supreme

Court can *apply the standard* we have set forth.

127 S. Ct. at 1065 (emphasis added). Because the application of the proper constitutional standard could lead to either “the need for a new trial, or a change in the level of the punitive damages award,” *ibid.*, this Court did not reach the second question presented: whether the \$79.5 million award was unconstitutionally excessive.

Justice Ginsburg’s dissent, joined by Justices Scalia and Thomas, chided the majority for reaching the merits of the federal constitutional claim. The dissenters contended that Philip Morris had not “preserve[d] any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel’s argument.” 127 S. Ct. at 1068 (Ginsburg, J., joined by Scalia & Thomas, JJ., dissenting). They further suggested that Philip Morris’s proposed jury instruction had not been sufficient to preserve its claim of constitutional error. *Id.* at 1069.<sup>4</sup> That view was implicitly rejected by a majority of the Justices, who addressed Philip Morris’s due process claim on the merits.

### **E. Proceedings On Remand**

On remand, the Oregon Supreme Court refused to “address the constitutional standard that the United States Supreme Court has articulated” and instead “adhere[d] to” the opinion that this Court

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<sup>4</sup> Justice Stevens wrote separately to express disagreement with the majority on the merits. 127 S. Ct. at 1065-67 (majority opinion “announc[ed] a new rule of substantive law” that unwisely “expand[ed] the concept of substantive due process”) (Stevens, J., dissenting).

had rejected. App., *infra*, 13a, 22a. The Oregon court assumed that the portion of the proposed instruction that addressed harms to non-parties “clearly and correctly articulated the standard required by due process” and was therefore correct as a matter of federal law. *Id.* at 21a. But the Oregon court held that it did not need even to consider a remedy for the trial court’s instructional error because Philip Morris’s proposed jury instruction “was flawed for other reasons that we did not identify in our former opinion,” *id.* at 3a—reasons that, in fact, had never been relied upon by either the Oregon Court of Appeals or the Oregon Supreme Court in nine years of appellate litigation.

Philip Morris’s error, according to the Oregon Supreme Court, was that it grouped its proposed charge on harms to non-parties with other paragraphs concerning wholly separate topics that, the court found, “did not state [Oregon] law correctly,” in two respects. App., *infra*, at 21a. One of those paragraphs would have told the jury that it “may,” rather than “shall,” take into account various factors in awarding punitive damages. And another paragraph would have asked the jury to consider the extent to which any misconduct by Philip Morris was motivated by “illicit” profits, as opposed to having the jury consider all profits Philip Morris may have received from its sales of cigarettes in Oregon. *Id.* at 18a-22a.

The court recognized that those supposed errors did not have any impact on the trial court’s refusal to instruct on harms to non-parties: the trial court had addressed and denied Philip Morris’s federal claim separately from the other issues. *Id.* at 15a. But the court nevertheless held that Philip Morris had for-

feited its constitutional claim by “placing all the party’s eggs in one instructional basket” (*id.* at 13a), and that this forfeiture was “an independent and adequate ground for affirming the trial judge’s ruling.” *Id.* at 14a. Finally, the court let stand without comment its prior holding that the jury’s \$79.5 million verdict was not constitutionally excessive. *Ibid.*

### **REASONS FOR GRANTING THE PETITION**

#### **I. THIS COURT SHOULD VACATE THE JUDGMENT AND ORDER THE OREGON SUPREME COURT TO APPLY THE CONSTITUTIONAL STANDARD ANNOUNCED IN *WILLIAMS*.**

The Oregon Supreme Court’s defiance of this Court’s directive should not be countenanced. This Court held that “the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris’ appeal,” and it remanded the case “so that the Oregon Supreme Court can apply the standard we have set forth.” 127 S. Ct. at 1065. The Oregon Supreme Court had no authority either to disobey the clear instructions of this Court or to conjure up state-law procedural grounds for the judgment *after* both it and this Court had reached the merits of Philip Morris’s federal claim. Moreover, as a matter of federal law, the Oregon Supreme Court’s rationale for refusing to address Philip Morris’s due process claim is not an independent and adequate state ground.

##### **A. The Oregon Supreme Court Lacked The Power To Disobey This Court’s Directive.**

The Oregon Supreme Court’s decision runs roughshod over a principle fundamental to our judi-



cial system—that this Court’s decisions must be scrupulously honored by the lower courts. The court below violated that principle by refusing to “apply the [constitutional] standard set forth” in the Court’s opinion. As Justice Jackson explained, from “its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.” *Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948); see also, e.g., *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). This Court has not hesitated to grant certiorari to reverse lower court decisions that contravene the clear command of its remand instructions.

In *Yates v. Aiken*, 484 U.S. 211 (1988), for example, the issue was whether the South Carolina Supreme Court had failed to comply with this Court’s instruction to apply the rule announced in an intervening constitutional decision of this Court. On remand, the South Carolina court had simply concluded that the defendant was not entitled to relief under *state* law. This Court reversed: “Our mandate contemplated that the state court would consider whether, as a matter of *federal* law, petitioner’s conviction could stand \* \* \*.” *Id.* at 215 (emphasis added).<sup>5</sup>

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<sup>5</sup> See also, e.g., *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam) (summarily reversing and remanding because the court of appeals had failed to comply with this Court’s remand instructions); *Stanton v. Stanton*, 429 U.S. 501, 502 (1977) (per curiam) (rejecting Utah Supreme Court’s attempt on remand to avoid addressing the constitutional error identified by this Court); *Utah Pub. Serv. Comm’n v. El Paso Natural Gas Co.*, 395 U.S. 464, 471 (1969) (reversing in an antitrust action because this Court’s “mandate directed complete divestiture” yet the lower court “did not \* \* \* direct complete divestiture”).

Here, this Court gave the Oregon Supreme Court clear directions on remand: “[W]e believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris’ appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth.” 127 S. Ct. at 1065. The Court plainly contemplated that on remand the Oregon Supreme Court would determine the proper remedy for the violation of Philip Morris’s constitutional right to be protected against the risk of punishment for harms to non-parties. That is why the Court stated in the very next sentence that “the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award.” *Ibid.*

In the face of the Court’s clear instruction to apply the correct due process standard to *this case*, the Oregon Supreme Court was not free to refuse to apply that standard on the basis of previously unmentioned state-law grounds. Reversal is warranted to implement this Court’s judgment in *Williams* and to vindicate the Court’s authority.

In the alternative, if the Court is not disposed to remand this case for a *third* time, the Court might wish to consider asserting its remedial power at this juncture and ordering a new trial that will be free from the constitutional error that the Court has identified. See *Aiken*, 484 U.S. at 215 (“Since the state court did not decide [the federal] question, we shall do so.”).<sup>6</sup>

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<sup>6</sup> While the Court suggested in its prior opinion that a remittitur might cure the problem (see 127 S. Ct. at 1065), we submit that a new trial is clearly the only adequate remedy. It is im-

**B. A State Court May Not Wait Until After This Court Decides A Federal Constitutional Claim To Interpose, For The First Time, A State-Law Bar To That Claim.**

When Philip Morris’s federal constitutional claim was first presented to and addressed by the Oregon Supreme Court, that court unquestionably had the authority to interpose a valid independent and adequate state ground for refusing to consider that claim, if one existed. But it could not do so for the first time on remand, *after* it and this Court had both addressed the merits of the federal claim. The Oregon courts lost the prerogative to invoke a state-law procedural bar to Philip Morris’s due process rights when, given no fewer than three opportunities to interpose such a barrier, they nevertheless consistently adjudicated the merits of the federal question.

It is settled doctrine that, where a state court decision reasonably appears to rest on federal law, this Court presumes that there is no adequate and independent state ground to support the judgment.

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possible to ascertain at this stage what verdict a properly-instructed jury would have returned. Such verdict might well have been for a lesser amount than the remittitur a court might choose. The only appropriate remedy for a prejudicially erroneous instruction, therefore, is a new trial. See, *e.g.*, *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1018 (9th Cir. 2007) (remittitur is “less appropriate [than a new trial] where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount”); *White v. Ford Motor Co.*, 500 F.3d 963, 973 (9th Cir. 2007) (remittitur cannot cure instructional error); *Werbungs Und Commerz Union Austalt v. Collectors’ Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (same). Indeed, this Court has reached that very conclusion in the context of criminal sentencing. See *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

*Coleman v. Thompson*, 501 U.S. 722, 735 (1991). In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court set forth its approach to determining whether a decision rests on state-law grounds and is thus unreviewable:

[W]hen \* \* \* a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so \* \* \*. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

*Id.* at 1040-41.

It follows that, where a state court does *not* indicate that its decision rests on state-law grounds—where, to the contrary, it explicitly (and, here, exclusively) bases its decision on principles of federal law—it is impermissible for the state court to invoke a state-law ground for the judgment for the first time *after* this Court has ruled on the federal issue.

In *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam), this Court rebuffed a state court's similar attempt to manufacture a new state-law ground for affirmance on remand. This Court had held unconstitutional a judgment of civil contempt against the NAACP for failing to turn over to the State the names and addresses of its members.

The Court’s mandate “remanded the case to the Supreme Court of Alabama ‘for proceedings not inconsistent with’ our opinion.” *Id.* at 241. On remand, the Alabama Supreme Court refused to vacate the contempt judgment, finding for the first time that the NAACP had failed to comply with other aspects of the State’s order. *Id.* at 242.

This Court summarily reversed, holding that the lower court had erred by finding a new rationale for upholding the judgment on remand, notwithstanding the federal constitutional defect found by this Court. When the case had been before this Court,

[t]he State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. \* \* \* That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. \* \* \* And that was the premise on which the Court disposed of the case. \* \* \* In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition.

*Patterson*, 360 U.S. at 243-44.

So too here. In their earlier consideration of the case, the Oregon courts did not hold that Philip Morris had failed to preserve its constitutional claim by making errors of state law in other parts of its proposed jury instruction. Instead, on the *two* previous occasions leading to remands by this Court, the Oregon courts addressed the *merits* of Philip Morris’s federal claim. As in *Patterson*, the state court’s decision to reach the merits of the federal claim in the earlier proceeding precludes it from rendering this

Court’s review and ruling on the merits a meaningless exercise. See also *Aiken*, 484 U.S. at 218 (“Since it has considered the merits of the federal claim” already, the South Carolina Supreme Court “has a duty to grant the relief that federal law requires”).

A contrary rule, allowing post-remand invocation of state-law grounds as an excuse for declining to remedy a constitutional violation, would be inconsistent with the sound administration of justice in our federal system and wasteful of this Court’s limited resources. That is precisely why in *Long* the Court adopted the approach of presumptive jurisdiction over appeals from state court decisions that appear to rest on federal grounds. The Court rejected the alternative approach of remanding an ambiguous case back to state court for clarification of the grounds upon which it rests, in part “because of [concerns about] the delay and decrease in efficiency of judicial administration.” 463 U.S. at 1039.<sup>7</sup>

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<sup>7</sup> This is unlike the situation in which the Court reverses a state-court decision that upheld a claim of federal right without reaching the question whether the claimant is independently entitled to relief under state substantive law. On remand from this Court, state courts remain free to recognize and apply state-law principles that offer broader protection of rights than federal law provides. See, e.g., *Cooper v. California*, 386 U.S. 58, 62 (1967); cf. *Danforth v. Minnesota*, 128 S. Ct. 1029, 1038-42 (2008). They may not, however, deploy state-law rules to *defeat* the federal constitutional protections recognized by this Court in the very same case.

**C. In Any Event, The State-Law Ground Invoked Below Did Not Provide An Independent And Adequate Basis For The Judgment.**

This Court should also summarily reverse because the procedural bar invoked by the Oregon Supreme Court is not an “independent and adequate” state ground for the judgment: it is an arbitrary rule that is neither firmly established nor regularly followed, and of which Philip Morris had no fair notice when presenting its proposed jury instructions.

*1. As A Matter Of Federal Law, Philip Morris Properly Preserved Its Constitutional Claim.*

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). As Justice Holmes explained for the Court, “[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). As a matter of federal law, the combination of a proposed jury instruction that correctly stated federal law and the presentation of oral argument was more than adequate to preserve Philip Morris’s constitutional claim. The Oregon Supreme Court’s post-hoc imposition of a stricter rule serves no legitimate state interest. See *Osborne v. Ohio*, 495 U.S. 103, 125 (1990) (invoking the “general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests”).

The Oregon Supreme Court refused on remand to apply the correct constitutional standard to Philip Morris's due process claim because it found that the proposed jury instruction on punitive damages was not "correct in all respects" under Oregon law. App, *infra*, at 51a-52a. Remarkably, the Oregon Supreme Court did not give even cursory consideration to the portion of the instruction that was at issue in this Court's decision. Instead, the Oregon court identified two supposed errors of *state law* in *other portions* of the proposed instruction. First, the instruction would have told the jury that it "may," rather than "shall," take into account various factors in awarding punitive damages. And second, it asked the jury to consider the extent to which any misconduct by Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris may have received from its sales of cigarettes in Oregon. *Id.* at 18a-22a.

The principal defect in the Oregon Supreme Court's reliance on the "correct in all respects" rule is that such a rule serves no legitimate state interest where the erroneous part of a proposed instruction addresses a different point of law *that was separately considered by the trial court*. Thus, even assuming that the Oregon court's hairsplitting distinctions did identify "errors" in the proposed charge, the court's reliance on them to foreclose Philip Morris's due process claim is indefensible.

An examination of the manner in which the instruction was proposed and considered at trial demonstrates that Philip Morris adequately preserved its federal claim. Plaintiff claimed that Philip Morris had engaged in a 50-year national campaign to deceive a nation of smokers into believing that the



causal link between smoking and cancer had not been proven. In response, as this Court explained, “Philip Morris asked the trial court to tell the jury that ‘you may consider the extent of harm suffered by others in determining what the reasonable relationship is’ between any punitive award and ‘the harm caused to Jesse Williams’ by Philip Morris’ misconduct, ‘but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims.’” 127 S. Ct. at 1061 (ellipses and brackets omitted) (quoting from joint appendix).

That proposed instruction was part of Philip Morris’s Requested Instruction Number 34, which also covered other subjects relating to punitive damages. As the Oregon Supreme Court acknowledged (App., *infra*, 6a), the trial court conducted a “line-by-line” analysis of Philip Morris’s proposed charge, and considered and ruled upon the harms-to-non-parties provision as a distinct issue. *Id.* at 6a, 16a, 156a. With respect to the relevant portion of the proposed instruction, Philip Morris argued at the charge conference that the Constitution prohibits punishment for harms to non-parties. *Id.* at 162a. The trial court asked defense counsel to identify cases holding “that this element \* \* \* has to be there for the jury.” *Ibid.* Because there was no case squarely on point, the court refused to give any instruction on the subject. *Ibid.*

Thus, the trial court considered the relevant portion of Requested Instruction Number 34 in isolation and rejected it *not* because the court believed that *other portions* of the instruction misstated *state* law, but because the court disagreed with Philip Morris’s

view that the instruction on harms to non-parties was required by *federal* law. App., *infra*, at 159a-162a. That the relevant instruction happened to appear with other paragraphs of Philip Morris’s proposed charge under a single heading, rather than under its own separate heading, had no effect on the trial court’s ruling at the charge conference; the court fully considered and rejected the federal due process claim both separately and on its merits. No change to other, unrelated parts of Requested Instruction Number 34 would have had any impact on the trial court’s rejection of the harm-to-others portion of the instruction.

The Oregon Supreme Court nevertheless held on remand that Philip Morris forfeited its constitutional claim because its proposed instruction on harms to non-parties also included *other* paragraphs, on distinct points of law, “that did not state [Oregon] law correctly.” App., *infra*, 21a. Under the Oregon Supreme Court’s approach, had Philip Morris submitted the harms to non-parties instruction on a separate sheet of paper, and thereby avoided “placing all the party’s eggs in one instructional basket” (*id.* at 15a), the federal claim would have been preserved.

This Court has repeatedly explained that where—as here—a defendant asserts a federal right clearly and gives the trial court an opportunity to consider the defendant’s argument on the merits, the claim is preserved as a matter of federal law and cannot be barred by a state procedural rule. For example, a party has no duty to ask for a jury instruction on a point of law that the trial court has already rejected: “Were we to accept this position, we would force resort to an arid ritual of meaningless form, and would further no perceivable state interest.” *Os-*

*borne*, 495 U.S. at 124-25 (internal quotation marks and ellipses omitted). See also *Douglas*, 380 U.S. at 422 (“No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair.”); *Henry v. Mississippi*, 379 U.S. 443, 447-48 (1965) (“A litigant’s procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State’s insistence on compliance with its procedural rule serves a legitimate state interest. \* \* \* If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.”).

The Oregon Supreme Court’s rigid reliance upon a supposed requirement that a proposed “instruction” be “correct in all respects”—even in respects that have nothing to do with the matter at issue—is a classic example of a procedure that furthers no perceptible state interest and therefore cannot bar a federal claim. Indeed, it bears a striking resemblance to the forfeiture doctrine applied by the Alabama Supreme Court, and held inadequate by this Court, in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). There, the state court refused to reach the merits of the plaintiff’s constitutional claim because it found errors in other portions of the plaintiff’s brief: “[W]here unrelated assignments of error are argued together and one is without merit, the others will not be considered.” *Id.* at 295 (internal quotation marks omitted). This Court rejected the “pointless severity” with which the Alabama Supreme Court applied this rule, noting that the NAACP’s brief had simply grouped its assignments of errors together under the same numerical heading for stylistic purposes. *Id.* at 297. Similarly, Philip

Morris grouped separate parts of the jury instructions addressing punitive damages under a single, general heading (“PUNITIVE DAMAGES – PRODUCTS LIABILITY”) for the convenience of the court. App., *infra*, 22a-25a. The trial court addressed each paragraph of the proposed instruction separately, and the supposed errors in other paragraphs had no effect on the court’s consideration of the relevant instruction. Oregon has no legitimate interest in extinguishing federal due process rights through such trivialities.

2. *The Novel Rule Announced By The Oregon Supreme Court Was Insufficient To Bar Philip Morris’s Federal Claim.*

The Oregon Supreme Court’s rationale fails for a second reason. An independent state-law procedural bar is adequate to support a state court judgment only if it is a “firmly established and regularly followed state practice.” *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). A state rule that is novel or applied inconsistently is by definition inadequate to preclude consideration of a party’s federal claim. See, e.g., *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958).<sup>8</sup> “Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon

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<sup>8</sup> See also, e.g., *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982) (procedure that had not been applied “evenhandedly to all similar claims” could not bar federal argument); *Staub v. City of Baxley*, 355 U.S. 313, 318-20 (1958) (where state decision was contrary to “long line” of prior rulings, it was not an adequate state ground for decision”); *Ward v. Love County*, 253 U.S. 17, 22 (1920); *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 475-76 (1918).

prior decisions, seek vindication in state courts of their federal constitutional rights.” *Ford v. Georgia*, 498 U.S. 411, 423 (1991) (quoting *Patterson*, 357 U.S. at 457-58).

The overly technical procedural bar at issue here—which was never identified by the Oregon courts until *after* this Court had ruled on the merits of Philip Morris’s claim and which represents a marked departure from typical Oregon procedure—is precisely the type of novel requirement that this Court has held *cannot* foreclose a federal claim. The decision below represents a distinct departure from usual Oregon procedure in multiple respects.

First, in *State v. George*, 97 P.3d 656 (Or. 2004) (en banc), the Oregon Supreme Court reiterated the rule that, where the trial court rejects a proposed instruction as a matter of substantive law—and not because it finds fault with the wording of the proposed instruction—there is no need to submit a revised instruction, because it would be “an exercise in futility.” *Id.* at 339. “Our requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures.” *Ibid.*<sup>9</sup> The rule applied below—that a proposed instruction must be correct even in those respects that were entirely irrelevant to the trial court’s rejection of the instruction—cannot be reconciled with *George*.

At oral argument following remand from this Court, the member of the Oregon Supreme Court who authored both of its opinions in this case pointedly stated that the court did not need to be con-

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<sup>9</sup> See also, *e.g.*, *State v. Hitz*, 766 P.2d 373, 375 (Or. 1988); *State v. Brown*, 800 P.2d 259, 264-266 (Or. 1990) (en banc).

cerned with whether its ruling is consistent with prior opinions such as *George*, because “the United States Supreme Court wouldn’t care for one second” about “[o]ur interpretation as to whether *George* is binding, useful, or irrelevant,” and because this Court “assumes that we’re proceeding in good faith, and there would be no basis, no matter what way we ruled on *George*, for the Court to assume anything different nor for you to claim anything different.” App., *infra*, 181a. Rather than trying to distinguish *George* in its opinion following remand, the Oregon Supreme Court simply ignored the precedent.

Second, and relatedly, the decision below dramatically expands the “correct in all respects” rule. This case marks the first time in any reported Oregon decision that an appellate court has rejected an instruction on one subject, after the trial judge considered that subject separately at the charge conference, merely because it appeared under the same heading as a defective instruction *on an entirely distinct point of law*. Normally, the Oregon courts consider the correctness of instructions topic by topic, as the trial judge did at the charge conference.<sup>10</sup> Indeed, in their prior appellate decisions in this very case, the Oregon courts applied the “correct in all respects” rule only in the context of the specific subject at issue—the question whether the award had to be proportional to the harm to the plaintiff, and could

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<sup>10</sup> See, e.g., *Bennett v. Farmers Ins. Co.*, 26 P.3d 785 (Or. 2001); *State v. Reyes-Camarena*, 7 P.3d 522 (Or. 2000) (en banc); *Hernandez v. Barbo Mach. Co.*, 957 P.2d 147 (Or. 1998); *Beglau v. Albertus*, 536 P.2d 1251 (Or. 1975) (en banc); *Owings v. Rose*, 497 P.2d 1183 (Or. 1972); *Brooks v. Bergholm*, 470 P.2d 154 (Or. 1970).

not punish for harms to non-parties. App., *infra*, 52a; *id.* at 103a-104a; 140a.

Third, although the Oregon appellate courts had three prior opportunities to identify a state-law ground for rejecting Philip Morris’s constitutional claim, they never did so. To the contrary, all three prior decisions reached the merits of Philip Morris’s constitutional claim. See App., *infra*, 47a, 104a-105a, 140a. That silence is telling: it is established procedure in Oregon to decide all questions of state law first, in order to avoid unnecessarily reaching federal constitutional issues. See *Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (per curiam) (Stevens, J., concurring in judgment) (collecting Oregon cases); see also, *e.g.*, *State v. Acremant*, 108 P.3d 1139, 1151 (Or. 2005) (court’s “usual practice” is to “consider[] all questions of state law before reaching federal constitutional claims”).

In sum, this procedural bar—fashioned only after this Court made clear that the Oregon court was wrong on the merits—is the antithesis of a “firmly established and regularly followed” procedural doctrine. *Ford*, 498 U.S. at 424; see also *Lee v. Kemna*, 534 U.S. 362, 380 (2002) (state-law basis for denying continuance inadequate where the “asserted procedural oversights \* \* \* were first raised more than two and a half years after [defendant’s] trial”); *Patterson*, 357 U.S. at 458 (procedural barrier applied inconsistently to the same party is not an adequate ground).

## II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO CLARIFY THE APPROPRIATE APPLICATION OF THE RATIO GUIDEPOST.

In May 2006, this Court granted review of the question whether the 97:1 ratio of punitive to compensatory damages in this case was constitutionally permissible. Because the Court reversed the Oregon Supreme Court on the issue of harms to non-parties and remanded the case for further proceedings, it did not reach the excessiveness issue. *Williams*, 127 S. Ct. at 1065. The Court's guidance on this important, recurring question is needed even more now than it was then.

### A. The Framework Adopted And Applied By The Oregon Supreme Court Conflicts With This Court's Decisions In *BMW* And *State Farm*.

The Oregon Supreme Court acknowledged that “the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case.” App., *infra*, 64a. It nevertheless affirmed the \$79.5 million penalty, which yielded a ratio of almost 100 to 1, because “the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.” *Id.* at 66a. The Oregon Supreme Court reaffirmed that view as recently as March 6, 2008, when it stated: “In *Williams*, we held that ‘extraordinarily reprehensible’ conduct on the part of the defendant may provide a basis for overriding concerns that may arise from an award that exceeds a single-digit ra-



tio.” *Goddard v. Farmers Ins. Co.*, No. S053405, 2008 WL 599323, at \*16 (Or. Mar. 6, 2008) (en banc).

The presence of aggravating reprehensibility factors alone does not override the ratio guidepost or even remove a case from the single-digit-ratio framework described in *State Farm* (much less justify the 97:1 ratio at issue here). To the contrary, the degree of reprehensibility, among other factors, helps the court to determine which single-digit multiplier is appropriate. In *State Farm*, this Court explained that normally a punitive award of four times compensatory damages “might be close to the line of constitutional impropriety.” 538 U.S. at 425. However, the absence of aggravating reprehensibility factors renders *any* punitive damages award “suspect.” *Id.* at 419. *State Farm* itself involved at least two aggravating reprehensibility factors—intentional deceit and a financially vulnerable victim. *See id.* at 419-20. Nevertheless, the Court suggested that any award producing a ratio of more than 1:1 would be unconstitutionally excessive on the facts of the case. *Id.* at 429.<sup>11</sup>

It makes no sense to consider each guidepost as an independent and sufficient factor that can “override” one or more of the others, as the Oregon Supreme Court did. Rather, the guideposts are constructs that must be considered together in assessing the excessiveness of a punitive award, and not “competitive tools,” as the Oregon Supreme Court described them (App., *infra*, 65a). Reprehensibility

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<sup>11</sup> On remand, the Utah Supreme Court held that a 9:1 ratio was permissible after finding all five reprehensibility sub-factors to have been established. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004).

may move the acceptable ratio toward the upper end of the single-digit range; it does not render the ratio guidepost inapplicable. By treating the ratio guidepost as an abstract inquiry that could be overridden by high reprehensibility, the Oregon Supreme Court's decision eliminates the "reasonable relationship" requirement and conflicts with this Court's punitive damages jurisprudence.

**B. The Lower Courts Are Deeply Divided On This Question.**

The Oregon Supreme Court's elimination of the "reasonable relationship" requirement directly conflicts with the approach taken by the Ninth Circuit, which assesses the *BMW* guideposts in concert with one another. That court has "discern[ed] from *BMW* and its progeny a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct." *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). In that framework, the reprehensibility guidepost and the ratio guidepost play distinct roles:

In cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality. *See, e.g., State Farm*, 538 U.S. at 425, 123 S. Ct. 1513 (acts of bad faith and fraud warranted something closer to a 1 to 1 ratio). In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional. *See, e.g., Zhang [v. Am. Gem Seafoods, Inc.]*, 339

F.3d 1020, 1043-44 (9th Cir. 2003)] (post-*State Farm* case upholding 7 to 1 ratio where the wrongful conduct involved significant racial discrimination); *Bains* [*LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776-77 (9th Cir. 2005)] (post-*State Farm* case indicating that ratio between 6 to 1 and 9 to 1 would be constitutional where underlying wrongful conduct was racial discrimination). And in cases where there are insignificant economic damages but the behavior was particularly egregious, the single-digit ratio may not be a good proxy for constitutionality. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding a punitive damage award with a 37 to 1 ratio of punitive damages to compensatory damages as constitutional because “defendant’s behavior was outrageous but the compensable harm” was nominal and difficult to quantify).

422 F.3d at 962.

The Ninth Circuit’s approach, with its appreciation that the reprehensibility analysis operates within limits set by the ratio guidepost, is irreconcilable with Oregon’s, which simply discards the ratio consideration based on the possibility that the jury found the defendant’s conduct to be highly reprehensible. The existence of a conflict such as this one, between a federal appellate court and the high court of one of its constituent states, is a compelling reason to grant review. See *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985). That is because such conflicts may lead to forum shopping and will produce different results based on nothing more than whether a particular lawsuit is removable.

The majority of lower courts have agreed with the Ninth Circuit and heeded this Court's admonition that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. In particular, the Eighth Circuit, noting that "caution is required" when compensatory damages are substantial, reduced a 3.75:1 ratio to "approximately 1:1" in a smoker's personal-injury case. *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005). See also *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (although employer engaged in egregious pattern of racial discrimination, 1:1 was the maximum constitutionally-permissible ratio where compensatory damages were \$600,000, which the court termed "a lot of money.").

Nonetheless, other courts agree with the Oregon Supreme Court that reprehensibility (a highly subjective criterion that is inherently present in all cases involving an award of punitive damages) may trump the ratio guidepost. These courts have expressly disregarded the single-digit limitation in cases in which none of the exceptions identified in *State Farm* was present, on the theory that high reprehensibility alone suffices to justify a double- or triple-digit ratio.

In *Mission Resources, Inc. v. Garza Energy Trust*, 166 S.W.3d 301 (Tex. App.—Corpus Christi 2005, pet. granted), for example, a Texas Court of Appeals upheld a \$10 million punitive award for trespass where the compensatory damages were \$543,667. The court "[a]dmitt[ed]" that the ratio of "approximately 20 to 1 \* \* \* exceeds the 'single-digit multipliers,' which, according to the Supreme Court, 'are more

likely to comport with due process.” *Id.* at 319. It nevertheless upheld the award because the trespass was “highly unlawful.” *Ibid.* Similarly, in *Superior Federal Bank v. Jones & Mackey Construction Co.*, 219 S.W.3d 643 (Ark. Ct. App. 2005), the Arkansas Court of Appeals upheld a \$3.08 million punitive damages award for defamation that was 17.6 times the \$175,000 compensatory damages award for that claim. The court recognized that “this ratio is greater than the single-digit ratio mentioned in *Campbell*,” and therefore was “constitutionally suspect.” *Id.* at 652-53. But it upheld the award simply because “a 17.6-to-1 ratio is not breathtaking.” *Id.* at 653.

The Constitution does not require a “one size fits all” approach to application of the ratio guidepost. But the current level of conflict and confusion on the ratio question in the lower courts is intolerable. The bottom line is that the guidepost is not being applied in any principled or predictable manner. The Oregon Supreme Court’s doctrinal holding—that the reasonable-relationship requirement can be “overridden” whenever the jury could have found the defendant’s conduct to be highly reprehensible—only adds to that disarray. The need for review of that holding is no less pressing now than it was when the Court granted certiorari on this issue two years ago.

### CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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