No. 11-445

In the
Supreme Court of the United States

FARMERS INSURANCE CO. OF OREGON, *et al.*,
Petitioners,

v.

MARK STRAWN, on his own behalf
and as representative of a class of
similarly situated Persons, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

DEBORAH J. LA FETRA
Counsel of Record
TIMOTHY SANDEFUR
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLaFetra@pacificlegal.org
E-mail: TSandefur@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

The Oregon Supreme Court eliminated a key element of liability—reliance—to allow 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 representations at issue. 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 $8 million punitive damages award that exceeds federal constitutional boundaries. To do so, it devised a novel, state-law procedural rule to conclude that Farmers waived its constitutional challenge to the punitive damages award.

The questions presented are:

1. Whether the Due Process Clause prohibits a state court from relieving class members of the burden of proving a long-standing and fundamental element of liability—here, individual reliance in a fraud claim—and thereby depriving the defendant of its right to assert individualized defenses.

2. 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.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE[1]

PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF's Free Enterprise Project is concerned with class action abuse and its adverse impact on the free market and entrepreneurial activities of America's job-creators. To that end, PLF has participated as amicus curiae in many cases involving constitutional due process limits on punitive damages and the misuse of class certification, including *Thomas v. Alcoser*, No. 11-308, 2011 U.S. LEXIS 7890 (Oct. 31, 2011) (*cert. denied*); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Philip Morris USA Inc. v. Jackson*, 131 S. Ct. 3057 (2011). PLF has also participated in cases like *Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (2009), and *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010), to support the federal Due Process Clause's guarantee against state courts deliberately manipulating the law to disallow a federal constitutional claim.

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents important issues related to the Due Process Clause: first, the requirement that class action plaintiffs demonstrate individual reliance to establish a fraud cause of action and, second, the evasive state court machinations that deprive defendants of constitutional defenses and fair judicial procedures. The federal constitutional dimension of these issues, coupled with the nationwide importance of their resolution, warrants this Court's review.

The first question presented, with regard to "presumed" reliance, reflects a disturbing, growing trend in the law. Sometimes seeking an extension of the fraud-on-the-market doctrine announced in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and sometimes just appealing to a court's interest in efficient allocation of judicial resources, plaintiffs in many jurisdictions are increasingly asking courts to strip defendants of the right to defend themselves, by simply "presuming" the existence of crucial elements of the plaintiffs' claims. Most courts have refused so far, leaving the decision below in conflict with many circuit courts and state courts of last resort. But if the decision below is permitted to stand, it could portend a barrage of new class actions, loosely bound together only by legal presumptions. Class actions were intended to allow aggregation of substantially *similar* claims, not to allow sundry complaints, many fatally lacking factual support, to disguise their individual deficiencies by mass presentation.

The second question presented goes to the fundamental nature of federalism in our constitutional structure. While the federalist system affords states

broad discretion to act within constitutional boundaries, they should not be free to manipulate state law in ways that subvert federally protected individual rights. This principle applies no less to state judiciaries than to state legislatures. *See*, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The requirements of due process and equal protection, among others, bar state courts from interpreting state laws in ways that evade those limits. In short, state autonomy in the federalist system is limited by protections for individual rights, and these limits are as essential when the state acts through the judicial process as when it acts through the legislative process.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH NUMEROUS FEDERAL AND STATE COURTS THAT REFUSE TO "PRESUME" RELIANCE, INJURY, AND DAMAGE

Class action litigation creates certain efficiencies, such as eliminating the need for duplicative discovery and trials. These efficiencies, however, do not justify depriving individual litigants of fair judicial procedures. *Stone v. White*, 301 U.S. 532, 535 (1937) (where a plaintiff has a right to make an equitable claim, the defendant has an equal right to present a case to defeat that claim); *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc) ("[C]onsiderations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"), *cert. denied*, 464 U.S. 1040 (1984).

Aggregating claims in a class action should not dramatically alter the substantive law underlying the lawsuit. *Alabama v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 318 (5th Cir. 1978) ("Just as the meaning of liability does not vary because a trial is bifurcated, the requisite proof also in no way hinges upon whether or not the action is brought on behalf of a class under Rule 23 . . . . Consequently, this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs.").

Using a legal presumption to relieve plaintiffs of the obligation to prove every essential element in their claim unfairly benefits plaintiffs at the expense of defendants. *See*, *e.g.*, *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (plaintiffs' proposal to prove causation through individual affidavits submitted to special master was a "one-sided procedure [which] would amount to an end-run around defendant's right to cross-examine individual plaintiffs"). Even when there is a common question as to the wrongfulness of the defendant's conduct, "this is only half the question"; courts may not combine claims in a class action where there are individualized factual questions as to whether each class member was truly harmed. *Yeger v. E*Trade Sec. LLC*, 884 N.Y.S.2d 21, 24 (N.Y. App. Div. 2009) (footnote omitted). As this Court recently made clear in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541, the class action device cannot be used to cover up factual differences between plaintiffs' claims. *See id.* at 2560 ("Wal-Mart is entitled to individualized determinations of each employee's eligibility for backpay."). In short, "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual

plaintiff's—and defendant's— cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 191-92 (3d Cir. 2001) ("[A]ctual injury cannot be presumed, and defendants have the right to raise individual defenses against each class member.").

In every case, the plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. Even where a presumption is properly applicable—*res ipsa loquitur*, for example—the plaintiff must prove each element establishing the inference, and the defendant is entitled to negate each element. *Aguirre v. Turner Constr. Co.*, 582 F.3d 808, 811 (7th Cir. 2009). "'Due process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted).

For this reason, most courts—in conflict with the decision below—require a showing of individual reliance in consumer class actions. *See*, *e.g.*, *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 234-36 (Md. 2000) (because class members with claims under state's consumer protection act would have to individually prove reliance on defendant's alleged misrepresentations and material omissions, class certification was inappropriate); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 694 (Tex. 2002) (refusing to adopt class-wide presumption of reliance on misrepresentations made by defendant where it found "no evidence that purchasers actually did rely on [defendant's] statements so uniformly that common issues of reliance predominate over individual ones");

Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 975 (5th Cir. 2000) (As a general rule, "[c]ertification is improper if the merits of the claim [depend] on the defendant's individual dealings with each plaintiff."); *Hammett v. Am. Bankers Ins. Co. of Fla.*, 203 F.R.D. 690, 699 (S.D. Fla. 2001) (whether defendants delayed or improperly paid each class members' claims could not be determined only by considering the legality of defendants' actions, but required consideration of each class member's cardholder agreement and claims history, because "these and other variables will affect whether a class member has a cognizable injury"); *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1138 (Fla. Dist. Ct. App.), *rev. denied,* 999 So. 2d 644 (Fla. 2008) ("[T]o proceed at the level of abstraction urged by [plaintiff] would raise due process concerns.").[2]

---

[2] *See also Mirkin v. Wasserman*, 858 P.2d 568 (Cal. 1993) (presumption of reliance cannot be applied to common law deceit and negligent misrepresentation claims in a securities class action); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474-75 (Del. 1992) (refusing to apply fraud-on-the-market presumption theory to state law class action fraud claims); *White v. BDO Seidman, LLP*, 549 S.E.2d 490, 495 (Ga. 2001) (presumption of reliance inapplicable to negligent misrepresentation class action claim); *Kaufman v. i-Stat Corp*., 754 A.2d 1188, 1196-97 (N.J. 2000) (no presumption of reliance to negligent misrepresentation class action claim); *Securities Investor Prot. Corp. v. BDO Seidman, LLP*, 222 F.3d 63, 73 (2d Cir. 2000) (holding fraud-on-the-market, "[t]o the extent that the federal courts have adopted this concept . . . has applied only in the context of the federal securities law" (citing *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 695 (9th Cir. 1977)); *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329, 1337 (S.D. Fla. 2007); *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 380 (D.N.J. 2004); *Mishkin v. Peat, Marwick, Mitchell & Co.*, 658 F. Supp. 271, 274-75 (S.D.N.Y. 1987).

The ripple effects of this case, therefore, will be strong and immediate if this Court allows the decision below to stand. Creative class action counsel are continually looking for new ways to "presume" elements of the plaintiffs' claims, so as to win the crucial first battle of certification.

For example, the Colorado Supreme Court recently decided the case of *Garcia v. Medved Chevrolet*, No. 09SC1080, 2011 Colo. LEXIS 842 (Oct. 31, 2011), in which Trina Garcia, purporting to represent thousands of automobile purchasers, sought to employ the fraud-on-the-market doctrine in the consumer protection context, thereby avoiding any need to prove reliance on the alleged misrepresentations or injury resulting from that reliance. Specifically, she alleged that the defendant automobile dealerships violated the Colorado Consumer Protection Act by adding aftermarket products (such as pinstripes) to new vehicles without separately identifying the cost of those aftermarket products in the documentation accompanying the sale. *Id.* at *2. Garcia purported to represent a class of all purchasers between 2003 through 2009, based on a presumption that each class member was injured by alleged misrepresentations in the common paperwork that accompanied each sale. *Id.* at *5-*7.

The trial court certified two classes: purchasers who were charged for products that were never installed, and purchasers for whom products were installed but allegedly not adequately disclosed. *Id.* at *13-*14. The court of appeals, rejecting the fraud-on-the-market theory for consumer protection claims, reversed, and held that Garcia had no method of proving that each supposed member of the class was

actually harmed. *Garcia v. Medved Chevrolet*, 240 P.3d 371, 381 (Colo. Ct. App. 2009). The Colorado Supreme Court affirmed the appellate court decision, holding that while plaintiffs may draw an inference of reliance from circumstantial evidence, defendants must be permitted to present evidence that could undermine that inference and the trial court is required to "rigorously analyze" the competing evidence to determine whether the inference is warranted under the circumstances. *Garcia*, 2011 Colo. LEXIS 842 at *20, *25-*26.

Meanwhile, in New York, consumer-plaintiffs complained that they had overpaid for allegedly deceptively labeled "All Natural" Snapple containing the much-maligned high fructose corn syrup, and sought class certification based on a presumption that the purported class members had relied on the label and been injured. *Weiner v. Snapple Beverage Corp.*, No 07-Civ.-8742, 2010 U.S. Dist. LEXIS 79647 (S.D.N.Y. Aug. 3, 2010). The district court denied the motion to certify the class on the grounds that common issues did not predominate. *Id.* at *16-*17. The court held that the plaintiffs were unable to prove at trial, through common evidence, that each putative class member paid a premium for Snapple beverages as a result of the "All Natural" labeling. *Id.* This proof was made especially difficult because there was no "uniform price for Snapple beverages during the class period," so that putative class members paid varying prices for the products. *Id.* at *23. The court emphasized that the issue of damages was bound up with the issue of injury, and that the plaintiffs therefore failed to show how class-wide damages could be proven. *Id.* at *18-*19. The court further rejected class certification on the plaintiffs' unjust enrichment

claim, holding that it would require individual inquiries as to whether each class member was fully informed about the inclusion of high fructose corn syrup, whether they understood the syrup to be "natural," and whether they continued to buy Snapple despite their knowledge of the syrup's inclusion. *Id.* at *35.[3]

Plaintiffs also requested class certification based on presumptions in the Eighth Circuit case of *In re St. Jude Medical Inc., Silzone Heart Valve Products Litig.*, 522 F.3d 836 (8th Cir. 2008). The plaintiffs in that case had been implanted with heart valves that the manufacturer had recalled due to reports of leakage. The court found that individualized questions as to whether the patients or their doctors had ever been exposed to misrepresentations about the faulty medical device would overwhelm any common issues. *Id.* at 838-39. Even if Minnesota's consumer fraud statute did not require the plaintiffs to present direct evidence of reliance upon misleading statements, the court held that it could not

> *prohibit St. Jude* from presenting direct evidence that an individual plaintiff (or his or her physician) did not rely on representations from St. Jude. When such evidence is available, then it is highly relevant and probative on the question whether there is a causal nexus between alleged misrepresentations and any injury.

---

[3] *See also Pelman v. McDonald's Corp.*, No. 02-Civ-07821, 2010 U.S. Dist. LEXIS 114247, *30-*31, *38 (S.D.N.Y. Oct. 27, 2010) (decertifying, after eight years of litigation, the class of consumers claiming that McDonald's allegedly misleading advertising caused a laundry list of health problems).

Id. at 840. The court bolstered its conclusion by noting that the defendants had discovered evidence that many of the named class representatives and their doctors had never been exposed to any misrepresentations about the device. *Id*. at 839.[4]

In *Dukes* and *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), this Court explored the boundaries of appropriate class certification. This case, arising in the context of consumer protection claims, differs from the constitutional and securities claims considered in those cases, but like those cases presents a critical question about the interaction of the class action procedure and due process of law. As in those cases, this Court should ensure that the law is clear that defendants have the constitutional right to require plaintiffs to prove every

---

[4] *See also Poulos v. Caesars World, Inc*., 379 F.3d 654, 664-66 (9th Cir. 2004) (rejecting the plaintiffs' argument that evidence that video poker and electronic slot machines were deceptively advertised as games of chance sufficed as class-wide proof of individual reliance, on the basis that gamblers use such machines for a variety of individualized reasons); *In re TJX Cos. Retail Security Breach Litig.*, 246 F.R.D. 389, 395 (D. Mass. 2007) (where reliance is an element of a claim, a presumption of reliance is never appropriate because "[p]roving the element of reliance will necessarily involve individual questions of fact"); *In re Grand Theft Auto Video Game Consumer Litig. (No. II)*, 251 F.R.D. 139, 155-57 (S.D.N.Y. 2008) (rejecting plaintiffs' argument that evidence of single misrepresentation to entire class in form of video game rating was sufficient to establish that class members relied on rating's representation of game's content in making purchase); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 874 (Fla. Dist. Ct. App. 2006) (holding that allowing plaintiff class of 65,000 purchasers of termite control to prove their allegations of deficient performance through "collective proof" would, "[b]y any standard . . . amount to a violation of substantive due process of law").

element of their claim, and the constitutional right to individualized defenses on the merits.

II

THE AUTONOMY OF STATES IN THE FEDERAL SYSTEM IS LIMITED BY FEDERAL CONSTITUTIONAL STANDARDS AND INDIVIDUAL RIGHTS

A. States Have No Discretion To Act Arbitrarily or Otherwise Violate Individual Rights

States enjoy autonomy under the federal system as a means to the attainment of certain substantive constitutional ends: specifically, the ends of securing such rights as life, liberty, and the pursuit of happiness. Declaration of Independence, 1 Stat. 1 (1776). State autonomy in the federalist system "is not just an end in itself," but exists to better secure individual rights. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Thus while state judiciaries enjoy supreme authority to interpret state laws, they may not use that authority to violate federally protected individual rights, and may not appeal to federalism to justify their doing so.

James Madison emphasized this fact in the ratification debates, when he remarked that it was "preposterous" to object to the Constitution on the grounds that it "may derogate from the importance of the governments of the individual States[.]" *The Federalist* No. 45, at 288-89 (James Madison) (Clinton Rossiter ed., 1961). The Revolutionary War had not been fought, and "the precious blood of thousands spilt" just so that "individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities

and attributes of sovereignty[.]" *Id*. at 289. On the contrary, the Revolution had been fought so that "the people of America should enjoy peace, liberty, and safety." *Id*. Recognizing that "the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object," also meant recognizing that state autonomy was limited by individual rights. *Id*. Thus, "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." *Id*. State autonomy in the federal system is thus an *instrumental* good, and not a good in itself which the Constitution incorporates for the sake of protecting states. Simply put, there is no legitimate state interest in violating individual rights.

The Constitution is not a treaty among sovereigns who are free to act in violation of the rights of citizens, but a sovereign authority which restricts state autonomy by both explicit and implicit limitations. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816). The explicit restrictions are set forth in Article I, section 10, and elsewhere, while the implicit restrictions are established by the traditionally recognized individual rights lying at the center of American constitutional jurisprudence. *See*, *e.g.*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (protecting rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (protecting rights "implicit in the concept of ordered liberty"). States may not violate either the enumerated or unenumerated rights of individuals,

regardless of the broad autonomy they enjoy under federalism.

In *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), dissenting Justice Brandeis famously observed that "one of the happy incidents of the federal system" was that a state could "serve as a laboratory; and try novel social and economic experiments." But the majority in *Liebmann* responded that "unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that Amendment merely by calling them experimental." *Id.* at 279. Although it is true that states may "indulge in experimental legislation," they may not do so "by enactments which transcend the limitations imposed upon them by the federal Constitution," because "there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments." *Id.* at 279-80. Again, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942), Justice Jackson reiterated this point: "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority."

While the government of Oregon is therefore supreme in regulating its internal affairs, and its judiciary is the supreme interpreter of state law, this Court rightly retains power to intercede on behalf of citizens whose federal constitutional rights are violated under the color of state law. The state may not appeal to the values of federalism to defend actions which deprive citizens of the rights to due process of law, equal protection of the laws, and other federally recognized constitutional rights.

B. Federal Constitutional Limits on State Autonomy Apply to State Judiciaries No Less Than to State Legislatures

While the protections accorded by the Fourteenth Amendment have usually been applied in cases involving state legislative action, they also apply to the actions of state judiciaries. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). State courts are not free to act arbitrarily when interpreting state law, since lawfulness itself requires at a minimum that a state must treat individuals in a fundamentally fair, or nonarbitrary, way. *See District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008) ("'[R]ational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee [of due process]."). This Court has repeatedly held that state courts cannot use their autonomous authority to interpret state law as an opportunity to violate individual rights or to subvert federal constitutional guarantees of due process under the guise of interpretation.

For example, in *Bouie*, 378 U.S. 347, several civil rights protestors engaging in a sit-in remained at a lunch counter after being ordered to leave. The state's law against trespassing only barred entry onto property after being warned not to enter; it did not prohibit a person who lawfully entered from remaining in a place after being told to leave. Nevertheless, the South Carolina Supreme Court interpreted the law to prohibit staying on land after being ordered off, and upheld the criminal convictions of the demonstrators. This Court reversed, because "by applying such a construction of the statute . . . the State has punished

them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The Court took pains to note that *Bouie* was not a "void for vagueness" case. *Id.* at 351. On the contrary, "the language of [the trespass law] was admirably narrow and precise; the statute applied only to 'entry upon the lands of another . . . after notice . . . prohibiting such entry.'" *Id.* at 351-52. But the state court's decision "unforeseeably and retroactively expanded [the statute] by judicial construction." *Id.* at 352. This arbitrary inconsistency with prior law was so radical as to violate the basic principles of fairness in the Due Process Clause.

Slightly more complicated was *Alabama ex rel. Patterson*, 357 U.S. 449, in which the state demanded that the NAACP hand over its membership list. The Association refused, and was held in contempt. *Id.* at 451. This Court granted certiorari, but the state argued that it lacked jurisdiction, because the NAACP had not adequately sought review by the appropriate writ to the state supreme court. *Id.* at 454-55. This error, the state continued, justified the Alabama Supreme Court in denying review, and because that denial was a state law procedural matter, this Court was barred from examining the underlying merits. *Id.* at 455. But this Court rejected this argument:

> We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment . . . . [Citing several

> Alabama state decisions.] . . . [W]e can discover nothing in the prior state cases which suggests that mandamus is the exclusive remedy . . . . Nor, so far as we can find, do any of these prior decisions indicate that the validity of [contempt] orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus.

Id. at 456-57. The Court went on to hold that states may not abuse their judicial autonomy to evade review by the United States Supreme Court: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457-58. *Patterson* makes clear that this Court retains power to inquire into state law to ensure that state judiciaries do not abuse their authority to avoid enforcement of federal constitutional guarantees. This Court has followed that rule in many other cases. *See*, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Douglas v. Alabama*, 380 U.S. 415, 421-22 (1965); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923). *Cf. Stop The Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. at 2601-04 (plurality op.) (judicial alteration of state property law rules may effect a taking in violation of the Fifth Amendment).

In *Ward v. Bd. of County Comm'rs of Love County, Okla.*, 253 U.S. 17 (1920), the Court observed that it has power to inquire not only into whether a litigant properly alleged federal rights, "but also whether [those rights were] denied in substance and effect, as

by putting forward non-federal grounds of decision that were without any fair or substantial support." *Id.* at 22 (citing cases). The Court has this power because "if non-federal grounds, plainly untenable, may be . . . put forward successfully, our power to review easily may be avoided." *Id.*

The Due Process Clause, among other constitutional provisions, significantly limits the power of a state judiciary to rest its decisions on independent nonfederal grounds: namely, the courts may not arbitrarily change state law in a manner incompatible with principles of fundamental fairness. This limit "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Id.* at 23. Indeed, *even where the nonfederal grounds might otherwise suffice*, this Court has power to examine those grounds where it is clear from the context of a case that they are being arbitrarily or unequally used by a judiciary determined to avoid this Court's judgment: "Ordinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim. There are, however, exceptional cases in which exorbitant application of a *generally sound rule* renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted; emphasis added). *See also Simpson v. Matesanz*, 175 F.3d 200, 207-08 (1st Cir. 1999), *cert. denied*, 528 U.S. 1082 (2000) ("When the state ground rests on a state finding of procedural waiver, federal courts will consider whether the state had consistently applied the state rule to determine whether the state ground is adequate.").

This Court's power to inquire into the "adequacy" of the supposedly independent state grounds for a state judicial determination is essential to maintaining its authority to render judgments on federal constitutional matters and enforce federal constitutional rights. Procedural fairness requires states to abide by predictable and stable rules which give defendants a fair opportunity to vindicate their federal rights. When a state court's decisions change rapidly, unpredictably, or without sufficient guiding principle, they may be "changing the rules in the middle of the game," in violation of due process. *See further* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1919 (2003) ("The Constitution or federal law imposes a duty of fidelity to prior state law . . . and the claim is that the state court materially and impermissibly departed from that law at a later point in time.").

C. Oregon Courts Have Continually Exploited Their Autonomy To Evade Federal Constitutional Standards of Due Process

The fact that state judicial decisions are immune from federal review when they are based on an adequate, independent state ground creates an incentive for state courts to manipulate their determinations to avoid this Court's oversight. The Oregon Supreme Court has been the poster child for this type of manipulation, utilizing it in constitutional cases for at least the past 15 years.

The first instance was in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994), a case where owners of beach property

sought a permit to build a seawall. The permit was denied, and the owners sued for just compensation, alleging that the denial amounted to a taking of their property for public use. *Id.* at 450-51. The court denied compensation on the grounds that "the common law doctrine of custom" barred landowners from excluding the public from the dry sand areas. *Id.* at 460. Yet this application of the doctrine of custom had been eliminated as a matter of law four years earlier in a case called *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989). Although *McDonald* declared that "[t]he public has no right to recreational use of the [dry-sand area] because there is no factual predicate for application of the doctrine [of custom]," *id.* at 724, the *Stevens* court ignored this case, and declared that because the doctrine of custom set a background principle barring property owners from excluding the general public, the owners could not claim that the denial of their permits had deprived them of any right to exclude. *Stevens*, 854 P.2d at 456. Thus the court held that the owners had not actually suffered a taking and were not due compensation. Although this Court denied certiorari, Justices Scalia and O'Connor observed that *Stevens* was an (ultimately successful) attempt to manipulate state law to avoid the federal Constitution's requirements as well as this Court's review: "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law." 114 S. Ct. at 1334 (Scalia & O'Connor, JJ., dissenting from denial of certiorari).

The Oregon Supreme Court set a similar trap for Philip Morris in the third remand of *Philip Morris v.*

Williams. After being repeatedly instructed to reconsider its punitive damages decision in light of federal constitutional guarantees, that court interposed a procedural rule for the first time, one which had not been addressed at earlier stages of the litigation, and in such a way as to block the application of federal due process rules. By manipulating state procedural devices, the Oregon Supreme Court deprived Philip Morris of its properly litigated constitutional objections by claiming that they were not properly raised. Long-established and generally understood procedural rules, however, establish legitimate expectations for litigants, and thereby set a baseline from which deviations can be judged in terms of due process. Just as the trespassers in *Bouie* had formed certain expectations on the basis of long-established legal principles, which the state could not evade consistently with due process, so here the state should not have been permitted to interpose a procedural device and thus deprive Philip Morris of procedural fairness by the simple expedient of claiming that the procedure sets the content of Philip Morris' due process rights. Once again, however, the Oregon court got away with it, when certiorari was denied.

In this case, the Oregon Supreme Court altered what plaintiffs were required to prove in a class action fraud suit by creating an "irrebuttable presumption" that each member of the class relied on certain misrepresentations, thus relieving plaintiffs of their obligation to prove reliance on the part of individual class members. *Strawn v. Farmers Ins. Co.*, 258 P.3d 1199, 1212-13 (Or. 2011). This conclusion is directly contrary to established state law; in *Newman v. Tualatin Dev. Co.*, 597 P.2d 800 (Or. 1979), the Oregon Supreme Court declared unambiguously that

individual determinations of reliance on an allegedly fraudulent contract would be required to maintain a class action lawsuit for fraud. Yet after suddenly reading *Newman* as confined to its "particular facts," *Strawn v. Farmers Ins. Co.*, 258 P.3d at 1211, that court upheld the punitive damages award and declared that Farmers had no right to challenge the constitutionality of the award. It held that the trial court's order, which contained no mention or analysis of the jurisdictional waiver issue, fully disposed of that issue, and that Farmers did not specifically raise the waiver issue on appeal, despite the fact that the intermediate appellate court actually decided that matter on the merits. *Strawn v. Farmers Ins. Co.*, 256 P.3d at 103 (denial of petition for reconsideration). In so doing, the court below manipulated state procedural law in such a way as to find that Farmers waived its constitutional challenge, when in fact it did not do so. This violates due process.

Such behavior is not excused by the principles of federalism and may not be permitted in the face of this Court's authority to protect federal constitutional rights. As the Rhode Island Supreme Court recently observed, courts

> can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the [legislature] provides to us, whereas justice extends farther. Justice is based on the relationship among people, but it must be based upon the rule of law:
>
> > "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in

> pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'"

State v. Lead Industries Ass'n, Inc., 951 A.2d 428, 436 (R.I. 2008) (footnote omitted) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)). The defendant in this case is entitled to a consistent, orderly, fundamentally fair disposition of this case in a manner that respects its rights and obeys the mandates of this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: November, 2011.

Respectfully submitted,

DEBORAH J. LA FETRA
Counsel of Record
TIMOTHY SANDEFUR
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: DLafetra@pacificlegal.org
E-mail: TSandefur@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation