No. 01-1289

In the
Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
PETITIONER,

v.

CURTIS B. CAMPBELL & INEZ PREECE CAMPBELL,
RESPONDENTS.

On Writ Of Certiorari To
The Utah Supreme Court

BRIEF OF RESPONDENTS

L. RICH HUMPHERYS
ROGER P. CHRISTENSEN
KARRA J. PORTER
CHRISTENSEN & JENSEN
50 South Main Street
Salt Lake City, UT 84144
(801) 323-5000

LAURENCE H. TRIBE
Counsel of Record
KENNETH CHESEBRO
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
3920 Northampton St., N.W.
Washington, D.C. 20015
(202) 686-0457

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Counsel for Respondents

QUESTION PRESENTED

Whether the punitive damages award in this case should be affirmed because:

(a) the state courts properly interpreted the guideposts prescribed by this Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996);

(b) the state courts adhered to the traditional rule that a defendant's out-of-state behavior may be considered in evaluating the reprehensibility of its tortious conduct; and

(c) the state courts did not err as a matter of federal law in admitting relevant "other acts" evidence.

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

A. State Farm's Unlawful PP&R Policy

This is *not*, as State Farm would have it, a case about a state court's overzealous attempt to impose an idiosyncratic moral code on the nation by punishing a company for a scattering of mostly lawful and unrelated instances of sharp dealing throughout the country. This is, rather, that rare specimen: a case about a company caught red-handed using a previously well-concealed fraudulent policy whose very existence the company steadfastly and disingenuously denied.

The "Performance, Planning and Review" ("PP&R") policy at the heart of this case, adopted by State Farm on May 1, 1979, was found to have remained in effect through the trial below and beyond. Pet. App. 23a-24a. It is a form of intentional wrongdoing that places the insurer's private financial interest above its duty to the insured. According to the trial court's post-trial findings, this PP&R policy, unbeknownst to the insured, calibrates the salaries of those involved in claims adjusting to their "ability to meet preset targets for payouts each year" – targets that are not tied "to the severity and fair value of the claims that are being handled" but instead constitute "arbitrary payment goals . . . for claims that have not yet arisen, concerning accidents that have not yet happened." Pet. App. 117a. Executives reinforce this clandestine incentive scheme by exhorting adjusters to "shore up the bottom line" by refusing to pay valid claims by insureds to cover the costs of their injuries or to cover claims made by those they injure, to the degree necessary "to ensure that State Farm has the 'most profitable claim service in the industry.'" *Id.* at 117a-18a.

Although there are many legitimate means by which insurance companies can boost profits, a policy of "intentionally underpaying claims" is not one of them. *Id.* at 115a. "[I]t is universally accepted within the industry that the compensation of claim adjusters cannot be set based on whether or not their claim payouts save the company money." *Id.* at 115-16a. It was

"universally accepted and was uncontroverted at trial, that insurers must not seek to enhance profits by intentionally underpaying claims . . . ." *Id.* at 115a. Insurance experts testified, without contradiction, that the PP&R policy was "inherently wrong" – an unlawful incentive scheme that "cannot be justified 'in any way.'" *Id.* at 118a. "They described such an incentive system as simply 'taboo in the insurance industry'; as 'grossly unfair' to consumers . . . ; as inherently fraudulent . . . ; and as 'creat[ing] a corporate culture that is predatory' and 'take[s] advantage of the gullible and defenseless people.'" *Id.* The PP&R policy was accompanied by efforts to conceal its existence and evade punishment by destroying internal documents (*id.* at 123a), "sanitizing" and falsifying individual claim files (*id.* at 127a), and encouraging State Farm employees to testify falsely at trial. *Id.* at 128a. Tellingly, although more than a dozen insurance companies and insurance trade associations have appeared as *amici* in this case, not one of them denies that State Farm's PP&R policy is inherently wrongful and tortious.

B. State Farm's Policy Harmed the Campbells

On May 22, 1981, respondent Curtis Campbell made an unsafe pass of six vehicles and thereby forced off the road an oncoming car driven by Todd Ospital. In trying to recover, Ospital struck a car driven by Robert Slusher. Ospital was killed and Slusher was left permanently disabled. The Utah Supreme Court found that "a consensus was reached early on by the investigators and witnesses that Mr. Campbell's unsafe pass had indeed caused the crash." Pet. App. 2a. State Farm's own investigator concluded that Campbell's "negligence . . . was manifest." JA 2885a. But his State Farm supervisor ordered him to change his report describing the facts of the accident and his analysis of liability. Pet. App. 3a.

Slusher and Ospital's estate sued Campbell. He and his wife, respondent Inez Campbell, were insured by petitioner State Farm under a $50,000 policy ($25,000 per claim). Pet. App. 2a-3a.

The Utah-based State Farm managers in charge of the Campbell file were laboring under "heavy pressure" to stay under preset annual caps on payouts pursuant to the PP&R policy. Pet. App. 133a. Without even reviewing the adverse evidence, they refused to offer or accept a settlement. *Id.* at 3a. Nonetheless, they reassured Campbell that the litigation posed no financial risk to him. *Id.* at 4a.

At trial, the jury found Campbell 100% at fault and entered a verdict totaling several times Campbell's policy limit and exceeding his other assets. Pet. App. 4a. State Farm then offered to pay only the policy limit and declined to post a bond in excess of that limit, leaving Campbell responsible for the rest. State Farm's lawyer told Campbell, "You may want to put for sale signs on your property to get things moving." *Id.* at 4a-5a; JA 825a. The Campbells were in utter shock at their impending financial ruin. Witnesses described the 65-year-old Campbell as "devastated," "distraught," "tied up in knots" – so "fragile" and "greatly distressed" that they feared that he might suffer another stroke or a heart attack. JA 813a-14a, 825a-29a, 1586a-87a, 1660a. His wife faced the prospect of losing her home, a joint interest in which she had recently deeded to Curtis. Pet. App. 25a. Because State Farm refused to protect them, the Campbells were forced into extended negotiations with Slusher and Ospital's estate. For 15 months following the verdicts, the Campbells lived under the threat that their assets might be seized. Ultimately, in December 1984, the parties executed an agreement in which Campbell relinquished 90 percent of his recovery from litigation against State Farm, which he was obligated under that agreement to pursue, in order to prevent the seizure of his other assets. Pet. App. 5a.

C. The Punitive Damages Trial

When the underlying litigation was over, the Campbells filed suit against State Farm. Pet. App. 5a. The trial court granted State Farm's contested motion to bifurcate the proceedings. *Id.* at 6a, 153a-54a. As a result, in the first phase of the trial (phase

I), the jury was asked to decide only whether State Farm acted unreasonably in refusing to settle the underlying case against Campbell. The Campbells were forced to proceed under "heavy evidentiary restrictions" that permitted only "evidence of State Farm's treatment of the Campbells, with no consideration of State Farm's general claim-handling procedures." *Id.* at 153a. The jury found that "State Farm had acted unreasonably and in bad faith." *Id.* at 6a.

Prior to the punitive phase of the trial (phase II), State Farm filed thirty-one (31) motions or briefs contesting the scope of evidence for that phase. All of State Farm's arguments ultimately preserved on appeal were premised solely on state law, primarily Utah Rule of Evidence 404(b). The trial court carefully addressed State Farm's evidentiary concerns in ten hearings held over fifteen days (Pet. App. 41a) and granted State Farm substantial relief. JA 3327a-55a. For example, the court restricted plaintiffs' ability to refer in their case in chief to the results of roughly 90 other cases pertaining to State Farm's wrongful conduct. JA 3335a, 3339a.

The trial court also warned State Farm in its pretrial rulings that "other acts" evidence could become admissible for impeachment and rebuttal purposes depending on State Farm's trial strategy. JA 3336a. The court noted that State Farm had designated a number of witnesses "who deny that State Farm engages in unfair conduct towards its insureds." JA 3336a. "State Farm has also designated five present and former insurance regulators as witnesses. . . . Such insurance regulator expert witnesses will give opinions that State Farm does not engage in unfair conduct towards its insureds with such opinions being based in large part on the regulators['] alleged lack of awareness of claims by persons insured by State Farm that they have been treated unfairly." *Id.* The trial court put State Farm on notice that, based on State Farm's designation of such witnesses, "the court deems it appropriate to allow evidence of the other cases designated by plaintiff[s] by way of impeachment and rebuttal." JA 3337a.

The trial court declined to exclude wholesale additional categories of "other acts" evidence under Utah Rule of Evidence 404(b), although it specifically preserved State Farm's ability to raise particularized objections at trial. As the trial court explained,

> The central issue in Phase II, as this Court understood it from the beginning, was the question of why did State Farm do what it did to the Campbells . . . The possible answers were: (1) it was inexplicable, there is simply no explanation; (2) it was a foolish or honest mistake; or (3) it was a result of two corporate policies, one to encourage or enforce a requirement that State Farm's claims handling be improperly used to enhance corporate profits, and second to conceal this profitable policy to evade legal and regulatory accountability for it. Stated simply and in short form that third possibility was the plaintiffs' institutional case . . . .

Pet. App. 154a-55a. The court ruled that evidence would be admissible to the extent it was pertinent to the Campbells' claims – "i.e., whether State Farm acted willfully and maliciously, or with conduct manifesting a knowing and reckless indifference toward and disregard of the rights of the Campbells." JA 3329a. "Plaintiffs must also rebut defendant's assertion that State Farm's actions toward the Campbells were inadvertent errors or mistakes in judgment." *Id.* The trial court properly held that "the Campbells' institutional case, involving evidence of State Farm's overall claims handling policies and practices, [was] highly probative, indeed essential to numerous material issues before the jury including: (1) intent, (2) reckless disregard, (3) absence of mistake, (4) agency, (5) existence of outrageous conduct, (6) existence of a wrongful pattern or practice underlying State Farm's torts, and (7) reprehensibility of any such wrongful pattern or practice." Pet. App. 156a-57a. At no time did the court suggest that the jury would be allowed to use the evidence to punish State Farm for conduct outside Utah.

The jury found that State Farm had defrauded the Campbells. It awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. *Id.* at 7a.

D. Post-Trial Review

On post-trial review, the trial court issued a lengthy opinion detailing its justification for a substantial punitive award. Pet. App. 99a-148a. The court found that State Farm's misconduct toward the Campbells was merely the tip of an iceberg of wrongful corporate policy: "the nature of State Farm's misconduct was pervasive." *Id.* at 110a. "[I]t involved not an isolated instance of wrongdoing toward the Campbells or the occasional consumer, but instead a company-wide claim-handling policy of providing incentives to adjusters to systematically deny Utah consumers benefits owed to them under insurance policies (incentives that were never disclosed to consumers)." *Id.* at 110a-11a.

The trial court found "ample evidence" that "State Farm has resorted to a variety of wrongful means to attempt to evade detection of, and liability for, its unlawful profit scheme," *id.* at 122a, and has thereby "evade[d] legal and regulatory accountability for it." *Id.* at 155a. State Farm trains its claims adjusters to prey on "consumers who are least knowledgeable about their rights and thus most vulnerable to trickery or deceit," who are viewed by adjusters as "the weakest of the herd." *Id.* at 122a.

The trial court also outlined State Farm's systematic destruction of unfavorable internal documents. "Many documents that were critical to the Campbells' proof in this case were obtained not through discovery directed to State Farm, but through the fortuity that State Farm employees happened to retain them after leaving the company, or that [plaintiffs' expert] uncovered and retained copies during the 1970s and 1980s in the process of investigating the company's claim-handling practices, often as part of litigation against the company." *Id.* at 124a. "[W]hile this case and others alleging bad faith claim handling

remained pending and subject to outstanding discovery requests[,] State Farm launched elaborate efforts to destroy its existing corporate memory on its past claim-handling practices, with the explicit purpose of keeping them from discovery in bad-faith cases." *Id.* at 125a.

Nonetheless, relying solely on a judge-made rule of state law limiting the ratio of punitive to compensatory damages, the trial court ordered a remittitur of the jury's award from $145 million to $25 million. The trial court stressed that "the ratio factor is the sole reason for the remittitur." Pet. App. 143a. The trial court also remitted the general damages to $1 million and awarded some $800,000 in attorneys' fees and litigation expenses. *Id.* at 7a.

E. The Utah Supreme Court's Decision

The Utah Supreme Court reinstated the original $145 million punitive verdict. Citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Utah court expressly applied a de novo standard of review to the punitive damages award in this case. Pet. App. 8a-9a. The state supreme court stated: "pursuant to *Cooper Industries*, we now review the factors de novo and do not defer to the trial court." *Id.* at 13a (citation omitted). "[E]ach court must analyze the facts of each case to ensure that the defendant's acts warrant the punitive damage award imposed. . . . The de novo standard of appellate review imposed by *Cooper Industries* underscores this principle." *Id.* at 32a-33a & n.11.

The court held that the punitive award was reasonable under the guideposts of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), noting "this case contains exceptional facts and circumstances." Pet. App. 34a. "For example, a State Farm official in the underlying lawsuit in Logan instructed the claims adjuster to change the report in State Farm's file by writing that Ospital was 'speeding to visit his pregnant girlfriend.' There was no evidence at all to support that assertion. Ospital was not speeding, nor did he have a pregnant girlfriend." *Id.* at 18a. This

was no accident, but the result of a deliberate corporate policy: "[f]or over two decades, State Farm set monthly payment caps and individually rewarded those insurance adjusters who paid less than the market value for claims." *Id.* "Agents changed the contents of files, lied to customers, and committed other dishonest and fraudulent acts in order to meet financial goals." *Id.* "State Farm engaged in deliberate concealment and destruction of all documents related to this profit scheme. State Farm's own witnesses testified that documents were routinely destroyed so as to avoid their potential disclosure through discovery requests." *Id.* at 19a. "Such destruction occurred even while this litigation was pending." *Id.* "State Farm's fraudulent conduct has been a consistent way of doing business for the last twenty years"; "[t]he likelihood of further misconduct by State Farm is great, given that it has not changed its conduct despite a previous $100 million punitive damages award"; and "the harm propagated by State Farm is extreme." *Id.* at 34a.

SUMMARY OF ARGUMENT

State Farm attacks "[t]he Utah Supreme Court's erroneous interpretation of the three [*BMW*] guideposts," which it complains "removes all meaningful due process constraints on the size of punitive awards." State Farm Br. 28. Without showing that any of the Utah courts' findings were clearly erroneous, State Farm accuses the state court of conducting "a roving inquiry into the defendant's general reprehensibility as an 'institution' over twenty years." *Id.* at 37.

State Farm's argument is predicated on an artificially truncated description of the wrong committed against the Campbells, a distortion of the Utah Supreme Court's decision, and a mischaracterization of the trial in this case.

The Utah Supreme Court properly interpreted the *BMW* guideposts. The court did not focus on State Farm's claims-handling practices in the abstract, but rather on the PP&R policy as it was applied specifically to the Campbells. The court found that State Farm's misconduct was highly reprehensible because

its incentive-skewing policy was intentional, not merely negligent, and persisted for years. The court found that the policy included carefully concealed efforts at evasion and cover-up; threatened enormous harm to Utah residents; and generated substantial illicit profits for State Farm.

The Utah Supreme Court did not impose extraterritorial punishment. It did not impair interstate commerce, nor did it interfere with the prerogative of other states to regulate the business of insurance within their borders. Rather, the Utah Supreme Court punished State Farm's wrongdoing only insofar as it threatened harm to Utah consumers, and it properly applied the *BMW* guideposts in holding that the award was reasonable in punishing and deterring misconduct in Utah. The court gave limited consideration to certain out-of-state conduct by State Farm only as part of its reprehensibility analysis, in a manner fully consistent with this Court's decisions in *BMW*, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

Nor did the Utah Supreme Court violate due process by considering constitutionally irrelevant "other acts." The court engaged in a de novo review before upholding the award as reasonable. The court did not even mention, let alone rely upon as a basis for the punitive award, the vast majority of the "other acts" evidence that State Farm now attacks. Moreover, State Farm did not raise a federal law challenge to any of that evidence below. Rather, its objections, to the extent it made any at all, were strictly limited to Utah law. State Farm's argument that the trial court erred by permitting the introduction of constitutionally dissimilar "other acts" evidence is therefore waived, as well as irrelevant in light of the Utah Supreme Court's de novo review.

Further, State Farm's "other acts" argument is premised on its mischaracterization of the trial in this case. The overwhelming bulk of the evidence offered by the Campbells at trial was from witnesses testifying as to the impact of the fraudulent PP&R policy on Utah consumers, including the Campbells. State Farm

does not attack this evidence. The limited snippets that State Farm *does* challenge were admitted to impeach and rehabilitate witnesses, to rebut State Farm's theory that its PP&R policy was being misconstrued and in any event had ended, and to show that the victimization of Utah consumers was not a local anomaly.

In the end, State Farm asks this Court to adopt numerous rules that are paradigmatically grist for the state legislative mill or, if there is a problem genuinely affecting interstate commerce, for action by Congress. For example, State Farm and its amici propose that this Court should use due process to create a federal constitutional analog of Fed. R. Evid. 403 and 404 restricting the admissibility of "other acts" evidence in state court (Amer. Council Life Insurers); limit the manner in which states may consider the "reprehensibility" and "comparability" guideposts (Dekalb Genetics Corp.); impose a rule that punitive damages must be limited to a small, single-digit multiple of compensatory damages (Chamber of Commerce); eliminate the defendant's wealth as a factor in assessing the reasonableness of punitive damages (ATRA; Business Roundtable), or prescribe intricate rules requiring states to consider only a defendant's net worth, rather than its revenues, assets, or policyholders' surplus (Truck Insurance Exchange); and all but eliminate the role of juries in assessing punitive damages (Alliance of American Insurers; "Leading Business Corporations"; Common Good).

In *Haslip*, *TXO*, *BMW*, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court approved fully adequate procedural protections which ensure that the requirements of due process are satisfied. Nothing in this case would justify additional measures. The states are already responding to the punitive damages issue in responsible and politically accountable ways, *see* appendix to this brief, and this Court should decline the invitation to micro-manage state procedures. The judgment below should be affirmed.

ARGUMENT

I. THE UTAH SUPREME COURT PROPERLY INTERPRETED THE *BMW* GUIDEPOSTS.

A. The Utah Court Correctly Interpreted the Reprehensibility Guidepost.

This Court has explained that a defendant's reprehensible misconduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. The Court has singled out for special condemnation schemes of "trickery and deceit," especially when they involve "repeated misconduct" and target people who are "financially vulnerable." *Id.* at 576. This Court has identified as particularly reprehensible a defendant's use of "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." *Id.* at 579. The Court has said that proof that the defendant's misconduct is "part of a nationwide pattern of tortious conduct" that the "defendant has repeatedly engaged in . . . while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law," as "repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 576-77 (citation omitted).

The Utah courts properly applied this guidepost. The trial court made extensive factual findings as to State Farm's reprehensibility, which the Utah Supreme Court commended. Pet. App. 13a. The trial court found that State Farm's "high-level corporate scheme" to cheat vulnerable policyholders "implicates virtually all the hallmarks of reprehensibility noted in *Gore* and must be regarded as deeply reprehensible." *Id.* 144a-45a. The state supreme court concluded: "[i]t is difficult to understand how State Farm can argue that there is no evidence that it committed fraud or acted illicitly when *the record contains volumes of such evidence*. The evidence was so extensive and convincing that it took the trial court *nearly twenty-eight pages*

to summarize it in his findings on the post-trial motions." Pet. App. 36a (emphases added).

This Court has explained that a "Court of Appeals should defer to the District Court's findings of fact unless they are clearly erroneous." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.14 (2001). State Farm does not purport to show that any findings were clearly erroneous, but it contends that no deference is due because the reprehensibility analysis allegedly rested upon "'improper predicates' and 'questionable conclusions.'" State Farm Br. 37. State Farm is wrong. Both Utah courts made findings about the specific PP&R policy applied to the Campbells in this case, and their findings relate to precisely the kinds of historical events that trigger appellate deference. The trial court found that "all of these elements of reprehensibility are present in the corporate policies that were responsible for injuring the Campbells, that have injured many other Utah consumers during the past two decades, and that continue today." Pet. App. 113a-14a.

For example, the trial court tied directly to the Campbell case its finding that State Farm had engaged in the "systematic destruction of documents, requested in litigation, that reveal the profit scheme." Pet. App. 123a. While this case was pending, State Farm held a meeting in Utah at which in-house counsel instructed Utah claims managers "to search their offices and destroy a wide range of material of the sort that had proved damaging in bad-faith litigation in the past – in particular, old claim-handling manuals, memos, claim school notes, procedure guides and other similar documents. These orders were followed even though at least one meeting participant, Paul Short, was personally aware that these kinds of materials had been requested by the Campbells in this very case." *Id.* at 125a. A memo written the next day by a State Farm employee explained that "[t]hey are trying to avoid having to come up with old records when the 'request for production of documents' comes in and they request 'all training manuals, memos, procedural guides, etc. that are in the possession of your claims reps and

management' . . . . [T]hat way if they subpoena our claim manual for U claims for 1987, for example, we will say we don't have it. This should be easier than trying to produce it or having to defend it." JA 3351-52. The trial court listed even more examples of document destruction by State Farm. JA 3352-55a.[1]

The court made the same link to the Campbells with respect to its finding that State Farm had engaged in "systematic manipulation of individual claim files to conceal claim mishandling" – "to provide a false, innocent picture of how the claim was handled, in an effort to minimize exposure to later lawsuits alleging bad-faith claim handling." Pet. App. 127a. "In fact, [a State Farm supervisor] sought to use this tactic in the Campbell case, instructing the [claim adjuster] to write in the file that Todd Ospital (who was killed in the accident) was speeding because he was on his way to see a pregnant girlfriend. There was no pregnant girlfriend." *Id.* at 130a.

The trial court found that State Farm "focuses on making the litigation process as time-consuming, expensive and prolonged as possible by, for example, making meritless objections; claiming false privileges; and destroying documents or claiming they don't exist," *id.* at 131a; and that State Farm employed these very tactics in this case. *Id.* at 132a-36a. Similarly, the court found that State Farm engages in the "systematic manipulation of testimony by employees" by "aggressively 'coaching' its

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[1] State Farm cites the trial court's decision not to give a spoliation instruction. Pet. Br. 36 n.34. But State Farm mischaracterizes the court's ruling that, while it would decline to give a specific instruction because it did not wish to "comment on the evidence" before the jury, JA 3167a, "[t]here has been a lot of evidence" of document destruction. JA 3166a. "This has come out about that as it relates to damages and any other issue in the case, and certainly counsel can argue the evidence that has been presented." JA 3166a. "And certainly the issue of State Farm's reluctance or even bad faith in its discovery practices is before the court, and the issue has been [p]reserved for the court to consider." JA 3167a. The court considered the evidence of document destruction to support punitive damages in its post-trial decision. Pet. App. 123a-24a.

employees to ensure that their testimony will be favorable to the company," *id.* at 128a; and that, in this case, State Farm's witnesses "refused to admit any flaws, ever, of any kind in any of State Farm's past or present claim-handling policies – or that even a single claimant had ever been treated unfairly during State Farm's entire existence – despite the documentation to the contrary drawn from State Farm's own files." *Id.* at 142a; *see also id.* at 21a (Utah Supreme Court's observation that, "[i]n addition to the trial court's findings, we note that State Farm refuses in its brief on appeal to concede any error or impropriety in the handling of the Campbell case.").

The Utah courts properly interpreted the reprehensibility guidepost as outlined by this Court.

B. The Utah Court Properly Interpreted the Ratio Guidepost.

The Utah Supreme Court also correctly interpreted the ratio factor. The state court noted that this Court has held "that there is no 'simple mathematical formula,' 'categorical approach,' or 'constitutional line' for determining an appropriate punitive to compensatory damage ratio." Pet. App. 29a (quoting *BMW*, 517 U.S. at 582). The court properly opined that "each court must analyze the facts of each case to ensure that the defendant's acts warrant the punitive damage award." *Id.* at 32a-33a.

There has never been a rigid ratio rule of the kind suggested by petitioner and its amici. This Court has observed that "the practice of awarding damages *far in excess of actual compensation* for quantifiable injuries was well recognized" in the eighteenth century. *Browning-Ferris Indus. v. Kelco, Inc.*, 492 U.S. 257, 274 (1989) (emphasis added).[2] In *TXO*, this Court

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[2] In *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763), for example, the court approved a punitive award of £300 – "an enormous sum almost 300 times the plaintiff's weekly wage," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421 (1994) – producing a ratio of punitive damages to compensable harm of at least 15:1. *See Browning-Ferris*, 492 U.S. at 274 n.20. In *Barry v. Edmunds*,

upheld "an award 526 times greater than the actual damages awarded by the jury." 509 U.S. at 453.[3] *See also BMW*, 517 U.S. at 582 ("reiterat[ing] [Court's] rejection of a categorical approach"); *Haslip*, 499 U.S. at 23 (4:1 ratio between punitive and compensatory damages, and 200:1 ratio between punitive damages and plaintiff's "hard" out-of-pocket expenses); *Browning-Ferris*, 492 U.S. at 262, 279 (ratio of punitive to compensatory damages over 100:1); *St. Louis, I. Mt. & So. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) (penalty 113 times plaintiff's actual loss permissible because it need not be "confined or proportioned to ... loss or damages"); *Cooper v. Casey*, 97 F.3d 914, 919 (7th Cir. 1996) (Posner, J.) ("[A] mechanical ratio, such as two to one or three to one or four to one or even ten to one, would not make good sense. The smaller the compensatory damages, the higher the ratio of punitive to compensatory damages has to be in order to fulfill the objectives of awarding punitive damages.").

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116 U.S. 550, 564 (1886), this Court noted a verdict where the ratio was 150:1. "[N]o definite ratio is prescribed" between actual and punitive damages. Charles T. McCormick, HANDBOOK ON THE LAW OF DAMAGES § 85, at 298 & n.7 (1935). *See also Alcorn v. Mitchell*, 63 Ill. 553 (1872) (punitive damages of $1,000, where defendant caused no compensable harm at all); *Reed v. Davis*, 4 Pick. 216, 217 (Mass. 1826) (upholding $500 award for trespass even though there was "little or no damage done to the goods or to the persons of the plaintiff or his family"); *New Orleans, Jackson, & Great Northern R.R. v. Hurst*, 36 Miss. 660, 665, 669 (1859) (upholding $4,500 in punitive damages where railroad train dropped plaintiff three quarters of a mile beyond the station and forced him to walk back, even though plaintiff suffered no harm); *McWilliams v. Bragg*, 3 Wis. 424, 427, 431 (1854) (15:1 ratio permissible); *Cathey v. St. Louis & S.F.R.Co.*, 130 S.W. 130, 133 (Mo. 1910) (9:1); *Livesey v. Stock*, 281 P. 70, 73 (Cal. 1929) (13:1); *Seaman v. Dexter*, 114 A. 75 (Conn. 1921) (12.5:1); *Pelton v. General Motors Acceptance Corp.*, 7 P.2d 263 (Or. 1932) (22:1).

[3] Petitioner misleadingly claims that *the* "ratio" in *TXO* was 10:1, *see* Pet. Br. 29 & n.25, 35 & n.32, but that 10:1 ratio was a function of "the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme." 509 U.S. at 462.

An inflexible ratio requirement would prevent punitive damages from serving their vital role in encouraging "private attorneys general" to vindicate the public interest. States are entitled to use punitive damages to fill the gaps in statutory criminal provisions and public law enforcement. In its leading punitive damages decision, the Utah Supreme Court cited to a scholarly article explaining that "[a]ll serious misdeeds cannot possibly be punished by government prosecution. . . . [L]imited judicial and prosecutorial resources permit prosecution for only a fraction of the crimes and violations committed. For these reasons, individual members of society must play a significant role in instituting actions to impose sanctions for serious misconduct."[4]

A rigid ratio rule would hamper deterrence, by enabling intentional wrongdoers to "carefully calculate the cost/benefit ratio of [their] wrongful conduct and avoid the deterrent potential of punitive damages." Pet. App. 27a. "Although a quantitative formula would be comforting, it would be undesirable. The

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[4] Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 649 (1980) (cited in *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 809 (Utah 1991)); *see also International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979) (observing that "the prospect of lucrative monetary recoveries unrelated to actual injury" provides "a powerful incentive to bring" lawsuits "'to punish reprehensible conduct and to deter its future occurrence.'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)); *Hopkins v. Atlantic & Saint Lawrence R.R.*, 36 N.H. 9, 18 (1857) ("the public may be said to have an interest that the wrong-doer should be prosecuted and brought to justice on a civil suit; and exemplary damages may in such cases encourage prosecutions, where a mere compensation for the private injury would not repay the trouble and expense of the proceeding"); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1287-88 (1976) ("the prospect of punitive damages recoveries induces injured plaintiffs to act as 'private attorneys general' and thereby helps to increase the number of wrongdoers who are properly 'brought to justice.' This assistance is important, for many serious misdeeds deserving of punishment are beyond the reach of the criminal law and the public prosecutor.") (footnotes omitted).

deterrent effect of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance." Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 31 HASTINGS L.J. 639, 666 (1980) (cited in *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 809 (Utah 1991)).

For these reasons, punitive damages have *never* been subject to firm ratios. In this case, the relevant ratio is at most 70:1.[5] However one computes the ratio, the Utah Supreme Court properly applied the second *BMW* guidepost, especially given the extraordinary circumstances distinguishing this case from any this Court has previously seen or is likely to see any time soon. The Utah Supreme Court observed that even "the *BMW* court made it clear that the initial punitive damage award in that case (500 times the amount of plaintiff's damages) was not automatically invalid, but that it was unconstitutional because of the specific facts of the case." Pet. App. 33a. "Like *BMW*, this case contains exceptional facts and circumstances. Here, however, they support a higher rather than a lower punitive damage award." *Id.* at 34a.

1. State Farm's unique history demonstrated that a punitive award of $100 million was not enough even to capture the attention of State Farm executives, let alone to force them to correct their unlawful PP&R policy. The Utah Supreme Court found that "a larger than normal punitive damage award is

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[5] State Farm counts as compensatory damages only the $1 million in general damages recovered by plaintiffs. Pet. Br. 29 n.26. The proper figure is at least $2,067,956.23, which is calculated by adding the $1 million general damages to the $264,287 excess verdict against Campbell (which the trial court noted would have been included in the special damages had State Farm not paid this amount just before Campbell sued, Pet. App. 144a), plus attorneys' fees and expenses of $400,834.70 and $400,747.78, respectively, *id.* at 7a, 67a-76a, and $2,086.75 in special damages. *Id.* at 100a. Fees and expenses were recognized in calculating the relevant ratio in *TXO*, 509 U.S. at 446, 451, 453 (plurality). *See BMW*, 517 U.S. at 581 (including "the harm to the victim that would have ensued if the tortious plan had succeeded").

necessary to attract the attention of State Farm officials and deter the company because, as the trial court found[,] State Farm's corporate headquarters had never learned of, much less acted upon, a punitive damage award of $100 million in a previous case." Pet. App. 17a; *see also id.* at 113a (trial court finding).

Whether the Texas case was ultimately settled is beside the point; State Farm management's remarkable failure even to note its existence was part of what the trial court identified as State Farm's policy of "willful blindness" – "of keeping no records at all on excess verdicts in third-party cases, or on bad faith claims made against State Farm or verdicts (including punitive damages verdicts) assessed against State Farm." Pet. App. 126a. "State Farm's top official over Utah … testified that State Farm had no system in place to track or record punitive damage awards, or even to report them to top officials, and that he did not himself plan to report to headquarters any punitive damages award in this case." *Id.* at 112-13a. The "information" or "agency" problem, well-known in the study of corporate management,[6] is exacerbated here by the fact that State Farm is a mutual company, with no publicly traded stock or major shareholders. Pet. Br. 49. Its diffuse ownership structure may explain such irregularities as State Farm's head-in-the-sand approach to keeping executives apprised of punitive damage awards.

The Utah Supreme Court also properly concluded that "larger awards are necessary for large corporations," to maximize the likelihood that "company executives . . . be [made] aware of imposed punitive sanctions." Pet. App. 31a; *see also id.* at 113a

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[6] The "information" or "agency" problem flows from the fact that corporate managers are only distantly accountable to the owners of a corporation, each of whom has only a tiny stake and little incentive to monitor corporate operations closely unless legal penalties are made large enough to attract their attention. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *Menichini v. Grant*, 995 F.2d 1224, 1232-33 (3d Cir. 1993); *International Ins. Co. v. Johns*, 874 F.2d 1447, 1465-66 (11th Cir. 1989); *Morrissey v. Curran*, 650 F.2d 1267, 1273 (2d Cir. 1981).

("Given that State Farm is so wealthy that th[e] earlier $100 million verdict (less than 0.18 percent of its wealth) was too small for top management even to notice, the jury's [$145 million] award (approximately 0.26 percent of its wealth) cannot be viewed as excessive . . . .").

The Utah courts rejected State Farm's far-fetched assertion that its Utah manager would not need to report the $145 million verdict because he had already taken corrective action. Pet. Br. 33. "There was no evidence that [the manager] did anything in writing, or in consultation with business lawyers. As the Court understands it, [the manager] was in the office of trial counsel preparing for his trial testimony and it was at that point, not long before the jury was to decide punitive damages, that [the manager] experienced a moment of enlightenment and, he testified, decided to adopt this new policy." Pet. App. 141a. The trial court doubted that "this repentance was genuine": "This testimony is just one example of the implausible nature of much of the testimony elicited from State Farm's employees in this case." *Id.* at 142a.[7] The Utah Supreme Court agreed, noting that

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[7] State Farm reassures this Court that it sends "peace of mind" letters "to policyholders in Utah and other states," Pet. Br. 33 – "not only in Utah, but nationwide." Pet. 21. But at trial, the Utah manager admitted that in *none* of the past Utah cases involving excess verdicts did the insureds "get any peace of mind letters." JA 1891a-92a. After trial, in 1996 and 1997 State Farm flatly denied the existence of any "peace of mind" policy in two cases in which letters were demanded based on the testimony in the *Campbell* trial. R. 9179-80, 9190-9203 (attorney affidavit). In 1998, State Farm failed to send any "peace of mind" letter in yet another case in which a policy-limits settlement demand was made and rejected. Campbells' Objection to Petition for Rehearing in Utah S. Ct. at 5 & Exhibit 2. By 1999, according to two Utah attorneys formerly employed at the company, State Farm had "revok[ed] the policy of sending 'peace of mind' letters to insureds who had possible excess exposure" even while it was "representing to courts, including the Utah Supreme Court, that" the policy was "presently in force." *Id.* at 5 & Exhibit 1, ¶ 25(e). To be sure, a year after the trial record in this case was closed, State Farm appended to its post-trial motion reply brief purported copies of "peace of mind" letters supposedly sent to at-risk insureds, but not

State Farm had previously claimed – falsely – that it had reformed its PP&R policy in 1992 and again in 1994. *Id.* at 23a-24a. Given this record of repeated pretenses of reform, the Utah courts understandably found that "the probability of recurrence of State Farm's misconduct appears extremely high." *Id.* at 24a, 142a. The danger of State Farm's continued misconduct is in marked contrast to BMW's corrective action. *See BMW*, 517 U.S. at 579.

2. State Farm's PP&R policy represents a particularly egregious form of *intentional* and *fraudulent* wrongdoing that has generated substantial illicit profits and threatened significant harm in Utah. A state is entitled to deter and punish such misconduct with special severity in order to *eradicate* it at the earliest available opportunity. The Fourteenth Amendment does not require a state to reduce damages in order to "optimize" the amount of fraud or intentional wrongdoing. "[S]ociety has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others . . . ." *Smith v. Wade*, 461 U.S.

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accompanied by an affidavit (or any other evidence) attesting that they had in fact been sent to anyone. The trial court ruled that these letters were "not in the trial record" and were "stricken from the record," and State Farm did not appeal. *Id.* at 3 n.1 (citing R. 10292, 10090-91, 10213-15). Undaunted, at the Utah Supreme Court rehearing stage, State Farm appended to its petition still *more* letters ostensibly sent to at-risk insureds. Again, no affidavit attesting that they had actually been sent was submitted, and none of the letters identified a recipient, so confirmation of receipt was impossible. *Id.* at 4 (citing Pet. Reh. 21). These documents accordingly were "not part of the record on appeal," *State v. Pliego*, 974 P.2d 279, 280 (Utah 1999), and in denying rehearing the Utah Supreme Court did not mention them. It is these non-record, non-evidence documents that State Farm has now lodged with this Court and referenced in its brief to support its unqualified assertion that it "sends such letters to policyholders in Utah and other states." Pet. Br. 33-34 n.31 (citing L. 594-98).

At a minimum, this case is distinguishable from the other punitive damages cases this Court has reviewed (or is likely often to see) in the boldness and persistence of petitioner's efforts to prove that it has "gone straight" by rectifying a wrong whose existence it misses no opportunity to deny.

30, 54 (1983). As Judge Easterbook has commented, "[t]he optimal amount of fraud is zero . . . ." *Ackerman v. Schwartz*, 947 F.2d 841, 847 (7th Cir. 1991).[8]

3. State Farm's policy threatened substantial public harm in Utah. The Utah Supreme Court found that its "policies have affected vast numbers of other Utah customers." Pet. App. 30a. Moreover, "State Farm's conduct corrupted its employees by forcing them to engage in deceptive practices or lose their jobs" and "created market disadvantages for other honest insurance companies." *Id.* at 23a. "Because State Farm's actions have such potentially widespread effects, this factor supports a high punitive damages award." *Id.* The trial court made similar findings. *Id.* at 113a, 139a-40a . In *TXO*, a plurality explained that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, *as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred*." 509 U.S. at 460 (second emphasis added).

4. The trial court also found that the PP&R policy was "extremely profitable." Pet. App. 140a. The Utah Supreme Court found that "these practices increased profits" and noted that this factor justifies "a higher than normal punitive damages award." *Id.* at 22a-23a. The defendant's actual or expected gain

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[8] *See* David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CALIF. L. REV. 1, 13, 18-19 (1990) (damages should be imposed to eliminate any risk of intentional torts, including fraud, whose "optimal level is zero"); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 422-23 (1998) (arguing that "the limit suggested by Polinsky and Shavell is inappropriate in most punitive damages cases" because it focuses on "optimal deterrence" rather than "complete deterrence"); Fred S. McChesney, *Deception, Trademark Infringement, and the Lanham Act: A Property-Rights Reconciliation*, 78 VA. L. REV. 49, 54 (1992) (social control of intentional theft "is not a problem of optimization at the margin. Rather, the law should seek the eradication of the valueless activity altogether.").

is a permissible basis for punitive damages. In *TXO*, for example, a plurality noted "the tremendous financial gains that TXO hoped to achieve," and indicated that an award of even ten times the size of the expected gain would be reasonable. 509 U.S. at 461. *See also Haslip*, 499 U.S. at 22 (approving consideration of "the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss"); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909) ($1.6 million penalty upheld because illegal business was "highly profitable" and defendant had over $40 million in assets).

5. Petitioner would read *BMW* as though it confined the states to a particular model of "optimal deterrence" theory. Pet. Br. 31 n.30. *BMW* did no such thing. *See Cooper Industries*, 532 U.S. at 439 ("deterrence is not the only purpose served by punitive damages"). The Due Process Clause "is not intended to embody a particular economic theory," *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), and does not require the states to adopt any particular socioeconomic assumptions as the basis for punitive damages. *See also CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92 (1987); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 300 (1989) (O'Connor, J., concurring in part and dissenting in part).

Petitioner and its *amici* are fundamentally misguided when they equate this case to a negligence tort and suggest that a state is constitutionally required to use a ratio rule to "balance" the supposed "benefits" from the defendant's tort in its damages calculus, in order to avoid overdeterring "socially desirable forms of behavior." Br. *Amicus Curiae* A. Mitchell Polinsky, et al. at 10. The PP&R policy is intentional wrongdoing that is not "socially desirable" in any way. Petitioner's position would revolutionize the criminal law, which eschews the finely tailored calibrations on which petitioner insists. *See Harmelin v. Michigan*, 501 U.S. 957, 989 (1991) (plurality); *id.* at 998 (Kennedy, J., joined by O'Connor and Souter, JJ., concurring in

part and in the judgment). Tellingly, one of State Farm's *amici* has recognized the inapplicability of a proportionality rule in his scholarly writings.[9]

In any event, the award is reasonable even under petitioner's theory, because State Farm's concealment of its policy gives it great confidence that few insureds will ever successfully sue. This Court has recognized that "[a] higher ratio may also be justified in cases in which the injury is hard to detect . . . ." *BMW*, 517 U.S. at 582. Both Utah courts made extensive findings regarding State Farm's cover-up, document destruction, and scorched-earth litigation tactics. Pet. App. 18a-20a; 121a-32a. As the trial court found, "State Farm has managed to construct a nearly impenetrable wall of defense against punishment for its wrongdoing, one so effective that it is able to pressure its adjusters to deny consumers insurance benefits with impunity, knowing: (1) that few of its victims will even realize that they have been wronged; (2) that fewer still will ever be able to sue; (3) that only a small fraction of those who do sue will be able to weather the years of litigation needed to reach trial; and (4) that any victims who do actually reach trial will have great difficulty establishing the basis for punitive damages when met with claims that only an 'honest mistake' was made, supported by a body of evidence that has been systematically sanitized, padded, purged, concealed, destroyed, or rehearsed." *Id.* at 122a.

State Farm objects to the Utah Supreme Court's statement that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability." Pet. Br. 30 (citing Pet. App. 30a, 34a). State Farm asserts, for the first time in this case, that the figure is limited to first-party claims and posits that third-party claims have a higher risk of detection. Pet. Br. 30-31.

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[9] Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1225-26, 1250-65 (2001) (arguing that a "proportionality" rule for criminal punishments would lead to under-deterrence).

Waiver aside,[10] State Farm misses the point. The 1-in-50,000 figure comes from State Farm's own employee training, not from the Utah courts. JA 1103a-04a. According to a former employee, State Farm uses that figure to train its adjusters that they can deny claims and cut payments without fear of repercussion because State Farm has "the leverage. We could wait as long as we needed to wait, and be as unreasonable as we wanted to, because we had the checkbook." JA 1103a. There was no testimony that State Farm distinguishes between first-party and third-party claims in using the 1-in-50,000 figure in its employee training.

Even if the probability of a successful adjudication of improper claims handling is greater in third-party cases – a dubious proposition[11] – the key point is that State Farm's own use of the 1-in-50,000 figure illustrates its confidence in its own evasion scheme, and the explicit focus it places on that scheme as a matter of corporate policy. As the trial court found, "these evasion tactics are so successful that State Farm trains its employees to ignore the threat of punitive damages in making their claim-handling decisions." Pet. App. 122a.

Even a substantial downward revision of the 1-in-50,000 figure would still justify the punitive damage award in this extraordinary case. State Farm's training figures assert that 1 in 5 will detect cheating, 1 in 100 of those will file suit, and 1 in 100 of those will actually go to trial. JA1103a-04a. Even if these probabilities were modified to account for the alleged differences in the third-party context – to assume, for example,

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[10] State Farm raised no objection to this figure below, either in testimony, JA 1103a-04a, or in closing argument. JA 3221a. It did not dispute the figure in post-trial or appellate briefing in the state courts.

[11] The insured may be in a poor position to determine the reasonableness of the insurer's conduct. Even though "it will hardly escape a policyholder's notice that an excess verdict has been rendered against him," Pet. Br. 31, the Utah courts found that State Farm has erected many daunting obstacles to successful tort claims in the third-party context.

that all victims of an excess verdict realize they've been cheated, that 1 in 10 of them find attorneys and file suit, and that 1 in 10 of them go to trial – State Farm's own logic would justify an award, purely on deterrence grounds, of at least $200 million, based on the total of $2,067,956.23 in actual harm suffered in this case. *See* note 5, *supra*.

C. The Utah Court Properly Interpreted the Third Guidepost Involving Comparison to Legislatively Authorized Penalties.

The third *BMW* guidepost involves a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." 517 U.S. at 583. The Utah Supreme Court properly interpreted this guidepost.

1. As the Utah Supreme Court noted, "the penalties that could be imposed under Utah law for the fraudulent scheme that has been pursued by State Farm are enormous." Pet. App. 35a (internal quotation marks omitted). In particular, the state court found that State Farm could have been forced: (a) to pay a $10,000 fine for each act of fraud; (b) to renounce its business license or have its Utah operations dissolved; (c) to disgorge all the illicit profits gained by its policy, plus pay a fine of twice the value of those profits; and (d) to publicly acknowledge that its officers had been convicted of fraud. *Id.* Moreover, State Farm's officers could have been removed or imprisoned for up to five years. *Id.*

State Farm challenges the Utah Supreme Court's interpretation of Utah law as to the available penalties. Pet. Br. 39. But "only state courts may authoritatively construe state statutes." *BMW*, 517 U.S. at 577; *see also Garner v. State of Louisiana*, 368 U.S. 157, 166 (1961) ("We . . . are bound by a State's interpretation of its own statute"). Moreover, State Farm fallaciously assumes that the relevant conduct in question is "a single alleged bad-faith failure to settle." Pet. Br. 39. To the contrary: it is an unlawful incentive scheme to keep payouts

arbitrarily low, cloaked by related efforts to evade punishment through document destruction and other cover-ups. State Farm does not deny that the PP&R policy, as thus defined, would violate both the Utah Pattern of Unlawful Activity Act (thereby triggering disgorgement) and the Utah Criminal Code's fraud provision (thereby triggering the imprisonment or removal sanction of Utah Code Ann. § 76-3-303).[12]

2. State Farm argues that the Utah court erred by considering *maximum* statutory penalties rather than "the penalties that might realistically be imposed" as defined by the actual practice of the Utah insurance commission. Pet. Br. 40. Petitioner's argument is inconsistent with *BMW*, which referred to "deference to *legislative* judgments," "[t]he *maximum* civil penalty authorized by the Alabama *Legislature*," and the "*statutory* fines." 517 U.S. at 583-84 (emphases added). The Court in *BMW* did not restrict its focus to the fines that *had been* imposed; instead, it looked to the "penalties that *could be* imposed." *Id.* at 583 (emphasis added). In *Cooper Industries*, this Court similarly referred to "the civil penalties *authorized or imposed* in comparable cases." 532 U.S. at 440 (emphasis added).[13] A defendant clearly is not entitled to the precise advance notice of likely punishments that State Farm seeks. *See TXO*, 509 U.S. at 465-66; *Haslip*, 499 U.S. at 14, 24 n.12; *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001) ("most prudent choice" among comparable penalties is statutorily allowable penalty, rather than typical penalties reflected in "decided cases," because statutes

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[12] Predicate offenses for the Utah Pattern of Unlawful Activity Act, Utah Code Ann. § 76-10-1602(v), (bb), (cccc), include theft by deception (Utah Code Ann. § 76-6-405), deceptive business practices (§ 76-6-507), and federal mail and wire fraud as defined in 18 U.S.C. §§ 1341, 1343.

[13] Although in *Cooper Industries* this Court opined that the particular misconduct in that case would have been subject at most to a $25,000 civil penalty, the Court reached that conclusion on the basis of a legal interpretation of the relevant statute (that it would have treated the defendant's wrongdoing as a single violation rather than as multiple violations).

"furnish[] a far more trenchant source of notice").

State Farm's argument is also foreclosed by the traditional principle that a sentence within the legislatively prescribed maximum is immune from challenge on excessiveness grounds. *See, e.g., Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972). In a similar proportionality context, states have explained that, to the extent statutory penalties are relevant, the maximum punishment authorized by statute should be considered. "Logic dictates" "that if a comparison is to be helpful at all, the maximum punishment authorized for the crime at issue is the only relevant consideration."[14] *See Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) ("First among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives") (citations and internal quotations omitted).[15]

II. THE UTAH SUPREME COURT'S JUDGMENT DOES NOT CONSTITUTE "EXTRATERRITORIAL PUNISHMENT."

The Utah Supreme Court did not err in considering actions outside Utah in assessing the reprehensibility of State Farm's

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[14] Brief of Alabama, *et al.*, as *Amici Curiae* in Support of Respondent, No. 01-6978, *Ewing v. California*, at 19 (July 31, 2002).

[15] The third guidepost should be applied flexibly in light of the historical tradition that punitive damages have not been limited by statutory penalties for analogous conduct. In *Hendrickson v. Kingsbury*, 21 Iowa 379 (1866), for example, the court rejected the argument that a jury's $3,625 punitive damages verdict for assault and battery should have been limited by the statutory penalty of $100 for the offense. The court explained that "the clear weight of authority is with the rule . . . that the damages in a civil case by way of punishment, have no necessary relation to the penalty" prescribed by the legislature for the same conduct. *Id.* at 390-91. *See also* 13 Cyc. of L. & P. 118 n.27 (1904) ("the damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong done to the public").

conduct. Nothing in the court's opinion suggests that the court was "punishing" out-of-state conduct in the manner condemned by this Court in *BMW*.

A. The Constitution Permits A State To Consider Out-of-State Conduct.

In *BMW*, this Court held that a state may not calculate punitive damages by directly multiplying the average amount of loss by the number of out-of-state transactions, at least where the conduct in question is lawful in other states: "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." 517 U.S. at 572.[16] However, this Court made clear that a state may *consider* out-of-state conduct in judging the defendant's reprehensibility and may increase the amount of punitive damages it would otherwise impose on the basis of out-of-state conduct:

> Of course, the fact that the Alabama Supreme Court correctly concluded that it was error for the jury to use the number of sales in other States as a multiplier in computing the amount of its punitive sanction does not mean that evidence describing out-of-state transactions is irrelevant in a case of this kind. To the contrary, as we stated in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462 n. 28 (1993), such evidence may be relevant to the determination of the degree of reprehensibility of the defendant's conduct.

Id. at 574 n.21. Indeed, this Court proceeded in *BMW* to

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[16] The Court left open whether even direct extraterritorial punishment might be permissible when the conduct is unlawful in a foreign state. *See id.* at 573 n.20. In this case, the trial court found that the PP&R policy was "inherently wrong," "simply taboo in the insurance industry," "inherently fraudulent," and "predatory." Pet. App. 118a. Accordingly, it may be treated as inherently wrongful and tortious in every relevant jurisdiction.

consider the defendant's nationwide conduct in judging the reasonableness of the punitive award *See id.* at 576-77.

In *BMW*, this Court also reaffirmed the holding of *TXO* that it was proper to consider evidence that the defendant had "engaged in similar nefarious activities in its business dealings *in other parts of the country*." 509 U.S. at 451 (plurality opinion) (emphasis added). *TXO* involved unadjudicated instances of alleged wrongdoing by the defendant (including settlements and pending litigation) in Oklahoma, Texas, and Louisiana. This Court noted approvingly that factors such as evidence of "alleged wrongdoing *in other parts of the country . . . are typically considered in assessing punitive damages*." *Id.* at 462 n.28 (emphasis added).

Even State Farm concedes, as it must, that it "might have been permissible under *BMW*" for the Utah Supreme Court to "consider evidence of similar out-of-state conduct in assessing the reprehensibility of State Farm's conduct toward plaintiffs." Pet. Br. 13-14. In the trial court, State Farm "agreed that it was not error for the jury to consider out-of-state evidence." Pet. App. 106a. *See also* PLAC Br. 18 ("a jury may consider relevant out-of-state conduct for the purpose of determining the reprehensibility of the defendant's acts toward the plaintiff"); DRI Br. 13 (same).

Thus, the Utah Supreme Court's judgment cannot be disturbed on the ground that it supposedly impairs interstate commerce or interferes with the prerogatives of other states. Any rule that a state must shut its eyes to out-of-state conduct would run afoul of well settled principles of state authority in our federal Union. States routinely base regulatory decisions on out-of-state conduct, even when the conduct has not been adjudicated unlawful or when it is perfectly legal in the state where it occurred. For example, states use out-of-state conduct to approve or deny licenses to practice law or medicine; licenses to operate a business or a car; and permits to own a firearm. The mandate of interstate equality embodied in the Privileges and Immunities Clause of Article IV, § 2, *see Saenz v. Roe*, 526 U.S.

489, 502 (1999), would plainly preclude a double standard for the admissibility of "other acts" evidence depending on whether the conduct in question occurred in-state or out-of-state. Otherwise, Utah would be forced to ignore relevant out-of-state conduct and in effect export the harms of the defendant's wrongdoing to other states.[17]

Even in the context of criminal sentences, where the interests of a defendant are greater than those of a defendant facing punitive damages, *see Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259-60 (1989), penalties may be based on out-of-state convictions. *See BMW*, 517 U.S. at 573 n.19. Sentences may be based even on out-of-state conduct that has not been adjudicated to be unlawful. *See Nichols v. United States*, 511 U.S. 738, 747 (1994); *Williams v. New York*, 337 U.S. 241, 247, 250 & n.15 (1949).[18]

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[17] Petitioner's reliance on the dormant Commerce Clause is particularly misplaced in this insurance case, because "the McCarran-Ferguson Act [15 U.S.C. § 1011] exempts the insurance industry from Commerce Clause restrictions." *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985). Precisely because insurance is marketed and regulated on a state-by-state basis, in this context there is "little reason" for concern that "large punitive damages judgments in inappropriate cases" can be used "to extort wealth from citizens in other states." Paul H. Rubin, John E. Calfee, and Mark F. Grady, *BMW v. Gore: Mitigating the Punitive Economics of Punitive Damages*, 5 S. CT. ECON. REV. 179, 204, 216 (1997).

[18] The propriety of considering out-of-state conduct is not affected by whether a sentencing factor is found by a judge or by a jury. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that any fact increasing the penalty for a crime beyond the prescribed statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt, this Court nonetheless reaffirmed "that nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment within the range prescribed by statute." *Id.* at 481 (emphasis omitted) (citing *Williams*). Some states, such as Utah, employ indeterminate sentencing provisions where first-degree felons are subject to

That a state's efforts to protect its own citizens may have incidental out-of-state effects does not invalidate those efforts under principles of federalism, the dormant Commerce Clause, or any other constitutional provision.[19] State regulation is not unconstitutional simply "because the economic market for [the relevant] products is nationwide" and state regulation "may have serious implications for . . . national marketing operations." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978); *see also id.* at 133 n.28. Indeed, a state is entitled to impose harsh deterrents to induce law-breakers to avoid its territory. *See Howard v. Fleming*, 191 U.S. 126, 136 (1903) ("If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned.").

B. The Utah Supreme Court Did No More Than The Constitution Permits.

The Utah Supreme Court's decision is fully consistent with these principles. The court did not punish out-of-state conduct, nor did it "project" Utah law extraterritorially. The Utah court did not purport to apply its law to transactions occurring in other

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sentences from zero to life. *See also Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (judge may consider a prior conviction as a sentencing factor rather than as an element of the offense).

[19] *See Travelers Health Assn. v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 650 (1950) (state "cease and desist provisions . . . can not be attacked merely because they affect business activities which are carried on outside the state") (internal quotation omitted); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 320 (1943) ("These regulations cannot be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state."); *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) ("The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.").

states or to adjudicate State Farm's liability to insureds in other states.

Rather, the Utah Supreme Court considered "the nature and circumstances surrounding defendant's misconduct" solely in order to conclude that "the reprehensibility guidepost is met." Pet. App. 29a. The court understood that "other acts" evidence had been admitted not to punish State Farm but "to determine whether State Farm's conduct *in the Campbell case* was indeed intentional and sufficiently egregious to warrant punitive damages." *Id.* at 6a-7a (emphasis added). The state court repeatedly cited to *BMW* and considered out-of-state conduct in precisely the manner approved by this Court. *Id.* at 20a. *BMW* and *TXO* expressly permit a state court to find that wrongdoing is more reprehensible when it represents the tip of an iceberg of deliberate corporate policy rather than an isolated mistake.

State Farm points to snippets in the Utah court's opinion that petitioner claims have no connection to its conduct in Utah and supposedly reflect extraterritorial punishment. State Farm is wrong. For example, State Farm notes that the Utah court referred to "the harmful effect" of State Farm's conduct "on the larger community of all those who deal with the company." Pet. App. 21a. But such an offhand reference falls far short of demonstrating that the Utah court attempted directly to punish out-of-state conduct, in any manner resembling the explicit multiplication condemned by this Court in *BMW*. Moreover, the Utah Supreme Court made clear that "the larger community" it sought to protect was composed of *Utah residents*. It explained, for example, that among the evidence relied upon by the trial court "to justify the high punitive damage award" was the fact that "State Farm's policies have affected vast numbers of other *Utah* customers." *Id.* at 30a (emphasis added); *see also id.* (noting "effects on other Utah customers"); *id.* at 27a (noting that Utah law permits consideration of conduct "towards the [plaintiffs] and other similarly situated Utahns").

State Farm also points to the Utah Supreme Court's statement that "State Farm's fraudulent practices were consistently directed

to persons – poor racial or ethnic minorities, women, and elderly individuals – who State Farm believed would be less likely to object or take legal action." Pet. App. 18a-19a. State Farm contends that this finding could have relevance only to "alleged conduct in California and Colorado." Pet. Br. 17. To the contrary: the Campbells themselves were a retired couple, and the Utah court was entitled to consider how State Farm's policy had manifested itself in Utah – through wrongdoing directed at vulnerable persons like the Campbells. The state supreme court expressly stated that this finding related to whether State Farm had engaged in "reprehensible conduct," Pet. App. 18a – plainly a legitimate topic for consideration under *BMW*.

Next, State Farm points to the Utah Supreme Court's reference to "mad dog defense tactics." Pet. App. 19a. But such evidence underscored State Farm's scheme of evasion and cover-up. State Farm applied such tactics *in this very case*. It refused from 1981 to 1983 to pay anything to protect the Campbells; refused in 1983 to bond the full amount of the judgments; withheld incriminating internal documents; and falsified evidence. Pet. App. 121a ("the falsifying or withholding of evidence of claim files [was] one of the fraudulent tactics which was used . . . in the *Campbell* case").

The Utah Supreme Court also noted that "State Farm never reported previous punitive damage awards to headquarters, even though prior awards included a Texas [verdict] of $100 million" (never reduced to judgment because the case settled first). Pet. App. 30a. But the court did not "punish" State Farm for the Texas award. Rather, the Utah court used State Farm's decision to disregard such "low" awards as evidence of what quantum of damages was necessary to deter injury in Utah from the same national PP&R policy.

C. Nothing At Trial Amounted To "Extraterritorial Punishment."

In the end, State Farm is left to complain not about the Utah Supreme Court's decision but about the admission of evidence

in the trial court that supposedly related to out-of-state matters. State Farm's argument is flawed.

1. The Utah Supreme Court did not use evidence regarding non-original equipment manufacturer (non-OEM) repair parts, appearance allowances, "first call" settlements, market surveys, independent medical examiner doctors, or earthquake or hurricane insurance, *see* Pet. Br. 8-9, 20-22, to impose "extraterritorial punishment." Indeed, the state supreme court did not even refer to any such evidence in assessing the reasonableness of the punitive damages award.[20] State Farm proceeds as if the Utah Supreme Court, the trial court, and the jury were all the same entity. They were not, and the attacks of petitioner and its *amici* on the "jury" are wholly beside the point.[21] This Court is reviewing the judgment of the Utah Supreme Court, which in turn did "not defer [even] to the trial *judge*," Pet. App. 13a (emphasis added), much less to the *jury.* The state supreme court instead engaged in a de novo review of the punitive award pursuant to *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *See* Pet. App. 8a-9a, 13a, 33a n.11.

State Farm fails to challenge the Utah Supreme Court's opinion on its own terms. Instead, it refers to the court's comment – when addressing an *evidentiary objection* under *Utah* law – that the trial court did not abuse its discretion in admitting "other acts" evidence for certain limited purposes because the evidence was "part and parcel" of the PP&R scheme. Pet. Br. 20 (quoting Pet. App. 39a). State Farm uses this improper sleight of hand – conflating the de novo federal excessiveness inquiry with a distinct state-law matter to which the court applied a completely different standard of review, Pet. App. 9a – to

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[20] Several amici mistakenly claim otherwise. *E.g.*, Health Ins. Assn. of America Br. at 5.

[21] *See* Br. of Several Leading Business Corporations; Br. of American Council of Life Insurers; Br. of Alliance of American Insurers, *et al.*

suggest that the Utah Supreme Court somehow held that this evidence (a) was admissible for all purposes, and (b) formed the basis for the punitive award. The state supreme court made no such holding, and State Farm is simply putting words in the Utah court's mouth.

2. Nor did any "extraterritorial punishment" occur in the trial court. That court stressed the harm to Utah consumers. *See* Pet. App. 113a (State Farm's policies "have injured many other Utah consumers during the past two decades"); *id.* at 119a (noting "[t]he effect of the PP&R program's arbitrary claim payout targets on operations here in Utah"); *id.* at 110a (PP&R policy "provid[ed] incentives to adjusters to systematically deny Utah consumers benefits owed to them"); *id.* (noting "evidence of similar misconduct by State Farm toward other Utah consumers during the past two decades").

The trial court held that "the Campbells never requested the jury to use this proceeding to punish State Farm for bad acts occurring outside Utah." Pet. App. 104a. The court opined that "it was entirely proper for the jury to consider the Campbells' evidence of State Farm's wrongful claim-handling policies and practices, based on evidence from inside and outside Utah, both in evaluating the reprehensibility of State Farm's policies that led to the [Campbells'] injuries . . . and in deciding what amount of punitive damages was needed both to punish State Farm for its wrongful business policies *in Utah* and to deter the continuation of such policies in the future." *Id.* at 104a-05a (emphasis added).[22]

The vast bulk of the evidence offered by the Campbells at trial was from Utah witnesses testifying as to the impact of the fraudulent PP&R policy on Utah consumers, including the Campbells. Twenty-one of the twenty-five witnesses called by

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[22] State Farm cites portions of trial counsel's closing arguments (Pet. Br. 12, 46), but the trial court properly dismissed this objection as based on "out-of-context quotations" and waived. Pet. App. 104a ("State Farm made no objection to the closing argument statements in question").

the plaintiffs fit this category.[23] Another witness addressed State Farm's policies in the region containing Utah. JA 987a (Bruce Davis). The expert witnesses called by plaintiffs also referred in part to the impact on Utah consumers. *E.g.*, JA 1215a-16a (Gary Fye), 2151a (Steven Prater). State Farm focuses on isolated portions of testimony, which were admitted for limited purposes: to impeach or rehabilitate witnesses, to respond to State Farm's theory that its PP&R policy was being misconstrued and in any event had ended, and to rebut State Farm's theory that the victimization of Utah consumers was a local anomaly. *See* Part III, *infra*. The testimony did not form the basis for extraterritorial punishment of State Farm.

Moreover, State Farm has waived any federal constitutional objection based on counsel's arguments or the admission of evidence at trial. The trial court found that State Farm "raised no constitutional objection at trial against the testimony or statements in closing argument of which it now complains," Pet. App. 104a, including the references at Pet. Br. 46.[24]

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[23] Ray Summers, for example, provided extensive testimony as to how the PP&R policy harmed the Campbells (JA 2884a-2912a) and other Utah residents. JA 2908a, 2913a-48a, 2984a-97a. *See also* JA 335a (Wendell Bennett), 433a-34a (Samantha Bird), 499a-500a (Paul Brenkman), 747a (Curtis Campbell), 813a (Donald Campbell), 817a (Inez Campbell), 940a (John Crowe), 1546a (Sharon Hancey), 1576a (Lyle Hillyard), 1585a (Brent Hoggan), 1607a (Felix Jensen), 1659a (Miles Jensen), 1730a (Craig Kingman), 1775a (Bill Lithgow), 2075a (John Ospital), 2091a (Winnifred Ospital), 2138a (Marilyn Paulsen), 2513a (Gordon Roberts), 2647a (Paul Short), 2754a (Robert Slusher).

[24] State Farm also waived its extraterritoriality argument in the state supreme court by failing to list it as an issue presented for review in its opening brief, *see* Utah R. App. P. 24(a)(5), Pet. App. 73a n.22, and essentially abandoning it in its reply brief. *See* State Farm Reply Br. in Utah S. Ct. at 37 n.39 ("Because plaintiffs have receded from their reliance on non-Utah conduct to justify the $145 million award, this part of the order hardly seems relevant . . . ."). Moreover, in the Utah Supreme Court, State Farm never argued that this punitive award actually constituted extraterritorial punishment – only that the award could not be *justified* by out-of-state conduct and that, once such

III. THE UTAH SUPREME COURT'S JUDGMENT DOES NOT CONSTITUTE PUNISHMENT FOR CONSTITUTIONALLY IRRELEVANT "OTHER ACTS."

State Farm complains that the Utah Supreme Court's reliance on the PP&R policy violates due process. Pet. Br. 23. Petitioner appears to argue (a) that *any* consideration of "other acts" evidence, at least as applied to a nationwide corporation, violates due process, or (b) that the *particular* evidence admitted at trial in this case was so "dissimilar" to the Campbells' claim as to violate due process. Neither argument has any merit.

A. There Is No Federal Constitutional Bar To the Consideration of "Other Acts."

Petitioner argues that punitive damages must be imposed solely according to "the defendant's conduct directed toward the plaintiffs." Pet. Br. 26. The Campbells, however, are complaining precisely about the PP&R policy as it was applied to them. They are *not* complaining about that policy in the abstract, or about disconnected "other acts" at all.

In any event, there is no merit to State Farm's argument that the Constitution somehow prohibits states from considering a defendant's conduct toward persons other than the plaintiff. State Farm waived any such contention at trial by failing to object to the jury instructions on that basis. Pet. App. 110a-11a. Moreover, punitive damages have always been imposed on the basis of the totality of a defendant's conduct, including "other acts," not merely according to what the defendant did to the particular plaintiff before the court. As one commentator wrote in 1830, "circumstances *which form no part of the actionable matter of a suit*, may be given in evidence to aggravate damages." Theron Metcalf, *Damages Ex Delicto*, 3 AM. L. MAG.

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conduct was stripped away, there was *insufficient remaining evidence* to justify the $25 million award. State Farm Opening Br. in Utah S. Ct. 72, 75.

270, 287 (1830) (emphasis added). "Any facts may be shown to enhance damages which tend to show actual malice. The plaintiff may show previous threats" by the defendant, for example.[25] That rule remains valid today. "[T]he trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer [and] the relations of the parties." Restatement (Second) of Torts § 908, comment e (1979). Consideration of such evidence is vital to ensure that punitive damages continue to encourage private attorneys general and thereby serve society's interest in "protecting the public by [deterring] the defendant and others from doing such wrong in the future." *Haslip*, 499 U.S. at 19 (quoting jury instructions).

This Court has repeatedly upheld the propriety of considering "other acts." In *TXO*, for example, this Court looked to the defendant's "larger pattern of fraud, trickery, and deceit." 509 U.S. at 462; *see also id.* at 469 (Kennedy, J., concurring in part and in the judgment) ("a pattern and practice of TXO to defraud and coerce those in positions of unequal bargaining power") (quoting lower court opinion). Tellingly, in *TXO* the various pieces in the pattern were far more disconnected than in this case. In *TXO*, slander of title in West Virginia was the plaintiff's cause of action. But other instances of the defendant's misconduct involved cheating an elderly Louisiana woman in an unrelated case who did not understand what she was signing (419 S.E.2d 870, 881-82); failing to pay royalties on gas production in Texas (*id.* at 882); underreporting production from other wells (*id.*); and failing to obtain permission to drill in Oklahoma. *Id.*

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[25] 3 J.G. Sutherland, A TREATISE ON THE LAW OF DAMAGES 727 (1883); *see also* Theodore Sedgwick, A TREATISE ON THE MEASURE OF DAMAGES 535-37 (4th ed. 1868) ("all the attendant circumstances of aggravation which go to characterize the wrong complained of, may be given in evidence; and so it has been held both in England and in this country"); *Symonds v. Carter*, 32 N.H. 458, 468 (1855) ("other acts . . . may be shewn in evidence" to prove malice).

These acts of dishonesty had little direct link to the slander of title tort and were separated in time, space, and content. Three of the cases had been settled without any admission of liability; two were still pending. But they were nonetheless considered by the West Virginia Supreme Court and by this Court. In *BMW*, this Court expressly reaffirmed the holding in *TXO* that other acts evidence may be considered. *See* 517 U.S. at 573 n.19, 574 n.21, 576-77; *see also Haslip*, 499 U.S. at 21 (upholding the consideration of "the existence and frequency of similar past conduct").

The consideration of "other acts" in setting a punitive award does not constitute "double punishment." *Contra* Pet. Br. 27. At common law, the possibility of multiple punitive damage awards for the same course of conduct was not considered problematic.[26] The Double Jeopardy Clause does not apply to punitive damages or civil penalties in suits between private persons. *See United States v. Halper*, 490 U.S. 435, 450 (1989). Nor do the principles underlying that clause have any application here. The admission of "other acts" evidence is not equivalent to punishment. *See Witte v. United States*, 515 U.S. 389, 406 (1995) ("[C]onsideration of relevant conduct in determining a defendant's sentence within the legislatively authorized punishment range does not constitute punishment for that conduct."); *United States v. Felix*, 503 U.S. 378, 387 (1992) (introduction of evidence under Rule 404(b) "is not the same thing as prosecution for that conduct"); *Dowling v. United States*, 493 U.S. 342, 348 (1990) (same). Increasing punishment

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[26] In *Coryell v. Colbaugh*, 1 N.J.L. 90 (1791), for example, the plaintiff was allowed to recover punitive damages for breach of a promise to marry, even though her father had previously recovered against the defendant for the same conduct. *See also Reutkemeier v. Nolte*, 161 N.W. 290, 294 (Iowa 1917) ("This is a situation that has often been met. The fact that a defendant has been or may be held liable for exemplary damages in one case has never been held a defense in his favor against liability for exemplary damages in another case to another plaintiff.")

because of a defendant's other acts does not constitute multiple punishment. *See Nichols v. United States*, 511 U.S. 738, 747 (1994); *Caspari v. Bohlen*, 510 U.S. 383, 391 (1994); *Gryger v. Burke*, 334 U.S. 728, 730 (1948). Moreover, even in the criminal context, there is no constitutional bar to each state's imposition of its own punishment on a multistate course of conduct. *Heath v. Alabama*, 474 U.S. 82, 88 (1985).

State Farm's conjecture that in the future it might be subject to additional punitive awards for the PP&R policy (Pet. Br. 27) is premature. If State Farm is threatened with excessive multiple punishment in the future, it can then raise a constitutional objection. The Due Process Clauses of the Fifth and Fourteenth Amendments apply nationwide. State Farm's implicit premise that subsequent state and federal courts are not competent to enforce whatever substantive due process limits might exist offends basic tenets of judicial federalism. *E.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988).[27]

B. "Other Acts" Evidence Poses Only A State-Law Issue.

There is no merit to petitioner's claim that the particular evidence admitted at trial in this case was so "dissimilar" to the Campbells' claim as to violate due process. The evidentiary objections that State Farm presents throughout its brief (Pet. Br. 6-11, 19-22, 25-26, 33, 37) were understandably litigated below solely in terms of Utah law. Prior to the punitive phase of the

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[27] The approach of the Restatement, supported by several courts and commentators, is to inform juries of other punitive awards that have already been imposed, or that may be imposed in the future, against the defendant for the same course of conduct. Restatement (Second) of Torts § 908 comment e (1979); *Unified School Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. Ct. App. 1981); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1273 (Or. 1980); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 459-60 (Wis. 1980); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1195 (1931); Owen, 74 MICH. L. REV. at 1319; Tom Riley, *Punitive Damages: The Doctrine of Unjust Enrichment*, 27 DRAKE L. REV. 195, 213 (1978).

trial, State Farm filed some thirty-one briefs and motions seeking to limit the evidentiary scope of the damages proceeding. JA 3327a-55a. The trial court "issued several detailed orders . . . tightly controlling the range of proof that would be allowed the Campbells in establishing their claims." Pet. App. 156a. After phase II concluded, State Farm moved for a new trial on the basis of its state-law evidentiary arguments, which the trial court denied. *Id.* at 149a-65a. On appeal, State Farm pursued a purely state-law claim under the Utah Rules of Evidence, which the Utah Supreme Court rejected. *Id.* at 37a-45a. No federal law issue regarding "other acts" evidence was pressed before or passed on by the Utah Supreme Court.[28]

The implications of this procedural history are twofold. First, State Farm has plainly waived any federal objection to the "other acts" evidence that it now presses in this Court. *See TXO*, 509 U.S. at 463-64.

Second, the body of procedural and evidentiary rulings by the Utah courts in this case underscores the folly of State Farm's suggestion that this Court manufacture a federal constitutional law of "other acts" and "relevance" that would largely replicate existing state-court rules on the subject. This Court has soundly declined to adopt a code of federal evidence law even in the capital punishment context. It should certainly decline to create such a code here. State Farm would have this Court plunge into fact-intensive considerations of relevance, motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident. These matters are not appropriate subjects of this Court's authority.

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[28] *See* State Farm Opening Br. in Utah S. Ct. at 1, 19-38; Br. of Appellee/Cross-Appellants at 37 n.24. In the portion of its briefs addressing punitive damages, State Farm argued only that "Utah precedent" and "sound policy" required ignoring the evidence of the impact of the PP&R policy on "other Utah insureds." State Farm Reply Br. in Utah S. Ct. at 36. It did not raise any federal law issue in the Utah Supreme Court concerning "other acts" evidence.

"[T]he States, and not this Court, retain 'the traditional authority' to determine what particular evidence . . . is relevant." *Skipper v. South Carolina,* 476 U.S. 1, 11 (1986) (Powell, J., concurring in judgment). "One reason for leaving it that way is that a sensible code of evidence cannot be invented piecemeal. Each item cannot be considered in isolation, but must be given its place within the whole." *Simmons v. South Carolina*, 512 U.S. 154, 183 (1994) (Scalia, J., dissenting); *see also Estelle v. McGuire*, 502 U.S. 62, 70 (1991) (admission of prior acts evidence did not violate due process); *Green v. Georgia*, 442 U.S. 95, 98 (1979) (Rehnquist, now C.J., dissenting) ("Nothing in the United States Constitution gives this Court any authority to supersede a State's code of evidence because its application in a particular situation would defeat what this Court conceives to be 'the ends of justice.'").

C. The Admission of the "Other Acts" Evidence In This Case Did Not Offend the Federal Constitution.

State Farm mounts a scatter-shot attack on the trial court's admission of various pieces of "other acts" evidence in phase II of the proceeding. The isolated snippets to which State Farm refers amount to a red herring. We have already noted that the vast majority of plaintiffs' trial evidence focused squarely on the Campbells and the operation of the PP&R policy in Utah. *See* pp. 35-36, *supra*. Moreover, the Utah Supreme Court did not even refer to non-original equipment manufacturer (non-OEM) repair parts, appearance allowances, "first call" settlements, market surveys, independent medical examiner doctors, or earthquake or hurricane insurance, *see* Pet. Br. 8-9, 20-22, in its de novo review of the punitive damages award. *See* p. 34, *supra*.

1. State Farm contends that plaintiffs' definition of the PP&R policy "is predicated on a definition of 'pattern' or 'scheme' so generalized and broad in scope as to bring within its purview virtually any activity engaged in by an insurance company in conducting its business." Pet. Br. 14. That is flatly untrue. As used by plaintiffs, the PP&R policy was *not* a catch-

all, "kitchen-sink" label, but a carefully defined corporate policy in which State Farm used an unlawful incentive scheme to keep payouts within arbitrary limits. "[O]ver a period of approximately two decades, State Farm has pursued an *official* policy of . . . *systematically* providing its claim adjusters with *unlawful incentives* to wrongfully deny benefits owed consumers." Pet. App. 114a (emphases added). "[T]his pattern of claims adjustment under the PP&R program was not a local anomaly, but was a consistent, nationwide feature of State Farm's business operations, orchestrated from the highest levels of corporate management." *Id.* at 120a.

Moreover, the Utah courts did not consider State Farm's policy simply in the abstract; they tied it directly to the injuries suffered by the Campbells. The evidence showed "the impact of these profit and evasion schemes on the Campbells specifically." Pet. App. 114a. "State Farm was able to engage in a gamble in which the Campbells (unwittingly) had all the downside risk and State Farm had all the potential upside gain." *Id.* at 132a. "This case is a clear example of how State Farm applies its profit and evasion schemes." *Id.* In fact, the treatment of the Campbells was a "textbook example[] of the sort of behavior that is predictably rewarded by State Farm under the PP&R program." *Id.* at 134a. "There was ample basis for the jury to find that everything that happened to the Campbells – when State Farm repeatedly refused in bad-faith to settle for the $50,000 policy limits and went to trial, and then failed to pay the 'excess' verdict, or at least post a bond, after trial – was a direct application of State Farm's overall profit scheme . . . ." *Id.* "[T]he record also shows that a variety of evasion tactics were used by State Farm . . . in an effort to conceal its wrongdoing toward the Campbells, and evade any punishment in connection with that wrongdoing." *Id.* at 136a. State Farm pursued its wrongful document destruction and suppression policies in the Campbell case itself. *Id.* at 116a, JA 3330a, JA 3341a-47a, JA3349a-3355a.

2. State Farm suggests: (a) that there could not have been a

"pattern" of misconduct affecting Utah because the Campbell case "was the only case in Utah in which a State Farm insured was exposed to the possibility of execution on an excess judgment" (Pet. Br. 23) and (b) that there is a fundamental difference between first-party and third-party fraud. Pet. Br. 24-25. Neither argument has merit.

(a) As the Utah Supreme Court found, "State Farm, as a matter of policy, keeps no corporate records related to lawsuits against it, thus shielding itself from having to disclose information related to the number and scope of bad faith actions in which it has been involved." Pet. App. 19a; *see also id.* at 112a. In this case, State Farm's specially prepared statistics showed that it lost more than 13,330 third-party bodily injury lawsuits nationwide between 1978 and 1995, with a "loss" defined as a jury verdict higher than State Farm's final pretrial offer. JA 3005a-06a. State Farm admits that there were seven excess verdict cases in Utah alone between 1978 and 1995. JA 288a-89a. Thus, the Campbell case was hardly the only State Farm excess verdict case, even in Utah. And even in cases that did *not* lead to excess verdicts, State Farm's PP&R policy may well have resulted in its insureds having to endure the trauma of trial as a result of the company's unreasonable rejection of settlement offers.

Nonetheless, the Campbell case was indeed unusual, even unique, in uncovering and exposing not simply another excess verdict, but an excess verdict that demonstrably resulted from State Farm's wrongful and clandestine corporate policy. The trial court found:

> [T]he essence of State Farm's claims-handling profit scheme was its disciplined insistence on having claims adjusters meet arbitrary, preset targets, one year at a time – and then, if that strategy yields an occasional setback threatening to take money out of the corporate coffers (through a lawsuit alleging bad faith), relying on a panoply of techniques for bullying the complaining victim

> into backing down rather than doing to State Farm what apparently only the Campbells, in the history of bad-faith litigation against State Farm, have managed to do: get to a jury on a punitive damages claim, armed with a reasonably complete factual record concerning the nature of State Farm's unlawful policies and practices.

Pet. App. 135a. Thus, the paucity of documented cases like the Campbells' hardly proves State Farm's innocence. Rather, it underscores the need for more severe punishment. As the trial court found, "State Farm has managed to construct a nearly impenetrable wall of defense against punishment for its wrongdoing, one so effective that it is able to pressure its adjusters to deny consumers insurance benefits with impunity." *Id.* at 122a.

(b) State Farm treated first-party and third-party claims the same way for purposes of the PP&R program. The trial court found that "the PP&R program, including the arbitrary claims payout goals, has applied equally to the handling of both third-party and first-party claims." Pet. App. 119a. "[The PP&R [policy] permeated all aspects of [State Farm's] claim-handling practices, including its mistreatment of consumers on both third-party and first-party insurance claims." *Id.* at 132a. From a profit and PP&R perspective, third-party and first-party claims are the same. A dollar of profit State Farm makes by underpaying a third-party claimant is exactly the same as a dollar of profit State Farm makes by underpaying a first-party claimant. Accordingly, the Utah courts did not err by admitting evidence relating to first-party claims. Indeed, if the courts had considered only third-party claim practice, they would have encouraged State Farm to shift its PP&R policy to first-party claims – exacerbating the harms inflicted on Utah residents.

3. State Farm complains about "other acts" evidence regarding non-OEM parts, appearance allowances, other lawsuits, and additional matters. *See* Pet. Br. 8-9, 20-22. But the bulk of this material was introduced solely as rebuttal and

impeachment evidence in response to the assertions of State Farm witnesses that the company had never treated any customer unfairly and that the events in Utah were a local anomaly. The trial court explained that "much of the evidence of which State Farm now complains was admitted because of State Farm's strategy at trial." Pet. App. 158a (quoting heading). The trial court opined:

> State Farm does not properly acknowledge that this evidence to which it now objects was admitted: (a) only as rebuttal or impeachment evidence (to attack the credibility of State Farm experts who purported to be extremely knowledgeable and would certainly have been aware if State Farm was engaging in such practices); or (b) as a result of various evidentiary doors that were opened by State Farm during trial, that the Court had previously closed (in some instances State Farm proceeded to open such doors even after being explicitly warned by the Court during the trial that such would be the consequence); or (c) because State Farm's own counsel elected to admit the evidence; or (d) without objection by State Farm when the evidence was offered.

Id. at 158a-59a; *see also* JA 1909a-11a, 3330a-32a, 3335a-37a.[29]

4. Further, the Utah courts would not have violated the Constitution even if they *had* considered as a basis for punitive damages State Farm's use of non-OEM parts, appearance allowances, and other matters cited at Pet. Br. 8-9, 20-22. Even if, as State Farm alleges, those practices are not in the abstract forbidden by state statutes, Pet. Br. 20-22 & nn. 17-20, and even if the practices described by State Farm were not malum in se or

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[29] Misleadingly, State Farm contends that "[m]ost" of plaintiffs' "other acts" evidence "was admitted as part of plaintiffs' affirmative case." Pet. Br. 7. The timing was a product of State Farm's trial strategy. State Farm insisted that rebuttal and impeachment evidence be presented *before* State Farm's case, based on the witness' deposition testimony. R. 7273-77.

malum prohibitum, they became relevant to punitive damages to the extent they were used as tools to implement State Farm's wrongful PP&R policy. Even if they were not independently prohibited by statute, they became proper subjects of consideration (although the Utah courts did not in fact consider them) because they confirmed the existence, scope, and effect of the PP&R policy.

State Farm argues that a lawful means may never be considered in assessing damages even when it is used for an unlawful end. That is incorrect. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 485-87 (1993) (statement of intent to select victim by race, itself protected by the First Amendment, may be used to enhance "the maximum penalty" for criminal conduct); 18 U.S.C. § 924(c)(1) (using firearm in commission of criminal act treated as aggravating factor).

5. The specific examples of "other acts" evidence cited by State Farm do not support its argument.

• Evidence of class actions against State Farm, including allegations concerning non-OEM parts, market surveys, independent medical examiner (IME) doctors, and other matters (Pet. Br. 8-9) was introduced for the limited impeachment-and-rebuttal purpose of showing that the insurance regulators called by State Farm as character witnesses had little actual knowledge of its operations. JA 278a-89a, 322a, 1909a-11a, 2463a-74a, 2477a-98a, 2583a-84a, 2587a, 2590a-2601a, 2604a-05a, 2607a-09a, 2624a-25a, 3116a-24a.

• Evidence regarding earthquake claims (Pet. Br. 9) was admitted solely in response to State Farm's own introduction of earthquake claims, as part of its attempt to attack one of plaintiffs' witnesses. JA 1139a-46a, 1165a-73a, 1178a-82a, 3107a-09a.

• Evidence regarding cancellation of hurricane insurance in Florida (Pet. Br. 9) was used only to impeach one of State Farm's expert character witnesses, who claimed that he had recently spoken with Florida regulators and that they had expressed no concerns about State Farm. JA 2467a-69a. His

credibility was attacked with evidence that the top regulator in Florida had recently described State Farm as a "corporate bully" for cancelling hurricane coverage, evidence admitted solely for this limited purpose. JA 319, 2497.

• Evidence that State Farm had probed the sex life of one of its former employees (Pet. Br. 19) was admitted on re-direct examination only after State Farm itself opened the door by attempting to impeach her testimony on the ground that she had been investigated by the company and had a "vendetta." JA 1109a, 1139a-47a, 1163a-64a.

• There was also evidence that appearance allowances, JA 981a-82a, 991a-1006a, 2021a-24a, 2065a (where insureds are paid less than full repair costs); deductions for depreciation, JA 1018a-19a (where insureds are paid less than full replacement costs); first-contact settlements, JA 1401a-03a, 1631a-33a, 2180a-81a, 2187a-89a (where insureds sign releases before having a chance fully to consider their rights and consult attorneys); and market surveys, JA 2006a-09a, 2016a-17a, 2509a-10a (which justify settling auto damage claims for less than book value), were all used as tools to decrease the compensation that insureds would otherwise receive and thereby reduce claim payouts in accord with the PP&R policy. Plaintiffs argued that this evidence showed that, "[i]f State Farm would cheat on a fixed damage which is admittedly owing, they will cheat on general damages which are unfixed." JA 3225a. "That shows the profit motive being injected into the claims department," "all the way through to the very bottom of this company," "a scheme which defrauded our clients." JA 3225a-26a.[30]

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[30] State Farm cultivates certain experts, including independent medical examiner (IME) doctors (Pet. Br. 9), "with litigation in mind, instead of trying to get a fair, independent evaluation. . . . [T]hey pay them a lot of money, they retain them lots of times." JA 2209a. "[T]he carrier has the duty to pay claims in good faith, and they're using an expert during the claims process to not pay what, maybe, they should." JA 2210a. There was testimony that the

IV. THE UTAH SUPREME COURT'S REFERENCE TO STATE FARM'S WEALTH WAS NOT CONSTITUTIONALLY OBJECTIONABLE.

Petitioner argues that a defendant's wealth should not be considered in analyzing whether a punitive damages award is excessive. The trial court found that State Farm waived this argument because it proposed jury instructions expressly directing the jury to consider "[t]he relative wealth of State Farm" in imposing punitive damages. Pet. App. 110a. Nor did State Farm raise any of its new-found objections to the precise manner in which its wealth should be calculated. *Contra* Pet. Br. 48 n.40.

The courts below considered wealth as only one factor in reviewing the punitive damages award under Utah law, *id.* at 17a, 111a-13a, and can hardly be faulted for doing so. Petitioner's own amicus concedes that "[t]aking 'wealth' or 'financial position' into account in a multifactor test as a matter of state law has thus far not been held to be constitutionally forbidden." ATRA Br. 26.[31] None of these decisions has

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use of cultivated experts occurred in the Campbell case. JA 2207a-08a, 2209a.

State Farm says that there was evidence attacking "the use of a high-low settlement agreement in a California arbitration." Pet. Br. 9. That is misleading. The evidence concerned a case where the State Farm offer of settlement was only a fraction of the high-low arbitration result, yet State Farm described the case as "well-handled." JA 2197a. The witness opined that encouragement of low-ball offers was a facet of the PP&R policy.

[31] *See TXO*, 509 U.S. at 462 n.28 (plurality); *BMW*, 517 U.S. at 591 (Breyer, J., joined by O'Connor and Souter, JJ.) ("one can understand the relevance of this factor to the State's interest in retribution"); *Haslip*, 499 U.S. at 21-22; *Browning-Ferris*, 492 U.S. at 300 (O'Connor, J., concurring in part and dissenting in part); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981) (evidence of wealth "is traditionally admissible as a measure of the amount of punitive damages that should be awarded"); *Washington Gas Co. v. Lansden*, 172 U.S. 534, 551 (1899); Restatement (Second) of Torts § 908(2) & comment e (1979); *Punitive Damages: Relationship to Defendant's Wealth*,

imposed limits on the consideration of wealth in the case of a nationwide corporation. State Farm's argument that the jury should have been permitted to consider only its wealth in Utah (Pet. Br. 47-48) – whatever that might mean – is a trial argument that State Farm waived by failing to raise it at all in the trial court. State Farm's argument would turn the Commerce Clause on its head by effectively requiring states to discriminate in favor of out-of-state entities.

State Farm's novel argument that punitive damages cannot constitutionally be imposed against mutual insurance companies (Pet. Br. 49) has no basis in law and is foreclosed by *Haslip*, where this Court approved a punitive award against a mutual insurance company, on the ground that it "creates a strong incentive for vigilance by those in a position 'to guard substantially against the evil to be prevented.'" 499 U.S. at 14 (citation omitted). Any public company could make the same plea as State Farm – that the award will penalize "innocent" stockholders. That has never provided a defense to punitive damages. Indeed, punitive damages may be especially necessary in cases involving mutual insurance companies. *See* p. 18, *supra.*

CONCLUSION

The judgment below should be affirmed.[32]

Respectfully submitted.

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87 A.L.R.4th 141, 151 (1992) (the "vast majority of courts" permit wealth to be considered).

[32] Even if this Court were to reverse, the proper disposition would be a remand to the Utah Supreme Court for proceedings not inconsistent with this Court's opinion – not a new trial, as petitioner claims. Pet. Br. 49-50. *See BMW*, 517 U.S. at 586 (choice of remedy is for state supreme court). In any event, as State Farm does not dispute, it long ago waived all federal law arguments that it was denied a fair trial. Cert. Opp. 6 n.3.

L. RICH HUMPHERYS
ROGER P. CHRISTENSEN
KARRA J. PORTER
CHRISTENSEN & JENSEN
50 South Main Street
Salt Lake City, UT 84144
(801) 323-5000

LAURENCE H. TRIBE
Counsel of Record
KENNETH CHESEBRO
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JONATHAN S. MASSEY
JONATHAN S. MASSEY, P.C.
3920 Northampton St., N.W.
Washington, D.C. 20015
(202) 686-0457

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Counsel for Respondents

APPENDIX: STATE PUNITIVE DAMAGES STATUTES

I. CAPS ON PUNITIVE DAMAGES AWARDS

Alabama – Ala. Code § 6-11-21 (2001) (in general limits punitive damages to three times compensatory damages or $500,000, whichever is greater, with lower limits in actions against small businesses, higher limits in actions involving physical injuries, and exclusions for class action suits and actions for wrongful death or intentional infliction of physical injuries)

Alaska – Alaska Stat. Ann. § 09.17.020(f) (2001) (in general limits punitive damages to three times compensatory damages or $500,000, whichever is greater); (g) (if the defendant is motivated by financial gain and adverse consequences known by defendant, then punitive damages are limited to the greatest of four times compensatory damages, four times aggregate financial gain defendant received from misconduct, or $7,000,000); (h) (limits punitive damages against employer for unlawful employment practice to $200,000-$500,000 depending on size of employer)

Colorado – Colo. Rev. Stat. § 13-21-102(1)(a) (2001) (as a main rule, caps punitive damages at amount of actual damages); (3) (allows for treble damages for wanton and willful behavior by defendant during the pendency of the case)

Connecticut – Conn. Gen. Stat. § 52-240b (2001) (caps punitive damages at twice compensatory damages in products liability cases)

Florida – Fla. Stat. ch. § 768.73(1)(a) (2002) (in general, caps punitive damages at three times compensatory damages or $500,000, whichever is greater)

Georgia – Ga. Code Ann. §§ 51-12-5.1(g) (2002) (caps punitive damages at $250,000 in some tort actions)

Indiana – Ind. Code Ann. § 34-51-3-4 (2002) (caps punitive

damages at greater of three times compensatory damages, or $50,000).

Kansas – Kan. Stat. Ann. § 60-3701(e)-(f) (2001) (in general, caps punitive damages at lesser of defendant's annual gross income, or $5 million, unless the defendant profits from her misconduct beyond this amount, in which case the court may award "an amount equal to 1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct")

Nevada – Nev. Rev. Stat. Ann. § 42.005(1) (2001) (caps punitive damages at three times compensatory damages if compensatory damages equal $100,000 or more, and at $300,000 if the compensatory damages are less than $100,000)

New Hampshire – N.H. Rev. Stat. Ann. § 507:16 (2002) ("No punitive damages shall be awarded in any action, unless otherwise provided by statute.")

New Jersey – N.J. Stat. Ann. 2A:15-5.14 (2002) ("No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $ 350,000, whichever is greater.")

North Carolina – N.C. Gen. Stat. § 1D-25(b) (2002) (caps punitive damages to three times compensatory damages or $250,000, whichever is greater)

North Dakota – N. D. Cent. Code § 32-03.2-11(4) (2002) (caps punitive damages at greater of two times compensatory damages, or $250,000)

Oklahoma – Okla. Stat., Tit. 23, § 9.1(B)-(C) (2002) (caps punitive damages at greater of $100,000, or actual damages, if jury finds defendant guilty of reckless disregard; and at greatest of $500,000, twice actual damages, or the benefit accruing to defendant from the injury-causing conduct, if jury finds that defendant has acted intentionally and maliciously)

Texas – Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (b) (2002) (limits punitive damages to the greater of twice economic damages plus noneconomic damages up to $750,000, or $200,000); (c) (exempts certain intentionally-committed felonies from these limitations)

Virginia – Va. Code Ann. § 8.01-38.1 (2001) (caps punitive damages at $350,000)

II. OTHER PROCEDURAL RULES

Alabama – Ala. Code § 6-11-20 (a) (2001) ("Punitive damages may not be awarded in any civil action, except civil actions for wrongful death … other than in a tort action where it is proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.")

Alaska – Alaska Stat. Ann. § 09.17.020 (b) (2001) (plaintiff must prove "by clear and convincing evidence" that defendant's conduct was "outrageous" or "evidenced reckless indifference to the interest of another person")

Arizona – Ariz. Rev. Stat. § 12-701 (2001) (provides a government standards defense for FDA approved drugs and devices)

California – Cal. Civ. Code §§ 3294-3495 (Deering 2002) (requires "clear and convincing" evidence of oppression, fraud, or malice; the trial is bifurcated allowing evidence of defendants' financial conditions only after a finding of liability)

Colorado – Colo. Rev. Stat. § 13-21-102(1)(a) (2001) (punitive damages require "fraud, malice, or willful and wanton conduct"); § 13-25-127(2) (2001) (punitive damages must be proven beyond a reasonable doubt)

Florida – Fla. Stat. ch. § 768.73(2) (2002) (prohibits multiple punitive damage awards based on the same act or course of conduct unless the court makes a specific finding that earlier

punitive damage awards were insufficient); § 768.72(2) (2002) ("A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence.")

Georgia – Ga. Code Ann. § 51-12-5.1(d) (2002) (in all cases in which punitive damages are claimed, liability for punitive damages is tried first, then amount of punitive damages); (e)(1) (prohibits multiple awards stemming from the same predicate conduct in products liability actions)

Idaho – Idaho Code § 6-1604 (2002) (requires preponderance of evidence of "oppressive, fraudulent, wanton, malicious or outrageous" conduct)

Indiana – Ind. Code Ann. § 34-51-3-2 (2002) (plaintiff must demonstrate all facts necessary for punitive damages award by "clear and convincing evidence")

Iowa – Iowa Code § 668A.1 (2002) (the standard for awarding punitive damages is "preponderance of clear, convincing, and satisfactory evidence that the conduct of the defendant from which the claim constituted willful and wanton disregard for the rights or safety of another"; such conduct must also be directly specifically at plaintiff or person from whom plaintiff derives her claim)

Kansas – Kan. Stat. Ann. §§ 60-3701(a) and (b) (2001) (trier of fact determines defendant's liability for punitive damages, then, if such damages are allowed, court determines amount of such damages in a separate proceeding based on enumerated factors)

Kentucky – Ky. Rev. Stat. Ann. § 411.184 (2001) ("A plaintiff shall recover punitive damages only upon proving, by clear and convincing evidence, that the defendant from whom such damages are sought acted toward the plaintiff with oppression, fraud or malice.")

Maryland – Md. Code Ann. Cts. & Jud. Proc. § 10-913(a) (2001) ("In any action for punitive damages for personal injury, evidence of the defendant's financial means is not admissible until there has been a finding of liability and that punitive damages are supportable under the facts.")

Minnesota – Minn. Stat. § 549.20 (2001) (the standard of conduct for punitive damages is "deliberate disregard for the rights or safety of others" and establishes a defendant's right to insist on a bifurcated trial when a claim includes punitive damages)

Mississippi – Miss. Code Ann. § 11-1-65 (2001) (establishes a "clear and convincing" evidence standard that the defendant acted with "actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud" for awarding punitive damages in most actions; requires bifurcation of trials on the issue of punitive damages; prohibits the award of punitive damages in the absence of compensatory awards; prohibits the award of punitive damages against an innocent seller; and establishes factors for the jury to consider when determining the amount of a punitive damages award)

Missouri – Mo. Rev. Stat. §§ 510.263 (2001) (mandates bifurcated proceedings, on request of any party, for jury to determine first whether defendant is liable for punitive damages, then amount of punitive damages; multiple punitive awards prohibited under certain conditions)

Montana – Mont. Code Ann. § 27-1-221 (2001) (upon finding defendant liable for punitive damages, jury determines the amount in separate proceeding; requires unanimous jury verdict; requires "clear and convincing" evidence of "actual fraud" or "actual malice")

Nevada – Nev. Rev. Stat. § 42.005 (2001) (if jury determines that punitive damages will be awarded, jury then determines amount

in separate proceeding; requires "clear and convincing" evidence of "oppression, fraud, or malice")

New Jersey – N. J. Stat. Ann. § 2A:15-5.13 (2002) (upon defendant's request, mandates separate proceedings for determination of compensatory and punitive damages); 2A:58C-5 (provides a government standard defense for FDA approved drugs)

North Carolina – N.C. Gen. Stat. § 1D-15 (2002) (requires "clear and convincing" evidence that the defendant is liable for compensatory damages and engaged in fraud, malice, willful or wanton conduct; 1D-30 (provides for a bifurcated trial on motion of defendant).

North Dakota – N. D. Cent. Code § 32-03.2 (2002) (upon request of either party, trier of fact determines whether compensatory damages will be awarded before determining punitive damages liability and amount; requires "clear and convincing" evidence that the defendant has been guilty of oppression, fraud, or actual malice for punitive damages award; prohibits a defendant's financial worth from being admitted in the punitive damages portion of a trial)

Ohio – Ohio Rev. Code Ann. § 2315.21 (B)-(C) (Anderson 2002) (requires "clear and convincing" evidence; punitives cannot be awarded unless plaintiff has proven "actual damages" were sustained because of defendant's "malice, aggravated or egregious fraud, oppression or insult"); 2307.80(c) (provides a government standard defense for FDA approved drugs)

Oklahoma – Okla. Stat., Tit. 23, § 9.1 (2002) (requires separate jury proceedings for punitive damages; codifies factors which the jury must consider in awarding punitive damages, then provides three separate "categories" for limiting punitive awards)

Oregon – Or. Rev. Stat. § 18.537(1) (2001) (imposes a "clear and convincing" evidence standard that defendant "acted with malice or has shown a reckless and outrageous indifference to a highly

unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others")

South Carolina – S.C. Code Ann. § 15-33-135 (2001) (requires "clear and convincing" evidence for punitive damage award)

South Dakota – S.D. Codified Laws § 21-1-4.1 (2001) (requires "clear and convincing" evidence of "willful, wanton, or malicious" conduct).

Texas – Tex. Civ. Prac. & Rem. Code § 41.003 (2002) (generally requires "clear and convincing" evidence of fraud, malice, or a "wilful act or omission or gross neglect in wrongful death actions" to impose punitive damages); § 41.004 (punitive damages can only be awarded if damages other than nominal damages have been awarded, unless defendant has acted with malice; punitive damages can not be awarded if claimant elects to have recovery multiplied under another statute)

Utah – Utah Code Ann. § 78-18-1 (2002) (provides for a "knowing and reckless" standard of liability based on "clear and convincing" evidence; evidence of defendant's wealth can only be introduced after a finding of liability for punitive damages); 78-18-2 (government standard defense for FDA approved drugs)

Wisconsin – Wisc. Stat. § 895.85(3) (2001) (allows punitive damages only where the defendant acts "maliciously or in intentional disregard of the rights of the plaintiff")