No. 01-1289

IN THE
Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,

Respondents.

On Writ of Certiorari to the Utah Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000

CARTER G. PHILLIPS
GENE C. SCHAERR*
RICHARD D. BERNSTEIN
STEPHEN B. KINNAIRD
KATHRYN R. HAUN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

August 19, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Amicus will address the following question, which is narrower than but fairly encompassed within the question on which certiorari was granted: Whether subjecting conduct that occurred wholly outside Utah to Utah's unique punitive damage laws, where Utah has no significant contacts with or legitimate regulatory interest in that conduct, violates the Constitution's Full Faith and Credit Clause and the constitutional structure of multiple, territorially sovereign States, and thereby violates petitioner's due process rights as well?

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INTEREST OF AMICUS CURIAE

The National Association of Manufacturers ("the NAM") respectfully submits this brief as *amicus curiae* in support of petitioner urging reversal of the judgment of the Utah Supreme Court.[1]

[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than the NAM, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), petitioner and respondent have filed with the Court a blanket consent for all *amici*.

The NAM is the oldest and largest multi-industry trade association in the United States. It represents 14,000 member companies and subsidiaries (including 10,000 small and mid-sized manufacturers) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 States.

Like petitioner here, many of the NAM's members operate in numerous States. Those companies would face enormous financial risk if, as the Utah Supreme Court concluded, their activities in one State could be the basis for punitive damage liability in another State – indeed, in all 49 other States – whose citizens were not directly affected by those activities. The resulting liability could well bankrupt many manufacturers. It would, at a minimum, severely discourage the development, manufacture and sale of a wide range of products in the United States.

What makes this case even more important to *amicus* and its members is that it illustrates a common practice in modern civil litigation. In case after case, plaintiffs lawyers urge juries to use one State's punitive damage laws to punish a defendant not merely for the conduct it is alleged to have engaged in within the boundaries of that State, but for its nationwide conduct. As in this case, moreover, juries are often told that various federal and state regulatory agencies have failed to provide adequate protection against corporate wrongdoing, and that they, the members of the jury, must now fill that role through the regulatory power of a large punitive damage award.

As shown below, allowing an individual State's punitive damage law to be applied in that manner would contravene fundamental principles of sovereignty and comity upon which our system of co-equal States was founded. And it would violate the Full Faith and Credit and Due Process Clauses.

STATEMENT OF THE CASE

The Utah Supreme Court's attempt to use Utah law to reach conduct in other States is well-documented in the statement of the case in the brief of petitioner State Farm Mutual Automobile Insurance Company. Suffice it to say that the respondents here, plaintiffs in a suit filed in Utah state court seeking compensatory and punitive damages against the petitioner, alleged that petitioner – as part of a "nationwide scheme" – acted in bad faith in refusing to settle third-party claims brought against respondents. Thus, in seeking punitive damages, respondents relied on an expansive range of allegedly tortious conduct that had occurred in other States.

Respondents' counsel, moreover, repeatedly urged the jury to punish State Farm for its conduct spanning the entire United States, that is, to punish State Farm in a Utah court subject to Utah laws for almost exclusively extraterritorial conduct. Indeed, the plaintiffs' lawyer advised the jury that "the insurance commissions in Utah *and around the country* are unwilling or inept at protecting people against abuses." JA 208a; 1317a-1318a (emphasis added). He then admonished them that "[t]he only regulators of insurance companies are juries like you. . . . [Y]ou are the regulators." *Id.*

The jury responded to this invitation to assume a nationwide regulatory role by awarding respondents $145 million in punitive damages, which was reduced by the trial court to $25 million. On appeal, the Utah Supreme Court reinstated the jury's punitive award, in part on the ground that such an award was necessary to remedy State Farm's "nationwide" conduct. Pet. at 10.

SUMMARY OF ARGUMENT

In this case, based originally on a single insurance transaction in Utah, the Utah Supreme Court applied Utah's unique punitive damage laws to a vast array of extraterritorial conduct notwithstanding that the conduct had no apparent connection to the State of Utah, to respondents, or to this lawsuit. The result – Utah's punishment of State Farm for conduct that occurred in other States – raises a key constitutional concern, namely, the application of one State's law to transactions with no connection to that State.

In *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), a majority of this Court concluded, based primarily on the federal Commerce Clause, that one State may not "impose its own policy choice on neighboring States" and, therefore, that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 571-72; *accord id.* at 607-10 (dissenting opinion of Ginsburg, J., joined by Rehnquist, C.J.). *Amicus* agrees with that conclusion, which has been addressed at length by petitioner and several other *amici*. However, because that decision's "dormant Commerce Clause" rationale does not command a consensus within the Court, *amicus* offers two additional and complementary reasons why this principle of "non-extraterritoriality" is required by the Constitution.

1. The first is the Full Faith and Credit Clause. In reinstating the jury's punitive damage award for State Farm's conduct with respect to non-Utah insureds that had no connection with Utah, and in failing to expunge all such reliance on extraterritorial conduct on appeal, the Utah Supreme Court violated that bedrock protection of State sovereignty. In so doing, the court also violated petitioner's rights under the Due Process Clause. See *Allstate Insurance*

Co. v. *Hague*, 449 U.S. 302, 308 n.10 (1981) (plurality opinion).

The text and history of the Full Faith and Credit Clause demonstrate that it was designed to do more than ensure that judgments in one State have *res judicata* effects in other States. It was also designed to, and does, prohibit a State from applying its regulatory and policy judgments to extraterritorial conduct that is not within the "jurisdiction" of that State under the conflict-of-laws principles that prevailed at the time of the Founding. Indeed, this is essentially the way that Clause has been interpreted in this Court's more recent decisions. See *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

Here, the vast majority of the conduct on which the $145 million punitive damage award was based occurred outside Utah and had effects wholly outside Utah. Accordingly, that conduct would have been considered to be wholly within the jurisdiction of other States under the *lex loci* conflict-of-laws principles that prevailed at the time of the Founding (and indeed under the more modern "interest" analysis used in *Shutts*). To apply Utah law to that conduct, therefore, plainly violates the Full Faith and Credit Clause and, indeed, severely prejudices the sovereign interests of other States in applying their own laws and policies to conduct occurring within their jurisdictions. And that intrusion into the sovereignty of other States is exacerbated by the existence of a square conflict between the judgment of the Utah court that petitioner's conduct deserved to be punished, and the judgment of several other States where the conduct actually occurred that much of it was lawful.

2. The second alternative basis for the principle articulated in *BMW* v. *Gore* is the overall constitutional structure, of which the Full Faith and Credit Clause is merely one important element. As this Court recently held in *Printz* v. *United States*, 521 U.S. 898 (1997), and as it has held in several other notable decisions, government action can be

invalid not only when it violates a specific clause of the Constitution, but also when it is contrary to the "essential postulate[s]" on which the constitutional structure is based. *Id.* at 918 (alteration in original).

As the Court held in *Printz*, several features of the constitutional structure were designed to protect the "'residuary and inviolable sovereignty'" of the States as against the federal government. *Id.* (quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)). But many of those same constitutional features, as well as other provisions such as the Full Faith and Credit Clause, were also designed to protect the States' sovereignty against intrusions by other States. Together (at a minimum), these features of the constitutional structure establish the "fundamental postulate" that one State may not attempt to regulate conduct that does not directly affect residents of that State and that occurs entirely in another State.

Here, the Utah Supreme Court has not only insisted that Utah law can be the basis for punitive damages for conduct that occurred entirely outside Utah. It has also allowed an unelected Utah jury to legislate, in effect, for every other State in which petitioner does business. That result is plainly inconsistent with the constitutional structure of co-equal State sovereigns, and with petitioner's correlative due process rights. And it is an affront to the sovereignty of the other States in which the challenged conduct occurred.

ARGUMENT

This case presents a striking failure by the Utah Supreme Court to obey the limitations by which our system of constitutional federalism protects the sovereignty of each State from incursions by other States. Specifically, as shown below, that court violated both the Full Faith and Credit Clause and the overarching constitutional structure, and in so doing violated petitioner's due process rights.

I. THE APPLICATION OF UTAH LAW TO PUNISH STATE FARM FOR CONDUCT THAT NEITHER OCCURRED IN UTAH NOR HAD EFFECTS THERE VIOLATES THE FULL FAITH AND CREDIT CLAUSE.

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. As shown below, the text and early history of that provision demonstrate that it is not limited to ensuring that state-court judgments have *res judicata* effect in other States. Rather, the provision was designed to ensure that each State would give "full faith and credit" to the sovereign right of every other State to determine for itself whether and how to regulate wholly intrastate conduct. This reading is confirmed by 20th-century decisions of this Court, such as *Allstate*, 449 U.S. at 312-13 (1981), and *Shutts*, 472 U.S. at 818-23. Under those decisions, and under the plain text of the Full Faith and Credit Clause, Utah's actions in this case are unconstitutional because they seek to regulate and punish conduct that occurred and had effects wholly within the confines of other sovereign States.

A. The Text and Early History of The Full Faith and Credit Clause Compel The Conclusion That One State May Not Regulate Conduct That Is Wholly Beyond Its Own Borders.

The notion that one State must respect the exclusive right of other States to regulate wholly intrastate conduct did not originate at the Constitutional Convention. That principle was expressly protected in Article IV of the Articles of Confederation. See Articles of Conf. art. IV, § 3 ("[f]ull faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State"). Thus, as the brief discussion of this point at the Convention makes clear, the Full Faith and Credit Clause was intended to protect the

sovereignty of states vis-à-vis each other, and that with respect to one another, States would remain as they were under the Articles of Confederation. See 2 *The Records of the Federal Convention of 1787*, at 447-48 (Max Farrand ed., rev. ed. 1966).

The provision's essential purpose was to avoid conflicts between States in adjudicating or regulating the same matters. The provision thereby served "to alter the status of the several States as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of others." *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 277 (1935).

Thus, in one sense, the Clause represented a sacrifice of sovereignty – one State could no longer simply ignore the laws, policies and decisions of another State as to conduct occurring (and producing effects) entirely in that State. But in another sense, the Clause enhanced the sovereignty of all the States by ensuring that all of them would respect the sovereign decisions of one State with respect to matters occurring in and solely affecting that State's own territory.

The problem, of course, was how to determine whether a particular matter was properly within the domain of one State rather than another. And the clear answer was to accord "full faith and credit" to applicable laws selected under the choice-of-law rules that existed at the time of the Founding. See Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249, 301 (1992). Unless a State had jurisdiction over a particular matter under those conflict-of-law rules, that State's judgments and laws were not entitled to full faith and credit.[2] On the other hand, if a State did have

[2] *See* Donald Regan, *Siamese Essays: (I) CTS Corp., v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1894 (1987) ("[T]he full faith and credit clause does not set down principles of legislative jurisdiction. Rather, it presupposes them."). *See also* Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. Chi. L. Rev. 775, 788-89, 816 (1955) (arguing the Full Faith and Credit Clause is "meaningless" in the absence of a "full-fledged system of conflict of laws," that the Founders believed was part of the Law of Nations).

jurisdiction over a matter under those settled principles, other States had an obligation to respect the State's decisions about it.

That the Framers were cognizant of choice-of-law principles cannot be doubted. Indeed, they invoked these principles often during the convention and ratification debates. See, *e.g.*, 2 Farrand, *supra* at 448; The Federalist No. 42, at 270 (James Madison) (Clinton Rossiter ed., 1961) (attacking defect in Articles of Confederation on grounds that "the law of one State [might] be preposterously rendered paramount to the law of another, within the jurisdiction of the other"); *id.* No. 80, at 476 (Alexander Hamilton) (distinguishing cases where the subject of controversy "was wholly relative to the lex loci" from those subject to "treaty or the general law of nations"). Indeed, an early draft of the Clause explicitly stated the choice-of-law prerequisite:

> "[w]henever the Act of any State, whether Legislative, Executive or Judiciary shall be attested & exemplified under the seal thereof, such attestation and exemplification, shall be deemed in other States as full proof of the existence of that act – and its operation shall be binding in every other State, *in all cases . . . which are within the cognizance and jurisdiction of the State, wherein the said act was done.*"[3]

[3] It is not known whether that portion of the provision was omitted intentionally because it stated the obvious, or whether it was omitted inadvertently. In all events, this choice-of-law principle was clearly implicit in the language ultimately chosen by the Framers. *See generally* Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 Colum. L. Rev. 249 (1992). *See also Bonaparte* v. *Tax Court*, 104 U.S. 592, 595 (1881)

2 Farrand, *supra*, at 448 (emphasis added).

Consistent with this conflict-of-law principle, this Court's early decisions recognized clear limitations upon the extent to which the Clause required a State to enforce the judgment of another State in contravention of its own statutes or policy. For example, in 1850, the Court held in *D'Arcy* v. *Ketchum* that, for a state to give effect to the judgment of a sister State, the sister State must have had some basis for jurisdiction under settled choice-of-law rules. See 52 U.S. (11 How.) 165, 174-76 (1850). Then, in *Bonaparte* v. *Tax Court*, the Court considered whether Maryland was required to give "credit" to the laws of other States that exempted their securities from taxation, as applied to securities issued by those States but owned by a resident of Maryland. See 104 U.S. 592, 594 (1881). In answering that question in the negative, the Court made clear that the Full Faith and Credit Clause embodies a jurisdictional prerequisite: the Court ruled that "[n]o state can legislate except with reference to its own jurisdiction." *Id.* And on that basis the Court held that "[o]ne state cannot exempt property from taxation in another."[4] *Id.*

(noting that the Constitution was not framed so as to allow a State to legislate "outside of its own jurisdiction"), *cited by* Laycock, *supra*.

[4] Similarly, *Alaska Packers Association* v. *Industrial Accident Commission*, 294 U.S. 532 (1935), echoing choice-of-law principles, held that the courts of one State should not be compelled to subordinate their own statutes to those of other States. Instead, the decision noted the need to "apprais[e] the governmental interests of each jurisdiction, and turn[ ] the scale of decision according to their weight." *See* 294 U.S. 532, 547 (1935). While this approach to conflict-of-law issues departed from the *lex loci* approach of the Founding era, the decision illustrates the general point that the Full Faith and Credit Clause has a jurisdictional prerequisite that is tied to conflict-of-law principles.

B. This Court's Recent Decisions Likewise Establish That The Full Faith And Credit Clause Prevents One State From Making Regulatory And Legal Judgments Regarding Conduct Solely Within The Jurisdictions Of Other States.

This Court's more recent decisions are to the same effect. They establish that, under the Full Faith and Credit Clause, the law of one State can be applied to conduct occurring in another State only if the first State possesses "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Allstate*, 449 U.S. at 312-13; see also *Shutts*, 472 U.S. at 818-23.[5] Nor may a State impose its own law on wholly extraterritorial conduct merely because it has personal jurisdiction over the parties to a lawsuit in which that conduct is at issue. See *Shutts*, 472 U.S. at 821 (noting that issue of personal jurisdiction "is entirely distinct from the question of the constitutional limitations on choice of law").

1. In *Shutts*, for example, this Court was asked to create, in the class-action context, an exception to the principle

[5] *Allstate* and *Shutts* comport with modern conflict-of-laws principles. These principles dictate that a State has a legitimate interest in regulating conduct that either (i) occurs within its territory, or (ii) causes effects substantially within its territory. *See Restatement (Second) of Conflict of Laws* §§ 9, 145 (1971); *see also* Russell J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 U. ILL. L. R. 129, 139 (jurisdiction where "defendant's conduct occurred" has the primary interest in determining punitive damages issues, although "[t]he plaintiff's state [also] has an interest in deterring conduct that has [effects] there"). Under the traditional approach to conflict-of-laws problems, courts applied the tort law of the State where the allegedly wrongful conduct occurred. *See* Restatement (First) of Conflict of Laws § 55 (1934); *see also Allstate*, 449 U.S. at 308 n.11 (noting the "law of the place of the wrong usually governed traditional choice-of-law analysis."). Under both the modern and traditional approaches, Utah has no basis for applying Utah punitive damages law to non-Utah conduct having no effects in Utah.

envisioned by the Framers – and recognized by this Court's early decisions and by *Allstate* – that a State must have sufficient contacts with conduct in another State to apply its law to that conduct. The petitioners in that case asked for such an exception based on the convenience of a forum State's courts and the fact that similar conduct had occurred in the forum State.

This Court, however, squarely rejected the argument that either of these reasons warranted an abandonment of the "significant contacts" principle. Instead, the Court reaffirmed the principle expressed in *Allstate*, *i.e.*, that for a State to assert its own laws it must have a legitimate regulatory interest in the specific conduct at issue. See *Shutts*, 472 U.S. at 821.

Notably, the Court in *Shutts* was concerned not with respecting *judgments* in another state, but with ensuring that the courts of one State (Kansas) respect the laws and policy judgments of other States. Thus, the principle for which *Shutts* stands is that the application by a State of its own laws to determine the legal consequences of conduct that occurred outside (and had no effects inside) that State violates the Full Faith and Credit Clause. Such an action fails to give "full effect" to the laws in the jurisdictions where that conduct occurred.

2. The rationale for the constitutional limitations recognized by the Founders, and reiterated by this Court in *Allstate* and *Shutts*, applies with full force in the punitive damage context, for several reasons.

First, there can be no question that, by allowing punitive damage awards based on a particular type of conduct, a State is effectively regulating that conduct.[6] Indeed, the whole

[6] *See, e.g., Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000); *New York Times* v. *Sullivan*, 376 U.S. 254, 265 (1964); *San Diego Bldg. Trades Council* v. *Garman*, 359 U.S. 236, 247 (1959)

purpose of punitive damages is not to compensate the victim of tortious conduct, but rather to deter the defendant from engaging in such conduct in the future. See, *e.g.*, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *BMW*, 517 U.S. at 568. Thus, when one State–Utah in this case–imposes punitive damages based on conduct in another State, it is effectively regulating conduct in that other State. And that, obviously, is an infringement of the second State's sovereign right to determine whether and how to regulate that same conduct.

In short, using the words "punitive damages" does not magically create a legitimate State interest in conduct occurring and having effects wholly outside a State's borders.

Second, without clear constitutional limitations, there is nothing to prevent a resident of one State from receiving a windfall based on conduct occurring entirely in a different State, and in a way that harms citizens of that and other States. To take an extreme (but nevertheless plausible) example, if a multi-state corporation were bankrupted by a punitive damage judgment awarded by a Utah jury but based in part on California conduct, a California resident who might have been injured by the company's California conduct would lose his ability to obtain redress under California law. That, obviously, is an offense to California's sovereignty.

Similarly, if a Utah resident may receive punitive damages based on nationwide conduct, that award is much more likely to approach or exceed the maximum allowed under the Due Process Clause.[7] Residents of the remaining 49 States would

("[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

[7] Because the constitutional limit on punitive damage awards is based on "fair notice" of the severity of the penalty to which conduct will be subject, *see BMW*, 517 U.S. at 574, it should apply to the aggregate total of such awards. Indeed, at least two circuits have held that the limit does apply to the aggregate total. *See Dunn* v. *HOVIC*, 1 F.3d 1371, 1389-91

thereby be deprived of punitive damage relief under their own States' laws.

Third, failure to respect the jurisdictional limits established in *Allstate* and *Shutts* in the punitive damage context would invite forum-shopping. Plaintiffs lawyers would simply bring suit against large institutional defendants in the State with the most lenient punitive damage regimes, rather than in the State where the allegedly unlawful conduct occurred (and which presumably has the greatest interest in the outcome of the litigation). That, once again, would offend the sovereignty of the latter State.

If anything, then, the principles embodied in the Full Faith and Credit Clause and espoused in *Allstate* and *Shutts* apply in the punitive damage context with even greater rigor than the contexts in which those cases arose. Utah must therefore justify the application in this case of its punitive damages law by demonstrating that it has legitimate regulatory interests in all of the extraterritorial conduct at issue according to objective criteria. See *Shutts*, 472 U.S. at 818-23; *Allstate*, 449 U.S. at 312-19; Restatement (Second) of Conflict of Laws § 9. But neither the Utah Supreme Court nor any other organ of the State has even attempted to make such a showing.

Nor can there be any doubt that State Farm was punished in substantial part for conduct that occurred outside Utah's borders as part of a "nationwide scheme" in all 50 States. In reinstating the punitive damage award, the Utah Supreme Court relied on conduct that indisputably occurred beyond Utah's borders and had no effect there. See Pet. at 10. For example, the court relied on State Farm's allegedly improper handling of hail damage claims in Colorado, earthquake

(3d Cir. 1993) (considering whether the aggregate of prior awards had reached the maximum amount tolerable under the Due Process Clause), *modified*, 13 F.3d 58 (3d Cir. 1993); *Simpson* v. *Pittsburgh Corning Corp.*, 901 F.2d 277, 280-82 (2d Cir. 1990) (same).

damage claims in California, and hurricane damage claims in Florida. See *id.* at 4. Similarly, it relied on State Farm's allegedly improper practices surrounding the selection of medical experts in Arizona, Texas, and Hawaii. See *id.*

Because this conduct neither occurred in Utah nor affected its residents, Utah has no legitimate regulatory interest in punishing this conduct. There is, for example, no pretense that a $145 million award is justifiable to deter repetition of this conduct in Utah alone. And the mere fact that other allegedly tortious conduct also occurred in Utah is insufficient to apply Utah law to conduct that occurred wholly outside the State. See *Shutts*, 472 U.S. at 821. As the Court put it in *BMW*, "the economic penalties that a State . . . inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." 517 U.S. at 572. The Utah Supreme Court utterly failed to satisfy that standard.

C. The Decision Below Allows Utah Juries to Regulate Lawful Conduct In Other States, And Is Therefore An Affront To The Sovereignty Of Those Other States.

For all these reasons, Utah's attempt to reach out-of-state conduct through application of its punitive damage scheme fails to give "full faith and credit" to the rights of other States to determine for themselves the legality of that conduct and how, if at all, it should be regulated or punished. Accordingly, the Utah Supreme Court's decision is unconstitutional regardless of any square conflict with the laws of other States. However, even if a conflict were required, that requirement is easily satisfied here on three independent grounds.

1. First, the conduct on which the Utah Supreme Court relied in reinstating the $145 million punitive award was

clearly lawful in a number of the States where it occurred. For example, respondents relied on State Farm's specification of non-OEM parts for the repair of its insureds' automobiles in Colorado and California. Yet such specification is expressly allowed in both of these States. See Cal. Code Regs. tit. 10, § 2695.8(g); Colo. Rev. Stat. § 10-3-1305; see also L. 581.[8]

When Utah punishes conduct that other States have expressly determined to be legally permissible, it improperly overrides the different policy choices made by those States. In doing so, it violates the Full Faith and Credit Clause as well as the Due Process Clause.

2. The dramatic variation in punitive damage regimes among States creates an additional substantive conflict. See *Smith* v. *Wade*, 461 U.S. 30, 59-60 (1983) (Rehnquist, J., dissenting) (discussing differences among State punitive damage schemes).[9] For example, some States disallow punitive damages completely. See, *e.g.*, N.H. Rev. Stat. Ann § 507:16 (New Hampshire); *Miller* v. *Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975) (Nebraska); *Peisner* v. *Detroit Free Press, Inc.*, 304 N.W.2d 814, 817 (Mich. Ct. App. 1981), *aff'd as modified*, 364 N.W.2d 600 (Mich. 1984) (Michigan); *Spokane Truck & Dray Co.* v. *Hoefer*, 25 P. 1072, 1074-75 (Wash. 1891) (Washington). Others allow punitive damages subject to monetary limitations. See, *e.g.*, Colo. Rev. Stat

[8] Moreover, the burden of proving that the conduct was unlawful in other States rests firmly with respondents. *See BMW*, 517 U.S. at 573. Not only did respondents fail to meet this burden, they did not offer any rebuttal to petitioner's showing that this conduct was lawful in certain States. *See* L. 580-93.

[9] The rules governing punitive damages are clearly matters of substantive right as opposed to merely procedure. *See Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 434-35 (1994). *See also* Charles T. McCormick, Handbook on the Law of Damages § 2, at 5-7 (1935) (expressing general agreement that for purposes of conflicts analysis damages issues are substantive; citing application of this principle to punitive damage claims).

§ 13-21-102(i)(a) (punitive damages limited to amount equal to actual damages) (Colorado); Ga. Code Ann § 51-12-5.1(g) (punitive damages limited to $250,000 in many tort actions) (Georgia); Nev. Rev. Stat § 42.005(1) (punitive damages limited to three times compensatory damages) (Nevada). Others, like Utah, take a more liberal approach.

States also differ in the procedures by which punitive damages can be imposed. For example, States often require different evidentiary showings to sustain such awards. Compare *Linthicum* v. *Nationwide Life Ins. Co.*, 723 P.2d 675, 679-80 (Ariz. 1986) ("malice") (Arizona), with *White Constr. Co.* v. *Dupont*, 455 So. 2d 1026, 1028 (Fla. 1984) ("something more than gross negligence") (Florida), *overruled on other grounds*, *Murphy* v. *International Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000) and *McClellan* v. *Highland Sales & Inv. Co.*, 484 S.W.2d 239, 242 (Mo. 1972) ("willful, wanton, malicious or so reckless as to be in utter disregard of consequences") (Missouri). One State's sovereign interest in regulating punitive damages for in-state conduct is impaired whenever another State does what Utah did here: substitute its own judgment for the policy choices of other States by imposing its punitive damage rules on conduct occurring in those States.

This is precisely the type of intrusion on State sovereignty that this Court rejected in *BMW*, largely under the Commerce Clause. See 517 U.S. 559 (1996). For reasons explained above, such intrusions are equally unlawful under the Full Faith and Credit Clause.

3. State "extraction statutes" create yet another source of substantive conflict. Such statutes require that a percentage of any punitive damage award be paid directly to the State. See, *e.g.*, Ga. Code Ann. § 51-12-5.1(e) (75% payable to State in products liability cases) (Georgia); Mo. Rev. Stat. § 537.675(1) (50% payable to various State compensation

funds) (Missouri). Currently, extraction statutes are in force in seven States.[10]

It is hard to imagine a more blatant violation of the Full Faith and Credit Clause's requirement that States respect each others' sovereignty than one State's awarding damages as a windfall to an individual plaintiff which should, under proper choice of law, be paid at least in part to another State. Yet that is precisely what happened in this case. Just five days after the Utah Supreme Court reinstated the $145 million judgment, Utah's Attorney General sent a letter to counsel for respondents indicating his State's "statutory right" to 50% of that award – in excess of $70 million – pursuant to Utah's extraction statute. See Utah Code Ann § 78-18-1(3) (50% of a punitive damage award over $20,000 payable to State).

If Utah's extraction statute is applied here, Utah will benefit at the expense of other States in which petitioner's challenged conduct occurred. Because the constitutional limits articulated in *BMW* apply to the *aggregate* of constitutional awards, see note 7 *supra*, States that have extraction statutes similar to Utah's would thus be denied the benefit of any punitive damage award that their own courts otherwise would have awarded.

* * * * *

In sum, the Full Faith and Credit Clause, both by its terms and as interpreted in *Allstate* and *Shutts*, precludes respondents' reliance on conduct that was wholly unconnected with Utah as a basis for punitive damages. That conclusion does not mean, of course, that State courts cannot use such similar evidence in determining "the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S.

[10] *See* Ga. Code. Ann. § 51-12-5.1(e) (Georgia); 735 Ill. Comp. Stat. § 5/2-1207 (Illinois); Ind. Code Ann. § 34-51-3-6 (Indiana); Iowa Code § 668A.1(2)(b) (Iowa); Mo. Rev. Stat. § 537.675 (Missouri); Or. Rev. Stat. § 18.540(1)-(3) (Oregon); Utah Code Ann. § 78-18-1(3) (Utah).

at 574 n.21. Indeed, criminal courts routinely, and properly, rely on reprehensible conduct that occurred outside State borders in rendering criminal sentencing decisions.[11] Nor does it mean that State courts should be precluded from using out-of-state conduct for other legitimate purposes–such as notice or scienter–in an appropriate case. But it does mean that one State cannot infringe the sovereignty of another State by seeking to regulate conduct that the Framers, applying the choice-of-law rules of the time, would have viewed as lying wholly within the jurisdiction of the second State.

II. EVEN IF THE FULL FAITH AND CREDIT CLAUSE WERE NOT SUFFICIENT TO INVALIDATE UTAH'S EXTRATERRITORIAL APPLICATION OF UTAH LAW, THAT ACTION IS FORECLOSED BY THE CONSTITUTION'S STRUCTURE.

Even if the Full Faith and Credit Clause were not sufficient to foreclose the Utah Supreme Court's approach, the structure of the Constitution precludes the extraterritorial assertion of one State's regulation into a co-equal State. In other words, even if the Constitution does not expressly preclude that result, it is precluded by "necessary implication." See *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 848 (1995) (Thomas, J., dissenting).

Reliance on the constitutional structure to invalidate governmental action is not, of course, a novel concept. The Court expressly reaffirmed the practice as recently as *Printz*

[11] In the criminal context, even if a court relies on out-of-state conduct in sentencing, the State is effectively regulating conduct *within* its own borders – *i.e.*, the conduct of a particular individual who, the State fears, may well harm others within the State. In such cases, the defendant is confined *within the boundaries of that State*. Thus, in that setting the State is clearly not seeking to regulate his out-of-state conduct. That is very different from a punitive damage award designed to regulate the conduct of a multi-state corporation in other States.

v. *United States,* and its holding in that case that a federal law represented an impermissible intrusion into State sovereignty relied in large measure upon implications from constitutional structure. See 521 U.S. 898, 923-24 n.13 (1997) (noting "[i]t is not at all unusual for our resolution of a significant constitutional question to rest upon reasonable implications" and citing cases). Similarly, in *Plaut* v. *Spendthrift Farm, Inc.*, the Court found, by implication, that Congress lacks the power to set aside final judgments. See 514 U.S. 211 (1995) (noting that the prolonged reticence of Congress to attempt to set aside a final judgment "would be amazing if such inference were not understood to be constitutionally proscribed"). And, in *Myers* v. *United States*, the Court relied on the Constitution's structural implications to define the contours of the President's removal power. See 272 U.S. 52 (1926) (reasoning that because the Executive is charged with ensuring laws be faithfully executed, "the reasonable implication, even in the absence of express words, [is that] he should select those who were to act for him under his direction in the execution of the laws [and the] further implication must be, in the absence of any express limitation respecting removals . . [he may] remov[e] those for whom he cannot continue to be responsible").

Just as in each of these cases certain elements of the Constitution's structure compelled a particular result, so too in this case do structural inferences compel the conclusion that Utah's actions are an impermissible intrusion into the sovereignty of its sister States. Indeed, in the same way that certain elements of the Constitution's structure protect the sovereignty of States as against the national government, as the Court concluded in *Printz*, 521 U.S. at 920, so also do certain elements of the constitutional structure–including some of the same elements relied upon in *Printz*–protect the sovereignty of the States as against *each other*. Moreover, the Constitution's structure makes clear that, to the extent one sovereign is permitted to intrude into what would otherwise

be the domain of another, it is only the federal Congress, and even then only subject to strict limits.

A. Allowing One State To Regulate Conduct Beyond Its Borders Would Offend The "Fundamental Postulate" That Each State Remains Sovereign In Its Own Sphere.

Quite aside from any textually explicit restriction, several elements of the Constitution's structure protect the sovereignty of each State from incursions by other States. As respondents' own counsel has recognized, these implied limitations are "crucial in preserving the overall constitutional structure." 1 Tribe, *Constitutional Law* 1021 (3d ed. 1990).

Most fundamentally, our Constitution established a federal system comprised of States that are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution." See *Coyle* v. *Smith*, 221 U.S. 559, 567 (1911). While States ceded certain powers as the price of forming the Union, they retained a sovereignty that is "residuary and inviolable." See Federalist No. 39, at 245 (James Madison).

This fundamental principle of respect by all the States for each others' sovereignty finds expression in a number of express constitutional provisions. Those include, for example, the Fugitive Slave Clause (U.S. Const. art. IV, § 2, cl. 3), the Imposts and Duties Clause (*Id.* art. I § 10, cl. 2), the Extradition Clause (*Id.* art. IV § 2, cl. 2), and the Territorial Integrity Clause (*Id.* art. IV § 3). Each of these Clauses is designed to preserve the sovereignty of the States with respect to each another, as well as with respect to the federal government. And each of them supports what this Court has deemed a "cardinal rule . . . underlying all the relations of the states to each other," namely: "Each State stands on the same level with all the rest. It can impose its own legislation on no

one of the others, and is bound to yield its own views to none." *Kansas* v. *Colorado*, 206 U.S. 46, 97 (1907).[12]

The Framers indisputably recognized the importance of protecting the sovereignty of one State from incursion by the others. As this Court noted in *Printz*, Madison himself observed that the "'local or municipal authorities [the States] form distinct and independent portions of the supremacy'" that is established and protected by the Constitution. *Printz*, 521 U.S. at 920 (citing Federalist No. 39, at 245 (James Madison)).

To ensure that each State remained "equal in power, dignity and authority" to every other State, the Founders made clear that each State's authority would be limited geographically. Thus, as Madison put it, each "State's government will represent and remain accountable to its *own* citizens." *Id.* (emphasis added).

This principle of geographically-limited State authority is reflected in numerous decisions of this Court, which "affirmatively establish[ ]" that a State may not "extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power." *New York Life Ins. Co.* v. *Head*, 234 U.S. 149, 162 & n.1 (1914) (citing cases). Indeed, this Court has repeatedly invoked principles of constitutional federalism to strike States' attempts to arrogate to themselves

[12] *Accord In Re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 613 (7th Cir. 1997) (Posner, J.) ("A state's power to regulate interstate commerce is limited . . . by the provisions of the federal Constitution that limit the extraterritorial powers of state government. A state cannot [for example] regulate sales that take place wholly outside it."); *K-S Pharmacies, Inc.* v. *American Home Prods. Corp.*, 962 F.2d 728 (7th Cir. 1992) (Easterbrook, J.) (Congress has the power to cast its net more widely [than the Nation's borders] but must say so. States lack any comparable power to reach outside their borders . . .").

the authority to regulate activity occurring in other States, as Utah did here.

For example, in *New York Life*, the Court invalidated Missouri's attempt to limit the terms of out-of-state contracts. The Court explained that to allow one State to impose such limitations would

> "throw[ ] down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so *obviously the necessary result* of the Constitution that it has rarely been called into question and hence authorities directly dealing with it do not abound."

Id. at 161 (emphasis added).

Similarly, in *Bigelow* v. *Virginia*, the Court vacated Virginia's misdemeanor prosecution of a newspaper editor who published an advertisement in a Virginia newspaper for abortions performed in New York. See 421 U.S. 809 (1975). In so doing, the Court explained that allowing Virginia to punish the editor would amount to a constitutionally impermissible attempt by one State to "regulate the services provided [in another State]." *Id.* at 824. See also *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 410 (1930) (due process clause prohibits Texas from creating "rights and obligations" under insurance contracts "which are neither made nor are to be performed in Texas.").

Just as the extraterritorial assertion of one State's law in *New York Life* and *Bigelow* operated to subvert our Constitution's federal scheme, so too does the application of Utah law to conduct occurring wholly beyond Utah's borders offend the system of co-equal State sovereignty that the Constitution's structure so carefully protects. Indeed, if this Court were to affirm the decision below, that decision would provide a roadmap for any State that wished to escape the

fundamental constraints imposed by our system of co-equal State sovereigns.

B. Allowing One State To Regulate Conduct Beyond Its Borders Would Offend The "Fundamental Postulate" That Only The National Government Has Authority To Regulate Conduct In All Fifty States.

The extraterritorial projection of one State's regulatory power would cause an additional, and equally troubling, disruption to the constitutional scheme: It would severely upset the division of power between State and federal government, a crucial element of the system of "'double security'" envisioned by the Founders. See *Printz*, 521 U.S. at 922 (citing Federalist No. 51 at 323 (the power "surrendered by the people is divided between two distinct governments [and creates together with separation of powers amongst the three branches] a "double security")).

Obviously, the Constitution does not "leave to speculation" who is to legislate nationally. It expressly delegates that authority to a national Congress, providing that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, §1. In addition, it provides that "the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby" *Id.* art. VI, § 2. These textual commands ensure that, to the extent there is a need for national legislation, it is for Congress to enact.

Indeed, this "postulate" of an exclusive federal right to legislate for the 50 States is demonstrated by the fact that the Constitution contains no clause allowing one State's law to be "supreme" in any circumstance. As discussed above, the only analogous provision is the Full Faith and Credit Clause,

which expressly protects the sovereignty of each State as against all the others.

The Framers, moreover, insisted upon a single national Congress to regulate, within defined limits, conduct in the 50 States. See, *e.g.*, *The Founders' Almanac*, 235 (Mathew Spaulding ed., 2001) (expressing agreement among the Framers that certain powers necessarily be vested in a single, national legislature). That scheme would be severely upset, and Congress' power usurped by a single State's action, if one State were able, as Utah did here, to legislate for the entire 50 States. Indeed, the concept of a national supreme law would be eviscerated if one State's law were permitted to be, in effect, the supreme law of the land, simply by virtue of that State's punitive damages scheme.

In this case, Utah's projection of its regulatory authority–via a jury's punitive damage award–intrudes upon the domain of the federal Congress, the only entity that has the power to legislate nationally. Utah's action thus offends one of the "fundamental postulates" of our constitutional structure, and must be invalidated. Any other result would effectively transform jurors into unelected, ad hoc national legislators, in plain contravention of Article I and the other provisions defining the powers of the federal government.

* * * * *

Justice Holmes, writing for the Court in an analogous context, once observed that "[t]he injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a state attempts in this manner to affect conduct outside its jurisdiction, or the consequences of such conduct, . . . it must fail." *Western Union Tel. Co.* v. *Brown*, 234 U.S. 542, 547 (1914). That, in essence, is what the Utah Supreme Court has tried to do in extending its own punitive damage scheme to extraterritorial conduct, especially conduct that was perfectly legitimate

under "the law governing the conduct of the parties at the time of the act or omission complained of." *Id.* If the structural principle of co-equal sovereignty is to have any meaning, that effort "must fail."

CONCLUSION

For these reasons, and those stated in petitioner's brief, the judgment of the Utah Supreme Court should be reversed.

Respectfully submitted,

JAN S. AMUNDSON
General Counsel
QUENTIN RIEGEL
Deputy General Counsel
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 637-3000

CARTER G. PHILLIPS
GENE C. SCHAERR*
RICHARD D. BERNSTEIN
STEPHEN B. KINNAIRD
KATHRYN R. HAUN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Amicus Curiae

* Counsel of Record

August 19, 2002