No. 01-1289

IN THE

Supreme Court of the United States

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

v.

CURTIS CAMPBELL AND INEZ CAMPBELL,
Respondents.

On Writ of Certiorari to the Utah Supreme Court

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 126 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute

[1] Pursuant to Rule 37, a blanket letter of consent from the parties has been filed with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

This case is of interest to *amicus* because it typifies the disproportionate punitive damages awards that occur all too frequently in our civil justice system. The members of *amicus* are active in the business and manufacturing communities and their members are the primary victims of excessive punitive damages awards. Ultimately, the impact of runaway punitive damages awards is felt by the consumer who purchases goods and services. *Amicus* has a unique understanding of the impact of excessive punitive damages awards and the need for clarification of this Court's ruling in *BMW of North America v. Gore*, 517 U.S. 559 (1996), regarding the use of extraterritorial evidence in the calculation of punitive damages awards, as well as the due process implications of punishing a defendant for conduct that is wholly unrelated to the conduct at issue or the alleged harm to the plaintiff.

SUMMARY OF ARGUMENT

This Court in several important rulings has correctly placed both substantive and procedural due process limitations on punitive damages. Some members of this Court, however, have expressed concern about placing such limitations on a practice that is said to have been in place at the time the Bill of Rights was adopted. All members of this Court should appreciate that the punitive damages practice of 1791 does not exist today—except in name. This case illustrates why.

Punitive damages were first developed and used for years as an auxiliary to the criminal justice system in a narrow category of cases, intentional torts. Until the late 1960s, virtually all punitive damages cases involved a single plaintiff who was wronged by a single defendant. The defendant's wrongful behavior toward the plaintiff was the source of evidence for the jury making a punitive damages award.

In the last thirty-five years, however, there have been ever-expanding "circles of evidence" of the alleged wrongful acts. The focus in punitive damages cases has expanded from the conduct of the defendant toward an individual plaintiff, to the relevant conduct of the defendant toward others, to the extreme situation now before this Court – irrelevant conduct of the defendant toward numerous persons throughout the country in many different circumstances.

The Utah Supreme Court's decision below in *State Farm v. Campbell*, No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), is a dramatic example of the unwarranted, unconstitutional expansion of punitive damages law. This expansion of law already has turned a once-narrow remedy into a litigation tactic that allows jurors in a single state court case to regulate nationwide commerce by imposing extraordinary punitive damages awards. Under the Utah Supreme Court's ruling, any act by a company, anywhere, performed at any time can serve as a basis for punitive damages awards.

This Court has made clear that the Commerce and Due Process Clauses of the United States Constitution and the principles of sovereignty and comity require that state courts permit punitive damages awards to be awarded based on the relevant acts of the defendant toward the plaintiff. *See Gore*, 517 U.S. 559. State courts should not use in-state punitive damages to regulate unrelated out-of-state conduct. This Court's constitutional mandate on this crucial distinction should be followed by all state courts. It was ignored by the court below.

ARGUMENT

I. THE ONGOING EXPANSION OF PUNITIVE DAMAGES LAW IS CREATING A LITIGATION CRISIS.

The record before this Court needs to be corrected regarding the nature and evolution of punitive damages practice since passage of the Bill of Rights in 1791. In oral arguments before this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the following exchange took place between Justice Scalia and counsel for the petitioner insurance company:

> QUESTION: [W]ho whispers in my ear that [the practice of awarding punitive damages] is in violation of due process when it's been going on since 1791 and nobody has thought so?
>
> RESPONSE: I suggest, Justice Scalia, that the situation here is essentially the same as it was in *Williams v. Illinois* [399 U.S. 235 (1970)], when you have the practice which had extended from medieval England down through the United States from the time of the Revolution and the adoption of the Constitution to the time of that decision, of increasing penalties of prisoners beyond the maximum allowed by statute when they were unable to pay fines or court costs, and there, as here, if that had been analyzed and looked at, the Court would probably have found that it violated due process, just as I submit that punitive damages [do] . . . .

Pacific Mutual Life Insurance Co. v. Haslip, S. Ct. U.S. Oral Arguments, Vol. 3, Case No. 89-1279, at 22 (Oct. Term 1990), *available at* 1990 WL 601340.

With all due respect to the petitioner's counsel in *Haslip*, who was focused on other issues, his answer to Justice Scalia, as shown by the instant case, was not in accord with the content and nature of some modern punitive damages awards. Punitive damages practice has not remained "essentially the same" as it existed in medieval England and colonial America. The punitive damages practice of 1791, while existing in some circumstances, does not apply in the case before this Court, or in many other instances in modern litigation.

> In the more than 200 years during which the common law of punitive damages has evolved in this country, only the last several have witnessed a proliferation of varied expressions of concern as to the manner in which the law has developed and may continue to develop in the future. . . . [R]ecent years have resulted in a literal explosion of punitive damage law and practice. This is so not only as to the number of cases in which they are sought, but also in the variety of causes of action in which they are claimed and in the different categories of defendants who are exposed to the awards.

J. Ghiardi & J. Kircher, PUNITIVE DAMAGES LAW & PRACTICE § 21.01, at 1 (1985) (footnotes omitted).

A. The Purpose of Punitive Damages.

Punitive damages are not ordinary civil or tort law damages.[2] Unlike compensatory damages, which provide payment for economic losses (e.g., lost wages and medical expenses) and noneconomic injuries (e.g., "pain and suffering"), punitive damages are not awarded to compensate for a harm.[3] Rather, punitive damages are "quasi-criminal" in nature and "operate as 'private fines' intended to punish the defendant and deter future wrongdoing."[4] Punitive damage awards serve an important social purpose. They allow the public to express its outrage, to punish defendants for reprehensible conduct, and to deter such conduct in the future, where compensatory damages alone in some instances may not adequately serve these objectives.[5]

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[2] *See* Victor E. Schwartz et al., PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS, 549-50 (10th ed. 2000).

[3] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury ... [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); *see also* W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS, § 2, at 9 (5th ed. 1984) (explaining that punitive damages are awarded to punish defendant, teach defendant not to "do it again," and deter others from similar behavior), [hereinafter "THE LAW OF TORTS"].

[4] *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)).

[5] *See* Jane Mallor & Barry Roberts, *Punitive Damages: Toward a Principled Approach*, 50 HASTINGS L.J. 969, 978-79 (1999).

B. Punitive Damages Doctrine of 1791.

Punitive, or exemplary, damages originally focused on the relationship between one plaintiff and one defendant. They were first recognized by the English common law in the mid-18th century in cases involving illegal search and seizures by officers of the Crown.[6] Historically, in England and then America, punitive damages were made available only in a narrow category of torts involving conscious and intentional harm inflicted by one person on another.

These cases, "the traditional intentional torts," were designed to punish an individual's purposeful bad act against another.[7] The causes of action included assault and battery,[8]

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[6] *See Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763) (first case to use the term "exemplary damage,"); *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). In these cases, English courts for the first time expressed that "the punitive and deterrent purposes of damage awards could be separated from their compensatory function." Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 14 (1982). *See also* The Hon. Janie L. Shores, *A Suggestion for Limited Tort Reform, Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 ALA. L. REV. 61, 62-69 (1992) (tracing the history of punitive damages forward from biblical times); James B. Sales & Kenneth B. Cole Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117, 1120 (1984); Comment, *Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, the Debate, the Defenses*, 42 Ohio St. L.J. 771, 772 (1981). *See also Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764) (illegal search and seizure); *Bruce v. Rawlins*, 95 Eng. Rep. 934 (C.P. 1770) (illegal search and seizure); *Sharpe v. Brice*, 96 Eng. Rep. 557 (C.P. 1774) (illegal search and seizure).

[7] *See* Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brook. L. Rev. 1003, 1006-07 (1999).

[8] *See, e.g., Grey v. Grant*, 95 Eng. Rep. 794 (C.P. 1764); *Benson v. Frederick*, 97 Eng. Rep. 1130 (K.B. 1766); *Corwin v. Watson*, 18 Mo. 71 (1853); *Porter v. Seiler*, 23 Pa. 424 (1854); *Lyon v. Hancock*, 35 Cal. 372 (1868); *Ward v. Blackwood*, 41 Ark. 295 (1883); *Trogden v. Terry*, 172 N.C. 540 (1916).

libel and slander,[9] malicious prosecution,[10] false imprisonment,[11] and intentional interferences with property such as trespass and conversion,[12] malicious attachment or destruction of property,[13] private nuisance,[14] and other conduct amounting to reckless endangerment.[15] The typical allega-

[9] *See, e.g., Vunck v. Hull*, 3 N.J.L. 814 (1809); *Gilreath v. Allen*, 32 N.C. (10 Ired.) 67 (1849); *Benaway v. Coyne*, 3 Pin. 196 (Wis. 1851); *Sheik v. Hobson*, 64 Iowa 146 (1884); *Louisville & Nashville R.R. Co. v. Ballard*, 85 Ky. 307 (1887); *Coffin v. Brown*, 50 A. 567 (Md. 1901); *Ellis v. Brockton Pub. Co.*, 84 N.E. 1018 (Mass. 1908).

[10] *See, e.g., Leith v. Pope*, 96 Eng. Rep. 777 (C.P. 1799); *Hewlett v. Cruchloy*, 128 Eng. Rep. 696 (K.B. 1813); *Brown v. McBride*, 24 Misc. 235, 52 N.Y.S. 620 (1898); *Jackson v. American Tel. & Tel. Co.*, 51 S.E. 1016 (N.C. 1905).

[11] *See, e.g., Fabrigas v. Mostyn*, 96 Eng. Rep. 549 (C.P. 1774); *Lake Shore & Mich. S. RV. v. Prentice*, 147 U.S. 101 (1893); *Schlencker v. Risley*, 4 Ill. 483 (1842); *Taber v. Hutson*, 5 Ind. 322 (1854); *Parsons v. Harper*, 57 Va. 64 (1860); *Hamlin v. Spaulding*, 27 Wis. 360 (1869); *Green v. Southern Express Co.*, 41 Ga. 515 (1871); *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350 (1887).

[12] *See, e.g., Merest v. Harvey*, 128 Eng. Rep. 761 (C.P. 1814); *Sears v. Lyons*, 171 Eng. Rep. 658 (K.B. 1818). Punitive damages were also allowed for seduction. *See, e.g., Tullidge v. Wade*, 95 Eng. Rep. 909 (C.P. 1769). And, for a period, English courts permitted an award of punitive damages for criminal conversation (i.e., adultery). *See, e.g., Duberly v. Gunning*, 100 Eng. Rep. 696 (K.B. 1813).

[13] *See, e.g., Taylor v. Giger*, 3 Ky. 586 (1803); *North v. Cates*, 5 Ky. 591 (1812); *Treat v. Barber*, 7 Conn. 274 (1828); *Huntley v. Bacon*, 15 Conn. 267 (1842); *Clark v. Bales*, 15 Ark. 452 (1855); *Schindel v. Schindel*, 12 Md. 108 (1858); *Dorsey v. Manlove*, 14 Cal. 553 (1860); *Lynd v. Picket*, 7 Minn. 184 (1862); *Brown v. Allen*, 35 Iowa 306 (1872); *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455 (1877); *Bradshaw v. Buchanan*, 50 Tex. 492 (1878); *Huling v. Henderson*, 161 Pa. 553 (1894).

[14] *See, e.g., Yazoo v. Mississippi Valley R.R. Co. v. Sanders*, 87 Miss. 607 (1906); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361 (1914).

[15] *See, e.g., Whipple v. Walpole*, 10 N.H. 130 (1839); *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Pickett v. Crook*, 20 Wis. 358 (1866); *Meibus v. Dodge*, 38 Wis. 300 (1875). As in England, punitive damages were also permitted in cases involving seduction. *See, e.g., Coryell v. Colbaugh*, 1 N.J.L. 77 (1791); *Mcaulay v. Birkhead*, 35 N.C. 28 (1851); *Reutkemeier v. Nolte*, 179 Iowa 342 (1917).

tion running through these cases was that defendant's tortious conduct had been motivated by a malicious or spiteful desire to injure the specific plaintiff. Punitive damages were allowed in these cases as an auxiliary, or "helper," to the criminal law system, which in its infancy "punished more severely for infractions involving property damage than for invasions of personal rights." James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 St. Mary's L.J. 351, 355 (1983).[16]

The nature of these claims made it relatively simple for the jurors to understand and carry out their responsibilities.

> The jury had only to assess the particular transaction before it and to determine on that basis whether the defendant's conduct warranted a punitive award. . . . Although not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry. In such circumstances, and despite the grave questions raised by the absence of procedural safeguards and the lack of adequate standards, it was possible to view

[16] *See also* Victor E. Schwartz & Liberty Magarian, *Challenging The Constitutionality of Punitive Damages: Putting Rules of Reason on an Unbounded Legal Remedy*, 28 American Bus. L.J. 485 (1990); David L. Walther & Thomas A. Plein, *Punitive Damages: A Critical Analysis*; *Kink v. Combs*, 49 Marq. L. Rev. 369, 371 (1965); Samuel Freifield, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5, 7 (1935). *See generally* THE LAW OF TORTS § 2, at 8.

punitive damages as minimally consistent with fundamental fairness.[17]

C. The Broadened Standard By Which Punitive Damages Now Are Awarded.

Beginning in the late 1960s, courts departed radically from the historical "intentional tort" moorings of punitive damages, *i.e.*, the law of 1791. In what has been called an American "legal revolution," courts began awarding punitive damages in so-called "mass tort litigation," particularly in the developing field of product liability.[18] While punitive damages remained available in the traditional one-on-one context for a defendant's intentional wrong to a specific plaintiff, they were expanded to cover conduct that was not intentional in nature, such as recklessness, willful and wanton misconduct, or even gross negligence.[19]

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[17] *See* John Calvin Jeffries, *A Comment on The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141 (1986) (footnote omitted) (also noting that most punitive judgments were, by today's standards, almost trivial in amount) [hereinafter "Jeffries"].

[18] In 1967, a California Court of Appeal held for the first time that punitive damages were recoverable in a strict product liability action. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967). Since then, punitive damages awards in product liability cases have proliferated.

[19] *See e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (a)(3) (Vernon 2001) (willful act or gross neglect in wrongful death cases); FLA. STAT. ANN. § 768.72(2) (West 2002) ("intentional misconduct or gross negligence"); *Wisker v. Hart*, 766 P.2d 168 (Kan. 1988) ("gross negligence"); *Rubeck v. Huffman*, 374 N.E.2d 411, 413 (Ohio 1978) ("caused by intentional, reckless, wanton, willful and gross acts or by malice inferred from conduct and surrounding circumstances"); *Seals v. St. Regis Paper Co.*, 236 So. 2d 388, 392 (Miss. 1970) (gross negligence and "reckless indifference to the consequences"). *See also* J. Sales & K. Cole, *Punitive Damages: A Relic That has Outlived Its Origins*, 37 Vill. L. Rev. 1117, 1130-38 (1984) (discussing standards of conduct giving rise to punitive damages award).

The focus of punitive damages also shifted away from the actual plaintiff toward alleged wrongful conduct by the defendant toward the public at large.[20] For example, while it was difficult to prove a defendant manufacturer marketed and sold a defective product with the conscious intent of injuring a specific plaintiff, it was much easier to establish that the defendant did so recklessly in disregard to the possible harm to potential consumers.[21] Similarly, particularly in

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[20] *See, e.g., Moore v. Jewel Tea Co.*, 253 N.E.2d 638, 648 (Ill. App. 1969), *aff'd*, 263 N.E.2d 103 (Ill. 1970) (plaintiffs were properly allowed to argue that defendant had been guilty of "gross disregard of the rights of the public"); *Madison Chevrolet, Inc., v. Donald*, 505 P.2d 1032, 1042 (Ariz. 1973) ("punitive damages ... are applicable where there is a 'reckless indifference to the interest of others"); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 741 (Minn.) (manufacturer "acted in reckless disregard of the public" in marketing non-flame retardant children's pajamas), *cert. denied sub nom, Riegel Textile Corp. v. Gryc*, 449 U.S. 921 (1980); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 442 (Wis. 1980) ("Some commentators speak of the behavior justifying punitive damages as 'flagrant indifference to the public safety.'") (citing Interagency Task Force on Product Liability, Product Liability: Final Report of the Legal Study, vol. 5 at 137 (U.S. Dept. of Commerce 1977)); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979) (punitive damages available where manufacturer has marketed known defective product in "reckless disregard of the public's safety"), *mod. on other grounds*, 615 P.2d 621 (Alaska 1980), *cert. denied*, 454 U.S. 894 (1981); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 810 (Cal. App. 1981) (interpreting statutory term "malice" to encompass "callous and conscious disregard of public safety" by manufacturer of defective product); Restatement (Second) of Torts § 908 cmt. b (1977) ("Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages.").

[21] In *Toole*, the first case to find that punitive damages were recoverable in a strict product liability action, the California Court of Appeal ruled that the plaintiff was not required to prove that the defendant pharmaceutical company acted with deliberate intent to injure the plaintiff. 251 Cal. App. 2d at 714. Rather, the malice in fact standard in Califor-

contract cases, courts accepted relevant evidence of the defendant's acts toward others to establish that the act complained of was performed in bad faith or fell within a pattern and practice of misconduct.

The advent of mass tort litigation and its expansion of punitive damages practice meant that punitive damages now could be imposed repeatedly for an alleged risk in a *single* product line or a *single* decision.[22] This resulted in an explosion of claims against manufacturers of such products as asbestos, formaldehyde, DES, Agent Orange, automobiles, tampons, and the Dalkon Shield IUD.[23] Similarly, contract-based claims for punitive damages became more and more frequent.[24] As Justice O'Connor pointed out in her dissent in

nia's punitive damages statute applied, and the plaintiff merely had to prove that the defendant acted recklessly and in wanton disregard to the possible harm to others when it marketed, promoted and sold the anti-cholesterol drug at issue. *See id.* at 715.

[22] As one commentator wrote, "[A] single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity." *See* Jeffries, 72 Va. L. Rev. at 142.

[23] *See* Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 Fordham L. Rev. 37, 51-52 (1983); Jeffries, 72 Va. L. Rev. at 142. Several courts have acknowledged that due process may be implicated in "mass tort" punitive damages awards cases. *See Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064 (D.N.J.), *vacated*, 718 F. Supp. 1233 (D.N.J. 1989), *rev'd on other grounds sub nom., Juzwin v. Asbestos Corp.*, 900 F.2d 686 (3d Cir.), *cert. denied*, 489 U.S. 896 (1990); *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989); *Leonen v. Johns-Manville Corp.*, 717 F. Supp. 272, 283 (D.N.J. 1989).

[24] *See* Dennett F. Kouri, *How to Settle Bad Faith Punitive Damages Cases*, Brief 31 (Fall 1984) ("In bad faith jurisdictions, virtually all first party cases dealing with a denial of insurance benefits include a charge of bad faith and a corollary demand for extra-contractual damages. These will, of course, include a prayer for the recovery of punitive damages.").

Haslip, "Unheard of only 30 years ago, bad faith contract actions now account for a substantial percentage of all punitive damages awards." *Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting).

Courts and commentators struggled with the theoretical and practical problems created by the wider availability of punitive damages awards. There was no good way to govern the total amount of punitive awards assessed nationwide in any set of lawsuits against a defendant. The vague standards for awarding and assessing punitive damages gave juries little guidance in their decisionmaking.[25] Judge Henry Friendly predicted the potential problems when he wrote in 1967 of the new expansion of punitive damages law:

> The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering. . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.[26]

D. The Explosion in Size and Frequency of Punitive Damage Awards.

Punitive damages practice picked up momentum following the American "legal revolution" of the late 1960s and 1970s.[27] The size and frequency of punitive damages rose

[25] *See* Jeffries, 72 Va. L. Rev. at 142.

[26] *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967).

[27] *See, e.g.*, Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133,

drastically as plaintiffs' lawyers became more likely to seek such awards.[28]

For most of their history, punitive damages had been "rarely assessed and [were] likely to be small in amount." Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982). Typically, punitive damages only slightly exceeded the compensatory damages awarded, if at all.[29] But in the late 1970s and

133 (1982) ("Punitive damages are in the air, are on the move. They are now dramatically awarded in cases in which liability of any sort would have been almost out of the question merely fifteen years ago."). Before 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and the punitive damages awards in each case were modest in proportion to the compensatory damages awarded. *See Toole* 251 Cal. App. 2d 689 (1967) ($175,000 compensatory, $250,000 punitive damages); *Gillham v. Admiral Corp.*, 523 F.2d 102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory damages, $50,000 attorneys' fees, $100,000 punitive damages); *Moore*, 253 N.E.2d 636 ($920,000 compensatory damages, $10,000 punitive damages). In 1978 and 1979, juries in Cook County, Illinois awarded punitive damages, respectively, in 26 and 15 cases. The average number of annual punitive damage judgments between 1959 and 1979 was 6.1, although 4 judgments or less were awarded in 10 of the 21 years and 3 or less each year between 1959 and 1966. *See* George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 n.1 (1982).

[28] Ford Motor Company, for example, reported that less than 0.5% of the products liability complaints filed against it prior to 1970 contained claims for punitive damages, while 27.1% of all such complaints in 1980 sought punitive awards. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 54 n.258 (1982). If only personal injury lawsuits are considered, the 1980 percentage is higher. *Id.*

[29] *See Southern Kan. Ry. v. Rice*, 38 Kan. 898 (1888) ($35 costs and fees, $10 injury to feelings, $71.75 punitive); *Taylor v. Grand Trunk Ry. of Canada*, 48 N.H. 304 (1869) ($500 actual damages, $858.50 exemplary); *Woodman v. Town of Nottingham*, 49 N.H. 387 (1870) ($578 actual, $100 exemplary); *Fay v. Parker*, 53 N.H. 342 (1872) ($150 actual, $331.67 exemplary). *See also* R. Blatt et al., *Punitive Damages: A State*

1980s, the size of punitive damages awards "increased dramatically" (George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982)), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface."[30]

Now, Judge Friendly's prediction of "overkill" from punitive damages unfortunately has come true. The explosion of punitive damages that began in the 1970s shows no signs of slowing down. Instead, multimillion dollar punitive damage verdicts[31] have become commonplace.[32] Numerous

By State Guide To Law And Practice § 1.2, at 5 (1991) ("[G]enerally before 1955, even if punitive damages were awarded, the size of the punitive damage award in relation to the compensatory damage award was relatively small, as even nominal punitive damages were considered to be punishment in and of themselves").

[30] Jeffries, 72 Va. L. Rev. at 142. *See also* Peter W. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); Walter K. Olson, THE LITIGATION EXPLOSION (1991); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation, Working Paper Series No. 50, Nov. 1992).

[31] For a sample of multimillion dollar punitive damage awards in 2002, see, *Romo v. Ford Motor Co.*, No. F034241, 2002 WL 1398041, at *18-19 (Cal. App. June 28, 2002) (upholding $290 million award in single product liability action as not grossly excessive); *Baker v. National State Bank*, L-00160-93, 2002 WL 1343809 (N.J. Super. June 21, 2002) (affirming trial court's remittitur of punitive damage award of $4 million to $1.8 million in employment discrimination case); *Burton v. R.J. Reynolds Tobacco Co.*, No. 94-2202-JWL, 2002 WL 1359316 (D. Kan. June 21, 2002) (awarding $15 million in punitive damages in product liability action); *Williams v. Philip Morris Inc.*, 9705-03957; A106791, 2002 WL 1189763 (Or. App. June 5, 2002) (reversing trial court's reduction of punitive damages award from $79.5 million to $32 million and reinstituting $79.5 million verdict); *Sand Hill Energy, Inc. v. Ford Motor Co.*, No. 1999-SC-1028-DG, 1999-SC-1029-DG, 2000-SC-0444-DG, 2002 WL 1000917 (Ky. May 16, 2002) (affirming the largest punitive damage award in Kentucky history, a $15 million award against manufacturer in product liability action); *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100 (Ill. App. 2002) (affirming punitive damage award of $2.3

companies, particularly manufacturers of asbestos-containing products, have been driven into bankruptcy as a result of excessive punitive damages awards.[33]

million against insurer for acted in bad faith by refusing victim's offer to settle for policy limits); *Court of Appeals of Georgia v. Six Flags Over Georgia*, LLC, 563 S.E.2d 178 (Ga. App. 2002) (ruling that punitive damages award of $257 million against general partner of amusement park for unfair and deceptive business practices was not excessive); *Bender v. Darden Restaurants Inc.*, No. 98-56031, 2002 WL 74441 (9th Cir. Jan. 18, 2002) (reinstating punitive damages award of $1.8 million against restaurant for denial of meal and rest breaks to workers); *Cooper Tire & Rubber Co. v. Tuckier*, No. 2000-CA-00404, 2002 WL 24605 (Miss. Jan. 10, 2002) (affirming $3 million punitive damage award against tire manufacturer in wrongful death action following rollover of vehicle).

[32] This dramatic increase has led one commentator to suggest that "[p]unitive damages have replaced baseball as our national sport." Theodore B. Olson, *Rule of Law: The Dangerous National Sport of Punitive Damages*, Wall St. J., Oct. 5, 1994, at A17. *See also* Malcom E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989) ("Today, hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case.") (cited by O'Connor, J., dissenting in *Haslip*, 499 U.S. at 62); Borowsky & Nicolaisen, *Punitive Damages in California: The Integrity of Jury Verdicts*, 17 U.S.F. L. Rev. 147, 150 (1983) (noting trend of "juries . . . award[ing] substantial punitive damages with increasing frequency").

[33] More than 57 companies have sought Chapter 11 protection as a result of unrestrained punitive damages in asbestos litigation. *See* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001); Mark A. Behrens, Editorial, *When the Working Well Sue*, Nat'l L. J. Apr. 29, 2001. More companies will follow, probably at the end of this year. *See* Deborah Hensler et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 50 (RAND Inst. for Civil Justice, 2001) (preliminary report) (predicting that "[a]ll of the major asbestos defendants are likely to be in bankruptcy within 24 months."); *see also* Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation*

In sum, the practice of awarding punitive damages as it existed in 1791 and through the late 1960s, confined to modest penalties in a few cases of intentional harms such as assault, shares only a "name" with the contemporary flood of huge awards for unintentional alleged wrongful acts or courses of conduct that are nationwide.

II. THE UTAH SUPREME COURT'S DECISION IMPERMISSIBLY EXPANDS PUNITIVE DAMAGES LAW IN VIOLATION OF THE COMMERCE CLAUSE AND DUE PROCESS.

History illustrates how punitive damages have gotten out of control. If punitive damages law and practice were as it existed in 1791, the constitutional problems would be unlikely to arise. But major changes that took place in the past thirty-five years have persuaded some courts that they can and should use punitive damage awards to regulate a defendant's acts in many other jurisdictions.[34] This is what occurred here.

Crisis, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), *available at* http://www.nlcpi.org.

[34] As this Court has seen, both in *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996), and now in *State Farm v. Campbell*, No. 981564, 2001 WL 1246676 (Utah Oct. 19, 2001), plaintiffs in recent years have sought and obtained punitive damages awards based on a defendant's nationwide conduct. *See Ford Motor Co. v. Ammerman*, 705 N.E.2d 539 (Ind. App. 1999) (jury complies with plaintiff's request to calculate punitive damages by multiplying the amount that it would have cost Ford to correct the alleged defect by the number of vehicles that were sold between 1983 and 1990; award later reduced), *trans. denied*, 726 N.E.2d 310 (Ind. 1999), *cert. denied*, 529 U.S. 1021 (2000); *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. App. 1994) (jury grants plaintiff's request to award $20 million in punitive damages for each of the five million GM pickup trucks with side saddle fuel tanks currently in use; appeals court reverses judgment but expressly approves use of the nationwide multiplier argument); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz.)

In the instant case, the $145 million punitive award was predicated on evidence of a "nationwide scheme to meet corporate fiscal goals by capping payouts on claims company wide," which plaintiffs termed the "Performance, Planning and Review" or "PP&R scheme." Pet. 6a; *see also* Pet. 18a-19a (listing examples of defendant's allegedly reprehensible conduct, including State Farm's "cheat[ing] its customers via the PP&R scheme . . . for over two decades," its "deliberate concealment and destruction of documents related to this profit scheme," and its use of "mad dog defense tactics.") The Utah Supreme Court glossed over State Farm's acts toward the Campbells and relied on the perceived effects State Farm's nationwide "scheme" had on policyholders and others. *See* Pet. App. 22a (agreeing with trial court that while "'[t]he harm is minor to the individual,'" it was "'massive in the aggregate.'").

A. The Utah Supreme Court's Use of Out-of-State Acts to Support The Award Interferes With State Sovereignty and The Commerce Clause of the United States Constitution.

This Court has made clear that a state court's effort to regulate a defendant's out-of-state conduct through large punitive damages awards is unconstitutional. While a jury may consider relevant out-of-state conduct for the purpose of determining the reprehensibility of the defendant's acts toward the plaintiff, *i.e.*, are punitive damages appropriate, *see TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993), it cannot inflate the amount of a punitive award based on out-of-state conduct. *See BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

(plaintiffs successfully request jury to calculate punitive damages by multiplying the number of "total loss" claims per year by the amount saved by deducting the allegedly fraudulent cleaning fee), *cert. denied*, 484 U.S. 974 (1987).

This Court has recognized that the Constitution has "special concern ... with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). "The sovereignty of each State ... implie[s] a limitation on the sovereignty of all of its sister States – a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

In accordance with principles of state sovereignty and comity, this Court in *Gore* expressly ruled 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." *Gore*, 517 U.S. at 572. A state can exercise its power through an award of damages just as it can through enforcement of statutes or regulations. *Id.* at 572 n.17. As a result, punitive damage awards must be imposed in a manner consistent with state sovereignty and comity.

The plaintiff in *Gore* sued BMW for failure to disclose his automobile had been repainted due to pre-delivery damage. This was done in accordance with BMW's nationwide policy of not disclosing pre-delivery damage where its cost of repair did not exceed three percent of the vehicle's suggested retail price. About 25 states had laws mandating disclosure of pre-sale repairs and BMW's policy complied with the strictest statute. The plaintiff was awarded $4,000 in compensatory damages and $4 million in punitive damages, an amount calculated by multiplying his compensatory damages by the number of similar sales in states nationwide. The Alabama Supreme Court reduced the punitive award to $2 million.

On appeal to this Court, the plaintiff argued that the large punitive damages award was necessary to induce BMW to change this nationwide policy. *See id.* at 572. The Court

rejected this argument, explaining that to avoid infringing on the policy choices of other states, "the economic penalties that States such as Alabama 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." *Id.* The Court reaffirmed the fundamental principle that while an individual state may make policy choices for its own state, it cannot impose those choices on another state. *Id.*; *see also Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999) (district court properly found the conduct punished occurred in a single state, Georgia, and that the state had a strong interest in deterring environmental pollution and enforcing the rights of property owners within its boundaries), *cert. denied sub nom, Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931 (1999); *Continental Trend Res., Inc. v. Oxy USA, Inc.*, 101 F.3d 634, 637, 642 (10th Cir. 1996) (district court properly admitted only acts of the defendant within Oklahoma, but the $30 million punitive award "is far more than is necessary to secure [the defendant's] attention and modify its behavior in Oklahoma"), *cert. denied*, 520 U.S. 1241 (1997).

While *Gore* itself focuses on improper attempts to punish conduct that was lawful in other jurisdictions, *see* 517 U.S. at 572, the Commerce Clause of the United States Constitution and principles of state sovereignty and comity cited by the Court require the rejection of any attempts to punish out-of-state conduct, lawful or unlawful.[35]

[35] On many occasions, this Court has rejected attempts by states to regulate outside their borders. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) ("[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other states"); *Healy v. Beer Inst.*, 491 U.S. 324 (1989) (striking down law requiring out-of-state beer shippers to affirm competitiveness of prices for state residents); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 583 (1986) (similarly ruling with regard to New York liquor price affirmation law); *Edgar v. MITE Corp.*, 457 U.S. 624, 644 (1982) (striking down law allowing Illinois Secretary of State to evaluate the fairness of any takeover offer for the shares of an Illinois company regardless of residency of shareholders; "[w]hile protecting local investors is plainly a legitimate state objective, the State has no legitimate interest in protecting nonresident shareholders"); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (Virginia cannot apply anti-procurement statute to punish newspaper editor for publishing advertisement for abortion services in New York; "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."); *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761 (1945) (invalidating Arizona train law governing length of trains in state as too disruptive of interstate commerce); *St. Louis Cotton Compress Co. v. Arkansas*, 260 U.S. 346, 349 (1922) ("It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside."). *See generally* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Or. L. Rev. 275 (1999).

Even assuming the existence of a "nationwide scheme to defraud State Farm policyholders" carried out through out-of-state unlawful activity, an assumption that is contested, the Supreme Court of Utah clearly acted outside its authority in upholding a punitive damages award based on unrelated extraterritorial conduct.

While states may share the goal of punishing unlawful activity, allowing one state to punish unlawful acts in another interferes with state sovereignty in at least two ways. First, the authority to punish misconduct is "[f]oremost among the prerogatives of sovereignty," *Heath v. Alabama*, 474 U.S. 82, 93 (1985). States have widely varying requirements for the imposition of punitive damages. These highly disparate requirements include different substantive

standards for the imposition of punitive damages;[36] different standards of proof;[37] and different procedures (*e.g.*, bifurcation requirements).[38] Some states do not allow the recovery of punitive damages at all,[39] while others limit the amount of punitive damages available.[40] When one state uses its own substantive and procedural laws to impose punitive damages for acts that took place in another state, it impermissibly interferes with the policy choices of the second state about how best to punish misconduct within its borders.

Second, in light of the current punitive damages crisis, allowing extraterritorial punitive awards is likely to interfere with the practical ability of the state in which the misconduct *occurred* to punish that conduct itself – or even to compensate persons who have been harmed by the defendant's conduct. Excessive extraterritorial punitive damages may bankrupt some defendants before compensation for harm may be allowed or punishment can be awarded by the state in which the other "alleged" misconduct occurred. Also, at some point, substantive due process limits the aggregate amount of punitive awards that can be imposed against a defendant for its misconduct. *See TXO*, 509 U.S. at 453 (Due Process Clause of the Fourteenth Amendment imposes substantive limits "beyond which penalties may not go."). Either way, states outside the forum "punishing" court could be severely and adversely impacted. Those states would lose their ability to exercise their lawful sovereign authority to punish misconduct inside their borders. As this Court wrote in *Heath*, "[t]o deny a State its power to enforce its criminal laws because another State has won the race to the courthouse 'would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines.'" *Heath*, 474 U.S. at 93 (quoting *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959)).

[36] *See* Sales & Cole, 37 Vill. L. Rev. at 1134 (discussing standards for award of punitive damages).

[37] *See, e.g.,* COLO. REV. STAT. § 13-25-127(2) (2002) (requiring proof beyond a reasonable doubt); IOWA CODE § 668A.1(1) (2002) (requiring proof by clear and convincing evidence); MINN. STAT. § 549.20(1)(a) (2002) (clear and convincing evidence); OR. REV. STAT. § 18.537 (2001) (clear and convincing evidence).

[38] *See, e.g.*, OKLA. STAT. tit. 23, § 9.1(B) (2002) (where punitive damages are warranted, jury will determine their amount in a separate proceeding); TEX. CIV. PRAC. & REM. CODE ANN. § 41.009 (Vernon 2002) (upon motion of defendant, court will order bifurcated trial, first of liability and compensatory damages issues, then of amount of punitive damages).

[39] *See, e.g.*, N.H. REV. STAT. ANN. § 507:16 (2002) (no punitive damages unless expressly provided for by statute); LA. CIV. CODE ANN. 3546 (West 2002) (no punitive damages unless authorized by law).

[40] *See, e.g.*, FLA. STAT. ANN. § 768.73 (West 2002) (three times compensatory damages or $500,000; may be higher upon finding of requisite intent); KAN. STAT. ANN. § 60-3701(e)-(f) (2001) (lesser of $5 million or the defendant's annual gross income; may be higher if profitability of misconduct exceeds limitation); N.J. STAT. ANN. § 2A:15-5.14(b) (West 2002) (greater of five times compensatory damages or $350,000); VA. CODE ANN. § 8.01-38.1 (Michie 2001) ($350,000).

In addition, the Utah Supreme Court's ruling violates the Constitution's grant of power to Congress under the Commerce Clause "To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cl. 3. It does so by allowing the State of Utah to use punitive damages to punish the alleged commercial activities of State Farm in other states. This Court has explained that the Commerce Clause is violated by the application of one state's law "to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 337. The *Gore* Court reaffirmed the fundamental principle that a state that seeks to impose burdens on interstate markets would interfere with federal power over interstate commerce. *See Gore,* 517 U.S. at 572.

If the ruling by the Supreme Court of Utah in this case is allowed to stand, corporations will be subject to crushing

punitive damages awards based on the entire sum of their business practices, whether lawful or wrongful, on the theory that wide-ranging disparate acts were all part of a nationwide "scheme" to maximize corporate profits. Thus, a court in one state considering a product liability claim for defective design could impose a punitive damages award on the manufacturer that also is based on alleged intrastate antitrust activity halfway across the country. A punitive damages award rendered in one state for an assault by a waiter at a local restaurant that is part of a nationwide chain could punish the chain's sales of alcohol to underage customers in another state.

The predictability and stability of law that help companies develop good business practices will disappear, as a business's activity in any one state will be subject to the vagaries of rules and decisions in 50 other jurisdictions. *See, e.g., Healy*, 491 U.S. at 336 (statute's legitimacy "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."). Creativity and innovation will be stifled if a company in one state trial has to face vague charges about its unrelated conduct in other jurisdictions.

The irony in this case and many other similar cases is that if the plaintiff's allegations about bad faith as to him were true, this course of conduct would have provided an adequate basis for an effective punitive damage award. Widening the circle of evidence beyond activities directed toward the plaintiff for the sole purpose of augmenting the award is not only unconstitutional, but unnecessary for punitive damages law to achieve its purposes of punishment and deterrence.

In sum, Utah simply has no legitimate interest in punishing irrelevant conduct by State Farm that took place outside its borders. States have no authority to apply their punitive damages laws to address disputes with which they have no significant relationship. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (even where jurisdiction is proper, state may not apply its own law to disputes unless it has "a 'significant contact or significant aggregation of contacts' to the claims asserted . . . , contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair.") (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

B. The Utah Supreme Court's Reliance on Unrelated Conduct Violates Due Process Protections.

The constitutional problems inherent in the Utah Supreme Court's imposition of its own punitive damage law to State Farm's acts outside its boundaries are heightened by the court's consideration of conduct entirely unrelated to Mr. Campbell's bad faith action. A judgment based on such dissimilar acts deviates far from the Court's mandate that there be a relationship between the reprehensibility of the defendant's conduct and the amount of the punitive damage award. *See Gore*, 517 U.S. at 575. Moreover, a punitive damage award based on conduct unrelated to the plaintiff's harm enters the "zone of arbitrariness" that violates the Due Process Clause of the Fourteenth Amendment. *See id.* at 568.[41]

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[41] As Justice O'Connor recognized in *Haslip*, "The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting). Moreover, given that punitive damages are a "quasi-criminal" penalty, *see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)), courts should admit

In *Gore*, the Court found that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 575. To be sure, the Court, in measuring the reprehensibility of the defendant's conduct, was particularly concerned with the harm inflicted upon the particular individual bringing the case. *See id.* at 576 ("The harm BMW inflicted on Dr. Gore was purely economic in nature."). While the Court found a defendant who is a recidivist may be punished more harshly than a first offender, its ruling was based on conduct toward others of a substantially similar nature. *See id.* In this case, State Farm's actions in other states, even if assumed improper, had no relationship whatsoever to its refusal to settle for the policy limits.

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evidence to show the propensity of the defendant to commit bad acts or the defendant's bad character with extraordinary care. For example, this Court has recently recognized in the criminal context that "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged" causes unfair prejudice to a criminal defendant. *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997). The Court's reasoning in *Old Chief* as to the inadmissibility of "evidence of a defendant's evil character" is equally applicable in the punitive damages context. Quoting then-Judge Breyer, the Court stated that "Although . . . 'propensity evidence' is relevant, the risk that the jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Id.* at 181 (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)). In this case, the Utah trial court admitted evidence of a host of allegations of State Farm actions, unrelated to the decision not to settle a claim against its insured within policy limits, that could only serve to cast State Farm as a bad actor in the eyes of the jury. Thus, it is quite probable that the jury reached its punitive damage award based on a desire to punish State Farm not for the reprehensibility of its acts toward Mr. Campbell, but for actions other than those stated in Mr. Campbell's complaint. This Court should not invite the use of punitive damage awards as a tool for punishing unpopular defendants in excess of their culpability.

This cases does not involve a defendant that embarked on a common scheme of conduct across the nation. Rather, the Utah trial court considered a plethora of "other acts" evidence, such as State Farm's allegedly fraudulent practices directed against poor racial or ethnic minorities, women, and elderly individuals, its investigation into the personal life of an employee, and its specification of non-original equipment manufacturer parts in making repairs of insureds' vehicles in other states. Pet. App. 18a-19a. The court even went so far as to consider activities of State Farm Fire and Casualty Company, a separate and independent entity as evidence of State Farm's reprehensible conduct. These activities included State Farm Fire and Casualty Company's cancellation of hurricane insurance coverage in Florida, and its handling earthquake and other property damage claims in California. The court's consideration of this information had nothing to do with State Farm's refusal to settle the third party claim against Mr. Campbell and, in some cases, did not even involve the defendant, State Farm. The consideration of this evidence infected the court's decision and resulted in an arbitrary punitive damage award that lacks a relationship to the reprehensibility of the defendant's conduct toward the plaintiff.

Furthermore, the Utah court's consideration of unrelated alleged bad acts of defendant violates the "second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damage award" – "its ratio to the actual harm inflicted on the plaintiff." *Gore*, 517 U.S. at 580. The Utah court used constitutionally impermissible evidence to justify the extraordinary award in this case, $145 million in punitive damages. The Court's second guidepost recognizes and incorporates the historical nature of punitive damage awards as punishment for the harm levied by an individual defendant upon an individual plaintiff. As discussed above, the trial court placed undue emphasis on the defendant's con-

duct toward individuals other than the plaintiff. Any harm resulting from State Farm's investigation of an employee who was suspected of having a conflict of interest because she received a gift from a contractor has no bearing on Mr. Campbell's claim. Nor does State Farm's allegedly poor treatment of minorities and women impact Mr. Campbell's claim, as he falls into neither of these categories. The court's consideration of such dissimilar actions tainted the court's punitive damage award and rendered its decision constitutionally infirm. The Utah Supreme Court's decision affirmed the wholesale introduction of "other acts" evidence and must be reversed by this Court.

CONCLUSION

For the foregoing reasons, *amicus* requests that the Utah Supreme Court's reinstatement of the $145 million punitive damages award should be reversed and the case remanded for a new trial as to punitive damages. If a new trial is not ordered, then, at least, a massive remittitur of the punitive award to an amount comporting with constitutional requirements would be warranted.

Respectfully submitted,

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APPENDIX A

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
CORPORATE MEMBERS

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Beretta U.S.A. Corp.

BIC Corporation

Biomet, Inc.

Biro Manufacturing Company Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

Caterpillar Inc.

Centerpulse USA Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

Dorel Juvenile Group, Inc.

E & J Gallo Winery

E.I. DuPont de Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

Exxon Mobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

GLOCK, Inc.

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global, Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Lincoln Electric Holdings, Inc.

Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R & D of America, Inc.

Monsanto Company/G.D. Searle & Co.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RHI Refractories America

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger, & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Proctor & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.