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 AMICI CURIAE OF THE STATES OF MINNESOTA, DELAWARE, FLORIDA, LOUISIANA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, OKLAHOMA, OREGON, AND RHODE ISLAND IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a State is constitutionally prohibited from considering extraterritorial activity in assessing punitive damages, in licensing and hiring decisions, and in imposing criminal sentences.

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INTEREST OF AMICI CURIAE

Amici curiae, the undersigned State Attorneys General submit this brief in support of the respondents in this case. The *amici* have a strong interest in this case for several reasons.

Each state regularly considers all relevant evidence—including out-of-state conduct and unrelated wrongdoing—in the determination of criminal sentences, in the issuance of regulatory licenses, in the imposition of civil penalties, and even in choosing to hire an employee. Whether it is to issue a conditional license or to impose a penalty, states regularly consider all relevant evidence regarding the character of the applicant, including activity in other states.

In this case Petitioner State Farm argues that the punitive damages award imposed by the State of Utah is unconstitutional because both the jury and the Utah Supreme Court, in reviewing the jury's award *de novo*, considered the bad faith and fraudulent activities undertaken by State Farm in other states. State Farm requests the Court to hold that a state cannot measure punitive damages based upon the defendant's conduct in other states.

The civil justice system promotes important state interests in public health, safety, and welfare. "Punitive damages have long been a part of traditional state tort law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).

Punitive damages encourage plaintiffs to serve as "private attorneys general," vindicating the public interest in law enforcement, punishment, and deterrence. By statute most states rely on private plaintiffs to perform this well accepted and time tested function. If the Court should rule

that out-of-state or "other acts" evidence is irrelevant in a punitive damage case, it effectively renders *de minimus* any punitive damages being awarded in a case, consequently eliminating the interest of "private attorneys general" in undertaking such actions.

This Court has long maintained a strong interest in preserving the appropriate balance of regulatory authority between the states and the federal government in our system of federalism. This case arose in state court and involves solely state law causes of action. The issues in this case should be left principally to the states. The Court should not expand federal law to preempt such traditional state law concepts such as the rules of evidence and the rules of civil procedure.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner attacks the judgment of the Utah Supreme Court in this case on the ground that, in reinstating the punitive award at issue, the state court impermissibly punished out-of-state conduct. We disagree.

There is no merit to petitioner's argument that a state should be prohibited, in imposing punitive damages, from considering anything other than what the defendant did to the *specific* plaintiffs in the particular case before the court. The states have traditionally been free to use punitive damages to encourage plaintiffs to serve as "private attorneys general" and thereby to perform important functions in promoting public health, safety, and welfare. If punitive damages are limited as proposed by the petitioner, the issue of punitive damages will be so *de minimus* as to discourage any action by a "private attorney general."

Petitioner argues that the Utah Supreme Court's judgment amounts to extraterritorial punishment and violates principles of federalism. The petitioner has the matter backwards. The Utah Court's judgment does not invade the prerogatives of other states. To the contrary, the Utah Court's ruling recognizes the ability of every state to protect its citizens by considering all evidence relevant to a defendant's reprehensibility and the amount necessary to deter wrongdoing that causes harm to its citizens.

The consideration of such evidence is frequently utilized by states in a variety of forums. States routinely use out-of-state conduct in the determination of criminal sentences, in evaluating the license applications of professionals, in determining whether businesses are entitled to do business in the state, in granting or denying gun permits and drivers' licenses, and many other regulatory matters. This Court should not construe the Due Process Clause under the Fourteenth Amendment, the Commerce Clause, or any other constitutional provision so as to prevent the states from considering out-of-state conduct to enforce important state policies and to deter egregious wrongful behavior directed at their citizens.

In fact, the rules sought by the petitioner would run counter to important values of federalism. Petitioner would require that Utah disregard the harmful out-of-state effects of the behavior that injures its own citizens simply because those injuries are suffered by citizens of other states. The Constitution does not require a state to turn a blind eye to such injuries. Nor was the Constitution intended to be a shield to protect extraterritorial wrongdoers from the sanctions of state government.

One central purpose of punitive damages is to punish intentional wrongdoing. Where the defendant is a corporation that does business in many states, often the only evidence of such intentional conduct are decisions and activity undertaken outside the forum state and implemented through corporate practices carried out in other states. Evidence of such conduct must necessarily be considered to determine the propriety of an award of punitive damages.

This Court has already designed procedural protections which ensure that the requirements of due process are satisfied in actions involving multi-state activity. In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), this Court made clear that punitive damage awards are unconstitutional unless they are reasonable in light of the facts and circumstances of the individual case. In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court underscored the responsibility of judges to review punitive damage awards to ensure that the requirements of due process are met. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court prescribed three "guide posts" for the judiciary to employ in judging reasonableness. And in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court held that the *de novo* standard governs appellate review of federal district court decisions regarding the reasonableness of punitive awards.

These decisions define the nature of punitive damages and recognize that the conduct of the perpetrator, regardless of jurisdiction, ought to be considered by the forum which is deliberating on the gravity of the harm caused by the perpetrator. The Court should not adopt any of the plethora of additional procedural measures proposed by the petitioner.

In particular, this Court should not prescribe a federal rule governing the manner in which state courts can consider "other acts" evidence.

The judgment of the Utah Supreme Court should be affirmed.

ARGUMENT

I. The Utah Supreme Court's Judgment Is Not "Extraterritorial Punishment."

Petitioner contends that the Utah Supreme Court usurped the prerogatives of its sister states in this case. This argument is wrong.

A. The Decision Below Promotes Rather Than Violates Principles of Federalism.

The Utah Supreme Court considered the full-scope of petitioner's fraudulent scheme in assessing its reprehensibility and the appropriate award necessary to deter future misconduct. The court found that the wrongdoing that occurred in Utah was the manifestation of a policy that extended outside the State. The Utah Supreme Court's consideration of this policy does not amount to extraterritorial "punishment." Every state has the authority to consider such evidence in protecting its citizens and deterring wrongdoing. And every state exercises this authority.

In *TXO*, this Court specifically approved the consideration of out-of-state conduct in determining the appropriate size of a punitive damage award. *See* 509 U.S. at 450-51 (reviewing court could consider "similar nefarious activities in business dealings"

in assessing the reasonableness of punitive damages); *id.* at 462 n.28 ("similar past conduct" may be considered); *Haslip*, 499 U.S. at 21-22 (same).

Similarly, in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court specifically opined that a state could look to out-of-state conduct in making its determination as to a defendant's reprehensibility. *Id.* at 563-64, 577. The Court also noted that the State could not calculate a punitive damage award by directly multiplying the amount of loss by the number of out-of-state transactions.

Under petitioner's view, other victims harmed by State Farm's corporate policy must be disregarded simply because they are not citizens of Utah. A perpetrator of offensive conduct should not be able to prevent a state from evaluating whether its conduct is part of a larger scheme of wrongdoing, whether or not it occurs within the jurisdiction of the state. It is the petitioner's insistence that the Court draw a bright line at a state's border, and not the Utah Supreme Court's decision, that offends principles of federalism.

Utah's consideration of petitioner's out-of-state conduct was fully consistent with principles of federalism and especially with the Privileges and Immunities Clause of Article IV, Section 2. This Clause "bar(s) discrimination against citizens of other states where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states." *Saenz v. Roe*, 526 U.S. 489, 502 (1999) (internal quotation omitted). This provision removes "from the citizens of each state the disabilities of alienage in the other states." *Paul v. Virginia*, 8 Wall 168, 180 (1868). Indeed, Utah would have failed to protect even its *own residents* against a nationwide scheme of corporate wrongdoing had it imposed an artificially small damages

award that would have been hopelessly inadequate to address the full scope of the defendant's misconduct.

If Utah treats out-of-state residents as less important than its own, it violates the principle of equality that lies at the heart of the Privileges and Immunities Clause.

Petitioner's argument is also inconsistent with the long-standing authority of states to regulate on the basis of out-of-state conduct in similar contexts. In criminal law, for example, a state often will base criminal sentences in part on out-of-state conduct. Thus, under repeat offender statutes or "three strikes" laws, defendants who have committed prior crimes receive enhanced sentences even if their prior offenses occurred out-of-state. More generally, a criminal sentence may permissibly be based on *all* facts and circumstances relevant to the question of appropriate punishment—regardless of whether the information pertains to out-of-state activities. Sentencing courts traditionally have considered the fullest information possible concerning the defendant's life and characteristics. *Williams v. New York*, 337 U.S. 241, 247 (1949). Such information might include prior convictions or even unrelated out-of-state conduct that did not result in a criminal conviction.

One of the purposes of punitive damages is to impose a civil penalty upon a perpetrator of reprehensible conduct. In punishing such a perpetrator the court is not rewarding the "private attorney general" or the plaintiff as much as it is penalizing the perpetrator in order to deter it and others in similar positions, from engaging in reprehensible conduct which is harmful to the public. The consideration of such extraterritorial activity by the perpetrator does not result in undue imposition of penalties should other states impose

sanctions, as those states will also consider, as part of the imposition of punitive damages or penalties, those actions that have been imposed by other states.

If the states were restricted in considering extraterritorial activity in the imposition of punitive damages, then the states similarly ought to be prohibited from considering extraterritorial activity as it relates to the imposition of civil, regulatory, or criminal penalties. Such a proposition would turn upside down the authority of states to protect their own citizens.

B. The Decision Below Is Compatible With the Due Process Clause.

Petitioner contends that due process restricts a state's regulatory authority to only that which occurs in the state's jurisdiction. The Due Process Clause does permit a state to impose criminal punishment based on conduct occurring entirely out-of-state. *See Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) (Minnesota could apply its law to an accident occurring in Wisconsin between Wisconsin residents); *Skiriotes v. Florida*, 313 U.S. 69, 79 (1941) (state has power to punish resident for committing acts outside state territorial waters); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911) ("Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect."); *cf. Blackmer v. United States*, 284 U.S. 421, 436-37 (1932) (affirming extraterritorial federal jurisdiction.)

This case does not present a question of a wholly extraterritorial projection of state law; for the facts are

uncontradicted that petitioner deliberately entered into Utah, transacted substantial business there, and committed tortious acts within the State. There is plainly a sufficient jurisdictional nexus for the imposition of appropriate punishment.

The mere fact that some elements of petitioner's course of conduct occurred out-of-state, pursuant to its nationwide policy, does not strip Utah of the power to consider such conduct in assessing the amount necessary to deter wrongdoing in the state. For example, a state may regulate the out-of-state performance of contracts entered into within its borders.[1] Similarly, a state may adjudicate workers' compensation claims based on injuries received out-of-state.[2] And a state may regulate an out-of-state company doing business within its borders, even when such regulation falls on out-of-state business activities and imposes additional financial burdens on such activities.[3] Accordingly, there can be no due process objection to basing punishment in part on out-of-state conduct.

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1. *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 541 (1934) ("The fact that the contract is to be performed elsewhere does not of itself put [the contract's] incidents beyond reach of the power which a state may constitutionally exercise.")

2. *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 156 (1932) (a State "has the power through its own tribunals to grant compensation to local employees, locally employed, for injuries received outside its borders").

3. *E.g., Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 649, 650 (1950) (holding that State may enjoin out-of-state company from doing business with its residents outside the State: "The Due Process Clause does not forbid a state to

(Cont'd)

C. The Decision Below Does Not Violate the Dormant Commerce Clause.

"The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987). Even assuming, *arguendo*, that tort actions are subject to the dormant Commerce Clause,[4]

(Cont'd)
protect its citizens from such injustice," and the State's "cease and desist provisions designed to accomplish this purpose can not be attacked merely because they affect business activities which are carried on outside the state."); *Hoopeston Canning Co. v. Cullen*, 318 U.S. 313, 320 (1943) (state may regulate an out-of-state insurer doing business domestically, even when the insurance contracts are signed in, and losses are paid from, another state: "These regulations cannot be attacked merely because they affect business activities which are carried on outside the state. Of necessity, any regulations affecting the solvency of those doing an insurance business in a state must have some effect on business practices of the same company outside the state."); *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940) (upholding power of Virginia to require out-of-state insurance companies to sell their policies through resident agents:

> the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.

4. *But see Buzzard v. Roadrunner Trucking*, 966 F.2d 777, 784 n.9 (3d Cir. 1992) ("Though there are numerous cases holding state legislative action invalid under the dormant commerce clause, we have found none invalidating liability founded on principles of state common law.")

consideration of a tortfeasor's "other" acts in assessing punishment is a facially neutral practice, even if it happens to involve out-of-state conduct. In fact, it is petitioner's position that involves discrimination on the basis of residence: petitioner argues that the federal Constitution requires Utah to prefer its residents over those of other states and to "export" harmful activity to other states.

The pricing affirmation cases on which petitioner relies, *Healy v. The Beer Institute*, 491 U.S. 324 (1989), and *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986)—to the extent that they apply anything beyond the anti-discrimination principle[5]—address a situation where there is conflict among the operation of the regulatory regimes of several states. In *Healy* and *Brown-Forman*, this Court held that a state may not regulate in a manner that sets prices on transactions between buyers and sellers in other states, in order to ensure a more favorable price structure for domestic consumers at the expense of consumers in other states.

Healy and *Brown-Forman* have no application here. "[I]t is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects. The Supreme Court has never suggested that the dormant Commerce Clause requires Balkanization, with each state's law stopping at the border."[6]

5. *But see Healy*, 491 U.S. at 344-45 (Scalia, J., concurring in part and in the judgment) (terming "dubious" any attempt to extract principle of extraterritoriality from dormant Commerce Clause, but finding it unnecessary to reach questions in light of "facial discrimination against interstate commerce" posed by law).

6. *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995);
(Cont'd)

Clearly, a state can apply its law to transactions that are conducted and completed in other states when it has a sufficient interest in doing so. Were it otherwise, nearly every aspect of substantive state law would be disabled from affecting the conduct of multistate corporations. Thus, in *CTS*, this Court upheld an Indiana takeover statute even though it directly inhibited interstate commerce by hindering tender offers for stock in multistate companies incorporated in Indiana.

Furthermore, there is no validity to the view that state regulation based in part on consideration of out-of-state conduct would amount to the sort of "inconsistent" regulation by different states that might be forbidden under the Commerce Clause. Cumulative punishment does not establish a Commerce Clause violation. "State laws which merely create additional, but not irreconcilable, obligations are not considered to be 'inconsistent'" for purposes of the Commerce Clause.[7] Moreover, the possibility of different approaches by different

(Cont'd)
see also Donald H. 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, 1878 (1987) ("It is clear that the Court cannot flatly prohibit all state laws that have extraterritorial effects, or even all state laws that have substantial extraterritorial effects. Such a prohibition would invalidate much too much legislation.")

7. *Instructional Systems, Inc.*, 35 F.3d at 826; *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472-73 (1981); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978); Donald H. Regan, *Siamese Essays*, *supra*, 85 Mich. L. Rev. at 1881 (States with "different standards" do not present the "sort of inconsistency" that is a "constitutional problem." "The commercial enterprise that chooses to operate in more than one state must simply be prepared to conform its various local operations to more than one set of laws").

states does not create a Commerce Clause issue. "'Although the Supreme Court has at times invalidated a state regulation because of the *possibility* that it might conflict with another state's regulation, in more recent cases the Court has required a demonstration of *actual conflict*.'"[8] In any event, there could be no conflict here: no state law *requires* an insurance company to engage in the practices at issue in this case.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of Utah.

Respectfully submitted,

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8. *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1293 (3d Cir.) (citing cases and quoting Laurence H. Tribe, *American Constitutional Law* 435 (2d ed. 1988)), *cert. denied*, 506 U.S. 1000 (1992).

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