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 FOR PETITIONER

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QUESTION PRESENTED

Whether the Utah Supreme Court, in direct contravention of this Court's decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and fundamental principles of due process, committed constitutional error by reinstating a $145 million punitive damage award that punishes out-of-state conduct, is 145 times greater than the compensatory damages in the case, and is based upon the defendant's alleged business practices nationwide over a twenty-year period, which were unrelated and dissimilar to the conduct by the defendant that gave rise to the plaintiffs' claims?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

Petitioner State Farm Mutual Automobile Insurance Company ("State Farm") is a mutual insurance company. It has no parent company.

Respondents Curtis B. Campbell and Inez Preece Campbell are individuals. Mr. Campbell died following the Utah Supreme Court's decision. A motion to substitute Inez Preece Campbell as proposed representative of his estate has been filed with the Utah Supreme Court. No substitution has been made as of the date of the filing of the instant brief.

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The opinion of the Third Judicial District Court of Salt Lake County, State of Utah (Pet. 99a-166a) has not been officially reported. The opinion of the Utah Supreme Court (Pet. 1a-98a), which is available at 2001 WL 1246676, is not yet officially reported.

STATEMENT OF JURISDICTION

The judgment of the Utah Supreme Court was entered on October 19, 2001, and State Farm's timely petition for rehearing was denied on December 4, 2001. Pet. 195a. A petition for certiorari was filed on March 1, 2002, and granted on June 3, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Plaintiffs Curtis and Inez Campbell's action against Petitioner State Farm arose from State Farm's handling of bodily injury claims asserted by third parties against its insured, Mr. Campbell, based upon his involvement in a 1981 automobile accident. Rather than settle the third-party claims against Mr. Campbell within policy limits, State Farm had the case tried on his behalf. The trial resulted in judgments against Mr. Campbell in excess of his policy limits, and Mr. and Mrs. Campbell subsequently brought the instant action against State Farm for bad faith failure to settle. The record establishes that between 1980 and 1994, State Farm handled more than 29,000 third-party bodily injury claims against its insureds in Utah. Of these more than 29,000, Mr. Campbell's case was the *only* instance where a State Farm insured was exposed to the possibility of execution on an excess verdict after a refusal by State Farm to settle within policy limits. *See* Joint Appendix ("JA") 287-97, 1851-53, 3005.

To transform this single instance of conduct into a springboard for huge punitive damages, plaintiffs, over State Farm's

constitutional and evidentiary objections, were allowed to present to the jury massive amounts of evidence of out-of-state and dissimilar conduct. The result was a $145 million punitive damages award against State Farm, which was remitted to $25 million by the trial court, but was reinstated in its entirety by the Utah Supreme Court. In reinstating the punitive award, the Utah Supreme Court repeatedly cited as deserving punishment an alleged twenty-year nationwide "scheme" comprising conduct and business practices by State Farm that were dissimilar and unrelated to its conduct toward the Campbells and much of which indisputably was lawful and occurred outside Utah.

A. The 1981 Accident and Underlying Third-Party Litigation

On May 22, 1981, while driving on a highway in Utah, Mr. Campbell tried to pass one or more vehicles. JA 806, 1321. Although he completed his pass without hitting another vehicle, an oncoming car driven by Todd Ospital swerved and crashed into a van driven by Robert Slusher. Ospital died, and Slusher was injured. Ex. P-32;[1] JA 3326. Mr. Campbell always maintained that he had not been at fault for the accident. JA 791, 799. State Farm decided to contest liability and therefore declined the offer by Slusher and Ospital's estate ("Ospital") to settle their claims against Mr. Campbell for the limits of his insurance policy. JA 344-45, 2804-07.

Slusher sued both Mr. Campbell and Ospital. Ospital in turn asserted a cross-claim against Mr. Campbell. Before trial, Slusher settled his claims against Ospital for $65,000 (half the limits of Ospital's two insurance policies) on the express condition that Ospital assist Slusher both in pursuing his claim against Mr. Campbell and (in the event of an excess verdict) in bringing a subsequent insurance bad faith action against State Farm. Ex. 70-D; JA 1331. As the Utah Supreme Court stated in an earlier opinion, at trial "[t]he cause of the collision was hotly disputed, with contradictory testimony concerning the speed of the Ospital and Campbell vehicles, whether Campbell had completely passed the caravan at

[1] Trial exhibits ("Ex.") and other materials referenced without Joint Appendix citations are reproduced in Petitioner's Lodging ("L").

the time Ospital lost control, and even whether another car which had passed the caravan might have precipitated Ospital's maneuvering."[2] On September 20, 1983, the jury found Mr. Campbell to be 100 percent at fault in the accident. Ex. P-3; JA 3324. On November 16 and 30, 1983, judgments against Mr. Campbell were filed totaling $186,000, which exceeded his policy limit of $50,000 ($25,000 per claimant). Exs. P-1, P-2, 78-D; JA 3324, 1332. After Mr. Campbell's post-trial motions were denied, State Farm, consistent with his request, appealed the judgments against him. JA 1590-93; Ex. 72-D; JA 1331.

On January 6, 1984, just weeks after the judgments against Mr. Campbell were filed, Mr. Campbell, his attorney, and attorneys for Slusher and Ospital reached a tentative agreement that Slusher and Ospital would not seek satisfaction of the judgments from Mr. Campbell in return for a significant percentage of the proceeds from a bad faith action that Mr. Campbell would bring against State Farm. JA 2085-87, 2768-69, 1957-89. This agreement was formalized and executed by Mr. Campbell, Slusher, Ospital, and their counsel on December 6, 1984.[3] The judgments against Mr. Campbell were never executed upon and were paid in full by State Farm shortly after they were affirmed on appeal. JA 1588, 2767.

[2] *Slusher v. Ospital*, 777 P.2d 437, 439 (Utah 1989). In addition, Farmers Insurance Company, whose insured owned the vehicle Todd Ospital was driving, concluded from its investigation and its interview with state trooper Kent Parker, who responded to the accident, that Ospital's excessive speed was the sole cause of the accident. Farmers' reports indicated that Ospital was driving "at a speed [80 m.p.h.] substantially in excess of the speed limit [55 m.p.h.]" and that Campbell was not negligent; accordingly, Farmers agreed to pay Slusher the $30,000 policy limit. Exs. P-32, P-33; JA 3326. Parker also testified that, when he interviewed Slusher at the hospital, Slusher asserted that Campbell did not cause the accident, an assertion that Slusher later denied making. JA 1256, 1330. Ospital's lawyer (co-counsel for the Campbells in the present case) wrote to his clients before the trial that "this is not a clear case, and we may not be successful in the wrongful death claim." Ex. 118-D; JA 504-05.

[3] The agreement provided, *inter alia*, that (i) Slusher and Ospital would not seek satisfaction of the judgments from Mr. Campbell; (ii) Ospital's and Slusher's attorneys would represent Mr. Campbell in a bad-faith action against State Farm and would receive a fee of 40 percent of the recovery; and (iii) Ospital and Slusher would receive 90 percent of the balance of the recovery, and Mr. Campbell 10 percent. Ex. 76-D; JA 1332.

B. The Campbells' Bad Faith Action

Mr. and Mrs. Campbell, represented by the attorneys for Ospital and Slusher, subsequently sued State Farm, alleging bad-faith failure to settle, fraud, emotional distress, and punitive damages. In early 1994, State Farm made *in limine* motions to preclude plaintiffs from introducing evidence of conduct that was not similar to the conduct involved in the handling of the third-party claims against Mr. Campbell[4] and conduct that occurred outside Utah. R. 752-79, 1116-24, 1865-83, 2672-2717. State Farm also moved to bifurcate the trial of the case "into separate trials - - the first trial to deal with plaintiffs' allegation of bad faith against State Farm, and the second trial, if necessary, to deal with whether State Farm's conduct justifies an award of punitive damages." R. 1093. In seeking bifurcation, State Farm did not concede that plaintiffs' evidence of State Farm's practices nationwide was proper. Rather, State Farm referred the trial court to its previously filed motion to exclude collateral evidence (R.1098-99) and stated that "[i]f a subsequent trial on punitive damages becomes necessary, the court could then decide how much, if any, of the vast amount of evidence plaintiffs want to introduce is actually admissible." R.1103, 1111.

The trial court ordered bifurcation of the trial into two phases, which were conducted before different juries in October-November 1995 and June-July 1996. The jury in the first phase determined that there had been a substantial likelihood that the underlying action against Mr. Campbell would result in excess judgments against him and that State Farm's decision to go to trial instead of settling was unreasonable. The second phase was to determine State Farm's liability for fraud and intentional infliction of emotional distress, and compensatory and punitive damages. Pet. 6a.

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[4] In the insurance context, third-party claims are claims brought against an insured by persons who are not parties to the insurance contract. In contrast, first-party claims are claims by an insured for contractual benefits under his or her insurance policy, such as for payment for repair of damage to the insured's own vehicle. There are significant legal and factual differences that set apart an insurer's decision to try third-party claims asserted against one of its insureds (such as Mr. Campbell) from an insurer's handling of first-party claims by its insureds for contractual benefits. *See infra* at 24-25.

Plaintiffs' evidence that specifically related to State Farm's handling of the third-party claims against Mr. Campbell included testimony that State Farm disregarded the strength of the claims against him and concealed from him the likelihood of an excess verdict; testimony by Ray Summers, a former State Farm claims adjuster,[5] that he was told to alter the Campbell file to change his evaluation of liability and include the statement that Todd Ospital was speeding on his way to visit a pregnant girlfriend; testimony that the attorney hired by State Farm to defend Mr. Campbell told Mr. Campbell after the verdict to put a for-sale sign on his house; and evidence that upon appeal of the underlying judgments State Farm did not post a supersedeas bond to protect the Campbells from the possibility of execution on the excess verdict, even though Mr. Campbell's attorney dropped his demand for such a bond shortly after the judgments against Mr. Campbell were filed.[6] *See, e.g.*, JA 795-96, 1603-04, 2170-71.

The damages claimed by the Campbells were principally for alleged emotional distress. However, as the trial court found, there was an "absence in the record of any objective evidence of emotional or mental distress." JA 3322, 3364. The court also stated that there was "a relatively limited period of time in which the primary stressor – that is, the threat of financial ruin – was a real threat to the Campbells." *Id.*

C. The "Institutional" Trial of State Farm and the Resulting $145 Million Punitive Award

The second phase of the trial lasted two months and ad-

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[5] Summers was fired by State Farm in May 1982 for falsifying documents. His subsequent wrongful termination and employment discrimination suit against State Farm was dismissed on summary judgment, which was affirmed on appeal. *See Summers v. State Farm Mut. Auto. Ins. Co.*, 864 F.2d 700, 701-02, 709-10 (10th Cir. 1988).

[6] As early as December 23, 1983, only weeks after the judgments against Mr. Campbell were filed, his new attorney, Brent Hoggan, indicated to State Farm that "a final determination as to the need of the supersedeas bond" could be made only after he met on January 6, 1984, with the attorneys representing Slusher and Ospital. Ex. 98-D; JA 2566. After that meeting, Hoggan never renewed his request for a bond. Moreover, plaintiffs' expert Gary Fye conceded "that the bond issue passed into non-importance" by May 1984. JA 1303-05.

dressed, *inter alia*, State Farm's liability for punitive damages. The trial court referred to the second phase as the Campbells' "institutional" case against State Farm. Pet. 110a, 156a, 158a. Before the second phase, State Farm again made *in limine* motions to exclude the massive amounts of "expert" and other testimony proffered by plaintiffs regarding various alleged State Farm "patterns and practices" nationwide. State Farm sought to exclude evidence of conduct that was not similar to the conduct involved in the handling of the third-party claims against Mr. Campbell and conduct that occurred outside Utah. R.5303-42, 6061-71, 6092-6124, 6140-55, 6177-85, 6261-6308. After the trial court denied nearly all of those motions (R.6588-96, 6626-33, 7793-95), State Farm moved for reconsideration based on this Court's then newly issued decision in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). State Farm argued, *inter alia*, that under *BMW* it would be improper as a constitutional matter for the jury to punish State Farm for out-of-state conduct that was not similar to State Farm's refusal to settle the third-party claims against Mr. Campbell. Pet. 168a-172a, 185a-188a. The trial court denied State Farm's motion.[7] Pet. 189a, 194a.

In his opening statement in the second phase of the trial, plaintiffs' counsel urged the jury to impose punitive damages on State Farm for its nationwide conduct. Plaintiffs' counsel told the jury that this case "transcends the Campbell file" and "involves a nationwide practice." JA 242. Plaintiffs' counsel emphasized to the jurors that they were "going to be evaluating and assessing, and hopefully requiring State Farm to stand accountable for what it's doing across the country, which is the purpose of punitive damages." *Id.*

The evidence at trial showed that State Farm, the nation's largest automobile insurance company, handled approximately 14 million claims annually. JA 1482, 1808-09. Plaintiffs contended that State Farm's handling of the Campbell case was part of a purported nationwide "scheme" by State Farm "to meet corporate fiscal goals by capping payouts on

[7] State Farm promptly challenged the trial court's rejection of its *BMW* due process arguments in a petition for extraordinary writ to the Utah Supreme Court, which was denied. *See* Mem. in Support of Pet. for Extraordinary Writ, May 23, 1996, at 13-14; L. 383-84.

claims company wide," a scheme plaintiffs denominated the "Performance, Planning and Review" or "PP&R scheme."[8] Pet. 6a; *see also* Pet. 18a. The Utah Supreme Court described this "scheme" as State Farm's "consistent way of doing business for the last twenty years." Pet. 34a. Even assuming such a "scheme" existed, it would by the sheer breadth of its description capture myriad aspects of corporate conduct, including conduct bearing no similarity to the specific conduct supporting plaintiffs' claims, entirely lawful corporate conduct, as well as conduct occurring outside Utah and affecting only residents of states other than Utah. Indeed, under the rubric of the alleged "PP&R scheme," plaintiffs were allowed to introduce wide-ranging evidence of State Farm's disparate business practices and conduct nationwide, as well as conduct by State Farm affiliates that were separate legal entities, over a period of twenty years. Most of plaintiffs' evidence of State Farm's purported nationwide conduct was admitted as part of plaintiffs' affirmative case.

Much of this evidence took the form of expert testimony by Stephen Prater and Gary Fye, both of whom confirmed plaintiffs' strategy for trying State Farm as an institution for its conduct nationwide. Prater told the jury that "this case is . . . about State Farm's pattern and practices nationwide. . . . The case is about more than what happened in Utah, is my point. That's why I'm here talking about all this other stuff." JA 2391. The following colloquy between plaintiffs' counsel and expert Fye again demonstrated the nationwide scope of the punitive damages sought by plaintiffs:

Q. To your knowledge, Mr. Fye, has any other trial that

[8] Plaintiffs took the term "Performance, Planning and Review" from State Farm's personnel evaluation program. This program was a "management by objective" program, a widely used method of personnel management. JA 1809-10, 1840-41; Ex. 52-P, trial pp. 243-44; JA 1363-64. Under this program, various goals (ranging from spending less time on personal phone calls to responding more quickly to customer complaints) were set for each State Farm employee and recorded in the employee's file. For a period of time, State Farm's PP&R manual listed among possible goals the reduction of average claims paid. Before the trial of this case, State Farm had revised its manual to eliminate such goals and had ended their use in employees' PP&R forms. JA 1812-13; Ex. 52-P, trial p. 197; Ex. 128-D; JA 1449; Ex. 138-D; R.10271:14.

you have been involved in had the extent and scope of evidence regarding State Farm's wrongful practices throughout the country than this case, here before this jury?

A. No. (JA 1521)

Two other principal witnesses for plaintiffs regarding State Farm's conduct outside of Utah were "fact" witnesses Ina DeLong and Bruce Davis. DeLong, a former employee of an entirely different State Farm company, State Farm Fire and Casualty Insurance Company ("State Farm Fire"), testified extensively about the handling of homeowners' earthquake damage claims and other first-party property damage claims in California. JA 1082-1106, 1165-73. Davis testified at length about the handling of claims for hail damage to motor homes and other first-party claims practices in Colorado. JA 986-1035. Neither DeLong nor Davis had any knowledge about State Farm's treatment of the Campbells. JA 1047-50, 1111, 1149.

Plaintiffs elicited testimony from Prater, Fye, DeLong, Davis, and other witnesses regarding a wide variety of purported practices nationwide by State Farm, most of which were common industry practices (JA 327, 1995, 2119), including the following:[9]

- the use of appearance allowances (cash payments in amounts less than repair cost to compensate insureds for minor dents and damage where insureds do not intend to have repairs done) in Colorado and elsewhere (JA 869-70, 981-82, 991-1011, 1746-50, 2022-24, 2065-68, 2680-85);
- the company's specification of non-original equipment manufacturer (non-OEM) parts and recycled or "salvage" parts for repair of its insureds' automobiles in Arkansas, Alabama, California, Colorado, Florida, Tennessee, Texas, and elsewhere (JA 323-31, 870-71, 1010-17, 1089, 1750-51, 1756-57, 1885-86, 2315-16, 2487, 2594-2601, 2603, 2605-07, 2685-87, 2740-41, 2796, 2873-76);

[9] Because of the massive amounts of such evidence introduced at the trial, State Farm's citations to the Joint Appendix for the practices and conduct described in this section are representative, not exhaustive.

- deductions from payments on automobile property damage claims in Colorado and elsewhere for depreciation due to age or prior damage and betterment (increased value of a vehicle due to new replacement parts) (JA 1018-19, 1752, 2686);
- the use of "first contact" or "first call" settlements (settlements reached at the first meeting between the adjuster and the insured) across the country (JA 1401-03, 1631-32, 2180-81, 2187-89, 2840-42);
- the use of market surveys rather than guidebooks when settling total loss claims in Colorado and elsewhere (JA 2006-09, 2016-17, 2509-10, 2624-25, 2691);
- the use of independent medical examiner ("IME") doctors in Arizona, California, Hawaii, Texas, and elsewhere (JA 2202-06, 2209-14, 2604-05, 3045);
- the use of a high-low settlement agreement in a California arbitration (JA 2196-97);
- State Farm Fire's practices in evaluating earthquake damage to its insureds' houses in California (JA 1165-73); and
- the prospective cancellation by State Farm Fire of hurricane insurance coverage for 62,000 Florida homeowners (JA 319, 2497).

Plaintiffs made no showing that these discrete and separate practices were unlawful in the states where they occurred. Indeed, many of them were specifically authorized by state statutes and regulations. *See infra* at 20-22. *None* of these practices had any connection to the specific conduct at issue in the Campbells' claims.[10]

[10] Numerous other dissimilar and unrelated alleged practices of State Farm were the subject of testimony elicited by plaintiffs, including using a computer program to determine the cost of automotive parts in Colorado and elsewhere (JA 1029-32, 2865-66); purportedly discouraging claimants from hiring attorneys (JA 453-54, 1631-33, 2181); not allowing claimants to "stack" insurance coverages in Arizona (JA 2605); not notifying insureds of car rental coverage and allegedly improperly terminating car rentals in Colorado and elsewhere (JA 1024-28, 2009-10); using worker's compensation cases to determine the value of bodily injury

(continued...)

Furthermore, although the Campbells made no claim that State Farm had discriminated against them, plaintiffs were allowed to introduce evidence (primarily through Davis and DeLong) as to State Farm's purported discrimination against the elderly, women, newlyweds, the poor, racial and ethnic minorities, and other "vulnerable" groups. JA 992-94, 1018-20, 1100-01. In addition, plaintiffs presented evidence regarding State Farm's purported nationwide use of "mad dog defense tactics" in litigation and purported harassment of witnesses. *See, e.g.*, JA 2258-66. Plaintiffs made no attempt to show, however, that any such alleged tactics were used in the litigation of the third-party claims against Mr. Campbell.[11]

Plaintiffs also elicited testimony from expert Prater and other witnesses concerning unsubstantiated allegations of wrongdoing in sixteen class actions against State Farm in Pennsylvania, Texas, Louisiana, California, Arkansas, Illinois, Arizona, Michigan, Alabama, Georgia, Tennessee and Washington. These cases involved first-party claims practices and complex regulatory issues, such as whether to allow the "stacking" of insurance policies, whether it is permissible for insurers to specify non-OEM parts in repair estimates, whether insurers must pay postmortem benefits, and whether insurers may specify that older vehicles be repaired with used parts. *See, e.g.*, JA 323-26, 1089, 1756-57, 1885-86, 2202, 2311-16, 2594-2607, 2741. None of these cases involved allegations similar to the Campbells' allegations of bad-faith failure to settle third-party claims.

In addition, plaintiffs presented evidence about individual lawsuits and jury verdicts in other states that had no relevance or connection to this case. For example, plaintiffs introduced

[10] (...continued)
claims (JA 2184); and using the law of comparative negligence purportedly to induce claimants to accept lower settlements in Colorado and elsewhere. JA 1028, 2011-16, 2166.

[11] Indeed, after the trial of the third-party claims against Mr. Campbell, Ospital's counsel (who is co-counsel for the Campbells in the instant action) wrote to Wendell Bennett, the attorney retained by State Farm to represent Mr. Campbell, and stated that he had "always considered [Bennett] to be one of the best trial attorneys, and [his] opinion was again reinforced during this trial" and that Bennett "had represented [Campbell's] case very well." Ex. 139-D; JA 379; L.1846.

evidence through expert Fye regarding a $100 million punitive damages jury verdict in a Texas case involving a first-party claim for underinsured motorist coverage. JA 1416, 1519-21; *see also* JA 1490, 1524-25. Judgment was never entered on the Texas punitive award, and the case was settled for "pennies on the dollar." JA 1488, 1493, 1526. The substantive basis of the Texas case had no factual or legal similarity to the Campbells' case. Equally unrelated to this case were the numerous other individual first-party cases about which plaintiffs elicited testimony from experts Prater and Fye as well as other witnesses.[12]

These massive amounts of testimony and evidence regarding State Farm's purported other conduct and practices nationwide overwhelmed the fact that State Farm's conduct toward Mr. Campbell was not shown to be anything other than an isolated, single occurrence in Utah. As discussed above, State Farm's unrebutted evidence regarding the company's handling of third-party bodily injury claims like those against Mr. Campbell, showed that from 1980 through 1994 State Farm handled 29,497 such claims against its insureds in Utah. Of these claims, 26,486 were settled without a lawsuit being filed, and only 438 claims were tried to a verdict, the remainder being settled or dismissed. Of the 438 claims that were tried to a verdict, 396 (or 90%) resulted in a finding of no liability for the insured or a verdict lower than State Farm's highest settlement offer. JA 3004-07. Only seven claims resulted in excess verdicts, and State Farm resolved all seven cases so that its insureds personally paid nothing. It is uncontradicted that Mr. Campbell was the only Utah insured who was exposed to a threat of execution on an excess verdict be-

[12] The unrelated first-party individual cases about which plaintiffs elicited testimony included (to give but a few examples) an Arizona case in which State Farm allegedly improperly took to arbitration the claims of an insured who was injured in an accident with underinsured drag racers (JA 2193-95); an Alaska case in which State Farm allegedly improperly arbitrated the value of an insured's nerve-root injuries (JA 1501-02); a California case in which an independent medical examiner allegedly gave improper medical evidence regarding a fourteen year old insured's "bulging herniated disks and problems in his neck" (JA 2211-13); and a Texas case against a separate State Farm company (State Farm Lloyds) that involved a dispute about the cause of foundation damage to a house. JA 2490-91.

cause of a refusal by State Farm to settle within policy limits. JA 287-97, 1851-53.

In closing argument, plaintiffs' counsel urged the jury to impose a large punitive award and repeatedly referred to State Farm's "widespread" misconduct. JA 3222, 3224, 3229. Plaintiffs' counsel specifically mentioned first-party claims practices such as "appearance allowance[s], collision loss totals, salvage, junk yard parts," and paying "less than book value" for total loss vehicles, and told the jury that the "difficulty" for plaintiffs of "trying to show a nationwide practice and how widespread" had been "immense." JA 3224-26. The jury deliberated for three and a half hours and rendered a verdict for plaintiffs, awarding $1.4 million and $1.2 million in emotional distress damages to Mr. and Mrs. Campbell respectively, $911.25 for the Campbells' out-of-pocket legal expenses, and $145 million in punitive damages. JA 93-95, 3320-21.

D. The Decisions of the Utah Courts

State Farm moved in the trial court for remittitur of the compensatory and punitive damage awards. State Farm argued that the punitive award was unconstitutionally excessive because it punished out-of-state and dissimilar conduct and was contrary to the guideposts set forth in *BMW*. R.7758-63, 7965-74, 7985-89, 8772-76, 8794-8804, 9347-54, 9360-72, 10293:197-221, 256-76. The trial court remitted the emotional distress damages to $1 million in total and remitted the $145 million punitive award to $25 million. Pet. 1a-2a.

State Farm appealed the entire judgment against it, and plaintiffs cross-appealed the remittitur of the $145 million punitive award. On appeal, State Farm argued, *inter alia*, that both the remitted $25 million punitive award and the jury's $145 million punitive award were unconstitutionally excessive because they were predicated on out-of-state and dissimilar conduct and inconsistent with the *BMW* guideposts. Appellant's Br. at 71-89; Appellant's Reply Br. at 35-39. In its decision, the Utah Supreme Court reinstated the $145 million punitive award, which is 145 times greater than the $1 million compensatory damages in this case. In reinstating the award, the Utah Supreme Court relied extensively upon State Farm's purported twenty-year nationwide "scheme" and specific instances of conduct that were plainly extraterritorial (i.e., outside Utah) and dissimilar to State Farm's conduct in the Campbells' case. The Court pointed to State Farm's alleged nationwide "PP&R scheme" or what it termed State Farm's "consistent way of doing business for the last twenty years, directed specifically at some of society's most vulnerable groups" (Pet. 34a); State Farm's purported discrimination against the "poor racial or ethnic minorities, women, and elderly individuals" (Pet. 19a); an investigative report on Ina DeLong, the former employee of State Farm Fire in California, that had no connection to this or any other Utah litigation (Pet. 19a); and many other matters entirely unconnected and dissimilar to the handling of the third-party claims against Mr. Campbell. The Court also stated that State Farm's "enormous" wealth and the $100 million Texas punitive award – which was never reduced to judgment – showed that an extremely large punitive award was necessary to get State Farm's attention. Pet. 17a, 30a. The Court denied State Farm's motion for rehearing on December 4, 2001. Pet. 195a.

SUMMARY OF ARGUMENT

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), this Court held as a matter of due process that a state has no legitimate interest in the punishment and deterrence of conduct beyond its borders that was not shown to be unlawful in the state where the conduct occurred. The Utah Supreme Court's decision in this case directly and egregiously contravenes that fundamental principle. The constitutional error in the Utah Supreme Court's decision is compounded by the fact that the conduct punished included a wide array of business activities over a twenty-year period that bore no similarity to the specific conduct about which the plaintiffs complain -- *i.e.*, an alleged bad faith failure to settle third-party claims.

In reinstating the $145 million punitive award,[13] the Utah Supreme Court did not simply consider evidence of similar out-of-state conduct in assessing the reprehensibility of State Farm's conduct toward plaintiffs, as might have been permis-

[13] The total current value of the punitive damage award, including the interest that has accrued since the award was rendered in 1996, is in excess of $200 million.

sible under *BMW*. Rather, it is clear from the Court's decision and the huge size of the punitive award that the Court *punished* not only State Farm's conduct toward the Campbells, but also a wide range of unrelated, dissimilar, and out-of-state conduct. Indeed, to support the punitive award, the Court cited as worthy of punishment a purported twenty-year nationwide "scheme" by State Farm to underpay insurance claims. This "scheme" was purportedly carried out through a variety of nationwide practices that plaintiffs did not show to be unlawful in the states where they occurred. In fact, many of those practices were clearly lawful in most states.

The Utah Supreme Court's reinstatement of the enormous punitive award based upon State Farm's conduct nationwide is far more pernicious than the attempted punishment of extraterritorial conduct disapproved of by this Court in *BMW*. In *BMW*, the extraterritorial conduct at issue was substantially identical to the defendant's conduct toward the plaintiff. In contrast, the Utah Supreme Court relied upon the notion of a generalized nationwide "scheme" to punish conduct and practices that bore no similarity to the specific conduct at issue. Evidence of the alleged all-encompassing "scheme" ranged from State Farm's specification of salvage and aftermarket automobile repair parts, to the prospective cancellation of hurricane insurance in Florida, to State Farm's purported discrimination against racial minorities and other vulnerable groups – none of which was at issue in this case or in any way similar to State Farm's conduct toward the Campbells. The Utah Supreme Court's punishment of dissimilar and unrelated conduct, both inside and outside of Utah, contravened the basic due process principle articulated by this Court in *BMW* that a punitive award must be reasonable in relation to the defendant's conduct toward the plaintiffs.

The "scheme" analysis relied upon by the Utah Supreme Court is predicated on a definition of "pattern" or "scheme" so generalized and broad in scope as to bring within its purview virtually any activity engaged in by an insurance company in conducting its business. If permitted to stand as precedent, the Utah Supreme Court's decision could be construed to authorize a roving inquiry into a corporate defendant's nationwide "way of doing business" (Pet. 34a) over decades whenever a plaintiff claims that the defendant's particular conduct

toward him or her was part of an improper "pattern" or "scheme." Such an unbounded expansion of the punitive damages inquiry, untethered to the claims at issue, threatens to bludgeon corporations and businesses nationwide with vast and repetitive punitive awards. Moreover, permitting a single jury to punish a corporation for its various practices and conduct nationwide impairs interstate commerce and intrudes upon the sovereignty of other states – a concern of particular importance in the present case, because the punitive damages award infringes upon the policy choices of other states in the highly regulated area of insurance. The Utah Supreme Court's analysis and decision are directly contrary to the constitutional principles set forth by this Court in *BMW* and other decisions.

The Utah Supreme Court also impermissibly distorted the three guideposts identified in *BMW* for determining whether a punitive damage award is unconstitutionally excessive. The extreme 145 to 1 ratio of punitive to compensatory damages, for example, was upheld on the basis of factors that had no relevance whatsoever to State Farm's alleged bad-faith conduct in handling the claims against Mr. Campbell. Similarly, in analyzing the guidepost of reprehensibility, the Court improperly relied upon the reprehensibility of dissimilar conduct not at issue in the plaintiffs' claims against State Farm. So, too, with respect to the third guidepost – civil and criminal penalties for comparable conduct – the Court incorrectly based its analysis upon the aggregate hypothetical penalties available for a whole range of alleged wrongdoing rather than focusing on the realistic penalties for the specific misconduct purportedly aimed at Mr. Campbell. The Court's analysis stripped the *BMW* guideposts of all meaningful constraining force upon the size of punitive damage awards.

In its prior decisions, this Court has indicated that if a defendant's conduct toward the plaintiffs is part of a pattern of *similar* repeated conduct, a higher punitive damage award may be constitutionally permissible. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 & n.28 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991); *BMW*, 517 U.S. at 577. The principle recognized by this Court is that the existence of *similar* conduct may shed light on the degree of reprehensibility of the conduct at issue. *Id.*

However, nothing in this Court's decisions suggests that due process permits a court or jury to reach out to impose a large punitive sanction against conduct by a defendant that is dissimilar and unrelated to the conduct directed toward the plaintiffs. State Farm submits that the $145 million punitive award reinstated by the Utah Supreme Court, primarily on the basis of extraterritorial and dissimilar conduct, is beyond the legitimate scope of Utah's interests in punishment and deterrence and grossly excessive as a matter of due process.

These constitutional errors were compounded by the Utah Supreme Court's improper emphasis on State Farm's "enormous" wealth nationwide as justifying the huge punitive award. A corporate defendant's wealth may not constitutionally be used to justify an inflated punitive damages award that bears no reasonable relationship to the plaintiffs' harm. For these reasons and those set forth below, State Farm respectfully submits that this Court should reverse the Utah Supreme Court's reinstatement of the punitive award and remand this case 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.

ARGUMENT

I. The Utah Supreme Court's Reinstatement of the $145 Million Punitive Award Impermissibly Punishes Out-of-State and Dissimilar Conduct, in Direct Contravention of *BMW v. Gore*

BMW makes clear that "the federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve." *BMW*, 517 U.S. at 568. This Court held that, as a matter of sovereignty and comity and of due process, "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 572, and that a punitive award "must be analyzed in the light of [conduct within the State], with consideration given only to the interests of [the State's] consumers." *Id.* at 574. Due process requires that a punitive award must be reasonably related to a State's interest in deterring and punishing unlawful conduct within its borders. *Id.* at 568.

The Utah Supreme Court's punishment of out-of-state conduct in this case went far beyond the punishment of extraterritorial conduct that this Court held constitutionally impermissible in *BMW*. All of the instances of out-of-state conduct at issue in *BMW* were substantially identical to the defendant's failure to disclose the pre-sale repair of the plaintiff's car. *Id.* at 563-64. In contrast, the Utah Supreme Court found punishable in this case an entire range of conduct over twenty years that was unrelated and dissimilar to the specific conduct giving rise to plaintiffs' claims.

Despite its professed goal of protecting Utah consumers, the Utah Supreme Court plainly intended its reinstatement of the $145 million punitive award not merely to punish State Farm for its conduct in the present case, but also to remedy "the harmful effect" of State Farm's conduct nationwide over two decades "on the larger community of all those who deal with the company."[14] Pet. 21a; *see also* Pet. 6a, 34a. In its decision, the Court relies heavily on dissimilar conduct and conduct that indisputably occurred beyond the borders of Utah. For example, the Court emphatically reiterates as a basis for the $145 million punitive award the trial court's finding that "State Farm's fraudulent practices were consistently directed to persons – poor racial or ethnic minorities, women, and elderly individuals – who State Farm believed would be less likely to object or take legal action." Pet. 18a-19a; *see also* Pet. 20a, 34a. The evidence for this charge centered on testimony regarding alleged conduct in California and Colorado. JA 992-94, 1018-20, 1023, 1100-01. This testimony was given by Ina DeLong, a former employee of State Farm Fire who primarily handled homeowners' first-party earthquake damage claims and other property damage claims in California; and Bruce Davis, who testified about the specification of non-OEM automobile repair parts and the handling of claims for hail damage to motor homes in Colorado. Neither Davis nor DeLong ever worked for State Farm in Utah.

[14] The Utah Supreme Court went even further, taking into its punitive damages calculus the purported harmful effects of the "scheme" on State Farm's employees, other insurance companies (through purported competitive pressure to adopt similar tactics), the insurance market, and ultimately "all consumers" of insurance. Pet. 23a.

DeLong admitted that in her work at State Farm Fire she had never been assigned to handle a case like the Campbell case. JA 1132. Likewise, Davis testified that in his work for State Farm in Colorado, he did not make decisions about whether to take cases to trial and did not make decisions about settlement and that his responsibilities did not include handling bodily injury claims. JA 1054-56. Neither witness had any personal knowledge of the facts of the Campbell case. JA 1047-50, 1111, 1149.

There was no evidence of any policy or practice of discrimination in Utah.[15] Indeed, plaintiffs' own witness, Samantha Bird, who worked as a claims adjuster and claims superintendent for State Farm in Utah from 1980 to 1991, testified that she never treated insureds differently because of age, race or gender, was never instructed to do so, and never trained others to do so. JA 476-77, 483-84. Moreover, the Campbells themselves never claimed, and introduced no evidence to show, that they were treated differently because of race, age, gender, or financial condition. Plaintiffs' witness Ray Summers, the former State Farm employee who handled the Campbell car accident, offered no testimony that he or any one else at State Farm "targeted" or discriminated against the Campbells.

The Utah Supreme Court's reliance on extraterritorial and dissimilar conduct was not confined to alleged acts of discrimination. In reinstating the punitive award, the Court emphasized the trial court's findings that "State Farm has systematically harassed and intimidated opposing claimants, witnesses, and attorneys" and employed "mad dog defense tactics." Pet. 19a. Just as with the purported evidence of discrimination, the testimony did not show harassment or intimidation that occurred in Utah or in connection with this case. Indeed, the only evidence of harassment or intimidation specifically discussed by the Court (Pet. 19a) was evidence of an investigation by State Farm of plaintiffs' witness Ina DeLong that occurred in California. DeLong testified that State Farm investigated her personal life shortly before she resigned from the company and again when she went to the newspapers with accusations regarding State Farm's handling of earthquake claims in California. JA 1108-09, 1163-64, 1168. That investigation was aimed at possible conflicts of interest arising out of DeLong's relationship with a contractor who did earthquake repairs and had given DeLong a color TV. The investigative report on DeLong had no connection to Utah, the Campbell case, or indeed to any litigation. The Utah Supreme Court's punishment of State Farm for investigating DeLong does not serve any legitimate Utah interest in regulation, punishment or deterrence and, as such, contravenes this Court's decision in *BMW*.[16] *See BMW*, 517 U.S. at 572-73.

Much of the evidence of purported "mad dog defense tactics" consisted of commentary by plaintiffs' expert Prater about a 1986 presentation on insurance litigation given at a conference for State Farm attorneys and claims managers by Hastings Law School Professor and Associate Dean Guy Kornblum. JA 2258-66. No showing was made that Professor Kornblum's presentation, which in fact was entirely proper (R.8821-32; L. 496-507), had any effect on the litigation of this case (or any other case). Indeed, the presentation took place three years after the trial of the third-party claims against Mr. Campbell. Likewise, although the Utah Supreme Court cites a State Farm "instruction manual for its attorneys" purportedly "mandating" them to ask claimants "personal questions" (Pet. 19a), neither the Campbells nor any other

[15] The evidence of conduct directed toward racial minorities or vulnerable persons in Utah was the testimony by former State Farm claims adjuster Ray Summers that one of his supervisors had sometimes made derogatory comments about minorities and that, in a case where a "vulnerable" young man had attempted to commit suicide by deliberately colliding with an oncoming car, Summers was instructed to deny coverage on the ground that the conduct was intentional. JA 2925-26, 2929-30.

[16] The Utah Supreme Court also relied upon, as purported evidence of harassment, testimony cited in the trial court's order by DeLong and plaintiffs' expert Fye that they found it objectionable to be deposed in every case in which they testified against State Farm. DeLong testified that she dislikes depositions conducted by a particular California lawyer and that she dislikes the bright lamps used for videotaping. JA 1168-69. Fye testified that he had been deposed three times for the present case and that he had not yet received all the payments due him from State Farm for those depositions. JA 1496-97. The deposing of Fye and DeLong in this case (even if they had been deposed by State Farm before in earlier – and factually different – cases) is not unlawful, does not constitute harassment or intimidation, and cannot justify punitive damages.

State Farm claimant in Utah testified that they had been asked any improper personal questions.

Indeed, the Utah Supreme Court throughout its decision makes clear that it is punishing State Farm not just for its treatment of the Campbells but for its alleged nationwide PP&R "scheme" (Pet. 6a, 18a, 20a, 22a, 43a) or what the Court termed State Farm's "consistent way of doing business for the last twenty years, directed specifically at some of society's most vulnerable groups." Pet. 34a. This purported "scheme" consisted almost entirely of a variety of first-party claims practices, such as the use of appearance allowances and the specification of salvage and aftermarket repair parts, that had nothing to do with State Farm's alleged failure to settle the third-party claims against Mr. Campbell. Contrary to plaintiffs' contentions, the Utah Supreme Court's listing of these practices in its discussion of Utah evidentiary issues (Pet. 37a) does not alter the fact that when the Court states it is punishing State Farm for its nationwide PP&R "scheme" or "way of doing business," these are the practices it is talking about. The Utah Supreme Court makes clear it regards these disparate practices as "part and parcel" of the PP&R scheme. Pet. 39a. The Court recognized it was punishing State Farm for this mass of alleged first-party conduct when it noted that even if the harm to the individual, Mr. Campbell, was minor, the harm was "'massive in the aggregate.'" Pet. 22a. That State Farm was tried and punished for its conduct nationwide is also demonstrated by plaintiffs' counsel's opening statement, in which he expressly urged the jury to punish State Farm "for what it's doing across the country." JA 242.

As evidence of State Farm's alleged nationwide "scheme," plaintiffs presented testimony regarding a wide variety of first-party claims practices that plaintiffs did not show to be unlawful in the state(s) where they occurred. Many of those practices were in fact standard in the industry (JA 327, 1995, 2119) and clearly lawful in most states. For example, the use of appearance allowances to settle claims for minor damage to vehicles is a lawful practice in nearly all states; deductions for depreciation and/or betterment on property damage claims are expressly permitted, subject to varying regulations, in at least 27 states; and the use of market surveys (fair market value) to settle total loss claims is permitted or recommended

in at least 24 states and forbidden in only three states (in which State Farm accordingly does not engage in the practice).[17] Likewise, State Farm's prospective cancellation of hurricane coverage in Florida was authorized under Florida law. *See* Fla. Stat. Ann. §§ 624.430, 626.9201, 215.555.

Plaintiffs also attacked State Farm's specification of non-OEM parts and used or "salvage" parts for the repair of its insureds' automobiles. Non-OEM parts are repair parts made by companies not affiliated with the "original equipment manufacturer," *i.e.*, the car manufacturer. Plaintiffs elicited extensive testimony as to State Farm's specification of non-OEM parts in Alabama, Arkansas, Colorado, California, Florida, Tennessee, Texas, and elsewhere. *See supra* at 8. Specification of non-OEM parts is expressly allowed, subject to varying regulations, in those states, as well as in most other states.[18] No state prohibits the specification of non-OEM

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[17] A fifty-state survey pertaining to these issues (which State Farm submitted to the Utah courts) appears at R.8930-43 (L.580-93). A number of state statutes and regulations not listed in the survey also expressly permit these practices, subject to varying regulatory requirements: deductions for depreciation and/or betterment, *see* Ga. Comp. R. & Regs. r. 120-2-52-.04(2); Haw. Rev. Stat. Ann. § 431:10C-313(c); S.D. Ins. Bull. 98-7 (Oct. 1, 1998); Vt. Code R. 21 020 008(7)(B); use of market surveys (fair market value): Ga. Comp. R. & Regs. r. 120-2-52-.06; Haw. Rev. Stat. Ann. § 431: 10C-311; Mont. Code Ann. § 33-23-202; N.J. Admin. Code tit. 11, § 3-10.4; 31 Pa. Code § 62.3(e)(iii).

[18] *See, e.g.*, Ala. Code § 32-17A-3; Ark. Code Ann. § 4-90-305; Colo. Rev. Stat. § 10-3-1305; Conn. Gen. Stat. § 38a-355; Fla. Stat. Ann. § 501.33; Ga. Comp. R. & Regs. r. 120-2-52-.05; Haw. Rev. Stat. § 431:10C-313.6; Idaho Code § 41-1328D; Ind. Code § 27-4-1.5-8; Iowa Admin. Code r. 191-15.15(507B); Kan. Stat. Ann. §§ 50-661 & 662; La. Rev. Stat. Ann. § 51:2424; Mich. Comp. Laws § 257.1363; Miss. Code Ann. § 63-27-5; N.H. Rev. Stat. Ann. § 407-D:4; Ohio Rev. Code Ann. § 1345.81; Okla. Stat. Ann. tit. 15, § 955; Or. Rev. Stat. §§ 746.287 & 292; 31 Pa. Code § 62.3(b)(10); Tenn. Comp. R. & Regs. 0780-1-59-.04; Utah Code Ann. § 31A-22-319; W. Va. Code § 46A-6B-3. Sixteen other states that expressly permit specification of non-OEM parts are listed in the survey at R.8930-43. State legislatures and regulators have made policy determinations to allow the specification of non-OEM parts because they lower repair costs and hold down premium payments. *See Berry v. State Farm Mut. Auto. Ins. Co.*, 9 S.W.3d 884, 887, 891-92 (Tex. Ct. App. 2000) (Texas permits insurers to use non-OEM parts in preparing repair estimates); *cf. Exeter v. GEICO Gen. Ins. Co.*, No. 47677-7-1, 2001 WL

(continued...)

parts. Likewise, the specification of used or salvage parts is permitted and regulated in many states.[19]

In addition, plaintiffs' counsel and witnesses portrayed as wrongful many other entirely lawful acts, such as the use of a high-low settlement agreement in an arbitration in California (JA 2196-97); the use of a computer program for automobile repair estimates in Colorado and elsewhere (JA 1029-32, 2865-66); the settlement of cases after trial for less than the amount of the verdict (JA 3231); the use of IME doctors[20] (JA 2209-10); and claims negotiations in which State Farm offered less initially than the "top dollar" it was ultimately willing to pay (JA 233). As this Court's decision in *BMW*, 517 U.S. at 572-73, makes clear, due process prohibits a court from awarding punitive damages to deter and punish lawful conduct. *See also Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort").[21]

In sum, it is clear from the Utah Supreme Court's decision and the exorbitant amount of the reinstated punitive award that the Court was acting to punish not only State Farm's conduct toward the Campbells but also a wide array of dissimilar, lawful and out-of-state conduct, in contravention of *BMW*

[18] (...continued)
1530948, at *4 (Wash. Ct. App. Dec. 3, 2001) (Washington allows specification of non-OEM parts).

[19] *See, e.g.*, Cal. Ins. Code § 1874.87; Ind. Code § 27-4-1.5-8(b)(2)(C); Iowa Admin. Code r. 191-23.11(516E); Mass. Regs. Code tit. 211, § 133.04; Minn. Stat. Ann. §§ 72A.201(6)(2), 72B.091(2); Ohio Rev. Code. § 1345.81(D); *Tomes v. Nationwide, Ins. Co.*, 825 S.W.2d 284, 285 (Ky. Ct. App. 1991); *Berry*, 9 S.W.3d at 887 n.2 (Texas).

[20] *See, e.g., Prince v. Bear River Mut. Ins. Co.*, No. 20010298, 2002 WL 1610562, at *8 (Utah July 23, 2002) (denying insurance benefits in reliance upon medical examiner's report is not bad faith even if the opinion is provided in exchange for remuneration); *Brito v. Liberty Mut. Ins. Co.*, 687 N.E.2d 1270, 1272-73 (Mass. Ct. App. 1999) (upholding insurer's IME requirement); *Huntt v. State Farm Mut. Auto. Ins. Co.*, 527 A.2d 1333, 1335-37 (Md. Ct. Spec. App. 1987) (same).

[21] To the extent that any of the out-of-state conduct in question is unlawful in the state(s) where it occurred, the Utah Supreme Court's punishment of that conduct is also constitutionally improper. *See* Point IV *infra*.

and State Farm's basic due process rights.

II. The Utah Supreme Court's Reliance upon a Purported Nationwide "Pattern" of Conduct Contravenes Fundamental Due Process Principles

The Utah Supreme Court attempted to justify its punishment of out-of-state and dissimilar conduct by characterizing each instance of alleged corporate wrongdoing as part and parcel of an over-arching "pattern" or "scheme" of nationwide misconduct. Pet. 6a, 18a, 20a, 22a, 43a. This approach could be construed to permit a plaintiff to recover massive punitive damages based upon every alleged wrongful act committed nationwide by a corporate defendant over decades, so long as the specific wrongdoing of which the plaintiff complains can be rhetorically linked to the generalized "pattern" or "scheme" of corporate malfeasance defined by the plaintiff. It would be as if the plaintiff in *BMW* had resorted to the rhetorical fiction that the defendant's failure to disclose the pre-sale repair of his car was part of a generalized "pattern" or "scheme" to maximize profits by all sorts of deceptive practices. Had the plaintiff in *BMW* defined the alleged wrongdoing in this catch-all manner, the approach taken by the Utah Supreme Court herein would have allowed a broad panoply of corporate acts to be introduced into evidence and punished by the jury, notwithstanding the fact that much or all of such conduct would have had nothing to do with the specific wrongdoing in the case – at least when considered at any rational level of specificity and concreteness. Such an open-ended expansion of the punitive damages inquiry eviscerates the constitutional constraints on punitive damages set forth by this Court in *BMW*.

Moreover, as a factual matter, the Utah Supreme Court's characterization of the conduct in this case as part of a "pattern" is incorrect. If State Farm's conduct toward the Campbells had been part of a twenty-year "pattern" of repeated practices, that conduct itself would have been repeated. It was not. The excess verdict against Mr. Campbell following State Farm's decision not to settle within policy limits was the only case in Utah in which a State Farm insured was exposed to the possibility of execution on an excess judgment. Not only was there no pattern of improper failure to settle by

State Farm, but this single failure to settle within policy limits cannot rationally be considered to form part of any nationwide "pattern" of alleged wrongful business practices.

In relying upon the purported "pattern," the Utah Supreme Court also disregarded the significant legal and factual differences that set apart an insurer's decision to take third-party claims against one of its insureds (such as Mr. Campbell) to trial from ordinary first-party claims handling practices. In making the decision to refuse an offer to settle third-party claims within policy limits, an insurer evaluates a range of case-specific factors, such as the apparent strength of the plaintiffs' case and the insured's defenses (including the credibility of witnesses and likely legal rulings). *See, e.g.*, 14 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 206:16-:18 (3d ed. 1999) (discussing insurer's duty to evaluate circumstances of case). That decision also involves a special duty on the part of the insurer to act in due consideration of the interests of its insured because of the risk to the insured of a verdict in excess of policy limits.[22] *See North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W.2d 824, 828-29 (Iowa 1991); *Spencer v. Aetna Life & Cas. Ins. Co.*, 611 P.2d 149, 154-55 (Kan. 1980); *Lawton v. Great Southwest Fire Ins. Co.*, 392 A.2d 576, 580-81 (N.H. 1978).

No analogous considerations are present with regard to the various first-party claims handling practices upon which plaintiffs relied in attempting to prove their entitlement to a large punitive award. *See* 14 Russ & Segalla, *supra*, § 198:3 ("The most obvious distinction in the claims handling context is that first-party insurance . . . does not involve any need for, or duty to, defend the insured. Likewise, the concept of a

[22] When a third party asserts claims against an insured, the insurer's obligation is to protect the interests of the insured, not the interests of the third party. *See, e.g., Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 150 (Tex. 1994) (insurer owes no statutory or other duty to third-party claimant); *Larocque v. State Farm Ins. Co.*, 660 A.2d 286, 288 (Vt. 1995) (relationship between insurer and third party asserting claims against insured "is by nature adversarial"; insurer has "no obligation . . . to conform to a particular standard of conduct with respect to [third party]"); *Kleckley v. Northwestern Nat'l Cas. Co.*, 526 S.E.2d 218, 219-20 (S.C. 2000) (no third-party action for bad-faith refusal to pay insurance benefits); *Sperry v. Sperry*, 990 P.2d 381, 383-84 (Utah 1999) (same).

'duty to settle' necessarily describes very different things when applied to a third-party context in which any settlement is with the third-party claimant, as opposed to a first-party context in which any settlement is with the insured or a beneficiary."); *see also Lawton*, 392 A.2d at 580-81 (differentiating between refusing to settle third-party claims and first-party claims handling); *North Iowa State Bank*, 471 N.W.2d at 828-29 (same); *Spencer*, 611 P.2d at 154-55 (same).

Thus, the factors to be considered by an insurer in deciding whether to settle or defend a third-party claim have no applicability to the claims handling practices that plaintiffs so extensively canvassed before the jury. The specification of non-OEM parts, the use of appearance allowances, and other first-party claims handling practices have nothing to do with State Farm's isolated decision to decline to accept the offer by the third parties here to settle their claims against Mr. Campbell, the subsequent excess verdict, and the other unique circumstances of this case.

Moreover, the disparate practices that plaintiffs sought to punish as part of the purported nationwide PP&R "scheme" have no relevance even to each other. Issues concerning the propriety of the specification of non-OEM parts have no bearing on issues regarding the appropriateness of "first contact" settlements or appearance allowances. Plaintiffs' contentions that these separate and discrete practices comprised a unitary "scheme" do not withstand scrutiny. A company's adoption of a number of different money-saving practices does not constitute a unitary, improper "scheme" by virtue of the fact that those different practices are referenced as goals in employee evaluation forms.[23] This is particularly so in

[23] The Utah Supreme Court incorrectly refers to "caps" on claim payment amounts. Pet. at 6a, 18a. For a period of time, the PP&R forms included *goals* that related to, *inter alia*, average claim payments; the forms never set caps on particular claims or mandated particular outcomes as to particular claims. *See* Ex. 51-P, trial pp. 147, 160, 187-90, 228; JA 1361-62. Indeed, plaintiffs' expert Fye acknowledged that, far from decreasing, State Farm's average amount paid per claim increased steadily after the PP&R program went into effect. JA 1444-45. Moreover, despite plaintiffs' claims that State Farm generated large "profits" from its claims handling, the evidence at trial showed that State Farm

(continued...)

view of the fact that the PP&R forms submitted into evidence at trial showed no consistent approach to these goals – some PP&R's contained no allegedly improper goals; some PP&R's contained one or more such allegedly improper goals, such as increasing "first contact" settlements (Ex. 51-P, trial pp. 385, 393, 446) or specifying non-OEM or salvage parts "in appropriate cases" (Ex. 50-P, p. 03647; JA 1361); and all the PP&R's contained other goals that had no connection to the purported "scheme," such as (in the case of plaintiffs' witness Bruce Davis) spending less time on the telephone (JA 1052) or (with respect to witness Michael Arnold) "enhanc[ing] customer service through timely response to customer complaints" and "continu[ing] to hire or promote a diverse work group."[24] Ex. 51-P, trial p. 28. No PP&R was shown to have influenced the decision by State Farm employees to take the third-party claims against Mr. Campbell to trial.

The Utah Supreme Court's imposition of huge punitive damages on State Farm as an institution for a twenty-year "scheme" or "pattern" of conduct dissimilar and unrelated to the conduct underlying plaintiffs' claims contravenes a fundamental principle of this Court's due process jurisprudence: that the punishment must be proportional to the defendant's conduct directed toward the plaintiffs. *See BMW*, 517 U.S. at 575 & n.24 ("[t]he principle that punishment should fit the

[23] (...continued)
incurred underwriting losses (the amount by which claims payments exceed the premiums collected from policyholders) during the years at issue, going from a net underwriting profit in 1980 to net underwriting losses of $1.2 billion in 1985 and $1.5 billion in 1989. Ex. 48-P, trial p. 76; JA 1369; Ex. 57-P, trial pp. 33, 65; JA 1436. Further, although plaintiffs' experts testified that the use of goals related to claims payments was "taboo in the insurance industry," "inherently wrong," and "creat[es] a corporate culture that is predatory" (*see* Br. in Opp. to Certiorari at 7), plaintiffs did not establish that the use of such goals was unlawful in any state.

[24] Other goals listed on the PP&R forms introduced at trial included "obtain adequate narrative reports from attending doctors as early as possible in the handling of BI [bodily injury] files to be in a position to settle when the claimants desire to make a settlement" (Ex. 51-P, trial p. 839), "consolidate business trips in the company car to reduce mileage driven" (*id.*), and "continue to recommend unrepresented claimants see competent orthopedics or neurologists." Ex. 51-P, trial p. 1587.

crime 'is deeply rooted and frequently repeated in common-law jurisprudence'") (citations omitted); *Solem v. Helm*, 463 U.S. 277, 284, 290 (1983) ("a criminal sentence must be proportionate to the crime for which the defendant has been convicted"); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."). *See also Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979) (finding punitive award excessive where it apparently punished defendant "for all wrongs committed against all purchasers and users of its products, rather than for the wrong done to this particular plaintiff"), *modified on reh'g*, 615 P.2d 621 (Alaska 1980) (reducing original punitive award of $2,895,000 to $500,000 instead of $250,000).

In cases such as the instant one where the defendant is a national corporation, providing mass marketed products or services, this requirement of proportionality of punitive damages to the conduct directed toward the plaintiff serves the additional "important purpose . . . [of] prevent[ing] multiple recovery at the defendant-seller's expense by insuring that the plaintiff collects only his proportion of the punitive damages." *Martin v. Johns-Manville Corp.*, 494 A.2d 1088, 1099 (Pa. 1985); *accord Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 856-57 (M.D. Pa. 1974). There is a fundamental unfairness in allowing one policyholder to collect punitive damages for conduct directed at others who are not before the court and who are free subsequently to seek punishment for the same conduct. If the Utah Supreme Court's reinstatement of the punitive award in this case were permitted to stand, State Farm could be punished in other states and other cases for the same national conduct punished in this case, resulting in excessive, repetitive, and overlapping punitive awards.

The trial of claims against a corporate defendant for punitive damages on a nationwide "institutional" level, as was done in this case, represents a radical departure from the protections inherent in the traditional litigation model and creates an unreasonable risk of arbitrary punitive awards. *Cf. BMW*, 517 U.S. at 594 (Breyer, J. concurring) (looking to "historic practice" or understanding to assess constitutionality of punitive award). In traditional litigation, 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." John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 141 (1986). Thus, "[a]lthough not constrained by the same procedural requirements as other forms of punishment, punitive damages at least were based on a manageable jury inquiry" that served to anchor punitive damages to the underlying claims and injuries of the plaintiffs. *Id.*

The huge punitive damages award in this case was not the product of a system of standards constrained by "historic practice" or understanding. Rather, the Utah Supreme Court approved a procedure that permitted the Campbells, through their claim for punitive damages, to put State Farm on trial as an institution for its conduct nationwide, whether lawful or unlawful, for over twenty years. The precedent set by the Utah Supreme Court subverts the central due process requirements of fairness, proportionality and reasonableness and exposes corporations and businesses to vast and repetitive punitive awards. This result contravenes the principles set forth in *BMW* and warrants reversal by this Court.

III. The Utah Supreme Court's Misapplication of the *BMW* Guideposts Violates Due Process

The Utah Supreme Court's decision fundamentally misapplies the three guideposts identified by this Court in *BMW* for determining whether a punitive damage award is unconstitutionally excessive. The Utah Supreme Court's erroneous interpretation of the three guideposts removes all meaningful due process constraints on the size of punitive awards and produced an arbitrary and unconstitutional result here.

A. The Extreme 145 to 1 Ratio Approved by the Utah Supreme Court Contravenes Due Process

In *BMW*, this Court held that "exemplary damages must bear a 'reasonable relationship' to compensatory damages." *BMW*, 517 U.S. at 580. Indeed, "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *Id.* Application of this guidepost should serve to focus a court's attention on "the relationship between the penalty and the harm to the victim caused by the defendant's

actions," *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001), thus tying the punitive award to the facts underlying the plaintiffs' claims. Although this Court in *TXO* upheld a punitive award where "the relevant ratio was not more than 10 to 1,"[25] *BMW*, 517 U.S. at 581, the Court has stated that a punitive damage award of four times the amount of compensatory damages is "'close to the line'" in terms of constitutional propriety. *Id.* at 581 (quoting *Haslip*, 499 U.S. at 23-24).

In this case, the $145 million punitive award reinstated by the Utah Supreme Court stands in a 145 to 1 ratio to the remitted compensatory damages of $1 million.[26] As this Court noted in *BMW*, "[e]lementary notions of fairness in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose." *Id.* at 574. State Farm certainly did not have adequate notice of the magnitude of the penalty that Utah might impose. The punitive award is $141 million more than the highest punitive award ($4 million) previously sustained in Utah after appellate review. *See Crookston v. Fire Ins. Exch.*, 860 P.2d 937, 938, 940 (Utah 1993). In the 1980s (when State Farm's conduct toward the Campbells occurred), Utah punitive awards rarely exceeded $100,000, and the acceptable ratio for larger punitive awards was generally "less than 3 to 1." *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 810 (Utah 1991).

While this Court has indicated that a "'mathematical bright line'" cannot be drawn "'between the constitutionally acceptable and the constitutionally unacceptable,'" *BMW*, 517 U.S. at 583 (quoting *Haslip*, 499 U.S. at 18), the 145 to 1 ratio in

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[25] The Utah Supreme Court incorrectly identified the relevant ratio in *TXO* as being a 526 to 1 ratio. Pet. 30a.

[26] Although plaintiffs in opposing *certiorari* claimed that the ratio was "at most 70 to 1" (Opp. at 24), plaintiffs' counsel, Laurence Tribe, specifically acknowledged in oral argument post-trial "the 145 to 1 ratio of the punitive damages in this case to the compensatory award, as reduced" by the trial court. R.10293:235; L.924; *see also id.* at 231 ("of course here the ratio is 145 to 1"); L.920. Moreover, both Utah courts recognized that, for the application of the *BMW* guideposts, the compensatory damages here are $1 million. Pet. 144a, 27a n.9. Thus, the ratio of the reinstated punitive award to compensatory damages is 145 to 1.

this case is clearly well over the constitutional limit. Indeed, the 145 to 1 ratio is far in excess of ratios that have been overturned as unconstitutional by United States Courts of Appeals, as well as by state courts of last resort, in cases such as this one where substantial, not nominal, compensatory damages have been awarded.[27]

The Utah Supreme Court's ratio analysis was skewed by its focus not on the facts relevant to the Campbells, but on purported facts relevant only to plaintiffs' "institutional case" against State Farm. For example, the Court emphasized what it stated was a "fact" found by the trial court – that "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability." Pet. 30a, 34a. The trial court never made such a finding.[28] Plaintiffs' 1 in 50,000 figure was based upon testimony by Ina DeLong regarding purported underpayments of first-party fire and automobile claims[29] and had no relevance to third-party excess verdict

[27] *See, e.g., Watkins v. Lundell*, 169 F.3d 540, 546 (8th Cir. 1999) (characterizing ratio of 14.89 to 1 as very high and ratio of 4 to 1 as constitutionally appropriate); *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 639 (10th Cir. 1996) (under *BMW*, ratios between 4 to 1 and 10 to 1 are constitutional; ratio generally cannot exceed 10 to 1); *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 504-05 (S.D. 1997) (rejecting 13.5 to 1 ratio). Indeed, even in cases where courts have found that the defendant's conduct toward the plaintiffs was highly reprehensible, ratios much lower than the 145 to 1 ratio in this case have been rejected as too high. *See, e.g., Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155, 179-80 (Mo. Ct. App. 1998) (where compensatory damages were large, ratio of 27 to 1 was excessive under *BMW* despite reprehensibility of conduct, which caused a death); *Orkin Exterminating Co. v. Jeter*, No. 1000710, 2001 WL 1391443, at *12-15 (Ala. Nov. 9, 2001) (10 to 1 ratio was excessive despite "highly reprehensible" conduct).

[28] Indeed, in preparing its order, the trial court deleted a proposed finding by the plaintiffs that contained this supposed "fact." *Compare* R.9941 ¶ 48 (left column) (L.689) *with* Pet. 122a, ¶ 48.

[29] Plaintiffs improperly sought to derive the 1 in 50,000 figure from DeLong's testimony as to "how many people who are underpaid actually discover it and pursue it" in State Farm's "fire and auto claims handling." JA 1103-04. DeLong testified that "only 2 out of 10 would actually come back and try to get more on their claim," that "a lot of that 20 percent will actually get the right amount paid to them," and that only 1 in

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cases, like the Campbell case. An insurance company's refusal to settle third-party claims within policy limits is far from "clandestine." Moreover, such a refusal to settle can be wrongful only if, *inter alia*, it leads to an excess verdict, and it will hardly escape a policyholder's notice that an excess verdict has been rendered against him or her at trial. Indeed, according to the testimony of plaintiffs' expert Gary Fye (JA 1479-80), whenever a third-party claim results in an excess verdict against an insured, it is "typical" for the plaintiff's lawyer to approach the insured and arrange to pursue the insured's potential bad faith claim against his or her insurer – exactly as happened in the Campbell case. *See also* James Bauman, *Emotional Distress Damages and the Tort of Insurance Bad Faith*, 46 Drake L. Rev. 717, 746-47 (1998) (describing "well-programmed" steps in third-party bad faith cases from an insurer's refusal to settle within policy limits, the excess verdict, and the assignment of the insured's bad faith failure to settle claim to the plaintiffs in return for a covenant not to execute on the judgment). The 1 in 50,000 figure is completely inapplicable to third-party excess verdict cases.[30]

[29] (...continued)
100 "would actually proceed to get an attorney and file a lawsuit." *Id.* Of those who filed a lawsuit, only 1 in 100 "would then make it to trial." *Id.* at 1104. Plaintiffs provided no documentary evidence supporting DeLong's testimony in this regard. In any case, these numbers clearly represent purported underpayments of first-party claims and have no applicability to policyholders who have excess verdicts rendered against them on third-party claims.

[30] The Utah Supreme Court's reliance on the 1 in 50,000 number also is not supported by economic theories of deterrence. Under the standard assumptions of such theories, "the imposition of damages equal to harm, appropriately multiplied to reflect the probability of escaping liability, achieves proper deterrence." A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 906 (1998). Determining the multiplier and the probability of escaping liability, of course, may depend on the way in which conduct is categorized. *Id.* at 893. The question is, for purposes of deterrence, "[s]hould categorization be narrow, with separate multipliers employed for different types of [occurrences], or be broad, with a single multiplier employed?" *Id.* Professors Polinsky and Shavell explain that for optimum deterrence "narrow definitions" and "separate multipliers" tailored to the conduct at issue should be used. *Id.* In the instant case, the Utah Supreme Court

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Similarly, the Utah Supreme Court incorrectly characterized the injury here as one in which, under *BMW*, a higher ratio might be justified because "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" Pet. 29a-30a (quoting *BMW*, 517 U.S. at 582). The Utah Supreme Court is clearly incorrect: far from being difficult to detect, the injury to the Campbells – namely their potential personal liability for a verdict in excess of their insurance coverage with their attendant emotional distress – was immediately apparent when the excess verdict against them was rendered. Indeed, Ospital and Slusher's attorneys in the underlying case against Mr. Campbell, who later became the Campbells' attorneys, were already laying the groundwork for the Campbells' lawsuit against State Farm even before the excess verdict against Mr. Campbell was rendered. *See supra* at 2. Furthermore, the jury had no trouble assessing the Campbells' noneconomic harm, awarding the Campbells $2.6 million in emotional distress damages, which the trial court remitted to $1 million. Thus, contrary to the Utah Supreme Court's assertion, this case did not present the factors noted by this Court in *BMW* as supporting a higher ratio: plaintiffs' injury was not concealed and the compensatory damages were not small or hard to determine. *See BMW*, 517 U.S. at 582.

In defending the 145 to 1 ratio, the Utah Supreme Court also erroneously relied upon the purported fact that State Farm "ha[d] not changed its conduct despite a previous $100 million punitive damage award" in Texas. Pet. 34a; *see also* Pet. 17a, 30a. That $100 million award was never entered by

[30] (...continued)
erroneously seized upon a multiplier based on testimony regarding a broad category of various first-party claims handling practices not at issue in the Campbell case. In fact, under standard economic deterrence theories, no punitive damages at all would be warranted for deterrence in cases such as this, because (as the testimony of plaintiffs' expert Fye indicates (JA 1293)) an insured who suffers an excess verdict through an insurer's failure to settle within policy limits will "typically" bring suit against the insurer unless the insurer pays the excess judgment. Indeed, the $1 million compensatory award has a substantial deterrent effect in itself, because it is far in excess of the amount (the $50,000 policy limit minus the cost of litigation) State Farm could have hoped to save by litigating rather than settling the third-party claims against Mr. Campbell.

the Texas trial court and never binding on State Farm because State Farm entered into a settlement agreement with the Texas plaintiff for pennies on the dollar. Moreover, the $100 million award was made by a Texas jury in a case involving first-party claims by a State Farm insured for underinsured motorist coverage. *See supra* at 11. The Texas case had no similarity whatsoever to the present case and therefore lends no rational support to the notion that a large award was needed to deter the conduct at issue in the present case. *See Leab v. Cincinnati Ins. Co.*, No. 95-5690, 1997 WL 360903, at *13 (E.D. Pa. June 26, 1997) (earlier punitive award did not support higher ratio where there were "significant differences" in facts of earlier case).

In addition, the Utah Supreme Court improperly attempts to tie the Texas case to this case through the testimony of regional vice-president Buck Moskalski that he himself would not report the punitive award in this case to State Farm headquarters – ignoring the uncontradicted fact that it rested with Mr. Moskalski to decide upon and take corrective measures in Utah in response to the case and that Mr. Moskalski in fact did so. JA 1848-55, 1887. Indeed, at no time since the trial of Mr. Campbell's case has any State Farm policyholder in Utah been exposed to personal liability on an excess verdict through State Farm's decision to proceed to trial rather than accept an offer to settle within policy limits. Mr. Moskalski testified that in the five excess verdict cases in Utah since 1989, State Farm had determined it should bear the responsibility for its decision to proceed to trial and either paid the excess verdicts in full or settled with the third-party claimants so that the insureds paid nothing. JA 1851-52. Mr. Moskalski also testified as to his decision made during the trial to formalize State Farm's policy of paying excess verdicts by sending letters to insureds prior to trial, promising to pay any compensatory damages that a jury might award in excess of policy limits. JA 1854, 1890. State Farm sends such letters to policyholders in Utah and other states whenever it decides to take such a case to trial.[31] The Utah Su-

[31] *See* R. 8988, 8991, 8997-99 (L.594-98); "Peace of Mind" Letters filed as Addendum 2 to State Farm's Petition for Rehearing to the Utah Su- (continued...)

preme Court's refusal to give weight to Mr. Moskalski's unrebutted testimony in this regard (Pet. 24a) was inconsistent with the Court's obligation under *BMW* to consider whether "less drastic remedies" than the $145 million punitive award could have been expected to deter future conduct of the kind directed toward the Campbells, or, indeed, whether any deterrence at all was needed. *See BMW*, 517 U.S. at 584; *see also id.* at 565-66 (noting that "[b]efore the judgment in this case, BMW changed its policy by taking steps to avoid the sale of any refinished vehicles in Alabama and two other States").

In sum, the Utah Supreme Court's approval of the 145 to 1 ratio in this case is inconsistent with this Court's decision in *BMW* and federal and state decisions following *BMW*. The Court did not focus only on the actual harm to the Campbells, as required under *BMW* and *Cooper*, but expressly noted "the harmful effect on the larger community of all those who deal with the company" and the "far-reaching negative effects on both its [the company's] insureds and society in general." Pet. 21a, 43a. The Court's ratio analysis is symptomatic of the larger error in its decision, namely, its punishment and deterrence of a whole range of extraterritorial and dissimilar conduct not at issue in plaintiffs' claims against State Farm.

B. The Utah Supreme Court's Analysis of the Reprehensibility Guidepost Impermissibly Relies Upon the Alleged Reprehensibility of Dissimilar Conduct, in Contravention of *BMW*

In *BMW*, 517 U.S. at 575-76, and *Cooper*, 532 U.S. at 440-41, this Court required courts to consider the degree of reprehensibility of the defendant's conduct toward the plaintiffs as a guidepost for the evaluation of the constitutional propriety of a punitive damages award. The Utah Supreme Court's extensive reliance upon dissimilar conduct, described above, resulted in a fundamental misapplication of the reprehensibility guidepost.

The Utah Supreme Court's reliance on such conduct went

[31] (...continued)
preme Court, dated November 16, 2001 (L.599-607).

far beyond the constitutionally permissible use of repeated, similar conduct as described in this Court's prior decisions on punitive damages. This Court has indicated that "repeated misconduct" may be "more reprehensible than an individual instance of malfeasance," *BMW*, 517 U.S. at 577, and that "'the existence and frequency of *similar* past conduct'" may be considered in determining the maximum amount of punitive damages that is constitutionally permissible for conduct in a given case. *See TXO*, 509 U.S. at 462 n.28 (emphasis added) (quoting *Haslip*, 499 U.S. at 21-22). The principle recognized by this Court is that consideration of similar conduct by a defendant may assist the court or the jury in evaluating the relative reprehensibility of the defendant's conduct. Accordingly, in *BMW*, 517 U.S. at 563-64, in evaluating the reprehensibility of BMW's failure to disclose pre-sale repairs to Dr. Gore's car, this Court considered documented instances of substantially identical failures by BMW in Alabama to disclose pre-sale repairs. Likewise, in *TXO*, 509 U.S. at 450-51, this Court made clear that the defendant's conduct consisted of "*similar* nefarious activities in business dealings." (emphasis added). *See also Haslip*, 499 U.S. at 14 (noting that "Pacific Mutual had received notice that its agent Ruffin was engaged in a pattern of fraud *identical* to those perpetrated against respondents") (emphasis added).

Thus, "the existence and frequency of *similar* past conduct," *TXO*, 509 U.S. at 462 n.28, might justify imposing punitive damages at the higher end of the constitutionally permissible range of ratios[32] for the defendant's conduct toward the plaintiffs. No such instances of similar conduct exist in the present case. Indeed, it is uncontradicted that Mr. Campbell's case was the *only* one in Utah in which an insured faced the possibility of personal liability for an excess verdict as a result of a decision by State Farm not to settle third-party claims within policy limits.[33] In analyzing reprehensibility,

[32] As noted above, while this Court approved a ratio of "not more than 10 to 1" in *TXO*, this Court has indicated that a ratio of 4 to 1 is "close to the line" of what is constitutionally permissible. *BMW*, 517 U.S. at 581.

[33] Plaintiffs in opposing certiorari (Opp. at 23) attacked the unrebutted testimony of State Farm's witnesses, who made clear that the Campbell
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however, the Utah Supreme Court did not make the constitutionally appropriate inquiry as to whether State Farm had shown a pattern of acting in bad faith in exposing insureds to excess verdicts – which it had not. Rather, the Court clearly assessed the reprehensibility of State Farm's unrelated and dissimilar nationwide conduct over two decades and relied upon the reprehensibility of that conduct as the basis for reinstating the huge punitive damages award.

Thus, in analyzing reprehensibility, the Utah Supreme Court cited, *inter alia*, State Farm's two-decades long "PP&R scheme," State Farm's purported concealment or destruction of documents,[34] purported discrimination, and purported harassment and intimidation of opposing claimants, witnesses, and attorneys. Pet. 18a-19a, 29a. As discussed above, such

[33] (...continued)
case was the only third-party excess verdict case in Utah in which a State Farm insured was exposed to personal liability. JA 287-97, 1851-52. State Farm's witnesses were able to testify with precision as to Utah excess verdicts because the trial court ordered and State Farm carried out a state-wide search for records and documents regarding such cases. JA 287-95; R.4553-54; R.5102-03; R.10247:65-68; L.174-86. There is no reason to suppose that there are other hidden excess verdicts against State Farm insureds that nobody knows about. Plaintiffs' witness Samantha Bird, a former State Farm claims superintendent in Utah, testified that neither she nor anyone she supervised had *ever* had a trial result in a verdict higher than State Farm's highest settlement offer. JA 472-73.

[34] Notably, after the close of evidence, the trial court gave little credence to the plaintiffs' allegations that State Farm had deliberately ordered documents destroyed to avoid their discovery in this case. The trial court refused to give a spoliation instruction, stating (JA 3167-68):

> The documents that have been produced that were thought to have been destroyed do not give rise to the worst inferences that the Plaintiffs would have us draw that they are harmful and that State Farm purposely destroyed them in the face of an existing discovery order to avoid their being seized in discovery and presented to the jury. I just don't think there has been a showing that that has happened . . . . And I frankly am of the view, whether it's relevant or not on this issue, that Moskalski didn't do it fully recognizing that there was a bad-faith case in which there was a discovery order and that was a way to get rid of documents that should properly be produced. I don't think that's what was going on in his head . . . .

conduct cited by the Court was irrelevant to State Farm's treatment of the Campbells, who made no allegation and presented no evidence that they were discriminated against because of age, race or poverty and who presented no evidence that State Farm harassed or intimidated them or their witnesses and attorneys in connection with this case.

Furthermore, even assuming that this and all the other conduct cited by the Utah Supreme Court could be said to form a "pattern," the dissimilar acts supposedly making up that "pattern" could not shed light on the conduct at issue here. Evidence of cancellation of hurricane coverage in Florida does not shed light on State Farm's handling of the third-party claims in this case. Nor is the evidence of the specification of non-OEM parts, and the host of other conduct that supposedly made up State Farm's "pattern" of conduct nationwide, in any way relevant to the specific conduct in this case. The Utah Supreme Court's "institutional" approach to weighing reprehensibility would allow every plaintiff suing a business or corporation to attempt to show reprehensibility by putting on the same kind of "institutional case," based on the corporation's disparate practices nationwide over decades, regardless of whether those practices were similar to the conduct directed toward the plaintiff. Such a procedure would improperly multiply the opportunities for massive repetitive punitive awards unrelated to the facts of the particular case.

Moreover, contrary to plaintiffs' contentions, the Utah Supreme Court's conclusions regarding reprehensibility do not constitute factual findings that are owed deference by this Court. Rather, the Utah Supreme Court committed legal constitutional errors in basing its reprehensibility analysis upon "improper predicate[s]" and "questionable conclusions" that cannot "survive *de novo* review." *Cooper*, 532 U.S. at 441-42. Clearly, due process mandates that the reprehensibility analysis focus on the defendant's specific conduct toward the plaintiffs and does not permit a roving inquiry into the defendant's general reprehensibility as an "institution" over twenty years. The Utah Supreme Court's misapplication of the *BMW* reprehensibility guidepost resulted in an award of punitive damages "run wild" and warrants reversal. *See TXO*, 509 U.S. at 475 (O'Connor, J., dissenting) ("time and again, this

Court and its Members have expressed concern about punitive damages awards 'run wild'"); *Haslip*, 499 U.S. at 18 (same).

C. The Utah Supreme Court Erroneously Justified the Punitive Award in this Case through a Comparison to Penalties Available for Multiple Instances of Other Conduct Unrelated to the Campbells' Claims

The Utah Supreme Court also failed to adhere to *BMW*'s third constitutional guidepost – i.e., an analysis of civil and criminal penalties for comparable conduct. *See BMW*, 517 U.S. at 583-84. It is clear from *BMW* that "comparable conduct" means conduct comparable to the conduct underlying the plaintiffs' claims. Thus, in *BMW*, this Court looked to the possible sanction of $2,000 for a violation of the Alabama Deceptive Trade Practices Act comparable to the defendant's failure to disclose to the plaintiff the pre-sale repair of his automobile. This Court noted that the Alabama statute did not provide fair notice that a single violation, or even fourteen violations consisting of identical conduct, could subject an offender to a multimillion dollar penalty. *Id.* at 584.

The Utah Supreme Court misapplied the *BMW* analysis by including in its consideration of this guidepost penalties for a host of conduct other than the underlying conduct toward plaintiffs. The Court did not look to possible penalties for State Farm's decision not to settle the third-party claims against Mr. Campbell. Rather, the Court looked to possible civil or criminal penalties for multiple instances of various allegedly fraudulent types of conduct by State Farm over two decades. The Court adopted the trial court's finding that the "'penalties that could be imposed under Utah law for the fraudulent scheme that has been pursued by State Farm are enormous'" and included "a $10,000 fine for each act of fraud." Pet. 35a (citing Utah Code Ann. § 31A-26-301 *et seq.* (the Utah Unfair Claims Practices Act)).

In fact, the proper constitutional guidepost under *BMW* would be a single $10,000 fine under the Utah Unfair Claims Practices Act for a single instance of conduct comparable to

State Farm's conduct toward the Campbells.[35] Like the limited fines under the Alabama Deceptive Trade Practices Act that served as a guidepost in *BMW*, the $10,000 fine for comparable conduct under the Utah Act did not provide "fair notice" that a single violation "might subject an offender to a multimillion dollar penalty." *See BMW*, 517 U.S. at 584. Indeed, the relevant $10,000 fine for comparable conduct is 14,500 times less than the $145 million punitive award reinstated by the Utah Supreme Court and unmistakably signals the gross excessiveness of that award.

The Utah Supreme Court also cited the penalties available under the Utah Pattern of Unlawful Activity Act (the Utah state RICO statute), Utah Code Ann. §§ 76-10-1602 (4)(ppp), 76-10-1603.5(5). Pet. 35a. This statute does not penalize a single instance of conduct, but only a pattern of multiple acts. Thus, the penalties for violation of this statute are not the appropriate guidepost under *BMW*, because the claims in this case are based upon a single alleged bad-faith failure to settle within policy limits. Moreover, this statute is inapplicable to the conduct at issue in this case. The list of criminal offenses to which the Utah Pattern of Unlawful Activity Act applies contains no offense that could conceivably constitute comparable conduct, including the subsection specified by the Utah Supreme Court, § 76-10-1602(4)(ppp), which lists "a confidence game" as an unlawful activity for purposes of the Act.

The remaining sections of the Utah Criminal Code cited by the Utah Supreme Court in its analysis of sanctions for comparable conduct are merely sentencing provisions, not substantive provisions defining criminal offenses. Moreover, the Utah Supreme Court seriously misstates the content of these provisions. For example, the Utah Supreme Court states that "under Utah Code Ann. §76-3-303, State Farm's officers could be imprisoned or removed for up to five years." Pet. 35a. Section 76-3-303 is a sentencing provision, not a substantive provision, and would only be applicable if State

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[35] Utah Insurance Law was recodified in 1985. The statutory provision in effect at the time of State Farm's conduct authorized a fine of $500. *See* Utah Code Ann. § 31-5-10.5 (1983). Arguably, that $500 fine is the relevant penalty for purposes of the third *BMW* guidepost.

Farm's conduct toward the Campbells constituted an offense as defined by Utah's Criminal Code – which it does not. Moreover, contrary to the Utah Supreme Court's opinion, section 76-3-303 does not authorize imprisonment at all; it authorizes a court to disqualify an executive who has been convicted of an offense from exercising managerial functions for a period of up to five years. *See* Utah Code Ann. § 76-3-303(2). Accordingly, the Court is plainly incorrect in stating that there is a possibility of imprisonment under section 76-3-303 and in concluding that this non-existent possibility of imprisonment is "an extremely important consideration" justifying the $145 million punitive award. Pet. 35a.

In short, the Utah Supreme Court's analysis of sanctions for comparable misconduct fails to follow the required constitutional analysis under *BMW* – first, by looking to sanctions for a purported twenty years of various acts of alleged misconduct, rather than the $10,000 fine provided by Utah law for a single instance of comparable misconduct, and, second, by looking to penalties and statutes that are inapplicable and irrelevant. This analysis by the Utah Supreme Court improperly transforms the third constitutional guidepost under *BMW* from a meaningful constraint on the size of a punitive damages award into a justification for inflated punitive awards against a corporate defendant for all manner of practices dissimilar and unrelated to the conduct that forms the basis of the plaintiffs' claims for compensatory damages.

Moreover, in *BMW,* this Court defined the applicable standard under the third guidepost as "the civil penalties authorized *or imposed* in comparable cases." *BMW*, 517 U.S. at 575 (emphasis added). The Utah Supreme Court, however, erroneously looked exclusively to the maximum penalties hypothetically available rather than consider the penalties that realistically might be imposed. The Court rejected State Farm's argument that the practice of the Utah insurance commission and the level of penalties actually imposed in comparable cases were relevant to the issue of whether State Farm had adequate notice of the $145 million punitive award in this case. Pet. 36a. The Court's approach fails to heed the constitutional concerns for notice that underlie the third guidepost. It also distorts and overstates the legislative and regulatory interest in deterring the specific conduct actually at issue. In

Johansen v. Combustion Engineering, Inc., 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit rejected the type of approach taken by the Utah Supreme Court in this case. The Eleventh Circuit explained that, as a matter of due process, "it cannot be presumed that the defendant had notice that the state's interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute." *Johansen*, 170 F.3d at 1337 (emphasis added). Rather, "constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether th[e] defendant had reason to believe that his specific conduct could result in a particular damage award." *Id.; see also In re Exxon Valdez*, 270 F.3d 1215, 1245-46 (9th Cir. 2001) (vacating punitive award in light of *BMW* and *Cooper*; in evaluating penalties for comparable conduct, looking not only to maximum statutory penalties, but to the fine actually imposed). Clearly, as the Eleventh Circuit recognized, the penalties actually imposed in other cases are relevant to the issue of whether a defendant had adequate notice of the magnitude of the penalty that might be imposed. *See Johansen*, 170 F.3d at 1337.[36] The Utah Supreme Court's misapplication of the third *BMW* guidepost warrants reversal by this Court.

IV. The Utah Supreme Court's Punishment of a Nationwide "Scheme" Impermissibly Impairs Interstate Commerce and Interferes with the Constitutional Prerogative of Other States to Regulate the Business of Insurance Within Their Borders

The Utah Supreme Court's reinstatement of the punitive award in this case, based on an alleged nationwide "scheme," arrogates to Utah courts and juries the right to regulate insurance practices outside the borders of Utah. The punitive award thus implicates not only State Farm's due process

[36] Moreover, any theoretical possibility of imprisonment under Utah statutes purportedly governing comparable conduct would not be relevant to the constitutional adequacy of the notice afforded to insurance companies such as State Farm of such a possible penalty in an excess verdict case. *See Johansen*, 170 F.3d at 1337. Plaintiffs made no showing whatsoever that any employee or agent of any insurer has ever been imprisoned in Utah or anywhere else in connection with an excess verdict resulting from an alleged failure to settle within policy limits.

rights, but also "the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989). As this Court reiterated in *BMW*, "no single State" may "impose its own policy choice on neighboring States," and "one State's power to impose burdens on interstate [commerce] is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *BMW*, 517 U.S. at 571-72 (citing *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881)); *see also New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[i]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon which the preservation of which the Government under the Constitution depends").

In each of the fifty states, insurance companies are subject to detailed and comprehensive laws and regulations that govern their obligations to policyholders. Such laws and regulations may vary significantly from state to state and reflect the different policy judgments of each state. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 733 (1996) (Kennedy, J., concurring) ("States, as a matter of tradition and express federal consent, have an important interest in maintaining precise and detailed regulatory schemes for the insurance industry"). Such state laws and regulations specifically govern many of the different practices that, according to plaintiffs and the Utah Supreme Court, constituted the allegedly improper nationwide "scheme" that plaintiffs urged as the basis for punitive damages in this case. *See supra* at 20–22; *see also* Brief of *Amici Curiae* Alliance of American Insurers, *et al.*, in Support of Petitioner.

Given the highly regulated nature of the insurance business, the imposition of the $145 million punitive damages award by a single Utah jury to punish State Farm's conduct "across the country" (as plaintiffs' counsel urged (JA 242)) impermissibly infringed on the constitutional prerogative of other states to regulate the business of insurance within their

borders. Clearly, if the Utah Commissioner of Insurance had sought to investigate and penalize State Farm's use of appearance allowances or specification of non-OEM parts in Colorado or California (for example), there is no doubt that his efforts would be rejected as an unconstitutional intrusion upon the right of those states to regulate insurance transactions within their borders. *Cf. Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-16, 620 (7th Cir. 1999) (affirming injunction prohibiting Wisconsin Secretary of Agriculture, Trade and Consumer Protection from attempting to regulate transactions in Illinois). Utah plaintiffs, juries and courts have no greater authority to regulate conduct outside Utah so as to infringe upon the sovereignty of Utah's sister states, and the impermissible effect of such regulation is not lessened because it is carried out by the Utah judicial system.[37] *See BMW*, 517 U.S. at 572 n.17 ("[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute") (citing cases). This is particularly true with respect to punitive damages, which are intended to punish the defendant's conduct "'and to deter its future occurrence.'" *Cooper*, 532 U.S. at 432 (citation omitted).

A state's imposition of punitive damages to punish insurance company practices outside its borders encroaches substantially on the sovereign domain of other states, regardless of whether the punished practices are lawful or unlawful.[38] As discussed above, it has long been recognized that each state has a vital interest in regulating insurance practices within its borders and in defining what practices are permissible. That interest clearly extends to policy determinations

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[37] *Cf.* Lawrence H. Mirel, *Plaintiffs' Lawyers Have No Business Regulating Insurance*, Legal Backgrounder, vol. 16, no. 12 (Washington Legal Foundation April 6, 2001). Commissioner Mirel of the District of Columbia Department of Insurance criticizes the "growing and disturbing trend toward 'regulation by lawsuit'" and states: "As Insurance Commissioner for the District of Columbia, I am charged by law with protecting the citizens of the District against unfair treatment by insurance companies. My office cannot do that job if our authority is subject to challenge by a trial judge in a remote jurisdiction." *Id.*

[38] In *BMW*, this Court left open the question of whether a state court may constitutionally punish conduct that is unlawful in the state where it occurred. *See BMW*, 517 U.S. at 573 n.20.

regarding the extent and appropriate limits of punishment of insurance company conduct. It is not up to Utah to vindicate the interest that other states may or may not have in punishing an insurance company for conduct within their borders. As this Court has recognized, "[a] State's interest in vindicating its sovereign authority through enforcement of its laws by definition can never be satisfied by another State's enforcement of its own laws." *Heath v. Alabama*, 474 U.S. 82, 93 (1985); *see also* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 Or. L. Rev. 275, 307 (1999) ("[o]ne state's usurpation of another's ability to impose punitive damages to punish conduct that occurred within that state's own jurisdiction constitutes a direct intrusion on that state's sovereignty").

Thus, even if some of the out-of-state conduct punished by the Utah Supreme Court in this case had been shown to be unlawful in the state where it occurred, Utah has no legitimate interest in punishing or deterring that conduct. By punishing State Farm's conduct outside Utah, the Utah Supreme Court has impermissibly projected its law and policy judgments into other states. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-84 (1986) (rejecting New York's attempt to "project its legislation" into other states); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (due process clause prohibited Texas from creating "rights and obligations" as to insurance contracts "which are neither made nor are to be performed in Texas").[39]

Utah's sister states not only have their own bodies of insurance law governing the practices and conduct at issue, but also have vastly different punitive damages regimes. *See Smith v. Wade*, 461 U.S. 30, 59-60 (1983) (Rehnquist, J., dissenting) (explaining that "a significant number of American jurisdictions refuse to condone punitive awards," that "[o]ther jurisdictions limit the amount of punitive damages that may be awarded, for example, to the plaintiff's attorney's fees," and that "there has been little uniformity among the standards applied in" the states that "do permit juries to award punitive damages in certain circumstances"). The Utah Supreme Court's reinstatement of the $145 million punitive award based on State Farm's "nationwide conduct encroaches on the authority of other states . . . by displacing their laws governing the standards and procedures for awarding punitive damages." Cordray, *supra*, at 307.

[39] In discussing the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, this Court stated that "[o]ne of the major arguments" for leaving regulation of insurance to the States was that "the States were in close proximity to the people affected by the insurance business and, therefore, were in a better position to regulate that business than the Federal Government." *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293, 302 (1960). That purpose, said this Court, "would hardly be served by delegating to any one State sole legislative and administrative control of the practices of an insurance business affecting the residents of every other State in the Union." *Id.*

Notably, had any of the persons allegedly harmed by State Farm's conduct in other states come to the Utah trial court to assert a claim against State Farm, Utah would have been constitutionally required to apply the tort law and punitive damages law of the relevant states. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985). The constitutional prohibition articulated in *Shutts* on a state's applying its own law to claims unrelated to that state is based upon the same constitutional principles of due process, full faith and credit, and state sovereignty that this Court invoked in *BMW*. *See Shutts*, 472 U.S. at 818-23. Thus, in finding unconstitutional the application of Kansas law to non-Kansas transactions in *Shutts*, this Court recognized Kansas' "interest in regulating petitioner's conduct in Kansas" and "Kansas' lack of 'interest' in claims unrelated to that State." *Id.* at 819, 822.

In this case, Utah lacks any interest in regulating State Farm's conduct in Colorado, California, and across the country. The Utah Supreme Court's reinstatement of the $145 million punitive award to punish such out-of-state and nationwide conduct, whether lawful or unlawful, is unconstitutional. *See Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996) (*BMW* "prohibit[s] reliance upon inhibiting unlawful conduct in other states"); *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1333 (11th Cir. 1999) ("punitive damages must be based upon conduct in a single state – the state where the tortious conduct occurred – and reflect a legitimate state interest in punishing and deterring that conduct"); *Ford Motor Co. v. Ammerman*, 705 N.E.2d 539, 561 (Ind. Ct. App. 1999) (extraterritorial punish-

ment is impermissible even when conduct "is unlawful in every state of the union"). As the court stated in *Ace v. Aetna Life Insur. Co.*, 40 F. Supp. 2d 1125, 1133 (D. Alaska 1999), this Court's decision in *BMW* should be read "broadly enough to suggest that [a state] must leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct."

Plaintiffs' attempt in this case to displace the authority of state insurance commissioners and regulators was explicit. Plaintiffs repeatedly attacked the competence of state regulators of insurance around the country. Plaintiffs sought not merely to rebut the testimony given on behalf of State Farm by current and former insurance department employees, but sought to convince the jury that, as plaintiffs' counsel asserted in his opening, "the insurance commissions in Utah *and around the country* are unwilling or inept at protecting people against abuses." JA 208 (emphasis added). In closing, plaintiffs' counsel expressly urged the jury to take the place of regulators: "The only regulators of insurance companies are juries like you. You are the ones that hear, investigate and listen to the evidence and impartially make decisions regarding the actions of insurance companies. . . . [W]hy were you important? Because you are the regulators. We do not have objective and effective regulators of the insurance industry." JA 3217-18.

Contrary to plaintiffs' counsel, a single jury in Utah or elsewhere cannot "investigate" an insurance company's "way of doing business" nationwide and is ill-suited and ill-equipped to function as a national regulatory body. This task should be left to the insurance regulators of the fifty states, who have the expertise, knowledge of the governing laws, and the investigatory tools to evaluate the range of an insurer's practices. *See* Brief of the American Council of Life Insurers as *Amicus Curiae* in Support of Petitioner. Permitting a single jury in Utah to attempt to fulfill that function infringes upon the constitutional prerogative of other states to make and enforce their own policy choices as to insurance practices within their borders. In reinstating the jury's $145 million punitive award, the Utah Supreme Court improperly and unconstitutionally approved and affirmed this usurpation of state regulatory authority.

V. The Utah Supreme Court's Overreliance on State Farm's Wealth Nationwide Warrants Reversal

In attempting to justify the huge punitive award in this case, the Utah Supreme Court repeatedly cited State Farm's "enormous" wealth nationwide. Pet. 17a, 30a. The Court's emphasis on State Farm's wealth to justify the punitive award caused the Court to disregard its constitutional obligation to ensure that the award was proportional to State Farm's alleged wrongdoing toward the plaintiffs. As numerous courts have recognized since *BMW*, a defendant's wealth cannot be used to trump the due process requirement, expressed in the *BMW* guideposts, of proportionality between a punitive award and the defendant's conduct toward the plaintiffs. *See, e.g., BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997) (on remand; a large punitive award "should not be upheld upon judicial review merely because the defendant has the ability to pay it"); *see also* Brief of *Amicus Curiae* The Business Roundtable in Support of Petitioner.

As this Court has recognized, the practice of ratcheting up punitive awards against large national corporations simply because they are large implicates other constitutional concerns as well. In *BMW*, 517 U.S. at 585, this Court made clear the fact that a defendant

> is a large corporation . . . does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, [a defendant's] status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.

In the present case, the punitive damages award was improperly calibrated to State Farm's nationwide surplus and assets. In closing, plaintiffs' counsel argued to the jury that a $100 million punitive damages award would be appropriate because it would amount to only one month's income on State Farm's national surplus. JA 3238. Furthermore, in reinstating the punitive damages award, the Utah Supreme Court specifically pointed to State Farm's national surplus and gross

assets (Pet. 17a),[40] most of which was indisputably earned by business activities and investments outside Utah. The $145 million award had no relationship to wealth derived by State Farm from its business activities in Utah (much less from conduct in Utah similar to that directed against the Campbells). Indeed, the punitive award actually exceeded the *gross* annual amount of premiums that State Farm received from Utah policyholders for the year before the trial. *See* Ex. 151-D; JA 2116. Thus, the award is in essence a nationwide amercement imposed by Utah.

The Utah Supreme Court failed to recognize that reliance on the wealth of a national corporation (like State Farm) as a factor in punitive awards must be balanced by concerns for the federal system and the need to avoid imposing undue burdens on interstate commerce. The court in *Ace*, 40 F. Supp. 2d at 1135, addressed this issue, stating that, under this Court's decision in *BMW*, "due process and comity concerns counsel restraint where a proposed award of punitive damages is based to a significant degree on an accumulation of wealth generated outside the jurisdiction where the wrong was suffered." Accordingly, in the case of a national company, "[h]eavy reliance on a defendant's aggregate wealth would be inappropriate," and "[s]ome tempering of the

[40] The record clearly establishes that the figures that the Utah Supreme Court used as representing State Farm's wealth are not proper even as measures of the company's national wealth. The Utah Supreme Court states that State Farm's national surplus in 1995 was $25 billion. Pet. 17a. The testimony of plaintiffs' expert Fye makes clear that this $25 billion figure represented the surplus of all the State Farm companies in 1995, not the surplus of State Farm Auto, the defendant in this case. JA 1523. According to Fye, the surplus of State Farm Auto was actually only $12.5 billion. JA 1524, 1932; Ex. 65-P, trial p. 7; JA 1406. The proportion of the relevant surplus (the surplus in excess of required minimums) that arose from State Farm's business in Utah would of course be a far smaller number still. *See Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 504-05 (8th Cir. 1998) (holding that to the extent a punitive damages award should be measured against an insurance company's wealth, only surplus in excess of state minimum surplus requirements should be taken into account). Moreover, as Fye admitted (JA 1407, 1409, 1502-03), the figure given by the Utah Supreme Court for State Farm's assets in 1995 ($54.75 billion) included the assets of other State Farm companies and did not represent net assets (that is, assets over liabilities), but rather gross assets and thus did not accurately measure wealth at all.

weight given that criterion [wealth] is necessary where it cannot be adjusted to reflect that which is necessary to protect the interests of each individual state's consumers" so as to "leave some room within which the other states can exercise their own interests in defining the precise extent of and in deterring wrongful conduct." *Id.* at 1132-33; *see also Johansen*, 170 F.3d at 1339 (defendant's wealth cannot justify an award "so large . . . as to 'implicate[ ] the federal interest in preventing . . . undue burdens on interstate commerce'") (quoting *BMW*, 517 U.S. at 585).

The Utah Supreme Court's improper emphasis on State Farm's wealth nationwide compounds the constitutional errors that pervaded its decision to reinstate the $145 million punitive award.[41] The Court's reinstatement of this huge punitive award against State Farm, a mutual insurance company, is particularly egregious because the award will benefit Utah plaintiffs and possibly the State of Utah[42] at the expense of State Farm policyholders across the country.[43]

The overwhelming constitutional errors in this case not only permeated the Utah Supreme Court's decision but also tainted the trial proceedings and the jury verdict as to punitive

[41] In reinstating the punitive award, the Utah Supreme Court erroneously pointed to the purported percentage of "State Farm's wealth" that the award represented. Pet. 17a. Reliance on such percentages improperly removes the focus of the punitive damages inquiry from the particular facts of the plaintiffs' case (the proper focus under *BMW*) and merely serves to inflate punitive awards against large corporations. *See Continental Trend*, 101 F.3d at 641 ("From the [*BMW*] Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits").

[42] The State of Utah has asserted that it is entitled to approximately 50% of the $145 million punitive award under Utah Code Ann. § 78-18-1(3). *See* Letter from the Office of the Utah Attorney General to plaintiffs' counsel of 10/24/01.

[43] *See Commonwealth ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950) (a mutual insurance company "is a co-operative enterprise wherein the policyholders, as members, are both insurer and insured"); *Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639 (Iowa 1979) (vacating award against mutual insurance company of punitive damages, which would fall on innocent policyholders).

damages. The massive amounts of evidence of out-of-state and dissimilar conduct, improperly admitted at trial over State Farm's constitutional objections, necessarily "'infected the jury's entire consideration' of punitive damages against [the defendant], resulting in fundamental error." *Annis v. County of Westchester*, 136 F.3d 239, 248-49 (2d Cir. 1998) (citation omitted). "'In such a case, the judgment of the [trial] court should be vacated and the cause remanded for a new trial on damages.'" *Id.* at 248 (citation omitted). Accordingly, State Farm submits that the preferable remedy is to remand this case for a new trial as to punitive damages. *See id.* ("[w]here 'the record establishes that the jury's verdict on damages was not only excessive but was also infected by fundamental error, remittitur is improper'") (citation omitted).

CONCLUSION

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.

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