

No. SJC-13778

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

ARMAND FONTAINE, Individually and as Personal Representative of the Estate of
Barbara Ellen Fontaine,

Plaintiff-Appellee,

v.

PHILIP MORRIS USA INC.,

Defendant-Appellant.

Appeal from the Commonwealth of Massachusetts Superior Court Department of
the Trial Court, Middlesex County Case No. 2081-cv-00169

**BRIEF FOR AMICI CURIAE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND WASHINGTON LEGAL
FOUNDATION IN SUPPORT OF APPELLANT**

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to S.J.C. Rule 1:21, the Chamber of Commerce of the United States of America states that it is a nonprofit, tax-exempt organization incorporated under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation has ten percent or greater ownership in the Chamber. The Chamber does not issue stock.

Washington Legal Foundation states that it is a nonprofit, tax-exempt corporation under the laws of the District of Columbia; it has no parent company, issues no stock, and no publicly held corporation owns any interest in it.

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STATEMENT OF INTEREST OF AMICI CURIAE¹

Amici respectfully submit this brief pursuant to the Court’s solicitation of amicus briefs on May 27, 2025.

The Chamber of Commerce of the United States of America (“the Chamber”) is the world’s largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, legislatures, and executive branches of the Federal and State governments. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation’s business community, including cases involving the availability of punitive damages. Many members of the Chamber are businesses operating in Massachusetts and have a particular interest in this case, which has stark economic implications for the Massachusetts business community.

¹ Pursuant to Mass. R. App. P. 17(c)(5), amici declare that no party or counsel for a party authored this brief in whole or in part and that no person other than amici, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Amici and its counsel further declare that, although amici have filed amicus briefs on similar issues in other cases, they have not represented one of the parties to the present appeal in any proceeding involving similar issues, nor have they been a party or represented a party in a proceeding or transaction that is at issue in the present appeal.

Founded in 1977, Washington Legal Foundation (“WLF”) is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Massachusetts. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To defend these values, WLF often appears as an amicus curiae in state courts of last resort. See, e.g., *Dunn v. Genzyme Corp.*, 486 Mass. 713 (2021); *Frlekin v. Apple Inc.*, 457 P.3d 526 (Cal. 2020); *DeLisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018).

SUMMARY OF THE ARGUMENT

The jury’s award of \$1 billion in punitive damages in this case—the highest award ever returned by a Massachusetts jury—demonstrates the need for procedural safeguards in cases where punitive-damages awards are possible. This case is an exemplar of what can happen in the absence of such safeguards: a verdict so disproportionate to the facts that plaintiff sought “only” a 90 percent reduction in its post-trial briefing. On appeal, this Court can and should interpret bedrock principles of Massachusetts law to require a clear-and-convincing standard of proof where a party seeks punitive damages and to recognize a right to bifurcation of the liability and punitive-damages phases of trial. These safeguards can help ensure that tort verdicts are predictable and just, rather than arbitrary and grossly excessive.

For good reason, the majority of states require a plaintiff to establish clear and convincing evidence before a court may award punitive damages. This heightened standard of proof is necessary because, similar to a criminal sentence, punitive damages are designed to punish defendants and achieve deterrence—not to remedy a harm. When facing this quasi-criminal form of punishment, defendants are entitled to greater scrutiny from the factfinder.

The Court should also hold that a liability trial should, upon request, proceed separately from a trial regarding punitive damages. Nineteen states require bifurcation of liability and punitive-damages trials in some or all cases to protect the integrity of the trial proceeding. Without this procedure, a jury's liability determination can be easily tainted by evidence of a defendant's net worth or by questions of mindset not relevant to liability—issues that may only properly be considered with respect to the punitive-damages claim. This creates the potential for jurors to confuse the issues and the risk of inflaming the passion and prejudice of the jury against the defendant.

The Court should interpret Massachusetts law to require both of these safeguards and vacate the jury's award.

ARGUMENT

I. A PUNITIVE-DAMAGES AWARD SHOULD REST ON CLEAR AND CONVINCING EVIDENCE

The overwhelming majority of states that recognize punitive-damages claims subject such claims to a “clear and convincing” standard of proof. Of the 48 states that permit punitive damages, 32 have adopted this standard by judicial decision, statute, or both. At least eight jurisdictions—Arizona, the District of Columbia, Indiana, Hawaii, Maine, Maryland, Tennessee, and Wisconsin—have done so by judicial decision.²

This Court should do likewise to protect individual and societal interests. Because punitive damages are a quasi-criminal form of punishment that subjects defendants to immense reputational, social, and economic penalties well beyond compensation for actual harm, they should be awarded only when the evidence of a defendant’s egregious misconduct is clear and convincing. This case demonstrates the risk of an arbitrary award when a lower standard of proof applies.

² See *Linthicum v. Nationwide Life Ins. Co.*, 723 P.2d 675, 681 (Ariz. 1986); *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 932 (D.C. 1995); *Masaki v. General Motors Corp.*, 780 P.2d 566, 575 (Haw. 1989), *abrogated on other grounds by Guieb v. Guieb*, 571 P.3d 382 (Haw. 2025); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 657 (Md. 1992); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); *Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 458 & n.23 (Wis. 1980). Indiana adopted the standard first by judicial decision, see *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349, 358 (Ind. 1982), and then later by statute, see Ind. Code § 34-51-3-2.

A. A Higher Standard Of Proof Is Necessary To Protect Individual Interests.

The function of a standard of proof is to “communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.” *In re Winship*, 397 U.S. 358, 370 (1970). “The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423 (1979); *Travelers Indem. Co.*, 442 N.E.2d at 358 (“The standard of proof employed reflects society’s assessment of where the risk of factual error should fall.”). For typical civil claims, a preponderance-of-the-evidence standard is appropriate because “we view it as no more serious ... for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.” *Winship*, 397 U.S. at 371. But the clear-and-convincing standard “is no stranger to the civil law.” *Woodby v. INS*, 385 U.S. 276, 285 (1966). Courts typically apply it in “civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant” because “[t]he interests at stake ... are deemed to be more substantial than mere loss of money.” *Addington*, 441 U.S. at 424. Accordingly, “some jurisdictions [] reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof.” *Id.* In Massachusetts, as this Court has recognized, “the clear and convincing standard is applied when particularly

important individual interests or rights are at stake.” *Doe v. Sex Offender Registry Bd.*, 473 Mass. 297, 309 (2015) (quotation marks omitted).³

Punitive damages implicate such “particularly important individual interests,” *Doe*, 473 Mass. at 309, because they extend beyond making the plaintiff whole to impose a societal sanction against the defendant. Punitive damages are “aimed at deterrence and retribution.” *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 412 (2013). They are “quasi-criminal punishment” that do not “serve to allocate an existing loss between two parties,” but rather “are specifically designed to exact punishment in excess of actual harm to make clear that the defendant’s misconduct was especially reprehensible.” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O’Connor, J., concurring); see also *Merrimack Coll. v. KPMG LLP*, 480 Mass. 614, 628 (2018) (“[A]n award of punitive damages requires a moral

³ The classes of cases to which the clear-and-convincing standard of proof commonly has been applied are: “(1) charges of fraud and undue influence, (2) suits on oral contracts to make a will, and suits to establish the terms of a lost will, (3) suits for the specific performance of an oral contract, (4) proceedings to set aside, reform or modify written transactions, or official acts on grounds of fraud, mistake, or incompleteness, and (5) miscellaneous types of claims and defenses ... where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds.” 2 McCormick On Evid. § 340 (9th ed.). Similarly, the Supreme Court of the United States has held that proof by a clear-and-convincing standard is required “in a variety of cases involving deprivations of individual rights not rising to the level of criminal prosecution, including commitment to a mental hospital, termination of parental rights, denaturalization and deportation.” *Id.*

judgment that the defendant's conduct is so blameworthy that it 'justifies punishment [rather than] merely compensation.'"). Because punitive damages are designed to punish, "there is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award." *Haslip*, 499 U.S. at 54 (O'Connor, J., concurring). Accordingly, "there is more than just money at stake" at a trial involving potential punitive damages—defendants also face reputational harm and social stigma. *Id.* Because there are great and sometimes irreversible consequences associated with an erroneous award, the Court should require a higher "degree of confidence" regarding "the correctness of factual conclusions" before a factfinder awards punitive damages. *Winship*, 397 U.S. at 370.

Courts in other states also recognize these features that distinguish claims for punitive damages from other civil claims. And because the "interests at stake" in punitive damages cases are "more substantial than mere loss of money," *accord Addington*, 441 U.S. at 423, most other states have adopted the clear-and-convincing evidence standard. Maryland's highest court held that a "heightened standard is appropriate in the assessment of punitive damages because of their penal nature and potential for debilitating harm." *Owens-Illinois*, 601 A.2d at 657. The Tennessee Supreme Court holds that basic notions of "fairness require[] that a defendant's wrong be clearly established before punishment, as such, is imposed." *Hodges*, 833 S.W.2d at 901. The Hawaii Supreme Court adopted a clear-and-

convincing standard because “punitive damages are a form of punishment and can stigmatize the defendant in much the same way as a criminal conviction.” *Masaki*, 780 P.2d at 575. And the Supreme Judicial Court of Maine observed that “[t]he potential consequences of a punitive damages claim warrant a requirement that the plaintiff present proof greater than a mere preponderance of the evidence.” *Tuttle*, 494 A.2d at 1363. These courts are in accord that “[n]otions of fairness and efficiency” weigh in favor of requiring clear and convincing evidence before punitive damages are awarded. *Id.* at 1360.

B. A Higher Standard Of Proof Better Serves The Societal Interest In Appropriate Deterrence.

This Court has consistently recognized that punitive damages are appropriate only for “conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” *Haddad v. Wal-Mart Stores, Inc.*, 455 Mass. 91, 107 (2009). Punitive damages should be awarded only “where a defendant’s conduct warrants condemnation and deterrence.” *Dartt v. Browning-Ferris Indus., Inc. (Mass.)*, 427 Mass. 1, 17 (1998). Under this precedent, a clear-and-convincing standard of proof is a necessary safeguard to ensure that punitive damages are awarded only in exceptional cases, where the evidence of the defendant’s outrageous and morally blameworthy conduct is clear and persuasive. Under a preponderance-of-the-evidence standard, by contrast, the trier of fact need only find the given proposition to be “more probable than not.” *Continental Assur.*

Co. v. Diorio-Volungis, 51 Mass. App. Ct. 403, 408 n.9 (2001). This standard does not ensure that punitive damages are reserved for these rare cases where the need for retribution and deterrence is obvious. Indeed, as the Supreme Court of Indiana noted, it would be “incongruous to permit a recovery” of punitive damages, which are supposed to be exceptional, upon the same standard of proof used in mine-run civil cases awarding compensatory damages. *Travelers Indem. Co.*, 442 N.E.2d at 362.

As other states have recognized, “[w]hen punitive damages are loosely assessed, ... [their] deterrent impact is lessened.” *Linthicum*, 723 P.2d at 681. That is because permitting punitive-damages awards as readily as compensatory damages awards means that they no longer “serve the useful purpose[] of expressing society’s disapproval of intolerable conduct.” *Tuttle*, 494 A.2d at 1363. A clear and convincing standard of proof helps “avoid dull[ing] the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct.” *Hodges*, 833 S.W.2d at 901 (internal quotation marks omitted).

Instead of achieving their deterrent purpose, punitive-damages awards—which have increased in size and frequency—are becoming “onerous not only to defendants but the public as a whole.” *Linthicum*, 723 P.2d at 681. Driven in part by punitive-damages awards, large and unpredictable “nuclear” jury verdicts like the one in this case “drive up the costs of goods and services, create insurability

problems, inhibit job growth and new investments for businesses or industries, deplete judicial resources, and—perhaps most significantly—undermine confidence in the rule of law.” U.S. Chamber of Commerce Institute for Legal Reform, *Nuclear Verdicts: Trends, Causes, and Solutions* 34 (Sept. 2022), available at https://instituteforlegalreform.com/wp-content/uploads/2022/09/NuclearVerdicts_RGB_FINAL.pdf. The unpredictability of these awards also prolongs costly litigation, as parties are unable to settle cases for reasonable amounts. These costs are borne not only by the defendant, but by businesses, consumers, taxpayers, and other litigants. But the benefits associated with these excessive awards are concentrated on a handful of individual plaintiffs who receive large windfalls above and beyond the compensation they are owed for the injuries they suffered.

The Court should take this opportunity to ensure that punitive damages are reserved for the exceptional case where a party’s conduct is “outrageous,” *Haddad*, 455 Mass. at 107. Accordingly, it should align its precedent with the majority of states and hold that plaintiffs seeking punitive-damages awards must satisfy a standard of clear and convincing evidence.

II. THE COURT SHOULD REQUIRE THAT LIABILITY AND PUNITIVE DAMAGES BE ADJUDICATED IN SEPARATE JURY TRIALS, UPON REQUEST

Even where a proper clear-and-convincing standard is applied, a plaintiff’s evidence in support of a punitive-damages award can prejudice trial proceedings in

the absence of proper temporal safeguards. Trial bifurcation ensures that the presentation of evidence that is relevant *only* to a punitive-damages claim does not unfairly prejudice the jury against the defendant when considering the threshold issues of liability and compensatory damages. In the absence of this safeguard, evidence intended solely to show that a defendant's conduct was outrageous, or that it makes a certain amount of profit, can distract the jury from its task at hand, support impermissible inferences at the liability stage, or induce the jury to base its verdict on passion and prejudice instead of facts.

Fifteen states have enacted statutes requiring bifurcated trials on punitive damages upon a timely request or motion by either party: Alaska, Arkansas, Georgia, Kansas, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, South Carolina, Tennessee, Texas, and West Virginia.⁴ At least two more states—Florida and Wyoming—have implemented this procedure by judicial decision. See *W.R. Grace & Co.—Conn. v. Waters*, 638 So. 2d 502, 506 (Fla. 1994) (“We hold that henceforth trial courts, when presented with a

⁴ Alaska Stat. Ann. § 09.17.020; Ark. Code Ann. § 16-55-211; Ga. Code Ann. § 51-12-5.1; Kan. Stat. Ann. § 60-3701; Minn. Stat. § 549.20; Miss. Code Ann. § 11-1-65; Mo. Rev. Stat. § 510.263; Mont. Code Ann. § 27-1-221; Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:15-5.13(b); N.C. Gen. Stat. § 1D-30; S.C. Code Ann. § 15-32-520; Tenn. Code Ann. § 29-39-104(a); Tex. Civ. Prac. & Rem. Code § 41.009; W. Va. Code § 55-7-29(c). Texas initially instituted this procedure by judicial decision, see *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994), and then later by statute, see Tex. Civ. Prac. & Rem. Code § 41.009.

timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues at trial.”); *Campen v. Stone*, 635 P.2d 1121, 1132 (Wyo. 1981) (“If the jury finds that punitive damages should be awarded, it then hears evidence of the defendant’s financial status and returns a separate verdict setting the award of punitive damages.”).⁵ And two states require bifurcated trials for certain types of actions: Delaware for medical-negligence actions, and Ohio for all tort actions upon a timely motion.⁶

This Court’s well-established precedent guarding against admission of extraneous and unfairly prejudicial evidence logically leads to a conclusion that evidence bearing only on the punitive-damages award should be heard only after the jury has returned a verdict on liability and compensatory damages. For example, generally, “the wealth or poverty of the parties is not to be considered in the assessment of compensatory damages,” and a “finding or verdict has been set aside whenever it appeared to be affected by a consideration of the pecuniary condition of the parties.” *Downey v. Union Tr. Co. of Springfield*, 312 Mass. 405,

⁵ New York’s intermediate appellate courts have been mixed on whether trial bifurcation is mandatory in cases involving punitive damages. Compare *Rupert v. Sellers*, 48 A.D.2d 265, 272 (N.Y. App. Div. 1975) (adopting trial bifurcation procedure), with *Byrd v. New York City Transit Auth.*, 172 A.D.2d 579, 581 (N.Y. App. Div. 1991) (holding that trial court did not abuse discretion in denying request for a bifurcated trial).

⁶ Del. Code Ann. tit. 18 § 6855; Ohio Rev. Code Ann. § 2315.21.

419 (1942). But this sort of evidence “has generally been allowed when a question of punitive damages has been raised.” *Campan*, 635 P.2d at 1128; see *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399, 419 (2021) (noting that “financial information” of the defendant was “relevant to the jury’s determination of punitive damages”), creating tension between these fundamental principles whenever liability and punitive damages are tried simultaneously. As happened in this case, plaintiffs’ request for punitive damages for the wrongful-death claim in their Amended Complaint allowed them to introduce evidence of defendant’s wealth at trial, notwithstanding defendants’ objections and request to bifurcate the trial. See RAI/387; RAI/144-149. The Superior Court denied the motion for bifurcation because it reasoned that “[t]o some extent, the relative wealth of the defendant companies is common knowledge.” RAI/236-267. This maneuver provides an obvious way to circumvent the typical rule disfavoring the introduction of evidence of a defendant’s net worth.

Consider the Florida Supreme Court’s resolution of this tension. That court appropriately recognized that defendants “who are forced to litigate the issue of liability and punitive damages in the same proceedings are at a severe disadvantage” because prejudicial “evidence of a defendant’s net worth”—which is only relevant to the punitive-damages phase—had to that point been allowed to be introduced before a jury determined liability. *W.R. Grace & Co.—Conn.*, 638 So.

2d at 506. To address this problem, the Florida Supreme Court held “that henceforth trial courts, when presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues at trial.” *Id.* Similarly, the Texas Supreme Court recognized that “evidence of a defendant’s net worth, ... by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury’s determination of other disputed issues[.]” *Moriel*, 879 S.W.2d at 30; see also *Campen*, 635 P.2d at 1127 (“Normally, the question of a defendant’s ability to pay has absolutely no relevance to the issue of negligence or even compensatory damages and evidence of financial status is inadmissible The danger of prejudice to a defendant of a disclosure of vast resources is obvious; also, a question of invasion of privacy is presented.”); *Rupert*, 48 A.D.2d at 272 (“Defendant’s wealth should not be a weapon to be used by plaintiff to enable him to induce the jury to find the defendant guilty of malice, thus entitling plaintiff to punitive damages. To avoid such possible abuse, we conclude that the split trial procedure should be used[.]”).

Bifurcation also ensures that juries are shielded from other categories of highly prejudicial evidence that are usually irrelevant to liability, such as evidence and argument about an evil motive or bad state of mind, or the nature and reprehensibility of the alleged misconduct. Bifurcated trials ensure that this type of evidence cannot be “used to prejudice the jury and becloud the issue[s]” during the

liability phase and that a “defendant’s conduct [is] judged in a prejudice-free atmosphere.” *Campan*, 635 P.2d at 1128. And plaintiffs are in no way prejudiced by bifurcation: any evidence relevant toward both liability and punitive damages remains admissible during the liability phase.

CONCLUSION

The Court should hold that punitive-damages awards must rest on proof by clear and convincing evidence and should, upon request, be tried separately from liability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs, including Rule 16(a)(13) (addendum), Rule 16(e) (references to the record), Rule 20, and Rule 21.

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. A. P. 20(a)(2)(D), the brief contains 3,160 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365, in 14 point Times New Roman font. The undersigned has relied on the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I, Mark C. Fleming, hereby certify, under the penalties of perjury, that on October 15, 2025, I caused a true and accurate copy of the foregoing to be filed and served via the Massachusetts Odyssey File & Serve site, and I served two copies on the following counsel either by first-class mail, pursuant to Mass. R. A. P. 13(c) and 19(d)(1), or by electronic mail with consent of the counsel being served, pursuant to Mass. R. A. P. 13(c):

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