

MUNGER, TOLLES & OLSON LLP

RONALD L. OLSON¹
ROBERT E. DENHAM
JEFFREY I. WEINBERGER
CARY B. LERMAN
GREGORY P. STONE
BRAD D. BRIAN
BRADLEY S. PHILLIPS
GEORGE M. GARVEY
WILLIAM D. TEMKO
STEPHEN M. KRISTOVICH
JOHN W. SPIEGEL
TERRY E. SANCHEZ
STEVEN M. PERRY
MARK B. HELM
JOSEPH D. LEE
MICHAEL R. DOYEN
MICHAEL E. SOLOFF
GREGORY D. PHILLIPS
KATHLEEN M. McDOWELL
GLENN D. POMERANTZ
THOMAS B. WALPER
PATRICK J. CAFFERTY, JR.
JAY M. FUJITANI
O'MALLEY M. MILLER
SANDRA A. SEVILLE-JONES
MARK H. EPSTEIN
HENRY WEISSMANN
KEVIN S. ALLRED
BART H. WILLIAMS
JEFFREY A. HEINTZ
JUDITH T. KITANO
KRISTIN LINSLEY MYLES
MARC T.G. DWORSKY
JEROME C. ROTH
STEPHEN D. ROSE
JEFFREY L. BLEICH
GARTH T. VINCENT
TED DANE
STUART N. SENATOR
MARTIN D. BERN
DANIEL P. COLLINS
ROBERT L. DELL ANGELO
BRUCE A. ABBOTT
JONATHAN E. ALTMAN
MARY ANN TODD
MICHAEL J. O'SULLIVAN
KELLY M. KLAUS
DAVID B. GOLDMAN
KEVIN S. MASUDA
HOJOON HWANG
PETER A. DETRE
DAVID H. FRY
LISA J. DEMSKY

MALCOLM A. HEINICKE
GREGORY J. WEINGART
SUSAN E. NASH
TAMERLIN J. GODLEY
JAMES C. RUTTEN
RICHARD ST. JOHN
ROHIT K. SINGLA
LUIS LI
CAROLYN HOECKER LUEDTKE
C. DAVID LEE
BRETT J. RODDA
SEAN ESKOVITZ
FRED A. ROWLEY, JR.
KATHERINE M. FORSTER
BLANCA FROMM YOUNG
RANDALL G. SOMMER
MANUEL F. CACHAN
ROSEMARIE T. RING
TODD J. ROSEN
MELINDA EADES LEMOINE
SETH GOLDMAN
GRANT A. DAVIS-DENNY
JONATHAN H. BLAVIN
DANIEL B. LEVIN
MIRIAM KIM
MISTY M. ANFORD
KATHERINE KU
HAILYN J. CHEN
BETHANY W. KRISTOVICH
JACOB S. KREILKAMP
JEFFREY Y. WU
LAURA D. SMOLOWE
ANJAN CHOUDHURY
KYLE W. MACH
SUSAN R. SZABO
KIMBERLY A. CHI
HEATHER E. TAKAHASHI
KEITH R.D. HAMILTON, II
SORAYA C. KELLY
ADAM R. LAWTON
JENNY H. HONG
ARON SEIJI LOWENSTEIN
MATTHEW A. MACDONALD
MARGARET G. MARASCHINO
ESTHER H. SUNG
BENJAMIN J. MARO
JOEL M. PURLES
KYLE A. CASAZZA
ERIN J. COX
CLAIRE YAN
JESLYN A. MILLER
MARK R. SAYSON
PETER E. GRATZINGER

560 MISSION STREET
TWENTY-SEVENTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

355 SOUTH GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

JEREMY A. LAWRENCE
BENJAMIN E. FRIEDMAN
CHRISTOPHER M. LYNCH
RAY S. SEILIE
ADAM I. KAPLAN
AMELIA L.B. SARGENT
KENNETH M. TRUJILLO-JAMISON
BRYAN H. HECKENLIVELY
LAURA WIRTH
JASMINE M. ROBERTS
JENNIFER A. JONES
LAURA K. LIN
JEFFREY M. OSOFSKY
GREGORY M. SERGI
ACHYUT J. PHADKE
DAVID A. TAYLOR
MARI OVERBECK
JESSE MAX CREED
JOHN M. GILDERSLEEVE
ERIC K. CHIU
SARAH L. GRAHAM
JESSICA BARCLAY-STROBEL
ZACHARY M. BRIERS
JENNIFER M. BRODER
CHRISTINA P. MONIGDIS
JOHN P. MITTELBACH
SARAH GARBER
SAMUEL T. GREENBERG
CAROLINE M. CUNNINGHAM
EMILY B. VIGLIETTA
KEVIN L. BRADY
EMILY R.D. MURPHY
ELLEN MEDLIN RICHMOND
JORDAN D. SEGALL
VICTORIA A. DEGYAREVA
WESLEY T.L. BURRELL
CHRISTA L. CULVER
ANYA J. GOLDSTEIN
KAREN A. LORANG
KURUVILLA J. OLASA
KEVIN H. SCOTT
JUSTIN P. RAPHAEL
HANNAH E. SHEARER
ROBERT W. GRAY, JR.
THOMAS P. CLANCY
JOSHUA PATASHNIK
ERIC C. TUNG
GUHA KRISHNAMURTHI
JOSHUA S. MELTZER
SARA E. CROLL
ANDREW G. PROUT
THANE REHN
ADAM B. WEISS

ROSE LEDA EHLE
AMY L. GREYWITT
ANDREW Z. WOLSTEN
NASSIM NAZEMI
CATHLEEN H. HARTGE
JOON S. HUR
MARIA JHAI
GRACE R. DLAI
ADAM P. BARRY
JENNIFER L. BRYANT
JUSTIN T. HELLMAN
ANDREW CATH. RUBENSTEIN
RIO PIERCE
JEFFREY A. PAYNE
VARUN BEHL
HANNAH L. DUBINA
ADAM GOTTESFELD
NICHOLAS D. FRAM
JOSHUA L. BENESH
SAMANTHA C. BOOTH
JOHN F. MULLER
BRIONNA N. NED
JESSE M. KING
LAURA C. ZARAGOZA
JOHN L. SCHWAB
SARA N. TAYLOR
ALEXANDER D. TEREPKA
MAXIMILLIAN L. FELDMAN
LAURA E. MATHE
SAMUEL T. BOYD

OF COUNSEL
RICHARD D. ESBENSHADE¹
ROBERT K. JOHNSON¹
ALAN V. FRIEDMAN¹
RONALD K. MEYER
MARK H. KIM
MARIA SEFERIAN
ALLISON B. STEIN
WILLIANA CHANG
BRAD SCHNEIDER
BENJAMIN J. HORWICH
E. MARTIN ESTRADA
ERIC P. TUTTLE

E. LEROY TOLLES
(1922-2008)

¹A PROFESSIONAL CORPORATION

April 22, 2016

Writer's Direct Contact
(415) 512-4066
(415) 644-6966 FAX
Ben.Horwich@mtol.com

The Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *Patricia Casey v. Kaiser Gypsum Company, Inc.*
Supreme Court Case No. S232453
First Appellate District, Division Four, Case No. A133062

Dear Chief Justice and Associate Justices:

I write on behalf of the Chamber of Commerce of the United States to urge the Court to grant the petition for review in this case. The petition presents this Court with an excellent opportunity to supply much-needed guidance on when the procedures leading to an award of punitive damages violate basic principles of fundamental fairness, resulting in arbitrary punishment.

I. Interest of the Chamber of Commerce of the United States

The Chamber of Commerce of the United States is the world's largest business federation, representing 300,000 direct members and indirectly representing 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, including in California. Many of the Chamber's members in California are

RECEIVED

APR 22 2016

CLERK SUPREME COURT

The Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
April 22, 2016
Page 2

defendants in tort litigation and thus have an acute interest in the proper and predictable application of the law of punitive damages.

The risk of arbitrary and devastating punitive damages is a grave concern to the Chamber's members. As Justice Brennan explained, unacceptable risks can emerge if "juries are left largely to themselves in making this important, and potentially devastating, decision." (*Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.* (1989) 492 U.S. 257, 281 [Brennan, J., concurring].) The Chamber's members, and all defendants facing claims for punitive damages, are entitled to a finder of fact that is properly informed, both as to the facts implicating liability and the legal limits on punitive damages.

II. The Court Should Grant the Petition

As the petition for review explains, and a review of the Court of Appeal's opinion reveals, the court deprived the jury empaneled to retry the claim for punitive damages of critical context: specifically, the truncated jury instructions on punitive damages explicitly excluded those constitutional "reprehensibility" factors that favored the defendant, and included only those factors that the judge deemed could be supported by the evidence. This fundamental failure to educate the jury on all of the applicable legal limits deprived the defendant of the process due under California law and the Federal Constitution. Although the decision below is unpublished, the petition for review explains that it implicates questions of punitive damages practice on which lower courts have often misapplied this Court's precedent to issues implicating fundamental fairness. This case presents a suitable opportunity for this Court to give valuable guidance on those recurring and important questions of constitutional dimension.

Avoiding arbitrary punishment is a touchstone of the U.S. Supreme Court's due process jurisprudence. "Punitive damages pose an acute danger of arbitrary deprivation of property." (*Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432.) "Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system ... may threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decisionmaker's caprice.'" (*Phillip Morris USA v. Williams* (2007) 549 U.S. 346, 352-353 [quoting *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416, 418].)

Accordingly, that Court has given special attention to "the question of what procedures are necessary to ensure that punitive damages are not imposed in an

The Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
April 22, 2016
Page 3

arbitrary manner.” (*Honda Motor, supra*, 512 U.S. at p. 420.) Thus, for example, “[e]xacting appellate review” is intended to ensure punitive damages are the product of the “application of law, rather than a decisionmaker’s caprice.” (*Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1172 [brackets in original, quoting *State Farm, supra*, 538 U.S. at p. 418].)

What the jury hears and how it is instructed goes to the heart of whether a verdict results in arbitrary and capricious punishment. (See, e.g., *Honda Motor, supra*, 512 U.S. at p. 433 “[P]roper jury instruction[] is a well-established and, of course, important check against excessive awards.”.) With respect to what the jury hears, due process demands that the defendant be allowed “an opportunity to present every available defense.” (*Phillip Morris, supra*, 549 U.S. at p. 353 [quoting *Lindsey v. Normet* (1972) 405 U.S. 56, 66].) That necessarily includes the right to present all of the facts and circumstances that are constitutionally relevant to determine liability and damages. (See *State Farm, supra*, 538 U.S. at p. 425 [“The precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.”]; *Medo v. Superior Court* (1988) 205 Cal.App.3d 64, 68 [“Punitive damages are not simply recoverable in the abstract. They must be tied to oppression, fraud or malice *in the conduct which gave rise to liability in the case.*”, italics in original].) The failure to include this context creates an unacceptable risk that a jury will impose punishment based upon a judgment that is disconnected from the particular acts giving rise to liability. Accordingly, the best practice would be to simply retry compensatory damages in tandem with a retrial of punitive damages, as the defendant here persuasively argues is required by statute. (See Pet. for Review 12-15.) At a minimum, a court should take great care to ensure that the artificially limited nature of the retrial does not leave a void that invites arbitrary punishment.

With respect to the second concern—that the jury be properly instructed—no serious argument exists that less guidance is better than more, or that incomplete instructions are better than complete ones. “Given the risks of unfairness ... , it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one. And given the risks of arbitrariness [among others], it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance.” (*Phillip Morris, supra*, 549 U.S. at p. 355 [citations omitted].) The factors in CACI 3949 (which are themselves of constitutional dimension, see Pet. for Review 21) educate the jury on the narrow role of punitive damages in our system by identifying the nature and degree of reprehensibility required to support such an extreme sanction. Without the benefit

The Hon. Chief Justice Tani Cantil-Sakauye
and Associate Justices
April 22, 2016
Page 4

of those benchmarks, a jury can bring to bear only its own arbitrary intuition. The constitutionally required “exacting appellate review” reflects a similar idea: that appellate judges (who may review many punitive damage awards over the course of a career) can bring a better-developed sense of what conduct truly merits punitive damages than can a jury whose members may be altogether unfamiliar with the concept. Accordingly, changing those foundational instructions as the trial court did, on the view that they were not implicated, deprives the jury of the critical knowledge that the defendant’s conduct *does not* meet the full range of accepted norms for judging reprehensibility. This sort of instructional error could hardly be more prejudicial.

* * *

As the petition explains, there are strong reasons to suspect that the proceedings below failed to give the jury the context it needed to proceed fairly and produce a constitutionally sound decision to punish the defendant. For these reasons, the Chamber urges this Court to grant the petition.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'Benjamin J. Horwich', with a long horizontal flourish extending to the right.

Benjamin J. Horwich

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, Twenty-Seventh Floor, San Francisco, CA 94105-2907.

On April 22, 2016, I served true copies of the following document described as **LETTER ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Munger, Tolles & Olson LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 22, 2016, at San Francisco, California.



Susan B. Ahmadi

SERVICE LIST
Casey v. Kaiser Gypsum Company, Inc.
Supreme Court No. S232453

Julie Ann Torres
DeHay & Elliston, LLP
1111 Broadway, Suite 1950
Oakland, CA 94607

Co-Counsel for Defendant and Appellant
KAISER GYPSUM COMPANY INC.

Lisa Perrochet
Curt Cutting
Horvitz & Levy LLP
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436-3000

Co-Counsel for Defendant and Appellant
KAISER GYPSUM COMPANY INC.

Gilbert L. Purcell
Lloyd F. LeRoy
Richard M. Grant
Brayton Purcell LLP
222 Rush Landing Road
Novato, CA 94945

Counsel for Plaintiff and Appellant
PATRICIA CASEY