

Supreme Judicial Court
FOR THE COMMONWEALTH OF MASSACHUSETTS

NO. SJC-13070

**PAMELA LARAMIE, individually as personal
representative of the Estate of Fred R. Laramie,**

PLAINTIFF-APPELLEE,

v.

PHILIP MORRIS USA INC.,

DEFENDANT-APPELLANT.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

**BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.
AND THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AS AMICI CURIAE
IN SUPPORT OF DEFENDANT-APPELLANT
AND SUPPORTING REVERSAL**

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**CORPORATE DISCLOSURE STATEMENT
AND RULE 17(c)(5) STATEMENT**

The Product Liability Advisory Council, Inc. is a non-profit professional organization incorporated in Michigan. It has no parent corporation, and no publicly held company has 10% or greater ownership in it.

The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. It has no parent corporation, and no publicly held company has 10% or greater ownership in it.

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, their 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 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.

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ISSUE PRESENTED

This Court solicited amicus briefs on the following question:

Whether the plaintiff's claim for punitive damages is barred by principles of res judicata because it was adjudicated and resolved in a prior action brought by the Massachusetts Attorney General, which resulted in the 1998 Master Settlement Agreement and corresponding Massachusetts consent decree and final judgment.

INTEREST OF AMICI CURIAE

Amici are the Product Liability Advisory Council, Inc. ("PLAC") and the Chamber of Commerce of the United States of America ("the Chamber").

PLAC is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. See https://plac.com/PLAC/Membership/Corporate_Membership.aspx. Those companies seek to contribute to the improvement and reform of law in Massachusetts and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of

the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 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 Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

This is such a case because state attorneys general have become increasingly aggressive about pursuing mass tort actions on a number of topics, and the same question presented here might arise over time in other settlements involving a wide array of issues, such as prescription drugs, chemicals, automobiles, fatty foods, sugary beverages, consumer privacy, environmental harms,

and - if experience is a guide - many other matters that have not yet occurred to tort lawyers.

PRELIMINARY STATEMENT

The United States Supreme Court has recognized that punitive damages pose special constitutional dangers. They can be imposed in arbitrary and excessive amounts that bear little relation to a plaintiff's actual damages. And notwithstanding the Supreme Court's mandate that punitive damage awards be given exacting judicial scrutiny, some courts neglect to enforce the due process limits on punitive damage awards, affirming awards that are grossly excessive, duplicative, or otherwise unconstitutional.

This appeal raises many of these concerns. In 1998, the Massachusetts Attorney General, acting on behalf of the citizens of the Commonwealth, entered into a consent decree with Appellant Philip Morris USA ("PM USA"). The consent decree resolved the Attorney General's claims against PM USA concerning its marketing and sale of cigarettes to Massachusetts citizens - the same conduct that allegedly harmed Plaintiff-Respondent Laramie in this case.

A key element of the consent decree was a provision stating that private citizens seeking to vindicate the interests of the "general public" are "absolutely and unconditionally" barred from bringing claims for "civil penalties and punitive damages" that challenge "past

conduct . . . in any way related . . . to" cigarette "manufactur[ing] and "marketing," or for "future conduct" related to the "use of" cigarettes. RAIV/17, 23-24, 120.

Despite this express language, the Superior Court permitted the plaintiff's punitive damage claim to proceed, holding that "actions undertaken by the Massachusetts attorney general could [not] deprive a private plaintiff, authorized by [statute] to bring a wrongful death action, of the right to recover punitive damages if that plaintiff proves the type of conduct that requires the entry of such an award." RAIV/294; A/70. The jury then awarded the plaintiff \$11 million in compensatory damages and \$10 million in punitive damages.

This brief draws upon the experience of PLAC, the Chamber, and their members to make two fundamental arguments concerning awards of punitive damages in products cases generally.

First, any analysis of whether *res judicata* bars the plaintiff's punitive damages claim must be informed by the special constitutional considerations that govern punitive damage awards. Especially relevant here is the constitutional prohibition on duplicative punishment. The risk of duplicative punishment is acute in cases like this one, where a product is alleged to have caused harm to a large number of individuals. Multiple punitive

damage awards in different cases involving the same product create a substantial danger that the defendant will be punished many times for the same conduct. Here, the consent decree -- which fully vindicates the public interest in retribution and deterrence -- makes duplicative punishment not just a risk but an absolute certainty.

Second, allowing the punitive damage award to stand would undermine the strong public interest in encouraging settlements. It would dramatically alter the incentive structure for resolving mass-tort litigation by deterring product manufacturers and other defendants from settling cases with the Massachusetts Attorney General - or with the attorneys general of other states that would treat this case as a persuasive precedent. From a defendant's perspective, a key purpose of settlement is to achieve certainty as to its liability for the course of conduct at issue. If a defendant cannot reach a settlement that forecloses the possibility of future punitive damage awards for the same conduct, that not only decreases the amount the defendant would be willing to pay, it reduces the defendant's willingness to settle the case at all. And the consequence of deterring settlements with the Attorney General would be that large sums of money that would otherwise have gone to the state - an outcome consistent with the notion that punitive damage awards

vindicate public rights - would now be paid to a handful of individual plaintiffs and their lawyers.

ARGUMENT

This Court should reverse the Superior Court and hold that the plaintiff's punitive damage claim is precluded. Upholding the award would violate the due process prohibition on duplicative punishments and deter product manufacturers in future cases from resolving mass tort cases through settlements with the Attorney General.

I. The Punitive Damage Award Violates Due Process And Must Be Vacated.

The Court has asked whether the plaintiff's punitive damage claim is barred by principles of res judicata. It is. The past and current parties are in privity; the cause of action is identical; and there was a prior final judgment on the merits. *See Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 843 (2005).

Whereas the parties' briefs focus on the specific application of the three elements, amici address a broader point: This Court's res judicata analysis must be informed by the special constitutional concerns that are raised by punitive damage awards. The United States Supreme Court has long recognized that punitive damages serve a public purpose in achieving retribution and deterrence, and just as with other forms of criminal or

quasi-criminal punishments, the Due Process Clause places strict limits on their imposition. Relevant here is the constitutional prohibition on duplicative punishment -- a prohibition that the punitive damage award in this case blatantly violates.

A. The Constitution Places Strict Limits On Punitive Damage Awards.

"[I]n our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 432 (2003). Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001) (citing Restatement (Second) of Torts § 903, at 453-454 (1979)).

Punitive damages, by contrast, are imposed to achieve the public "purposes of retribution and deterrence." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991). The Supreme Court has emphasized that, even though punitive damages may be awarded in lawsuits brought by private individuals, they serve *public* objectives. In *BMW of North America, Inc. v. Gore*, the Court explained that "[p]unitive damages may properly be imposed to further a *State's* legitimate interests in punishing unlawful conduct and deterring

its repetition.” 517 U.S. 559, 568 (1996) (emphasis added); see also *Haslip*, 499 U.S. at 47 (O’Connor, J., dissenting) (punitive damages “operate as private fines levied by civil juries to advance governmental objectives”) (emphasis added); *Kruglov v. Copart of Connecticut, Inc.*, 771 Fed. Appx. 117, 120 (2d Cir. 2019) (“the purpose of punitive damages is not to remedy private wrongs but to vindicate public rights”) (emphasis added and quotation marks omitted). The retributive function of punitive damages serves the public interest by punishing the wrongdoer for its violation of the law. The deterrence function of punitive damages serves the public interest by rendering it less likely that the defendant, or another potential wrongdoer, will engage in the same misconduct.

Punitive damages are a “quasi-criminal” penalty, *Cooper Indus.*, 532 U.S. at 432, and share many features of criminal penalties. Among other things, they are not intended to compensate the plaintiff, who has already “been made whole for his injuries by compensatory damages,” *State Farm*, 538 U.S. at 419, but rather are imposed to serve the public goals discussed above. As the Supreme Court explained more than a century ago, “[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having

in view the enormity of his offence rather than the measure of compensation to the plaintiff." *Day v. Woodworth*, 13 How. 363, 371 (1852). That remains true in modern times, as "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008); see also *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor . . . and to deter him and others from similar extreme conduct.").

Although punitive damages "serve the same purposes as criminal penalties," *State Farm*, 538 U.S. at 417, they are often imposed without the same procedural protections that apply in criminal proceedings. For example, they do not require the same standard of proof - beyond a reasonable doubt - required before a criminal sanction may be imposed. And juries are often given ambiguous instructions on how to decide if punitive damages are warranted and, if so, the amount of the penalty. See *State Farm*, 438 U.S. at 418 ("[v]ague instructions . . . do little to aid the decisionmaker"); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) ("[j]ury instructions typically leave the jury with wide discretion in choosing amounts"). Compounding these problems are the vague standards that often govern

punitive damage determinations, leading juries to make ad hoc judgments as to whether the particular conduct was sufficiently egregious to warrant a civil sanction.

For all these reasons, courts have a special responsibility to enforce the “procedural and substantive limitations on [punitive damage] awards.” *State Farm*, 538 U.S. at 416, and ensure that any such award satisfies basic standards of fairness and rationality. “[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue.” *Id.* at 417-18 (quoting *Haslip*, 499 U.S. at 59 (O’Connor, J., dissenting)).

B. The Punitive Damage Award Violates The Constitutional Prohibition On Duplicative Punishments.

1. A recurring constitutional problem surrounding awards of punitive damages is the danger of duplicative punishments. Although punitive damages serve public purposes, they are usually pursued by private plaintiffs seeking an individual recovery through a tort lawsuit. This creates the potential for duplicative punishments, especially in the context of a mass tort, where a product is alleged to have caused harm to a group of people.

The danger is that successive juries will award punitive damages based on the same acts of misconduct by the same defendant. Each plaintiff will argue that an award of punitive damages is necessary to achieve the

public objectives of retribution and deterrence. That argument may be persuasive in the first lawsuit, brought at a time when the defendant has not yet been punished. But assuming the first lawsuit results in a punitive damage award, the rationale loses force when a second plaintiff sues, and then a third and fourth. By the time the one hundredth -- or one thousandth -- plaintiff brings a case, there exists no remaining public interest to be vindicated.

The Supreme Court has recognized this common-sense principle and held that duplicative awards of punitive damages are unconstitutional. In *State Farm*, the Court considered at length the allegations that the defendant's conduct had injured many other people besides the plaintiffs. See 538 U.S. at 414-15, 420-23. The Court held that the Utah Supreme Court erred in relying on this evidence to sustain the punitive damage award and specifically concluded that "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.* at 423. The Court cited with approval Justice Breyer's concurrence in *Gore*, where he had cautioned against "'double count[ing]'" by including in the punitive damages award some of the compensatory, or punitive damages that subsequent plaintiffs would also recover." 517 U.S. at 593 (Breyer, J., concurring).

The Court made the same point in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007). There, it held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” *Id.* at 353. Allowing punishment for harm to nonparties would open the door to duplicative and unconstitutional punishment. Indeed, the Court quoted the defendant’s proposed jury instruction, rejected by the trial court, which would have instructed the jury that “you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims.” *Id.* at 356 (quotation marks and emphasis omitted).

2. Upholding the punitive damage award in this case would violate due process by imposing a duplicative punishment.

The consent decree imposed a substantial monetary sanction on PM USA that fulfilled the public interests in retribution and deterrence. The sanctions imposed by the consent decree were to punish the defendants for harm suffered *by Massachusetts citizens* including Mr. and Mrs. Laramie. In recognition of the fact that the interests in retribution and deterrence were fully

vindicated, the consent decree expressly provided that future plaintiffs seeking to vindicate the interests of the "general public" are "absolutely and unconditionally" barred from bringing claims for "civil penalties and punitive damages," that challenge "past conduct . . . in any way related . . . to" cigarette "manufactur[ing] and "marketing," or for "future conduct" related to the "use of" cigarettes. RAIV/17, 23-24, 120. There can be no serious dispute that the claims in this case fall squarely within that description: the plaintiff sought punitive damages based on conduct that was directly related to exposure to tobacco products.

Although the plaintiff contends that she did not sue on behalf of the general public, and thus her wrongful death claim falls outside the scope of the consent decree, that argument is misplaced. To the extent her wrongful death claim seeks *compensatory* damages, her interest may be private, but the same is not true with regard to her demand for *punitive* damages. As to *that* demand, Plaintiff identifies no authority suggesting that there is a surviving "private" interest in punitive damages that could sustain the award. As explained above, punitive damages serve the public purposes of retribution and deterrence, and here the defendant's course of conduct, to the extent it harmed Massachusetts citizens, has already been fully punished

by the State. Indeed, the Attorney General has already determined the appropriate penalty, on behalf of Massachusetts and its citizens, and signed a release. There is no claim that PM USA has failed to perform its obligations under the agreement.

In sum, upholding the imposition of punitive damages in this case would not only violate the terms of the consent decree and basic principles of res judicata, but would violate due process by imposing an additional punishment for the same conduct. Allowing Massachusetts plaintiffs to bring their own individual lawsuits and recover substantial awards ostensibly aimed at vindicating public rights that have already been fully vindicated would violate due process, both here and in other mass tort cases going forward. The Court should therefore reverse the judgment below and vacate the punitive damage award.

II. Upholding The Punitive Damage Award Will Deter Parties From Settling Mass-Tort Cases With The Attorney General.

"[S]ettlements are strongly encouraged by public policy." *Jalbert v. SEC*, 945 F.3d 587, 595 (1st Cir. 2019). The public interest in encouraging settlements is heightened in cases where the Attorney General settles a mass tort action on behalf of state citizens. History teaches that litigating such cases can be exceedingly difficult and expensive. They often take many years to resolve, consuming substantial public

resources as the parties move through discovery to trial to appeal. For that reason, Attorneys General and defendants frequently look to resolve such cases through settlement.

If this Court were to affirm the punitive damage award, it would upset settled expectations and radically change the incentive structure in ways that would have devastating effects on the willingness of future defendants to settle such cases, no matter the underlying subject. This is so for many reasons.

First, defendants will be far less willing to settle mass tort cases if they still face the chance of substantial liability from future lawsuits. A defendant that knows that even a comprehensive settlement with the State will not prevent follow-on litigation by private plaintiffs has far less incentive to settle. From the defendant's perspective, much of the value of a settlement consists of certainty and finality, putting the matter behind it, and avoiding future litigation risk and tort liability. If tort liability (or a significant aspect of tort liability) remains on the table, the defendant would gain relatively little by settlement and may prefer just to take its chances in the courts.

Second, while a defendant may be willing to settle even if it still faced future liability for *compensatory* damages, the possibility of future *punitive* damage

liability is a very different matter. Unlike compensatory damage awards, which typically bear a rational relationship to the harm the plaintiff suffered, punitive damages are regularly imposed in exorbitant and seemingly random amounts - the very antithesis of predictability. See *Exxon Shipping*, 554 U.S. at 499 ("The real problem, it seems, is the stark unpredictability of punitive awards."). In resolving a dispute, defendants seek to reduce their liability to a sum certain, at least to the extent possible. "Settlement is, of course, a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 346 (D. Mass. 2015) (quotation marks omitted). Effectively barring the Attorney General from settling punitive damage claims would disincentive settlements because of the arbitrary and often lottery-like nature of punitive damage awards.

Third, allowing the plaintiff to recover punitive damages, notwithstanding the Attorney General's settlement of such claims, would have the effect in future cases of redirecting punitive damage recoveries from state coffers to individual plaintiffs and their lawyers. If an Attorney General's apparent settlement of punitive damages claims is a legal nullity, future defendants obviously will not settle such claims. The consequence is that large sums of money that would

otherwise have gone to the state would now be paid to a small number of individual plaintiffs and their lawyers. While redirecting punitive damage recoveries by concentrating the awards in a small group of people would give a windfall to the select few, it would deprive the general public of the recovery the Attorney General would otherwise have obtained on their behalf. That inevitable outcome is directly at odds with the concept that punitive damages vindicate injuries to the public.

Fourth, were this Court to uphold the punitive damage award despite the Attorney General's apparent settlement of such claims, it would undermine defendants' confidence in the Attorney General's ability to make binding settlements. If mass-tort settlements with that office cannot be enforced according to their terms, defendants' willingness to enter such settlements would be reduced, to say the least. Few defendants would be interested in a deal in which they pay massive amounts to the Attorney General to resolve future claims, only to discover years later that its benefit of the bargain is illusory because the Attorney General never had the authority to compromise the claims.

CONCLUSION

This Court should reverse the judgment of the Superior Court.

April 12, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the Rules of Court that pertain to the filing of briefs, including but not limited to: Rule 16(e) (References to the Record) and Rule 20 (Form and Length of Briefs, Appendices and Other Documents).

I hereby certify that this Brief complies with the type volume limit of Rule 20(a)(C) because, excluding the parts of the document exempted by Rule 20(a)(2)(D), this document contains 3,553 words.

This Brief complies with the typeface and type style requirements of Rule 20(a)(4)(B) because it has been prepared in a monospaced typeface using Microsoft Word 2013 in Courier New 12-point font.

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