In the Supreme Court of Nevada

PHILIP MORRIS USA INC., a foreign corporation,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and the HONORABLE VERONICA M. BARISICH,

Respondents,

and

DOLLY ROWAN, AS AN INDIVIDUAL, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF NOREEN THOMPSON; NAVONA COLLISON, AS AN INDIVIDUAL; RUSSELL THOMPSON, AS AN INDIVIDUAL; R.J. REYNOLDS TOBACCO COMPANY, A FOREIGN CORPORATION; LIGGETT GROUP LLC, A FOREIGN CORPORATION; QUICK STOP MARKET, LLC, A DOMESTIC LIMITED LIABILITY COMPANY; JOE'S BAR, INC., A DOMESTIC CORPORATION; THE POKER PALACE, A DOMESTIC CORPORATION; SILVER NUGGET GAMING, LLC D/B/A SILVER NUGGET CASINO, A DOMESTIC LIMITED LIABILITY COMPANY; AND JERRY'S NUGGET, A DOMESTIC CORPORATION,

Real Parties in Interest

No. 84805

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PHILIP MORRIS USA INC.'S PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

Christopher D. Dusseault
cdusseault@gibsondunn.com
Sarah M. Kushner
smkushner@gibsondunn.com
[*pro hac vice* applications pending]
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7855
Facsimile: (213) 229-6855

Bruce Scott Dickinson, Esq.
Nevada Bar No. 2297
bdickinson@sdlawoffice.net
STEPHENSON & DICKINSON, P.C.
2820 West Charleston Boulevard, Suite 17
Las Vegas, Nevada 89102
Telephone: (702) 474-7229
Facsimile: (702) 474-7237

Attorneys for The Product Liability Advisory Council, Inc.

The Product Liability Advisory Council, Inc. (PLAC) hereby moves for leave to file an amicus brief in support of Philip Morris USA Inc.'s ("PM USA") petition for writ of mandamus, or alternatively, prohibition.

PLAC is a non-profit association representing a broad cross-section of American and international product manufacturers. PLAC's primary purpose is to file *amicus curiae* briefs in cases presenting issues that affect the development of product related litigation and impact PLAC's members.

PLAC's members have a vital interest in courts consistently and correctly applying product liability law. PM USA's petition presents an important issue of interest to PLAC because the district court's holding below that PM USA may be liable under the Nevada Deceptive Trade Practices Act even though it did not design, manufacture, or sell the products that allegedly caused Decedent's injuries and death is contrary to well-settled principles of product liability law and threatens to upend the important public policy considerations that underlie those principles.

PLAC's proposed amicus brief is attached hereto as **Exhibit 1**.

Dated this 24th day of June, 2022.

Gibson, Dunn & Crutcher LLP

By: */s/ Christopher D. Dusseault*
Christopher D. Dusseault
cdusseault@gibsondunn.com
Sarah M. Kushner
smkushner@gibsondunn.com
[*pro hac vice* applications pending]
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7855
Facsimile: (213) 229-6855

By: */s/ Bruce Scott Dickinson*
Bruce Scott Dickinson, Esq.
Nevada Bar No. 2297
bdickinson@sdlawoffice.net
STEPHENSON & DICKINSON, P.C.
2820 West Charleston Boulevard,
Suite 17
Las Vegas, Nevada 89102
Telephone: (702) 474-7229
Facsimile: (702) 474-7237

Attorneys for The Product Liability Advisory Council, Inc.

CERTIFICATE OF SERVICE

I certify that on June 24, 2022, I submitted the foregoing Motion for Leave to File an Amicus Brief in Support of Philip Morris USA Inc.'s Petition For Writ of Mandamus or, Alternatively, Prohibition, for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118
(702) 938-3838
lroberts@wwhgd.com

Attorney for Petitioner

Fan Li, Esq.
fli@kulaw.com
KELLEY | UUSTAL
500 North Federal Highway, Ste. 200
Fort Lauderdale, FL 33301

Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
micah@claggettlaw.com
david@claggettlaw.com

Attorneys for Real Parties in Interest, Dolly Rowan, Navona Collison, and Russell Thompson

Valentin Leppert, Esq.
(Pro Hac Vice)
Spencer Miles Diamond, Esq.
(Pro Hac Vice)
KING & SPALDING
1180 Peachtree Street NE, Ste. 16090
Atlanta, GA 30309
(404) 572-3578 – Telephone

Ursula Marie Henninger, Esq.
(Pro Hac Vice)
KING & SPALDING
300 S. Tryon Street
Charlotte, NC 28202
(704) 503-2631 – Telephone

Dennis L. Kennedy, Esq.
dkennedy@baileykennedy.com
Joseph A. Liebman, Esq.
jliebman@baileykennedy.com
BAILEY KENNEDY
8984 Spanish Ridge Ave.
Las Vegas, NV 89148
(702) 562-8820 – Telephone

Attorneys for Real Parties in Interest, Jerry's Nugget, Joe's Bar, Inc., Quick Stop Market, LLC, R.J. Reynolds Tobacco Company, Silver Nugget Gaming, LLC, and The Poker Palace

/ / /

Daniel F. Polsenberg, Esq.
dpolsenberg@lrrc.com
Christopher J. Jorgensen, Esq.
cjorgensen@lewisroca.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, NV 89169
(702) 949-8200 – Telephone

Kelly Anne Luther, Esq. (Pro Hac Vice)
KASOWITZ BENSON TORRES LLP
1441 Brickell Ave., Ste. 1420
Miami, FL 33131
(786) 587-1045 – Telephone

Attorneys for Real Party in Interest, Liggett Group, LLC

I further certify that the foregoing Motion was mailed via U.S. Mail to the following:

The Honorable Veronica Barisich
Eighth Judicial District Court
Department 5
Phoenix Building
330 S. Third Street, Courtroom 1100
Las Vegas, Nevada 89155

Respondent

By: */s/ Tracey L. Heinhold Keith*
Authorized Representative of
Stephenson & Dickinson, P.C.

Exhibit 1

In the Supreme Court of Nevada

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Real Parties in Interest

No. 84805

[PROPOSED] AMICUS BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PHILIP MORRIS USA INC.'S PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

Christopher D. Dusseault
cdusseault@gibsondunn.com
Sarah M. Kushner
smkushner@gibsondunn.com
[*pro hac vice* applications pending]
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7855
Facsimile: (213) 229-6855

Attorneys for The Product Liability Advisory Council, Inc.

Bruce Scott Dickinson, Esq.
Nevada Bar No. 2297
bdickinson@sdlawoffice.net
STEPHENSON & DICKINSON, P.C.
2820 West Charleston Boulevard, Suite 17
Las Vegas, Nevada 89102
Telephone: (702) 474-7229
Facsimile: (702) 474-7237

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The Product Liability Advisory Council, Inc. ("PLAC") is a domestic non-profit association incorporated in Michigan. PLAC has no parent corporation and no publicly held corporation has 10% or greater ownership in PLAC.

PLAC will be represented in this matter by Christopher D. Dusseault and Sarah M. Kushner of Gibson, Dunn & Crutcher LLP, and Bruce Scott Dickinson of Stephenson & Dickinson, P.C.

Dated this __ day of June, 2022.

Gibson, Dunn & Crutcher LLP

By: */s/* _____

Christopher D. Dusseault
cdusseault@gibsondunn.com
Sarah M. Kushner
smkushner@gibsondunn.com
[*pro hac vice* applications pending]
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Telephone: (213) 229-7855
Facsimile: (213) 229-6855

By: */s/* _____

Bruce Scott Dickinson, Esq.
Nevada Bar No. 2297
bdickinson@sdlawoffice.net
STEPHENSON & DICKINSON, P.C.
2820 West Charleston Boulevard,
Suite 17
Las Vegas, Nevada 89102
Telephone: (702) 474-7229
Facsimile: (702) 474-7237

Attorneys for The Product Liability Advisory Council, Inc.

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I. STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with over 65 corporate members representing a broad cross-section of American and international product manufacturers. PLAC seeks to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. 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.

Since 1983, PLAC has filed over 1,200 briefs as *amicus curiae* in both state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of law as it affects product liability. Philip Morris USA Inc.'s ("Petitioner") petition presents an important issue of interest to PLAC because the decision below threatens to upend the important public policy considerations that underlie product liability law.

PLAC files this *amicus curiae* brief with leave of this Court as permitted by NRAP 29(c).

II. SUMMARY OF ARGUMENT

This case is, at its core, a product liability action. *See* Restatement (Third) of Torts: Products Liability (Introduction) (1998) (product lability law involves "the liability of commercial product sellers and distributors for harm caused by their products"). Ms. Noreen Thompson ("Decedent") passed away in 2020 after developing lung cancer. Plaintiff Dolly Rowan ("Plaintiff"), as Special Administrator of Decedent's estate, now seeks to recover damages for Decedent's injuries and death, claiming they were caused by Decedent smoking Pall Mall, Camel, Viceroy, and Pyramid brand cigarettes for roughly 65 years.

It is undisputed that Petitioner did not design, manufacture, distribute, or sell Pall Mall, Camel, Viceroy, or Pyramid brand cigarettes during the relevant time period. It is also undisputed that Decedent never purchased or used any of Petitioner's products. Yet the district court held that Plaintiff has stated a viable claim against Petitioner under the Nevada Deceptive Trade Practices Act ("NDTPA"). This result not only contravenes core principles of product liability law, including product use and causation, but it also puts product manufacturers across all industries in the untenable and unworkable position of facing

potential liability for injuries caused by products that they did not make and over which they have no control.

The Court should grant Petitioner's request for a writ of mandamus or, alternatively, prohibition, to correct the district court's error.

III. ARGUMENT

A. Principles of Product Liability Law, and Tort Law More Generally, Limit Liability Against Product Manufacturers To Those That Sold or Manufactured The Harm-Producing Product

A well-established principle of product liability law is that "when a plaintiff is injured by a product and seeks to hold a manufacturer liable for her injuries, she can sue only the manufacturer of the product that caused the injury." Victor E. Schwartz, Phil Goldberg & Cary Silverman, *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When The Harm Was Allegedly Caused By Generic Drugs Has Severe Side Effects*, 81 Fordham L. Rev. 1835, 1860 (2013). This has long been the rule in Nevada and elsewhere. *See, e.g.*, *Schueler v. Ad Art, Inc.*, 136 Nev. 447, 457, 472 P.3d 686, 694 (Ct. App. 2020) (product liability claims are limited to those against "a seller or manufacturer of the faulty product" (citing *Calloway v. City of Reno*, 116 Nev. 250, 270–71, 993 P.2d 1259, 1272 (2000)); *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 363, 197 P.3d

127, 138 (2008) (refusing to find a product manufacturer responsible for a defect "in another manufacturer's product").

This rule makes good policy sense, too. The rationale underlying product liability law is that it is appropriate to hold manufacturers liable for product defects because they are in the best position to internalize the costs attendant to harm-producing products. *See Allison v. Merck & Co.*, 110 Nev. 762, 767–68, 878 P.2d 948, 952 (1994) (where "injury is caused by a defective product, responsibility is placed upon the manufacturer . . . rather than on the injured consumer" because product liability law fixes "responsibility for injuries caused by defective products . . . wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market"); *see also* Schwartz et al., 81 Fordham L. Rev. at 1860 ("Product liability law is based on the rationale that a seller is accountable for the risks internal to its operations, namely the manufacture, design, and warnings of the goods that it makes, distributes, or sells."); William L. Prosser, Law of Torts § 97, at 650 (4th ed. 1971) ("Underlying this theory was the belief that the manufacturer, by increasing prices and purchasing liability insurance, could best

allocate the losses caused by defective products to the public at large."). As explained in the Restatement (Second) of Torts:

> [T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement (Second) of Torts § 402A, cmt. c (1965).

None of these policy justifications is served by imposing liability on manufacturers for defects in products that others manufactured, distributed, and sold. Manufacturers do not, for instance, owe any "special responsibility" to purchasers and users of *other* brands' products. *See, e.g.*, *Rastelli v. Goodyear Tire & Rubber Co.*, 79 N.Y.2d 289, 298, 591 N.E.2d 222, 227 (Ct. App. 1992) (product liability claim failed against manufacturer that "had no control over the production" of the product at issue, "had no role in placing that [product] in the stream of commerce,

and derived no benefit from its sale"); Schwartz et al., 81 Fordham L. Rev. at 1861 (manufacturers "do not have any special responsibility to those who use a competitor's product" or a "moral or legal obligation to stand behind the goods of another").

Manufacturers are also in no position to internalize the costs attendant to harm-producing products manufactured and sold by others. *See, e.g.*, *Braaten v. Saberhagen Holdings*, 165 Wash. 2d 373, 392, 198 P.3d 493, 501 (2008) (declaring policies underlying product liability law "inapplicable" to manufacturers that "did not manufacture, sell, or otherwise distribute" the product at issue because they "could not treat the burden of accidental injury . . . as a cost of production against which liability insurance could be obtained"); Schwartz et al., 81 Fordham L. Rev. at 1861 (manufacturers "are not in a position to incorporate the costs of liability into their prices when the liability is associated with products they did not make or sell").

Even setting aside these policy considerations, the basic requirement of causation is not satisfied in a suit seeking to hold a manufacturer liable for injuries caused by defects in another manufacturer's product. Causation is "a necessary element" in all

product liability cases. *Holcomb v. Georgia Pac., LLC*, 128 Nev. 614, 621, 289 P.3d 188, 192 (2012); *see also Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 195, 209 P.3d 271, 277 (2009) ("Nevada law is clear that a plaintiff bears the burden of proving causation in strict product liability cases."). To prove causation in a product liability suit, a plaintiff must prove that her injuries were proximately caused by a manufacturer's wrongful conduct. *See Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) ("This court has long recognized that to establish proximate causation 'it must appear that the injury was the natural and probable consequence of the . . . wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'" (citation omitted)). Injuries stemming from use of one manufacturer's product are in no sense "the natural and probable consequence" of alleged wrongful conduct attributable to a different manufacturer.

B. The District Court's Holding Undermines The Policies Underlying Product Liability Law

In this case, Plaintiff seeks to hold Petitioner liable for Decedent's lung cancer and death even though it did not manufacture the only products—Pall Mall, Camel, Viceroy, and Pyramid brand cigarettes—that she claims caused those injuries. The district court nonetheless held

that Plaintiff has stated a viable claim against Petitioner under the NDTPA and NRS 41.600(1), which provides a private right of action to "any person who is a victim of consumer fraud." In reaching this conclusion, the district court asserted that Plaintiff "can arguably show that [D]ecedent was misled by false public statements" made by Petitioner that "resulted in harm" to her notwithstanding that she never used any of Petitioner's products, and observed that "[t]here is no requirement" of "product purchase or use . . . under [the] NDTPA." 35 Petitioner's Appendix 1487.

This result turns well-settled principles of product liability law on their head. A simple example is illustrative. Imagine a product market in which just two products compete. Manufacturer 1 exercises the utmost care in manufacturing Product 1, and Manufacturer 2 refuses to even follow minimum safety standards in manufacturing Product 2. After viewing both manufacturers' similar advertisements, a consumer purchases Product 2 and is seriously injured while using the product. Under the district court's approach, the consumer would have every incentive to sue Manufacturer 1 under the NDTPA claiming to have been misled about the safety of the product generally, and omit Manufacturer

2 altogether from her suit, in order to sidestep the doctrinal hurdles that product liability law imposes.[1] Such a result forces Manufacturer 1 to internalize a cost that is not its own, and fails to incentivize Manufacturer 2 to exercise greater care in manufacturing its product. These results are impossible to square with the policy justifications underlying product liability law.

This is not the first time that plaintiffs have tried to creatively plead claims in order to sidestep the requirements of product liability law. Most relevant here, over the past few decades, plaintiffs injured by generic drugs have repeatedly tried to plead novel "innovator liability" claims against brand-name drug manufacturers. *See* Schwartz et al., 81 Fordham L. Rev. at 1849–52. In these cases, plaintiffs allege that a brand-name manufacturer's labels or promotional materials misrepresented certain safety or efficacy information about the brand-

[1] Significantly, there is no cap on the damages a private plaintiff may recover in a suit under NRS 41.600 and the NDTPA. *See* NRS 41.600(3)(a) ("If the claimant is the prevailing party, the court shall award the claimant . . . any damages that the claimant has sustained."). A private plaintiff can also recover attorney's fees that it could not recover in a product liability action. *See* NRS 41.600(3)(c).

name drug, causing them to take the generic equivalent of the drug and become injured. *See id.*

By and large, courts across the country have rejected these attempts because they seek to do an end-run around product liability law. *See* Victor E. Schwartz, *Rendering Justice in Key Areas of Tort Law in The Next Decade*, 49 Sw. L. Rev. 378, 382 (2021) (observing that "[a]lmost all courts have rejected this theory"). In the first published appellate decision to address this issue, the United States Court of Appeals for the Fourth Circuit dismissed a negligent misrepresentation claim brought against a brand-name drug manufacturer for injuries resulting from the use of another company's generically equivalent drug. *Foster v. Am. Home Prods. Corp.*, 29 F.3d 165, 168 (4th Cir. 1994). The Fourth Circuit rejected the district court's view that the claim was "distinct from the [plaintiffs'] products liability claims," concluding that "[a]lthough actions for negligent misrepresentation arise in many contexts other than products liability, in this case the allegations of negligent misrepresentation are an effort to recover for injuries caused by a product." *Id.* The Fourth Circuit was therefore "persuaded that the Maryland courts would reject this effort to circumvent the necessity that

a defendant be shown to have manufactured the product that caused an injury prior to being held liable for such injury." *Id.*

More recently, the United States District Court for the District of Nevada relied on similar reasoning in dismissing innovator liability claims asserted against brand-name manufacturers because "neither [brand-name manufacturer] manufactured the product that injured" the plaintiff. *Moretti v. Wyeth, Inc.*, No. 2:08-CV-00396-JCMGWF, 2009 WL 749532, at *4 (D. Nev. Mar. 20, 2009) (reasoning that under Nevada law, "where product has caused injury, responsibility is placed on the manufacturer of that product," and "[t]his result remains the same regardless of whether [a] [p]laintiff characterizes her claims as misrepresentation/fraud or claims arising in product liability").

The dangers of a contrary approach are as numerous as they are obvious. As the Iowa Supreme Court observed in a case refusing to impose innovator liability on a brand-name manufacturer for harms caused by a generic drug: "Where would such liability stop? If a car seat manufacturer recognized as the industry leader designed a popular car seat, could it be sued for injuries sustained by a consumer using a

competitor's seat that copied the design?" *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014).

Allowing plaintiffs to seek relief against product manufacturers under the NDTPA for injuries caused by a different manufacturer's product raises similar concerns: Under what circumstances would it be appropriate to allow such claims to proceed? Simply upon a showing that the manufacturer operated in the same market as the manufacturer whose product caused a plaintiff's injuries and engaged in a deceptive trade practice? That is effectively what the district court held. But such a result lacks any meaningful limiting principle rooted in product liability law, or even civil law more generally. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw The Line*, 70 Okla. L. Rev. 359, 359 (2018) ("Civil and criminal laws have long been premised on the fundamental principle that one is responsible only for his or her own misdeeds."). It would also make Nevada an outlier in this respect, opening up the floodgates to private lawsuits against product manufacturers.

The better view is therefore the one espoused by numerous courts—including Nevada federal courts sitting in diversity jurisdiction—that

"[a]mong manufacturers of products, liability rests *only* with the manufacturer of the product that actually caused the alleged injury because that manufacturer profited from sales of the product and controlled its safety." *Moretti*, 2009 WL 749532, at *4 (emphasis added); *see also* Schwartz et al., 81 Fordham L. Rev. at 1862–63 & n.200 (collecting cases holding that "when harm arises out of a product, a cause of action exists only against the manufacturer of the product in question," no matter how a plaintiff styles her claim). This bright-line rule avoids transforming product manufacturers into de facto insurers of their competitors' products, and ensures that the proper entity internalize the costs of product defects.

IV. CONCLUSION

For all of the foregoing reasons, PLAC respectfully requests that the Court grant Petitioner's request for a writ of mandamus or, alternatively, prohibition, to correct the district court's error. Among product manufacturers, liability should rest *only* with the manufacturer of the product that actually caused a plaintiff's alleged injuries—no matter how a plaintiff styles her claim. Holding otherwise would invite plaintiffs to sidestep the policy justifications that underlie product

liability law and open the floodgates to private lawsuits against product manufacturers.

Dated this __ day of June, 2022.

Gibson, Dunn & Crutcher LLP

By: */s/* _____

Christopher D. Dusseault
cdusseault@gibsondunn.com
Sarah M. Kushner
smkushner@gibsondunn.com
[*pro hac vice* applications pending]
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7855
Facsimile: (213) 229-6855

By: */s/* _____

Bruce Scott Dickinson, Esq.
Nevada Bar No. 2297
bdickinson@sdlawoffice.net
STEPHENSON & DICKINSON, P.C.
2820 West Charleston Boulevard,
Suite 17
Las Vegas, Nevada 89102
Telephone: (702) 474-7229
Facsimile: (702) 474-7237

Attorneys for The Product Liability Advisory Council, Inc.

V. CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because this brief was prepared in Microsoft Word 2019 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 21(d) and 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2,726 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this __ day of June, 2022.

Gibson, Dunn & Crutcher LLP

By: */s/* _____

Christopher D. Dusseault
cdusseault@gibsondunn.com
Sarah M. Kushner
smkushner@gibsondunn.com
[*pro hac vice* applications pending]
GIBSON, DUNN & CRUTCHER LLP

333 South Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7855
Facsimile: (213) 229-6855

Attorneys for The Product Liability Advisory Council, Inc.

CERTIFICATE OF SERVICE

I certify that on June __, 2022, I submitted the foregoing Amicus Brief of The Product Liability Advisory Council, Inc. in Support of Philip Morris USA Inc.'s Petition For Writ of Mandamus or, Alternatively, Prohibition, for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

D. Lee Roberts, Jr., Esq.
Nevada Bar No. 8877
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 S. Rainbow Blvd., Ste. 400
Las Vegas, NV 89118
(702) 938-3838
lroberts@wwhgd.com

Attorney for Petitioner

Fan Li, Esq.
fli@kulaw.com
KELLEY | UUSTAL
500 North Federal Highway, Ste. 200
Fort Lauderdale, FL 33301

Micah S. Echols, Esq.
Nevada Bar No. 8437
David P. Snyder, Esq.
Nevada Bar No. 15333
CLAGGETT & SYKES LAW FIRM
4101 Meadows Lane, Suite 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
micah@claggettlaw.com
david@claggettlaw.com

Attorneys for Real Parties in Interest, Dolly Rowan, Navona Collison, and Russell Thompson

Valentin Leppert, Esq.
(Pro Hac Vice)

Spencer Miles Diamond, Esq.
(Pro Hac Vice)
KING & SPALDING
1180 Peachtree Street NE, Ste. 16090
Atlanta, GA 30309
(404) 572-3578 – Telephone

Ursula Marie Henninger, Esq.
(Pro Hac Vice)
KING & SPALDING
300 S. Tryon Street
Charlotte, NC 28202
(704) 503-2631 – Telephone

Dennis L. Kennedy, Esq.
dkennedy@baileykennedy.com
Joseph A. Liebman, Esq.
jliebman@baileykennedy.com
BAILEY KENNEDY
8984 Spanish Ridge Ave.
Las Vegas, NV 89148
(702) 562-8820 – Telephone

Attorneys for Real Parties in Interest, Jerry's Nugget, Joe's Bar, Inc., Quick Stop Market, LLC, R.J. Reynolds Tobacco Company, Silver Nugget Gaming, LLC, and The Poker Palace

Daniel F. Polsenberg, Esq.
dpolsenberg@lrrc.com
Christopher J. Jorgensen, Esq.
cjorgensen@lewisroca.com
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, NV 89169
(702) 949-8200 – Telephone

Kelly Anne Luther, Esq. (Pro Hac Vice)
KASOWITZ BENSON TORRES LLP
1441 Brickell Ave., Ste. 1420
Miami, FL 33131
(786) 587-1045 – Telephone

Attorneys for Real Party in Interest, Liggett Group, LLC

/ / /

I further certify that the foregoing Amicus Brief was mailed via U.S. Mail to the following:

The Honorable Veronica Barisich
Eighth Judicial District Court
Department 5
Phoenix Building
330 S. Third Street, Courtroom 1100
Las Vegas, Nevada 89155

Respondent

By: */s/* _____