IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA CAMACHO; AND ANTHONY CAMACHO,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NADIA KRALL, DISTRICT JUDGE,
Respondents,
and
PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; LV SINGHS NC. d/b/a SMOKES & VAPORS, a domestic corporation,
Real Parties in Interest.

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PETITION FOR WRIT OF MANDAMUS

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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 justices of this court may evaluate possible disqualification or recusal.

1. Sandra Camacho and Anthony Camacho are individuals.
2. Claggett & Sykes Law Firm and Kelley Uustal represent Sandra Camacho and Anthony Camacho in the district court and in this court.

Dated this 4th day of May 2023.

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ROUTING STATEMENT

This court should retain the instant mandamus petition, as it presents questions of statewide public importance involving whether federal law preempts Nevada tort law concerning the manufacture and marketing of cigarettes, whether a manufacturer assumes a duty of care to consumers upon placing its products in the stream of commerce, and whether the Master Settlement Agreement ("MSA") precludes persons from requesting punitive damages in tort actions against cigarette manufacturers. *See* NRAP 17(a)(11)-(12).

RELIEF THE PETITION SEEKS

Petitioners, Sandra Camacho and Anthony Camacho, urge this court to issue a writ of mandamus ordering the district court to vacate its orders granting summary judgment in favor of real parties in interest Philip Morris USA, Inc. ("PM") and Liggett Group, LLC ("LG") (collectively "Cigarette Manufacturers") regarding the Camachos' negligence claim and request for punitive damages.[1] Given that different

[1]Sandra died after the district court granted the Cigarette Manufacturers' motions for summary judgment and during the drafting of the instant petition. *See* 61 PA 9577-79. Anthony will move to amend the case captions in the district court and in this court upon establishing Sandra's estate.

district court judges have reached different conclusions regarding the above issues, given that the Camachos would have to try the underlying matter a second time if this court granted relief upon an appeal from a final judgment, and given that the district court stayed the underlying matter pending resolution of the instant petition, the Camachos urge this court to entertain their petition.

Regarding their negligence claim, the weight of authority clearly demonstrates that federal law does not preempt the Camachos' negligence claim against the Cigarette Manufacturers. Furthermore, Nevada law imposes a duty upon a manufacturer to warn consumers about its product's foreseeable dangers. Regarding their request for punitive damages, the weight of authority clearly demonstrates that claim preclusion does not bar the Camachos' punitive damages request. Furthermore, the MSA's express terms do not release personal injury claims. The district court's conclusions to the contrary are erroneous, which warrants relief. Accordingly, the Camachos urge this court to grant their petition and issue a writ of mandamus correcting the district court's legal errors.

ISSUES THE PETITION PRESENTS

Whether the district court erred in granting the Cigarette Manufacturers' motion for summary judgment as to the Camachos' negligence claim.

Whether the district court erred in granting the Cigarette Manufacturers' motion for summary judgment as to the Camachos' request for punitive damages.

NECESSARY FACTS

Sandra, like millions of other Americans that started smoking in the 1960s, did not know what costs she would pay when she accepted her first cigarette and smoked it. She did not know nicotine's addictive grasp would enthrall her. She did not know she would lose her larynx. She did not know she would lose her voice. She did not know she would lose her life.

Yet, the instant mandamus petition is not just about Sandra. It is also about cigarettes. It is about the corporations that design, manufacture, and sell cigarettes. It is about what the corporations knew regarding their cigarettes' harmful effects. It is about public understanding regarding cigarette smoking's harmful effects. It is about

corporate obfuscation and denial. It is about prior state cigarette litigation. It is about the underlying cigarette litigation. It is about other cigarette litigation currently pending in Nevada district courts.

To assist this court in resolving the instant mandamus petition, the Camachos begin with the deliberate design choices that the Cigarette Manufacturers made that rendered their cigarettes unreasonably dangerous beyond what an ordinary consumer with ordinary knowledge would contemplate. Next, the Camachos address the Cigarette Manufacturers' advertising practices and their effectiveness in shaping behavior. The Camachos then address public health information regarding smoking's harmful effects, its slow diffusion and public acceptance, and the Cigarette Manufacturers' efforts to combat it. The Camachos follow with a summary of Nevada's litigation against the cigarette industry and the resulting MSA. The Camachos then address Sandra's smoking history. Finally, the Camachos present the at-issue moving papers and the district court's resolution of the same.

I. *Cigarette design defects and their alternatives*

The United States Surgeon General estimated that the Cigarette Manufacturers and the cigarette industry have caused

20,830,000 early deaths in the United States between 1965 and 2014. 4 PA 745. For nearly a century, the Cigarette Manufacturers have intentionally designed cigarettes to be more addictive, placing their pecuniary interests ahead of public health. *See id.* at 653-61, 732-34, 737-38; 832-41, 874-79; 5 PA 904-19, 923-24, 940-51. Three broad categories of intentional design choices make cigarettes particularly dangerous beyond the ordinary knowledge of ordinary consumers: nicotine and addiction, curing and inhalation, and additives and combustion. The Camachos address each in turn.

A. *Nicotine and addiction*

The Cigarette Manufacturers have long known that their cigarettes are addictive. Behind closed doors, they mused, "It is fortunate for us that cigarettes are a habit [users] can't break." 4 PA 835. PM understood that "[T]he cigarette will even preempt food in times of scarcity on the smoker's priority list," 5 PA 911, and urged its executives to "think of the cigarette pack as a storage container for a day's supply of nicotine," 4 PA 836, and to determine the "minimum nicotine [required] to keep normal smokers hooked," *id.* at 693-94 (internal quotations omitted). Despite knowing that nicotine is addictive and understanding

how public awareness of the same could harm it, *see* 5 PA 920-21, PM actively worked to conceal nicotine's addictiveness, *see* 4 PA 837-38.

The United States Surgeon General and researchers would later confirm that nicotine is addictive. *See* 5 PA 904-07. Indeed, nicotine is as addictive as cocaine and heroin. *See id*. at 912-19. Nicotine rapidly diffuses into the brain, causing the release of dopamine and signaling pleasure. *Id*. at 904. Regular cigarette smoking exposes the brain to nicotine throughout the day, as nicotine can remain in the blood for up to six hours. *Id*. This constant nicotine exposure changes the structure and function of neurological receptors, causing tolerance and physiological dependence. *Id*. at 904-05. This is particularly true for adolescents, as their still-developing brains cause them to develop addiction at lower levels of nicotine exposure. *See id*. at 908-09. Thus, adolescents may exhibit addiction symptoms within days to weeks of use. *See id*.

The American Psychiatric Association recognizes nicotine addiction as a form of illness, defining it in the *Diagnostic Statistical Manual Fifth Edition* as "Tobacco Use Disorder." *See id*. at 915-19. Nicotine withdrawal causes "irritability, anxiety, agitation, depressed mood, difficulty concentrating, insomnia, hunger, . . . weight gain,"

headaches, and constipation. *Id.* at 905. Over 90 percent of adult cigarette smokers want to quit, and most will so attempt within a given year. *Id.* at 905. However, quitting is extremely difficult, with 60 percent of attempts failing within a week. *Id.* Overall, only 2.7 percent of smokers successfully quit each year. *Id.* at 905-06.

The Cigarette Manufacturers have long been capable of producing low-nicotine cigarettes. They can breed low-nicotine tobacco or use nicotine extraction methods. *See* 4 PA 659. Indeed, PM has over 100 patents to so do, some of which existed in 1939. *See id.* As early as 1963, PM expressly acknowledged that it could "produce a . . . low nicotine product." *Id.* at 875. PM would eventually manufacture and sell three low-nicotine cigarettes that do not sustain nicotine addiction. *See id.* at 659. Even though the Cigarette Manufacturers could manufacture cigarettes that do not contain enough nicotine to sustain addiction, they understood that nicotine addiction is the foundation of their business. *See id.* at 838.

B. *Curing and inhalation*

The Cigarette Manufacturers made other intentional design decisions to increase their cigarettes' addictiveness. The Cigarette

Manufacturers intentionally use flue curing to treat tobacco leaves. *See id.* at 660, 874-76; 5 PA 940. Flue curing uses heat to stop tobacco leaf sugars from degrading. *See* 4 PA 654. Additional sugar reduces the acidity of cigarette smoke, making it easier for a user to inhale. *See id.* Inhaling tobacco smoke into the lungs allows nicotine to reach the brain within 15 to 20 seconds, immediately releasing dopamine and signaling pleasure. *See* 5 PA 904, 944-45. Thus, flue curing's effects make cigarettes more addictive, *see id.* at 944-47, and increase their harm to health by exposing the respiratory system to an array of carcinogens and poisons, *see id.* at 951-52.

Instead of flue curing, the Cigarette Manufacturers could air cure tobacco leaves. *See* 4 PA 654-55, 658. Air curing allows tobacco leaf sugars to degrade, reducing sugar content by over 90 percent. *See id.* at 654. This reduced sugar content renders the resulting smoke too acidic or harsh for a user to inhale. *See id.*; 5 PA 944-45. Indeed, air curing is the method of tobacco curing that existed prior to modern cigarette manufacturing methods and is the curing method that manufacturers of cigars and pipe tobacco use. *See* 4 PA 654; 5 PA 945. Understanding the detrimental health consequences that inhaling cigarette smoke causes,

PM manufactured a non-inhalable cigarette, *see* 4 PA 657-58, and internally considered non-inhalable cigarettes as viable, yet chose to use the flue-curing process instead, *see id*. at 656; 5 PA 946.

C. *Additives and combustion*

In addition to intentionally designing cigarettes so users could inhale carcinogenic and poisonous smoke, the Cigarette Manufacturers further enhanced their cigarettes' addictiveness by infusing them with various additives during the manufacturing process, including sugar and ammonia. *See* 4 PA 738; 5 PA 946-47. Like flue curing's effect, additional sugar reduces the acidity of cigarette smoke and increases inhalation. *See* 5 PA 946. Furthermore, combusting sugar releases acetaldehyde, which enhances a neurological receptor's ability to interact with nicotine. *See id*. at 946-47. PM was aware of this interaction, and other researchers have verified the same. *See id*. at 947.

Adding ammonia produces a more potent nicotine molecule upon combustion. *See* 4 PA 738; 5 PA 947. This amplifies nicotine's pharmacological effect. *See* 5 PA 947. PM was aware of this interaction, and other researchers have verified the same. *See* 4 PA 738; 5 PA 947. The Cigarette Manufacturers could refrain from infusing additives, and

additive-free cigarettes currently exist on the market. *See* 5 PA 936. Yet, instead of manufacturing a safer cigarette, the Cigarette Manufacturers decided to include additives that promote addiction. *See id*.

Combustion produces toxic compounds that a smoker inhales upon smoking. *See* 4 PA 655-56; 5 PA 937. Indeed, most of the toxic compounds that a cigarette contains come from combustion. *See* 4 PA 733; 5 PA 948. The cigarette industry began developing cigarettes that do not require combustion in the 1960s, and a manufacturer released such a cigarette in the 1980s. *See* 4 PA 733. PM currently produces such a cigarette through its IQOS brand. *See id*. at 879. Thus, the Cigarette Manufacturers could stop manufacturing and selling combustible cigarettes and solely manufacture cigarettes that do not combust. *See id*.

II. *Advertising practices*

In addition to manufacturing and selling cigarettes with intentional design defects, the Cigarette Manufacturers used negligent advertising practices[2] to encourage cigarette use and addiction, *see id*. 801-07, 820-21, particularly among teenagers and young adults, *see id*.

[2]This petition addresses health-related advertising practices below. *See infra* Necessary Facts § III(B).

at 717-26, 809-19, 821-23; 5 PA 925-29. The Cigarette Manufacturers' own words best capture their approach. PM wished to "[g]et 'em young, train 'em [r]ight," 4 PA 755-56, recognizing that "today's teenager is tomorrow's potential regular customer, and the overwhelming majority of smokers first begin to smoke while still in their teens," 5 PA 929.

The cigarette industry generally saturated print, radio, and television media with its advertising. *See* 4 PA 803-04. The cigarette industry also saturated outdoor spaces with marketing, using billboards, displays in high-traffic spaces, and displays on various transit systems. *See id.* at 804. Through the 1950s, the cigarette industry was a leading sponsor of national radio and television programs. *Id.* During that time, PM boasted that it delivered approximately 6.7 billion advertising messages to Americans in a single year. *Id.* at 801. By the 1960s, the Federal Trade Commission concluded that cigarette advertising reached nearly every American that could read or understand English, rendering it nearly impossible to avoid. *See id.* at 802. By the 1980s, cigarette advertisements occupied nearly half of the nation's billboards. *See id.* at 805.

In targeting adolescents, the Cigarette Manufacturers manipulated adolescents' desires to rebel, look older, have more autonomy, and create their identity. *See* 4 PA 718-19, 723-24; 5 PA 925-26, 928-29. LG advertising used attractive couples with seductive themes, children in the background, cute dogs, and cartoons. *See* 5 PA 929-31. Like other cigarette manufacturers, *see* 4 PA 720, LG also permitted confectioners to produce candy cigarettes using its corporate logo, *see* 5 PA 929. PM created a comic strip character and placed advertisements in comics sections of newspapers. 4 PA 812. PM also used a diminutive actor resembling a child as a product spokesman, Johnny Philip Morris, noting his appeal to children. *See id*. at 812-13. The Cigarette Manufacturers also engaged in "sampling," giving away cigarettes to people, including adolescents, at concerts, sporting events, shopping malls, supermarkets, thoroughfares, school and college campuses, and housing projects. *See* 4 PA 724; 5 PA 927. PM internally boasted that its strongest sales came from the 15 to 24 age group. 4 PA 817.

Empirical research would later demonstrate that cigarette advertising affected attitudes and motivations about smoking, with some

finding a strong correlation between advertising exposure, cigarette use, and eventual addiction. *See* 5 PA 925-26. Adolescents were three times more responsive to cigarette advertising. *Id*. at 925.

III. *Consumer expectations about cigarette smoking's health effects*

Despite the Cigarette Manufacturers' averments to the contrary, ordinary consumers with ordinary knowledge did not understand smoking's harmful effects when they began smoking. The Camachos present empirical data and evidence regarding public knowledge about smoking's harmful effects before robust public health evidence demonstrated its harm, how the Cigarette Manufacturers sowed doubt regarding the same, and how public knowledge slowly changed.

A. *Prior public perceptions*

Before public health research demonstrated the contrary, the Cigarette Manufacturers made sweeping health-related claims about their cigarettes. LG claimed its cigarettes were "just what the doctor ordered." 4 PA 726. PM claimed switching to its cigarettes would improve or eliminate nose and throat irritation and that smokers were empirically "[s]afer" consuming its cigarettes. *Id*. at 807-08. PM also declared that its cigarettes provided "pleasure without penalties" and

took "the fear out of smoking." *Id*. at 667. Indeed, PM boasted that it was "good practice" for a doctor to recommend its cigarettes to smoking patients. *Id*. at 809.

Many prominent medical professionals, medical organizations, and medical publications initially expressed skepticism that cigarette smoking caused disease. *See id*. at 672-74, 705-09. Other print media cast doubt that cigarettes were addictive or caused cancer. *See id*. at 827. Public health textbooks were ambiguous about smoking's health impacts. *See id.* at 824. Public opinion mirrored the Cigarette Manufacturers' claims and medical skepticism, with a 1954 Gallup poll finding that less than half of respondents believed that smoking correlated with cancer, a 1958 Gallup poll finding 33 percent of respondents believed that smoking caused cancer, and a 1958 poll finding that only 4 percent of respondents stating that cancer or lung harm was a troubling aspect of cigarettes. *Id*. at 703-04.

B. *Public health proclamations and cigarette industry obfuscation*

By the 1950s, epidemiological studies, animal experimentation, autopsies, and analytical chemistry compiled robust data demonstrating that smoking caused cancer. *See id*. at 669-71. In

1954, the American Cancer Society proclaimed that smoking correlated with cancer, and many public health bodies soon followed. *Id*. at 671. In 1962 and in 1964, the Royal College of Physicians and the United States Surgeon General respectively proclaimed that smoking caused cancer. *Id*. at 674. In 1988, the United States Surgeon General proclaimed that smoking is addictive. *Id*. at 778.

The Cigarette Manufacturers knew these proclamations were correct. *See id*. at 829-32, 836. Yet, they used a variety of tactics to create doubt. They founded the Tobacco Industry Research Committee, later the Council for Tobacco Research, and the Tobacco Institute to contest public health research. *See id*. at 675, 682-84, 847-48; 5 PA 953-54. They employed a powerful public relations firm, which in turn hired prominent writers to publish works obfuscating smoking's health risks. *See* 4 PA 675, 697, 849-51. Cigarette industry leaders also publicly denied smoking's harmful effects. *See id*. at 765, 770, 772-74, 776, 779, 831, 838; 5 PA 921-22.

However, the Cigarette Manufacturers understood that increased public awareness about smoking's harmful effects would impede their pecuniary interests and used health-oriented gimmicks to

reassure smokers. Indeed, PM explicitly understood that it needed to "give smokers a psychological crutch . . . to continue smoking." 4 PA 853-54. Thus, the industry introduced various filters, low-tar brands, mild brands, light brands, king-size brands, and menthols to reassure smokers. *See id.* at 686, 726-30, 735-36, 844-46; 5 PA 936-39. The Cigarette Manufacturers knew, however, that such gimmicks provided no safety benefits. 4 PA 729-30, 737-41, 845-46; 5 PA 937-39. Public health bodies would so confirm. 4 PA 846.

C. *Public perceptions after 1964*

The Cigarette Manufacturers knew that the United States Surgeon General's 1964 report had little impact on public opinion regarding smoking's harmful effects. *See* 4 PA 860-61. Indeed, dual surveys from 1964 and 1966 demonstrated that between 55 to 66 percent of smokers would not believe smoking was dangerous unless the Cigarette Manufacturers so admitted. *Id.* at 862. The same surveys demonstrated that between 60 to 63 percent of smokers believed that science had yet to prove that smoking caused cancer. *Id.* In a 1965 poll, only 20 percent of respondents that smoked believed that smoking was a major cause of cancer. *Id.* at 703. A 1966 survey demonstrated that

between 39 to 45 percent of smokers did not believe or did not know if smoking caused cancer. *Id.* at 861. A dual study from 1968 and 1970 demonstrated that teenagers discounted smoking's harmful effects, believing any harm would occur in the future and that they would be able to quit before they experienced it. *Id.* at 863. A 1975 study demonstrated that between 52 to 54 percent of teenagers believed that society exaggerated the dangers of smoking. *Id.* Two 1981 surveys found that 49 percent of smokers did not know that smoking caused most cases of lung cancer, and that 31 percent of smokers did not believe or were unaware that smoking caused cancer. *Id.* at 861.

Regarding addiction, 15 percent of teenaged smokers responding to a 1968 poll believed they would still be smoking in 5 five years, even though empirical evidence demonstrated that 35 percent would still be smoking. *Id.* at 703. Market research in the 1970s demonstrated that 73 percent of smokers were unaware that cigarettes contained nicotine. 5 PA 922.

By 1959 and 1969, PM and LG respectively knew that smokers believed that filters removed tar and nicotine and influenced smoking decisions. 4 PA 845, 860. By 1979, PM knew that smokers

believed that filters provided health and safety benefits and suggested that smokers still held such a belief in 1994. *Id.* at 735.

In 1981, the Federal Trade Commission concluded that smokers only had a vague awareness that cigarettes were harmful and did not understand the "nature and extent" of smoking's health risks. *Id.* at 864. The above demonstrates that the general population took decades to accept smoking's hazardous impacts on health and that the Cigarette Manufacturers contributed to this delay.

IV. *The MSA*

In 1997, Nevada, through its Attorney General, filed a complaint against the Cigarette Manufacturers and other defendants. *See* 2 PA 241-367. Nevada sought to recover damages for the health care expenditures it made that the Cigarette Manufacturers' conduct caused and to restrain the Cigarette Manufacturers from marketing to adolescents. *See id.* at 246-48. The complaint expressly named Nevada as the sole plaintiff. *See id.* at 249. It further alleged specific injuries that Nevada experienced related to public health expenditures. *See id.* at 337-38, 346, 350-66. Nevada requested, among other forms of relief, restitution and damages to compensate it for the public health

expenditures it made treating tobacco-related diseases. *See id.* at 345, 348, 351, 353-54, 358, 361-66. Nevada also requested punitive damages, alleging that the Cigarette Manufacturers' conduct so warranted. *See id.* at 366-67. Nevada did not seek to represent individual citizens that the Cigarette Manufacturers harmed nor did Nevada seek to vindicate its citizen's rights relating to personal injuries that the Cigarette Manufacturers caused. *See id.* at 241-367.

Nevada and the Cigarette Manufacturers, among other parties, signed the MSA. *See* 3 PA 373-527. The MSA's express terms only released claims that Nevada, Nevada's subdivisions or agents, or a person acting in a representative capacity to vindicate a public right brought or could have brought. *See id.* at 393. The MSA expressly provided that it did not release solely private or individual claims. *Id.*

V. *Negligence claims and request for punitive damages*

A. *Sandra's smoking history*

Sandra was born in 1946 and lived much of her life in Chicago. 10 PA 1632. Her father and mother both smoked cigarettes. *Id.* at 1626-27, 1655. Sandra saw cigarette advertising on billboards, magazines, and television. *See id.* at 1743, 1745; 11 PA 1842, 1945, 1947-49, 1951-52. She saw advertisements including the Marlboro Man and Johnny Philip

Morris, which were PM advertisements. *See* 5 PA 958. Sandra did not know that smoking was harmful to her health. *See* 10 PA 1657. Her high school teachers did not discuss smoking's harmful effects. *See id*. at 1695. Sandra began smoking in 1964 when she was 18 years old. *See id*. at 1690. Her friend offered her an LG cigarette. *Id*. at 1745. Sandra thought it was safe because it had a filter. *See id*. at 1745; 11 PA 1852-53, 1922-23, 1953. Sandra also thought it was cool to smoke. *See* 11 PA 1807, 1843, 1910, 1920, 1929, 1940. She inhaled the smoke from her first cigarette and smoked the whole thing. *Id*. at 1926. She wanted another cigarette upon finishing her first. *Id*.

Sandra became a regular smoker, 10 PA 1753, smoking during breaks while she waited tables, *id*. at 1625, 1708-09, while she cut hair, *id*. at 1713, and during breaks as a cashier, *id*. at 1715. While living in Chicago, she smoked one cigarette every half hour. 11 PA 1804. She smoked while dating Anthony. 10 PA 1627-28. It was the first thing she did upon waking up. 11 PA 1955. She smoked while drinking coffee. 13 PA 2179. She smoked while cooking dinner. *Id*. at 2177. She smoked after eating dinner. *Id*. at 2173. It was the last thing she did before going

to sleep. 11 PA 1959. She sometimes woke from sleep to smoke in the middle of the night. *Id*. Smoking a cigarette relaxed her. *Id*. at 1812.

Sandra was unaware of the United States Surgeon General's 1964 report on smoking's health effects. *See* 10 PA 1721; 11 PA 1982-83. The labels on cigarette cartons did not grab her attention. *See* 10 PA 1722, 1727; 11 PA 1873. Rather, Sandra believed the Cigarette Manufacturers' statements that no proof existed demonstrating that smoking was hazardous to health. *See* 10 PA 1720, 1725; 11 PA 1845, 1847-48, 1903, 1908, 1963-65. Sandra's family did not urge her to quit smoking. *See* 10 PA 1678-79, 1681, 1683.

In 1990, Sandra's father died from a heart attack, which she attributed to his smoking. 10 PA 1648. The Camachos moved to Las Vegas the same year, *id*. at 1649-50, and Sandra switched from LG cigarettes to PM cigarettes, *see id. at* 1758-59. She estimated that her cigarette consumption increased to two packs a day. 11 PA 1804. She was not aware that LG later admitted that its cigarettes caused cancer and were addictive. *Id*. at 1939-37.

Sandra made her first attempts at quitting in Las Vegas. *See* 10 PA 1649-50; 11 PA 1819. Her first attempt lasted one day. 11 PA

1820. She threw her cigarettes in the trash and used nicotine gum. *Id.* at 1820-21. She eventually retrieved her cigarettes from the trash and smoked them. *Id.* at 1820-21, 1961-62. Sandra tried to quit over ten times. *Id.* at 1823-24, 1960. Her quitting attempts always failed within a day due to her nicotine addiction. *See* 10 PA 1692; 11 PA 1961. Nicotine withdrawal would make her feel anxious, miserable, and mean, and she constantly thought about smoking a cigarette. 11 PA 1822, 1838, 1961. Sandra's health care providers were also unable to help her quit smoking, *see* 10 PA 1688, 1733-36, noting that she suffered from Tobacco Use Disorder, *see* 5 PA 960-66.

Sandra's health care providers ultimately diagnosed her with laryngeal cancer, removed her larynx, and administered nine weeks of radiation and chemotherapy. *See* 4 PA 893-97; 11 PA 1887, 1899. Sandra's cancer diagnosis caused her to quit smoking, *see id.* at 1955, though she still craves cigarettes, *id.* at 1960. Her cancer diagnosis was also the first time she believed that smoking was harmful to her health. 10 PA 1723; 11 PA 1963. Sandra believes that she would not have smoked if she knew about smoking's harmful effects prior to her nicotine addiction. *See* 10 PA 1721; 11 PA 1838, 1910, 1968.

B. *The Camachos' complaint*

The Camachos ultimately filed a complaint against, among other defendants, the Cigarette Manufacturers, alleging, among other causes of action, negligence and requesting punitive damages. *See* 1 PA 1-24. The Camachos alleged that the Cigarette Manufacturers had a duty to manufacture, market, and sell cigarettes free of design defects, which the Cigarette Manufacturers breached. *Id.* at 19-21. The Camachos also alleged that the Cigarette Manufacturers were negligent in making deceptive or fraudulent representations that cigarettes were safe, that scientific testing had failed to prove that cigarettes were dangerous, or that light brands were safe, contained less nicotine, and deposited less tar in the lungs. *Id.* at 20-21. The Camachos further alleged that LG had a duty to warn Sandra about smoking's harmful effects before 1969, which it breached. *Id.* at 21. Finally, the Camachos alleged that the Cigarette Manufacturers' breach caused their damages. *Id.* at 22-23.

VI. *Relevant motion practice*

A. *Negligence summary judgment motions*

PM, 1 PA 75-91, and LG, *id.* at 140-57, moved for summary judgment regarding the Camachos' negligence claim. The Cigarette

Manufacturers averred that the Camachos failed to present evidence that the Cigarette Manufacturers' cigarettes were more dangerous than the ordinary consumer believed. *See id*. at 79-80, 148-49, 153-54. They also contended that federal law preempted a negligent design defect claim. *See id*. at 80-82, 151-52. They further averred that the Camachos did not demonstrate that a design defect caused Sandra's cancer. *See id*. at 82-85, 154-55. The Cigarette Manufacturers alternatively suggested that the *Restatement (Second) of Torts* §402A cmt. i (Am. L. Inst. 1965) precluded a negligent design defect claim. *See* 1 PA 85-86, 149-51. Finally, they contended that they did not have a special relationship with Sandra such that they had a duty to warn her of smoking's harmful effects before 1969, *see id*. at 86-87, 145-46, that 15 U.S.C. § 1331 preempted such claims for post-1969 conduct, *see id*. at 87-88, 145, and that the Camachos did not demonstrate that a proper warning would have prevented Sandra from smoking, *see id*. at 146-48.

The Camachos opposed. 4 PA 621-46; 30 PA 4653-85. They first argued that they proffered evidence of three broad design defects that the Cigarette Manufacturers' cigarettes contained, the elimination of which would have reduced or eliminated the chances that Sandra

developed cancer. *See* 4 PA 626-32; 30 PA 4666-72. The Camachos also argued that what an ordinary consumer's expectations were regarding cigarettes was a question of fact and that they proffered evidence demonstrating that many smokers did not understand smoking's harmful effects. *See* 4 PA 632-35; 30 PA 4672-75. The Camachos also noted that other jurisdictions had rejected reliance upon Comment i. *See* 4 PA 635-36; 30 PA 4675-77. The Camachos explained that their experts opined that the design defects caused Sandra's cancer. *See* 4 PA 636-37; 30 PA 4677-78. The Camachos also argued that federal law did not preempt their negligence claims, proffering caselaw from other jurisdictions so demonstrating. *See* 4 PA 638-42; 30 PA 4657-58, 4678-82. Finally, the Camachos argued that the Cigarette Manufacturers owed Sandra a duty to warn her of smoking's harmful effects. *See* 30 PA 4658-65.

PM, 57 PA 8697-707, and LG, *id.* at 8786-92, replied in support, reiterating their prior averments.

B. *Hearing, order, and reconsideration*

The district court presided over a hearing on the motions, and the parties proffered arguments consistent with their moving papers. *See*

58 PA 8841-8862, 8902-06. The district court ultimately granted the motions. 59 PA 8976-81, 9123-35. The district court concluded that the Cigarette Manufacturers did not have a special relationship with Sandra such that they had no duty to warn her about smoking's harmful effects. *Id.* at 8980, 9128. The district court also found that the Camachos did not present any evidence that Sandra would have stopped smoking had LG provided such a warning before 1969. *Id.* at 8980. The district court also concluded that 15 U.S.C. § 1331 preempted the Camachos' negligent advertising and marketing claims. *Id.* at 8980, 9128. The district court further concluded that the Camachos failed to present evidence that the Cigarette Manufacturers' cigarettes were more dangerous than the ordinary consumer believed or that Sandra would not have developed laryngeal cancer if the design defects did not exist. *Id.* at 8980-81. Finally, the district court concluded that federal law and the *Restatement (Second) of Torts* § 402A precluded the Camachos' negligence claims regarding design defects. *Id.* at 8981.

The Camachos moved to reconsider. *Id.* at 8982-90. The Cigarette manufacturers opposed, averring that the Camachos did not present any new issues of fact or law and did not demonstrate that the

district court clearly erred. *Id.* at 9139-47; 60 PA 9220-26. The district court agreed and denied the motion. 61 PA 9372-73.

C. *Punitive damages motions*

PM moved for summary judgment regarding the Camachos' request for punitive damages, 3 PA 604-18, which LG joined, 2 PA 228-30. Relying upon the MSA, the Cigarette Manufacturers averred that claim preclusion barred the Camachos' request for punitive damages, contending that the Attorney General adequately represented the Camachos' interest in punishing the Cigarette Manufacturers, that the Camachos based their request on the same facts giving rise to the MSA, and that the MSA was a final judgment. *See* 3 PA 608-13. The Cigarette Manufacturers also averred that the MSA's terms barred the Camachos' punitive damages request and that punitive damages exclusively serve the public interest of punishment rather than of compensating a plaintiff. *See id.* at 614-17.

The Camachos opposed. 16 PA 2638-58. They first argued that claim preclusion cannot apply to their request for punitive damages because punitive damages are not a stand-alone claim but are a remedy. *See id.* at 2643-44. They alternatively argued that the MSA did not

resolve the Cigarette Manufacturers' liability for punitive damages because the Cigarette Manufacturers did not admit any liability under the MSA. *See id*. at 2644-45. The Camachos also noted that the MSA explicitly excluded personal injury claims from its scope. *See id*. at 2645-46, 2656-58. The Camachos then argued that they were not in privity with the Attorney General because she only sought redress for harm that Nevada experienced regarding public health expenditures and adolescent marketing, not personal injuries. *See id*. at 2646-48. Indeed, the Camachos proffered persuasive authority from sister jurisdictions allowing personal injury plaintiffs to request punitive damages against the Cigarette Manufacturers after the MSA's ratification. *See id*. at 2649-2654. Finally, the Camachos argued that the public policy exception to claim preclusion should apply. *See id*. at 2654-56.

PM replied in support, 56 PA 8673-84, which LG joined, 57 PA 8800-01, largely reiterating their prior averments. While the Cigarette Manufacturers admitted that the Attorney General could not represent the Camachos regarding Sandra's injuries, they nonetheless suggested that she represented the Camachos' interests in their punitive damages request. *See id*. at 8679.

D. *Hearing, order, and reconsideration*

The district court presided over a hearing on the motions, and the parties proffered arguments consistent with their moving papers. *See* 58 PA 8868-86. The district court granted the motion. *See* 59 PA 8969-71. The district court concluded that punitive damages exist to vindicate a public interest rather than to compensate a plaintiff. *Id*. at 8970. The district court also concluded that the Camachos were in privity with the Attorney General. *Id*. at 8970-71. Accordingly, the district court suggested that claim preclusion barred the Camachos' request for punitive damages. *See id*. at 8971.

The Camachos moved to reconsider. *Id*. at 9075-80. The Cigarette Manufacturers opposed, averring that the Camachos did not present any new issues of fact or law and did not demonstrate that the district court clearly erred. *Id*. at 9156-62; 60 PA 9348-49. The district court summarily denied the motion. *See* 61 PA 9360-61.

VII. *Stay pending the instant petition*

The Camachos moved the district court to stay the underlying proceedings to pursue mandamus relief from this court. *Id*. at 9356-62. Notwithstanding their belief that the district court correctly resolved the at-issue motions, the Cigarette Manufacturers agreed that a stay was

appropriate. *See id.* at 9556. The district court granted the motion, concluding that the instant petition would present issues of first impression and welcoming this court's guidance. *Id.* at 9568.

POINTS AND LEGAL AUTHORITIES

I. *Writ relief standard*

A writ of mandamus is available to, among other uses, "compel the performance of an act that the law requires." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160. This court ordinarily limits mandamus relief to situations where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); NRS 34.170. In considering whether to entertain mandamus relief, this court also considers whether the petition will allow it to clarify "an important issue of law . . . and considerations of sound judicial economy and administration militate in favor of granting [mandamus relief]." *Int'l Game Tech., Inc.*, 124 Nev. at 197-98, 179 P.3d at 559.

Considerations of judicial economy militate in favor of entertaining the instant petition. This court has yet to address whether

federal law preempts negligence claims against cigarette manufacturers and whether the MSA's express terms or claim preclusion prevents a plaintiff from requesting punitive damages against a cigarette manufacturer resulting from personal injury claims. Other plaintiffs are currently litigating these issues in cases pending in Nevada district courts, and district courts have arrived at different conclusions under substantially similar facts. *See* 29 PA 4646-49 (*Tully v. Philip Morris USA, Inc.*, No. A-19-807657-C (Nev. Dist. Ct. May 24, 2022) (denying motion for summary judgment on punitive damages)); 62 PA 9623-26 (*Tully v. Philip Morris USA, Inc.*, No. A-19-807657-C (Nev. Dist. Ct. July 8, 2020) (denying motion to dismiss regarding negligence claims)), *id.* at 9643-52 (*Geist v. Philip Morris USA, Inc.*, No. A-19-807653-C (Nev. Dist. Ct. Mar. 17, 2023) (same)). This court routinely entertains mandamus petitions under these circumstances, as considerations of sound judicial economy ordinarily compel resolution of issues of first impression that will impact pending litigation presenting the same issues. *See R.J. Reynolds Tobacco Co. v. Eighth Jud. Dist. Ct.*, 138 Nev., Adv. Op. 55, 514 P.3d 425, 428 (2022); *Endo Health Sols., Inc. v. Second Jud. Dist. Ct.*, 137 Nev., Adv. Op. 39, 492 P.3d 565 (2021); *Piroozi v. Eighth Jud. Dist. Ct.*,

131 Nev. 1004, 1007, 363 P.3d 1168, 1170 (2015); *Beazer Homes Holding Corp. v. Eighth Jud. Dist. Ct.*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012); *Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011). This consideration weighs in favor of entertaining the instant petition.

Furthermore, the underlying proceeding is ongoing, as the Camachos retain strict liability claims against the Cigarette Manufacturers. *See* 1 PA 27-31. Accordingly, the Camachos lack a plain, speedy, and adequate remedy in the ordinary course of law to remedy the district court's erroneous dismissal of their negligence claims and request for punitive damages. *See Neville v. Eighth Jud. Dist. Ct.*, 133 Nev. 777, 779, 406 P.3d 499, 501 (2017) (electing to entertain mandamus relief where the district court dismissed many of the petitioner's claims early in the proceedings, noting that the petitioner lacked "a plain, speedy, and adequate legal remedy in pursuing his dismissed claims"). If the Camachos obtained relief from a final judgment, the Camachos would necessarily have to present substantially similar evidence and examine substantially similar witnesses in prosecuting their request for punitive damages. Moreover, the district court would have to empanel a different

jury to resolve such a request, which is anathema to Nevada's punitive damages statutory scheme. *See* NRS 42.005(3) (requiring the same trier of fact to resolve punitive damages liability and damages). This consideration also weighs in favor of entertaining the instant petition.

Additionally, the merits of the instant petition turn on a mixture of purely legal questions and the district court's resolution of disputed facts on a motion for summary judgment, which also renders mandamus relief appropriate. *See R.J. Reynolds Tobacco Co.*, 138 Nev., Adv. Op. 55, 514 P.3d at 428 (entertaining a mandamus petition involving a purely legal question); *High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Jud. Dist. Ct.*, 133 Nev. 500, 503, 402 P.3d 639, 643 (2017) (entertaining a mandamus petition challenging a partial grant of summary judgment involving important issues of law and impacting other pending cases). Furthermore, the parties fully developed their legal positions in the district court, *see* 1 PA 75-91, 140-57; 3 PA 604-18; 4 PA 621-46; 16 PA 2638-58; 30 PA 4653-85; 56 PA 8673-84; 57 PA 8697-707, 8786-92, and the district court issued merits-based decisions, *see* 59 PA 8969-71, 8976-81, 9123-35. Accordingly, this court has an adequate record to resolve the legal merits that the instant

petition poses. *Cf. Archon Corp. v. Eighth Jud. Dist. Ct.*, 133 Nev. 816, 823, 407 P.3d 702, 708 (2017) (noting that mandamus relief is not appropriate where the parties did not brief, and the district court did not address, the arguments that the petition poses).

Finally, the district court's errors are manifest and do not withstand legal scrutiny. *See infra*, Points & Legal Auths. §§ II-III. Accordingly, this court's intervention at this stage of the proceeding will "prevent multiple proceedings arising from the same case," which this court recognizes promotes the interests of judicial economy. *Borger v. Eighth Jud. Dist. Ct.*, 120 Nev. 1021, 1030, 102 P.3d 600, 606 (2004).

Given that the Camachos lack a plain, speedy, and adequate remedy in the ordinary course of law, given that instant petition presents purely legal questions and the district court's resolution of disputed facts on a motion for summary judgment with a record that the parties fully developed, given these legal questions are issues of statewide importance pending in other district court cases, and given that this court's intervention at this stage in the underlying proceedings may prevent additional proceedings arising from the same case and other cases, the Camachos respectfully urge this court to entertain the instant petition.

II. *The district court erred in granting summary judgment regarding the Camachos' negligence claim*

In granting the Cigarette Manufacturers' motion for summary judgment regarding the Camachos' negligence claims, the district court made patently erroneous legal conclusions on three threshold issues and misapplied the summary judgment standard. *See* 59 PA 8976-81, 9123-35. The Camachos begin with the threshold questions of preemption, preclusion, and duty before addressing the district court's erroneous weighing of competing evidence on a motion for summary judgment.[3]

A. *Federal law does not impliedly preempt the Camachos' negligence claim*

The district court erroneously concluded that implied federal preemption precludes the Camachos' negligence claims.[4] *Id.* at 8980,

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[3]Caught between a sparse order as to PM, which this court may construe consistent with the moving papers and the hearing, *see Mortimer v. Pac. States Sav. & Loan Co.*, 62 Nev. 147, 160, 145 P.2d 733, 738 (1944), and waiver rules, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011), the Camachos find themselves in the unenviable position of having to address each argument that the Cigarette Manufacturers proffered below.

[4]While the district court's order does not explicitly state which preemption theory it applied, the moving papers demonstrate that the district court relied upon implied preemption. *See* 1 PA 80-82, 151-52; 57

9128. This court reviews whether federal law preempts state-law claims de novo. *Teva Parenteral Meds., Inc. v. v. Eighth Jud. Dist. Ct.*, 137 Nev., Adv. Op. 6, 481 P.3d 1232, 1239 (2021).

The Supreme Court of the United States expressly held that 15 U.S.C. § 1334 alone governs the preemptive scope of federal law concerning cigarette advertising or promotion. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992). The Court explained that 15 U.S.C. § 1334 only preempts claims where the predicate legal duty that the manufacturer breached has a direct relationship to cigarette advertising or promotion concerning smoking and health. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 85-86 (2008); *Cipollone*, 505 U.S. at 523-24. Courts must assume that the warnings that the federal government imposes upon cigarette advertising or promotion are sufficient and may not permit theories that would supplement such warnings. *Good*, 555 U.S. at 79. Thus, federal law preempts a failure to warn claim alleging that manufacturers had a duty to include "additional, or more clearly stated, warnings" about smoking's health effects in their post-1969 advertising.

PA 8700.

Cipollone, 505 U.S. at 524-25. Federal law also preempts states from targeting cigarette advertising. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550-51 (2001).

However, federal law does not preempt claims for unlawful trade practices, fraudulent misrepresentation, conspiracy to misrepresent material facts, or conspiracy to conceal material facts, as the predicate duty underlying those claims is a duty not to deceive or to commit or conspire to commit fraud. *See Good*, 555 U.S. at 80-87; *Cipollone*, 505 U.S. at 527-31. Federal law also does not preempt failure to warn theories involving negligent testing and research. *Cipollone*, 505 U.S. at 524-25. Nor does federal law preempt states from prohibiting cigarette sales to adolescents. *See Reilly*, 533 U.S. at 552.

Other jurisdictions have followed the Court's guidance, holding that federal law does not preempt a variety of state claims. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1189-90 (11th Cir. 2017) (holding that strict liability and negligence claims survive express preemption); *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1147-49 (9th Cir. 2005) (holding that failure to warn claims and fraudulent concealment claims survive express preemption); *R.J. Reynolds Tobacco*

Co. v. Marotta, 214 So. 3d 590, 598-605 (Fla. 2017) (holding that strict liability claims survive express preemption).

Here, the Camachos' negligence claims concern the Cigarette Manufacturers' duty to manufacture, market, and sell cigarettes free of design defects. 1 PA 19-21. These claims are clearly outside the scope of 15 U.S.C. § 1334(b)'s express language, as the predicate duties concern eliminating design defects. *See Good*, 555 U.S. at 80-87; *Cipollone*, 505 U.S. at 527-31; *Graham*, 857 F.3d at 1189-90. The Camachos' remaining negligence claim against LG concerns LG's negligent marketing and promotion practices before Congress enacted 15 U.S.C. § 1334(b), *see* 1 PA 21-22, which escapes express preemption for want of retroactive effect, *see Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 859-60 (D.N.H. 1988). Accordingly, the district court's reliance, if any, upon express preemption was erroneous.

Notwithstanding the Court's explicit holding that 15 U.S.C. § 1334 alone governs the preemptive scope of federal law concerning cigarette advertising or promotion, *see Cipollone*, 505 U.S. at 517, the Cigarette Manufacturers nonetheless advanced an implied preemption argument in the district court. Implied preemption occurs when "federal

law dominates a particular field . . . or actually conflicts with state law." *Teva Parenteral Meds.,* 137 Nev., Adv. Op. 6, 481 P.3d at 1239. In the former, federal law must "so thoroughly occupy a legislative field, or touch a field in which the federal interest is so dominant, that Congress effectively [left] no room for states to regulate conduct in that field." *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 371, 168 P.3d 73, 79 (2007). In the latter, an actual conflict between federal and state law exists such that a party cannot comply with both. *See id*. at 371-72, 168 P.3d at 80.

Rather than make the above showing, the Cigarette Manufacturers persuaded the district court that *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-38 (2000), *superseded by statute as stated in Nicopure Labs, LLC v. Food & Drug Administration*, 944 F.3d 267, 272 (D.C. Cir. 2019), stood for the premise that federal law impliedly preempts state tort law that would effectively remove cigarettes from the market. There, the Court considered whether the Food and Drug Administration could regulate tobacco products based upon the Food and Drug Administration's determination that nicotine was a drug. *See* 529 U.S. at 131. Upon

reviewing the Food and Drug Administration's statutory scheme, *see id.* at 133-43, and upon reviewing tobacco-specific legislation, *see id.* at 143-59, the Court concluded that Congress had not granted the Food and Drug Administration the ability to regulate tobacco, *see id.* at 161. Thus, the Food and Drug Administration could not promulgate tobacco control regulations. *Id.* The Court did not address preemption or tort claims in any manner. *See id.* at 125-61.

Notwithstanding that *Brown & Williamson Tobacco Corp.* is factually and legally inapposite to the instant matter, the Cigarette Manufacturers nonetheless clung to a specific passage[5] in the district court:

> Congress, however, has foreclosed the removal of tobacco products from the market. A provision of the United States Code currently in force states that 'the marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.' 7 U.S.C. § 1311(a). More importantly, Congress has directly addressed the

[5]LG quoted the *Brown & Williamson Tobacco Corp.* syllabus rather than the Court's holding. *See* 1 PA 151. Regardless, the Camachos assume that LG intended to rely upon the same passage that PM relied upon.

> problem of tobacco and health through legislation on six occasions since 1965. When Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. Nonetheless, Congress stopped well short of ordering a ban. Instead, it has generally regulated the labeling and advertisement of tobacco products, expressly providing that it is the policy of Congress that 'commerce and the national economy may be . . . protected to the maximum extent consistent with' consumers 'being adequately informed about any adverse health effects.' 15 U.S.C. § 1331. Congress' decision to regulate labeling and advertising and to adopt the express policy of protecting 'commerce and the national economy . . . to the maximum extent' reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

529 U.S. at 137-138 (alterations in original) (internal citations omitted). Such reliance lacks merit.

First, Congress repealed 7 U.S.C. § 1311(a). *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 611, 118 Stat. 1418, 1522 (2004). Second, Congress subsequently empowered the Food and Drug Administration to regulate tobacco products. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776

(2009). Thus, the statutory foundation of the Court's analysis no longer exists, rendering *Brown & Williamson Tobacco Corp*. unpersuasive.[6]

Alternatively, this single passage from *Brown & Williamson Tobacco Corp.* does not demonstrate that federal law occupies the entire field of tobacco legislation. Indeed, the Court has explicitly held that states may impose tort liability on cigarette manufacturers where the predicate duty is unrelated to advertising and marketing. *See Good*, 555 U.S. at 80-87; *Reilly*, 533 U.S. at 552; *Cipollone*, 505 U.S. at 524-31. Other courts have noted that congressional interventions in the tobacco

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[6]Thus, the district court's reliance, if any, upon *Pooshs v. Philip Morris USA, Inc.*, 904 F. Supp. 2d 1009, 1024-26 (N.D. Cal. 2012), *Jeter ex rel. Smith v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 684-86 (W.D. Pa. 2003), *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 117-18 (D.P.R. 2002), *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1223-25 (W.D. Wis. 2000), *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 471-73 (Fla. Dist. Ct. App. 2007), and *Badon v. R.J. Reynolds Tobacco Co.*, 934 So. 2d 927, 932-34 (La. Ct. App. 2006), as to implied preemption similarly lacks merit. All the above courts relied upon the same language from *Brown & Williamson Tobacco Corp*. to conclude that the imposition of state design defect tort law would conflict with federal law. *See Pooshs*, 904 F. Supp. 2d at 1024-26; *Jeter ex rel. Smith*, 294 F. Supp. 2d at 684-86; *Cruz Vargas*, 218 F. Supp. 2d at 117-18; *Insolia*, 128 F. Supp. 2d at 1223-25; *Davis*, 973 So. 2d at 471-73; *Badon*, 934 So. 2d at 932-34. Accordingly, this court should reject these cases on the same grounds that it should reject *Brown & Williamson Tobacco Corp*.

legislative field resulted in advertising and marketing requirements, leaving ample room for state tort law outside of that limited realm. *See Graham*, 857 F.3d at 1186-88; *see also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 599-600 (8th Cir. 2005). While courts have yet to address it, the current regulatory scheme clearly preserves a wide range of state sovereignty over tobacco products, including negligence and strict liability. *See* 21 U.S.C. § 387p(a)(2), (b). Accordingly, the Cigarette Manufacturers cannot demonstrate that federal law occupies the entire field of tobacco legislation.

Furthermore, the Cigarette Manufacturers failed to demonstrate that the imposition of Nevada tort law under the theories that the Camachos pleaded conflict with federal law. Rather than proffer a specific federal statute or regulation that conflicts with the Camachos' tort theories, the Cigarette Manufacturers relied upon the same passage from *Brown & Williamson Tobacco Corp*. to suggest that Congress foreclosed the removal of cigarettes from the market.[7] *See* 1 PA 80-82,

[7]The district court's reliance upon *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), if any, lacks merit. There, the imposition of state tort law requiring airbags directly conflicted with a federal regulation that allowed "manufacturers to choose among different

151-52. Such an averment is inconsistent with implied preemption jurisprudence, as the Court has repeatedly recognized that congressional inaction alone does not give rise to federal preemption of state law. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). "[O]therwise, deliberate federal inaction could always imply [preemption], which cannot be. There is no federal [preemption] *in vacuo*, without a constitutional text or a federal statute to assert it." *P.R. Dep't of Consumer Affs. v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) (italics in original).

Given that federal law does not occupy the entire field of tobacco legislation, and given that no federal statute or regulation conflicts with the Nevada tort theories that the Camachos pleaded, the district court's application of implied preemption was erroneous.

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passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies," citing "safety concerns . . . associated with airbags" and a desire to "develop data on [the] comparative effectiveness" of different approaches. *Id.* at 878-79. Here, there is no federal statute or regulation that conflicts with the Camachos' tort theories.

B. *The Restatement (Second) of Torts § 402A cmt. i does not preclude the Camachos' negligence claim*

Alternatively, the Cigarette Manufacturers relied upon the *Restatement (Second) of Torts* § 402A cmt. i to induce the district court's erroneous grant of summary judgment. *See* 1 PA 85-86, 149-51; 59 PA 8981. Nevada courts review questions of law, including the application of Section 402A's legal doctrines, de novo. *See Schueler v. Ad Art, Inc.*, 136 Nev., Adv. Op. 52, 472 P.3d 686, 691 (Ct. App. 2020).

Section 402A generally provides that a manufacturer is liable if it places a product in the stream of commerce that contains an unreasonably dangerous defect. Comment i elaborates:

> The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by 'unreasonably dangerous' in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk,

> and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

Nevada's strict liability jurisprudence clearly demonstrates that Nevada courts have taken a piecemeal approach to incorporating Section 402A and its various comments. *See Schueler*, 136 Nev., Adv. Op. 52, 472 P.3d at 691 (relying upon Comment d); *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192-93, 209 P.3d 271, 276-77 (2009) (clarifying that Nevada courts had not adopted Comment j); *Allison v. Merck & Co.*, 110 Nev. 762, 769-74, 878 P.2d 948, 954-56 (1994) (relying upon Comment c and rejecting Comment k); *Young's Mach. Co. v. Long*, 100 Nev. 692, 694, 692 P.2d 24, 25 (1984) (relying upon Comment a and Comment n); *Jacobsen v. Ducommun, Inc.*, 87 Nev. 240, 243, 484 P.2d 1095, 1097 (1971) (relying upon Comment h). This jurisprudential history unequivocally belies the Cigarette Manufacturers' reliance upon

Schueler for the proposition that Nevada courts have adopted Section 402A wholesale.

Turning to Comment i, this court has indirectly quoted Comment i once for the proposition that a product is "unreasonably dangerous" if it is "dangerous to an extent beyond that contemplated by the ordinary consumer," *Allison*, 110 Nev. at 774, 878 P.2d at 956 (internal quotations omitted). Despite indirectly quoting it, this court then criticized Comment i for want of clear meaning and for moving away from a traditional strict liability approach toward a negligence standard. *See id.* at 774 n.11, 878 P.2d at 956 n.11. Instead of adopting Comment i, this court noted that it would continue "following [its] precedent and the traditional principles of strict liability." *Id.* This court recently affirmed such a commitment, again rejecting the adoption of negligence-oriented approaches to strict liability. *See Ford Motor Co. v. Trejo*, 133 Nev. 520, 523-31, 402 P.3d 649, 652-57 (2017). Accordingly, the district court's reliance, if any, upon Comment i to dismiss the Camachos' negligence claims is contrary to Nevada jurisprudence, rendering it erroneous.

Even if this court were to disavow its criticism, adopting Comment i would not foreclose the Camachos' negligence claims. Comment i's plain language demonstrates that products that a manufacturer cannot make entirely safe, like alcohol or tobacco, become unreasonably dangerous when they, unbeknownst to the ordinary consumer, contain substances or poisons that increase the danger of consumption. Thus tobacco "without any additives or foreign substances" is not unreasonably dangerous, but manufactured tobacco products containing adulterated tobacco or additives might be unreasonably dangerous. *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522 (D. Kan. 1995); *see also Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 272-73 (D.R.I. 2000) (rejecting application of Comment i); *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 480 (Fla. Dist. Ct. App. 2007) (Gross, J., concurring) (explaining that tobacco additives that made cigarette smoke easier to inhale precluded application of a "good tobacco" defense under Comment i). Accordingly, the weight of authority belies the district court's blanket application of Comment i.[8]

[8]This court may summarily reject the district court's reliance, if any, upon *Parsons v. Colt's Manufacturing Co. LLC*, 137 Nev., Adv. Op.

C. *The Cigarette Manufacturers assumed a duty to warn Sandra by placing their cigarettes in the stream of commerce*

The district court erroneously concluded that the Cigarette Manufacturers did not owe Sandra a duty to warn. 59 PA 8980, 9128. Whether a manufacturer owes a duty to a consumer is a question of law, *see Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1493, 970 P.2d 98, 114 (1998), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001), which this court reviews de novo, *Wyeth v. Rowatt*, 126 Nev. 446, 460, 244 P.3d 765, 775 (2010).

To induce the district court's erroneous conclusion, the Cigarette Manufacturers proffered *Wiley v. Redd*, 110 Nev. 1310, 885 P.2d 592 (1994). There, this court considered whether an alarm company or its customer owed a police officer responding to an alarm on the customer's property a duty to warn the police officer that the customer

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72, 499 P.3d 602 (2021), as that case did not involve the *Restatement (Second) of Torts* § 402A. The district court's reliance, if any, upon *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 515-16 (3d Cir. 1987), is similarly unavailing, as that case merely cited Comment i in passing and turned on the district court's application of Comment j. Finally, *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1397-98 (5th Cir. 1992) (Jolly, J. concurring), is factually inapposite, as that concurrence merely explained that the danger of a forklift backing into a person constitutes an open and obvious danger such that Comment i would apply.

had vicious dogs on the property. *See id.* at 1312-14, 885 P.2d at 593-95. This court began by noting that Nevada "law does not impose a general affirmative duty to warn others of dangers." *Id.* at 1316, 885 P.2d at 596. Rather, there must be "a special relationship between the parties" to impose such a duty, which turns on "considerations of social policy." *Id.* This court explained that imposing a duty to warn upon the alarm company would give rise to parallel obligations to become aware of hazards on all its customers' premises, which would "adversely impact the ability of alarm companies to provide services at reasonable cost to the public." *Id.* Thus, imposing such a duty was "socially undesirable." *Id.*

However, this court summarily concluded that the customer owed a duty to warn the police officer, as a premises owner owes a duty of reasonable care to entrants. *See id.* at 1315, 885 P.2d at 595 (citing *Moody v. Manny's Auto Repair*, 110 Nev. 320, 332, 871 P.2d 935, 943 (1994)). The social policy considerations underpinning this conclusion lie within California jurisprudence. *See Moody*, 110 Nev. at 332-33, 871 P.2d at 942-43 (citing *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968), *superseded by statute on other grounds as stated in Calvillo-Silva v. Home*

Grocery, 968 P.2d 65, 71-72 (Cal. 1998)). Those social policies are the closeness of the premises owner's conduct and injuries, the blameworthiness of the premises owner's conduct, preventing future injuries, and the availability of insurance. *Rowland*, 443 P.2d at 567-68.

Accordingly, *Wiley* stands for the proposition that special relationships giving rise to duties of care exist when social policy so justifies. Rather than engage in this analysis, the district court flatly concluded that the Cigarette Manufacturers had no special relationship with Sandra and therefore had no duty to warn her. 59 PA 8980, 9128. However, the relationship between a manufacturer and a consumer is less attenuated than that between an alarm company and the responding police officers that it summons.

Nevada courts have long recognized that social policy mandates the imposition of duties upon manufacturers, explaining:

> 'The public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel. By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising, and otherwise, they do everything they can to induce that belief . . . . The supplier has invited and solicited the use; and

> when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer . . . .'

Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 441-42, 420 P.2d 855, 857 (1966) (quoting William L. Prosser, *The Fall of the Citadel*, 50 Minn. L. Rev. 791, 799 (1966)). Imposing such a duty effectively reduces hazards to life and health to consumers and imposes the costs of such hazards and harms upon "the manufacturer that put such products on the market" rather than powerless consumers that the products injure. *Dolinski*, 82 Nev. at 442, 420 P.2d at 857 (internal quotations omitted); *see also Teva Parenteral Meds., Inc.*, 137 Nev., Adv. Op. 6, 481 P.3d at 1241-42 (holding that Nevada law imposed a duty of reasonable care upon a manufacturer to prevent known harm to consumers). Despite their averments to the contrary,[9] Nevada law imposes a duty of

[9]The Cigarette Manufacturers proffered *Burton v. R.J. Reynolds Tobacco Co.*, 397 F.3d 906 (10th Cir. 2005), *Jeter v. Brown & Williamson Tobacco Corp.*, 113 F. App'x 465 (3d Cir. 2004), and *Prentice v. R.J. Reynolds Tobacco Co.*, 338 So. 3d 831 (Fla. 2022), to contend that they did not owe Sandra a duty to warn her about smoking's harmful effects. Yet, each of those cases involved a fraudulent concealment claim, *see Burton*, 397 F.3d at 910-14; *Jeter*, 113 F. App'x at 469; *Prentice*, 338 So. 3d at 840-43. While a defendant must have a duty to disclose for a plaintiff to recover under a fraudulent concealment claim, *see Leigh-Pink v. Rio Props., LLC*, 138 Nev., Adv. Op. 48, 512 P.3d 322, 325-26 (2022), a duty to disclose need not exist in a negligence matter, *see Rivera*, 125

reasonable care upon "manufacturers to make their products as safe as commercial feasibility and the state of the art will allow." *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 138, 808 P.2d 522, 524 (1991). Accordingly, the district court's conclusion that the Cigarette Manufacturers did not owe a duty to Sandra is clearly erroneous.

D. *Genuine issues of material fact preclude summary judgment*

This court reviews a district court's order granting summary judgment de novo. *Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The movant "bears the initial burden of production to show the absence of a genuine issue of material fact." *Id.* Since the Camachos bore the burden of persuasion at trial, the Cigarette Manufacturers could only prevail on their motion for summary judgment

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Nev. at 191, 209 P.3d at 275. The *Burton* court expressly recognized this distinction, reversing the plaintiff's recovery under a fraudulent concealment claim but affirming his recovery under a negligent failure to warn claim. *See Burton*, 397 F.3d at 910-14, 916-19. Given that the Camachos are challenging the district court's dismissal of their negligence claims rather than a fraudulent concealment claim, the district court's reliance, if any, upon *Burton*, *Jeter*, and *Prentice* lacks merit. Finally, this court must reject the district court's inappropriate reliance, if any, upon *Bahrampour v. Sierra Nevada Corp.*, No. 82826-COA, 2022 Nev. App. Unpub. LEXIS 12 (Nev. Ct. App. Jan. 13, 2022). *See* NRAP 36(c)(3).

by "either . . . submitting evidence that negates an essential element of [the Camachos'] claim, or . . . pointing out . . . that there is an absence of evidence to support [the Camachos'] case." *Id.* at 602-03, 172 P.3d at 134 (internal citation and quotations omitted). If the Cigarette Manufacturers made such a showing, the Camachos would nonetheless defeat summary judgment by "transcend[ing] the pleadings and, by affidavit or other admissible evidence, introduce[ing] specific facts that show a genuine issue of material fact." *Id.* at 603, 172 P.3d at 134. When reviewing the parties' proffered evidence, this court must view "the evidence, and any reasonable inferences drawn from it, . . . in a light most favorable to [the Camachos]." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

"The substantive law controls which factual disputes are material and will preclude summary judgment." *Id.* at 731, 121 P.3d at 1031. It is axiomatic that a plaintiff must establish the existence of a duty of care, breach of that duty, legal causation, and damages to prevail on a negligence claim. *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). The existence of a duty of care is a question of law, *see PetSmart, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev., Adv.

Op. 75, 499 P.3d 1182, 1186 (2021), and Nevada law imposes a duty of care upon manufacturers that place their products into the stream of commerce, *see Teva Parenteral Meds., Inc.*, 137 Nev., Adv. Op. 6, 481 P.3d at 1241-42. Thus, the Camachos satisfy this element.

Breach under a traditional negligence theory occurs where the defendant fails to exercise the degree of care that an ordinary prudent person would exercise in a particular situation. *See Driscoll v. Erreguible*, 87 Nev. 97, 101, 482 P.2d 291, 294 (1971). Causation exists where the plaintiff demonstrates that the defendant's breach was the legal cause of the plaintiff's damages. *See Wyeth*, 126 Nev. at 464, 244 P.3d at 778. A but-for causation theory applies where only one of multiple and mutually exclusive injury theories could have caused the plaintiff's injury, but a substantial-factor causation theory applies "when an injury may have had two causes, either of which, operating alone, would [be] sufficient to cause the injury." *Id*. at 464-65, 244 P.3d at 778 (internal quotations omitted). Questions of breach, causation, and damages are questions of fact for the jury. *See Klasch v. Walgreen Co.*, 127 Nev. 832, 841, 264 P.3d 1155, 1161 (2011) (noting for breach and causation); *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 454, 686

P.2d 925, 932 (1984) (noting for damages). The Camachos now direct this court's attention to the facts they proffered in opposition to summary judgment for each of their negligence theories, which this court must draw reasonable inferences from and view in their favor. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029.

1. *The Cigarette Manufacturers' advertising practices were a substantial factor in influencing Sandra's decision to smoke*

The record before this court belies the district court's flat conclusion that the Camachos proffered no evidence that the Cigarette Manufacturers' advertising influenced Sandra's decision to smoke. 59 PA 8980.

The Cigarette Manufacturers deliberately targeted teenagers, encouraging use and addiction. *See* 4 PA 717-26, 755-56, 801-07, 809-19, 820-23; 5 PA 925-31. The Cigarette Manufacturers also repeatedly advertised that their cigarettes were safe, *see* 4 PA 667, 726, 807-09, and advertised various gimmicks to reassure consumers that their cigarettes were safe, *see id.* at 686, 726-30, 735-41, 844-46; 5 PA 936-39. They saturated the media, making it nearly impossible to avoid their advertising. *See* 4 PA 801-05. This advertising empirically influenced attitudes and motivations about smoking, and teenagers were three

times more responsive to the same. *See* 5 PA 925-26. The Cigarette Manufacturers established industry groups to obfuscate the nascent epidemiological research demonstrating smoking's harmful effects. *See* 4 PA 675, 682-83, 847-48; 5 PA 953-54.

Sandra saw the Cigarette Manufacturers' advertising as an adolescent. *See* 10 PA 1743, 1745; 11 PA 1842, 1945, 1947-49, 1951-52. Consistent with the Cigarette Manufacturers' advertisements, she believed that cigarettes with a filter were safe. *See* 10 PA 1745; 11 PA 1852-53, 1922-23, 1953. Consistent with the Cigarette Manufacturers' advertisements, Sandra also believed that smoking was cool. *See* 11 PA 1807, 1843, 1910, 1920, 1929, 1940. Before she started smoking, she did not know that smoking was harmful to her health. *See* 10 PA 1657, 1695. Sandra developed a nicotine addiction, *see* 5 PA 960-66, making it incredibly difficult for her to quit, *see id*. at 904-09, 912-19; 10 PA 1649-50, 1692; 11 PA 1819-24, 1838, 1960-62. Sandra's smoking ultimately caused her laryngeal cancer. *See* 4 PA 893-97.

A reasonable jury could find that a reasonably prudent manufacturer would not deliberately influence teenagers to use an addictive and dangerous cigarette, knowingly mislead consumers about

the dangers of its cigarettes, and knowingly advertise gimmicks which mislead consumers into believing that its dangerous cigarettes are safe. Accordingly, a reasonable jury could find that the Cigarette Manufacturers breached their duty of care to Sandra. A reasonable jury could also find that the Cigarette Manufacturers' advertising was a substantial factor[10] in Sandra's decision to accept the cigarette that her friend offered her and to continue smoking afterwards until she developed a nicotine addiction. A reasonable jury could find that Sandra's nicotine addiction caused her to continue smoking. Finally, a reasonable jury could find that Sandra's smoking caused her laryngeal cancer. Accordingly, genuine issues of material fact exist regarding the Camachos' negligence theory as to the Cigarette Manufacturers' advertising practices, rendering the district court's grant of summary judgment erroneous.

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[10]The Cigarette Manufacturers' advertising practices and Sandra's friend's offer of a cigarette do not present mutually exclusive theories of liability. Both operating alone could have caused Sandra to continue smoking after she consumed her first cigarette. Thus, the district court's reliance, if any, upon *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991), to impose a but-for causation standard lacks merit.

2. *Sandra would not have smoked or would have quit smoking at an earlier date had the Cigarette Manufacturers warned her of smoking's health effects*

The record before this court belies the district court's conclusion that the Camachos proffered no evidence that Sandra would not have started smoking or would have quit smoking at an earlier date had the Cigarette Manufacturers warned her about smoking's health effects. 59 PA 8980.

In the analogous strict liability context,[11] Nevada courts require a plaintiff to demonstrate "that a different warning would have altered the way the plaintiff used the product or would have prompted [the] plaintiff to take precautions to avoid the injury." *Rivera*, 125 Nev. at 191, 209 P.3d at 275 (internal quotations omitted). Here, Sandra repeatedly stated that she would not have smoked if she knew about smoking's harmful effects prior to her nicotine addiction. *See* 10 PA 1721;

[11]Given that the elements of strict liability focus on causation and damages, *see Stackiewicz*, 100 Nev. at 448, 686 P.2d at 928, and given that whether a different warning would have changed Sandra's behavior also focuses on causation, reliance upon *Rivera* for this proposition is appropriate notwithstanding that *Rivera* concerned a strict liability claim rather than a traditional negligence claim, *see* 125 Nev. at 190, 209 P.3d at 274.

11 PA 1838, 1910, 1968. A reasonable jury could believe Sandra's testimony and find that Sandra would have never begun smoking or would have quit at an earlier date had the Cigarette Manufacturers warned her about smoking's harmful effects. Accordingly, genuine issues of material fact exist regarding the Camachos' negligence theory as to the Cigarette Manufacturers' failure to warn about smoking's harmful effects, rendering the district court's grant of summary judgment erroneous.

3. *The Cigarette Manufacturers' cigarettes were more dangerous than the ordinary consumer expected when Sandra began smoking*

The district court concluded that consumers know that cigarettes are inherently dangerous, causing cancer and death, which precluded negligence liability. *See* 59 PA 8980-81. In so doing, the district court erred.

In the analogous strict liability context,[12] Nevada courts require a plaintiff to demonstrate that a product has dangerous

[12]Even though the Cigarette Manufacturers moved for summary judgment regarding the Camachos' negligence claim, they relied upon strict liability caselaw concerning what other jurisdictions deem the common knowledge exception to liability. *See Ward v. Ford Motor Co.*, 99 Nev. 47, 49, 657 P.2d 95, 96 (1983); *Guilbeault*, 84 F. Supp. 2d at 266-

characteristics beyond what an ordinary consumer possessing ordinary knowledge common to the community would contemplate.[13] *Ward v. Ford Motor Co.*, 99 Nev. 47, 49, 657 P.2d 95, 96 (1983). Nevada law and the weight of authority provide that such a determination is ordinarily a question of fact for the jury. *See id*; *see also Tompkin v. Am. Brands*, 219 F.3d 566, 572 (6th Cir. 2000), *overruled on other grounds by Wimbush v.*

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67. Regardless, Nevada courts recognize that whether a risk of harm constitutes common knowledge is relevant to whether the plaintiff assumed the risk of his or her injury or otherwise contributed to the same. *See Turner v. Mandalay Sports Ent., LLC*, 124 Nev. 213, 219 n.19, 180 P.3d 1172, 1176 n.19 (2008) (regarding assumption of risk); *Hamilton v. S. Nev. Power Co.*, 70 Nev. 472, 478-79, 273 P.2d 760, 763 (1954) (regarding contributory negligence). Thus, the ordinary consumer's knowledge appears relevant regardless of whether this court deems it the common knowledge exception, assumption of risk, or contributory negligence.

[13]The Cigarette Manufacturers proffered no authority supporting their assertion that *Ward* requires the Camachos to demonstrate that the Cigarette Manufacturers' cigarettes are more dangerous than other cigarettes. *See* 1 PA 148-49. Here, negligence liability properly attaches if the Camachos demonstrate that the Cigarette Manufacturers' cigarettes possess dangerous characteristics beyond what an ordinary consumer possessing ordinary knowledge common to the community would contemplate. *Ward*, 99 Nev. at 49, 657 P.2d at 96. Such liability attaches even if all cigarettes contain the same dangerous characteristics unbeknownst to the ordinary consumer. Concluding otherwise is contrary to this court's refusal to carve out special exceptions from liability to specific manufacturers. *See Allison*, 110 Nev. at 772-73, 878 P.2d at 955.

Wyeth, 619 F.3d 632, 639 n.5 (6th Cir. 2010); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1106-13 (D. Ariz. 2003); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 494 (D.S.C. 2000); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 844-45 (W.D. Ky. 1999); *Burton*, 884 F. Supp. at 1526; *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 182-83 (Iowa 2002); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 389-90 (App. Div. 2003).

Here, Sandra began smoking in 1964,[14] *see* 10 PA 1690, the same year that the United States Surgeon General proclaimed that smoking causes cancer.[15] The district court deemed the United States

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[14]When Sandra began smoking is dispositive when considering the ordinary consumer's knowledge, as "[n]icotine's addictive grip makes it difficult to quit smoking," making a "hooked" user "[in]capable of making a rational choice." *Insolia*, 216 F.3d at 599.

[15]This court should summarily reject the district court's reliance, if any, upon *Solimon v. Philip Morris, Inc.*, 311 F.3d 966, 974 (9th Cir. 2002), *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 351-52 (6th Cir. 2000), and *Barker v. Brown & Williamson Tobacco Co.*, 105 Cal. Rptr. 2d 531, 537 (Ct. App. 2001), as those courts concluded that smoking's harmful effects were common knowledge after Sandra began smoking. This court should similarly reject the district court's reliance, if any, upon *Brown & Williamson Tobacco Corp.*, as the Court's recitation of congressional action regarding tobacco regulation began in 1965, *see* 529 U.S. at 137-38.

Surgeon General's proclamation dispositive, taking it as evidence of what the ordinary consumer possessing ordinary knowledge common to the community knew. *See* 59 PA 8980-81. However, the Camachos proffered evidence that the Surgeon General's proclamation initially had little impact on consumer knowledge, with most smokers and adolescents expressing skepticism about the causal relationship between smoking and cancer.[16] *See* 4 PA 860-63. Thus, a reasonable jury could find that ordinary consumers possessing ordinary knowledge common to the community had yet to adopt the United State Surgeon General's proclamation when Sandra began smoking, which precludes summary judgment.[17]

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[16]The district court's summary adoption of the United States Surgeon General's proclamation is analogous to the *Guilbeault* court's use of judicial notice. *See* 84 F. Supp. 2d at 273-75. However, NRS 47.130(2) provides that facts appropriate for judicial notice must be "[g]enerally known" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." Given that the Camachos have proffered evidence demonstrating that ordinary consumers possessing ordinary knowledge common to the community did not understand smoking's harmful effects when Sandra began smoking, the district court's reliance, if any, upon *Guilbeault* is contrary to NRS 47.130(2).

[17]The district court's reliance, if any, upon *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 433-34 (D. Md. 2000), is

Moreover, persuasive authority provides that Nevada law requires that the ordinary consumer possessing ordinary knowledge common to the community must know about specific health risks rather than general health risks for the common knowledge exception to preclude liability. *See Rivera*, 395 F.3d at 1152 (citing *Allison*, 110 Nev. at 771, 878 P.2d at 954). Thus, proper application of the common knowledge exception to the instant matter would require a showing that the ordinary consumer possessing ordinary knowledge common to the community knew that cigarette smoking caused laryngeal cancer and was addictive. The Cigarette Manufacturers proffered no such evidence in their moving papers.[18] *See* 1 PA 75-88, 140-56; 57 PA 8697-705, 8786-90. Regarding addiction, the Camachos proffered polling data

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therefore misplaced, as the plaintiff in that case proffered no evidence demonstrating that ordinary consumers were generally unaware of smoking's harmful effects.

[18]LG merely proffered a transcript from a different trial of a commercial of a deceased actor telling viewers not to smoke and discussion of a website the PM established in the late 1990s to early 2000s stating that smoking causes cancer and is addictive. *See* 1 PA 212-20. Given that Sandra started smoking in 1964, the district court's reliance, if any, upon this transcript lacks merit. *See Insolia*, 216 F.3d at 599.

demonstrating that smokers were largely unaware that cigarettes contain nicotine and are addictive ten years after Sandra began smoking. 5 PA 922. Thus, a reasonable jury could find that ordinary consumers possessing ordinary knowledge common to the community did not know that smoking was addictive when Sandra began smoking, which precludes summary judgment.

4. *The Cigarette Manufacturers' cigarettes contain design defects that were a substantial factor in causing Sandra's laryngeal cancer*

The district court concluded that the Camachos failed to proffer evidence that the Cigarette Manufacturers' cigarettes contained design defects that were the but-for cause of Sandra's cancer. 59 PA 8980-81. In so doing, the district court misapplied Nevada law.

The Cigarette Manufacturers had a duty to make their products safe, *see Robinson*, 107 Nev. at 138, 808 P.2d at 524, and breached that duty by placing products in the stream of commerce that had specific design characteristics rendering them more dangerous than the ordinary user having ordinary knowledge available in the community would contemplate, *see Trejo*, 133 Nev. at 525, 402 P.2d at 653. In the

analogous strict liability context,[19] Nevada law permits a plaintiff to demonstrate that a product has an unreasonably dangerous design defect by showing that a safer and commercially feasible design existed at the time of manufacture. *See id.* at 525-26, 402 P.3d at 653-54.

The Camachos presented evidence of specific design defects, including nicotine, flue curing, inhalation, additives, and combustibility. *See* 4 PA 654-55, 658, 660, 738, 874-76; 5 PA 904-09, 912-19, 940, 944-47, 951-52. These design defects are not inherent characteristics of cigarettes, *see* 15 U.S.C. § 1332 (defining a cigarette as, relevant here, "any roll of tobacco wrapped in paper or in any substance not containing tobacco"), as the Camachos proffered evidence that commercial feasibility and the state of the art allowed the Cigarette Manufacturers to produce cigarettes without the design defects that the Camachos identified, *see* 4 PA 654-55, 657-59, 733, 879; 5 PA 936, 945. Regarding causation, the

[19]Given that the elements of strict liability focus on causation and damages, *see Stackiewicz*, 100 Nev. at 448, 686 P.2d at 928, and given that whether a safer and feasible alternative design would have reduced the danger also focuses on causation, reliance upon *Trejo* for this proposition is appropriate notwithstanding that *Trejo* concerned a strict liability claim rather than a traditional negligence claim, *see* 133 Nev. at 525-26, 402 P.3d at 653-54.

Camachos' oncology expert, John Ruckdeschel, M.D., opined that Sandra's smoking of LG's and PM's cigarettes was a substantial factor in her development of laryngeal cancer.[20] *See* 4 PA 896-97. The Camachos' clinical psychology and addiction expert, Judith J. Prochaska, Ph.D.,[21] opined that the Camachos' proffered design defects were a substantial factor in sustaining Sandra's addiction and in her development of cancer. *See* 5 PA 904-07, 912-19, 923-24, 937, 944-45, 946-47, 964-65. Specifically, Dr. Prochaska opined:

> In my opinion, the reason Sandra smoked for as long as she did and as much as she did is because

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[20]Given that Dr. Ruckdeschel opined that PM's cigarettes were a substantial factor in Sandra's development of cancer, the district court's reliance, if any, upon *Allison*, 110 Nev. at 767, 878 P.2d at 952, *Baymiller v. Ranbaxy Pharmaceuticals, Inc.*, 894 F. Supp. 2d 1302, 1311 (D. Nev. 2012), and *Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396-JCM-(GWF), 2009 U.S. Dist. LEXIS 29550 at *7-8 (D. Nev. Mar. 20, 2009), lacks merit.

[21]Dr. Prochaska has a doctoral degree in clinical psychology. 5 PA 899. She has tenure at Stanford University and is the Deputy Director of its Prevention Research Center in its Department of Medicine. *Id.* She has admitting privileges at Stanford Medicine within the Lucile Packard Children's Hospital and Stanford Health Care. *Id.* She also directs the Stanford Cancer Center's Tobacco Treatment Service. *Id.* She actively treats patients with nicotine addiction. *Id.* Accordingly, Dr. Prochaska satisfies the *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008), requirements, rendering the district court's reliance, if any, upon *Grover C. Dils Medical Center v. Menditto*, 121 Nev. 278, 287-88, 112 P.3d 1093, 1100 (2005), meritless.

> of the levels of nicotine in the cigarettes that she smoked and because she became addicted. If she had smoked cigarettes that were not addictive or that had substantially reduced nicotine, more likely than not, she would not have become addicted nor sustained her addiction to cigarettes.
>
> If the cigarettes that Sandra smoked had a smoke pH level of 8 or higher, making it difficult to inhale, in my opinion, more likely than not, she would not have become addicted nor sustained her addiction to cigarettes.
>
> . . . .
>
> It is my professional opinion to a reasonable degree of scientific certainty that Sandra Camacho was addicted to cigarettes containing nicotine that were manufactured by [LG] and [PM]; Sandra smoked to sustain that addiction; and Sandra's addiction to nicotine in cigarettes was as sufficient and substantial contributing cause of her . . . cancer.

Id. at 965. Accordingly, the Camachos proffered evidence of specific design defects that the Cigarette Manufacturers' cigarettes contained and proffered expert witness opinions demonstrating that the design defects were a substantial factor[22] in causing Sandra's laryngeal cancer.[23]

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[22]Given that the design defects and Sandra's smoking operated together to cause Sandra's laryngeal cancer, the district court's reliance, if any, upon *Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970), to impose a but-for causation standard lacks merit.

[23]Accordingly, *Poosh*s, 904 F. Supp. 2d at 1025-26, *Estate of White*, 109 F. Supp. 2d at 433-34, *Cipollone v. Liggett Group, Inc.*, 683 F. Supp.

Given that a reasonable jury could find that the Cigarette Manufacturers' cigarettes contain design defects, and given that a reasonable jury could find that the design defects were a substantial factor in causing Sandra's addiction and laryngeal cancer, genuine issues of material fact precluded the district court's erroneous grant of summary judgment.[24]

III. *The district court erred in granting summary judgment regarding the Camachos' punitive damages request*

In addition to compensatory and other damages, the Camachos requested punitive damages in their complaint on their negligence and strict liability claims. 1 PA 23-24, 31. In striking the Camachos' punitive damages request upon the Cigarette Manufacturers' summary judgment motion, the district court seemingly relied upon

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1487, 1493-95 (D.N.J. 1988), *Whiteley v. Philip Morris, Inc.*, 11 Cal. Rptr. 3d 807, 856-64 (Ct. App. 2004), and *Davis*, 973 So. 2d at 472-73, are inapposite, as the plaintiffs in those cases did not identify specific design defects or did not proffer competent causal opinions. The district court's reliance upon these cases, if any, was erroneous.

[24]The district court's reliance, if any, upon the Camachos' expert witnesses' testimony from prior cases with different plaintiffs lacks merit, as prior inconsistent statements are a subject for impeachment upon cross-examination, *see* NRS 50.075; NRS 50.135, and a district court may not resolve witness credibility or the weight of evidence on a motion for summary judgment, *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001).

claim preclusion.[25] 59 PA 8970-71. In so doing, the district court concluded that the Attorney General adequately represented the Camachos' personal injury interests in punishing the Cigarette Manufacturers in the litigation giving rise to the MSA. *See id.* The district court made no explicit finding regarding whether the Attorney General could have brought the Camachos' claim in the prior litigation. *See id*. The district court also adopted the averments that PM advanced in its moving papers by reference, *see id*., which included a contention that the Camachos based their claims upon the same facts and circumstances as the prior litigation. *See* 3 PA 612-13.

To demonstrate the erroneous nature of the district court's conclusion, the Camachos briefly address the policy objectives underlying punitive damages before turning to the plain language of the MSA's release provisions and preclusion.

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[25]While the district court did not expressly state which form of preclusion it applied, PM's moving papers clearly demonstrate that the district court relied upon claim preclusion rather than issue preclusion. *See id*. at 608-13; 56 PA 8678-81.

A. *Punitive damages in general*

The plain language of NRS 42.005(1) demonstrates that punitive damages serve the policy objectives of deterrence and punishment. This court has repeatedly emphasized the importance of the deterrence function, noting that punitive damages serve to dissuade a defendant from continuing reprehensible conduct and to dissuade other actors from engaging in similar reprehensible conduct. *See Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 614, 5 P.3d 1043, 1053 (2000); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1267-68, 969 P.2d 949, 962 (1998); *Guar. Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 208, 912 P.2d 267, 273-74 (1996); *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44-45, 846 P.2d 303, 304-05 (1993); *Republic Ins. Co. v. Hires*, 107 Nev. 317, 321, 810 P.2d 790, 792-93 (1991); *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987). Learned treatises concerning punitive damages accord. *See* 1 John J. Kircher & Christine M. Wiseman, *Punitive Damages Law & Practice* §§ 2:6, 2:7, 2:9 (2020).[26]

[26]This court has repeatedly relied upon this treatise in developing its punitive damages jurisprudence. *See Land Baron Invs., Inc. v. Bonnie Springs Fam. Ltd. P'ship*, 131 Nev. 686, 701 n.12, 356 P.3d 511, 521 n.12

Additionally, punitive damages are not a stand-alone claim, but are remedy that a plaintiff may request upon satisfying the controlling elements in conjunction with an underlying independent claim. *See Teva Parenteral Meds., Inc.*, 137 Nev., Adv. Op. 6, 481 P.3d at 1241 n.4; 22 Am. Jur. 2d *Damages* § 567 (2023). The underlying independent claim need not address conduct that a defendant directs toward the public or conduct that otherwise harms the public, as uniquely personal claims like defamation may support a request for punitive damages.[27] *See Bongiovi*, 122 Nev. at 581-52, 138 P.3d at 450-51. Finally, Nevada's punitive damages statutory scheme contains no provision disallowing a plaintiff from requesting punitive damages

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(2015); *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 747 n.63, 192 P.3d 243, 257 n.63 (2008).

[27]Thus, this court should reject the district court's reliance, if any, upon New York caselaw providing that a plaintiff must show that his or her request for punitive damages concerns "pervasive and grave misconduct affecting the public generally." *Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487, 490 (App. Div. 2008); *see also Mulholland v. Philip Morris USA, Inc.*, No. 14-144-cv(L), No. 14-265-cv(XAP), 2015 U.S. App. LEXIS 168 at *6 (2d Cir. Jan. 7, 2015); *Grill v. Philip Morris USA, Inc.*, 653 F. Supp. 2d 481, 489-99 (S.D.N.Y. 2009); *Shea v. Am. Tobacco Co.*, 901 N.Y.S.2d 303, 305 (App. Div. 2010). At least one jurisdiction has rejected this caselaw on these grounds. *See Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731, 744 n.9 (Mass. 2021).

against a defendant that a jury has already returned a punitive damages award against in a different controversy.[28] *See* NRS 42.001; NRS 42.005; NRS 42.007.

B. *Claim preclusion does not apply*

"[C]laim preclusion bars parties and their privies from litigating claims" that a party brought or could have brought "in a prior action concerning the same controversy." *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d 912, 915 (2014). To apply, the parties or their privies must be in both actions, the district court entered a valid final judgment in the first action, and the second action concerns "the same claims or any part of them" that the parties or their privies brought or could have brought in the first action. *Id.* This court reviews a district court's application of claim preclusion de novo. *See id.* at 256, 321 P.3d at 914.

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[28]Given that Ga. Code Ann. § 51-12-5.1(e) only allows one award of punitive damages against a defendant in a strict liability matter, this court should reject the district court's reliance, if any, upon *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006). At least one jurisdiction has rejected this caselaw on these grounds. *See Laramie*, 173 N.E.3d at 744 n.9.

1. *The Attorney General did not represent the Camachos' personal injury interests*

The district court relied upon an adequate representation theory to conclude that the Camachos were privies of the Attorney General. *See* 59 PA 8970-71. A thoughtful examination of adequate representation jurisprudence and a careful comparison of the Attorney General's complaint and the Camachos' complaint clearly demonstrates that the district court erred.

This court adopted the *Restatement (Second) of Judgments* § 41 (Am. L. Inst. 1982) regarding whether preclusion applies under an adequate representation theory. *See Alcantara*, 130 Nev. at 261, 321 P.3d at 917. Under that section, preclusion will attach where, relevant here, "[a]n official or agency invested by law with authority to represent [a] person's interests" represents "[that] person who is not a party to an action" and that person is "entitled to the benefits of a judgment as though [that person was] a party." *Restatement (Second) of Judgments* § 41(1)(c). Generally, where a public official pursues remedies that are supplemental to the remedies that a private person may pursue himself or herself, "the official's maintenance of an action does not preclude other litigation by the persons affected." *Id*. at § 41 cmt. d. For example, if

> [a]n agency of government sues B, an employer, to compel B to modify its employment practices so far as they have racially discriminatory effects. A judgment in favor of the agency does not preclude C, an employee of B who has been adversely affected by B's employment practices, from obtaining other relief for himself, if the agency's power to pursue corrective remedies is not preemptive.

Id. at § 41 cmt. d, illus. 7.

This court has twice considered whether privity under an adequate representation theory applies since its adoption of Section 41. *See Weddell v. Sharp*, 131 Nev. 233, 237-38, 350 P.3d 80, 83 (2015); *Alcantara*, 130 Nev. at 260-61, 321 P.3d at 917-18. In *Alcantara*, a person fatally assaulted a father in a parking lot. 130 Nev. at 255, 321 P.3d at 914. The father's estate and three of the father's heirs brought a wrongful death action against the premises owner and lost. *Id.* The father's remaining heir later brought a wrongful death action against the same premises owner for the same wrong. *Id.* The district court dismissed the remaining heir's action, which this court affirmed. *See id.* at 263, 321 P.3d at 919. In so holding, this court explained that the estate adequately represented the remaining heir's interests, as she was a beneficiary of the estate, and the estate specifically represented the underlying

negligence claim regarding her father and the premises owner. *Id.* at 261, 321 P.3d at 918.

In *Weddell*, two former business partners submitted their disputes to a panel of attorneys for binding resolution, waiving any conflicts of interest that the attorneys may have had with the disputes. *See* 131 Nev. at 235-36, 350 P.3d at 81. The attorneys resolved the dispute, and the losing business partner stipulated that the resolution bound him. *See id.* at 236, 350 P.3d at 82. However, the losing business partner later brought causes of action against the attorneys, challenging their conduct during the resolution process. *Id.* The district court ultimately dismissed the losing business partner's action under a claim preclusion theory. *See id.* On appeal, this court held that privity did not exist between the winning business partner and the attorneys such that claim preclusion would attach because the winning business partner did not represent the attorneys' interests in the subsequent action. *See id.* at 237-38, 350 P.3d at 82-83.

Thus, *Alcantara* and *Weddell* clearly demonstrate that privity will only attach under an adequate representation theory if a litigant in the prior action adequately represented a subsequent litigant's particular

interest in a particular claim. *See Interest, Black's Law Dictionary* 968 (11th ed. 2019) (defining "interest," in relevant part, as "[a] legal share in something; all or part of a legal or equitable claim to or right in property").

Other jurisdictions have acknowledged that personal injury plaintiffs may request punitive damages in jurisdictions that signed the MSA. *See Boerner*, 394 F.3d at 604 (reducing an Arkansas award of punitive damages against a party to the MSA); *Shaffer v. R.J. Reynolds Tobacco Co.*, 860 F. Supp. 2d 991, 998-99 (D. Ariz. 2012) (concluding that a jury must resolve the personal injury plaintiff's request for punitive damages against a party to the MSA); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 406 (Ct. App. 2011) (affirming a punitive damages award against a party to the MSA); *Bifolk v. Philip Morris, Inc.*, 152 A.3d 1183, 1209-15 (Conn. 2016) (same); *Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731, 741-45 (Mass. 2021) (holding that a personal injury plaintiff was not a privy of the Attorney General of Massachusetts); *Williams v. RJ Reynolds Tobacco Co.*, 271 P.3d 103, 114 (Or. 2011) (holding that a personal injury plaintiff could recover punitive damages against a party to the MSA); *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I.

656, 729 (2022) (reducing an award of punitive damages against a party to the MSA); *In re Tobacco Litig.*, 624 S.E.2d 738, 740-44 (W. Va. 2005) (affirming the district court's bifurcation of a punitive damages request in a class action against a party to the MSA).

The *Laramie* court's analysis is particularly instructive, as it is factually and legally identical to the instant matter. In rejecting PM's assertion that the personal injury plaintiff was a privy of the Attorney General of Massachusetts, the court explained that a plaintiff's particular cause of action grounds his or her interest in requesting punitive damages. *See Laramie*, 173 N.E.3d at 742. Moreover, the court noted that punitive damages may not punish a defendant for harm that the defendant inflicted upon "'strangers to the litigation.'" *Id.* at 743 (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (1996)). Thus, the state's unfair and deceptive trade practices action and request for punitive damages did not and could not represent the plaintiff's interest in punitive damages resulting from her wrongful death action. *See Laramie*, 173 N.E.3d at 743. Given that the former action concerned the harm that PM had inflicted upon Massachusetts, and given that the latter action concerned that harm that PM inflicted upon the plaintiff,

claim preclusion did not bar the plaintiff's request for punitive damages for want of privity. *See id.*; *see also Bullock*, 131 Cal. Rptr. 3d at 393 (same).

Here, the Attorney General expressly stated that she sued under NRS 228.170(1) (proving the Attorney General may bring suit "to protect and secure the interest of the State"), NRS 598.0963(3) (providing the Attorney General may bring a deceptive trade practices act "in the name of the State of Nevada"), and her "common law authority . . . to represent the State of Nevada." 2 PA 249. In summarizing the relevant damages that the cigarette industry caused Nevada, the Attorney General expressly alleged that the cigarette industry's conduct caused Nevada to incur damages through "increased Medicaid payments and increased health care insurance for public employees." *Id.* at 246-47.

Turning to the relevant claims, the Attorney General's negligence theory alleged that the cigarette industry's products caused "Medicaid recipients" to contract diseases, which in turn caused Nevada to suffer damages in providing "medical assistance to [those] Medicaid recipients." *Id.* at 362. The Attorney General sought damages to "repay the State of Nevada for the sums the State . . . expended . . . and to

provide restitution which would restore [Nevada] to the financial position that it would be in" had the cigarette industry not caused Medicaid recipients to contract diseases. *Id.* at 362. The Attorney General also sought "damages in restitution for the sums of money" that Nevada currently paid and would pay in the future "for medical services and care to Medicaid recipients." *Id.* at 363. The Attorney General's strict liability theory similarly sought redress "for medical services and care to Medicaid recipients" that the cigarette industry caused Nevada to pay. *See id.* at 364-65. The Attorney General's request for punitive damages alleged that the cigarette industry acted with oppression, fraud, and malice in causing the above damages. *See id.* at 366-67.

Thus, the Attorney General's claims against the Cigarette Manufacturers sought restitution for the public health costs that the Cigarette Manufacturers' products caused. In contrast, the Camachos sued in their individual capacity. *See* 1 PA 1. Their negligence claims alleged that the Cigarette Manufacturers' conduct caused Sandra's addiction and laryngeal cancer. *See id.* at 22. The Camachos' strict liability claim advanced similar allegations. *See id.* at 30. Their negligence and strict liability claims sought redress for Sandra's pain and

medical expenses and for Anthony's loss of companionship, care, support, and consortium. *See id*. at 23, 30-31. The Camachos' request for punitive damages alleged that the Cigarette Manufacturers acted with conscious disregard for Sandra's safety in causing the above damages. *See id*. at 23, 31.

Proper application of Section 41, Nevada jurisprudence, and the weight of authority clearly demonstrates that the Attorney General did not represent the Camachos' interests in their personal injury claims. The Attorney General did not seek redress for any personal injuries that any Nevada resident experienced from the cigarette industry's conduct. Rather, the Attorney General sought to recover the money that Nevada paid or would pay in health care expenditures due to the cigarette industry's conduct. Regarding punitive damages, the Attorney General sought to punish the cigarette industry for its conduct in driving up Medicaid expenses and contributing to the delinquency of children. The Attorney General did not seek to punish the cigarette industry for its conduct in causing personal injuries to any Nevada resident. Accordingly, the district court erred in relying upon an adequate

representation theory to preclude the Camachos' punitive damages request.

2. *The Attorney General could not have brought the Camachos' personal injury claims in parens patriae*

Alternatively, the Cigarette Manufacturers averred that the Attorney General's citation to her common-law authority to represent Nevada amounted to an invocation of her ability to act in parens patriae, rendering the Camachos privies of the Attorney General. *See* 3 PA 611; 56 PA 8679. The district court's reliance upon this averment, if any, lacks merit.

This court has only commented upon the common-law authority of the Attorney General in passing. *See State ex rel. Fowler v. Moore*, 46 Nev. 65, 81-82, 207 P. 75, 77 (1922) (citing *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 284-85 (1888), and *People v. Miner*, 2 Lans. 396, 397-99 (N.Y. Gen. Term. 1868)). In *San Jacinto Tin Co.*, the Court held that the Attorney General of the United States had the inherent authority to bring suit in cases where a government land grant "would work serious injury to the United States[ ] and prejudice its interest." 125 U.S. at 284-85. In *Miner*, the court held that the Attorney General of New York had common-law authority, in relevant part, to protect and

defend the government's property and revenue, to prevent public nuisances, and to protect "lunatics, and others, who are under the [government's] protection." 2 Lans. at 398-99. Here, the Camachos' personal injury claims do not fit within the *San Jancinto Tin Co.* nor the *Miner* framework.

Turning to parens patriae jurisprudence, this court has only used this theory regarding Nevada's obligations to delinquent minors,[29] which is inapposite to the instant matter. *See A Minor v. Juv. Div.*, 97 Nev. 281, 289, 630 P.2d 245, 250 (1981); *Young v. Bd. of Cnty. Comm'rs*, 91 Nev. 52, 54, 530 P.2d 1203, 1205 (1975). Turning to other authority, the Court has recognized that parens patriae is only appropriate where the state has a quasi-sovereign interest giving rise to its ability to bring

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[29]The Cigarette Manufacturers also relied upon *State v. Reliant Energy, Inc.,* 128 Nev. 483, 486 n.2, 289 P.3d 1186, 1188 n.2 (2012), *abrogated by Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 384-91 (2015), *as stated in In re W. States Wholesale Nat. Gas Antitrust Litig.*, No. 2:03-cv-01431-RCJ-PAL, MDL No. 1566, No. 2:05-cv-01331-RCJ-PAL, No. 2:06-cv-00233-RCJ-PAL, No. 2:06-cv-00267-RCJ-PAL, No. 2:06-cv-00282-RCJ-PAL, No. 2:06-cv-01351-RCJ-PAL, No. 2:07-cv-00987-RCJ-PAL, No. 2:07-cv-01019-RCJ-PAL, No. 2:09-cv-00915-RCJ-PAL, 2017 U.S. Dist. LEXIS 49435 at *205 (D. Nev. Mar. 30, 2017), to convince the district court to apply a parens patriae theory upon the instant matter. Given that the Court abrogated *Reliant Energy, Inc.*, the district court's reliance, if any, upon the same lacks merit.

an action on behalf of its citizens. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602-03 (1982). These actions typically involved, relevant here, states litigating to enjoin or abate nuisances that injure public health and welfare or states litigating to end discriminatory or unfair economic practices that injure economic well-being. *See id*. at 603-07. In these instances, the injury must be "to a sufficiently substantial segment of [the] population." *Id*. at 607.

Here, the Cigarette Manufacturers failed to demonstrate that a sufficiently substantial segment of Nevada's population developed laryngeal cancer from consuming their products. *See* 3 PA 611; 56 PA 8679-80. Thus, the Cigarette Manufacturers failed to cogently argue that the Attorney General could bring the Camachos' personal injury claims under a parens patriae theory.[30] *See Watson v. Texas,* 261 F.3d 436, 444-

[30]The Cigarette Manufacturers repeatedly emphasized that the Attorney General and the Camachos alleged similar facts in their respective complaints. *See* 3 PA 612-13; 56 PA 8680-81. This emphasis lacks merit, as the application of claim preclusion turns upon whether the party in the prior action brought or could have brought the claim at issue in the subsequent action. *See Alcantara*, 130 Nev. at 257, 321 P.3d at 915. Given that the Attorney General could not bring the Camachos' personal injury claims, any similarity between the Attorney General's allegations and the Camachos' allegations is irrelevant, rendering the district court' reliance, if any, upon this averment meritless.

45 (5th Cir. 2001) (noting that the Attorney General of Texas need an assignment of rights from Texas smokers to represent their personal injuries and would have so pleaded). Accordingly, the district court's reliance, if any, upon a parens patriae theory was erroneous.

C. *The MSA's express terms did not release the Camachos' personal injury claims or their derivative request for punitive damages*

Alternatively, the Cigarette Manufacturers averred that the MSA's terms released the Camachos' request for punitive damages. 3 PA 614; 56 PA 8681. The plain language of the MSA belies this averment, rendering the district court's reliance, if any, erroneous.

This court applies contract law when construing settlement agreements, including release terms. *See May v. Anderson*, 121 Nev. 668, 672-73, 119 P.3d 1254, 1257-58 (2005). Absent ambiguity, this court applies the contract's clear and unambiguous terms. *APCO Constr., Inc. v. Helix Elec. of Nev., LLC*, 138 Nev., Adv. Op. 31, 509 P.3d 49, 53 (2022). Additionally, this court must give every term effect, *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013), and must avoid rendering any provisions nugatory, *Rd. & Highway Builders, LLC v. N. Nev. Rebar, Inc.*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012).

The Cigarette Manufacturers first contended that the Camachos were third-party beneficiaries of the MSA, which barred a request for punitive damages. 3 PA 614. However, the express terms of the MSA provide that it does not "provide any rights to . . . any person or entity that is not a Settling State." *Id.* at 517. Regardless, other jurisdictions have squarely held that private persons are not third-party beneficiaries of the MSA. *See McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1261-62 (11th Cir. 2001); *Watson*, 261 F.3d at 444-45; *Floyd v. Thompson*, 227 F.3d 1029, 1037 (7th Cir. 2000); *Lopes v. Commonwealth*, 811 N.E.2d 501, 507-08 (Mass. 2004). Accordingly, the district court's reliance on this averment, if any, was erroneous.

The Cigarette Manufacturers also relied upon an innately misleading amalgamation of scattered terms from the MSA to suggest that the MSA released the Camachos' punitive damages request.[31] *See* 3 PA 614. The Camachos direct this court to the plain language of the at-issue release.

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[31]A thorough review of the MSA demonstrates that the Cigarette Manufacturers took terms from the definition of "Claims," 3 PA 387, the definition of "Released Claims," *id.* at 393-94, and the release provision, *see id.* at 490.

The MSA released "all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now [had], or hereafter can, shall or may have." *Id.* at 490. Thus, the MSA is inapplicable if the Camachos are not "Releasing Parties."

The MSA defined the "Releasing Parties," in relevant part, as

> persons or entities acting in a parens patriae, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity whether or not any of them participate in this settlement . . . to the extent that any such person or entity is seeking relief on behalf of or generally applicable to the general public in [Nevada] or the people of [Nevada], as opposed solely to private or individual relief for separate and distinct injuries . . . .

Id. at 394-95. This definition's plain language only concerns persons acting in a representative capacity to vindicate public rights and plainly excludes persons acting to vindicate private or individual rights. Given that they brought suit in their individual capacities, and given that they seek redress for the individual harms they suffered, the Camachos are not "Releasing Parties" under the MSA. Holding otherwise would render the definition's explicit recitation of various representative capacities and explicit exception for private or individual harms nugatory, which is contrary to contract principles. *See Bielar*, 129 Nev. at 465, 306 P.3d at

364; *Rd. & Highway Builders, LLC*, 128 Nev. at 390, 284 P.3d at 380. The weight of authority accords. *See McClendon*, 261 F.3d at 1261-62; *Floyd*, 227 F.3d at 1037; *Lewis v. State ex rel. Miller*, 646 N.W.2d 121, 126 (Iowa Ct. App. 2002); *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266, 1289 (La. Ct. App. 2007); *Laramie*, 173 N.E.3d at 740; *Robinson v. State*, 68 P.3d 750, 754 (Mont. 2003); *Williams*, 271 P.3d at 113. Accordingly, the district court's reliance, if any, upon the MSA was erroneous, which warrants reversal.

CONCLUSION

In granting the Cigarette Manufacturers' motions for summary judgment, the district court committed manifest errors that do not withstand scrutiny. Accordingly, the Camachos urge this court to issue a writ of mandamus ordering the district court to vacate its orders granting summary judgment in favor of the Cigarette Manufacturers regarding the Camachos' negligence claims and request for punitive damages. In so doing, this court will spare the Camachos and the Nevada judiciary the burden of a second action on, at a minimum, the Camachos' request for punitive damages, and this court will provide clarity to

Nevada district courts as they resolve similar actions against the Cigarette Manufacturers, both of which promote judicial economy.

Dated this 4th day of May 2023.

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DECLARATION OF DAVID P. SNYDER, ESQ. IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

David P. Snyder, Esq. being first duly sworn, states:

I am attorney with Claggett & Sykes Law Firm and attorney of record for petitioners Sandra Camacho and Anthony Camacho in the instant matter. I have reviewed the instant matter's record and believe that it supports the factual assertions that the instant petition presents. The Camachos file this petition in good faith, and the Camachos do not have a plain, speedy, and adequate remedy in the ordinary course of law to obtain the relief that they request. Thus, extraordinary relief is the only means that the Camachos can use to obtain relief. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 4th day of May 2023.

/s/ *David P. Snyder*

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CERTIFICATE OF COMPLIANCE

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 I prepared this brief in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 18,294 words and the Camachos filed a motion to exceed with this court;

or

☐ does not exceed _____ pages.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires a reference to the page and

volume number, if any, of the transcript or appendix where the court will find the matter relied on to support every assertion in the brief.

I understand that I may be subject to sanctions if the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of May 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *PETITION FOR WRIT OF MANDAMUS* and appendices with Supreme Court of Nevada on the 4th day of May 2023. I shall make electronic service of the foregoing documents in accordance with the Master Service List as follows:

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I further certify that I served a copy of the foregoing documents by e-mail to the following:

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