No. 86501

IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA CAMACHO and ANTHONY CAMACHO,
Plaintiffs-Petitioners

v.

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

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 INC. D/B/A SMOKES & VAPORS, a domestic corporation,

Real Parties in Interest.

On Petition for Writ of Mandamus from
the Eighth Judicial District Court for Clark County, Nevada
No. A–19–807650–6
Hon. Nadia Krall

REAL PARTY IN INTEREST PHILIP MORRIS USA INC.'S MOTION TO EXCEED WORD LIMIT FOR ANSWER TO PETITION FOR WRIT OF MANDAMUS

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Counsel for Real Party in Interest Philip Morris USA Inc.

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.

The parent company of Philip Morris USA Inc. is Altria Group, Inc. Altria Group, Inc. is the only publicly held corporation that owns 10% or more of Philip Morris USA Inc.'s stock. Philip Morris USA Inc. has no other publicly traded subsidiaries or affiliates. Philip Morris USA Inc. is and has been represented in this litigation by Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Shook, Hardy & Bacon, L.L.P.; Arnold & Porter Kaye Scholer LLP; and Fasi & DiBello, P.A.

DATED: August 22, 2023

/s/ D. Lee Roberts, Jr.
Attorney for Real Party in Interest
Philip Morris USA Inc.

Pursuant to NRAP 21(d), 27, and 32(a)(7)(D), Real Party in Interest Philip Morris USA Inc. respectfully moves the Court for an order allowing it to file a 18,404-word answer to Plaintiffs' Petition for Writ of Mandamus.

Petitions for writs of mandamus, and answers to such petitions, "shall . . . contain[] no more than 7,000 words" unless the Court directs otherwise. NRAP 21(d). On May 4, 2023, Plaintiffs filed (i) a Petition for Writ of Mandamus that contains either 18,294 or 18,340 words (Doc. 2023–14062),[1] and (ii) a motion to exceed the applicable word limit (Doc. 2023–14063). Over Philip Morris's partial objection (Doc. 2023–14945), the Court granted Plaintiffs' motion to exceed, and ordered Philip Morris and the other real parties in interest to respond. Doc. 2023–16632 at 2 n.1.[2]

Philip Morris recognizes that "permission to exceed the . . . type-volume limitation will not be routinely granted" and that "motion[s] to file a brief that exceeds the applicable page limit or type-volume limitation will

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[1] The certificate of compliance attached to Plaintiffs' petition certifies that the brief contains 18,294 words, but Plaintiffs' motion to exceed word limit represents that the petition contains 18,340 words.

[2] Philip Morris later moved the Court to extend its time to file its answer to Plaintiffs' petition to August 22, 2023. Doc. 2023–17271. The Court granted that motion. Doc. 23–19110.

be granted only upon a showing of diligence and good cause." NRAP 32(a)(7)(D). As explained in the attached declaration of Elliott M. Davis, Philip Morris has made this showing. In short, Plaintiffs' extended petition necessitates an extended response, and Philip Morris has exercised diligence in drafting a comprehensive answer to Plaintiffs' petition that is approximately the same length as that petition.

The Declaration of Elliott M. Davis is attached as Exhibit A. The proposed answer, which includes the Rule 32(a)(9)(C) certification, is attached as Exhibit B.

For these reasons, Philip Morris respectfully requests that the Court grant this motion and allow Philip Morris to file a 18,404-word answer to Plaintiffs' Petition for Writ of Mandamus.

Dated: August 22, 2023

Respectfully submitted,

/s/ D. Lee Roberts, Jr.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on August 22, 2023, I filed the foregoing REAL PARTY IN INTEREST PHILIP MORRIS USA INC.'S MOTION TO EXCEED WORD LIMIT FOR ANSWER TO PETITION FOR WRIT OF MANDAMUS, with the Clerk of the Nevada Supreme Court.

Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of the foregoing document by email to the following:

Hon. Nadia Krall, D.J.
Dept04lc@clarkcountycourts.us
Respondents

/s/ Kelly L. Pierce

Exhibit A

DECLARATION OF ELLIOTT M. DAVIS

I, Elliott M. Davis, hereby declare:

1. I am Senior Counsel with the law firm of Shook, Hardy & Bacon L.L.P., and one of the principal authors of Real Party in Interest Philip Morris USA Inc.'s Answer To Petition For Writ Of Mandamus.

2. Despite our diligence and best efforts, we cannot respond to Plaintiffs' writ petition, which contains over 18,000 words, within NRAP 21(d)'s presumptive 7000-word limit.

3. In their motion to exceed the presumptive word limit, Plaintiffs represented that "the number of legal issues and the factual presentation that they require prevent[ed] [them] from complying with NRAP 21(d)." Doc. 2023–14063 at 9.

4. Unpacking Plaintiffs' myriad arguments in their extended petition necessitates an answer of similar length. Philip Morris's proposed 18,404-word answer, which exceeds the presumptive 7000-word limit by 11,404 words, is similar in length to Plaintiffs' petition, which, based on Plaintiffs' representations, contains either 18,294 or 18,340 words.

5. To echo Plaintiffs, we are confident that Philip Morris's proposed answer "will allow [the Court's] law clerks, staff attorneys, and

justices to obtain a thorough understanding of the entire case." Doc. 2023-14063 at 9. Good cause thus exists to grant Philip Morris's motion.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on August 22, 2023.

Elliott M. Davis

Exhibit B

No. 86501

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The parent company of Philip Morris USA Inc. is Altria Group, Inc. Altria Group, Inc. is the only publicly held corporation that owns 10% or more of Philip Morris USA Inc.'s stock. Philip Morris USA Inc. has no other publicly traded subsidiaries or affiliates. Philip Morris USA Inc. is and has been represented in this litigation by Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; Shook, Hardy & Bacon, L.L.P.; Arnold & Porter Kaye Scholer LLP; and Fasi & DiBello, P.A.

DATED: August 22, 2023

/s/ D. Lee Roberts, Jr.
Attorney for Real Party in Interest
Philip Morris USA Inc.

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PRELIMINARY STATEMENT

Plaintiffs' writ petition concerns one of several similar smoking-related personal-injury lawsuits currently pending in Nevada's district courts. In each of these lawsuits, the plaintiffs allege that Philip Morris USA Inc., other cigarette manufacturers, and various other members of the tobacco industry conspired to conceal the risks of smoking. The plaintiffs assert various common-law and statutory causes of action, and demand compensatory and punitive damages.

These sorts of allegations are hardly novel in Nevada. Over 25 years ago, Nevada's Attorney General leveled materially identical allegations against Philip Morris and other tobacco-industry defendants. The State later resolved its claims—including a punitive-damages claim—in an omnibus settlement that, to date, has provided Nevada with over a *billion* dollars in monetary relief alone.

In this particular action, the district court granted Philip Morris partial summary judgment on Plaintiffs' claims for punitive damages and negligence. The district court's decisions below were correct.

Plaintiffs argue that they can recover punitive damages in this action. They are wrong. In Nevada, punitive damages exist to vindicate the public's

interest in punishing and deterring misconduct. And when personal-injury plaintiffs seek punitive damages, they act "as private attorneys general to effect [those] deterrence and retribution functions." *In re Paris Air Crash*, 622 F.2d 1315, 1319 (9th Cir. 1980) (Kennedy, J.).[1] But Nevada's *real* Attorney General has already vindicated the public's interest in punishment and deterrence by suing Philip Morris over the same alleged course of conduct, demanding punitive damages, and resolving that lawsuit to the tune of over a billion dollars in monetary relief alone. Plaintiffs' punitive-damages claim is thus barred by the doctrine of claim preclusion.

Plaintiffs' negligence claim fares no better. Plaintiffs assert two broad theories to support their negligence claim. They first contend that Philip Morris failed to warn Plaintiff Sandra Camacho about the risks of smoking cigarettes. But Plaintiffs unambiguously waived their failure-to-warn theory against Philip Morris in their briefing below. And for good reason: all such claims against Philip Morris are expressly preempted by federal statute, as confirmed by the United States Supreme Court. *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 79 (2008) ("States may not impede commerce in

[1] Unless expressly included, all citations and internal quotation and alteration marks have been omitted.

cigarettes by enforcing rules that are based on an assumption that the federal warnings are inadequate.").

Plaintiffs also argue that the Philip Morris cigarettes that Ms. Camacho smoked were defectively designed because they were inhalable, they were combustible, and they contained nicotine. In other words, Plaintiffs seek to hold Philip Morris liable for selling conventional cigarettes instead of heated, non-inhalable, nicotine-free sticks. Putting aside that these products are hardly alternatives to one another, Plaintiffs have not demonstrated that heated, non-inhalable, nicotine-free sticks—if such a thing could even be designed and manufactured—would have been commercially feasible. And, in all events, imposing state-law tort liability on Philip Morris for selling cigarettes instead of heated, non-inhalable, nicotine-free sticks would intractably conflict with Congress's intent—as confirmed, again, by the U.S. Supreme Court—"that tobacco products remain on the market." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 139 (2000). So Plaintiffs' negligent-design-defect theory is also preempted by federal law. Because neither of Plaintiffs' negligence theories is viable, the district court correctly granted Philip Morris partial summary judgment on Plaintiffs' negligence claim.

The district courts have split on whether plaintiffs may recover punitive damages in these actions. In Philip Morris's view, this issue merits advisory-mandamus consideration in order to clarify the law for the district courts.[2] But because the district court's decisions below were correctly decided, Plaintiffs' petition should be denied.

STATEMENT OF THE CASE

Plaintiffs Sandra and Anthony Camacho sued three cigarette manufacturers (Philip Morris USA Inc., R.J. Reynolds Tobacco Co., and Liggett Group, LLC) and two retailers for injuries Ms. Camacho allegedly sustained from smoking cigarettes. *See generally* 1 PA 1–55.[3] As relevant to Plaintiffs' writ petition: (i) Philip Morris moved for partial summary judgment on Plaintiffs' negligence claim, 1 PA 75–89; (ii) Liggett moved for partial summary judgment on Plaintiffs' negligence and strict-liability claims, 1 PA 140–56; and (iii) Philip Morris and R.J. Reynolds moved for

[2] As we explain below, advisory-mandamus consideration of the district court's dismissal of Plaintiffs' negligence claim is not warranted.

[3] Citations in the form of X PA Y, refer to Petitioners' Appendix, volume X, page Y.

partial summary judgment on Plaintiffs' punitive-damages claim, 3 PA 604–18.

After briefing and argument, the district court granted each of these motions in full, except that it denied Liggett summary judgment on Plaintiffs' strict-liability claim. 59 PA 8969–72; 59 PA 8979–81; 59 PA 9127–29. Plaintiffs moved the district court to reconsider these orders; their motions were denied. 61 PA 9535–37; 61 PA 9547–49.[4]

Plaintiffs then moved the district court to stay the trial pending the resolution of their then-forthcoming writ petition. 61 PA 9356–61. Philip Morris and Liggett did not oppose such a stay. 61 PA 9555–58. The district court granted Plaintiffs' unopposed motion and "stay[ed] the entire matter . . . pending the Supreme Court of Nevada's resolution of Plaintiffs' mandamus petition." 61 PA 9565–70.

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[4] The district court also granted R.J. Reynolds Tobacco Co. summary judgment on grounds not at issue in this writ petition. *See generally* R.J. Reynolds Tobacco Company's Response to July 25, 2023 Order to File Document, Doc. 23–24705.

STATEMENT OF THE FACTS

A. Nevada Sues Philip Morris On Behalf Of Its Citizens.

On May 21, 1997, Nevada, through its Attorney General, filed a lawsuit against Philip Morris and a number of other defendants. 2 PA 241–367. In her lawsuit, the Nevada Attorney General purported to "challenge[] a massive unlawful course of conduct and conspiracy [allegedly] perpetrated by the defendants," which, in the Attorney General's words, included: (i) "suppressing and distorting the state of [defendants'] knowledge" about "the health risks of cigarette smoking"; (ii) "[c]reating and/or funding fraudulent 'front' organizations such as the Tobacco Industry Research Council"; (iii) "[s]ecretly destroying, concealing, and shipping overseas incriminating evidence of industry testing and research on the health risks of cigarette smoking and the addictive nature of nicotine"; and (iv) "[c]onspiring to [conceal] and concealing the addictive nature of tobacco products and the tobacco companies' deliberate manipulation of the nicotine levels in tobacco products." 2 PA 242.

The gist of the Nevada Attorney General's complaint was that the defendants "injured and endangered the comfort, repose, health and safety of the residents of the State of Nevada by selling tobacco products which are

dangerous to human life and health and cause injury, disease and sickness." 2 PA 352. One of the Attorney General's principal objectives was "to secure for the people of the State of Nevada a fair and open market, free from unfair or deceptive acts or practices." 2 PA 248.

To that end, Nevada asserted fourteen claims against the defendants, including claims for negligence, strict liability, deceptive trade practices, and conspiracy. 2 PA 343, 355, 362, 364, 366. Nevada also alleged that "[t]he defendants' conduct . . . was oppressive, fraudulent, and malicious"; as a result, Nevada asserted, it "is entitled . . . to an award of punitive damages against the defendants for the sake of example and by way of punishing the defendants." 2 PA 366–67.

B. Nevada Settles With Philip Morris And Releases Claims For Punitive Damages.

In November 1998, Nevada (along with 45 other States, the District of Columbia, and five U.S. territories) executed a comprehensive settlement agreement known as the Master Settlement Agreement, or the MSA. 3 PA 373–527. In the MSA, "the States released the participating tobacco manufacturers from all claims for past conduct based on the sale, use, and marketing of tobacco products." *Star Scientific Inc. v. Beales*, 278 F.3d 339, 345

(4th Cir. 2002). "They also released future monetary claims arising out of exposure to tobacco products, including future claims for reimbursement of healthcare costs allegedly associated with the use of or exposure to tobacco products." *Id.* The parties reduced the MSA to a Consent Decree and Final Judgment in December 1998. 3 PA 533–44, *as corrected* nunc pro tunc, 3 PA 546–47.

According to the MSA, both Nevada *and* any person "acting in a . . . private attorney general . . . capacity" in seeking to vindicate the interests of the "general public" are "absolutely and unconditionally" barred from bringing claims for "civil penalties and punitive damages," "accrued or unaccrued," "for past conduct . . . in any way related . . . to" cigarette "manufactur[ing]" and "marketing," or for "future conduct" related to the "use of" cigarettes. 3 PA 387, 393–95, 490. Individuals allegedly harmed by tobacco-industry conduct are not barred by the MSA from bringing personal-injury lawsuits—but only to the extent their individual suits seek "solely . . . private or individual relief for separate and distinct injuries." 3 PA 395.

"In return, the participating tobacco manufacturers agreed to" a number of broad restrictions on their conduct, and "to make annual

payments 'in perpetuity' for the damages caused to the States." *Star Scientific Inc.*, 278 F.3d at 345; *see generally* 3 PA 398–421, 434–63, 466–90. At the time the MSA was signed, it was estimated that "the States [would] receive more than $200 billion through 2025." *Star Scientific Inc.*, 278 F.3d at 345. To date, Nevada has received over one billion dollars in MSA payments. *See* Nat'l Ass'n of Attorneys General, "Payments To States Since Inception Through April 20, 2023," https://perma.cc/2E7V-JVA7.

C. Plaintiffs' Lawsuit

Plaintiffs allege that Ms. Camacho smoked cigarettes manufactured by Liggett from 1964 to 1990. *See generally* Pet. at 20–21. Plaintiffs claim that she switched in 1990 to cigarettes manufactured by Philip Morris, *see id.* at 21, and smoked cigarettes manufactured by Philip Morris until 2017, 1 PA 6 ¶ 17.

Plaintiffs' lawsuit is premised on the same course of conduct as alleged in the Nevada Attorney General's lawsuit. Plaintiffs allege that Philip Morris "concealed the addictive and deadly nature of cigarettes from [Ms. Camacho], the government, and the American public by making knowingly false and misleading statements and by engaging in an over two-hundred and fifty-billion-dollar conspiracy"—a not-so-veiled reference to Nevada's

and the other States' lawsuits against Philip Morris, and the MSA that followed. 1 PA 6. "Despite knowing internally, dating back to the 1950s, that cigarettes were deadly, addictive, and caused death and disease," Plaintiffs continued, Philip Morris and the other defendants "purposefully and intentionally lied, concealed information, and made knowingly false and misleading statements to the public, including Plaintiff, that cigarettes were allegedly not harmful." 1 PA 7 (emphasis omitted).

In fact, Plaintiffs' amended complaint includes 59 paragraphs describing the "historical allegations of Defendants [sic] unlawful conduct" that, they acknowledge, "giv[es] rise to [their] lawsuit." 1 PA 9–19 (initial capitalization omitted). Many of these "historical allegations"—which include allegations about a 1953 meeting at the Plaza Hotel, the establishment of the Tobacco Industry Research Committee, a 1954 advertisement known as the "Frank Statement," and several other instances of alleged tobacco-industry conduct—mirror those found in the Nevada Attorney General's 1997 complaint. *Compare* 1 PA 9–19 *with* 2 PA 259–340.

Plaintiffs asserted seven claims against Philip Morris, including—as in Nevada's complaint—claims for negligence, strict liability, deceptive trade practices, and conspiracy. 1 PA 19–51. In each of these claims, Plaintiffs—

again, like Nevada—demanded "an award of exemplary and punitive damages pursuant to NRS 42.005 in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future." 1 PA 24, 27, 31, 38, 43, 46, 51.

Plaintiffs' negligence claim, in particular, was based on two theories. First, Plaintiffs alleged that Philip Morris and Liggett negligently designed their cigarettes in a variety of respects. 1 PA 19–20. Specifically, Plaintiffs contend that the cigarettes Ms. Camacho smoked were defective because: (i) they contain nicotine and are thus addictive; (ii) they are inhalable; and (iii) they are combustible (in other words, the tobacco burns when the cigarette is lit). *See* Pet. at 4–10, 66. And second, Plaintiffs alleged that Philip Morris and Liggett "failed to warn/and or [sic] adequately warn" Ms. Camacho of the risks of smoking cigarettes "prior to July 1, 1969." 1 PA 21.

D. The District Court's Decisions

The district court granted Philip Morris's motion for partial summary judgment on Plaintiffs' punitive-damages claim. 59 PA 8970–71.[5] The district court explained that "[i]n Nevada, punitive damages vindicate a

[5] This ruling also applied to Liggett, as Liggett had filed a joinder to Philip Morris's motion. 59 PA 8970.

public interest and . . . are not to compensate a plaintiff." *Id.* at 8970. The court then concluded that the "Nevada Attorney General's representation of Plaintiffs' interests" in securing punitive damages "was more than 'adequate'": "Nevada resolved its lawsuit via the MSA, pursuant to which Defendants agreed to be punished in the amount of $240 billion . . . and deterred from engaging in the activities that both the Nevada Attorney General and Plaintiffs alleged were wrongful." *Id.* at 8971.

The district court also granted Philip Morris and Liggett partial summary judgment on Plaintiffs' negligence claim. With regard to Plaintiffs' negligent-failure-to-warn theory, the district court concluded that: (i) the Federal Cigarette Labeling and Advertising Act "preempts any failure to warn claims premised on advertising and promotion" concerning post-July 1, 1969, conduct, 59 PA 8980 & 9128; and (ii) "there is no special relationship between Plaintiff [Sandra Camacho] and the Defendants," so "the duty element of Plaintiffs' negligence claim cannot be met." *Id.*[6]

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[6] These holdings dispose of Plaintiffs' negligent-failure-to-warn theory against Philip Morris, as Plaintiffs allege that Ms. Camacho began smoking Philip Morris cigarettes in 1990. *See* Pet. at 21. The district court also concluded that Plaintiffs' negligent-failure-to-warn theory against Liggett, based on Ms. Camacho's pre-1969 smoking, failed for other reasons. *See* 59 PA 8980.

As to Plaintiffs' negligent-design-defect theory, the district court held that: (i) it "is precluded by federal conflict preemption"; (ii) the danger inherent in cigarettes—"i.e. that cigarettes can cause cancer and death"—was not "beyond the common knowledge of the ordinary consumer"; and (iii) Plaintiffs had not shown that any supposed design defects were "a legal cause of Mrs. Camacho's laryngeal cancer." 59 PA 8980–81. In other words, Plaintiffs' negligence claim failed both as a matter of fact and as a matter of law.

THE PROPRIETY OF WRIT RELIEF

The Court's May 26, 2023, Order "direct[ed] [the] real parties in interest to address the propriety of writ relief, in addition to addressing the merits of the petition." Doc. 23–16632.

Traditionally, this Court issues writs of mandamus "to compel an act that the law requires or to correct a lower court's clear and indisputable legal error." *R.J. Reynolds Tobacco Co. v. Eighth Judicial District Court*, 138 Nev. Adv. Op. 55, 514 P.3d 425, 428 (2022). Traditional mandamus relief is not proper here. As explained below, the district court's decisions were correctly decided.

The Court also has discretion, through its "advisory mandamus" process, to clarify "an important issue of law"—particularly when "district courts are reaching different conclusions on [that] very issue." *Lyft, Inc. v. Eighth Judicial District Court*, 137 Nev. 832, 834, 501 P.3d 994, 998 (2021).

In Philip Morris's view, the question whether the Nevada Attorney General's settlement of the State's 1997 lawsuit against Philip Morris and other cigarette manufacturers precludes Nevada plaintiffs from recovering punitive damages from those defendants in later personal-injury lawsuits warrants advisory-mandamus consideration. This question presents an important issue of law relating to the power and authority of Nevada's Attorney General to represent the public's interest. It is a pure legal question that will recur in every smoking lawsuit in Nevada, and it is one that has split the district courts. *Compare* 59 PA 8970–71 (granting summary judgment on punitive damages in *Camacho*) *with* 29 PA 4646–49 (denying summary judgment on punitive damages in *Tully*) *and* 62 PA 9643–52 (same, in *Geist*).

In fact, after hearing argument on the punitive-damages issue in the *Tully* case, former Chief Justice Gibbons suggested that the parties "avail themselves" of the writ process "[b]ecause I do believe that the Supreme

Court would take this case quickly and would rule on it and have th[e] issue resolved prior to the time that it's going to trial. . . . I could be wrong, but I think this is a public interest case." 61 PA 9375–76; *see also Bd. of Parole Comm'rs v. Second Judicial District Court*, 135 Nev. 398, 401, 451 P.3d 73, 77 (2019) ("We elect to exercise [mandamus] discretion here because the petition presents a pure question of law that is of statewide significance."). The Court should deny Plaintiffs' petition and, in doing so, take this opportunity to clarify that the Nevada Attorney General's settlement of the State's 1997 lawsuit precludes plaintiffs from recovering punitive damages from the settling defendants in later smoking-related personal-injury lawsuits filed by Nevada residents.

Plaintiffs' petition also presses the question whether they can pursue a negligence claim against Philip Morris and Liggett. In Philip Morris's view, this question does not warrant advisory-mandamus consideration. As is apparent from Plaintiffs' lengthy factual recitation and much of their argument, *see* Pet. at 3–22 & 53–69, the correctness of the district court's ruling on Plaintiffs' negligence claim turns in part on case-specific facts, rendering the district court's fact-bound decision unsuitable for advisory-

mandamus review.[7] *See Walker v. Second Judicial District Court*, 136 Nev. 678, 684, 476 P.3d 1194, 1199 (2020) (declining advisory-mandamus relief where, among other things, "[t]he dispute in district court was factual, not legal").

As explained below, the district court correctly granted partial summary judgment to Philip Morris on Plaintiffs' negligence claim. But there is no compelling reason for the Court to wade through that issue now. "To grant advisory mandamus" on the negligence issue "would extend [the Court's] discretion beyond the salutary escape hatch it provides to the final judgment rule and present the very inefficiencies in judicial economy that the final judgment rule seeks to prevent." *Archon Corp. v. Eighth Judicial District Court*, 133 Nev. 816, 824–25, 407 P.3d 702, 710 (2017).

SUMMARY OF THE ARGUMENT

I. The district court properly granted Philip Morris partial summary judgment on Plaintiffs' punitive-damages claim.

A. Plaintiffs' punitive-damages claim is barred by the doctrine of claim preclusion. In Nevada, punitive damages serve to

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[7] To be more specific, Philip Morris was entitled to summary judgment on Plaintiffs' negligent-design-defect claim for four independent reasons, two of which are legal in nature and two of which are factual in nature. *See infra* Part II.B.

vindicate a public interest in punishment and deterrence—an interest that the Nevada Attorney General already vindicated in a lawsuit that she brought on behalf of the public and in which she alleged a materially identical course of purported misconduct.

B. Persuasive authority from the Georgia Supreme Court and the New York Appellate Division confirms that the district court's conclusion was correct.

C. Even if the claim-preclusion doctrine did not apply, Plaintiffs are intended beneficiaries of the settlement agreement between the Nevada Attorney General and Philip Morris, and that settlement agreement—which binds Plaintiffs to the extent they seek to vindicate a public interest through their punitive-damages demand—prospectively released Plaintiffs' punitive-damages claim.

II. The district court also correctly granted Philip Morris partial summary judgment on Plaintiffs' negligence claim.

A. With regard to Plaintiffs' negligent-failure-to-warn theory: (i) Plaintiffs expressly waived this argument below as against Philip Morris; (ii) Plaintiffs' failure-to-warn theory, as against Philip Morris, is expressly preempted by federal law; and (iii) Plaintiffs cannot assert a failure-to-warn

theory as a matter of Nevada law since they have not identified evidence of any material relationship—let alone a "special relationship"—between Ms. Camacho and Philip Morris sufficient to create a duty to disclose.

B. With regard to Plaintiffs' negligent-design-defect theory: (i) it is impliedly preempted by federal law because it conflicts with Congress's intent, as expressed through several statutory schemes, that cigarettes remain on the market; (ii) it fails because Plaintiffs have introduced no evidence showing that their purported alternative design—a heated, non-inhalable, nicotine-free stick—is a true alternative design, let alone one that would have been commercially feasible; (iii) it fails because cigarettes are not unreasonably dangerous as a matter of law—as demonstrated through a section of the Restatement adopted by this Court; and (iv) Plaintiffs have introduced no evidence that any design defect caused Ms. Camacho's injuries.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED PHILIP MORRIS SUMMARY JUDGMENT ON PLAINTIFFS' PUNITIVE-DAMAGES CLAIM.

The district court properly granted Philip Morris summary judgment on Plaintiffs' claim for punitive damages. 59 PA 8969–71.

"In Nevada," the district court explained, "punitive damages vindicate a public interest and . . . are not to compensate a plaintiff." *Id.* at 8970. Indeed, this Court has recognized that punitive damages "provide a means by which the community . . . can express community outrage or distaste for the misconduct of an oppressive, fraudulent or malicious defendant and by which others may be deterred and warned that such conduct will not be tolerated." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 45, 846 P.2d 303, 305 (1993). Punitive damages also "provide[] a benefit to society by punishing undesirable conduct that is not punishable by the criminal law." *Id.* In other words, awards of punitive damages are rooted in "public policy concerns" that are wholly "unrelated to the compensatory entitlements of the injured party." *Id.*; *see Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006) ("Punitive damages are designed not to compensate the plaintiff for harm suffered but, instead, to punish and deter the defendant's culpable conduct.").

In this sense, when plaintiffs seek punitive damages, they act—as then-Judge Anthony Kennedy put it—"as private attorneys general to effect the deterrence and retribution functions of" punitive damages. *In re Paris Air Crash*, 622 F.2d 1315, 1319 (9th Cir. 1980). So a plaintiff's interest in punitive

damages is "not truly personal in nature at all." *Id.* at 1319–20. "It is rather a *public* interest." *Id.* at 1320 (emphasis added); *see also, e.g.*, *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986) (en banc) ("[P]unitive damages reward individuals who serve as 'private attorneys general' in bringing wrongdoers to account."), *abrogated in part on other grounds by Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991); *In re School Asbestos Litig.*, 789 F.2d 996, 1003 (3d Cir. 1986) (punitive-damages awards "act almost as a form of criminal penalty administered in a civil court at the request of a plaintiff who serves somewhat as a private attorney general"); *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594, 623 (7th Cir. 1981) (noting "the 'private attorney general' concept inherent in the allowance of punitive damages in civil suits").

It follows that Plaintiffs cannot seek punitive damages in this lawsuit as private attorneys general because Nevada's *actual* Attorney General, in settling the State's *parens patriae* lawsuit that alleged the same course of conduct alleged by Plaintiffs here, has already vindicated the "public policy concerns" of punishment and deterrence that animate awards of punitive damages. *Siggelkow*, 109 Nev. at 45, 846 P.2d at 305. Plaintiffs' punitive-damages claim is accordingly barred by the doctrine of claim preclusion.

And even if the claim-preclusion doctrine did not bar Plaintiffs' punitive-damages claim, the MSA itself bars that claim. For these reasons, Philip Morris was entitled to summary judgment on Plaintiffs' punitive-damages claim.

A. Claim Preclusion Bars Plaintiffs From Pursuing Punitive Damages In This Lawsuit.

The doctrine of claim preclusion is straightforward: it "precludes parties or those in privity with them from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction." *Kuptz-Blinkinsop v. Blinkinsop*, 136 Nev. 360, 364, 466 P.3d 1271, 1275 (2020). "The application of claim preclusion is a question of law that [this Court] review[s] de novo." *Id.*

The "three-part test for determining whether claim preclusion should apply" turns on whether: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008). Plaintiffs' punitive-damages claim meets all three of these

elements. As such, the doctrine of claim preclusion bars Plaintiffs from recovering punitive damages in this action.

1. Plaintiffs Are In Privity With The Attorney General.

"Nevada law previously limited the concept of privity to situations where the individual acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase." *Mendenhall v. Tassinari*, 133 Nev. 614, 618, 403 P.3d 364, 369 (2017). "More recently, in *Alcantara v. Wal–Mart Stores, Inc.*, this [C]ourt adopted the Restatement (Second) of Judgments § 41, which additionally recognizes privity under an 'adequate representation' analysis." *Mendenhall*, 133 Nev. at 618, 403 P.3d at 369. "However, privity may also be found in other circumstances, beyond those categories noted in the Restatement." *Id.* "Indeed, contemporary courts have broadly construed the concept of privity, far beyond its literal and historic meaning, to include any situation in which the relationship between the parties is sufficiently close to supply preclusion." *Id.*

The Restatement, as adopted by this Court, demonstrates that Plaintiffs are in privity with the Attorney General with respect to their punitive-damages claim. And even putting the Restatement aside, the

relationship between Plaintiffs (as private attorneys general in seeking punitive damages) and the actual Attorney General is "sufficiently close to supply preclusion." *Id.*

(a) The Restatement Demonstrates That Plaintiffs Are In Privity With The Attorney General.

In *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 321 P.3d 912 (2014), this Court "adopt[ed] the Restatement (Second) of Judgments section 41's examples of privity that arises when a plaintiff's interests are being represented by someone else." *Id.* at 261, 321 P.3d at 917. The fourth such example provides that "[a] person is represented by a party who is . . . [a]n official or agency invested by law with authority to represent the person's interests." Restatement (Second) of Judgments § 41(1) & (1)(d). This resolves the privity question because the Attorney General *was* "invested by law with authority to represent" Plaintiffs' "interests" with respect to punitive damages. *Id.*

The Attorney General brought her suit "pursuant to," among other things, "the Nevada Deceptive Trade Practices Act" (NRS chapter 598) and the "Nevada Unfair Trade Practices Act" (NRS chapter 598A). 2 PA 249. The Legislature expressly empowered the Attorney General, through her Bureau

of Consumer Protection, to enforce those Acts on behalf of the public and "to represent . . . the public interest . . . in any proceeding." NRS 228.390(1) (1997); *see* NRS 228.380(1) (1997) ("[T]he Consumer's Advocate may exercise the power of the Attorney General in areas of consumer protection, including, but not limited to, enforcement of chapters . . . 598 [and] 598A . . . of NRS."); NRS 228.302 & 228.304 (1997) (defining Consumer's Advocate as part of the Attorney General's Bureau of Consumer Protection). And by "public interest," the Legislature "means the interests or rights of the State of Nevada *and of the residents of this State*." NRS 228.308 (1997) (emphasis added). These statutory provisions empower Nevada, through its Attorney General, to represent its citizens in lawsuits as *parens patriae*. *See* NRS 598A.070(1), (1)(C) & NRS 598A.160(1)(a), (b) (1997) (Attorney General may institute Unfair Trade Practices Act proceedings "as parens patriae of the persons residing in the State"); *see also Zimmerman v. GJS Grp., Inc.*, No. 2:17–cv–304, 2017 WL 4560136, at *1–9 (D. Nev. Oct. 11, 2017) (granting Nevada's motion to intervene as *parens patriae* in Americans With Disabilities Act lawsuit).

Though Plaintiffs argue that the Attorney General could not have represented Nevada residents' interests in the State's 1997 lawsuit (Pet. at

82–85), they ignore the statutory framework that allowed the Attorney General to do exactly that. Indeed, this Court acknowledged the State's ability to sue under the Unfair Trade Practices Act "in its capacity as parens patriae on behalf of [its] residents" in *State ex rel. Johnson v. Reliant Energy, Inc.*, 128 Nev. 483, 486 n.2, 289 P.3d 1186, 1188 n.2 (2012).[8] Because the Legislature expressly vested the Attorney General with authority to represent the interests and rights of Nevada residents, claim preclusion's privity element is satisfied.[9]

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[8] Plaintiffs implore the Court to ignore *Reliant Energy*, supposedly because it was abrogated by *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015). *See* Pet. at 83 n.29. *ONEOK* simply held (contrary to *Reliant Energy*) that certain state-law antitrust lawsuits were not preempted by the Natural Gas Act, 15 U.S.C. § 717 *et seq.* *See ONEOK, Inc.*, 575 U.S. at 376. That holding has no bearing on the fact, acknowledged in *Reliant Energy*, that the State may represent its residents in a *parens patriae* capacity.

[9] Plaintiffs argue that "privity will only attach . . . if a litigant in the prior action adequately represented a subsequent litigant's particular interest in a particular claim." Pet. at 76–77. But again, in seeking punitive damages, Plaintiffs act as private attorneys general—and the real Attorney General more than adequately represented the public interest in punishing and deterring Philip Morris.

(b) Plaintiffs' Interest In Punitive Damages Is The Same Public Interest Pursued By The Attorney General.

As explained above, the concept of privity is broadly construed. Even if the Legislature had not expressly authorized the Attorney General to represent Plaintiffs' interests, their relationship—with respect to punishing and deterring Philip Morris—"is sufficiently close to supply preclusion." *Mendenhall*, 133 Nev. at 618, 403 P.3d at 369.

Plaintiffs' interests in pursuing punitive damages against Philip Morris are the same as the Attorney General's in 1997: "punish[ing] and deter[ring] the defendant's [allegedly] culpable conduct." *Bongiovi*, 122 Nev. at 580, 138 P.3d at 450. Both these purposes—punishment and deterrence—"are quintessentially and exclusively public in their ultimate orientation and purpose." *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 150 (N.Y. App. Div. 2008). And that is why, in seeking punitive damages, Plaintiffs act as "private attorneys general." *In re Paris Air Crash*, 622 F.2d at 1319.

Plaintiffs admit as much in their Amended Complaint. They demanded punitive damages "in an amount appropriate to punish and make an example of Defendants, and to deter similar conduct in the future." 1 PA 24, 27, 31, 38, 43, 46, 51. But the Attorney General *already* sought

"punitive damages against the defendants for the sake of example and by way of punishing the defendants," 2 PA 366–67—and then settled the State's claims. 3 PA 533–44, *as corrected* nunc pro tunc, 3 PA 546–47.

Plaintiffs do not disagree with any of this. *See* Pet. at 71 (explaining that "punitive damages serve the policy objectives of deterrence and punishment"). Instead, they argue that "the Attorney General did not represent the Camachos' interests in their personal injury claims" and that she did not "bring [their] personal injury claims under a parens patriae theory." *Id.* at 81, 84. But those are not the arguments that we press here. In fact, we fully agree that the "Attorney General did not represent the *Camachos'* interests in their *personal* injury claims." *Id.* at 81 (emphases added). But by settling her 1997 lawsuit, the Attorney General vindicated the *public's* interests in punishing and deterring Philip Morris's alleged misconduct, *see* 1 PA 24, 27, 31, 38, 43, 46, 51, apparently concluding that the substantial relief afforded by the settlement—the *billion* dollars that Nevada has received to date and the vast equitable relief to which Philip Morris agreed—sufficed to punish and deter Philip Morris.

There is nothing unfair about this conclusion. Punitive damages are completely "unrelated to the compensatory entitlements of the injured

party." *Siggelkow*, 109 Nev. at 45, 846 P.2d at 305. And plaintiffs are "never entitled to punitive damages as a matter of right." *Transaero Land & Dev. Co. v. Land Title of Nev., Inc.*, 108 Nev. 997, 1001, 842 P.2d 716, 719 (1992). The Attorney General has already satisfied the public interest in punishing and deterring misconduct. And because the Attorney General accomplished the public goals of punishment and deterrence underlying Plaintiffs' claims for punitive damages, *see* 1 PA 24, 27, 31, 38, 43, 46, 51, Plaintiffs' relationship with the Attorney General—with respect to punishing and deterring Philip Morris—"is sufficiently close to supply preclusion." *Mendenhall*, 133 Nev. at 618, 403 P.3d at 369. Or, to borrow Plaintiffs' formulation of the test, the Attorney General is in privity with Plaintiffs because she "adequately represented [their] particular interest in a particular claim"—their claim for punitive damages. *Cf.* Pet. at 76–77.

2. The Consent Decree Was A Valid Final Judgment.

Plaintiffs do not dispute that the Consent Decree and Final Judgment (3 PA 533–44, *as corrected* nunc pro tunc, 3 PA 546–47) satisfies the valid-final-judgment element. Nor could they. A consent judgment "constitutes a final judgment for purposes of claim preclusion." *Mendenhall*, 133 Nev. at 619,

403 P.3d at 370; *see also Weddell v. Sharp*, 131 Nev. 233, 238 n.1, 350 P.3d 80, 83 n.1 (2015) ("[A] consent judgment can form a basis for claim preclusion").

3. Both Lawsuits Are Based On The Same Set Of Material Facts.

With regard to the final claim-preclusion factor, "[t]he test for determining whether the claims, or any part of them, are barred in a subsequent action is if they are based on the same set of facts and circumstances as in the initial action." *Mendenhall*, 133 Nev. at 620, 403 P.3d at 370. Plaintiffs' Amended Complaint is, indeed, based on the same set of facts and circumstances as the Attorney General's Complaint. It is hard to compare the two pleadings and conclude otherwise. As shown below, many of the allegations are substantively identical:

Plaintiffs' Amended Complaint	Attorney General's Complaint
"By February 2, 1953 Defendants had concrete proof that cigarette smoking increased the risk of lung cancer. A previously secret and concealed document by Defendant, an R.J. Reynolds' [sic] states: 'Studies of clinical data tend to confirm the relationship between heavy smoking and prolonged smoking and incidence of cancer of the lung.'" (1 PA 9 ¶ 35.)	"As early as 1953, prior to the issuance of the Frank Statement, RJR's Claude Teague created an internal survey of cancer research and concluded that 'studies of clinical data tend to confirm the relationship between heavy and prolonged tobacco smoking and the incidence of lung cancer.'" (2 PA 292 ¶ 159.)

Plaintiffs' Amended Complaint	Attorney General's Complaint
"Approximately six months later on December 21, 1953, Life Magazine and Reader's Digest published articles regarding a ground-breaking mouse painting study, conducted by Drs. Wynder and Graham, which concluded that tar from cigarettes painted on the backs of mice developed into cancer." (1 PA 9–10 ¶ 36.)	"A second study was published in December 1953 by Dr. Ernest Wynder and others of the Sloan-Kettering Institute whose experiments with mice confirmed the cancer causing properties of cigarettes." (2 PA 262 ¶ 63.)
"[I]n order to maximize profits, Defendants decided to intentionally ban [sic] together to form a conspiracy which, for over half a century, was devoted to creating and spreading doubt regarding a disingenuous 'open debate' about whether cigarettes were or were not harmful." (1 PA 10 ¶ 38.)	"To continue in its hugely profitable business, in 1953 the Tobacco Industry entered into a multifaceted unlawful conspiracy that continues to this day. One essential element of the conspiracy was an agreement to suppress harmful information concerning tobacco products . . . ." (2 PA 244 ¶ 9.)
"This conspiracy was formed in December of 1953 at the Plaza Hotel in New York City." (1 PA 10 ¶ 39.)	On "December 15, 1953 . . . the presidents of the leading tobacco companies met at an extraordinary gathering in the Plaza Hotel in New York City." (2 PA 263 ¶ 67.)

Plaintiffs' Amended Complaint	Attorney General's Complaint
"On December 28, 1953, Defendants again met at the Plaza Hotel where they knowingly and purposefully agreed to form a fake 'research committee,' called the Tobacco Industry Research Committee ('TIRC') (later renamed the Council for Tobacco Research ('CTR'))." "TIRC's *public* mission statement was to supposedly aid and assist with so-called 'independent' research into cigarette use and health." (1 PA 11 ¶¶ 42, 43 (emphasis in original).)	"In response to what the industry internally called the 'health scare' in late 1953 and early 1954, the Tobacco Companies and their public relations agent, Hill & Knowlton, jointly created a purportedly independent entity initially known as the Tobacco Industry Research Council (TIRC). As part of their unlawful conspiracy, the Tobacco Companies publicly represented that the TIRC would undertake, on behalf of the public and those responsible for the public health, including the State of Nevada, to objectively research and gather data concerning the relationship between cigarette smoking and health and truthfully publicize the results of this 'independent' research." (2 PA 245 ¶ 12.)
"For the next five decades, TIRC/CTR worked diligently, and quite successfully, to rebuff the public's concern about the dangers of cigarettes. Defendants, through TIRC/CTR, invented the false and misleading notion that there was an 'open question' regarding cigarette smoking and health. They appeared on television and radio to broadcast this message." (1 PA 12 ¶ 47)	"From 1954 to the present the industry has been using the TIRC and its successor, the Council for Tobacco Research (CTR), to knowingly publish false reports regarding the relationship between smoking and health." (2 PA 245 ¶ 12.)

Plaintiffs' Amended Complaint	Attorney General's Complaint
"The formation and purpose of TIRC was announced on January 4, 1954, in a full-page advertisement called 'A Frank Statement to Cigarette Smokers' published in 448 newspapers throughout the United States." (1 PA 11 ¶ 44.)	"The cigarette industry announced the formation of the TIRC on January 4, 1954, with newspaper advertisements placed in virtually every city with a population of 50,000 or more, reaching a circulation of more than 43 million Americans. The advertisement was 5 captioned 'A Frank Statement to Cigarette Smokers.'" (2 PA 267 ¶ 84.)
"Furthermore, not only did Defendants know and appreciate the dangers of cigarettes, but they were also intentionally manipulating ingredients, such as nicotine, in cigarettes to make them more addictive. Their documents reveal they knew the following . . . 'Nicotine is addictive . . . We are then, in the business of selling nicotine, an addictive drug' (Concealed Document 1963). . . ." (1 PA 13 ¶ 54.)	"The Tobacco Industry is aware of the addictive nature of nicotine as evidenced by just one of the many internal industry documents addressing this subject: 'Moreover, nicotine is addictive. We are, then in the business of selling nicotine, an addictive drug . . . .'" "The Tobacco Industry's unlawful conduct does not stop with misrepresentations concerning the addictive nature of nicotine and the adverse health effects of tobacco use. The industry has secretly gone a step further by manipulating the level of nicotine in tobacco products in order to increase addiction and sell more product." (2 PA 243–44 ¶¶ 6, 8.)

Plaintiffs' Amended Complaint	Attorney General's Complaint
"Defendants have continued to target and prey upon children, teenagers, minorities, and other segment populations, all in the name of money." (1 PA 18 ¶ 84.)	"In addition to ensuring a captive market through the addiction of its customers, the defendants have maintained their sales and replaced the hundreds of thousands of smokers who die each year by intentionally targeting marketing and promotional efforts at children and adolescents." (2 PA 320 ¶ 238.)
"Defendants knew there were ways to minimize the disease and destruction their product, cigarettes, caused through alternative safer designs of cigarettes including but not limited to nicotine free or reduced nicotine cigarettes." "Defendants willfully, purposefully, and knowingly did not make safer cigarettes . . . ." (1 PA 25 ¶¶ 111–12.)	"Defendants' activities in furtherance of the output-restriction/non-competition combination included wrongfully restraining, suppressing, and concealing research on the health effects of smoking, including the addictive properties of tobacco products, and wrongfully restraining, concealing, and suppressing the research and marketing of safer cigarettes. Despite the ability to produce 'safer' cigarettes, the defendants did not market such products, except in limited test markets, because it was agreed among the conspirators that no company would characterize or promote a product as biologically 'safer.'" (2 PA 284 ¶ 131.)

Plaintiffs' Amended Complaint	Attorney General's Complaint
"Defendants breached said aforementioned duties of due and reasonable care in that they produced, designed, manufactured, sold, and/or marketed defective cigarettes . . . ." (1 PA 22 ¶ 94.)	"Defendants' overt acts in furtherance of these purposes, include, without limitation . . . designing, testing, manufacturing, marketing, supplying and selling defective cigarettes . . . ." (2 PA 356–57 ¶ 370.)

In short, the complaints do not merely allege *similar* or *related* misconduct; they allege the *same* misconduct, based on the *same* evidence. Because Plaintiffs' punitive-damages claim is based on the same set of facts as the Attorney General's now-settled complaint, the third claim-preclusion element is satisfied. *See Mendenhall*, 133 Nev. at 620, 403 P.3d at 370.

Plaintiffs do not seriously dispute that their lawsuit is based on the same set of facts as the Attorney General's. Instead, they level four counterarguments. None has any merit.

First, Plaintiffs characterize the Attorney General's complaint as merely seeking to recover increased healthcare costs borne by the State. *See* Pet. at 79–80. But the Attorney General's complaint was not so narrow. The Attorney General made clear that "[t]he [o]bjectives of [her] [a]ction" included: (i) "secur[ing] for the people of the State of Nevada a fair and open

market, free from unfair or deceptive acts or practices"; (ii) "requir[ing] fair and full disclosure by defendants of the nature and effects of their products"; and (iii) "disgorg[ing] defendants' profits from their sales of tobacco products accomplished through violations of state law." 2 PA 248 ¶ 16.

Second, Plaintiffs argue that "[r]egarding 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." Pet. at 81. Plaintiffs tellingly do not cite anything in the record to support this proposition.

In truth, the Attorney General did not limit her punitive-damages claim to punish Philip Morris for "driving up Medicaid expenses and contributing to the delinquency of children." *Contra id.* Rather, the Attorney General demanded punitive damages because, in her view, "[t]he defendants' conduct described in [her] complaint was oppressive, fraudulent, and malicious." 2 PA 366 ¶ 408. And that conduct included allegations that Philip Morris, for example, "unreasonably injured and endangered the comfort, repose, health and safety of the residents of the

State of Nevada by selling tobacco products which are dangerous to human life and health and cause injury, disease and sickness." 2 PA 352 ¶ 354. So Plaintiffs' citation-less assertion that "[t]he Attorney General did not seek to punish the cigarette industry for its conduct in causing personal injuries to any Nevada resident" (Pet. at 81) is demonstrably false.

Third, Plaintiffs argue that Philip Morris's "emphasis" on the substantial similarity between the two lawsuits "lacks merit" because, they argue, "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." Pet. at 84 n.30. And, they continue, because "the Attorney General could not bring the Camacho's personal injury claims, any similarity between the Attorney General's allegations and the Camachos' allegations is irrelevant." *Id.*

But again, we do not contend that claim preclusion somehow bars Plaintiffs' *personal-injury* claims. Rather, the claim-preclusion doctrine bars their claim for *punitive damages*. And as explained above, the Attorney General has already vindicated the public's (and hence, Plaintiffs') interest in punishing and deterring Philip Morris. The Louisiana Supreme Court perhaps said it best: "Because a claim for punitive damages is related to the

defendant's conduct, and not the plaintiff's particular injury, [a plaintiff's] assertion that punitive damages arise with each separate injury, even when based on the same conduct or actions of the defendant, is incorrect as a matter of law and disregards the nature and purpose of punitive damages." *Chauvin v. Exxon Mobil Corp.*, 158 So. 3d 761, 769 (La. 2014).

Finally, citing *Teva Parenteral Medicines, Inc. v. Eighth Judicial District Court*, 137 Nev. 51, 481 P.3d 1232 (2021), Plaintiffs argue that "punitive damages are not a stand-alone claim, but" instead "are [a] remedy," implying that claim preclusion cannot preclude a demand for punitive damages. Pet. at 72. In fact, *Teva Parenteral Medicines* explains that punitive damages are not "a separate *cause of action*." 137 Nev. at 62 n.4, 481 P.3d at 1241 n.4 (emphasis added). Indeed, this Court routinely refers to "[c]laims for punitive damages." *E.g.*, *Hetter v. Eighth Judicial District Court*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994) ("Claims for punitive damages can be asserted with ease . . . ."); *see also, e.g.*, *Otak Nev., L.L.C. v. Eighth Judicial District Court*, 129 Nev. 799, 812, 312 P.3d 491, 500 (2013) ("As no causes of action remain on which to base an award of damages, we conclude that P & R's punitive damages claim must also be dismissed."); *Fanders v. Riverside Resort & Casino, Inc.*, 126 Nev. 543, 548 n.1, 245 P.3d 1159, 1163 n.1 (2010)

("The district court should consider Fanders' punitive damages claims only to the extent that they are based on claims that do not fall under the NIIA.").

The fact that a punitive-damages claim is a remedy and not a stand-alone cause of action does not affect the claim-preclusion analysis. After all, "claim preclusion applies to all *grounds of recovery* that were or could have been brought in the first case." *Five Star Capital Corp.*, 124 Nev. at 1055, 194 P.3d at 713 (emphasis added). And this Court has expressly *rejected* the position that "for claim preclusion to apply . . . the two sets of claims must be based on the same 'cause of action.'" *Mendenhall*, 133 Nev. at 620 n.2, 403 P.3d at 370 n.2.

In short, Plaintiffs' punitive-damages claim satisfies all three elements necessary to trigger the claim-preclusion doctrine. Accordingly, the district court properly dismissed Plaintiffs' punitive-damages claim.

B. Persuasive Authority Favors Preclusion.

The Georgia Supreme Court and the New York Supreme Court's Appellate Division have both concluded, on very similar facts, that those States' resolution of their respective late-1990s lawsuits against cigarette manufacturers barred personal-injury plaintiffs from asserting punitive-

damages claims against cigarette manufacturers. The same analysis should apply here.

As in Nevada, punitive damages in Georgia "serve a public interest and are intended to protect the general public, as opposed to benefitting or rewarding particular private parties." *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006). So when Georgia sought punitive damages against the tobacco industry, it "did so as parens patriae and in this capacity represented the interests of all Georgia citizens, including" the *Gault* plaintiffs, thus rendering "the State and plaintiffs . . . privies" of one another. *Id.* After finding that the State's and the plaintiffs' punitive-damages claims were "the same," and that the State's consent decree had preclusive effect, the Georgia Supreme Court concluded that "[t]he State's release of its punitive damages claim as parens patriae preclude[d] plaintiffs from pursuing the same claim for punitive damages in this action." *Id.* at 553–54.[10]

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[10] Plaintiffs try to distinguish *Gault* on the grounds that Georgia law "limits the recovery of punitive damages in product liability cases to one award of punitive damages from a defendant in a [Georgia] court . . . 'for any act or omission . . . regardless of the number of causes of action which may arise from such act or omission.'" *Gault*, 627 S.E.2d at 552 (quoting Ga. Code Ann. § 51–12–5.1(e)(1)). But *Gault* simply identified that provision to

Similarly, the New York appellate court in *Fabiano* concluded that the plaintiffs' punitive-damages claim, "based upon defendants' course of conduct in connection with the marketing of tobacco products over a period of decades . . . had . . . been interposed and prosecuted by the [New York] Attorney General on behalf of all New York residents . . . in the litigation concluded in the Master Settlement Agreement and ensuing judgment." 54 A.D.3d at 152. Because "punitive damages claims are quintessentially and exclusively public in their ultimate orientation and purpose," they "do not, even when asserted in the context of a personal injury action, essentially relate to individual injury." *Id.* at 150. Instead, "punitive damages are in their true aspect a prerogative reserved to the State for the accomplishment of social purposes, and it is thus fitting that those who pursue such damages in the context of private actions should be viewed as acting in the State's behalf, as 'private attorneys general.'" *Id.*

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support its conclusion that "punitive damages serve a public interest." 627 S.E.2d at 552. And in that respect, Georgia's conception of punitive damages is indistinguishable from Nevada's. *Cf. Siggelkow*, 109 Nev. at 45, 846 P.2d at 305 ("[A] punitive damage award has as its underlying purpose public policy concerns unrelated to the compensatory entitlements of the injured party.").

As such, "a claim by a private attorney general to vindicate what is an essentially public interest in imposing a punitive sanction cannot lie where . . . that interest has been previously and appropriately represented by the State Attorney General in an action addressed, on behalf of all of the people of the State, including plaintiffs and the decedent, to the identical misconduct." *Id.* at 151. "Relitigation of the [punitive-damages] claim is" accordingly "barred under the doctrine of res judicata." *Id.*; *accord, e.g.*, *Mulholland v. Philip Morris USA, Inc.*, 598 F. App'x 21, 24 (2d Cir. 2015) (applying New York law); *Shea v. Am. Tobacco Co.*, 73 A.D.3d 730, 731–32 (N.Y. App. Div. 2010). So, too, here.[11]

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[11] Plaintiffs attempt to distinguish *Fabiano* on the grounds that, to recover punitive damages in New York, "the injury . . . must be shown to reflect pervasive and grave misconduct affecting the public generally." *Fabiano*, 54 A.D.3d at 150. But Nevada law is no different. After all, one of the principal reasons for awarding punitive damages is to "deter[] the tortfeasor and others from engaging in similar conduct"—thus providing a benefit to the general public. *Siggelkow*, 109 Nev. at 45, 846 P.2d at 305. Plaintiffs try to prove their point by arguing that in Nevada, "uniquely personal claims like defamation may support a request for punitive damages." Pet. at 72. But New York also allows plaintiffs to recover punitive damages on defamation claims. *See, e.g.*, *Liker v. Weider*, 41 A.D.3d 438, 439 (N.Y. App. Div. 2007) ("punitive damages also were properly awarded given the reprehensible and repetitive nature of the defendant's defamatory conduct"); *Carroll v. Trump*, No. 20–cv–7311, -- F. Supp. 3d --, 2023 WL 4393067, at *19–20 (S.D.N.Y. July 5, 2023) (denying defendant summary judgment on punitive damages claim in defamation action); *Bouveng v. NYG Capital LLC*, 175

Plaintiffs implore this Court to adopt the reasoning of *Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731 (Mass. 2021), in which the Massachusetts Supreme Judicial Court concluded that the Massachusetts Attorney General's lawsuit against the tobacco industry did not preclude personal-injury plaintiffs from recovering punitive damages in individual smoking cases. *See id.* at 741–46. *Laramie* is easily distinguishable.

In Massachusetts, punitive damages serve *dual* purposes: they "serve a public interest" (as in Nevada) and they "also serve to vindicate a *personal* right." 173 N.E.3d at 742 (emphasis added). The Supreme Judicial Court acknowledged that the punishment and deterrence aspects of punitive damages "serve a public interest." *Id.* But "the objectives of punitive damages" in Massachusetts *also* "include compensating claimants for their legal costs and emotional injuries." *Drywall Sys., Inc. v. ZVI Constr. Co.*, 761 N.E.2d 482, 487 (Mass. 2002). And because "the Attorney General did not adequately represent the [*Laramie*] plaintiff's personal interest in punitive

F. Supp. 3d 280, 351 (S.D.N.Y. 2016) ("In sum, the $1 million punitive damage award against NYGG on Plaintiff's defamation claim will remain undisturbed.").

damages," the claim-preclusion doctrine did not bar the plaintiff's punitive-damages claim. *Laramie*, 173 N.E.3d at 744.

Plaintiffs here, however, have no such "personal interest in punitive damages," *id.*, under Nevada law. Unlike in Massachusetts, punitive damages in Nevada are "*unrelated* to the compensatory entitlements of the injured party." *Siggelkow*, 109 Nev. at 45, 846 P.2d at 305 (emphasis added). Instead, they are "designed" purely "to punish and deter the defendant's culpable conduct," *Bongiovi*, 122 Nev. at 580, 138 P.3d at 450 (2006)—an aim that the *Laramie* court declared to be a "public interest." *Laramie*, 173 N.E.3d at 742. So *Laramie* only further proves our point.[12]

Plaintiff also directs the Court to *Bullock v. Philip Morris USA Inc.*, 198 Cal. App. 4th 543 (Cal. Ct. App. 2011), which also held that a smoker's punitive-damages claim was not barred by the claim-preclusion doctrine. *See id.* at 557–58. But California applies an idiosyncratic "primary rights" form of claim preclusion, under which "a cause of action consists of the

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[12] Plaintiffs also point to *Laramie*'s recognition that punitive damages "may not be used to punish a defendant for harm inflicted upon nonparties or 'strangers to the litigation.'" 173 N.E.3d at 743 (quoting *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007)). But Plaintiffs were not "strangers" to the Nevada Attorney General's lawsuit. As explained above, the Nevada Attorney General sought punitive damages on behalf of the general public.

plaintiff's primary right to be free from a particular injury," *id.* at 557—an approach "California continue[s] to apply" "[u]nlike federal courts and other state courts that [have] moved to a transactional approach to claim preclusion." *Weissman v. Mut. Prot. Trust*, No. B290812, 2019 WL 2265351, at *6 (Cal. Ct. App. May 28, 2019). And that's why the *Bullock* court rejected the rationale of *Gault* and *Fabiano*: because Georgia and New York "do not subscribe to the primary rights theory of res judicata." *Bullock*, 198 Cal. App. 4th at 558 n.5. Because Nevada similarly "do[es] not subscribe to the primary rights theory of res judicata," the *Bullock* decision is, as *Bullock* itself put it, "neither on point nor persuasive." *Id.*[13]

[13] In addition to *Laramie* and *Bullock*, Plaintiffs string-cite six other cases to support the proposition that "[o]ther jurisdictions have acknowledged that personal injury plaintiffs may request punitive damages in jurisdictions that signed the MSA." But five of these cases did not address the claim-preclusion doctrine at all, so they have no bearing on the resolution of the question before this Court. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005); *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 656 (2022); *Bifolck v. Philip Morris, Inc.*, 152 A.3d 1183 (Conn. 2016); *Williams v. RJ Reynolds Tobacco Co.*, 271 P.3d 103 (Or. 2011); *In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005). The decision in *Shaffer v. R.J. Reynolds Tobacco Co.*, 860 F. Supp. 2d 991 (D. Ariz. 2012), concerned *issue* preclusion—and only in the context of a plaintiff's (unsuccessful) attempt to preclude a tobacco defendant from contesting liability. *See id.* at 992. *Shaffer* too has no bearing on the question at bar.

C. The MSA Bars Plaintiffs' Punitive Damages Claims.

Even if the claim-preclusion doctrine did not apply, the MSA's terms would still preclude Plaintiffs from recovering punitive damages in this lawsuit. That's because (i) the MSA released Plaintiffs' claims for punitive damages, and (ii) though they did not sign the MSA, Plaintiffs are intended beneficiaries of the MSA.

1. The MSA Released Plaintiffs' Punitive Damages Claims.

The MSA released "all Released Parties from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have." 3 PA 490. As such, the MSA released Plaintiffs' punitive-damage claims because: (i) Philip Morris is a "Released Party"; (ii) Plaintiffs' punitive-damages claim is a "Released Claim"; and (iii) Plaintiffs are "Releasing Parties."

First, there is no serious dispute that Philip Morris is a Released Party. *See* 3 PA 391–92, 394–95, 529–530.

Second, Plaintiffs' punitive-damages claim is a Released Claim. The MSA provides that "Claims" include civil "claims, demands, actions, suits, causes of action, damages (whenever incurred), [and] liabilities of any nature

including civil penalties *and punitive damages* . . . known or unknown, suspected or unsuspected, accrued or unaccrued." 3 PA 387 (emphasis added). And a Released Claim is a "Claim[] . . . arising out of or in any way related . . . to . . . the . . . use, sale, distribution, manufacture, development, advertising, marketing or health effects of . . . Tobacco Products." 3 PA 393. So Plaintiffs' claim for punitive damages is a "Released Claim."

Finally, Plaintiffs are Releasing Parties. Releasing Parties include the settling States as well 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." 3 PA 394–95.

Plaintiffs resist the notion that they fall within this definition, arguing that its "plain language only concerns persons acting in a representative capacity to vindicate public rights" and that it "plainly excludes persons acting to vindicate private or individual rights." Pet. at 87. But in seeking punitive damages—which, again, exist to vindicate "public policy concerns unrelated to the compensatory entitlements of the injured party," *Siggelkow*, 109 Nev. at 45, 846 P.2d at 305—Plaintiffs *are*, in fact, "acting in a

representative capacity to vindicate public rights." Pet. at 87. So Plaintiffs are Releasing Parties under the terms of the MSA.[14]

2. Plaintiffs Are Intended Beneficiaries Of The MSA.

To be sure, Plaintiffs did not sign the MSA. But as Plaintiffs acknowledge, "this [C]ourt applies contract law when construing settlement agreements," Pet. at 85, and "intended third-party beneficiar[ies] [are] bound by the terms of a contract even if [they] are not . . . signator[ies]." *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604 (2005). "Whether an individual is an intended third-party beneficiary . . . depends on the parties' intent, gleaned from reading the contract as a

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[14] Plaintiffs string-cite seven cases in support of their position that they are not Releasing Parties. Pet. at 88. Five of those cases do not concern the question whether individual plaintiffs are "Releasing Parties" with respect to their punitive-damages claims, and are thus irrelevant to the question at hand. *See McClendon v. Georgia Department of Community Health*, 261 F.3d 1252 (11th Cir. 2001); *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000); *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266 (La. Ct. App. 2007); *Robinson v. Montana*, 68 P.3d 750 (Mont. 2003); *Lewis v. State ex rel. Miller*, 646 N.W.2d 121 (Iowa Ct. App. 2002). *Laramie* concluded that the plaintiff was not a Releasing Party with respect to her punitive-damages claim, 173 N.E.3d at 746 n.10—but that was because, as explained above, Massachusetts plaintiffs (unlike Nevada plaintiffs) "ha[ve] a private interest in punitive damages." *Id.* at 744. The court in *Williams v. RJ Reynolds Tobacco Co.*, 271 P.3d 103 (Or. 2011), similarly held that personal-injury plaintiffs have private interests in punitive-damages awards, *see id.* at 113–14—a conclusion that, as explained above, does not comport with Nevada law.

whole in light of the circumstances under which it was entered." *Id.* at 779, 121 P.3d at 605. For these reasons, Plaintiffs' claims for punitive damages are barred by the terms of the MSA.

The MSA, and its attendant circumstances, prove that Plaintiffs are intended third-party beneficiaries of the MSA. Two of the Attorney General's principal goals in her lawsuit were "to secure for the people of the State of Nevada a fair and open market, free from unfair and deceptive acts or practices" and "to require fair and full disclosure by defendants of the nature and effects of their products." 2 PA 248 ¶ 16. In other words, the Attorney General sought to use her lawsuit to benefit the general public.

And that's exactly what the MSA did. Through the MSA, Philip Morris and the other participating manufacturers agreed to a number of prohibitions and restrictions to benefit the general public, including prohibitions and restrictions on: (i) the use of cartoon characters in their advertising and promotional materials (3 PA 399); (ii) the ability of manufacturers to sponsor events and sports teams (*id.* at 399–402); (iii) the use of advertisements on billboards and in public transit (*id.* at 402–04); (iv) product placement in media (*id.* at 404–05); (v) the minimum size of cigarette packs (*id.* at 408–09); and (vi) lobbying (*id.* at 409–12). The MSA

also required the dissolution of trade-industry groups, including the Council for Tobacco Research. *Id.* at 412–13. And it required Philip Morris and the other participating manufacturers to fund a national foundation that would, among other things, work "to prevent diseases associated with the use of Tobacco Products in the States." *Id.* at 421–28.

Because the parties intentionally crafted the MSA to benefit Plaintiffs and all other members of the general public, Plaintiffs are intended beneficiaries of the MSA. They are accordingly "bound by the terms of" the MSA, *Canfora*, 121 Nev. at 779, 121 P.3d at 604, and cannot recover punitive damages in this action.

Plaintiffs resist this conclusion in two ways. Both are wrong.

First, Plaintiffs argue that they are not intended beneficiaries because the MSA provides that it does not "provide any rights to," and cannot "be enforce[d] by, any person or entity that is not a Settling State or a Released Party." 3 PA 517. But the fact that Plaintiffs cannot legally enforce the MSA has no bearing on the fact that the MSA was intentionally designed to benefit them. Since the MSA was intended to benefit them, they are intended beneficiaries and are thus bound by the MSA.

Second, Plaintiffs argue that "other jurisdictions have squarely held that private persons are not third-party beneficiaries of the MSA." (Pet. at 86.) In fact, the four cases that they string-cite for support say no such thing. For starters, Texas did not sign the MSA; it signed a different settlement, with different terms, called the "Comprehensive Settlement Agreement." *Watson v. Texas*, 261 F.3d 436, 439 (5th Cir. 2001). So Plaintiffs' citation to *Watson* is irrelevant. As for *Lopes v. Commonwealth*, 811 N.E.2d 501 (Mass. 2004), *McClendon v. Georgia Department of Community Health*, 261 F.3d 1252 (11th Cir. 2001), and *Floyd v. Thompson*, 227 F.3d 1029 (7th Cir. 2000), those cases simply stand for the unremarkable proposition that the MSA did not release individual personal-injury claims. *See Lopes*, 811 N.E.2d at 507–08; *McClendon*, 261 F.3d at 1259–62; *Floyd*, 227 F.3d at 1035–38. If anything, *Floyd* proves *our* point: It explains that, under the MSA, "[i]ndividual persons . . . release claims . . . insofar as they are acting for the state and suing on general injuries." 227 F.3d at 1037. And by seeking punitive damages to vindicate a public interest in punishment and deterrence, that's what Plaintiffs are doing here.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT TO PHILIP MORRIS ON PLAINTIFFS' NEGLIGENCE CLAIM.

Plaintiffs alleged that Philip Morris failed to warn Ms. Camacho about the dangers of smoking, and that the company negligently designed the Philip Morris brands of cigarettes that Ms. Camacho smoked. The district court correctly rejected both of these theories.[15]

A. The District Court Correctly Rejected Plaintiffs' Negligent-Failure-To-Warn Theory.

Plaintiffs vacillate on whether they continue to press a negligent-failure-to-warn theory against Philip Morris. *Compare* Pet. at 38 (referencing their "remaining [non-design-defect] negligence claim against" *Liggett*) *with id.* at 56–60 (arguing that "genuine issues of material fact exist regarding the Camachos' negligence theory as to the *Cigarette Manufacturers'* advertising practices") (emphasis added). In all events, Plaintiffs cannot pursue any such theory against Philip Morris for three independent reasons: (i) Plaintiffs expressly waived their failure-to-warn theory against Philip Morris below; (ii) Plaintiffs' failure-to-warn theory is expressly preempted

[15] As explained above, Philip Morris does not believe that these issues warrant advisory-mandamus consideration. In any event, the district court correctly dismissed Plaintiffs' negligence claim.

by federal law; and (iii) Plaintiffs' failure-to-warn theory fails because there was no "special relationship" between Philip Morris and Ms. Camacho.

1. Plaintiffs Waived Their Failure-To-Warn Theory As Against Philip Morris.

Plaintiffs expressly waived their failure-to-warn theory against Philip Morris in the district court. They cannot now resuscitate it.

In Part IV(C) of its partial-summary-judgment motion on Plaintiffs' negligence claim, Philip Morris explained that "Plaintiffs' failure to warn theory . . . fails" and that Philip Morris "is entitled to summary judgment on Plaintiffs' negligence claim to the extent it is based on any failure to warn." 1 PA 86–88 (initial capitalization omitted). In response, Plaintiffs represented that their "claims against Philip Morris are not failure-to-warn claims based on advertising and promotion. So section II(C) [sic; IV(C)] of Defendant's Motion is a red herring and entirely moot." 4 PA 625 (citing 1 PA 86–88).

Because Plaintiffs did "not urge[]" their failure-to-warn theory against Philip Morris "in the trial court," that theory "is deemed to have been waived and [should] not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

2. Plaintiffs' Failure-To-Warn Theory Is Expressly Preempted By Federal Law.

Even if Plaintiffs had not waived their failure-to-warn theory against Philip Morris below, such a theory is expressly preempted by federal law. That's because Ms. Camacho contends that she only began smoking cigarettes manufactured by Philip Morris in 1990—and failure-to-warn claims premised on post-July 1, 1969 smoking are expressly preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*[16]

The U.S. Constitution's Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In other words, the Supremacy Clause "provides that federal law supersedes, or preempts, conflicting state law." *Teva Parenteral Medicines*, 137 Nev. at 60, 481 P.3d at 1239.

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[16] Philip Morris and Liggett are somewhat differently situated in that Plaintiffs allege that Ms. Camacho smoked cigarettes manufactured by Liggett before July 1, 1969. To be clear, Plaintiffs' failure-to-warn claims are expressly preempted to the extent that they concern Ms. Camacho's post-July 1, 1969 smoking, regardless of which brand of cigarettes she had smoked.

"There are two types of preemption—express and implied." *Id.* "Express preemption occurs when Congress explicitly declares in the statute's language its intent to preempt state law." *Id.* And preemption may also "be implied if the federal law dominates a particular legislative field (field preemption) or actually conflicts with state law (conflict preemption)." *Id.*

The Federal Cigarette Labeling and Advertising Act, or FCLAA, imposes several labeling requires on cigarettes. 15 U.S.C. § 1333(a). It also contains a preemption provision. 15 U.S.C. § 1334. As amended effective July 1, 1969, the FCLAA's preemption provision provides that: (i) except as required by the U.S. Secretary of Health and Human Services, "no statement relating to smoking and health, other than the statement required by [15 U.S.C. § 1333], shall be required on any cigarette package"; and (ii) unless the cigarette labeling at issue did not conform to § 1333 (an allegation that Plaintiffs have not raised), State law may not impose any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes." 15 U.S.C. § 1334(a) & (b); *see* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, § 3, 84 Stat. 87, 90 (1970) (preemption amendment "shall take effect as of July 1, 1969").

"Together," the U.S. Supreme Court has explained, "the [FCLAA's] labeling requirement and pre-emption provisions express Congress' determination that the prescribed federal warnings are both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking." *Altria Grp., Inc.*, 555 U.S. at 79. "Because Congress has decided that no additional warning statement is needed to attain that goal, States may not impede commerce in cigarettes by enforcing rules that are based on an assumption that the federal warnings are inadequate." *Id.* As such, as it relates to post-July 1, 1969 smoking, negligence claims based on a failure-to-warn theory are preempted. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 524 (1992) (plurality opinion); *see, e.g.*, *King v. E.I. Dupont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993) ("[T]he holding in [*Cipollone*'s] plurality opinion that the 1969 Act preempted the plaintiff's failure-to-warn claim fairly can be said to constitute the view of the Court because six members of the Court concurred in that conclusion.").

It is thus no wonder that Plaintiffs waived their failure-to-warn-based negligence theory as to Philip Morris. Plaintiffs contend that Ms. Camacho only began smoking cigarettes manufactured by Philip Morris in 1990. *See*

Pet. at 21 (representing that Ms. Camacho "switched from [Liggett] cigarettes to [Philip Morris] cigarettes" in 1990). Accordingly, their failure-to-warn-based negligence theory against Philip Morris is expressly preempted by the FCLAA.

In an attempt to muddy otherwise clear waters, Plaintiffs argue that "federal law does not preempt claims for unlawful trade practices, fraudulent misrepresentation, conspiracy to misrepresent material facts, or conspiracy to conceal material facts." Pet. at 37. It is true that a five-Justice majority concluded that the FCLAA "does not pre-empt state-law claims . . . that are predicated on [a] duty not to deceive." *Altria Grp., Inc.*, 555 U.S. at 91. But Plaintiffs' petition does not concern such claims. The question here—as Plaintiffs put it in their petition—is "[w]hether the district court erred in granting the Cigarette Manufacturers' motion for summary judgment as to the Camachos' *negligence* claim." Pet. at 3 (emphasis added).

Plaintiffs also argue that federal law does not "preempt states from prohibiting cigarette sales to adolescents." Pet. at 37. But that argument has nothing to do with their failure-to-warn theory. 1 PA 21. And in all events, Plaintiffs acknowledge that Ms. Camacho "began smoking . . . when she was 18 years old." Pet. at 20.

Finally, citing *Cipollone*, Plaintiffs argue that "[f]ederal law also does not preempt failure to warn theories involving negligent testing and research." Pet. at 37 (citing *Cipollone*, 505 U.S. at 524–25). That is not what *Cipollone* says at all. *Cipollone* involved two failure-to-warn theories, one of which asserted that the defendants "were negligent in the manner that they tested [and] researched . . . their cigarettes." 505 U.S. at 524. The plurality held that "insofar as claims under [this] failure-to-warn theory require a showing that [defendants'] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted." *Id.* In other words, as the Ninth Circuit put it, "a negligent testing claim based on a failure to warn theory is preempted." *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995) (quoting *Cipollone*, 505 U.S. at 524).

True, the U.S. Supreme Court held that the FCLAA "does not . . . pre-empt . . . claims that rely *solely* on [defendants'] testing or research practices or other actions unrelated to advertising or promotion." *Cipollone*, 505 U.S. at 524–25 (emphasis added). In other words, standalone negligent-testing or negligent-research claims, unrelated to a supposed failure to warn, may not necessarily be expressly preempted by the FCLAA. But Plaintiffs did not

rest their negligence claim on standalone negligent-testing or negligent-research theories (to the extent that such theories could even undergird a negligence claim in Nevada). *See* 1 PA 19–24. Nor did Plaintiffs oppose Philip Morris's partial-summary-judgment motion on such grounds. *See* 4 PA 621–43. Plaintiffs cannot avoid partial summary judgment based on theories that they did not assert below.[17]

3. Plaintiffs' Failure-To-Warn Theory Fails Because There Was No "Special Relationship" Between Philip Morris And Ms. Camacho.

"To prevail on a negligence theory, a plaintiff generally must show," among other things, that "the defendant owed a duty of care to the plaintiff." *Wiley v. Redd*, 110 Nev. 1310, 1315, 885 P.2d 592, 595 (1994). "[T]he law," however, "does not impose a general affirmative duty to warn others of dangers." *Id.* at 1316, 885 P.2d at 596. "Specifically, in failure to warn cases, defendant's duty to warn exists only where," among other things, "there is a special relationship between the parties." *Id.* "Absent such a relationship,

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[17] Plaintiffs challenge two aspects of the district court's conclusion that Plaintiffs' pre-July 1, 1969, failure-to-warn theory against Liggett "also fail[s]." *Compare* 59 PA 8980 *with* Pet. 56–60. Because, according to Plaintiffs, Ms. Camacho only began smoking cigarettes manufactured by Philip Morris in 1990 (*see* Pet. at 21), these fact-based challenges do not concern Philip Morris.

no duty to disclose arises . . . ." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1487, 970 P.2d 98, 111 (1998), *overruled in part on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 270–71, 21 P.3d 11, 14–15 (2001).

Plaintiffs do not dispute these general principles. Instead, they argue that Philip Morris had a special relationship with Ms. Camacho. Pet. at 49–53. Plaintiffs are wrong.[18]

A "special relationship" exists "where a party reasonably imparts special confidence in the defendant and the defendant would reasonably know of this confidence." *Dow Chem. Co.*, 114 Nev. at 1486, 970 P.2d at 110. As its name implies, a special relationship "requires, at a minimum, some form of relationship between the parties." *Id.* at 1487, 970 P.2d at 110. Here, Plaintiffs and Philip Morris had no material relationship. Indeed, Ms. Camacho does not even allege—let alone proffer evidence showing—that she purchased cigarettes directly from Philip Morris. Instead, Plaintiffs

[18] Plaintiffs do not contend that there is any meaningful difference between Philip Morris and Liggett in this regard. Accordingly, Plaintiffs' failure-to-warn-based negligence claim against Liggett was also properly dismissed in its entirety—even with respect to Ms. Camacho's alleged pre-July 1, 1969, smoking—for lack of a special relationship.

alleged that Ms. Camacho purchased cigarettes from two retailer-defendants, Silverado's and Smokes & Vapors. 1 PA 6.

This Court's decision in *Dow Chemical* is instructive. In that case, plaintiffs sued Dow Chemical "in connection with alleged defects in silicone gel breast implants manufactured by" a Dow Chemical subsidiary. *Dow Chem. Co.*, 114 Nev. at 1475, 970 P.2d at 103. As relevant here, the plaintiffs (i) alleged that Dow Chemical "concealed the hazards of liquid silicone after it had 'partially assumed' [its subsidiary's] duty to perform toxicological testing on liquid silicone," and (ii) argued that Dow Chemical had "a duty to disclose publicly the alleged dangers of silicone implants because," among other things, it "possessed superior knowledge about silicone safety yet, according to [the plaintiffs], it actively and intentionally suppressed this knowledge." *Id.* at 1485–86, 970 P.2d at 110.

It was undisputed that Dow Chemical had no "relationship of any kind" with the plaintiffs, so it was also undisputed that Dow Chemical did not have a special relationship with them. *Id.* at 1487, 970 P.2d at 111. Nor, this Court held, could Dow Chemical's "superior knowledge about the dangers of using silicone within the human body" somehow trigger a "duty to disclose" in the absence of a special relationship. *Id.* "Dow Chemical,"

this Court explained, "had no duty to disclose to the [plaintiffs] any superior knowledge it may have had regarding the safety of silicone products . . . because it was not directly involved in the transaction from which [the] lawsuit arose, or any other transaction with the" plaintiffs. *Id.*

Even assuming that Ms. Camacho *had* purchased cigarettes directly from Philip Morris (and she did not), such a transaction still would not have created a special relationship. "[S]imply manufacturing or selling an alleged defective product is not enough to support the required [special] relationship." *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F. Supp. 2d 1279, 1292 (D. Nev. 2013) (citing *Dow Chem. Co.*, 114 Nev. at 1487, 970 P.2d 98). "[A] straightforward vendor-vendee relationship, or an association characterized by routine, arms-length dealings will not suffice to establish a special relationship." *Silver State Broad., LLC v. Crown Castle MU, LLC*, No. 2:18–cv–734, 2018 WL 6606064, at *3 (D. Nev. Dec. 17, 2018); *accord Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406, 1416 n.3 (D. Nev. 1995).

To be sure, this question arises most often in the context of fraudulent-concealment claims. *See, e.g.*, *Dow Chem. Co.*, 114 Nev. at 1485–87, 970 P.2d 109–11; *Peri & Sons Farms, Inc.*, 933 F. Supp. 2d at 1292–93. But that distinction is irrelevant as fraudulent-concealment claims and negligent-

failure-to-warn claims both require, as a prerequisite, a duty on the defendant's part to warn or disclose. *Compare, e.g.*, *Dow Chem. Co.*, 114 Nev. at 1486, 970 P.2d at 110 ("For a mere omission to constitute actionable fraud, a plaintiff must first demonstrate that the defendant had a duty to disclose the fact at issue.") *with, e.g.*, *Wiley*, 110 Nev. at 1316, 885 P.2d at 596 ("[I]n [negligent] failure to warn cases, defendant's duty to warn exists only where there is a special relationship between the parties, and the danger is foreseeable.").[19]

Finally, Plaintiffs ask the Court to declare that there is a special relationship between them and Philip Morris (Pet. at 49–53), notwithstanding the fact that a special relationship requires "some form of

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[19] In a footnote, Plaintiffs argue that "a duty to disclose need not exist in a negligence matter," citing for support *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009). Pet. at 52–53 & n.9. Putting aside the fact that a negligent-failure-to-warn theory necessarily requires a duty to disclose, *see Wiley*, 110 Nev. at 1316, 885 P.2d at 596, *Rivera* does not say what Plaintiffs represent that it says. For starters, *Rivera* did not concern a negligence claim at all; rather, the *Rivera* plaintiff was proceeding "solely on [a] *strict product liability* failure-to-warn claim." *Rivera*, 125 Nev. at 189, 209 P.3d at 273 (emphasis added). As Plaintiffs later concede, *Rivera* did not "concern[] . . . a traditional negligence claim." Pet. at 59 n.11. And in any event, *Rivera* explains that a defendant may be found liable under a strict-liability theory "if the manufacturer failed to provide an adequate warning," which necessarily implies a duty to disclose. *Rivera*, 125 Nev. at 191, 209 P.3d at 275.

relationship between the parties." *Dow Chem. Co.*, 114 Nev. at 110–11, 970 P.2d at 1487. In support, Plaintiffs cite two *strict-liability* cases for the proposition that manufacturers have duties to make their products safe, or at least as safe as possible. Pet. at 51–53 (citing *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966) and *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 808 P.2d 522 (1991)).

But Nevada's adoption of strict products liability hardly means that the Court should infer, for negligence claims, a special relationship between two parties that lack a material relationship. After all, the whole point of strict liability is to impose liability on a manufacturer "*without* a showing of negligence or privity." *Ford Motor Co. v. Trejo*, 133 Nev. 520, 525, 402 P.3d 649, 653 (2017) (emphasis added). Whereas negligence theories "focus[] on the conduct of the manufacturer," strict-liability theories focus on "the product itself." *Id.* at 529, 402 P.3d at 656. Indeed, this Court has declined other efforts to conflate negligence and strict liability. *See id.* (rejecting risk-utility test for strict liability on grounds that it would "insert[] a negligence standard into an area of law where this court has intentionally departed from traditional negligence analysis"). So Plaintiffs' appeal to strict-liability cases

cannot somehow establish a special relationship between them and Philip Morris.[20]

B. The District Court Correctly Rejected Plaintiffs' Negligent-Design-Defect Theory.

Plaintiffs' negligent-design-defect theory fails for four independent reasons: (i) it is impliedly preempted by federal law; (ii) Plaintiffs presented no evidence of a commercially feasible alternative design; (iii) cigarettes are not unreasonably dangerous, as explained in comment i of the Restatement (Second) of Torts, section 402A, which this Court has adopted; and (iv) Plaintiffs identified no evidence showing that any design defect caused Ms. Camacho's injury.

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[20] Plaintiffs also cite to *Teva Parenteral Medicines* for support (Pet. at 52), but it is not clear how that case has any relevance here. That case simply held that failure-to-warn claims against the manufacturer of a generic drug are preempted by federal law. *Id.* at 62–64, 481 P.3d at 1240–42. The only tort duty discussed in any level of detail was a duty to stop selling "50 mL vials of propofol to clinics [that the defendants] allegedly know are misusing their product." *Id.* at 63, 481 P.3d at 1241. What that has to do with the question whether Plaintiffs and Philip Morris were in a "special relationship" is anybody's guess.

1. Plaintiffs' Negligent-Design-Defect Theory Is Impliedly Preempted By Federal Law.

As explained above, preemption is implied when "federal law dominates a particular legislative field (field preemption) or actually conflicts with state law (conflict preemption)." *Teva Parenteral Medicines, Inc.*, 137 Nev. at 60, 481 P.3d at 1239. Conflict preemption, in turn, arises in two circumstances: first, when "compliance with both state and federal law is physically impossible"; and second, "when a state law obstructs the accomplishment and execution of the full purposes and objectives of Congress." *Davidson v. Velsicol Chem. Corp.*, 108 Nev. 591, 600, 834 P.2d 931, 936–37 (1992). This second form of conflict preemption, known as "obstacle preemption," preempts Plaintiffs' design-defect claim.

Plaintiffs' design-defect theory is premised on the notion that conventional cigarettes are defective because: (i) they contain nicotine and are thus addictive; (ii) they are inhalable; and (iii) they are combustible. *See* Pet. at 4–10, 66. But those are the features that make a cigarette a cigarette. So Plaintiffs' theory is really that every single conventional cigarette on the market is defectively designed in violation of Nevada law. *See id.* As one of

Plaintiffs' experts put it, "[t]he conventional cigarette . . . is a defective product. They're all defective." 9 PA 1425.

But a constellation of federal laws specifically contemplates the continued manufacture and sale of conventional cigarettes. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the U.S. Supreme Court noted that "Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965." *Id.* at 137.[21] And "[w]hen Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects." *Id.* at 138.

Yet despite its active involvement in tobacco regulation, Congress always "stopped well short of ordering a ban" on cigarettes. *Id.* Its policy of allowing the sale of tobacco products reflects its recognition that, while the risks of smoking are real, so too is the economic importance of the tobacco industry. To accommodate these competing interests, Congress

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[21] *See* Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89–92, 79 Stat. 282 (1965); Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91–222, 84 Stat. 87 (1970); Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98–24, 97 Stat. 175; Comprehensive Smoking Education Act, Pub. L. No. 98–474, 98 Stat. 2200 (1984); Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99–252, 100 Stat. 30; Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102–321, § 202, 106 Stat. 323, 394 (1992).

struck a balance: it protected public health by "regulat[ing] the labeling and advertisement of tobacco products," and it protected economic interests by "foreclos[ing] the removal of tobacco products from the market." *Id.* at 137, 138. In other words, "it is the policy of Congress that 'commerce and the national economy may be . . . protected to the maximum extent consistent with' consumers 'be[ing] adequately informed about any adverse health effects.'" *Id.* at 138–39 (quoting 15 U.S.C. § 1331).

The Supreme Court did not mince words. Congress, it explained, "inten[ded] that tobacco products remain on the market." *Id.* at 139. And "[a] ban of tobacco products" would "*plainly contradict* congressional policy." *Id.* (emphasis added).

Plaintiffs' negligent-design-defect claim thus cannot proceed. Again, their legal theory, as expressed by one of their experts, is that *all* conventional cigarettes are defective. *See* 9 PA 1425. And if a Nevada jury were to agree, the resulting "tort judgment [would] establish[] that the defendant has violated a state-law obligation," *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008)—a state-law obligation not to sell conventional cigarettes that would conflict with Congress's "intent that tobacco products remain on the

market." *Brown & Williamson*, 529 U.S. at 139.[22] That is why myriad courts have concluded that negligent-design-defect claims concerning cigarettes are impliedly preempted by federal law.[23] Because Plaintiffs' negligent-design-defect claim "interfere[s] with the careful balance struck by Congress" and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it is impliedly preempted. *Arizona v. United States*, 567 U.S. 387, 406 (2012); *see Davidson*, 108 Nev. at 592 & 601, 834 P.2d at 932 & 937 (state-law tort claim regarding pesticide labeling was impliedly preempted by federal law because "such state damage actions would hinder Congress' goal of reaching uniformity in pesticide labeling").

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[22] To be sure, a tort judgment would not preclude Philip Morris from continuing to sell cigarettes in Nevada. But implied preemption is not "defeated by the prospect that a manufacturer could pay the state penalty for violating a state-law duty." *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 487 n.3 (2013). "To hold otherwise would render [conflict] pre-emption all but meaningless." *Id.*

[23] *See, e.g.*, *Pooshs v. Philip Morris USA, Inc.*, 904 F. Supp. 2d 1009, 1025–26 (N.D. Cal. 2012); *Jeter ex rel. Smith v. Brown & Williamson Tobacco Co.*, 294 F. Supp. 2d 681, 685–86 (W.D. Pa. 2003), *aff'd on other grounds*, 113 F. App'x 465 (3d Cir. 2004); *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).

Plaintiffs resist this conclusion in seven different ways. None of their arguments has any merit.

First, Plaintiffs ask this Court to "reject" the U.S. Supreme Court's decision in *Brown & Williamson*, Pet. at 42 n.6, on the supposed grounds that its "statutory foundation . . . no longer exists." Pet. at 41–42. Putting aside the fact that only the U.S. Supreme Court may "overrul[e] its own decisions," *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023), *Brown & Williamson*'s statutory foundation is alive and well. As grounds for *Brown & Williamson*'s supposed demise, Plaintiffs note that, four years after the U.S. Supreme Court issued that decision, "Congress repealed 7 U.S.C. § 1311(a)"—one of the many statutes on which *Brown & Williamson* relied. Pet. at 41–42. Plaintiffs' argument doesn't pass muster.

Section 1311 was part of the Agricultural Adjustment Act of 1938, 52 Stat. 45 (1938), a Depression-era program that "regulat[ed] tobacco growers by establishing a system of quotas and price supports." *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1049 (11th Cir. 2008). In the early 2000s, "Congress determined that the price support system was no longer in the best interest of the industry" and, in 2004, ultimately "dismantled the tobacco quotas and price supports that had been in place since 1938 and created a program to

help tobacco farmers make the transition to a free market system." *Id.* It is difficult to conceive of how Congress's continued desire to legislatively aid "the best interest of the [tobacco] industry," *id.*, could somehow be construed as some sort of congressional policy shift that would support banning conventional cigarettes.

In any event, the Supreme Court's reliance on § 1311—which comprised a congressional finding that the tobacco industry is "'one of the greatest basic industries of the United States'"—was minimal. *Brown & Williamson*, 529 U.S. at 137 (quoting 7 U.S.C. § 1311(a)). After quoting section 1311, the Court quickly pivoted to the *six* statutory regimes that collectively "reveal[ed] [Congress's] intent that tobacco products remain on the market," expressly noting that those statutory schemes were "[m]ore important[]" than section 1311. *Brown & Williamson*, 529 U.S. at 137, 139. Congress's 2004 repeal of section 1311 thus hardly undermines *Brown & Williamson*'s continuing vitality.

Second, Plaintiffs argue that their negligent-design-defect claim is not preempted because it is "clearly outside the scope of 15 U.S.C. § 1334(b)'s express [preemptive] language." Pet. at 38. But "Congress' inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict

pre-emption principles.'" *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (emphasis in original, quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)). So, for example, "a local law that is consistent with an express preemption clause may still be preempted if it 'actually conflicts' with federal law." *Atay v. Cnty. of Maui*, 842 F.3d 688, 704 (9th Cir. 2016).

Third, Plaintiffs note that in 2009, "Congress subsequently empowered the Food and Drug Administration to regulate tobacco products" in enacting the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111–31, 123 Stat. 1776 (2009), also known as the TCA. Pet. at 41. But so what? The TCA's enactment represents just another instance in which "Congress has directly addressed the problem of tobacco and health through legislation," and—yet again—"stopped well short of ordering a ban." *Brown & Williamson*, 529 U.S. at 137–38. In fact, the TCA expressly provides that it should not "be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." 21 U.S.C. § 387p(b). So the TCA does not affect this implied-preemption analysis.

Fourth, Plaintiffs argue that *Brown & Williamson* "does not demonstrate that federal law occupies the entire field of tobacco legislation." Pet. at 42–

43. But that's not what we're arguing at all. Plaintiffs' negligent-design-defect claim is not *field* preempted; it is *conflict* preempted.

Fifth, Plaintiffs argue that Philip Morris did not "proffer a specific federal statute or regulation that conflicts" with their negligent-design-defect claim, and that, in their view, "there is no federal statute or regulation that conflicts with" their claim. Pet. at 43–44 & n.7. Plaintiffs are wrong. As explained above, the U.S. Supreme Court surveyed *six* statutory regimes and concluded that "the collective premise of these statutes is that cigarettes . . . will continue to be sold in the United States," such that "[a] ban of tobacco products"—which Plaintiffs' negligent-design-defect claim, if successful, would effectively impose as a matter of Nevada law—"would therefore plainly contradict congressional policy." *Brown & Williamson*, 529 U.S. at 137–39.

Sixth, Plaintiffs argue that "congressional inaction alone does not give rise to federal preemption of state law." Pet. at 44. What congressional inaction? Again, Congress has "directly addressed the problem of tobacco and health through legislation" on more than half a dozen occasions "since 1965" and despite all of this legislative activity, it has "stopped well short of ordering a ban." *Brown & Williamson*, 529 U.S. at 137–38. That is preemption

not from "inaction," but from sustained, continuous legislation evincing Congress's clear intent that cigarettes are to be regulated, not banned.

Finally, Plaintiffs suggest that Philip Morris "could stop manufacturing and selling [conventional] cigarettes." Pet. at 10. But Congress has expressed its intent that conventional cigarettes "will continue to be sold in the United States," *Brown & Williamson*, 529 U.S. at 139, and the Supreme Court has "reject[ed] this 'stop-selling' [theory] as incompatible with [its implied] pre-emption jurisprudence." *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 488 (2013). "[A]n actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability." *Id.*

Because Plaintiffs seek to use Nevada tort law to penalize Philip Morris for selling a product that Congress intended to remain on the market, Plaintiffs' negligent-design-defect theory is impliedly preempted by federal law.

2. Plaintiffs Introduced No Evidence Of A Commercially Feasible Alternative Design.

In Nevada, plaintiffs may prove that a product is defectively designed by introducing "evidence that a safer alternative design was feasible at the

time of manufacture." *Ford Motor Co.*, 133 Nev. at 526, 403 P.3d at 654. Where, as here, Plaintiffs attempt to prove a design defect by demonstrating the existence of a safer alternative design, the "alternative design presented must be commercially feasible." *Id.* Because Plaintiffs did not demonstrate a commercially feasible alternative design, their negligent-design-defect claim was properly dismissed.[24]

Plaintiffs argue that conventional cigarettes are defectively designed for three principal reasons: (i) they contain nicotine and are thus addictive; (ii) they are inhalable; and (iii) they are combustible. *See* Pet. at 4–10, 66. In Plaintiffs' view, Philip Morris instead should have manufactured and sold heated, non-inhalable, nicotine-free sticks. *See id.*

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[24] As a general matter, "proof of an alternative design is not required" to state a design-defect claim. *Ford Motor Co.*, 133 Nev. at 528, 402 P.3d at 655. But proof of an alternative design is required here. That's because, as explained above, Part II.A.2, since 1969 cigarettes have been accompanied with federally mandated warnings that have been deemed adequate as a matter of federal law. *See Altria Grp., Inc.*, 555 U.S. at 79. And such adequate warnings "shield manufacturers from liability unless the defect could have been avoided by a commercially feasible change in design that was available at the time the manufacturer placed the product in the stream of commerce." *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 139, 808 P.2d 522, 525 (1991) (emphasis omitted). So in the context of this case, Plaintiffs must demonstrate a commercially feasible alternative design.

As a threshold matter, that's not an alternative design at all; that is an entirely different product. "The function of a cigarette is to give pleasure to a smoker." *Adamo v. Brown & Williamson Tobacco Co.*, 900 N.E.2d 966, 968 (N.Y. 2008). "[S]atisfying the consumer is the only function the product has." *Id.* So the notion that a cigarette can—as a matter of Nevada tort law—be substituted in the market with a heated, non-inhalable, nicotine-free stick is "akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead." *City of Philadelphia v. Lead Indus. Ass'n*, No. 90–cv–7064, 1992 WL 98482, at *3 (E.D. Pa. Apr. 23, 1992). "The challenge is to the product itself, not to its specific design." *Id.*

The same is true here. "Cigarettes are made to be inhaled and to contain nicotine." *R.J. Reynolds Tobacco Co. v. Nelson*, 353 So. 3d 87, 93 (Fla. Dist. Ct. App. 2022). "[T]o the typical smoking consumer," a non-inhalable, denicotinized cigarette "would be a 'design defect.'" *Id.* at 93–94; *see also, e.g.*, *Pooshs*, 904 F. Supp. 2d at 1025 ("'[I]nhalable smoke' is an inherent feature of cigarettes."). Indeed, as one of Plaintiffs' experts notes, a non-inhalable cigarette is effectively a mini-cigar. *See* 4 PA 658 ("It is not difficult to make cigarettes that will not be routinely inhaled, all you have to do is use

tobacco varieties traditionally used in cigars."). But "[i]t is common knowledge and requires no citation or expert testimony to understand that cigars are an entirely different product from cigarettes." *Liggett Grp., Inc. v. Davis*, 973 So. 2d 467, 474 (Fla. Dist. Ct. App. 2007).

If Ms. Camacho wanted to smoke a non-inhalable tobacco product, she easily could have smoked cigars. But she did not smoke cigars, *see* 11 PA 1817–18; she smoked cigarettes. The fact that cigars and cigarettes are different products "is evidenced by [cigars'] existence and [Ms. Camacho's] refusal to smoke them." *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 590 (Pa. Super. Ct. 2004). Just like sparkling cider and champagne are completely different products enjoyed in different ways by different people, so too are cigarettes and the heated, non-inhalable, nicotine-free sticks envisioned by Plaintiffs' imaginative experts. *See also, e.g.*, *Hosford v. BRK Brands, Inc.*, 223 So. 3d 199, 207 (Ala. 2016) ("[W]e now hold as a matter of law that [a] dual-sensor smoke-alarm design . . . is not, in fact, a safer, practical, alternative design to an ionization smoke alarm; rather, it is a design for a different product altogether."); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 385 (Tex. 1995) ("A motorcycle could be made safer by adding two additional wheels and a cab, but then it is no longer a motorcycle.").

Even if heated, non-inhalable, nicotine-free sticks could be considered an alternative design for cigarettes, there is no evidence that such sticks were "commercially feasible" and "available at the time" Philip Morris "placed [its cigarettes] in the stream of commerce"—or at any point in time, for that matter. *Robinson*, 107 Nev. at 139, 808 P.2d at 525. Plaintiffs argue that they "proffered evidence that commercial feasibility and the state of the art allowed the Cigarette Manufacturers to produce cigarettes without the design defects that [they] identified," Pet. at 66, but the record materials they cite do not bear out that proposition.

For starters, Plaintiffs do not identify any record materials suggesting that anyone has ever designed and manufactured a heated, non-inhalable, nicotine-free stick—let alone that such a design is commercially feasible. Instead, Plaintiffs point to record materials suggesting that, at various points in time, companies have manufactured cigarettes that avoided one or two—but never all three—of their supposed defects.

For example, one of Plaintiffs' experts opines that various companies manufactured non-inhalable cigarettes in the 1950s and 1960s. *See* 4 PA 657–58. But those products were combustible and contained nicotine. *See* 19 PA 3110–11. And they were complete commercial failures, never exceeding 1%

of market share in the 1960s, 1970s, and 1980s. *See* 19 PA 3116–18. As Plaintiffs' expert put it: "They never became extremely popular like the traditional cigarettes." *Id.* at 3118.

Plaintiffs also point to three brands of low-nicotine "cigarettes" manufactured by Philip Morris—Merit De-Nic, Benson & Hedges De-Nic, and Next—as proof that cigarette manufacturers could produce a low-nicotine "cigarette." *See* 4 PA 659. But those products were combustible and inhalable. And, as one of Plaintiffs' experts noted, they were also commercial failures: "Test marketing of Next lasted less than 6 months before the brand was discontinued. The De-Nic versions of Merit and Benson & Hedges also were short-lived." 5 PA 942.

Finally, Plaintiffs point to non-combustible "cigarettes," like Premier and Eclipse (from the late 1980s and the early 1990s) and various modern-era cigarette-alternatives like Vuse (introduced in 2013) and JUUL (introduced in 2015). *See* 4 PA 878–79; 5 PA 950. But they are "not the same product, and therefore [can]not be characterized as a better design" of conventional cigarettes. *Goldstein*, 854 A.2d at 590. In any event, each of these products (as one of Plaintiffs' experts put it) "deliver[s] nicotine in levels that can induce and sustain physical dependency and addiction." 4

PA 879. And Premier and Eclipse both failed in the marketplace. *See* 6 PA 1103–04.

In short, all of the supposed alternative designs Plaintiffs identified possess at least one, and generally two, of the supposed "design defects" about which they complain. And aside from modern-era e-cigarettes (which did not exist until recently and bear no resemblance to conventional cigarettes), all of them were commercial failures. Even assuming that a heated, non-inhalable, nicotine-free stick could exist in theory, Plaintiffs have introduced no evidence suggesting that it would have been "commercially feasible"—and they certainly have not shown that such a product was or even could have been "available at the time" Philip Morris "placed [its cigarettes] in the stream of commerce." *Robinson*, 107 Nev. at 139, 808 P.2d at 525.

3. Cigarettes Are Not Unreasonably Dangerous As A Matter Of Law.

The district court also correctly granted partial summary judgment on Plaintiffs' negligent-design-defect theory based on the Restatement (Second) of Torts, section 402, comment i, 59 PA 8981, which explains that cigarettes are not unreasonably dangerous as a matter of law.

"With respect to proving whether a product is defective, this [C]ourt [has] adopted the consumer-expectation test, which is set forth in Section 402A of the Restatement (Second) of Torts." *Ford Motor Co.*, 133 Nev. at 525, 402 P.3d at 653. "Under this test, a product is defectively designed if it 'fails to perform in the manner reasonably to be expected in light of its nature and intended function and is more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.'" *Id.* at 521, 402 P.3d at 650 (quoting *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970)).

In other words, this Court has adopted comment i to Section 402A. Comment i provides that a product is not unreasonably dangerous—and thus not defective—simply because it "cannot possibly be made entirely safe for all consumption." Restatement (Second) of Torts, § 402A, cmt. i. "That is not what is meant by 'unreasonably dangerous' in this Section." *Id.* Instead, "[t]he 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." *Id.* That is the exact standard adopted by this Court. *Cf. Ford Motor Co.*, 133

Nev. at 521, 402 P.3d at 650. So Plaintiffs' position that comment i "is contrary to Nevada jurisprudence," Pet. at 47, is incorrect.[25]

It is no wonder that Plaintiffs ask this Court to ignore comment i. Comment i—which, again, this Court has adopted—proceeds to use *tobacco* as an example of a product that is typically *not* defective: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." Restatement (Second) of Torts, § 402A, cmt. i. In other words, a cigarette is not defective simply because it is a cigarette, as courts across the country have recognized.[26] The district court thus correctly dismissed Plaintiffs' negligent-design-defect theory.

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[25] Plaintiffs also note this Court's criticism, in *Allison v. Merck & Co., Inc.*, 110 Nev. 762, 774 n.11, 878 P.2d 948, 956 n.11 (1994), of the very standard it has adopted. *See* Pet. at 47. As Plaintiffs acknowledge, the Court's criticism was based on the fact that comment i represents "a move toward a negligence standard." *Allison*, 110 Nev. at 774 n.11, 878 P.2d at 956 n.11. But so what? Plaintiffs' petition concerns their negligence claim.

[26] *See, e.g.*, *Johnson ex rel. Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp. 2d 16, 21 (D. Mass. 2004) ("Courts and the Restatement agree that cigarettes, though cancer-causing, cannot be ruled generally defective based upon the dangers of smoking."); *Jeter*, 294 F. Supp. 2d at 686 ("[T]he cigarettes Mr. Smith smoked were not defective, but rather, are a product that carries inherent risks."); *Toole v. Brown & Williamson Tobacco Corp.*, 980 F. Supp. 419, 425 (N.D. Ala. 1997) ("[N]o product better fits the section of comment i . . . since the dangers of tobacco have been ordinary knowledge common to the community for many years."); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 231 (N.D. Ohio 1993) ("[T]he risks posed by smoking

In the alternative, Plaintiffs point to other language in comment i—that "tobacco containing something like marijuana may be unreasonably dangerous," *id.*—and argue that "manufactured tobacco products containing adulterated tobacco or additives might be unreasonably dangerous," and thus defective. Pet. at 48. But one of Plaintiffs' own experts has admitted that "[i]t's not the additives that make a cigarette harmful" and that "additives are relatively unimportant in terms of the overall toxicity . . . and harm potential of a cigarette." 1 PA 138–39.

In sum, the district court properly dismissed Plaintiffs' negligent-design-defect theory because conventional cigarettes are not unreasonably dangerous as a matter of law. *See* Restatement (Second) of Torts, § 402A, cmt. i.[27]

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are an inherent characteristic of cigarettes."); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158 (E.D. Pa. 1987) ("The tobacco was not a 'defective' product because it may or does cause or increase the risk of lung cancer and other life threatening diseases.").

[27] Plaintiffs also argue that there is a question of fact whether "ordinary consumers possessing ordinary knowledge common to the community had yet to adopt the United State [sic] Surgeon General's proclamation when [Ms. Camacho] began smoking" in 1964. Pet. at 63. Even if that were true, Ms. Camacho did not begin smoking cigarettes manufactured by Philip Morris until 1990. Pet. at 21. Even assuming for the sake of argument that ordinary consumers did not know that cigarettes were harmful in 1964, after "the United States Surgeon General proclaimed that smoking causes

4. Plaintiffs Introduced No Evidence Showing That Any Design Defect Caused Ms. Camacho's Injury.

Plaintiffs also must show that "the [alleged design] defect caused [Ms. Camacho's] injury." *Ford Motor Co.*, 133 Nev. at 525, 402 P.3d at 653. And to prove causation, they must demonstrate that "but for the" negligent design defect, "the harm would not have occurred." *See Iliescu v. Hale Lane Peek Dennison & Howard Prof'l Corp.*, No. 76146, 136 Nev. 823, 455 P.3d 841, 2020 WL 406781, at *3 (Nev. Jan. 23, 2020) (unpublished disposition); *see Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 524, 815 P.2d 151, 156 (1991) ("[I]n order to satisfy [the causation] element, plaintiff must show that *but for* defendant's negligence, his or her injuries would not have occurred.") (emphasis in original), *overruled in part on other grounds by Tucker v. Action Equip. & Scaffold Co.*, 113 Nev. 1349, 951 P.2d 1027 (1997).

Plaintiffs do not even attempt to show but-for causation. Instead, they merely argue that they proffered evidence "demonstrating that the [alleged] design defects were a substantial factor in causing [Ms. Camacho's] laryngeal cancer." Pet. at 68 (footnote omitted). But that is not the correct

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cancer," Pet. at 62, Plaintiffs do not—and cannot—make the same argument about the year 1990.

standard. *See Iliescu*, 2020 WL 406781, at *3.[28] Accordingly, Plaintiffs' negligent-design-defect claim was properly dismissed.

That said, Plaintiffs' negligent-design-defect claim fails under any causation standard. Pointing to one of their experts' reports, Plaintiffs argue that had Ms. Camacho smoked non-inhalable or low-nicotine cigarettes, she likely would not have become addicted to cigarettes, and that her alleged addiction to cigarettes was a substantial contributing cause of her laryngeal cancer. *See* Pet. at 67–68. But Plaintiffs introduced no evidence suggesting that Ms. Camacho ever would have smoked non-inhalable or low-nicotine cigarettes. Again, if Ms. Camacho wanted to smoke a non-inhalable tobacco product, she would have smoked cigars instead of cigarettes; yet she did not. *See* 11 PA 1817–18. And even though denicotinized and low-nicotine cigarettes were available on the market (albeit for short periods of time), Ms.

[28] In an effort to avoid proving but-for causation, Plaintiffs argue that "the [supposed] design defects and [Ms. Camacho's] smoking operated together to cause [her] laryngeal cancer." Pet. at 68 n.22. But to prove their negligent-design-defect theory, Plaintiffs must show that "the *defect* caused [Ms. Camacho's] injury." *Ford Motor Co.*, 133 Nev. at 525, 402 P.3d at 653 (emphasis added). They cannot prevail on a negligent-design-defect claim on the theory that Ms. Camacho's cancer was caused simply by smoking cigarettes. Accordingly, Plaintiffs' efforts to avoid but-for causation lack merit.

Camacho had never tried such a product. *See* 11 PA 1817. So there is no evidence to suggest that Ms. Camacho would have avoided laryngeal cancer if Philip Morris's cigarettes were non-inhalable and low-nicotine, because there is no evidence that Ms. Camacho would have chosen to smoke such cigarettes.

If anything, the evidence *disproves* causation, at least with respect to Philip Morris. Ms. Camacho only began smoking cigarettes manufactured by Philip Morris after smoking cigarettes produced by Liggett for 26 years. *See* 10 PA 1757–59. She switched to a Philip Morris brand of cigarettes because she had moved to Las Vegas and the Liggett cigarettes she had been smoking were "[h]ard to find." *Id.* At around the same time Ms. Camacho switched to smoking cigarettes manufactured by Philip Morris, she claims that she had tried to quit smoking, but was unable to do so. *See* 10 PA 1649–50. Plaintiffs argue that she was unable to quit "due to her nicotine addiction." Pet. at 22.

Because, according to Plaintiffs, Ms. Camacho was already addicted to nicotine when she began to smoke cigarettes manufactured by Philip Morris, she would not have been satisfied smoking a low-nicotine or nicotine-free cigarette. It follows that if Philip Morris had exclusively produced low-

nicotine or nicotine-free cigarettes, Ms. Camacho never would have smoked a Philip Morris brand of cigarette; she would have found another brand—a brand with nicotine—to smoke. And because—according to Plaintiffs' own expert—all conventional cigarettes are "all equally addictive" and "all equally as dangerous," 1 PA 222–23, if one were to assume that smoking caused Ms. Camacho's laryngeal cancer, she *still* would have sustained cancer had she smoked another brand of conventional cigarettes. In short, Plaintiffs have not shown—and cannot show—that "but for the" supposed design defects in Philip Morris's cigarettes, "the harm would not have occurred." *Iliescu*, 2020 WL 406781, at *3.

CONCLUSION

The district court correctly granted Philip Morris summary judgment on Plaintiffs' claims for punitive damages and negligence. Their Petition for Writ of Mandamus should accordingly be denied.

Dated: August 22, 2023

Respectfully submitted,

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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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Book Antiqua 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 proportionately spaced, has a typeface of 14 points or more, contains 18,404 words, and Philip Morris USA Inc. has filed a motion to exceed the applicable word limit with this Court.

Finally, I hereby certify that I have read this appellate 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 every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter

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

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on August 22, 2023, I filed the foregoing REAL PARTY IN INTEREST PHILIP MORRIS USA INC.'S ANSWER TO PETITION FOR WRIT OF MANDAMUS, with the Clerk of the Nevada Supreme Court.

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I further certify that I served a copy of the foregoing document by email to the following:

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