IN THE SUPREME COURT OF THE STATE OF NEVADA

LAURA PURKETT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA CAMACHO; AND ANTHONY CAMACHO, INDIVIDUALLY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE NADIA KRALL, DISTRICT JUDGE,

Respondents,

and

PHILIP MORRIS USA, INC., a foreign corporation; R.J. REYNOLDS TOBACCO COMPANY, a foreign corporation, individually, and as successor-by-merger to LORILLARD TOBACCO COMPANY and as successor-in-interest to the United States tobacco business of BROWN & WILLIAMSON TOBACCO CORPORATION, which is the successor-by-merger to THE AMERICAN TOBACCO COMPANY; LIGGETT GROUP, LLC., a foreign corporation; and ASM NATIONWIDE CORPORATION d/b/a SILVERADO SMOKES & CIGARS, a domestic corporation; LV SINGHS NC. d/b/a SMOKES & VAPORS, a domestic corporation,

Real Parties in Interest.

No. 86501

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Micah S. Echols, Esq.
Nevada Bar No. 8437
Matthew S. Granda, Esq.
Nevada Bar No. 12753
David P. Snyder, Esq.
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
Nevada Bar No. 13685
CLAGGETT & SYKES LAW FIRM
4101 Meadows Ln., Ste. 100
Las Vegas, Nevada 89107
(702) 655-2346 – Telephone
micah@claggettlaw.com
david@claggettlaw.com

Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL
500 N. Federal Hwy., Ste. 200
Fort Lauderdale, Florida 33301
(954) 522-6601 – Telephone
klw@kulaw.com

Attorneys for Petitioners, Laura Purkett, individually and as personal representative of the estate of Sandra Camacho, and Anthony Camacho, individually

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RELIEF THE PETITION SEEKS

Petitioners, Laura Purkett, personally and as the representative of Sandra Camacho's estate, and Anthony Camacho (collectively "the Camachos"), petitioned this court for a mandamus writ ordering the district court to vacate its orders granting summary judgment in favor of real parties in interest Philip Morris USA, Inc. ("PM") and Liggett Group, LLC ("LG") (collectively "Cigarette Manufacturers") regarding the Camachos' negligence claims and request for punitive damages.

In so petitioning, the Camachos argued that considerations of judicial economy militated in favor of this court's intervention, as other plaintiffs are currently pursuing identical negligence claims and requesting punitive damages against the Cigarette Manufacturers in the Eighth Judicial District Court and district courts are reaching different conclusions regarding the application of Nevada law. Regarding their negligence claims, the Camachos argued that the district court erred in concluding that preemption applied, erred in applying the *Restatement (Second) of Torts* § 402A comment i (Am. L. Inst. 1965), erred in concluding that the Cigarette Manufacturers did not owe Sandra a duty

of care, and erred in weighing competing evidence against them in resolving the Cigarette Manufacturers' motion for summary judgment. Regarding their punitive damages request, the Camachos argued that the district court erred concluding that claim preclusion applied and in relying upon the Master Settlement Agreement ("MSA").

In answering, the Cigarette Manufacturers conceded that this court's intervention is appropriate regarding the Camachos' punitive damages request but contended that this court should decline to intervene regarding the Camachos' negligence claims. Regarding the Camachos' negligence claims and request for punitive damages, the Cigarette Manufacturers generally repeated the averments they proffered before the district court.

The Camachos begin with the mandamus standard. They then address their negligence claims followed by their request for punitive damages. In so doing, the Camachos will meticulously identify the caselaw that the Cigarette Manufactures have abandoned or failed to contest. The Camachos are confident that the instant reply clearly demonstrates that the district court manifestly erred in granting the at-issue motions for summary judgment, that the Cigarette Manufacturers'

contrary averments are unavailing or inapposite, and that mandamus relief is appropriate under the circumstances.

POINTS AND LEGAL AUTHORITIES

I. *Mandamus relief is appropriate under the circumstances*

In urging this court to entertain their petition, the Camachos primarily relied upon traditional mandamus grounds. *See* Pet. at 30-34. Rather than engage the Camachos' traditional mandamus arguments, the Cigarette Manufacturers flatly contended that traditional mandamus is not appropriate here, *see* PM Answer at 13; LG Answer at 8, before urging this court to decline reliance upon advisory mandamus grounds, *see* PM Answer at 14-16; LG Answer at 8-9. The Camachos begin by addressing the Cigarette Manufacturers' confusion regarding the propriety of traditional mandamus to the instant petition before addressing the propriety of advisory mandamus.

A. *Traditional mandamus relief is appropriate under the circumstances*

Traditional mandamus is available where the petitioner has a legal right to the act that the writ seeks, the respondent had a plain and nondiscretionary legal duty to perform the act that the writ seeks, and the petitioner lacks a plain, speedy, and adequate remedy such that

the writ will serve as an appropriate remedy. *Walker v. Second Jud. Dist. Ct.*, 136 Nev., Adv. Op. 80, 476 P.3d 1194, 1196 (2020).

A district court's decision to grant or deny a motion for summary judgment is clearly a nondiscretionary legal duty, as a district court must deny such a motion where the nonmovant demonstrates that a genuine issue of material fact remains. *See Cuzze v. Univ. & Cmty. Coll. Sys.*, 123 Nev. 598, 603, 172 P.3d 131, 134 (2007). Given that the Camachos are challenging the district court's erroneous grants of summary judgment contrary to NRCP 56's mandatory language and Nevada substantive jurisprudence, traditional mandamus relief is plainly available,[1] and Nevada jurisprudence accords, *see High Noon at Arlington Ranch Homeowners Ass'n v. Eighth Jud. Dist. Ct.*, 133 Nev. 500, 503, 402 P.3d 639, 643 (2017) (entertaining traditional mandamus relief challenging a district court's grant of summary judgment). The Cigarette Manufactures did not contest the Camachos' reliance upon

[1]Thus, PM's reliance upon *R.J. Reynolds Tobacco Co. v. Eighth Judicial District Court*, 138 Nev., Adv. Op. 52, 514 P.3d 425, 434-35 (2022), to suggest that traditional mandamus is unavailable here lacks merit, as that matter concerned a mandamus petition challenging a district court's discretionary decision to reconsider a prior order.

High Noon at Arlington Ranch Homeowners Ass'n, *see* PM Answer at 13-16; LG Answer at 8-9, thereby conceding that the Camachos' petition satisfies the first two prongs of traditional mandamus relief, *see Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (deeming a failure to respond to an argument as a confession of error).

Regarding the third prong of traditional mandamus relief, *Neville v. Eighth Judicial District Court* plainly demonstrates that an appeal from a final judgment does not constitute a plain, speedy, and adequate remedy in the ordinary course of law where the district court dismissed some claims from the litigation but allowed others to proceed. 133 Nev. 777, 779, 406 P.3d 499, 501 (2017). There, the district court dismissed the petitioner's wage claims under Nev. Const. art. 15, § 16 and NRS Chapter 608 but allowed his breach of contract claim to proceed. *Id.* This court concluded that the petitioner lacked a plain, speedy, and adequate legal remedy to pursue his dismissed claims under those circumstances. *Id.* The Camachos relied upon *Neville* to argue the same, as the district court dismissed their negligence claims and request for punitive damages but allowed their strict liability claim to proceed. Pet. at 32-33. The Cigarette Manufacturers did not contest the Camachos'

reliance upon *Neville*,[2] *see* PM Answer at 13-16; LG Answer at 8-9, thereby conceding that the Camachos' petition satisfies the third prong of traditional mandamus relief, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

Accordingly, the Camachos have demonstrated that traditional mandamus is available here, and they urge this court to exercise its discretion to entertain their petition.

B. *Advisory mandamus relief is also appropriate under the circumstances*

Advisory mandamus is available where the petition presents a legal issue of statewide importance that needs clarification and where such intervention will promote judicial economy and administration. *Walker*, 136 Nev., Adv. Op. 80, 476 P.3d at 1198. The Cigarette Manufacturers conceded that advisory mandamus is appropriate

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[2]LG proffers *Archon Corp. v. Eighth Judicial District Court*, 133 Nev. 816, 819, 407 P.3d 702, 706 (2017), to contend that traditional mandamus is not available here. LG Answer at 8. Yet, the *Archon Corp.* petitioner conceded that the district court did not have a clear legal duty to dismiss the at-issue claim, conceded that an appeal was an adequate remedy at law, and requested intervention under an advisory mandamus theory. 133 Nev. at 820-21, 407 P.3d at 707. Thus, LG's reliance upon *Archon Corp.* regarding traditional mandamus lacks merit.

regarding the Camachos' request for punitive damages, PM Answer at 14-15; LG Answer at 1 (joining PM's answer), but contended that advisory mandamus is not appropriate regarding the Camachos' negligence claim, PM Answer at 15-16; LG Answer at 8-9. The Camachos begin with the legal issues that the petition poses before addressing the urgent need for clarification and how the same will promote judicial economy.

Relying upon *Walker* and *Archon Corp*., the Cigarette Manufacturers averred that the district court's dismissal of the Camachos' negligence claims on summary judgment turned on fact-bound decisions, rendering advisory mandamus inappropriate. PM Answer at 15-16; LG Answer at 8-9. These averments lack merit. *Walker* concerned a mandamus challenge to a district court's findings that an attorney did not arbitrate in bad faith under NAR 22. *See* 136 Nev., Adv. Op. 80, 476 P.3d at 1196-99. *Archon Corp*. concerned, in relevant part, the district court's finding that the real party in interest alleged that the petitioner caused him ongoing harm within the statute of limitations, which precluded dismissal and required more factual development. *See*

133 Nev. at 823-25, 407 P.3d at 709-10. Neither *Walker* nor *Archon Corp.* are analogous to the Camachos' petition.

Whether federal preemption precludes the Camachos' negligence claims, whether the Section 402A comment i precludes the same, and whether the Cigarette Manufacturers owed Sandra a duty of care are purely legal questions that do not turn on any fact-bound decisions. *See Teva Parenteral Meds., Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev., Adv. Op. 6, 481 P.3d 1232, 1239 (2021) (noting that whether federal preemption applies is a question of law); *Schueler v. Ad Art, Inc.*, 136 Nev., Adv. Op. 52, 472 P.3d 686, 691 (Ct. App. 2020) (same for Section 402A's application); *Dow Chem. Co. v. Mahlum,* 114 Nev. 1468, 1493, 970 P.2d 98, 114 (1998) (same for whether a manufacturer owes a duty of care to a consumer)*, overruled on other grounds by GES, Inc. v. Corbitt,* 117 Nev. 265, 271, 21 P.3d 11, 15 (2001). Moreover, whether the district court viewed the Camachos' proffered evidence in a light most favorable to them and drew all reasonable inferences from the same in granting the Cigarette Manufacturers' motions for summary judgment is also a question of law for this court. *Cuzze*, 123 Nev. at 602, 172 P.3d at 134. Accordingly, the Cigarette Manufacturers' attempt to frame the

Camachos' petition as challenging the district court's factual findings strains the bounds of credulity and is unavailing. Moreover, the Cigarette Manufacturers failed to address the Camachos' argument that the parties fully developed their legal positions before the district court, that the district court issued a merits-based decision, and that this court has an adequate record to resolve the petition's merits, *compare* Pet. at 33-34, *with* PM Answer at 15-16; LG Answer at 8-9, which this court should deem as a concession, *Ozawa*, 125 Nev. at 563, 216 P.3d at 793. These legal questions are ripe for advisory mandamus.

Regarding statewide importance and the urgent need for clarification, the Cigarette Manufacturers failed to address the Camachos' reliance upon *Tully v. Philip Morris USA, Inc.*, No. A-19-807657-C (Nev. Dist. Ct. May 24, 2022) (denying motion for summary judgment on punitive damages), *Tully v. Philip Morris USA, Inc.*, No. A-19-807657-C (Nev. Dist. Ct. July 8, 2020) (denying motion to dismiss regarding negligence claims), and *Geist v. R.J. Reynolds Tobacco Co.,* No. A-19-807653-C (Nev. Dist. Ct. Mar. 17, 2023)[3] (same), to show that

[3]While the instant petition has moved through briefing, the district court has amended the case caption in *Geist* to reflect the dismissal of

district courts were reaching different conclusions regarding the legal questions that their petition poses, *see* PM Answer at 15-16; LG Answer at 8-9, which this court should deem as a concession, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Since the Camachos filed their petition, another plaintiff has filed a civil suit bringing substantially similar claims against the Cigarette Manufacturers and other defendants. *See* 2 RA 145-287 (*Lango v. Philip Morris USA, Inc.*, No. A-23-872964-C (Nev. Dist. Ct. June 26, 2023)). All of these district court matters will raise the same legal questions that the instant petition concerns, which further demonstrates that the at-issue legal questions have statewide importance. Finally, LG's contention that the Camachos' negligent failure-to-warn claim has no import in other pending cases is plainly erroneous, as *Geist* and *Lango* have plaintiffs that began smoking before 15 U.S.C. § 1334's preemptive effect applied. *See* 1 RA 6; 2 RA 151-52. The record before this court clearly demonstrates that the Camachos' petition concerns legal questions of statewide importance in urgent need of clarification.

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some defendants. *See* 2 RA 288-92.

Regarding whether advisory mandamus will promote judicial economy and administration, the Camachos argued that their petition posed issues of first impression, that resolution would impact pending litigation, and that resolution would prevent multiple proceedings arising from the underlying matter. *See* Pet. at 31-32, 34. The Cigarette Manufacturers failed to respond to these arguments and the supporting caselaw the Camachos proffered,[4] *see* PM Answer at 15-16; LG Answer at 8-9, which this court should deem as a concession, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Resolving the Camachos' petition now can only promote judicial economy. This is especially true given that the Cigarette Manufacturers agree that this court should entertain the petition's punitive damages questions. Entertaining the Camachos' mandamus

[4]Specifically, the Cigarette Manufacturers failed to address the Camachos' reliance upon *R.J. Reynolds Tobacco Co.*, 138 Nev., Adv. Op. 55, 514 P.3d at 428, *Endo Health Solutions., Inc. v. Second Judicial District Court*, 137 Nev., Adv. Op. 39, 492 P.3d 565 (2021), *Piroozi v. Eighth Judicial District Court*, 131 Nev. 1004, 1007, 363 P.3d 1168, 1170 (2015), *Beazer Homes Holding Corp. v. Eighth Judicial District Court*, 128 Nev. 723, 730, 291 P.3d 128, 133 (2012), *Williams v. Eighth Judicial District Court*, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011), and *Borger v. Eighth Judicial District Court*, 120 Nev. 1021, 1030, 102 P.3d 600, 606 (2004). *See* PM Answer at 15-16; LG Answer at 8-9.

petition on one ground but declining the other would thwart judicial economic rather than promote it.

The Cigarette Manufacturers expressly agree that this court should entertain the Camachos' mandamus petition to resolve the punitive damages issues. The Cigarette Manufacturers' assertion that this court should not entrain the negligence issues because they turn on factual disputes is clearly incorrect, and they do not meaningfully challenge the Camachos' arguments as to why advisory mandamus is appropriate under the circumstances. Accordingly, the Camachos have demonstrated that advisory mandamus is also available here, and they urge this court to exercise its discretion to entertain their petition.

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

In petitioning for mandamus relief regarding their negligence claims, the Camachos argued that federal law does not impliedly preempt their negligence claims, that Section 402A comment i does not preclude the same, that the Cigarette Manufacturers assumed a duty of reasonable care to Sandra by placing their cigarettes in the stream of commerce, and that genuine issues of material fact precluded the Cigarette Manufacturers' motions for summary judgment. *See* Pet. at 35-

69. The Camachos address the Cigarette Manufacturers' answers to each argument in turn.

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

In failing to address the Camachos' arguments regarding the inapplicability of field preemption, *compare* Pet. at 38-43, *with* PM Answer at 64-73; LG Answer at 1, the Cigarette Manufacturers have conceded that field preemption does not foreclose the Camachos' negligence claims, *Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Rather, the Cigarette Manufacturers contend that obstacle preemption, a species of conflict preemption, forecloses the same. PM Answer at 64-73. This contention fails.

Federal jurisprudence holds that obstacle preemption occurs where a state law "stands as an obstacle to the accomplishment and execution" of Congress's purposes and objections. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (internal quotations omitted). Whether a state law poses a sufficient obstacle turns on an examination of the at-issue federal statutes, identifying their purpose and the effects that Congress intended. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). In so doing, courts should presume that an express

preemption clause generally limits the application of implied preemption to matters outside the scope of the at-issue federal statute, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992), and that a federal statute does not supersede a state's historic police powers unless Congress clearly and manifestly demonstrated such a purpose, *Arizona*, 567 U.S. at 400 (internal quotations omitted). Nevada jurisprudence accords, holding that obstacle preemption "occurs when federal law actually conflicts with any state law." *Rolf Jensen & Assocs. v. Eighth Jud. Dist. Ct.*, 128 Nev. 441, 445, 282 P.3d 743, 746 (2012) (internal quotations omitted).

Much like they did before the district court, the Cigarette Manufacturers primarily rely upon *Food & Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 137-38 (2000), *superseded by statute as stated in Nicopure Labs, LLC v. Food & Drug Administration*, 944 F.3d 267, 272 (D.C. Cir. 2019). There, the Court held that the Food and Drug Administration could not regulate tobacco products under 21 U.S.C. §§ 301-399i notwithstanding the Food and Drug Administration's finding that nicotine was a drug because the Food and Drug Administration would have to ban tobacco products if it had such

regulatory power. *Brown & Williamson Tobacco Corp*., 529 U.S. at 133-37. The Court concluded that such a ban would be contrary to multiple federal laws,[5] which it read to infer that Congress intended that tobacco products remain on the market. *Brown & Williamson Tobacco Corp*., 529 U.S. at 137-38. Given that obstacle preemption turns on statutory analysis, the Camachos address the statutes that *Brown & Williamson Tobacco Corp*. relied upon.

7 U.S.C. § 1311(a) (1938) used to provide that "[t]he marketing of tobacco constitutes one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare." However, Congress repealed this

[5]Specifically, 7 U.S.C. § 1311(a) (1938), 15 U.S.C. §§ 1331-1341 (codifying the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965), the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1969), and the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984)), 15 U.S.C. §§ 4401-4408 (codifying the Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30 (1986)), 42 U.S.C. § 290aa-4 (codifying the Alcohol and Drug Abuse Amendments of 1983, Pub. L. No. 98-24, 97 Stat. 175 (1983)), and 42 U.S.C. § 300x-26 (codifying the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. No. 102-321, § 202, 106 Stat. 323, 394 (1992)).

statute after the Court decided *Brown & Williamson Tobacco Corp.* *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 611, 118 Stat. 1418, 1522 (2004). The Cigarette Manufacturers fail to direct this court to any other statute providing that tobacco is necessary to the general welfare.[6] *See* PM Answer at 65-73; LG Answer at 1.

15 U.S.C. §§ 1331-1341 concern health warning labels on cigarettes, banning cigarette advertising on certain media, ingredient reporting duties, and programs to promote smoking research, education, and information. Of these statutes, the Cigarette Manufacturers only address 15 U.S.C. § 1331. PM Answer at 69-70; LG Answer at 1. It provides that

> [i]t is the policy of the Congress, and the purpose of this Act . . . , to establish a comprehensive Federal program to deal with cigarette labeling

[6]The Cigarette Manufacturers do not cogently argue how 7 U.S.C. § 1311's history and Congress's subsequent dismantling of price controls, *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1049 (11th Cir. 2008), is relevant regarding whether any current federal statute provides that tobacco is necessary to the general welfare such that this court may infer that federal law impliedly preempts the at-issue negligence claims. This court should summarily disregard this distraction. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

> and advertising with respect to any relationship between smoking and health, whereby–
>
> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331. The plain language of this declaration clearly demonstrates that Congress limited its scope to cigarette labeling and advertising. Notwithstanding, the Cigarette Manufacturers cling to 15 U.S.C. § 1331(2) to suggest that the stated purpose of protecting commerce and the national economy amounts to a requirement that cigarettes remain on the market. *See* PM Answer at 69-70; LG Answer at 1. The prefatory -materials canon defeats such a suggestion, as a congressional expression of policy and purpose cannot go beyond the specific language of the operative statutes. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 217-20 (2012). Given that the plain language of 15 U.S.C. §§ 1332-1341 contains no

requirement that cigarettes remain on the market, the Cigarette Manufacturers' reliance upon 15 U.S.C. § 1331(2) fails.

Turning to the remaining statutes that *Brown & Williamson Tobacco Corp.* relied upon, 15 U.S.C. §§ 4401-4408 concern educating the public regarding the harms of smokeless tobacco, health warning labels on smokeless tobacco packages and derivative preemption regarding the same, and ingredient reporting duties. 42 U.S.C. § 290aa-4 concerns the collection of national data regarding substance abuse. 42 U.S.C. § 300x-26 concerns federal grants to states to help prevent the sale of tobacco products to individuals under 21 years old. None of these statutes contain any language requiring that cigarettes remain on the market.

Finally, Congress has subsequently empowered the Food and Drug Administration to regulate tobacco products. *See* 21 U.S.C. §§ 387-387u (codifying the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 42 (2009)). Importantly, Congress carefully crafted a preemption statute delineating a power division regarding tobacco regulation between the Food and Drug Administration and other federal agencies, states and their subdivisions, or indigenous tribal governments. *See* 21 U.S.C. § 387p. Under this power division,

the Food and Drug Administration retains preemptive power to establish regulations "relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products." 21 U.S.C. § 387p(a)(2)(A). However, states and other actors retain the ability

> to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products . . . including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age.

21 U.S.C. § 387p(a)(1). Congress explicitly protected this power from the statute's preemption clause. 21 U.S.C. § 387p(a)(2)(B). Finally, Congress explicitly provided that 21 U.S.C. §§ 387-387u would not "modify or otherwise affect any action or the liability of any person under the product liability law of any [s]tate." 21 U.S.C. § 387p(b).

Federal courts construing this statute have universally concluded that states retain their traditional police powers to outright ban tobacco products if they so desire. *See R.J. Reynolds Tobacco Co. v. City of Edina*, No. 20-2852, 2023 U.S. App. LEXIS 4650 at *10-13 (8th Cir. Feb. 27, 2023) (concluding that 21 U.S.C. § 387p allows states to

enact blanket prohibitions on tobacco products); *R.J. Reynolds Tobacco Co. v. City of L.A.*, 29 F.4th 542, 553-62 (9th Cir. 2022) (concluding that neither express preemption nor obstacle preemption prevented a city from banning a tobacco product); *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 81-83 (1st Cir. 2013) (concluding that a city may ban the sale of flavored tobacco); *U.S. Smokeless Tobacco Mfg. Co. LLC v. City of N.Y.*, 708 F.3d 428, 433-36 (2d Cir. 2013) (same). Accordingly, Congress has enacted legislation that has superseded *Brown & Williamson Tobacco Corp.*,[7] rendering it and the caselaw that relies upon it wholly unpersuasive.[8] *See* Pet. at 41-43.

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[7]In suggesting that only the Court may overrule its own decisions, the Cigarette Manufacturers display profound ignorance regarding the balance of power between the Court and Congress. *See* PM Answer at 69 (quoting *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, ___, 143 S. Ct. 2028, 2038 (2023)); LG Answer at 1. While Congress may not legislatively supersede the Court's decisions regarding constitutional questions, *Dickerson v. United States*, 530 U.S. 428, 437 (2000), Congress has broad constitutional power to supersede the Court's decisions regarding the interpretation of statutes through legislation, *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994). Given that *Mallory* concerned application of U.S. Const. amend XIV, 600 U.S. at ___, 143 S. Ct. at 2033, and given that *Brown & Williamson Tobacco Corp.* concerned the construction of statutes, 529 U.S. at 137-38, the Cigarette Manufacturers' reliance upon *Mallory* is wholly inapposite and lacks merit.

[8]Accordingly, this court should reject the Cigarette Manufacturers'

Rather than "intend[ing] that tobacco products remain on the market," *Brown & Williamson Tobacco Corp.*, 529 U.S. at 139, the plain language of 21 U.S.C. § 387p clearly demonstrates that Congress has expressly allowed a means through which various actors may remove tobacco products from the market if they so desire. Thus, allowing a Nevada jury to determine whether the Cigarette Manufacturers were negligent in designing and placing inherently dangerous cigarettes[9] into

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reliance upon *Pooshs v. Philip Morris USA, Inc.*, 904 F. Supp. 2d 1009, 1025-26 (N.D. Cal. 2012), *Jeter v. Brown & Williamson Tobacco Co.*, 294 F. Supp. 2d 681, 685-86 (W.D. Pa. 2003), *Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 117-18 (D.P.R. 2002), and *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1223-25 (W.D. Wis. 2000). The Camachos also note that the Cigarette Manufacturers have abandoned their reliance upon *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 471-73 (Fla. Dist. Ct. App. 2007), and *Badon v. R.J. Reynolds Tobacco Co.*, 934 So. 2d 927, 932-34 (La. Ct. App. 2006), by not raising them in their answers. *See* PM Answer at 65-73; LG Answer at 1.

[9]15 U.S.C. § 1332(1) defines a cigarette as "any roll of tobacco wrapped in paper or in any substance not containing tobacco" or "any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette." 21 U.S.C. § 387(3) incorporates 15 U.S.C. § 1332(1) and further defines a cigarette as including "tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette or as roll-your-own tobacco." Thus, a cigarette that does not have enough nicotine to sustain addiction, is not inhalable, and it not combustible would still qualify as a

the stream of commerce would pose no obstacle to any federal statute or regulation that the Cigarette Manufacturers proffered. This plainly defeats the Cigarette Manufacturers' reliance upon obstacle preemption and renders their proffered caselaw inapposite.[10]

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cigarette. Regardless, the Cigarette Manufacturers knowingly misrepresent Louis M. Kyriakoudes, Ph.D.'s deposition testimony in framing the same as an opinion that all cigarettes are defective. PM Answer at 65-66; LG Answer at 1; *see also* RPC 3.3(a)(1) (prohibiting a lawyer from knowingly making "a false statement of fact . . . to a tribunal"). The record before this court demonstrates that a former defendant qualified the term "conventional cigarette" as those that burn tobacco, contain nicotine levels that sustain addiction, and combust. 9 PA 1424-25. Thus, Dr. Kyriakoudes's deposition testimony merely stands for the proposition that addictive, inhalable, and combustible cigarettes are defective, but does not stand for the proposition that any cigarette under 21 U.S.C. § 387(3) is defective. The Cigarette Manufacturers repeat this deceptive misrepresentation in framing one of the Camachos' factual contentions in their petition. *Compare* Pet. at 10, *with* PM Answer at 73; LG Answer at 1; *see also* RPC 3.3(a)(1).

[10]*Mutual Pharmacy Co. v. Bartlett*, 570 U.S. 472 (2013) (concerning a conflict between federal and state generic drug labeling laws), *Arizona v. United States*, 567 U.S. 387 (2012) (concerning a conflict between federal and state laws governing immigration), *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008) (concerning a conflict between federal and state law governing the safety and effectiveness of medical devices), *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (concerning a conflict between federal and state laws governing automobile safety requirements), and *Davidson v. Velsicol Chemical Corp.*, 108 Nev. 591, 834 P.2d 931 (1992) (concerning a conflict between federal and state laws governing pesticide labeling), had actual conflicts between federal and state law mandating the application of preemption, rendering them inapposite. No conflict between federal and state law existed in

B. *Section 402A comment i does not preclude the Camachos' negligence claims*

In petitioning for mandamus relief, the Camachos argued that Nevada jurisprudence unequivocally demonstrated that Nevada appellate courts have taken a piecemeal approach to the adoption of Section 402A's comments. *See* Pet. at 45-47. In answering, the Cigarette Manufacturers failed to contest the majority of the Camachos' proffered caselaw,[11] *see* PM Answer at 79-82; LG Answer at 1, which this court should deem as a concession that Nevada appellate courts have followed a piecemeal approach, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Regardless, the Cigarette Manufactures rely upon *Ford Motor Co. v. Trejo*, 133 Nev. 520, 521-25, 402 P.3d 650-53 (2017), and *Allison v. Merck & Co.*, 110 Nev. 762, 774 n.11, 878 P.2d 948, 956 n.11 (1994), to contend that this court adopted Section 402A comment i, and that the same precludes the Camachos' negligence claims. This reliance fails.

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002), or in *Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016), also rendering them inapposite.

[11]Specifically, the Cigarette Manufacturers failed to address *Schueler*, 136 Nev., Adv. Op. 52, 472 P.3d at 691, *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192-93, 209 P.3d 271, 276-77 (2009), *Young's Machine Co. v. Long*, 100 Nev. 692, 694, 692 P.2d 24, 25 (1984), and *Jacobsen v. Ducommun, Inc.*, 87 Nev. 240, 243, 484 P.2d 1095, 1097 (1971).

This court did not cite Section 402A comment i in *Trejo*. *See* 133 Nev. at 521-32, 402 P.3d at 650-58. Rather, this court merely noted that it previously adopted the consumer-expectation test that Section 402A sets forth. *Id.* at 525, 402 P.3d at 653 (citing *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 414, 470 P.2d 135, 138 (1970)). Turning to *Ginnis*, this court merely cited Section 402A(1)(b) for the proposition that a "defect must have been present when the product left the manufacturer" for liability to attach. 86 Nev. at 414, 470 P.2d at 138. This court did not cite Section 402A comment i in *Ginnis*. *See* 86 Nev. at 410-18, 470 P.2d at 136-41. Rather, this court has only referenced Section 402A comment i in passing, criticizing its application in the strict liability context. *See Allison*, 110 Nev. at 774 n.11, 878 P.2d at 956 n.11. That the Cigarette Manufacturers urge this court to apply a strict liability concept that it criticized to foreclose the Camachos' negligent-design claim is puzzling.

Even if this court were to abandon its prior criticism of Section 402A comment i, its application would nonetheless be inappropriate here. Section 402A comment i's plain language demonstrates that it does not apply to products that contain poisonous substances unbeknownst to the ordinary consumer with ordinary knowledge regarding the product. The

Camachos proffered caselaw demonstrating that courts have rejected Section 402A comment i's application to cigarettes, as they undergo significant manufacturing processes that include the addition of additives,[12] *see* Pet. at 48, which the Cigarette Manufacturers failed to address, *see* PM Answer at 79-82; LG Answer at 1, and which this court should deem a concession, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

Rather than addressing the Camachos' caselaw, the Cigarette Manufacturers proffered *Johnson v. Brown & Williams Tobacco Corp.*, 345 F. Supp. 2d 16 (D. Mass. 2004), *Jeter v. Brown & Williamson Tobacco Co.*, 294 F. Supp. 2d 681 (W.D. Pa. 2003), *Toole v. Brown & Williamson Tobacco Co.*, 980 F. Supp. 419 (N.D. Ala. 1997), *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228 (N.D. Ohio 1993), and *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987). PM Answer at 81 n.26; LG Answer at 1. These cases are factually or legally inapposite and fail.[13]

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[12]Specifically, the Camachos proffered *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522 (D. Kan. 1995), *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 272-73 (D.R.I. 2000), and *Davis*, 973 So. 2d at 480 (Gross, J., concurring).

[13]The Cigarette Manufacturers have abandoned their reliance upon *Parsons v. Colt's Manufacturing Co. LLC*, 137 Nev., Adv. Op. 72, 499 P.3d 602 (2021), *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1397-98 (5th Cir. 1992) (Jolly, J. concurring), and *Hon v. Stroh Brewery Co.*, 835 F.2d

In some of these cases, the courts relied upon *Brown & Williamson Tobacco Corp.*, 529 U.S. at 137-38, *Johnson*, 345 F. Supp. at 21; *Jeter*, 294 F. Supp. at 685-86, which Congress has since superseded, *see supra* Points & Legal Auths. § II(A). In others, the plaintiff failed to allege or proffer evidence of a specific defect that rendered the tobacco product unreasonably dangerous beyond what an ordinary consumer contemplates. *See Johnson*, 345 F. Supp. 2d at 20-22; *Paugh*, 834 F. Supp. at 230-31; *Gunsalus*, 674 F. Supp. at 1158-59. In *Jeter*, the plaintiff admitted that no safe cigarette exists, that all tobacco products are inherently dangerous, and that no commercially or technically feasible alternative cigarette design existed. 294 F. Supp. 2d at 686. In *Toole*, the plaintiff alleged a negligent failure-to-warn claim rather than a negligent-design claim. 980 F. Supp. at 424-25. Given that the *Toole* plaintiff began smoking in 1990, the court deemed that ordinary consumers knew of the risks of smoking by that time and precluded the claim. 980 F. Supp. at 425.

510, 515-16 (3d Cir. 1987), as they did not raise them in their answering briefs.

Here, the Camachos proffered evidence demonstrating that the Cigarette Manufacturers' products contain specific design defects that render them unreasonably dangerous beyond what an ordinary consumer contemplated when Sandra began smoking, *see* 4 PA 653-61, 737-38, 874-79; 5 PA 901-19, 923-24, 940-51, and that commercially feasible alternative designs existed that were less dangerous, 4 PA 654-55, 656-59, 875, 879; 5 PA 936, 945-46. This alone defeats the Cigarette Manufacturers' reliance upon *Johnson*, *Jeter*, *Paugh*, and *Gunsalus*. The Camachos' negligence claim against PM concerns a negligent-design claim rather than a negligent-failure-to-warn claim, which defeats PM's reliance upon *Toole*. Finally, Sandra began smoking in 1964, 10 PA 1690, and the Camachos presented evidence demonstrating that ordinary consumers did not fully contemplate smoking's risks when Sandra began smoking, *see* 4 PA 703, 860-62, which defeats LG's reliance upon *Toole*.

Moreover, the Cigarette Manufacturers did not contest the Camachos' argument that taking judicial notice of the United States Surgeon General's reports on tobacco to determine ordinary consumer knowledge is a misuse of judicial notice, *compare* Pet. at 63 n.16, *with* PM Answer at 79-82; LG Answer at 1, 12-26, which this court should

deem a confession,[14] *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. The Cigarette Manufactures also did not contest the Camachos' argument that Nevada courts should cabin their analysis regarding ordinary consumer knowledge about cigarettes to the time when the consumer began smoking, *compare* Pet. at 62 n.14, *with* PM Answer at 82 n.27; PM Answer at 1, which this court should also deem a confession, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. This defeats PM's averment regarding Sandra's knowledge when she started smoking PM cigarettes in 1990, as nicotine already trapped her in its "addictive grasp" and "hooked" her, rendering her "[in]capable of making a rational choice" regarding her smoking behavior. *See Insolia v. Philip Morris, Inc.*, 216 F.3d 596, 599 (7th Cir. 2000). Accordingly, even if this court were to adopt Section 402A comment i, such adoption would not foreclose the Camachos' negligence claims.

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[14]Tellingly, the Cigarette Manufacturers have abandoned their reliance upon *Solimon v. Philip Morris, Inc.*, 311 F.3d 966, 974 (9th Cir. 2002), *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 351-52 (6th Cir. 2000), *Guilbeault*, 84 F. Supp. 2d at 266-73, and *Barker v. Brown & Williamson Tobacco Co.*, 105 Cal. Rptr. 2d 531, 537 (Ct. App. 2001), which similarly used the United States Surgeon General's warning to determine ordinary consumer knowledge, by not proffering them in their answers. *See* PM Answer at 79-82; LG Answer at 1, 12-26.

C. *The Cigarette Manufacturers owed Sandra a duty of reasonable care*

In petitioning for mandamus relief, the Camachos expressly stated that their negligence claims against the Cigarette Manufacturers collectively concerned their duty to manufacture, market, and sell cigarettes free of design defects and that their remaining negligence claim against LG individually concerned its breach of its duty to warn Sandra of its cigarette's harmful effects prior to the enaction of 15 U.S.C. § 1334. *See* Pet. at 38. However, the Camachos referred to the Cigarette Manufacturers rather than just LG in arguing that they owed Sandra a duty to warn and that genuine issues of material fact existed regarding that negligence claim. *See id.* at 49-60. The Cigarette Manufacturers were understandably confused by this use, *see* PM Answer at 51; LG Answer at 1, so the Camachos begin by expressly stating that they are not pursuing a negligent failure-to-warn claim against PM in the instant petition, as 15 U.S.C. § 1334 expressly preempts such a claim.

Turning to the at-issue claims, the Camachos note that the Cigarette Manufacturers do not dispute that they owed a general duty of care to Sandra, which includes a duty to make their products as safe as commercial feasibility and the state of the art allowed. *Compare* Pet. at

65-66, *with* PM Answer at 65-86; LG Answer at 1. This court should deem this failure to contest the Camachos' argument as a confession of error, *Ozawa*, 125 Nev. at 563, 216 P.3d at 793, and conclude that the Cigarette Manufacturers owed such a general duty of care to Sandra.

Regarding the Camachos' negligent failure-to-warn claim against LG, the Cigarette Manufacturers contend that they do not have a special relationship with consumers and owe no duty to warn the same of their product's dangers. *See* PM Answer at 58-64; LG Answer at 1, 9-12. In so doing, the Cigarette Manufacturers erroneously conflate fraudulent-concealment jurisprudence with negligence jurisprudence and otherwise ignore the Camachos' arguments regarding the social policy considerations that underpin the imposition of a duty to warn upon manufacturers.

In contending that LG had no duty to warn Sandra of its cigarette's dangerous propensities, the Cigarette Manufacturers relied upon *Mahlum*, 114 Nev. at 1485-87, 970 P.2d at 109-11 (concerning the special relationship giving rise to a duty to disclose in a fraudulent concealment matter), *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F. Supp. 2d 1279, 1292-93 (D. Nev. 2013) (same), and *Nevada Power Co.*

v. Monsanto Co., 891 F. Supp. 1406, 1415-17 (D. Nev. 1995) (same).[15] However, a fraudulent concealment claim's elements, *see Leigh-Pink v. Rio Props., LLC*, 138 Nev., Adv. Op. 48, 512 P.3d 322, 325-26 (2022) (including elements of inducement and reliance), and Nevada jurisprudence, *see Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 634-35, 855 P.2d 549, 553-54 (1993), clearly demonstrate that such a claim may only apply where there is a dealing between two parties of unequal knowledge concerning material facts and an element of confidence. As *Mahlum* explained, a duty to disclose rarely arises between a manufacturer and a consumer, as the manufacturer ordinarily does not engage in direct dealings with consumers.[16] *See* 114 Nev. at 1487, 970 P.2d at 111.

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[15]The Cigarette Manufacturers have abandoned their reliance upon *Jeter v. Brown & Williamson Tobacco Corp.*, 113 F. App'x 465 (3d Cir. 2004), and *Prentice v. R.J. Reynolds Tobacco Co.*, 338 So. 3d 831 (Fla. 2022), by not proffering them in their answers. *See* PM Answer at 58-64; LG Answer at 1, 9-12. The Cigarette Manufacturers also properly abandoned their reliance upon *Bahrampour v. Sierra Nevada Corp.*, No. 82826-COA, 2022 Nev. App. Unpub. LEXIS 12 (Nev. Ct. App. Jan. 13, 2022). *See* NRAP 36(c)(3).

[16]The Cigarette Manufacturers also proffered *Silver State Broadcasting, LLC v. Crown Castle Mu, LLC*, No. 2:18-cv-00734-GMN-VCF, 2018 U.S. Dist. LEXIS 212160 at *5-10 (D. Nev. Dec. 17, 2018). PM Answer at 61; LG Answer at 1. Yet, *Silver State Broadcasting, LLC*

However, *Mahlum* also demonstrates that a duty to disclose is different than a duty to warn. After reversing the jury's verdict in favor of the respondent under a fraudulent-concealment theory for want of a duty to disclose, *see* 114 Nev. at 1485-87, 970 P.2d at 109-11, this court later considered whether substantial evidence supported the jury's verdict in favor of the respondent under a negligent performance-of-an-undertaking theory, which included a manufacturer's duty to warn consumers regarding its product's risks, *see id.* at 1491-504, 970 P.2d at 113-21. In so doing, this court noted that a manufacturer owes a general duty of care to consumers, which includes a duty to warn them of a product's risks. *See id.* at 1504, 970 P.2d at 121. Other courts have recognized this distinction between a duty to disclose and a duty to warn,[17] *see Burton v. R.J. Reynolds Tobacco Co.*, 397 F. 3d 906, 910-19,

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concerns whether a duty to disclose the identity of a subcontractor exists between a licensor's agent and a licensee in a gross negligence matter. *See id*. at *2-6. Thus, the Cigarette Manufacturers' reliance upon *Silver State Broadcasting, LLC* similarly fails, as it also concerns whether an element of confidence or reliance existed, which is not present between a manufacturer and a consumer.

[17]While subtle, the definitional differences between disclose and warn reinforce such a conclusion. *Compare Disclose*, *Black's Law Dictionary* 583 (11th ed. 2019) ("To make (something) known or public; to show (something) after a period of inaccessibility or of being unknown;

(10th Cir. 2005), which the Cigarette Manufacturers failed to contest in their answers, *see* PM Answer at *See* PM Answer at 58-64; LG Answer at 1, 9-12, thereby confessing error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

Rather than engage with inapposite fraudulent concealment jurisprudence concerning the duty to disclose, the Camachos invite this court to consult failure-to-warn jurisprudence. As this court explained, social policy considerations determine whether a special relationship exists that demands the imposition of a duty to warn. *Wiley v. Redd*, 110 Nev. 1310, 1312-16, 885 P.2d 592, 593-96 (1994). Thus, this court has held that an employer has a duty to warn employees of foreseeable dangers because the employer should be aware of apparent dangers and the imposition of such a duty would make workplaces safer. *See Sims v. Gen. Tel. & Elecs.*, 107 Nev. 516, 521-22, 815 P.2d 151, 154-55 (1991),

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to reveal."), *with Warning*, *Black's Law Dictionary* 1899 (11th ed. 2019) ("The pointing out of a danger, esp. to one who would not otherwise be aware of it."), *and Adequate Warning*, *Black's Law Dictionary* 1899 (11th ed. 2019) ("A warning that reasonably alerts a product's average user to a potential hazard, and the nature and extent of the danger.").

overruled on other grounds by Tucker v. Action Equip. & Scaffold Co., 113 Nev. 1349, 1356 n.4, 951 P.2d 1027, 1031 n.4 (1997).

This court has also held that a premises owner has a duty to warn entrants of dangers on his or her premises, *Wiley*, 110 Nev. at 1315, 885 P.2d at 595 (citing *Moody v. Manny's Auto Repair*, 110 Nev. 320, 332, 871 P.2d 935, 943 (1994)), as a premises owner should be aware of dangerous conditions on the premises and can provide warnings to reduce the risk of harm, *Moody*, 110 Nev. at 329-30, 871 P.2d at 941, and "modern social mores and humanitarian values" compel the imposition of such a duty, *id.* at 332, 871 P.2d at 943 (quoting *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968) (explaining that the closeness of the premises owner's conduct and injuries, the blameworthiness of the premises owner's conduct, preventing future injuries, and the availability of insurance supported the imposition of such a duty), *superseded by statute on other grounds as stated in Calvillo-Silva v. Home Grocery*, 968 P.2d 65, 71-72 (Cal. 1998)).

In contrast, this court declined to impose a duty to warn responding police officers of dangers upon an alarm company's customer's premises upon the alarm company, as such an imposition would give rise

to parallel obligations to become aware of hazards on all its customers' premises. *Wiley*, 110 Nev. at 1316, 885 P.2d at 596. This court deemed such an imposition "socially undesirable," as it would "adversely impact the ability of alarm companies to provide services at reasonable cost to the public." *Id.* In relying on this portion of *Wiley*, the Cigarette Manufacturers suggest that their relationship with consumers is more akin to that between an alarm company and the responding police officer that the alarm company summons rather than the relationship between a premises owner and an entrant or an employer and an employee. This suggestion is jurisprudentially bankrupt.

Nevada jurisprudence already recognizes that manufacturers owe a duty of care to consumers, *see Teva Parenteral Meds., Inc.*, 137 Nev., Adv. Op. 6, 481 P.3d at 1241 (holding that the plaintiff's negligence theory that the manufacturer had a duty to stop selling propofol vials to a clinic where the manufacturer knew the clinic misusing the same to the detriment of consumers was viable), and this court has alluded to a manufacturer's duty to warn consumers in a negligence matter, *Mahlum*, 114 Nev. at 1504, 970 P.2d at 121. The imposition of such a duty comports with social policy, as it reduces the risk of injury to consumers.

See Shoshone Coca-Cola Bottling Co. v. Dolinski, 82 Nev. 439, 442, 420 P.2d 855, 857 (1966). Thus, this court should reject the Cigarette Manufacturers' bare assertion that Nevada jurisprudence does not impose a duty to warn consumers upon manufacturers. *See* PM Answer at 62-64; LG Answer at 1, 10-12. Moreover, the Cigarette Manufacturers did not contest the Camachos' argument that such a duty comports with social policy, nor did the Cigarette Manufacturers proffer any argument that the imposition of such a duty would be socially undesirable or adversely impact the public, *see* PM Answer at 58-64; LG Answer at 1, 9-12, which this court should deem a confession of error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

Nevada appellate courts have been more explicit regarding a manufacturer's duty in the strict liability context, holding that manufacturers must give consumers adequate warnings regarding a product's foreseeable risks of danger when it places its product in the stream of commerce. *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 818, 357 P.3d 387, 397 (Ct. App. 2015) (citing *Robinson v. G.G.C., Inc.*, 107 Nev. 134, 138, 808 P.2d 522, 524 (1991)); *see also Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 191, 209 P.3d 271, 275 (2009). The

Cigarette Manufacturers take exception to the Camachos' reliance upon strict liability jurisprudence to buttress their arguments regarding a manufacturer's duty to warn consumers. *See* PM Answer at 63-64; LG Answer at 1, 10-12. Yet, Section 402A comment c plainly captures the rationale behind the imposition of strict liability, explaining that a "seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it." Any suggestion that a special responsibility toward any member of the consuming public does not amount to a duty of care to consumers strains the bounds of credulity.[18]

Finally, LG argues that the Camachos' strict liability claim subsumes their negligence claims. In so doing, LG proffers *Carter v. Ethicon Inc.*, No. 2:20-cv-1232-KJD-VCF, 2021 U.S. Dist. LEXIS 62463

[18]Thus, this court may reject the Cigarette Manufacturers' reliance upon *Trejo* and LG's reliance upon *Motor Coach Industries, Inc. v. Khiabani*, 137 Nev., Adv. Op. 42, 493 P.3d 1007 (2021), *Oak Grove Investors v. Bell & Gossett Co.*, 99 Nev. 616, 668 P.2d 1075 (1983), *disapproved on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000), *Outboard Motor Corp. v. Schupbach*, 93 Nev. 158, 561 P.2d 450 (1977), and *Dolinksi*, 82 Nev. at 442-43 P.2d at 857-58.

(D. Nev. Mar. 31, 2021). There, the court concluded that the plaintiff's strict liability claim subsumed the plaintiff's negligence claim. *Id.* at *7-9. The court derived its conclusion from *Forest v. Vitek, Inc.*, 884 F. Supp. 378, 380 (D. Nev. 1993), and *Forest v. E. I. Du Pont de Nemours & Co.*, 791 F. Supp. 1460, 1464 (D. Nev. 1992). *Carter*, 2021 U.S. Dist. LEXIS 62463 at *8-9. Yet, *E. I. Du Pont de Nemours & Co.* merely concluded that the court should consider affirmative defenses to both a negligence claim and strict liability claim in resolving a motion for summary judgment. 791 F. Supp. at 1464-67. Interestingly, the court still separately considered the plaintiff's strict liability and negligence claims. *See id.* at 1467-68, 1470. The court did not cite any Nevada caselaw standing for the proposition that a strict liability claim subsumes a negligence claim. *See id.* at 1464. In *Vitek, Inc.*, the court again merely concluded that it should consider affirmative defenses to both a negligence claim and a strict liability claim in resolving a motion for summary judgment. 884 F. Supp. at 380. The court again did not cite any Nevada caselaw standing for the proposition that a strict liability claim subsumes a negligence claim. *See id.* Thus, the *Carter* court's conclusion stretches the persuasive authority it relies upon.

Turning to binding authority, Nevada jurisprudence abounds with caselaw where a plaintiff simultaneously pursued a negligence claim and a strict liability claim without this court holding that one claim subsumed the other. *See, e.g., Teva Parenteral Meds., Inc.*, 137 Nev., Adv. Op. 6, 481 P.3d at 1238; *Holcomb v. Ga. Pac., LLC*, 128 Nev. 614, 618, 289 P.3d 188, 190 (2012); *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 236, 955 P.2d 661, 663 (1998); *Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 517-20, 893 P.2d 367, 369-70 (1995); *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 213, 826 P.2d 570, 571 (1992); *Nat'l Union Fire Ins. Co. v. Pratt & Whitney Can.*, 107 Nev. 535, 537, 815 P.2d 601, 602 (1991); *Landmark Hotel & Casino v. Moore*, 104 Nev. 297, 298-99, 757 P.2d 361, 362 (1988); *Jacobson v. Manfredi*, 100 Nev. 226, 229, 679 P.2d 251, 253 (1984); *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 598-99, 584 P.2d 159, 160 (1978); *Amundsen v. Ohio Brass Co.*, 89 Nev. 378, 379, 513 P.2d 1234 (1973); *Ginnis*, 86 Nev. at 411, 470 P.2d at 136. This wide body of caselaw clearly demonstrates that LG's reliance upon *Carter* is unavailing, as *Carter* plainly misstates Nevada law.[19] The Camachos may

[19]This caselaw also renders LG's reliance upon *Olson v. Prosoco, Inc.*, 522 N.W.2d 284 (Iowa 1994), meritless.

simultaneously proceed under their negligence theories or their strict liability theories.[20]

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

Having addressed the Cigarette Manufacturers' averments regarding whether the Camachos' negligence claims are legally permissible, the Camachos now address the Cigarette Manufacturers' contentions that no genuine issues of material fact remained regarding the negligence claims. The Camachos begin with the Cigarette Manufacturers' causal standard averments before addressing the evidence that the Camachos proffered in opposing summary judgment.

1. *A substantial-factor standard applies to the Camachos' negligent advertising and negligent design claims*

In arguing for a substantial-factor causal standard, the Camachos relied upon *Wyeth v. Rowatt*, 126 Nev. at 446, 464, 244 P.3d 765, 778 (2010). Pet. at 55. Regarding their negligent advertising claim, the Camachos argued that LG's advertising practices and Sandra's

[20]In relying upon *Young's Machine Co. v. Long*, 100 Nev. 692, 692 P.2d 24 (1984), LG confuses the contributory-negligence affirmative defense and a negligence claim. LG Answer at 11. That the contributory-negligence affirmative defense is not available when a plaintiff alleges a strict-liability claim is not relevant as to whether a plaintiff may simultaneously prosecute a negligence claim and a strict-liability claim.

friend's offer of a cigarette were not mutually exclusive causes of Sandra's decision to smoke, and both could have independently caused Sandra to begin smoking. *Id*. at 56-58. LG failed to address this argument, flatly contending that its advertising did not contribute to Sandra's decision to smoke and failing to argue that its advertising practices and Sandra's friend's offer presented mutually exclusive theories.[21] *See* LG Answer at 23-24. This court should deem LG's failure as a confession of error. *See Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

Regarding their negligent-design claim, the Camachos argued that all the design defects in the Cigarette Manufacturers' cigarettes could have independently caused Sandra to develop lung cancer and were not mutually exclusive of one another. *See* Pet. 65-69. The Cigarette Manufacturers make no argument that the Camachos' proffered design

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[21]Given the evidence that the Camachos' proffered demonstrating that LG's advertising practices empirically influenced adolescent attitudes and motivations about smoking, *see* 5 PA 925-26, and given that Sandra saw LG advertising, *see* 11 PA 1947-48, this court should reject LG's reliance upon *Iliescu v. Hale Lane Peek Dennison & Howard Professional Corp.*, No. 76146, 2020 Nev. Unpub. LEXIS 95 at *4-8 (Nev. Jan. 23, 2020), as *Iliescu* did not involve sufficient and independent causes of harm. The Camachos further note that LG has abandoned any reliance upon *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 805 P.2d 589 (1991), by failing to proffer it in its answer. *See* LG Answer at 23-26.

defects presented mutually exclusive theories of liability, *See* PM Answer at 83-85; LG Answer at 1, which this court should deem a confession of error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Finally, the record before this court plainly belies the Cigarette Manufacturers' suggestion that the Camachos did not proffer any evidence demonstrating that their proffered design defects caused Sandra's injuries.[22] *See* 4 PA 896-97; 5 PA 904-07, 912-19, 923-24, 937, 944-47, 964-65.

2. *Advertising practices*

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[22]Given that the Camachos proffered evidence that the Cigarette Manufacturers' cigarettes contained design defects, *see* 4 PA 654-55, 658, 660, 738, 874-76; 5 PA 904-09, 912-19, 940, 944-47, 951-52, and given that the Camachos' medical expert witnesses opined that these defects were substantial factors in Sandra's development of cancer, *see* 4 PA 896-97; 5 PA 904-07, 912-19, 923-24, 937, 944-47, 964-65, this court should reject the Cigarette Manufacturers' reliance upon *Trejo*. The Camachos also note that the Cigarette Manufacturers abandoned any reliance upon *Allison*, 110 Nev. at 767, 878 P.2d at 952, *Thomas v. Bokelman*, 86 Nev. 10, 462 P.2d 1020 (1970), *Baymiller v. Ranbaxy Pharmaceuticals, Inc.*, 894 F. Supp. 2d 1302, 1311 (D. Nev. 2012), and *Moretti v. Wyeth, Inc.*, No. 2:08-cv-00396-JCM-(GWF), 2009 U.S. Dist. LEXIS 29550 at *7-8 (D. Nev. Mar. 20, 2009), regarding their causation averments by failing to proffer them in their answering briefs. *See* PM Answer at 83-86; LG Answer at 1. Finally, the Cigarette Manufacturers fail to cogently argue their naked assertion that the Camachos cannot pursue a negligent-design claim involving the Cigarette Manufacturers' cigarettes, PM Answer at 84 n.28; LG Answer at 1, which this court should summarily reject, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

Despite the Camachos squarely addressing the evidence demonstrating that genuine issues of material fact precluded summary judgment regarding their negligent-advertising claim, *see* Pet. at 56-58, LG only makes passing references to the same, *see* LG Answer at 17-18, 24-25.

In contravention of the summary judgment evidentiary standard, *see Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005), LG urged this court to resolve factual disputes in its favor regarding Sandra's deposition testimony, LG Answer at 17, 24-25. It is axiomatic that this court must accept the Camachos' evidence as true and draw all reasonable inferences from the same. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. Thus, this court must accept Sandra's testimony that she initially could not remember seeing any LG advertisements before she began smoking upon the Cigarette Manufacturers' initial deposition question, but later remembered seeing LG advertisements upon seeing the same as true. *See* 11 PA 1908, 1947-48. This court must also accept the Camachos' expert witness testimony demonstrating that cigarette advertising empirically influenced attitudes and motivations about smoking, with a strong correlation between advertising exposure,

cigarette use, eventual addiction, and adolescent responsiveness. *See* 5 PA 925-26.

Moreover, LG blatantly misrepresented Sandra's deposition testimony on two occasions. *See* RPC 3.3(a)(1). Contrary to LG's first misrepresentation, Sandra merely testified that she "smoked [an LG cigarette] because [her] girlfriend gave it to [her] . . . [a]nd it was filter[ed]." *Compare* LG Answer at 18, *with* 11 PA 1853. Contrary to LG's second misrepresentation, Sandra testified that she believed that filters were safe based upon her exposure to advertising. *Compare* LG Answer at 18, 11 PA 1919-20, *with* 10 PA 1745. Finally, LG did not cogently argue its remaining contentions, *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006), as it proffered no citation to the record or to any authority in support thereof, *see* LG Answer at 24-25.

The record before this court demonstrates that LG advertised that its filtered cigarettes were "just what the doctor ordered," 4 PA 667, 726, 887, because they had a "miracle tip" that provided the most effective filtration for removing heavy particles and providing much less nicotine, *id.* at 887. The record before this court further demonstrates

that LG advertising promoted an image that smoking was cool. 5 PA 930. Sandra saw LG advertisements before she began smoking, 11 PA 1947-48, believed that LG cigarettes were safer because of the filter, 10 PA 1745, and believed that smoking was cool, 11 PA 1843. This is consistent with empirical data regarding cigarette advertising's effect on adolescent behavior. *See* 5 PA 925-26. Thus, a reasonable jury could find that LG's advertising practices were a substantial factor in causing Sandra to smoke, which ultimately led to her addiction, cancer, and death. The grant of summary judgment on this claim was erroneous, and LG's contrary averments lack merit.

3. *Failure to warn*

Regarding the Camachos' arguments regarding their negligent failure-to-warn claim, LG averred that Sandra's deposition testimony is insufficient to demonstrate that a genuine issue of material fact precluded summary judgment. *See* LG Answer at 14-16, 21-23. In so doing, LG misread the caselaw that it relies upon and again urged this court to resolve factual disputes in its favor in contravention of the summary judgment standard. *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

LG proffered voluminous caselaw standing for the proposition that allegations in a complaint without admissible evidentiary support cannot defeat summary judgment.[23] LG also proffered inapposite caselaw concerning whether an employee's testimony alone could rebut the presumption of at-will employment. *See Yeager v. Harrah's Club, Inc.*, 111 Nev. 830, 833-37, 897 P.2d 1093, 1094-96 (1995). These cases are all factually and legally inapposite to the instant matter. Tellingly, LG also proffered caselaw where this court accepted a party's testimony as true in resolving a motion for summary judgment. *See Ortega v. Reyna*, 114 Nev. 55, 60, 953 P.2d 18, 22 (1998), *abrogated on other*

[23]Specifically, LG proffered *King v. Cartlidge*, 121 Nev. 926, 928, 124 P.3d 1161, 1162-63 (2005), *Wayment v. Holmes*, 112 Nev. 232, 236-37, 912 P.2d 816, 819 (1996), *Serrett v. Kimber*, 110 Nev. 486, 491-93, 874 P.2d 747, 751-52 (1994), *Dennison v. Allen Group Leasing Corp.*, 110 Nev. 181, 185, 871 P.2d 288, 290-91 (1994), *Michaels v. Sudeck*, 107 Nev. 332, 334-35, 810 P.2d 1212, 1213-15 (1991), *Clauson v. Llyod*, 103 Nev. 432, 434-35, 743 P.2d 631, 633 (1987), *Bird v. Casa Royale West*, 97 Nev. 67, 70-71, 624 P.2d 17, 19 (1981), *Havas v. Long*, 85 Nev. 260, 263, 454 P.2d 30, 31-32 (1969), *Catrone v. 105 Casino Corp.*, 82 Nev. 166, 169-72, 414 P.2d 106, 108-09 (1966), and *Bond v. Stardust, Inc.*, 82 Nev. 47, 50, 410, P.2d 472, 473-74 (1966). LG also proffered *Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 216 P.3d 793 (2009). Yet, *Rodriguez* did not reach any evidentiary issues, as this court resolved the matter on legal grounds. *Id.* at 585-88, 216 P.3d at 799-800.

grounds by Martinez v. Maruszczak, 123 Nev. 433, 443 n.28, 168 P.3d 720, 727 n.28 (2007).

Applying *Ortega*, Sandra's deposition testimony demonstrates that she did not know that smoking was harmful to her health when she began smoking. *See* 10 PA 1657, 1695, 1721; 11 PA 1982-83. Sandra further testified that she would not have smoked if she knew about smoking's harmful effects prior to her nicotine addiction.[24] 10 PA 1721; 11 PA 1838, 1910, 1968. Sandra's testimony also demonstrates that she would have heeded a warning from LG, as she believed Cigarette Manufacturer statements that no proof existed demonstrating that smoking was hazardous to health. *See* 10 PA 1720, 1725; 11 PA 1845, 1847-48, 1903, 1908, 1963-65. Thus, a reasonable jury could find that Sandra would not have smoked had LG warned her of its cigarette's harmful effects. *see Rivera*, 125 Nev. at 191, 209 P.3d at 275. The grant

[24]Thus, LG's reliance upon *R.J. Reynolds Tobacco Co. v. Nelson*, 353 So. 3d 87, 92-93 (Fla. Dist. Ct. App. 2022), is misplaced, as the plaintiff in that case proffered no evidence that the decedent would have quit smoking had the manufacturer warned him of smoking's dangers.

of summary judgment on this claim was erroneous, and LG's contrary averments lack merit.[25]

4. *Dangerousness beyond an ordinary consumer's expectations*

Despite the Camachos squarely addressing the evidence demonstrating that genuine issues of material fact precluded summary judgment regarding whether ordinary consumers with ordinary knowledge knew about smoking's dangerous effects when Sandra began smoking, *see* Pet. at 60-65, the Cigarette Manufacturers chose to solely rely upon Section 402A comment i and did not contest any of the Camachos' arguments,[26] *see* PM Answer at 79-82, LG Answer at 1, which

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[25]LG's reliance upon *Mulholland v. Philip Morris USA, Inc.*, 598 F. App'x 21, 23-24 (2d Cir. 2015), lacks merit, as the court noted that the jury weighed conflicting evidence regarding whether the plaintiff would have quit smoking had PM given an adequate warning. *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 790 (Mo. Ct. App. 2008), similarly held that questions regarding knowledge of the harm and whether a warning would have prevented smoking are for the jury. Thus, the jury must resolve the conflicting evidence regarding whether Sandra would have smoked had LG given an adequate warning, *Wood*, 121 Nev. at 729, 121 P.3d at 1029, rendering LG's reliance upon *Mulholland*, *Smith*, and competing evidence, *see* LG Answer at 19-21, meritless.

[26]Thus, the Cigarette Manufacturers concede that ordinary consumer knowledge is a question of fact for the jury and concede the applicability of the caselaw that the Camachos proffered so demonstrating. *See Ward v. Ford Motor Co.*, 99 Nev 47, 49, 657 P.2d 95, 96 (1983); *Tompkin v. Am. Brands*, 219 F.3d 566, 572 (6th Cir. 2000),

this court should deem a confession of error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793.

Rather, PM merely contends that Sandra began smoking PM cigarettes in 1990, well after the United States Surgeon General's warnings. PM Answer at 82 n.27. Yet, the Cigarette Manufacturers do not contest that the dispositive inquiry regarding ordinary consumer knowledge begins when the smoker begins smoking, as nicotine addiction renders them unable to make rational choices about cigarette consumption. *See Insolia*, 216 F.3d at 599. Given that Sandra began smoking in 1964, 10 PA 1690, and given that Sandra developed Tobacco Use Disorder, *see* 5 PA 960-66, PM's reliance upon ordinary consumer knowledge in 1990 lacks merit.[27]

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overruled on other grounds by Wimbush v. Wyeth, 619 F.3d 632, 639 n.5 (6th Cir. 2010); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1106-13 (D. Ariz. 2003); *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 494 (D.S.C. 2000); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 844-45 (W.D. Ky. 1999); *Burton*, 884 F. Supp. at 1526; *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 182-83 (Iowa 2002); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 389-90 (App. Div. 2003). The Cigarette Manufacturers also concede that the *Guilbeault* court's use of judicial notice regarding ordinary consumer knowledge was erroneous. *See* 84 F. Supp. 2d at 272-73.

[27]The Cigarette Manufacturers have abandoned their reliance upon *Estate of White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 433-

5. *Design defects*

Regarding the Camachos' negligent design claim, the Cigarette Manufacturers averred that Nevada law requires the Camachos to proffer evidence of alternative designs and that the Camachos did not proffer evidence of the same, *see* PM Answer at 73-79; LG Answer at 1, and that the Camachos otherwise did not demonstrate that the defects that they proffered caused Sandra's injuries, *see* PM Answer at 83-86; LG Answer at 1. The Camachos address each in turn.

The Cigarette Manufacturers are correct that Nevada law requires proof of a commercially feasible alternative design where the product already has a warning. *See Eads v. R.D. Werner Co.*, 109 Nev. 113, 114-15, 847 P.2d 1370, 1371-72 (1993); *Robinson*, 107 Nev. at 139, 808 P.2d at 525. Regardless, the Camachos proffered evidence that the Cigarette Manufacturers were able to manufacture commercially feasible cigarettes that lacked one or more of the design defects that the Camachos proffered. *See* 4 PA 654-55, 657-59, 733, 879; 5 PA 936, 945. The Cigarette Manufacturers suggest that cigarettes without these

34 (D. Md. 2000), by not proffering it in their briefs.

design defects were not commercially feasible or otherwise were not cigarettes. Both suggestions fail.

In pointing to conflicting evidence in the record,[28] the Cigarette Manufacturers again asked this court to resolve conflicting evidence in its favor in contravention of the summary judgment standard. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. Moreover, the Cigarette Manufacturers misstated Robert Proctor, Ph.D.'s and Judith J. Prochaska, Ph.D.'s testimony. Dr. Proctor clearly opined that non-inhalable and non-combustible cigarettes "never became extremely popular" because manufacturers never informed the public that such "product[s] [were] much less likely to [cause] lung cancer." *See* 6 PA 1103-04. Dr. Prochaska opined that such cigarettes would have a market

[28]The Cigarette Manufacturers did not contest the Camachos' argument that an expert witness's testimony from a prior case with different plaintiffs may constitute a prior inconsistent statement, which is a subject for impeachment upon cross-examination, *see* Pet. at 69 n.24; *see also* NRS 50.075; NRS 50.135, nor did the Cigarette Manufacturers contest that resolving witness credibility is inappropriate on a summary judgment motion, *see* Pet. at 69 n.24; *see also Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001). Thus, this court should summarily reject the Cigarette Manufacturers' reliance upon Robert Proctor, Ph.D.'s testimony from a different matter, *see* 19 PA 3110-11, 3116-18, and the Cigarette Manufacturers' invitation to resolve witness credibility in contravention of the summary judgment standard.

among early smokers that have not developed nicotine dependence. *See* 5 PA 942. Dr. Prochaska also opined that manufacturers failed to promote reduced nicotine cigarettes, as such would require manufacturers to admit that their cigarettes caused harm. *See* 5 PA 942. Finally, Dr. Prochaska opined that cigarettes without the defects that the Camacho's proffered struggle in the marketplace due to the ready availability of defective cigarettes that sustain nicotine addiction. *See id.* at 942-43. Regardless, given that whether an alternative design is commercially feasible is a question of fact for the jury, *McCourt v. J.C. Penney Co.*, 103 Nev. 101, 102-03, 734 P.2d 696, 697-98 (1987), and given that the Camachos proffered evidence demonstrating that the alternative designs are the same, the Cigarette Manufacturers' averment on this ground lacks merit.

Regarding the Cigarette Manufacturers' flat contention that a cigarette without the design defects that the Camachos proffered would constitute a different product such that it is not an alternative design, the definition of cigarette under 15 U.S.C. § 1332(1) does not demand that

a cigarette be addictive, inhalable, or combustible.[29] The Cigarette Manufacturers do not address this statutory definition, *see* PM Answer at 73-79; LG Answer at 1, which this court should deem as a concession, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Even if this court were to overlook their concession, the Cigarette Manufacturers' proffered caselaw is legally or factually inapposite.

This court has rejected the risk-utility framework for evaluating whether a product is defective. *Trejo*, 133 Nev. at 530-31, 402 P.3d at 657. Notwithstanding, the Cigarette Manufacturers proffered caselaw relying upon a risk-utility framework, holding that a cigarette's utility lies in "gratify[ing] smokers' desire for a certain experience." *See Adamo v. Brown & Williamson Tobacco Co.*, 900 N.E.2d 966, 968 (N.Y.

[29]Given that the statutory definition of cigarette is compatible with cigarettes that do not contain the design defects that the Camachos proffered, this court should reject the Cigarette Manufacturers' reliance upon *Goldstein v. Phillip Morris Inc.*, 854 A.2d 585, 590 (Pa. Super. Ct. 2004). This court should also summarily reject *Philadelphia v. Lead Industries Ass'n Inc.*, No. 90-8064, 1992 U.S. Dist. LEXIS 5849 at *8-9 (E.D. Pa. Apr. 23, 1992) (concerning lead paint versus zinc paint), *Hosford v. BRK Brands, Inc.*, 223 So. 3d 199, (Ala. 2016) (concerning a ionization smoke alarm versus a dual-sensor smoke alarm), and *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 385 (Tex. 1995) (comparing a motorcycle to a car), as these authorities do not concern cigarattes.

2008). As the Supreme Court of Massachusetts explained, the *Adamo* court gives no consideration to a cigarette's addictive propensity and makes no distinction between an unaddicted consumer and a nicotine addict. *See Evans v. Lorillard Tobacco Co.*, 900 N.E.2d 997, 1020 (Mass. 2013). Indeed, placing the emphasis on an addict's need to satisfy his or her physiological craving would essentially remove addictive chemicals from strict liability and remove any incentive for manufacturers to make a less addictive product. *See id.* at 1018-19. Thus, the proper point of comparison regarding an alternative design must be to the unaddicted consumer. *See id.* at 1019. This court should follow the *Evans* court's sage holding, rejecting *Adamo* and other caselaw relying upon a risk-utility analysis.[30]

Regarding their causation contentions, the record before this court clearly belies the Cigarette Manufacturers' assertion that the Camachos did not proffer expert witness opinions demonstrating a causal connection between the Camachos' proffered design defects and Sandra's

[30]This court should similarly reject the Cigarette Manufacturers' reliance upon *Davis*, 973 So. 2d at 473-74, as it concerns the risk-utility test.

injuries. Indeed, the Cigarette Manufacturers do not contest the factual basis of Dr. Prochaska's causal opinions,[31] nor do they contest Dr. Prochaska's ability to so opine.[32] *See* PM Answer at 83-84; LG Answer at 1. Rather, the Cigarette Manufacturers proffer an obtuse suggestion that even if they manufactured defect-free cigarettes, Sandra would have continued to smoke defective cigarettes, which somehow breaks the causal chain between their defective product and Sandra's injuries. PM Answer at 84-86; LG Answer at 1. Putting aside that the Cigarette Manufacturers do not receive the benefit of any inferences in moving for summary judgment, *see Wood*, 121 Nev. at 729, 121 P.3d at 1029, and putting aside that they proffered no caselaw demonstrating that entertaining a convoluted hypothetical is appropriate resolving a motion

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[31]Given that the Camachos proffered evidence of defects that the Cigarette Manufacturers' cigarettes contain, and given that the Camachos proffered expert witness opinions demonstrating a causal relationship between those defects and Sandra's injuries, this court should reject the Cigarette Manufacturers reliance upon *Pooshs*, 904 F. Supp. 2d at 1024-26, and *Nelson*, 353 So. 3d at 92-93, as those plaintiffs did not proffer evidence of defects nor that such defects caused the plaintiffs' damages.

[32]The Cigarette Manufacturers have abandoned their reliance upon *Grover C. Dils Medical Center v. Menditto*, 121 Nev. 278, 287-88, 112 P.3d 1093, 1100 (2005), by not proffering it in their briefs.

for summary judgment, *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38, the Cigarette Manufactures demonstrate profound confusion regarding the fundamental premise of tort law.[33]

It may be that Sandra would have smoked defective cigarettes even if the Cigarette Manufacturers only manufactured cigarettes without the defects that the Camachos proffered. In that event, the Cigarette Manufacturers would not be involved in this litigation. However, the Cigarette Manufacturers do manufacture defective cigarettes, and those defects caused Sandra's injuries. Thus, they are liable for any damage that their conduct caused.

E. *Conclusion*

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[33]The Camachos remind the Cigarette Manufacturers that

> [a] tort is a civil wrong . . . for which the law provides a remedy. This area of law imposes duties on persons to act in a manner that will not injure other persons. A person who breaches a tort duty has committed a tort and may be liable to pay damages in a lawsuit brought by a person injured because of that tort.

Victor E. Schwartz et al., *Prosser, Wade & Schwartz's Torts* 1 (12th ed. 2010).

Given that federal law does not impliedly preempt the Camachos' negligence claims, given that Section 402A comment i does not preclude the same, given that LG owed Sandra a duty to warn her of its cigarette's harmful effects, and given that the Camachos proffered admissible evidence demonstrating that genuine issues of material fact remained regarding their negligence claims' elements, the district court erred in granting the Cigarette Manufacturers' motions for summary judgment regarding the Camachos' negligence claims.

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

In petitioning for mandamus relief, the Camachos proffered Nevada's punitive damages statutes and learned treatises to demonstrate the function that punitive damages serve. *See* Pet. at 71-73. The Camachos then argued that claim preclusion did not apply for want of privity between the Nevada Attorney General and the Camachos, *see id.* at 73-85, and that the MSA did not release the Camachos' punitive damages request, *see id.* at 85-88.

In answering, the Cigarette Manufacturers proffered a mixture of Nevada caselaw standing for the general proposition that punitive damages serve a public interest, proffered federal caselaw

suggesting that a plaintiff acts as a private attorney general in requesting punitive damages, and suggested that this court may sever a punitive damages request from a tort claim giving rise to the request. *See* PM Answer at 18-21; LG Answer at 1, 27-31. They then use these theories to clumsily force the Camachos' punitive damages request into a claim preclusion analysis and into the MSA's release terms. *See* PM Answer at 21-50; LG Answer at 1, 31-34. The Cigarette Manufacturers' theory is unpersuasive, as it has no tether to Nevada's punitive damages statutory scheme, legislative history, or Nevada jurisprudence and is otherwise contrary to the weight of authority.

A. *Nevada's punitive damages statutes, legislative history, and caselaw demonstrate that an underlying tort claim necessarily tethers a request for punitive damages*

The gravamen of the Cigarette Manufacturers' punitive damages contention is that this court may sever the Camachos' request for punitive damages from the Camachos' tort claims giving rise to the request and then apply claim preclusion or the MSA's release terms to this stand-alone punitive damages request. However, Nevada's punitive damages statutory scheme, legislative history, and caselaw clearly

demonstrates that a request for punitive damages is bound to an underlying claim for compensatory damages.

Recent Nevada jurisprudence explicitly recognizes that punitive damages are a remedy and necessarily bound to an underlying claim for compensatory damages. *See Snodgrass v. Bango Oil, LLC*, No. 77652, 2021 Nev. Unpub. LEXIS 562 at *10 (Nev. July 23, 2021) (concluding that punitive damages are "not a separate cause of action"); *Teva Parenteral Meds., Inc.*, 137 Nev., Adv. Op. 6, 481 P.3d at 1242 (noting that a punitive damages request is derivative of the underlying claim); *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev., Adv Op. 33, 468 P.3d 862, 881 (Ct. App. 2020) (holding that punitive damages are a remedy rather than a cause of action); *see also Wolf v. Bonanza Inv. Co.*, 77 Nev. 138, 143, 360 P.2d 360, 362 (1961) (holding that a plaintiff may not recover punitive damages without prevailing on an underlying claim and receiving an award of compensatory damages); 22 Am. Jur. 2d *Damages* § 567 (2013) ("[A]s a rule, there is no cause of action for punitive damages by itself" as it "is not a separate or independent cause of action").

Indeed, Nevada's punitive damages statutory scheme repeatedly tethers the appropriateness of punitive damages and the amount of the same to the underlying claim and derivative compensatory damages award. The definitional statutes tether the culpable mental state giving rise to an award of punitive damages to the injury that the plaintiff suffered. *See* NRS 42.001. The operative statutes tether an award of punitive damages to an existing award of compensatory damages where the culpable mental state is present. *See* NRS 42.005(1)-(2). The statute governing employer liability similarly tethers an award against the employer to the injury that the plaintiff suffered and an existing award of compensatory damages. *See* NRS 42.007(1). Finally, the statute governing intoxicated driving tethers an award of punitive damages to the plaintiff's injury. NRS 42.010(1). These statutes demonstrate that a request for punitive damages is inseverable from the claim giving rise to the request.

NRS 42.005's legislative history accords, as both proponents and opponents of the Nevada Legislature's enactment of NRS 42.005 understood that an award of punitive damages is necessarily derivative of the injury that the plaintiff sustains and the compensatory damages

award that the plaintiff obtains. *See* H'rg on A.B. 307 Before the S. Judiciary Comm., 65th Leg. (Nev., May 18, 1989) (testimony of Mike Sloan explaining that a punitive damages award must have a relationship to the compensatory damages award and of Rex Jemison explaining that "the jury considers the amount of injury" the plaintiff sustained); Hr'g on A.B. 307 Before the J. S. & Assemb. Judiciary Comms., 65th Leg. (Nev., Mar. 29, 1989) (testimony of Mr. Sloan explaining that punitive damages should "balance the equities . . . between the state and the person who's hurt" and that an award should "bear[ ] a relationship to the harm that was actually done").

The Cigarette Manufacturers failed to address Section 567, *see* PM Answer at 18-21, 37-38; LG Answer at 1, thereby confessing error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Furthermore, the Cigarette Manufacturers reliance upon caselaw predating explicit holdings that punitive damages are a remedy rather than a stand-alone claim lacks merit, as Nevada appellate courts have impliedly rejected prior imprecise terminology regarding the character of punitive damages.[34] It is

[34]Thus, this court should reject the Cigarette Manufacturers' reliance upon *Otak Nevada, LLC v. Eighth Judicial District Court*, 129

axiomatic that a remedy is "[t]he means of enforcing a right or . . . redressing a wrong," *Remedy*, *Black's Law Dictionary* 1547 (11th ed. 2019), and that a claim is "[a] demand for money, property, or legal to which one asserts a right," *Claim*, *Black's Law Dictionary* 311 (11th ed. 2019). The Cigarette Manufacturers' attempt to upend established legal principles to avoid accountability strains the bounds of credulity.[35]

Rather than address the dispositive issue of whether a court may sever a request for punitive damages from the claim giving rise to the same, the Cigarette Manufacturers proffered irrelevant distractions

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Nev. 799, 812, 312 P.3d 491, 500 (2013), *Fanders v. Riverside Resort & Casino, Inc.*, 126 Nev. 543, 548 n.1, 245 P.3d 1159, 1163 n.1 (2010), and *Hetter v. Eighth Judicial District Court*, 110 Nev. 513, 520, 874 P.2d 762, 766 (1994).

[35]The Cigarette Manufacturers rely upon a single sentence from *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054-55, 194 P.3d 709, 713 (2008), to assert that claim preclusion applies to a stand-alone remedy. *See* PM Answer at 38; LG Answer at 1. First, the Camachos note that this court's use of the phrase "grounds of recovery" occurs immediately after it set forth the elements of claim preclusion, which turns on "claims" rather than remedies. *See Ruby*, 124 Nev. at 1054-55, 194 P.3d at 713. Second, the phrase "grounds of recovery" clearly refers to "claim" rather than "remedy." *See Ground of Action*, *Black's Law Dictionary* 848 (11th ed. 2019) (defining the phrase as a cause of action); *Cause of Action*, *Black's Law Dictionary* 275 (11th ed. 2019) (defining the term as a claim). Accordingly, the Cigarette Manufacturers' reliance upon *Ruby* lacks merit.

regarding the purpose that punitive damages serve, a plaintiff's right to a punitive damages award, and the capacity that a plaintiff operates within in requesting punitive damages. *See* PM Answer at 18-21; LG Answer at 1, 27-31. The Camachos do not dispute that punitive damages serve a public policy purpose of punishment and deterrence,[36] as NRS 42.005(1) expressly contemplates this aim. Nor do the Camachos dispute that a plaintiff has no right to an award of punitive damages.[37] *See* NRS

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[36]The Cigarette Manufacturers proffer *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008), *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006), *Siggelkow v. Phoenix Insurance Co.*, 109 Nev. 42, 45, 846 P.2d 303, 305 (1993), *Ace Truck & Equipment Rentals, Inc. v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987), *New Hampshire Insurance Co. v. Gruhn*, 99 Nev. 771, 773, 670, P.2d 941, 942 (1983), *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973), *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 134 P. 753, 761-70 (1913), *Quigley v. Central Pacific Railroad Co.*, 11 Nev. 350, 365 (1876), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001), *BMW of North America v. Gore*, 517 U.S. 559, 568 (1996), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), *Cady v. Case*, 26 P. 448 (Kan. 1891), *New Orleans, Jackson & Great Northern Railroad Co. v. Hurst*, 36 Miss. 660, 666 (1859), and *Pastorius v. Fisher*, 1 Rawle 27, 28 (Pa. 1828), to support this unremarkable proposition.

[37]The Cigarette Manufacturers proffer *Dillard Department Stores, Inc. v. Beckwith*, 115 Nev. 372, 380, 989 P.2d 882, 887 (1999), *Siggelkow*, 109 Nev. at 44, 846 P.2d at 304, and *Transaero Land & Development Co. v. Land Title of Nevada, Inc.*, 108 Nev. 997, 1001, 842 P.2d 716, 719 (1992), to support this unremarkable proposition.

42.005; NRS 42.007; NRS 42.010. However, these general statements of law are irrelevant regarding whether a court may sever a request for punitive damages from the claim giving rise to the request.

Notwithstanding, the Cigarette Manufacturers demonstrate profound confusion regarding what the term "right" means in the context of a punitive damages award. NRS 42.005's legislative history is instructive here. In debating the Nevada Legislature's statutory codification of punitive damages, proponents understood that a plaintiff has no "vested right" to an award of punitive damages. *See* Hr'g on A.B. 307 Before the S. Judiciary Comm., 65th Leg. (Nev., May 18, 1989) (testimony of Michael Sloan); Hr'g on A.B. 307 Before the J. S. & Assemb. Judiciary Comms., 65th Leg. (Nev., Mar. 29, 1989) (testimony of Mr. Sloan and of Margo Piscevich). It is axiomatic that a vested right is "[a] right that so completely and definitively belongs to a person that it cannot be impaired or taken away without the person's consent." *Vested Right*, *Black's Law Dictionary* 1585 (11th ed. 2019). Thus, a plaintiff has no vested right an award of punitive damages, as the Nevada Legislature has plenary power to allow, limit, or disallow punitive damages and as such an award is entirely discretionary even if the requisite culpability

exists. *See* NRS 42.005; NRS 42.007; NRS 42.010. As Justice Brennan sagely explained,

> [Punitive damages] are never awarded as of right, no matter how egregious the defendant's conduct. If the plaintiff proves sufficiently serious misconduct on the defendant's part, the question whether to award punitive damages is left to the jury, which may or may not make such an award. Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his [or her] loss.

Smith v. Wade, 461 U.S. 30, 52 (1983) (internal citations and quotations omitted). Thus, the Cigarette Manufacturers' reliance upon this plain and unremarkable statement of Nevada law is unavailing.

The Cigarette Manufacturers' reliance upon a private-attorney-general theory similarly fails. Generally, the private-attorney-general doctrine refers to "[t]he equitable principle that allows the recovery of attorney[ ] fees to a party who brings a lawsuit that benefits a significant number of people, requires private enforcement, and is important to society as a whole." *Private-Attorney-General Doctrine*, *Black's Law Dictionary* 1448 (11th ed. 2019). Here, the Camachos' personal injury claims do not benefit a significant number of people nor

are they important to society as a whole. Thus, the Cigarette Manufacturers' reliance upon this inapposite theory lacks merit.

Regardless, this court has only referred to the private-attorney-general doctrine on three occasions, none of which concerned punitive damages requests. *See Principal Invs., Inc. v. Harrison*, 132 Nev. 9, 13-14, 366 P.3d 688, 692 (2016) (concerning the enforceability of an arbitration agreement); *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 122 Nev. 132, 138-39, 127 P.3d 1088, 1093-94 (2006) (concerning Nevada's False Claims Act); *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 92 n.20, 127 P.3d 1057, 1064 n.20 (2006) (concerning the enforceability of an arbitration agreement and the availability of attorney fees). The Cigarette Manufacturers' attempt to force this otherwise foreign theory into Nevada punitive damages jurisprudence fails.[38]

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[38]The Cigarette Manufacturers proffer several federal cases that mention their private-attorney-general theory. *In re School Asbestos Litigation*, 789 F.2d 996, 1002-08 (3d Cir. 1986), concerned whether a district court could certify a mandatory class under FRCP 23(b)(1)(B) regarding class members' requests for punitive damages against asbestos companies. In explaining the purpose of punitive damages, the court remarked that they "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." *Id.* at 1003. *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 403 (5th Cir. 1986), concerned

Accordingly, Nevada punitive damages statutes, the legislative history of the same, and Nevada jurisprudence unequivocally demonstrate that a court cannot sever a plaintiff's request for punitive damages from the underlying claim giving rise to the request. Thus, the

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seeking punitive damages under Mississippi law, yet the Mississippi case the court cited does not contain the phrase "private attorneys general." *See Standard Life Ins. Co. of Ind. v. Veal*, 354 So. 2d 239, 247 (Miss. 1977). *In re Paris Air Crash*, 622 F.2d 1315, 1319 (9th Cir. 1980), concerned seeking punitive damages under Cal. Civ. Code § 3294. While that statute makes no reference to the court's allusion to a private-attorney-general theory, the Supreme Court of California would later note that a plaintiff properly retains an award of punitive damages that he or she receives "as a reward for the plaintiff's valuable role as a 'private attorney general.'" *Dyna-Med, Inc. v. Fair Emp. & Hous. Comm'n*, 743 P.2d 1323, 1338 (Cal. 1987); *see also In re Simon II Litig.*, 407 F.3d 125, 136 (2d Cir. 2005) (noting that a punitive damages award encourages private lawsuits to assert legal rights). Finally, *In re Air Crash Disaster Near Chicago, Illinois*, 644 F.2d 594, 622-26 (7th Cir. 1981), the court considered a conflict of law question concerning punitive damages. In so doing, the court noted that considering whether a state could criminally prosecute a corporate actor is improper when determining which jurisdiction's punitive damages laws should control, as "the 'private attorney general' concept" inherently allows punitive damages in civil suits. *Id.* at 623. The Cigarette Manufacturers do not explain how these comments compel a conclusion that Nevada punitive damages jurisprudence treats a plaintiff requesting punitive damages as if he or she were acting in the place of the Nevada Attorney General. Indeed, "the private attorneys general metaphor, . . . is just that, a metaphor, and metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *In re Exxon Valdez*, 270 F.3d 1215, 1228 (9th Cir. 2001) (internal quotations omitted).

proper analysis regarding whether claim preclusion applies turns upon the Camachos' underlying tort claims giving rise to their punitive damages request.[39]

B. *Claim preclusion does not apply for want of privity under an adequate representation theory or under a parens patriae theory*

1. *The Cigarette Manufacturers' reliance upon adequate representation fails*

In arguing that the privity did not exist between the Camachos and the Nevada Attorney General regarding their tort claims, the Camachos relied upon *Weddell v. Sharp*, 131 Nev. 233, 237-38, 350 P.3d 80, 83 (2015), *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 257, 321 P.3d 912, 915 (2014), and the *Restatement (Second) of Judgments* § 41 (Am. L. Inst. 1982). Pet. at 74-77. Section 41(1)(c) clearly explains that an adequate representation theory will only apply where an official or agency has legal authority to represent a person's interest and the person is entitled to the benefits of any judgment as if he or she were a

[39]LG fails to cogently argue how 26 U.S.C. § 104(a)(2) (providing that compensatory damages resulting from personal injury do not constitute gross income but that punitive damages constitute gross income) alters this conclusion, *see* LG Answer at 30 n.6, and this court should summarily reject LG's reliance upon the same, *see Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

party. *Weddell* and *Alcantara* clearly demonstrate the factual application of this rule, as this court held claim preclusion applied where an estate represented an heir's interest in a wrongful death action and the heir was entitled to any judgment the estate received, *see* 130 Nev. at 261-63, 321 P.3d at 918-19, but did not apply where a lawsuit and a subsequent lawsuit concerned different interests, *see* 131 Nev. at 237-38, 350 P.3d at 82-83 (concerning a business partner dispute in the former and arbitration panel misconduct in the latter).

The Cigarette Manufacturers do not address comment d or illustration 7 of Section 41, *Alcantara*'s facts, or *Weddell* notwithstanding their applicability, *see* PM Answer at 22; LG Answer at 1, which this court should deem a confession of error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Rather, the Cigarette Manufacturers proffered a mere rule statement from *Alcantara* before flatly asserting that the Nevada Attorney General had the legal authority to represent the Camachos' personal injury claim. *See* PM Answer at 22-25; LG Answer at 1. Yet, none of the statutes that the Cigarette Manufacturers proffered[40] allow

[40]The Camachos note that the Nevada Attorney General filed her complaint on May 21, 1997. 2 PA 241. Given that Nevada legislative

the Nevada Attorney General to represent a personal injury claim. Furthermore, the Cigarette Manufacturers failed to identify a single deceptive trade practice under the then-existing statutes, *see* NRS 598.0915 (1995); NRS 598.0917 (1993); NRS 598.092 (1993); NRS 598.0923 (1985); NRS 598.0925 (1989), and they fail to identify a single unfair trade practice under NRS 598A.060 (1981), that allowed the Nevada Attorney General to represent the Camachos' personal injury claim. The Cigarette Manufacturers' failure to so demonstrate is fatal to their reliance upon an adequate representation theory.

Given that the Nevada Attorney General could not represent the Camachos' personal injury claim, and given that courts cannot sever a punitive damages request from the claim giving rise to the request, the

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enactments ordinarily become operative on October's first day, *see* NRS 218D.330 (1989), many of the statutes that the Cigarette Manufacturers proffered were not effective when the Nevada Attorney General filed her complaint. Regardless, NRS 228.302, NRS 228.304, and NRS 228.308 are mere definitional statutes that do not identify the type of action in which the Nevada Attorney General may prosecute or intervene in. NRS 228.380(1) (1991) and NRS 228.390(1) (1981) merely define the authority of the Consumer's Advocate to enforce NRS Chapters 598 and 598A. NRS 598A.070(1) (1989) and NRS 589A.160(1) (1975) merely imposes a duty upon the Nevada Attorney General to enforce the NRS Chapter 598A and authorizes the Nevada Attorney General to bring civil actions to achieve the same.

Cigarette Manufacturers' reliance upon an adequate representation theory of privity fails.[41]

2. *The Cigarette Manufacturers' reliance upon parens patriae fails*

In arguing that the Nevada Attorney General could not represent the Camachos' personal injury claims under a parens patriae theory, the Camachos proffered the common-law origins of the Nevada Attorney General's authority, *see State ex. rel. Fowler v. Moore*, 46 Nev. 65, 81-82, 207 P. 75, 77 (1922); *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 284-85 (1888) (identifying the inherent authority to prevent injury or prejudice to the state); *People v. Miner*, 2 Lans. 396, 397-99 (N.Y. Gen. Term 1868) (identifying the inherent authority to protect state property and revenue, prevent public nuisances, and protect lunatics and others under state protection), this court's holdings regarding parens patriae representation, *see A Minor v. Juv. Div.*, 97 Nev. 281, 289, 630

[41]The Cigarette Manufacturers' reliance upon *Chauvin v. Exxon Mobil Corp*., 158 So. 3d 761, 769 (La. 2014), fails, as the plaintiff requesting punitive damages in a subsequent lawsuit was a class member in the prior lawsuit. Thus, the *Chauvin* presented a scenario where the same plaintiff was requesting a second award of punitive damages against the same defendant for the same misconduct, *id*., which is inapposite to the instant petition.

P.2d 245, 250 (1981) (authority to protect delinquent minors); *Young v. Bd. of Cnty. Comm'rs*, 91 Nev. 52, 54, 530 P.2d 1203, 1205 (1975) (same), and the Court's holding regarding the same, *see Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602-07 (1982) (authority to enjoin or abate nuisances injuring public health and welfare and to end discriminatory or unfair economic practices and injury economic well-being that harm "a sufficiently substantial segment of [the] population"). Pet. at 82-85.

The Cigarette Manufacturers did not contest the scope of the parens patriae theory,[42] nor did they argue that the Camachos' personal injury claims otherwise satisfied the elements of parens patriae representation,[43] *see* PM Answer at 24-25; LG Answer at 1, 31-34,

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[42]Indeed, the caselaw that the Cigarette Manufacturers proffered similarly defines the scope of parens patriae representation. *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257-59 (1972), *superseded by statute as stated in State ex rel. Montgomery v. Philip Morris, Inc.*, No. 97CVH05-5134, 1998 Ohio Misc. LEXIS 94 at *38 n.151 (Ohio Ct. C.P. Aug. 28, 1998); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 770-71 (7th Cir. 2011); *Zimmerman v. GJS Grp., Inc.*, No. 2:17-cv-00304-GMN-GWF, 2017 U.S. Dist. LEXIS 168630 at *13-21 (D. Nev. Oct. 11, 2017).

[43]Notwithstanding its subsequent abrogation, the Cigarette Manufacturers cling to *State v. Reliant Energy, Inc.*, 128 Nev. 483, 486 n.2, 289 P.3d 1186, 1188 n.2 (2012), *abrogated by Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 384-91 (2015), *as stated in In re W. States Wholesale*

thereby conceding the argument, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Even if this court were to overlook the Cigarette Manufacturers' concession, none of the parens patriae caselaw that they proffered concerns a personal injury claim. *See Moore*, 46 Nev. at 89-90, 207 P. at 80 (holding that the Nevada Attorney General lacked common-law authority to intervene in a divorce); *Alfred L. Snapp & Son, Inc.*, 458 U.S. 592, 598-99 (concerning discriminatory economic practices); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 257-59 (1972) (concerning anti-trust actions), *superseded by statute as stated in State ex rel. Montgomery v. Philip Morris, Inc.*, No. 97CVH05-5134, 1998 Ohio Misc. LEXIS 94 at *38 n.151 (Ohio Ct. C.P. Aug. 28, 1998); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 770-71 (7th Cir. 2011) (same); *Zimmerman v. GJS Grp.,*

Nat. Gas Antitrust Litig., No. 2:03-cv-01431-RCJ-PAL, MDL No. 1566, No. 2:05-cv-01331-RCJ-PAL, No. 2:06- cv-00233-RCJ-PAL, No. 2:06-cv-00267-RCJ-PAL, No. 2:06-cv-00282- RCJ-PAL, No. 2:06-cv-01351-RCJ-PAL, No. 2:07-cv-00987-RCJ-PAL, No. 2:07-cv-01019-RCJ-PAL, No. 2:09-cv-00915-RCJ-PAL, 2017 U.S. Dist. LEXIS 49435 at *205 (D. Nev. Mar. 30, 2017). Even if this court were to ignore *Reliant Energy, Inc.*'s abrogation, the Nevada Attorney General relied upon NRS 598A.060 to represent Nevada and Nevada's citizens against the offending corporations' price fixing. *See* 128 Nev. at 486, 289 P.3d at 1188. Given that NRS 598A.060 does not allow the Nevada Attorney General to represent a personal injury claim, the Cigarette Manufacturers' reliance upon *Reliant Energy, Inc.* still fails.

Inc., No. 2:17-cv-00304-GMN-GWF, 2017 U.S. Dist. LEXIS 168630 at *1-4 (D. Nev. Oct. 11, 2017) (concerning discrimination against disabled persons). Nor could they, as the invocation of parens patriae standing "is inappropriate where an aggrieved party could seek private relief." *Mo. ex rel. Koster v. Harris*, 847 F.3d 646, 652 (9th Cir. 2017). Whether by concession or on the merits, the Cigarette Manufacturers' parens patriae averments fail.[44]

3. *The Cigarette Manufacturers remaining averments regarding claim preclusion fail*

Having demonstrated that Nevada courts cannot sever a punitive damages request from the claim giving rise to the request, and having demonstrated that the Cigarette Manufacturers' adequate

[44]LG suggests that a plaintiff represents the state in requesting punitive damages, relying upon *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469, 471 (Ala. 1988). LG Answer at 32. *Tiffin* relied upon a law review journal note for that proposition. *See* 537 So. at 471 (quoting Note, *Apportionment of Punitive Damages*, 38 Va. L. Rev. 71, 73 (1952)). No other controlling opinion appears to have relied upon this proposition, rendering it a jurisprudential dead end. LG proffers no Nevada statute or caselaw standing for such a proposition, rendering *Tiffin* wholly unpersuasive. Furthermore, given that statutes prospectively operate, *Dekker/Perich/Sabatini Ltd. v. Eighth Jud. Dist. Ct.*, 137 Nev., Adv. Op. 53, 495 P.3d 519, 523 (2021), LG's attempt to apply NRS 598.0963(3) (2023) to the Nevada Attorney General's 1997 complaint is meritless.

representation and parens patriae theories lack merit, this court need not address the remainder of the Cigarette Manufacturers' averments regarding claim preclusion.[45] *See Alcantara*, 130 Nev. at 257, 321 P.3d at 915 (requiring privity, a final judgment, and the ability to bring the at-issue claim in the first action for claim preclusion to apply). The Camachos nevertheless address the Cigarette Manufacturers' remaining averments out of an abundance of caution.

Much like they did before the district court, the Cigarette Manufacturers urge this court to adopt minority positions from New York and Georgia that are plainly contrary to Nevada punitive damages statutes, legislative history, public policy, and jurisprudence. The Camachos address each in turn.

The Cigarette Manufacturers' reliance upon *Fabiano v. Philip Morris Inc.*, 862 N.Y.S.2d 487 (App. Div. 2008), and other New York caselaw[46] is unavailing. Unlike Nevada, New York jurisprudence holds

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[45]Specifically, this court need not consider the Cigarette Manufacturers' contentions regarding the existence of a final judgment and the existence of the same set of material facts. *See* PM Answer at 28-34; LG Answer at 1.

[46]Specifically, the Cigarette Manufacturers proffer *Mulholland v. Philip Morris USA, Inc.*, No. 14-144-cv(L), No. 14-265-cv(XAP), 2015 U.S.

that punitive damages are a claim rather than a remedy. *See id.* at 491 (explaining that "[a]lthough punitive damages claims depend upon the existence of an underlying cause of action for compensatory relief, . . . they are nonetheless distinct claims"). Indeed, a plaintiff bringing a punitive damages claim in New York must demonstrate an underlying claim giving rise to an award of compensatory damages and that the defendant's conduct "reflect[s] pervasive and grave misconduct affecting the public generally . . . , to, in a sense, merge with a serious public grievance, and thus merit punitive, indeed quasi-criminal sanction . . . by the [s]tate." *Id.* at 490 (internal citations omitted). Furthermore, New York courts have reasoned that plaintiffs seeking punitive damages "in the context of private actions should be viewed as acting in the [s]tate's behalf." *Id.* at 491. Given that Nevada appellate courts deem punitive damages to be a remedy rather than a claim, and

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App. LEXIS 168 at *6 (2d Cir. Jan. 7, 2015), and *Shea v. American Tobacco Co.*, 901 N.Y.S.2d 303, 305 (App. Div. 2010), to bolster *Fabiano*. PM Answer at 41; LG Answer at 1, 34. The Camachos note that *Mulholland* is a summary order under FRAP 32.1 and of limited persuasive value. Furthermore, the Cigarette Manufacturers have abandoned their reliance upon *Grill v. Philip Morris USA, Inc.*, 653 F. Supp. 2d 481, 489-99 (S.D.N.Y. 2009), by not proffering it in their answers.

given that this court has not adopted an analogous private-attorney-general theory regarding punitive damages requests, *see supra* Points & Legal Auth. § III(A), the Cigarette Manufacturers' reliance upon New York jurisprudence fails for want of compatibility with Nevada law.[47]

The Cigarette Manufacturers' reliance upon *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006), similarly fails. Unlike Nevada, Georgia's punitive damages statutory scheme only allows one award of punitive damages against a defendant "for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission." Ga. Code Ann. § 51-12-5.1(e)(1). Additionally, Georgia's punitive damages statutory scheme provides that 75 percent of a punitive damages award less attorney fees and costs belongs to the Georgia State Treasurer. Ga. Code Ann. § 51-12-5.1(e)(2). Contrary to the Cigarette

[47]That New York jurisprudence allows a punitive damages claim to proceed with a defamation claim does not change the incompatibility of New York's stand-alone claim jurisprudence and Nevada's remedy jurisprudence. Thus, the Cigarette Manufacturers' reliance upon *Carroll v. Trump*, No. 20-cv-7311(LAK), 2023 WL 4393067 at *19-20 (S.D.N.Y. July 5, 2023), *Bouveng v. Nyg Capital LLC*, 175 F. Supp. 3d 280, 351 (S.D.N.Y. 2016), and *Liker v. Weider*, 838 N.Y.S.2d 140, 142 (App. Div. 2007), is unavailing.

Manufacturers' averments, *see* PM Answer at 39 n.10; LG Answer at 1, the *Gault* court expressly relied upon this statute to hold that the Georgia Attorney General already represented Georgia's interest in obtaining punitive damages against cigarette manufacturers in obtaining the MSA, *see* 627 S.E.2d at 552. Given that Nevada's punitive damages statutory scheme contains no provisions analogous to Georgia's punitive damages statutory scheme, the Cigarette Manufacturers' reliance upon Georgia jurisprudence fails for want of compatibility with Nevada law.

Rather than adopt these minority positions, this court should align itself with the weight of authority regarding the inapplicability of claim preclusion to a punitive damages request. As the Camachos demonstrated, at least eight jurisdictions that signed the MSA have permitted a personal injury plaintiff to request punitive damages against cigarette manufacturers. *See Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 604 (8th Cir. 2005) (Arkansas); *Shaffer v. R.J. Reynolds Tobacco Co.*, 860 F. Supp. 2d 991, 998-99 (D. Ariz. 2012); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 406 (Ct. App. 2011); *Bifolk v. Philip Morris, Inc.*, 152 A.3d 1183, 1209-15 (Conn. 2016) (same); *Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731, 741-45

(Mass. 2021); *Williams v. RJ Reynolds Tobacco Co.*, 271 P.3d 103, 114 (Or. 2011); *R.J. Reynolds Tobacco Co. v. Gerald*, 76 V.I. 78 656, 729 (2022); *In re Tobacco Litig.*, 624 S.E.2d 738, 740-44 (W. Va. 2005).

Even if this court were to credit the Cigarette Manufacturers' attempts to distinguish *Bullock*[48] and *Laramie*,[49] *see* PM Answer at 42-

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[48]In attempting to distinguish *Bullock*, the Cigarette Manufacturers relied upon *Weissman v. Mutual Protection Trust*, No. B290812, 2019 Cal. App. Unpub. LEXIS 3612 (Cal. Ct. App. May 28, 2019). Cal. Ct. R. 8.1115(a) precludes such reliance, as the California appellate courts deemed *Weissman* unsuitable for publication. Accordingly, this court must reject the Cigarette Manufacturers' reliance upon *Weissman*. Regardless, that California uses a primary rights theory of claim preclusion is irrelevant. The *Bullock* court explained that remedies are derivative of the claims that a plaintiff brings. 131 Cal. Rptr. 3d at 393. Thus, claim preclusion did not bar the plaintiff's request for punitive damages stemming from the plaintiff's personal injury claim because the California Attorney General only sought redress for the economic harm that cigarettes caused to California. *Id.* That Nevada does not use a primary right theory of claim preclusion does not preclude reliance on the basic premise that the application of claim preclusion turns upon the claim that the plaintiff alleges rather than the remedy that the plaintiff requests.

[49]In attempting to distinguish *Laramie*, the Cigarette Manufacturers note that Mass. Gen. Laws ch. 229, § 2 provides that a plaintiff has a right to punitive damages of at least $5,000 if the plaintiff proves the culpable mental state in a wrongful death action and that Massachusetts jurisprudence recognizes a compensatory element of a punitive damages award in a wrongful death action. *See Drywall Sys., Inc. v. ZVI Constr. Co.*, 761 N.E.2d 482, 487 (Mass. 2002). However, this does not alter the *Laramie* court's analysis of the difference between the wrongs that the Massachusetts Attorney General sought to punish, the

44; LG Answer at 1, 34 n.7, the Cigarette Manufacturers fail to acknowledge the remaining caselaw implicitly allowed plaintiffs to request punitive damages notwithstanding the MSA, which this court should deem a confession of error, *see Ozawa*, 125 Nev. at 563, 216 P.3d at 793. The clear majority rule is that "[a]n award of punitive damages to one plaintiff does not preclude recovery of punitive damages by all subsequent plaintiffs in multiple litigation," 22 Am. Jur. 2d *Damages* § 603 (2023), and the caselaw that the Camachos proffered accords.

Regarding public policy, the Cigarette Manufacturers' invitation to adopt the *Fabiano* and *Gault* minority positions would frustrate the purpose of a punitive damages request in a matter sounding in products liability. NRS 42.005(2)(a) expressly provides that manufacturers of a defective product are not subject to the cap on punitive damages. NRS 42.005's legislative history clearly demonstrates that protecting consumers was the Nevada Legislature's paramount concern in not applying a cap to defective product manufacturers. *See*

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wrongs that the *Laramie* plaintiff sought to punish, or the *Laramie* court's holding that claim preclusion turns upon the claim rather than the remedy. *See* 173 N.E.3d at 746.

Hr'g on A.B. 307 Before the S. Judiciary Comm., 65th Leg. (Nev., May 18, 1989) (testimony of Allan Earl explaining that punitive damages awards must be of a sufficient magnitude so that a manufacturer cannot sustain the burden of paying them, which advances the goal of consumer protection); Hr'g on A.B. 307 Before the J. S. & Assemb. Judiciary Comms., 65th Leg. (Nev., Mar. 29, 1989) (testimony of Ms. Piscevich explaining that punitive damages seek to ensure that culpable conduct "never happen[s] again" and of Lawrence Semenza explaining that punitive damages prod, push, and get a defendant's attention in order to obtain compliance). Nevada legislators were more explicit. Upon Assembly Bill 307's third reading, Senator Sue Wagner testified,

> Products liability is also a vital concern with this bill. Again, we are dealing with many multi-billion dollar corporations. We want to enhance the safety of Nevada citizens by sending this message. This, we believe, will encourage safe, well-designed products to be placed in the hands of Nevada consumers. We want to make certain in our state that a manufacturer will never make the economic decision to keep a defective product on the shelves rather than correct the problem and save many people from death or devastating injuries. Examples of these types of decisions include the Ford Pinto, Dalkon Shield, and asbestos cases. We do not want the manufacturers

> of such products, used by Nevada citizens daily, to be able to make this economic decision.

S. Daily J., 65th Leg., at 14 (Nev., May 24, 1989). Assemblyman Robert Sader delivered nearly identical testimony. *See* Assemb. Daily J., 65th Leg., at 32 (Nev., May 8, 1989).

Here, the Cigarette Manufacturers contend that the MSA already punished and deterred them. *See* PM Answer at 25 n.9, 27-28, 36, 50; LG Answer at 1, 31, 33. Yet, the Cigarette Manufacturers "specifically disclaim[ed] and denie[d] any liability or wrongdoing whatsoever with respect to the claims and allegations asserted against it by the Attorneys General of the Settling States and the Litigating Political Subdivisions," and "entered into [the MSA] solely to avoid the further expense, inconvenience, burden[,] and risk of litigation." 3 PA 511-12. Moreover, the Cigarette Manufacturers did not agree to make any changes to their defective cigarettes that would reduce their harm to Nevada consumers, *see id.* at 398-416, and have continued to place defective cigarettes into the stream of commerce. Contrary to their representations in their answers, the Cigarette Manufacturers have faced no punishment, *Punishment, Black's Law Dictionary* 1490 (11th ed. 2019) ("A sanction . . . assessed against a person who has violated the

law."), nor have they faced any deterrence, *Deterrence, Black's Law Dictionary* 564 (11th ed. 2019) ("The act or process of discouraging certain behavior, particularly by fear . . . ."). Rather, the Cigarette Manufacturers maintain that they violated no law and refuse to change their manufacturing practices. Adopting *Fabiano* and *Gault* would effectively foreclose the civil justice system's ability to prod and push the Cigarette Manufacturers into reducing their cigarette's harm and will ensure that their culpable conduct continues. Such an outcome would be contrary to NRS 42.005's legislative history, and this court should reject it.[50]

Finally, the Cigarette Manufacturers averred that the Nevada Attorney General sought to punish the Cigarette Manufacturers for causing personal injuries. *See* PM Answer at 35-36; LG Answer at

[50]The Camachos note that the Cigarette Manufacturers may present evidence of their financial condition as a defense to an excessive punitive damages award, *see* NRS 42.005(4), which resolves any concerns regarding "the potential for 'overkill' inherent in allowing multiple recoveries of punitive damages for an indefinite class of plaintiffs," *see* 22 Am. Jur. 2d *Damages* § 603.

1.[51] In so doing, they proffered three citations to the Nevada Attorney General's complaint, which the Camachos address in turn.

The Cigarette Manufacturers blatantly misrepresented the objectives that the Nevada Attorney General's complaint listed, omitting those that undermined their position. *See* PM Answer at 34-35; LG Answer at 1; *see also* RPC 3.3(a)(1). The Nevada Attorney General's complaint expressly stated that its goals were

> (i) to secure for the people of the State of Nevada a fair and open market, free from unfair or deceptive acts or practices and illegal restraints in trade; (ii) to return to the State the increased costs of health care caused by defendants' wrongful conduct; (iii) to require fair and full disclosure by defendants of the nature and effects of their products; (iv) to unequivocally halt the marketing of tobacco products to minors; and (v) to disgorge defendants' profits from their sales of tobacco products accomplished through violations of state law.

2 PA 248. These objectives clearly sound in deceptive trade practices under NRS Chapter 598 and unfair trade practices under NRS Chapter

[51]The Camachos' petition belies the Cigarette Manufacturers' misleading suggestion that the Camachos proffered no citation to the record in support of their argument regarding the scope of the Nevada Attorney General's complaint. *Compare* Pet. at 79-81, *with* PM Answer at 35-36; LG Answer at 1; *see also* RPC 3.3(a)(1).

598A, and clearly seek to recover the health care costs that Nevada incurred because of the Cigarette Manufacturers' conduct.

The Cigarette Manufacturers' reliance upon the Nevada Attorney General's punitive damages request similarly fails. The Nevada Attorney General's punitive damages request incorporated all her prior allegations against the defendants and alleged that the defendants acted with the requisite culpability to warrant punitive damages. *Id*. at 366-37. A careful review of the remedies that the Nevada Attorney General sought clearly demonstrates that she never requested any damages to compensate persons that suffered injury due to tobacco use,[52] rendering the Cigarette Manufacturers contentions on this ground meritless.

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[52]Specifically, the Nevada Attorney general uniformly sought to enjoin the defendants from causing the delinquency of minors, enjoin the defendants from continuing deceptive or unfair trade practices, enjoin the defendants to disclose research on smoking's health effects, enjoin the defendants from continuing their conspiracy, order the defendants to fund education programs regarding smoking and health, order the defendants to fund smoking cessation programs, disgorge the defendants' profits from sales to minors, civil penalties for violations of NRS Chapter 598, order the defendants to pay five percent of their gross income to Nevada for each year that they violated NRS Chapter 598A, order the defendants to pay restitution to restore Nevada to the financial position it would be in if it were not paying health care costs due to tobacco use,

Finally, the Cigarette Manufacturers rely upon a single sentence from the Nevada Attorney General's claim for performance of another's duty to the public, which alleged that the defendants' wrongful conduct had "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." *Id*. at 352. Yet, the remaining portions of the Nevada Attorney General's claim clearly demonstrate that the defendants' misconduct caused a "health crisis," causing "Nevada to assume the financial burden of smoking related medical costs, a burden which should have been borne by the defendants." *Id*. This clearly demonstrates that the Nevada Attorney General was seeking to recover expenditures on public health rather than damages for persons harmed by tobacco products.

The Nevada Attorney General's complaint clearly demonstrates that she did not seek to represent the interests of persons

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order the defendants to pay damages to repay Nevada for its public health expenditures due to tobacco use, and attorney fees and costs. *See id*. at 342-45, 347-48, 351-54, 357-58, 360-66.

injured by tobacco use nor did she seek to punish cigarette manufacturers for causing the same. Legal scholarship accords, as two scholars explained,

> The [tobacco] litigation was designed to circumvent the freedom-of-choice and individual-rights strategies that tobacco attorneys had used to win previous litigation. In the [tobacco] litigation, claims were aggregated at the [s]tate level to avoid the blameworthiness problems faced by individual litigants and the need to show individual causation. Consistent with the underlying theory of the case, the [s]tate [a]ttorneys [g]eneral attempted to prove their case based on epidemiological studies of the population-based harms caused by tobacco, not by harms to specific individuals. Since the [s]tate had no choice but to absorb the Medicaid costs of tobacco-related diseases, and it is the taxpayers, not smokers, who are injured financially, the [s]tates argued that the traditional industry defenses raised in individual litigation are irrelevant.

Peter D. Jacobson & Kenneth E. Warner, *Litig. & Pub. Health Pol'y Making: The Case of Tobacco Control*, 24 J. Health Pol., Pol'y & L. 769, 777 (1999) (citation omitted). The Cigarette Manufacturers' contrary averments are meritless.

C. *The MSA did not release the Camachos personal injury claim and derivative punitive damages request, and the Camachos were not beneficiaries of the MSA*

The Cigarette Manufacturers rely upon their theory that a court may sever a request for punitive damages from the claim giving rise to the request and their private attorney general or parens patriae theories to contend that the MSA released the Camachos' request for punitive damages. *See* PM Answer at 45-47; LG Answer at 1. As the Camachos argued above, punitive damages are a remedy that is derivative of their personal injury claim, and this court has not adopted a private-attorney-general theory regarding punitive damages requests. *See supra* Points & Legal Auths. § III(A)-(B). These arguments apply with equal force regarding the Cigarette Manufacturers' MSA averments and render the same meritless. Regardless, the Camachos address a few points.

The Cigarette Manufacturers misrepresent the MSA's definition of a "Released Claim." *See* PM Answer at 45-46; LG Answer at 1; *see also* RPC 3.3(a)(1). Regarding claims concerning past conduct, the term only has application to claims "that were, could be or could have been asserted now or in the future . . . by a Settling State or a Releasing

Party." 3 PA 393. Thus, the MSA could only release the Camachos' personal injury claim and derivative request for punitive damages if they are "Releasing Parties." Given that the Camachos sued in their individual capacities to vindicate their individual rights, they are not "Releasing Parties," *see id.* at 394-95, and their claims are not "Released Claims."

Other jurisdictions construing the MSA have uniformly held that the MSA did not release personal injury claims. *See McClendon*, 261 F.3d at 1261-62; *Floyd*, 227 F.3d at 1037; *Lewis v. State ex rel. Miller*, 646 N.W.2d 121, 126 (Iowa Ct. App. 2002); *Scott v. Am. Tobacco Co.*, 949 So. 2d 1266, 1289 (La. Ct. App. 2007); *Laramie*, 173 N.E.3d at 740; *Robinson v. State*, 68 P.3d 750, 754 (Mont. 2003); *Williams*, 271 P.3d at 113. Given that a court may not sever a punitive damages request from the claim giving rise to the same, the Cigarette Manufacturers' attempts to distinguish *McClendon*, 261 F.3d at 1261-21, *Floyd*, 227 F.3d at 1037, *Miller*, 646 N.W.2d at 126, *Scott*, 949 So. 2d at 1289, and *Robinson*, 68 P.3d at 784, on the grounds that they did not address an award of punitive damages fails.

Even if this court were to credit such an averment, *Williams* clearly demonstrates that the MSA did not release punitive damages requests deriving from personal injury claims. Indeed, the *Williams* court explicitly rejected PM's contention that the MSA precluded a personal injury plaintiff from requesting punitive damages. *See* 271 P.3d at 112-13. The court noted that while a plaintiff has no vested right to an award of punitive damages, a plaintiff acquires an individual interest in a punitive damages award when the jury awards the same to the plaintiff. *Williams*, 271 P.3d at 113-14. The Cigarette Manufacturers fail to cogently argue how this proposition is any different under Nevada law, *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38, as they proffer no citation to their proposition that a plaintiff requesting punitive damages has no interest in the same.[53] *See* PM Answer at 47 n.14; LG

[53]In so contending, the Cigarette Manufacturers are confusing a vested right with an interest. Regardless, their suggestion that a plaintiff does not have an interest in a punitive damages award that a district court has reduced to a judgment strains the bounds of credulity. *See Interest*, *Black's Law Dictionary* 968 (11th ed. 2019) ("A legal share in something; all or part of a legal or equitable claim to or right in property . . . ."); *Judgment*, *Black's Law Dictionary* 1007 (11th ed. 2019) ("A court's final determination of the rights and obligations of the parties in a case.").

Answer at 1. Moreover, NRS 42.005's legislative history clearly demonstrates a plaintiff has a personal interest in a punitive damages award, as the Nevada Legislature expressly rejected an amendment that would have diverted a percentage of a punitive damages award to an educational fund. *See* Hr'g on A.B. 307 Before the Assemb. Judiciary Comm., 65th Leg. (Nev., Apr. 12, 1989) (rejecting Assemblyman Robert E. Gaston's amendment notwithstanding the apparent windfall nature of a punitive damages award). *Williams* clearly demonstrates the jurisprudential bankruptcy of the Cigarette Manufacturers' position.

Finally, the Cigarette Manufacturers' suggestion that the Camachos are intended beneficiaries or third-party beneficiaries of the MSA is meritless. It is axiomatic that an intended beneficiary is "[a] third-party beneficiary who is intended to benefit from a contract and thus acquires rights under the contract as well as the ability to enforce the contract once those rights have vested." *Intended Beneficiary*, *Black's Law Dictionary* 192 (11th ed. 2019); *see also Third-Party Beneficiary, Black's Law Dictionary* 192 (11th ed. 2019) ("Someone who, though not a party to a contract, stands to benefit from the contract's performance."). The MSA's plain language provides that it did not "provide any rights to,

[and is not] enforceable by, any person or entity that is not a Settling State or a Released Party." 3 PA 517. The Cigarette Manufacturers proffer no cogent argument contravening the MSA's plain language, *see* PM Answer at 49; LG Answer at 1, nor could they. Other jurisdictions that have addressed this question have concluded that the MSA does not confer any beneficiary right to any individual person.[54] *See McClendon v. Ga. Dep't of Cmty. Health*, 261 F.3d 1252, 1261-62 (11th Cir. 2001) (holding that Georgia persons suffering illnesses caused by tobacco products "are not entitled to any of the [MSA] settlement proceeds," as those "were paid only for other claims—those covering the interests of the settling states themselves"); *Floyd v. Thompson*, 227 F.3d 1029, 1037 (7th Cir. 2000) (holding that Wisconsin persons who received Medicaid payments to treat their tobacco-related illnesses could not assert a claim to anything within the MSA); *Lopes v. Commonwealth*, 811 N.E.2d 501, 511 (Mass. 2004) ("Every Federal Circuit Court of Appeals that has considered the question has held that a Medicaid beneficiary has no

[54]The Cigarette Manufacturers' argument concerning the applicability of *Watson v. Texas*, 261 F.3d 436, 444-45 (5th Cir. 2001), is well-taken and the Camachos abandon their reliance upon the same.

cognizable claim . . . to the tobacco settlement funds."). The Cigarette Manufacturers' contrary framing of these cases is a naked misrepresentation of their holdings. *See* PM Answer at 50; LG Answer at 1; *see also* RPC 3.3(1).

D. *Conclusion*

Given that punitive damages are a remedy rather than a claim, given that the Camachos were not in privity with the Nevada Attorney General under an adequate representation theory or under a parens patriae theory, given that the MSA did not release the Camachos' personal injury claims giving rise to their request for punitive damages, and given that the Camachos are not intended beneficiaries of the MSA, the district court erred in granting the Cigarette Manufacturers' motions for summary judgment regarding the Camachos' punitive damages request.

CONCLUSION

At least four personal injury lawsuits involving cigarette manufacturers are currently pending in the Eighth Judicial District Court. That district courts are arriving at different legal conclusions under similar fact patterns demonstrates the need for this court to clarify

the legal questions that the Camachos' mandamus petition presents. Accordingly, the Camachos urge this court to entertain the merits of their mandamus petition. Regarding the merits, the Camachos' mandamus petition clearly demonstrates the manifest errors that the district court committed in granting the Cigarette Manufacturers' motions for summary judgment. In answering the Camachos' mandamus petition, the Cigarette Manufacturers misrepresented the record before this court, mispresented the caselaw that the Camachos' proffered, and otherwise failed to defend the district court's errors.

Accordingly, the Camachos urge this court to issue a writ of mandamus ordering the district court to vacate its orders granting summary judgment in favor of the Cigarette Manufacturers regarding the Camachos' negligence claims and request for punitive damages.

Dated this 13th day of November 2023.

CLAGGETT & SYKES LAW FIRM

/s/ *David P. Snyder*

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Micah S. Echols. Esq.
Nevada Bar No. 8437
Matthew S. Granda, Esq.
Nevada Bar No. 12753
David P. Snyder, Esq.
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
Nevada Bar No. 13685

Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL

Attorneys for Petitioners,
Laura Purkett and Anthony Camacho

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because I prepared this brief in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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

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

find the matter relied on to support every assertion in the brief.

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

Dated this 13th day of November 2023.

CLAGGETT & SYKES LAW FIRM

/s/ *David P. Snyder*

Sean K. Claggett, Esq.
Nevada Bar No. 8407
Micah S. Echols. Esq.
Nevada Bar No. 8437
Matthew S. Granda, Esq.
Nevada Bar No. 12753
David P. Snyder, Esq.
Nevada Bar No. 15333
Charles L. Finlayson, Esq.
Nevada Bar No. 13685

Fan Li, Esq.
Nevada Bar No. 15771
KELLEY | UUSTAL

Attorneys for Petitioners,
Laura Purkett and Anthony Camacho

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS* and appendices with Supreme Court of Nevada on the 13th day of November 2023. I shall make electronic service of the foregoing documents in accordance with the Master Service List as follows:

KELLEY | UUSTAL
Fan Li, Esq.
fli@kulaw.com
500 N. Federal Hwy., Ste. 200
Fort Lauderdale, Florida 33301
(305) 444-7675 – Telephone
Attorney for Petitioners, Laura Purkett and Anthony Camacho

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL
D. Lee Roberts, Jr., Esq.
lroberts@wwhgd.com
Phillip N. Smith, Jr., Esq.
psmithjr@wwhgd.com
Daniela LaBounty, Esq.
dlabounty@wwhgd.com
6385 S. Rainbow Blvd., Ste. 400, Las Vegas, Nevada 89118
(702) 938-3809 – Telephone
Attorneys for Real Parties in Interest, Philip Morris USA, Inc., and ASM Nationwide Corporation

LEWIS ROCA ROTHGERBER CHRISTIE LLP
Daniel F. Polsenberg
dpolsenberg@lrrc.com
J. Christopher Jorgensen
cjorgensen@lrrc.com
3993 Howard Hughes Pkwy., Ste. 600, Las Vegas, Nevada 89169
(702) 949-8200 – Telephone
Attorneys for Real Party in Interest, Liggett Group, LLC

KASOWITZ BENSON TORRES LLP
Kelly Anne Luther, Esq. (pro hac vice)
kluther@kasowitz.com
Maria H. Ruiz, Esq. (pro hac vie)
mruiz@kasowitz.com
Giselle Gonzalez Manseur, Esq. (pro hac vice)
gmanseur@kasowitz.com
1441 Brickell Ave., Ste. 1420, Miami, FL 33131
(786) 587-1045 – Telephone
Attorneys for Real Party in Interest, Liggett Group, LLC

SHOOK, HARDY & BACON L.L.P.
Scott A. Chesin (pro hac vice)
Elliott M. Davis (pro hac vice)
One Rockefeller Plaza, Ste. 2801, New York, N.Y. 10020
(212) 989-8844 – Telephone
Attorneys for Real Party in Interest, Philip Morris USA, Inc.

FASI & DIBELLO
Joseph M. Fasi, II, Esq. (pro hac vice)
fasi@fasidibellolaw.com
150 SE 2d Ave., Ste. 1010, Miami, FL 33131
(305) 537-0469 – Telephone
Attorney for Real Party in Interest, Philip Morris USA Inc.

WEINBERG, WHEELER, HUDGINS, GUNN & DIAL, LLC
Ryan T. Gormley, Esq.
rgormley@wwhgd.com
6385 S. Rainbow Blvd., Ste. 400, Las Vegas, Nevada 89118
(702) 938-3838 – Telephone
Attorney for Real Party in Interest, Philip Morris USA, Inc.

SHOOK, HARDY & BACON L.L.P.
Peter M. Henk (pro hac vice)
phenk@shb.com
600 Travis St., Ste. 3400, Houston, Texas 77002
(713) 227-8008 – Telephone
Attorney for Real Party in Interest, Philip Morris USA, Inc.

SHOOK, HARDY & BACON
Jennifer Blues Kenyon, Esq.
jbkenyon@shb.com
Bruce R. Tepikian, Esq.
btepikian@shb.com
2555 Grand Blvd., Kansas City, MO 64108
(816) 474-6550 – Telephone
Attorneys for Real Party in Interest, Philip Morris USA, Inc.

BAILEY KENNEDY
Dennis L. Kennedy, Esq.
dkennedy@baileykennedy.com
Joseph A. Liebman, Esq.
jliebman@baileykennedy.com
8984 Spanish Ridge Ave., Las Vegas, Nevada 89148
(702) 562-8820 – Telephone
Attorneys for Real Party in Interest, R.J. Reynolds Tobacco Company

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

Hon. Nadia Krall, D.J.
dept04lc@clarkcountycourts.us
Respondent

/s/ Anna Gresl

Anna Gresl, an employee of
CLAGGETT & SYKES LAW FIRM