No. _____

In the
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

ARMAND FONTAINE, individually and as special personal representative of the Estate of Barbara Ellen Fontaine,

Respondent.

On Petition for Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Cigarette Labeling and Advertising Act preempts any "requirement or prohibition based on smoking and health … with respect to the advertising or promotion of … cigarettes" beyond those required by federal law. 15 U.S.C. §1334(b). In *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), a plurality opined that whether a state-law claim imposes a requirement "based on" smoking and health turns on the scope of the claim's "predicate" "legal duty." *Id.* at 523-24. Invoking "the strong presumption against pre-emption," the plurality concluded that the Labeling Act preempts only failure-to-warn and fraud-based warning-neutralization claims—but not fraud claims based on a "general duty" "not to deceive." *Id.* at 523, 528-29. The Court adopted the plurality's test in *Altria Group v. Good*, 555 U.S. 70 (2008), again invoking the presumption to narrow the text. Justice Thomas—joined by the Chief Justice and Justices Scalia and Alito—dissented from that "atextual" and "unworkable" decision and warned that the Court "may" be "forced" to "revisit" it. *Id.* at 92, 112.

Below, the Massachusetts Supreme Judicial Court applied *Altria* to affirm a fraud judgment based on Petitioner's removal of additional, voluntary health warnings beyond those required by the Labeling Act from certain cigarette packages. The court acknowledged that liability for the same conduct would be preempted if asserted as a failure-to-warn claim.

The questions presented are:

1. Whether, under *Altria*, simply re-labeling conduct that would support a failure-to-warn claim as

a generic fraud claim is enough to escape preemption under the Labeling Act.

2. Whether *Altria* should be revisited and overruled.

PARTIES TO THE PROCEEDING

Petitioner Philip Morris USA Inc. was a defendant before the trial court and the appellant before the Massachusetts Supreme Judicial Court.

Respondent Armand Fontaine was the plaintiff before the trial court and the appellee before the Massachusetts Supreme Judicial Court.

R.J. Reynolds Tobacco Co. and DeMoulas Super Markets, Inc. were defendants in the trial court but were not parties to the proceedings on appeal.

CORPORATE DISCLOSURE STATEMENT

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. (NYSE: MO), a publicly traded company that has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RELATED PROCEEDINGS

Fontaine v. Philip Morris USA Inc., No. 2081-CV-00169 (Mass. Super. Ct. filed Jan. 17, 2020);

Fontaine v. Philip Morris USA Inc., No. 2024-P-0363 (Mass. Ct. App. transferred *sua sponte* May 21, 2025); and

Fontaine v. Philip Morris USA Inc., No. SJC-13778 (Mass. judgment entered Apr. 22, 2026).

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INTRODUCTION

Congress enacted the Federal Cigarette Labeling and Advertising Act to establish a "comprehensive Federal" regime for the labeling and advertising of cigarettes. 15 U.S.C. §1331. To that end, the Act offers a simple bargain: Manufacturers must label their cigarette packages and advertising with one of several federally mandated warnings about the health effects of smoking; if they do, they may not be subject to any state-law requirement "based on smoking and health." *Id.* §1334(b). Thus, a state law mandating additional warnings above and beyond those required by federal law is clearly preempted. Similar labeling-related preemption provisions pervade the U.S. Code, reflecting "Congress's judgment that the ability to sell a product throughout the country with a single label can be important to maintaining an efficient nationwide market." *Monsanto v. Durnell*, 146 S.Ct. 2001, 2012 (2026).

While Congress plainly foreclosed efforts by states to mandate warnings above and beyond those required by federal law, federal law allows manufacturers to include additional voluntary warnings. For a time, certain brands marketed by Liggett Group included the additional voluntary warning that "Smoking is Addictive." After Petitioner acquired those brands, it discontinued that voluntary warning while maintaining the mandatory federal warnings, thus aligning the newly acquired brands with Petitioner's other products. The court below recognized that under this Court's precedents, an effort to bring a state-law failure-to-warn claim based on the removal of a voluntary warning would be squarely preempted. Nonetheless, because the same

basic theory was packaged as a generic fraud claim, the decision below allowed the case to proceed, resulting in a more-than-$1 billion jury verdict based on the failure to supplement the federally required labeling.

The Supreme Judicial Court premised its formalistic rule on this Court's decision in *Altria Group v. Good*, 555 U.S. 70 (2008), and the plurality opinion in *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). Under those cases, whether a state-law claim imposes a requirement "based on" smoking and health depends on the scope of the claim's "predicate" "legal duty." *Cipollone*, 505 U.S. at 524. If the claim rests on the theory that a manufacturer's packaging "should have included additional, or more clearly stated, warnings," it is preempted, *id.*; if the claim rests on a "general duty" "not to deceive," it is not, *id.* at 528-29. In other words, preemption turns on whether "the gravamen of the claim was the defendants' failure to warn." *Altria*, 555 U.S. at 81.

The *Altria-Cipollone* predicate-duty test prompted widespread criticism from the start. Justice Scalia derided the test as impossible to apply "consistently" and grounded on "the narrowest possible construction" of the Labeling Act. *Cipollone*, 505 U.S. at 545, 552 (Scalia, J., dissenting in part). Justice Thomas condemned it as "atextual," "unworkable," and at odds with "a commonsense reading" of the statute. *Altria*, 555 U.S. at 92, 97 (Thomas, J., dissenting). And lower courts have persistently lamented that it "is difficult to apply." *Pooshs v. Philip Morris USA*, 2014 WL 6789886, at *16 (N.D. Cal. Dec. 2, 2014).

The decision below takes application of the *Altria-Cipollone* test to new heights of absurdity. Respondent's theory that Petitioner could be held liable under state law for selling cigarettes accompanied by the federally mandated warnings—simply because it removed additional voluntary warnings included by a previous manufacturer—is a frontal assault on the Labeling Act's express-preemption clause. Congress enacted a preemption provision, not a pleading requirement, and it did so to prevent "diverse, nonuniform, and confusing cigarette labeling" requirements imposed by state law. 15 U.S.C. §1331(2). A state law punishing a manufacturer for removing a wholly voluntary warning is in essence a failure-to-warn claim and is plainly preempted by the Labeling Act, regardless of how a plaintiff labels her claim under state law.

The Supreme Judicial Court's contrary view is either a fundamental overreading of *Altria* or a powerful argument for its overruling. Congress enacted a meaningful express-preemption provision. There is no valid basis to read *Altria* as converting that substantive provision into a pleading requirement. But if that is indeed a faithful reading of *Altria* then it is an utterly faithless construction of the statutory text. Either way, this Court should grant review and reverse.

In his *Altria* dissent, Justice Thomas forecast that lower courts would struggle to apply the majority's test, and that the day would come when the Court would be "force[d] … to yet again revisit [its] interpretation of the Labeling Act." 555 U.S. at 112 (Thomas, J., dissenting). That day is here. This case presents an important opportunity for the Court to

either clarify the *Altria-Cipollone* predicate-duty test or jettison it altogether as atextual and wholly unworkable. Granting review likewise would provide an opportunity to clarify that the presumption against preemption—which *Altria*, the *Cipollone* plurality, and the decision below all invoked—has no role in interpreting express-preemption provisions. And it would allow the Court to make clear that failure-to-warn claims cannot escape preemption merely by being repackaged or disguised as fraud or design-defect claims.

Whether to clarify *Altria* or overrule it, this Court should grant review to vindicate Congress' interest in federal regulatory uniformity and to declare definitively that the plain statutory language—not a judge-made presumption—determines the scope of express-preemption provisions.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported at 277 N.E.3d 585 and reprinted at App.1-41. The relevant oral ruling of the trial court is not published in any reporter but is reprinted at App.66-67.

JURISDICTION

The Massachusetts Supreme Judicial Court issued its judgment on April 22, 2026. Justice Jackson extended the certiorari deadline to August 20. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISION INVOLVED

The express-preemption provision of the Federal Cigarette Labeling and Advertising Act states: "No requirement or prohibition based on smoking and

health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. §1334(b).

STATEMENT OF THE CASE

A. Legal Background

1. In 1965, the Labeling Act "establish[ed] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. §1331. To that end, the Act mandated that cigarette packages bear one of several federally prescribed warning labels to inform the public about the "adverse health effects of cigarette smoking." *Id.* §1331(1). At the same time, Congress made clear such warnings were both necessary and sufficient: It provided that "no statement relating to smoking and health, other than" the statements in §1331, "shall be required on any cigarette package." *Id.* §1334(a).

To prevent states from disrupting that uniform labeling regime, Congress enacted an express-preemption provision that, as amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970), precludes states from imposing any "requirement or prohibition based on smoking and health … with respect to the advertising or promotion" of cigarettes "labeled in conformity with" the Labeling Act's requirements. 15 U.S.C. §1334(b). Together, the federal labeling requirements and express-preemption provision ensure that "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" do not "impede[]" "commerce and the national economy." *Id.* §1331(2).

2. This Court first considered the scope of the Act's express-preemption provision in *Cipollone*. The Court concluded that the Act preempts certain state-law fraud and failure-to-warn claims against tobacco companies, but no opinion secured a majority.

The *Cipollone* plaintiffs asserted claims for failure to warn and "two theories of fraudulent misrepresentation." 505 U.S. at 527 (plurality op.). One of the fraud theories "alleged that [the defendants] had willfully, 'through their advertising, attempted to neutralize the federally mandated warning' labels"; the other alleged "false representation of a material fact." *Id.* at 510, 528. Six Justices agreed that the Labeling Act preempts failure-to-warn claims, but the Justices fractured as to which of the plaintiffs' two fraud claims were preempted.

Invoking a "presumption against the pre-emption of state police power regulations," a four-Justice plurality endorsed a claim-by-claim preemption analysis that asks "in each case … whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health.'" *Id.* at 518, 523-24. The plurality concluded that the plaintiffs' failure-to-warn claims were preempted under that test because they rested on a duty to "includ[e] additional, or more clearly stated, warnings" about the health risks of smoking. *Id.* at 524. The plurality held that the warning-neutralization fraud claim was also preempted as a requirement "based on smoking and health" because "[s]uch a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to

minimize the health hazards associated with smoking." *Id.* at 527.

By contrast, the plurality concluded that fraudulent misrepresentation "claims based on allegedly false statements of material fact made in advertisements" for cigarettes are not preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation—the duty not to deceive." *Id.* at 528-29. According to the plurality, "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Id.* at 529.

Justice Scalia, joined by Justice Thomas, sharply criticized the plurality's predicate-duty test—and its "extraordinary and unprecedented" reliance on the notion that "express pre-emption provisions must be construed narrowly." *Id.* at 544 (Scalia, J., dissenting in part). They would have held that the test for determining whether a claim is "based on smoking and health" is one of "proximate application"—*i.e.*, whether the claim "impose[d] an obligation in this case *because of the effect of smoking upon health*." *Id.* at 554 (emphasis added). Applying this broader, more straightforward standard, Justices Scalia and Thomas concluded that the Act preempted all the plaintiffs' claims. *Id.* at 544, 554.

3. Almost two decades later, this Court revisited the Labeling Act's preemption framework in *Altria*, and, in a 5-4 opinion, adopted the *Cipollone* plurality's preemption framework. While "acknowledg[ing]"—as the *Cipollone* plurality had done, 505 U.S. at 529 n.27—"that [its] analysis of these claims may lack 'theoretical elegance,'" the Court held that the Labeling Act preempts theories of state-law liability

"predicate[d]" on a "legal duty that … constitutes a requirement or prohibition based on smoking and health … with respect to … advertising or promotion" of cigarettes. *Altria*, 555 U.S. at 80, 84. Applying that predicate-duty test, the Court held that the plaintiffs' claim that the "deceptive statements 'light' and 'lowered tar and nicotine' induced them to purchase [the defendants'] product allege[d] a breach of the duty not to deceive" and therefore was not preempted. *Id.* at 82.

Justice Thomas, joined by the Chief Justice, Justice Scalia, and Justice Alito, dissented. Justice Thomas criticized the majority's approach as "unworkable," "atextual," and "overtaken by more recent decisions of this Court," and faulted the majority for relying on a presumption against preemption to narrow the Act's express-preemption provision. *Id.* at 92, 97, 111-12 (Thomas, J., dissenting). "Applying the proper test—*i.e.*, whether a jury verdict on [the plaintiffs'] claims would impos[e] an obligation on the cigarette manufacturer because of the effect of smoking upon health," Justice Thomas viewed the plaintiffs' claims as preempted because they "seek to impose liability on [the defendants] because of the effect that smoking light cigarettes had on their health." *Id.* at 109. Justice Thomas warned that the "resulting confusion about the nature of a claim's 'predicate duty' and inevitable disagreement in the lower courts" may "force" the Court "to yet again revisit the Court's interpretation of the Labeling Act." *Id.* at 111-12.

B. Factual And Procedural Background

1. In 2020, Respondent Armand Fontaine brought this action against Petitioner seeking recovery for the

death of his wife, a longtime smoker. App.5-6. Respondent asserted claims against Petitioner for wrongful death, breach of the implied warranty of merchantability, negligent design, negligent marketing, fraud, civil conspiracy, and deceptive trade practices. *Id.*[1]

The case proceeded to trial in 2022. App.6. A central theme of Respondent's trial presentation was that Petitioner's cigarette warning labels were ineffective and that it should have added additional warnings to its cigarette packaging beyond those mandated by Congress. *See* App.69, 73, 75.

Respondent emphasized that theory when questioning witnesses and during closing arguments by highlighting Petitioner's purchase of several cigarette brands from Liggett Group, a separate manufacturer. In 1997, Liggett voluntarily placed an additional warning on its cigarette packages—not required by the Labeling Act—that "Smoking is Addictive." App.71. Two years later, Petitioner purchased several Liggett brands and began selling them with only the federally mandated warning labels, in conformity with how Petitioner labeled its existing brands. App.72-73.

Before trial, Petitioner moved, based on the Labeling Act, to preclude Respondent from introducing evidence of the Liggett warnings to support his fraud and conspiracy claims. App.58. Petitioner explained that Respondent's theory of liability—that the removal of the voluntary Liggett

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[1] Respondent also sued R.J. Reynolds Tobacco and DeMoulas Super Markets. R.J. Reynolds was dismissed before trial, and the jury found in favor of DeMoulas. App.5-6 & n.8.

warnings showed that "Philip Morris was concealing facts about the addictiveness of smoking"—was an "attempt to circumvent express preemption" and to impose liability for "failing to include warnings in addition to the federally mandated warnings." App.60. The trial court disagreed. App.66-67. It accepted Respondent's representation that "[p]reemption does not apply to common law causes of action for fraud or conspiracy" under *Altria* and *Cipollone*, and ruled that the jury was entitled to "pas[s] judgment, essentially, on Philip Morris's conduct" in "removing such warnings." App.65, 66-67.

Having been given that green light, Respondent repeatedly highlighted the voluntary Liggett warnings at trial, arguing that Petitioner should be held liable and punished for failing to continue Liggett's voluntary warnings. On direct examination in Respondent's case-in-chief, Respondent's expert historian, Dr. Proctor, testified that Petitioner "took [Liggett's] warnings off completely" and "never put them on again." App.69.

Respondent's counsel also cross-examined Petitioner's corporate representative on the same topic:

> Q: And when Philip Morris purchased [the Liggett] brands, Philip Morris removed that label that Liggett had put on there, the label that [read] 'Warning: Smoking is addictive.' Philip Morris took that off, didn't they?
>
> A: We did, yes.

App.73.

Respondent's counsel further hammered the voluntary Liggett warnings during closing argument,

faulting Petitioner for a supposed lack of "transparen[cy]" about the dangers of smoking based on its removal of the voluntary warnings:

> [T]hey said they wanted to be honest and transparent with their consumers about nicotine being addictive. So what did they do? They removed the labels. They removed them. They took them off. They didn't have to do that. That was their choice to make.

App.75.

That inflammatory (and preempted) appeal had its intended effect, as the jury ultimately found in Respondent's favor on all his claims. App.7. The jury awarded $8 million in compensatory damages and an eye-popping $1 *billion* in punitive damages—the largest punitive-damages award in Massachusetts history by several orders of magnitude. App.1-2, 11-12 & n.11. The trial court remitted the punitive-damages award to $56 million. App.2.

2. Petitioner appealed to the Massachusetts Appeals Court, and the Supreme Judicial Court transferred the appeal on its own initiative. App.10. Petitioner renewed its argument on appeal that the jury was "erroneously permitted to impose liability on theories that are preempted by the [Labeling] Act." App. 3. The Supreme Judicial Court rejected the argument and affirmed.

The Supreme Judicial Court concluded that the jury's liability findings did not rest "on theories preempted by the Labeling Act." App.4. To reach that conclusion, the court began by underscoring that the Act "is to be read narrowly 'in light of the presumption against the pre-emption of state police power regulations.'" App.36 (quoting *Cipollone*, 505 U.S. at

517-18). Citing *Altria* and *Cipollone*, the court held that "no … preempted claim was asserted in this case" because Respondent had asserted claims only for "fraud and conspiracy," rather than failure to warn, and "[s]tate law fraud and conspiracy claims alleging breach of the 'duty not to deceive' are not preempted by the Labeling Act." App.37. According to the court, it was irrelevant to Labeling Act preemption that the same evidence and "theor[y]" of liability—*i.e.*, that Petitioner had allegedly "deceiv[ed] its customers" by refusing to provide additional warnings not required by federal law—could have equally supported "an unasserted preempted claim" for failure to warn. App.36-37. What mattered, the court concluded, was that the "claim[s] that w[ere] asserted" were captioned as fraud and conspiracy—not failure to warn. App.37.

REASONS FOR GRANTING THE PETITION

The decision below is incompatible with the "comprehensive Federal program to deal with cigarette labeling and advertising" established in the Labeling Act. 15 U.S.C. §1331. Respondent's state-law judgment holds Petitioner liable for removing entirely voluntary health warnings about smoking and health above and beyond the warnings mandated by federal law. That is a cut-and-dried case for preemption under the Act, as the underlying tort plainly imposes a state-law requirement "based on smoking and health." *Id.* §1334(b). The Massachusetts Supreme Judicial Court evaded that straightforward conclusion only by converting the Act's substantive express-preemption provision into a pleading requirement. The Supreme Judicial Court attributed that alarming result to this Court by

reading *Altria* to allow these claims to go forward because Respondent denominated them "fraud" and "conspiracy," rather than failure to warn. But this Court's decision in *Altria*, properly construed, forecloses that formalistic result because "the gravamen of the claim[s] was [Petitioner's] failure to warn." 555 U.S. at 81. In enacting the Labeling Act's express-preemption provision, Congress sought to accomplish something of substance—namely, to eliminate state-law warning requirements above and beyond the federal-law mandates—not to impose a mere pleading requirement. It is hard to imagine a claim that is more antithetical to Congress' judgment than one that imposes liability for removing an entirely voluntary additional warning from cigarettes that include all the warnings federal law requires. And the removed warning—"Smoking is Addictive"—plainly addresses smoking and health. To allow that claim to go forward simply because the plaintiff eschewed a failure-to-warn label clearly conflicts with any sensible reading of *Altria*. S.Ct.Rule.10(c).

If, however, the Massachusetts Supreme Judicial Court correctly applied *Altria*, then *Altria* must be overruled. Justice Thomas, joined by three other dissenting Justices, warned that the predicate-duty test would prove "unworkable," in part because it has "little or no relationship to the text of the statute," and emphasized that lower courts had already experienced "frustration" and "difficulty in applying" the test first announced by the *Cipollone* plurality. 555 U.S. at 92. The lower courts' difficulties have only compounded since *Altria* was decided. And if the only way to make the *Altria* test workable is to convert it into a formalistic pleading requirement as the Supreme Judicial Court did here, then the test is

unsustainable. *Altria* is likewise difficult to square with subsequent developments, as this Court has squarely abandoned the presumption against preemption in more recent express-preemption cases. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016). Undeterred, the court below continued to apply the presumption against preemption, and other courts have used *Altria* as an excuse to resist the message conveyed by *Franklin*.

While stare decisis has greater force in statutory cases, neither *Cipollone* nor *Altria* actually tried to give the statutory text itself a definitive construction, resorting instead to the presumption against preemption. Moreover, as Justice Thomas emphasized in *Altria*, "the Court should not hesitate to allow [its] precedent to yield to the true meaning of an Act of Congress when [its] statutory precedent is unworkable or badly reasoned." 555 U.S. at 108. That is precisely the case here, especially as construed by the court below. *Altria*'s atextual reading of the Labeling Act continues to confound lower courts, has opened the door to billions of dollars in fraud-based liability for companies that have fully complied with federal labeling requirements, and has fomented precisely the type of "diverse, nonuniform, and confusing" state-law requirements the Act's "comprehensive Federal" scheme was designed to stamp out. 15 U.S.C. §1331. There is no reason to wait for Congress to fix a problem of this Court's own making. *See Altria*, 555 U.S. at 108 (Thomas, J., dissenting). The day has come to either clarify *Altria* or overrule it.

I. The Decision Below Conflicts With This Court's Decision In *Altria*.

The Massachusetts Supreme Judicial Court upheld a $64 million judgment based on Petitioner's decision to remove voluntary health warnings above and beyond those required by federal law. The court's holding that the Labeling Act does not preempt this labeling-based theory of state-law liability is impossible to reconcile with a proper understanding of this Court's decision in *Altria* (or any credible construction of the Act's express-preemption clause).

A. The Labeling Act requires cigarette manufacturers to "include in their packaging and advertising … precise warnings mandated by Congress" to ensure that the public is "adequately informed that cigarette smoking may be hazardous to health." *Altria*, 555 U.S. at 78 (quoting 15 U.S.C. §1331). At the same time, Congress shielded cigarette manufacturers from inconsistent state regulation by expressly preempting any state-law "requirement or prohibition based on smoking and health … with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the" Act. 15 U.S.C. §1334(b).

Under a faithful application of the *Altria-Cipollone* framework, the Labeling Act forecloses Respondent's labeling-based fraud and conspiracy claims. That framework focuses the preemption analysis on the "predicate" "legal duty" underpinning the claim. *Cipollone*, 505 U.S. at 524 (plurality op.). If the claim imposes a duty to "includ[e] additional, or more clearly stated, warnings" about the health risks of smoking, it is a preempted requirement "based on smoking and health." *Id.* at 523-24 (quoting 15 U.S.C.

§1334(b)). Liability for removing an entirely voluntary additional warning—while retaining the federally mandated warning—can only be understood as imposing a requirement for additional warnings about the health risks of smoking. *Altria* further emphasized that the touchstone is whether "the gravamen of the claim was the defendants' failure to warn." 555 U.S. at 81. Liability for removing an entirely voluntary label is plainly a complaint about the defendants' failure to warn, no matter what label is placed on the tort.

Respondent sought to hold Petitioner liable for fraud and conspiracy based on its removal of the voluntary warning "Smoking is Addictive"—a warning provided in addition to those required by federal law—from the packages of cigarette brands it purchased from another manufacturer, Liggett. *See* App.75. That theory of liability imposes a paradigmatic "requirement … based on smoking and health." 15 U.S.C. §1334(b). Respondent's claim that Petitioner committed fraud by not retaining Liggett's voluntary warnings rested on the theory that Massachusetts law required it to provide *additional* health warnings on its cigarette packages beyond those mandated by the federal government.

The Labeling Act squarely forecloses that state-law theory. As this Court explained in *Altria*, Congress determined in the Labeling Act that "the prescribed federal warnings are both necessary *and sufficient* to achieve its purpose of informing the public of the health consequences of smoking." 555 U.S. at 79 (emphasis added). States thus may not "enforc[e] rules that are based on an assumption that the federal warnings are inadequate." *Id.* That

describes Respondent's fraud and conspiracy claims to a T, as they seek to impose state-law liability based on Petitioner's removal of the Liggett warnings and its decision to leave only the federally mandated warnings on its cigarette packages. That theory of liability necessarily rests on the "assumption that the federal warnings are inadequate," *id.*, and that additional "warnings [should] be included in advertising and promotional materials," *Cipollone*, 505 U.S. at 527. The Act preempts that theory.

B. In holding otherwise, the Massachusetts Supreme Judicial Court invoked *Cipollone* for the proposition that "[s]tate law fraud and conspiracy claims alleging breach of the 'duty not to deceive' are not preempted by the Labeling Act." App.37. According to the court, it was irrelevant that evidence of "the same conduct"—Petitioner's removal of the Liggett warnings—could have supported a "preempted claim" for failure to warn. *Id.*

That superficial reasoning overreads *Altria* and converts the Labeling Act's substantive preemption clause into a mere pleading requirement. *Altria* indeed asks whether a fraud claim alleges a breach of the general "duty not to deceive." 555 U.S. at 81. But when the alleged "deception" is the failure to continue to supply voluntary warnings above and beyond those mandated by federal law, that is a failure-to-warn claim, whatever label is attached to it.

Nothing in *Cipollone* or *Altria* is to the contrary. In fact, the "fraud" claim here is even more obviously preempted than the fraud claim that the plurality found preempted in *Cipollone*. There, the plaintiffs alleged that the defendants, through their advertising, committed fraud by "neutraliz[ing] the

effect of federally mandated warning labels." 505 U.S. at 527. As the plurality explained, such a claim is "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." *Id.* It was thus "quite clear" that the plaintiffs' "theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory." *Id.* at 528. The same logic applies *a fortiori* here; Respondent's fraud claim imposes an affirmative state-law requirement that manufacturers continue to include additional warnings on cigarette packages that federal law does not mandate.

The Supreme Judicial Court did not meaningfully analyze the underlying duty at issue. And the court ignored *Altria*'s admonition that preemption turns on the "gravamen" of the claim—not its label. 555 U.S. at 81. Indeed, since *Altria*, this Court has only reinforced that federal preemption depends on substance, not labels. In *Mutual Pharmaceutical v. Bartlett*, 570 U.S. 472 (2013), for example, the Court held that the Federal Food, Drug, and Cosmetic Act's labeling requirements preempted a state design-defect claim that "imposed a duty on [the manufacturer] to strengthen [a drug's] warnings." *Id.* at 487. Likewise, in *National Meat Association v. Harris*, 565 U.S. 452 (2012), the Court rejected an effort to "fram[e]" state law in a way that would avoid federal preemption. *Id.* at 464.

The decision below stands that principle on its head and invites plaintiffs to evade the Labeling Act simply by invoking the magic word "fraud." Allowing enterprising plaintiffs to plead around the Act's express-preemption provision by disguising a failure-to-warn claim as a fraudulent-misrepresentation claim would engender precisely the "diverse, nonuniform, and confusing cigarette labeling" regime that Congress condemned. 15 U.S.C. §1331(2). It would render the express-preemption provision that Congress enacted "almost meaningless," and it "pay[s] too little respect to Congress' substantial reworking of the Act." *Cipollone*, 505 U.S. at 529 n.27. *Altria* does not countenance that facile workaround.

To the extent that the court below adopted this misguided interpretation of *Altria* by applying the presumption against preemption, that only heightens the need for this Court's review. For better or worse, this Court already applied the presumption against preemption in *Altria* and the *Cipollone* plurality opinion. That approach is now outmoded and may justify revisiting *Altria*, but applying the presumption to interpret a decision that has already applied the presumption is not just anachronistic, but impermissible double counting. Only by applying a presumption-against-preemption-squared could one reach the absurd conclusion that a claim that is in essence a failure-to-warn claim escapes preemption just because it is labeled a fraud claim.

Finally, the Supreme Judicial Court's misconstruction of *Altria* has significance well beyond the Labeling Act. Numerous statutes contain express-preemption provisions that preempt failure-to-warn claims but not all state-tort liability. *See, e.g.*,

Durnell, 146 S.Ct. at 2012 (collecting statutes); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-25 (2008). Given the obvious incentives for plaintiffs to plead around federal preemption defenses, all those statutes require courts to develop rules for separating disguised failure-to-warn claims that are preempted despite being labeled a fraud or design-defect claim. *See, e.g.*, *Riegel*, 552 U.S. at 330 (recognizing availability of such an argument). If all a plaintiff need do to evade federal preemption under those statutes is change the label on the claim, then Congress' clear intent will be hopelessly frustrated. Thus, reviewing and correcting the decision below will provide critical guidance for numerous statutes beyond the Labeling Act.

II. If The Decision Below Correctly Applied *Altria*, *Altria* Should Be Overruled.

If the Massachusetts Supreme Judicial Court's decision is a faithful application of *Altria*, then *Altria* should be revisited and overruled.

A. *Altria* Conflicts with the Statutory Text, Structure, and Purpose.

1. The Labeling Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion" of cigarettes bearing the federally prescribed warning labels. 15 U.S.C. §1334(b). As Justices Scalia and Thomas explained, that text is most naturally read as preempting any state common-law or statutory claim that imposes an obligation "*because of* the effect of smoking upon health." *Cipollone*, 505 U.S. at 554 (Scalia, J., dissenting in part) (emphasis added); *see also Altria*, 555 U.S. at 97 (Thomas, J., dissenting) (same).

That conclusion flows directly from the text's plain wording. State common-law claims impose "requirements" because they obligate defendants to take or refrain from certain actions on pain of liability. *Durnell*, 146 S.Ct. at 2010; *see Riegel*, 552 U.S. at 324-25. And "[i]n common talk, the phrase 'based on' indicates a but-for causal relationship." *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007). Taking those terms together, a claim (a "requirement") is "based on smoking and health" under the Labeling Act if it "imposes an obligation" on a cigarette manufacturer to change its advertising or promotion "because of the effect of smoking upon health." *Altria*, 555 U.S. at 96 (Thomas, J., dissenting).

Under that but-for test, the source of the underlying state-law obligation is irrelevant. "[T]he methodology must focus not upon the ultimate source of the duty (*e.g.*, the common law) but upon its proximate application" to the purportedly actionable advertising or promotion. *Cipollone*, 505 U.S. at 553 (Scalia, J., dissenting in part). Thus, when a cigarette manufacturer's labeling conforms with federal law, the Labeling Act preempts state-law claims that, because of the relationship between "smoking and health," would hold a manufacturer liable for statements it made, or failed to make, in its "advertising or promotion" of cigarettes. 15 U.S.C. §1334(b). Unlike the predicate-duty test, that approach is straightforward to apply (and follows from the text).

2. *Altria*'s more complicated and less preemptive view of the Labeling Act is irreconcilable with the statute's structure and stated purpose.

The "textually stated objective of [the Labeling Act's] preemption clause," *Durnell*, 146 S.Ct. at 2010, is to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," 15 U.S.C. §1331. Through that comprehensive regime, Congress sought to forestall a set of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" from impeding "commerce and the national economy." *Id.*; *see Lorillard Tobacco v. Reilly*, 533 U.S. 525, 543 (2001). Superimposing divergent state-law fraud standards on the federal labeling framework is incompatible with Congress' explicit intent to establish uniform federal regulation. *Cf. Durnell*, 146 S.Ct. at 2013. To be sure, the Labeling Act allows manufacturers to provide additional warnings on top of the mandated federal warnings. But such voluntary warnings do not detract from the comprehensive federal regime or the importance of uniform requirements. By contrast, to impose liability—and punitive damages to boot—for removing a voluntary warning (while retaining the federally required warnings) is wholly incompatible with a comprehensive federal regime, the purpose of which is to establish uniform requirements.

The comprehensive character of the Labeling Act's federal regulatory framework is reinforced by the savings clause that expressly authorizes the FTC to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. §1336. The FTC savings clause underscores the absence of any comparable Labeling Act provision preserving a role for the states in regulating health-related statements or omissions in cigarette advertising and promotion. Congress "demonstrated that when [it] wished to"

save regulatory authority for particular actors, it "knew how to do so and did so expressly." *FS Credit Opportunities v. Saba Cap. Master Fund*, 146 S.Ct. 1546, 1555 (2026). Had Congress intended the states to retain a role in policing health-related claims or omissions in cigarette advertising and promotion, it would have included an analogous state-law savings clause—as it has done in other tobacco regulatory frameworks, *see* 15 U.S.C. §4406(c) (expressly preserving state-law liability based on advertising for smokeless tobacco products), and other statutory schemes that this Court has considered in recent years, *see Montgomery v. Caribe Transp. II*, 146 S.Ct. 1199, 1204 (2026). It chose not to do so in the Labeling Act.

B. *Altria*'s Reasoning Is Doctrinally Flawed and Logically Incoherent.

Altria's reasoning underlying its predicate-duty test was "suspect" from the start and has been undermined by subsequent developments. *Cipollone*, 505 U.S. at 552 (Scalia, J., dissenting).

1. Neither *Altria* nor the *Cipollone* plurality identified any textual basis for the predicate-duty test. The only support the *Cipollone* plurality could muster was "the background presumption against pre-emption and … legislative history." 505 U.S. at 529 n.27 (plurality op.). *Altria* likewise grounded its analysis entirely in "the assumption that the historic police powers of the States [are] not to be superseded … unless that was the clear and manifest purpose of Congress." 555 U.S. at 77.

That reliance on the presumption against preemption to narrow the plain language of an express-preemption provision was dubious from the

outset, but it is completely inconsistent with this Court's more recent preemption precedents instructing that courts should "not invoke any presumption against pre-emption" when a "statute contains an express pre-emption clause." *Franklin*, 579 U.S. at 125. Consistent with that approach, the presumption against preemption made no appearance in this Court's recent decision in *Durnell* construing the express-preemption clause of the Federal Insecticide, Fungicide, and Rodenticide Act. *See* 146 S.Ct. 2001.

The *Cipollone* plurality reached deeper into its outmoded toolkit by invoking legislative history, which it claimed "plainly expresse[d] an intent to preserve the 'police regulations' of the States." 505 U.S. at 529 n.27 (quoting S. Rep. No. 91-566, at 12 (1969)). But it is now well-established that legislative history cannot "be used to 'muddy' the meaning of 'clear statutory language.'" *Food Marketing Inst. v. Argus Leader Media*, 588 U.S. 427, 436 (2019). And the quoted Senate Report is irrelevant anyway. It merely explained that Congress intended to preserve states' power "with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar* police regulations." S. Rep. No. 91-566, at 12 (emphasis added). The Senate's belief that the text would not disturb police regulations over activities *unrelated to* cigarette advertising and promotion—and thus unaddressed by the Labeling Act—provides no support for the *Cipollone* plurality's preservation of state tort liability for the very advertising and promotional activities the Labeling Act "comprehensive[ly]" governs. 15 U.S.C. §1331.

Altria also invoked policy considerations, speculating that preemption of state-law fraud claims would encourage "cigarette manufacturers to engage in fraudulent advertising." 555 U.S. at 81 n.7. But as Justice Thomas emphasized, that concern was unfounded even in 2008 because "misleading promotional statements for cigarettes remain subject to federal regulatory oversight under the Labeling Act," which preserves the FTC's authority to police fraud by cigarette manufacturers. *Id.* at 107 (Thomas, J., dissenting). And *Altria*'s concern is particularly unfounded today—nearly two decades after Congress granted the Food and Drug Administration sweeping regulatory authority and enforcement powers over the tobacco industry, including its marketing practices. *See* Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §3(1), 123 Stat. 1776, 1781 (2009) (making the FDA "the primary Federal regulatory authority with respect to the manufacture, marketing, and distribution of tobacco products").

C. The *Stare Decisis* Factors Confirm That *Altria* Should Be Overruled.

Stare decisis does not justify retaining *Altria*. Each of the *stare decisis* factors—(1) the "quality" of *Altria*'s "reasoning," (2) its "workability," (3) its "disruptive effect on other areas of the law," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022), (4) "its consistency with other related decisions," (5) "developments since the decision was handed down," and (6) any "reliance" interests, *Janus v. Am. Fed'n of State, Cnty. & Municipal Emps.*, 585 U.S. 878, 917 (2018)—supports overruling *Altria*.

1. As explained, *Altria* was egregiously wrong from the outset. *Altria*'s predicate-duty test is

incompatible with the statutory text, structure, and stated purpose. Indeed, *Altria* did not purport to construe the statutory text, or even suggest that its reading was the best interpretation of that text. Instead, it claimed only that its reading "represents 'a fair understanding of congressional purpose,'" *Altria*, 555 U.S. at 84 (quoting *Cipollone*, 505 U.S. at 529-30 n.27)—albeit one that depended entirely on the now-discredited "presumption against pre-emption." *Cipollone*, 505 U.S. at 529 n.27.

2. *Altria* has proven unworkable. In dissent, Justice Thomas highlighted that lower courts had already lamented the "impossibility" of applying the *Cipollone* framework. 555 U.S. at 97 (Thomas, J., dissenting) (collecting cases); *see also Cipollone*, 505 U.S. at 543-44 (Blackmun, J.) (concurring in part and dissenting in part) (predicting "the difficulty lower courts will encounter in attempting to implement today's decision"). The chorus of confusion has only grown louder since. *E.g.*, *Pooshs*, 2014 WL 6789886, at *16. "[I]n practice," *Altria*'s "thin," "formalistic" distinction between preempted and non-preempted claims invites evasion. *Jacobson v. R.J. Reynolds Tobacco*, 2013 WL 12094893, at *3 (S.D. Fla. Sept. 12, 2013).

The decision below powerfully illustrates the unworkability of *Altria*'s predicate-duty test. Indeed, the only way the courts below could make the test workable was to resort to rank formalism. The Massachusetts Supreme Judicial Court recognized that Respondent's claims assailing the removal of a voluntary warning above and beyond those required by federal law could readily have been pleaded as a preempted failure-to-warn claim. But because they

were labeled instead as fraud claims, the court gave them a free pass. A rule for substantive preemption that can only be made workable by converting it to a mere pleading requirement cannot stand.

3. *Altria*'s reliance on the presumption against preemption has also engendered doctrinal confusion in other areas of law. Despite this Court's contrary admonition in *Franklin*, 579 U.S. at 125, lower courts have continued to invoke *Altria* and *Cipollone* as support for applying the presumption against preemption to narrow the scope of express-preemption provisions.

In *Shuker v. Smith & Nephew*, 885 F.3d 760 (3d Cir. 2018), for example, the Third Circuit cited *Cipollone* as precedent compelling it to continue applying the presumption against preemption to the Medical Device Amendments of 1976. *Id.* at 770-71. The court reasoned that *Franklin* did not involve "historic … state regulation of health and safety" and that courts therefore must "continue to apply the presumption against preemption" where claims "invoke the historic police powers of the States" and "leave to the Supreme Court the prerogative of overruling its own decisions." *Id.* at 771 n.9 (alterations omitted).

Similarly, in *R.J. Reynolds Tobacco v. City of Edina*, 60 F.4th 1170 (8th Cir. 2023), the Eighth Circuit invoked the presumption against preemption to narrowly construe the Tobacco Control Act. The Eighth Circuit acknowledged that it was presented with "two plausible readings" of the statute that "compel[led] two different outcomes." *Id.* at 1176. Relying on *Altria*, it treated the presumption against preemption as dispositive and adopted "the

reading … that disfavors preemption." *Id.* at 1177; *accord Iowans for Alts. to Smoking & Tobacco v. Mosiman*, 2026 WL 2197766, at *5 (8th Cir. July 30, 2026).

More generally, lower courts and individual judges have consistently expressed "great difficulty in deciding how to read th[is] … Court's instructions" regarding application of the presumption against preemption to express-preemption provisions, given the clear conflict between *Cipollone/Altria* and *Franklin*. *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1108 (9th Cir. 2024) (O'Scannlain, J., concurring); *see Air Evac EMS v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018) (Wilkinson, J.) (noting this Court's "somewhat varying pronouncements on presumptions in express preemption cases"); *Dialysis Newco v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258-59 (5th Cir. 2019) (identifying circuit split on the question whether the presumption against preemption applies to express-preemption provisions).

Cipollone was the genesis of this Court's presumption-against-preemption jurisprudence in express-preemption cases. *See* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 305 n.205 (2000). Thus, as long as *Altria*'s adoption of the *Cipollone* plurality's presumption-fueled predicate-duty test remains on the books, the issue will continue to bedevil the lower courts. And because the "confusion" stems directly from this Court's own cases, only this Court can "fix it." *GHP Mgmt. v. City of Los Angeles*, 145 S.Ct. 2615, 2616 (2025) (Thomas, J., dissenting from the denial of certiorari).

4. *Altria* is a doctrinal aberration. Its predicate-duty test cannot be squared with this Court's post-*Altria* decisions in *Durnell*, 146 S.Ct. 2001, or *Northwest v. Ginsberg*, 572 U.S. 273 (2014), or with a long line of pre-*Altria* cases. In each of those cases, the Court held that federal law preempts application of a general state-law obligation *to a specific set of facts* encompassed by an express-preemption provision. Thus, unlike *Altria* and *Cipollone*, these cases looked to the "proximate application" of the state-law duty, not to its "ultimate source," in applying an express-preemption provision. *Cipollone*, 505 U.S. at 553 (Scalia, J., dissenting in part).

Durnell offers the most recent illustration. That case involved FIFRA's express-preemption provision, which prohibits states from imposing any "requirements for labeling or packaging" of herbicide that are "in addition to or different from" the federal labeling requirements "under" FIFRA. 7 U.S.C. §136v(b). The Court held that FIFRA preempted a state-law failure-to-warn claim requiring an herbicide manufacturer to add a cancer warning to its label when EPA had concluded that such a warning was not required. *Durnell*, 146 S.Ct. at 2012. In so holding, the Court concluded that common-law failure-to-warn claims—which are not specific to herbicide labeling or packaging—"qualify as labeling requirements because those rules set a standard for a product's labeling." *Id.* at 2010. The Court rejected the argument that, since both state and federal law "simply requir[e] manufacturers to include adequate warnings," the failure-to-warn claim imposed no requirement "different from" FIFRA. *Id.* at 2012-13. The Court dismissed that argument as "operat[ing] at far too high a level of generality," reasoning that

looking to a "general" standard rather than its "specific" applications would "nullify FIFRA's preemption clause and the uniformity that Congress sought for safety warnings on pesticide labels." *Id.* at 2013. Yet that is precisely the level of generality that *Altria* applied to fraud claims—and precisely the harm that *Altria* has inflicted on the Labeling Act's comprehensive federal labeling regime.

Other cases have likewise rejected *Altria*'s level-of-generality analysis, both in the Labeling Act context and beyond. *See Reilly*, 533 U.S. at 547-48 (holding that tobacco-advertising regulations issued under a state unfair-and-deceptive-practices statute constituted preempted requirements "based on smoking and health" under the Labeling Act); *see also, e.g.*, *Ginsberg*, 572 U.S. at 276 (holding that the specific application of the general common-law duty of good faith and fair dealing constituted a preempted state-law requirement that "relates to" "rates, routes, or services" under the Airline Deregulation Act); *Am. Airlines v. Wolens*, 513 U.S. 219, 228-29 (1995) (same for statutory consumer fraud and unfair practices claim); *Riegel*, 552 U.S. at 328 (holding that the specific application of a general common-law duty to a medical device constituted a preempted state-law requirement "'with respect to'" that device under the Medical Device Amendments). *Altria* is thus a true outlier in this Court's preemption jurisprudence.

5. As explained above, subsequent developments have only eroded *Altria*'s always-shaky doctrinal foundations. This Court has now squarely (and repeatedly) rejected *Altria*'s reliance on the presumption against preemption in construing express-preemption provisions. *See, e.g., Franklin*,

579 U.S. at 125; *see Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011). This Court has likewise made clear that invocation of Senate Reports and other legislative history is no substitute for focus on the text that underwent bicameralism and presentment. This Court should bring *Altria* into line and spare lower courts the confusion generated by it. *Altria*, 555 U.S. at 98 (Thomas, J., dissenting) ("We owe far more to the lower courts, which depend on this Court's guidance, and to litigants, who must conform their actions to the Court's interpretation of federal law."); *cf. Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 534 (2022) (formally overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971), because lower courts continued to apply it "long" after this Court "abandoned" it).

6. Overruling *Altria* would disturb no reliance interests. Given the clarity of Congress' direction that the federal warnings suffice, no one can credibly claim a reliance interest in this context. Nor can anyone claim "legitimate reliance interest[s]" in being able to re-label preempted failure-to-warn claims as fraud and conspiracy claims or, more broadly, litigating state-law claims that Congress preempted over a half-century ago. *South Dakota v. Wayfair*, 585 U.S. 162, 186 (2018). The only legitimate reliance interests here are those of cigarette manufacturers who have been told by Congress that if they provide the federally mandated warnings, they need not worry about additional or different state-law requirements. Because *Altria* has frustrated the only legitimate reliance interests that implicate anyone's "primary conduct," "*stare decisis* does not compel adherence to a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law."

Alleyne v. United States, 570 U.S. 99, 119 (2013) (Sotomayor, J., concurring).

Finally, considerations of statutory *stare decisis* should not apply with full force here. Even in the statutory context, *stare decisis* is not an inexorable command. *See, e.g.*, *Leegin Creative Leather Prods. v. PSKS,* 551 U.S. 877, 904 (2007). And, here, *Altria* did not even purport to adopt the best reading of the statutory text. Instead, it invoked "the background presumption against pre-emption" to avoid definitively giving the text its best reading. *Cipollone*, 505 U.S. at 529 n.27 (plurality op.); *Altria*, 555 U.S. at 84. Its predicate-duty test is thus best understood as a pure judge-made rule, and it is this Court's burden—not Congress'—to correct an error of its own creation. *Altria*, 555 U.S. at 108 (Thomas, J., dissenting); *Leegin*, 551 U.S. at 904 (overruling decision adopting judge-made rule under the Sherman Act). Under these circumstances, this Court should not "place on the shoulders of Congress the burden of the Court's own error." *Altria*, 555 U.S. at 108 (Thomas, J., dissenting).

III. The Questions Presented Are Exceptionally Important, And This Case Is A Sound Vehicle For Resolving Them.

The questions presented have far-reaching legal and practical significance. One of multiple "labeling preemption provisions" scattered throughout the United States Code, the Labeling Act "reflect[s] Congress' judgment that the ability to sell a product throughout the country with a single label can be important to maintaining an efficient nationwide market." *Durnell*, 146 S.Ct. at 2012; *see* 15 U.S.C. §1331. But this Court's decision in *Altria* and the

Massachusetts court's decision below failed to sufficiently respect that judgment. Following *Altria*, cigarette manufacturers have faced an avalanche of claims alleging labeling- and advertising-based fraud under a patchwork of state tort laws—a result incompatible with Congress' intent to establish a "comprehensive Federal" scheme for cigarette advertising and promotion. *See Bates v. Dow Agrosciences LLC*, 554 U.S. 431, 448 (2005); 15 U.S.C. §1331.

This case presents a valuable opportunity to set things straight—both in the Labeling Act setting and beyond.

A. The decision below provides a roadmap for imposing state-law liability on cigarette manufacturers that are in full compliance with federal labeling requirements. The Massachusetts Supreme Judicial Court's formalistic approach to Labeling Act preemption enables plaintiffs to circumvent the statute's preemption protections by repackaging failure-to-warn theories in fraud garb—exacerbating a problem inherent in *Altria*'s predicate-duty test. As Justice Thomas foresaw in *Altria*, the "inevitabl[e] result" of narrowing the Labeling Act's express-preemption provision has been "an untold number of ... lawsuits," massive state-law liability for manufacturers whose labeling comports with the Act, and the proliferation of the type of inconsistent, "nonuniform" state-law labeling requirements that Congress sought to foreclose. *Altria*, 555 U.S. at 108 (Thomas, J., dissenting).

Justice Thomas's predictions have proved prescient. Given the Labeling Act's clear text, a decision to include or remove a voluntary warning

above and beyond the federally mandated warnings should have been shielded from potential liability. Yet, here, Respondent used the removal of a voluntary warning to whip the jury into a sufficient frenzy to impose a $1 billion punitive award. Reducing that award to $56 million neither disguises the violation here nor avoids the preemption problem. And the outsized award here is no outlier. Since *Altria* was decided, cigarette manufacturers have confronted staggering liability in fraud cases challenging their advertising and promotion. In Massachusetts alone, cigarette manufacturers have incurred hundreds of millions of dollars in fraud liability in just the last three years. *See, e.g.*, *Greene v. Philip Morris USA*, 208 N.E.3d 676, 688, 692 (Mass. 2023) (affirming $37 million fraud judgment in smoking-and-health case); *Jones v. R.J. Reynolds Tobacco Co.*, No. 1684CV03277 (Mass. Super. Ct. Apr. 10, 2024) ($150 million jury verdict, remitted to $50 million); *Perez-Trinidad v. R.J. Reynolds Tobacco*, 2026 WL 1198765 (Mass. Super. Ct. Mar. 19, 2026) ($12 million); *Estate of Penza v. R.J. Reynolds Tobacco*, 2025 WL 2849075 (Mass. Super. Ct. Feb. 13, 2025) ($86 million); *Reppucci v. R.J. Reynolds Tobacco*, 2025 WL 905394 (Mass. Super. Ct. Feb. 25, 2025) ($53 million judgment).

In recent years, similar verdicts have proliferated around the country. *See*, *e.g.*, *Philip Morris USA v. Rintoul*, 342 So.3d 656, 661 (Fla. Ct. App. 2022) ($157 million); *Higgs v. R.J. Reynolds Tobacco Co.*, 2026 WL 1243803 (Or. Ct. App. May 6, 2026) (affirming $18 million fraud judgment); *Manious v. R.J. Reynolds Tobacco*, No. 3CCV-22-0000072 (Haw. Cir. Ct. Dec. 31, 2024) ($86 million). Each of these verdicts rests on state-law requirements for the advertising and

promotion of cigarettes that Congress foreclosed in the Labeling Act. Only this Court can restore the uniformity Congress guaranteed in the Labeling Act and stem the tide of regulation-by-litigation.

Like decisions construing other preemption provisions, *Altria* has "affect[ed] more than" the Labeling Act. *Durnell*, 146 S.Ct. at 2012. Its reasoning has perplexed lower courts grappling with whether to construe express-preemption provisions narrowly in light of the presumption against preemption. Confusion over that issue injects uncertainty into "most major industries," Jay B. Sykes, Cong. Rsch. Serv., R45825, *Federal Preemption: A Legal Primer* 1 (May 18, 2023), including medical devices, banking, air transportation, securities, automobile safety, energy, and tobacco. Courts following the Supreme Judicial Court's approach in this case could dramatically limit the intended reach of dozens of federal express-preemption provisions. *E.g.*, *Thornton v. Tyson Foods*, 28 F.4th 1016, 1023 (10th Cir. 2022) (Federal Meat Inspection Act); *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) (Biomaterials Access Assurance Act); *Webb v. Trader Joe's*, 999 F.3d 1196, 1201 (9th Cir. 2021) (Poultry Products Inspection Act); *Int'l Bhd. of Teamsters v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 845-46, 853-54 (9th Cir. 2021) (Motor Carrier Safety Act of 1984); *Pharmacy Care Mgmt. Ass'n v. Wehbi*, 18 F.4th 956, 967 (8th Cir. 2021) (ERISA); *Shuker*, 885 F.3d at 771 n.9 (Food, Drug, and Cosmetic Act); *Lupian v. Joseph Cory Holdings*, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (Federal Aviation Administration Authorization Act); *Watson v. Air Methods*, 870 F.3d 812, 817 (8th Cir. 2017) (en banc) (Airline Deregulation Act); *R.J.*

Reynolds Tobacco v. Cnty. of Los Angeles, 29 F.4th 542, 553 n.6 (9th Cir. 2022) (Tobacco Control Act); *Atay v. Cnty. of Maui*, 842 F.3d 688, 692, 699 (9th Cir. 2016) (Plant Protection Act).

What is more, "several other federal statutes across a range of industries contain similar or identical *labeling* preemption provisions." *Durnell*, 146 S.Ct. at 2012 (emphasis added). Each one of those statutes requires courts to police efforts to plead around preemption defenses and frustrate Congress' will by disguising failure-to-warn claims as ordinary fraud or design-defect claims. *See, e.g.*, *Riegel*, 552 U.S. at 330 (remanding for such an inquiry). The Supreme Judicial Court's approach, which turns entirely on the label Respondent attached to a claim that is in essence a failure-to-warn claim, cannot be the correct approach. By granting review here and clarifying both the proper test for preemption and how courts can police artful pleading, this Court will provide critical guidance in cases under the Labeling Act and numerous other statutes preempting label-based failure-to-warn claims but leaving other state-law claims unpreempted.

B. This case is an excellent vehicle for clarifying or overruling *Altria*. The case comes to this Court after final judgment on a full trial record. The development of Respondent's labeling-based fraud theory at trial offers a stark example of how plaintiffs have attempted to evade the Labeling Act's preemption protections by disguising failure-to-warn theories as fraud claims. And the Massachusetts Supreme Judicial Court's explicit reliance on the presumption against preemption provides this Court a concrete opportunity to address—and definitively

jettison—that doctrine's continuing application in settings implicating states' traditional police powers.

Nor are there any procedural obstacles that would impede the Court's resolution of the questions presented. Petitioner squarely raised a Labeling Act preemption objection in both the trial court and in the Supreme Judicial Court, and both courts passed upon the issue. *See* App.37-40, 48, 52-53. And Petitioner's request to overrule *Altria* is properly preserved as an argument in support of that "consistent claim." *Citizens United v. FEC*, 558 U.S. 310, 331-32 (2010) (alteration omitted).

CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 20, 2026

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Appendix A

SUPREME JUDICIAL COURT OF MASSACHUSSETTS

No. SJC-13778

ARMAND FONTAINE,[1]

Appellee,

v.

PHILIP MORRIS USA INC.,

Appellant.

Argued: Nov. 5, 2025
Filed: April 22, 2026

Before: Budd, C.J., Gaziano, Kafker, Wendlandt, Georges, Dewar, & Wolohojian, JJ.

ORDER & OPINION

WOLOHOJIAN, J. This is a wrongful death action against a cigarette manufacturer whose products marketed under the names Marlboro and Parliament caused Barbara Fontaine to die of lung cancer.[2] After

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[1] Individually and as personal representative of the estate of Barbara Ellen Fontaine.

[2] We hereafter refer to the members of the Fontaine family individually by their first names. For convenience, we also refer

a four-week trial, a jury found that Philip Morris USA Inc. (Philip Morris or company) (1) committed a breach of the implied warranty of merchantability by failing to make or sell reasonable safer alternative types of cigarettes (specifically, cigarettes having very low levels of nicotine, that were noninhalable, or that were "[h]eat-not-burn"), (2) negligently designed its cigarettes, (3) negligently marketed its cigarettes to Barbara when she was a minor, (4) engaged in fraud, and (5) entered into a concerted action conspiracy with other tobacco companies and organizations. The jury further found that each of these actions caused Barbara's lung cancer and death, and they awarded compensatory and punitive damages. Specifically, the jury awarded a total of $8.014 million in compensatory damages among the four plaintiffs: (1) $2.5 million to Barbara's estate in compensation for her conscious pain and suffering plus $514,000 in reasonable and necessary medical bills, and (2) loss of consortium damages of $1 million to Barbara's husband (Armand), $1.5 million to her son (Brian), and $2.5 million to her daughter (Meghan). In addition, the jury awarded $1 billion in punitive damages. After trial, the judge remitted the punitive damages award to seven times the compensatory damages, i.e., to slightly more than $56 million.

Most of the issues Philip Morris raises in this appeal stem from the punitive damages award. To begin with, Philip Morris argues that the size of the jury's punitive damages award demonstrates in and of itself that the jurors were swept away by passion and

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to Barbara's estate and Armand, Bryan, and Meghan Fontaine collectively as the "plaintiffs."

prejudice such that the entire verdict must be set aside. Second, Philip Morris argues that the remitted award is constitutionally excessive. Third, it argues that the judge should have adopted two safeguards to prevent a "runaway" punitive damages award. Specifically, Philip Morris contends that the judge should have bifurcated the trial so as to avoid introducing evidence of the company's revenue during the liability phase, and that the judge should have adopted and imposed a higher burden of proof by instructing the jury that punitive damages must be proved by clear and convincing evidence.

Philip Morris raises two additional arguments that are not related to the punitive damages award. First, it contends that the jury were erroneously permitted to impose liability on theories that are preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq. (Labeling Act). Second, Philip Morris contends that the judge should have excluded certain testimony that it contends led the jury to impose liability for the company's exercise of its right to defend itself in litigation.

We conclude that the judge had ample basis upon which to find that the jury were not inflamed by passion or prejudice and, accordingly, that the judge did not abuse her discretion in denying Philip Morris's motion for a new trial on that basis. We also conclude that the judge remitted the punitive damages to an amount that was within constitutionally permissible bounds. We further conclude that the judge did not abuse her discretion in denying Philip Morris's motion to bifurcate the trial. Nor did the judge err by declining to adopt or impose a higher burden of proof for the imposition of punitive damages, and we decline

to adopt a higher standard now. We are also not persuaded that the jury were permitted to find liability on theories preempted by the Labeling Act, or that they were drawn into imposing liability for the company exercising its right to defend itself in litigation. For these reasons, we affirm.[3]

Background. We set out here an overview of the evidence and proceedings below, reserving further detail for our later discussion of the issues raised on appeal.

Barbara was a regular smoker of cigarettes by 1971, when she was fifteen years old. From that time until she quit smoking in 2015, she smoked only two brands of cigarettes: Marlboro and Parliament (also called Parliament Lights), both of which were manufactured and marketed by Philip Morris. She switched to Parliament Lights around 1979, when the company's advertising led her to believe that they were less harmful because they were "light" and because of their recessed filter.[4]

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[3] We acknowledge the amicus brief submitted in support of the defendant by the Chamber of Commerce of the United States of America and Washington Legal Foundation. We also acknowledge the amicus briefs submitted in support of the plaintiff by Parents Against Vaping e-cigarettes, the Institute for Health and Recovery, and Action on Smoking and Health; the Massachusetts Academy of Trial Attorneys and the American Association for Justice; the Public Health Law Center at Mitchell Hamline School of Law and the Massachusetts Association of Health Boards; and Professors Valerie P. Hans, Michael Heise, and Jennifer K. Robbennolt, as well as the amicus brief submitted in support of neither party by Pioneer New England Legal Foundation.

[4] In 1979, Philip Morris renamed the Parliament brand to Parliament Lights without changing its design.

Barbara became addicted to smoking, and her daily activities and routines were affected by her need to smoke.[5] Although she made several attempts over the years to quit, none was successful, even during her two pregnancies when her motivation was presumably high.[6] She finally succeeded in 2015 after a physician refused to perform a medical procedure unless she stopped smoking.[7] By that time, Barbara had smoked over a pack of (twenty) cigarettes each day for at least forty years.

Shortly after she quit smoking, Barbara was diagnosed with inoperable lung cancer. She died of that disease two years later, leaving behind Armand, her husband of twenty-seven years, and her two children, Brian and Meghan. She was sixty years old at the time of her death.

On January 17, 2020, Armand, individually and in his capacity as Barbara's personal representative;

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[5] Smoking was the first thing Barbara did in the morning and the last thing she did at night; she became edgy and irritable when forced to go without cigarettes during the day. She would leave restaurants and family gatherings in order to go outside to smoke, and interrupted movies and baseball games for smoking breaks. After she and Armand decided not to smoke inside their home, she took to smoking in her unheated garage, including during extreme cold weather.

[6] From 1989 to 2015, Barbara resorted to a variety of methods to quit smoking, including nicotine patches, nicotine gum, electronic cigarettes, prescription medication, tapering her cigarette use, going "cold turkey," and a visit to the "Mad Russian." See Levy, GURU: Yefim Shubentsov; A Rasputin for Smokers, N.Y. Times, Nov. 8, 1998.

[7] The record does not suggest that the procedure was related to Barbara's smoking.

Brian; and Meghan filed suit against Philip Morris, R.J. Reynolds Tobacco Company, and Demoulas Super Markets, Inc.[8] The complaint asserted claims for Barbara's wrongful death pursuant to G. L. c. 229, § 2, breach of the implied warranty of merchantability, negligent design, negligent marketing, fraud, civil conspiracy, and deceptive trade practices in violation of G. L. c. 93A. The plaintiffs sought damages for Barbara's wrongful death; her conscious pain and suffering before her death; her medical, burial, and funeral expenses; Barbara's lost earnings; and loss of consortium damages on behalf of Armand, Brian, and Meghan. Also sought were multiple damages and attorney's fees pursuant to G. L. c. 93A, and punitive damages. The judge reserved the G. L. c. 93A claim for herself; the other claims went to trial before a jury in 2022.

We need not belabor here the plaintiffs' evidence of Philip Morris's wrongful conduct over several decades. It suffices to say that its magnitude and weight was such that the company did not seriously attempt to refute it and, indeed, acknowledged to the jury that the company "said and did some things that should not have been said and should not have been done." But Philip Morris argued "this is not a case about whether the tobacco industry always did the right thing," and urged the jury to focus instead on its assertion that since 1999 (more than twenty-five years after Barbara began smoking), the company had been transparent

[8] None of the claims against R.J. Reynolds Tobacco Company or Demoulas Super Markets, Inc., is implicated in this appeal. The claims against R.J. Reynolds Tobacco Company were dismissed prior to trial, and the jury found in favor of Demoulas Super Markets, Inc.

with consumers about the risks of smoking, and that the company's previous bad acts were therefore things of the past.

The company also did not dispute (indeed, it acknowledged) that cigarettes are inherently dangerous and carcinogenic, can cause lung cancer, contain nicotine, and can be addictive. Instead, it stressed that cigarettes are not illegal despite their inherent health risks and that none of the four alternative cigarette designs put forward by the plaintiffs was viable, either for scientific or commercial reasons.

Nor did the company challenge that Barbara became addicted to cigarettes, or that smoking caused her lung cancer and death. However, the company forcefully argued that Barbara was an intelligent, motivated woman capable of making her own decisions and who understood the risks of smoking as a result of warning labels, health education in high school, and the experience of watching her mother die of lung cancer. The company also attempted to cast doubt on the evidence suggesting that Barbara was influenced by Philip Morris's advertising, including its descriptions of Parliaments as "light" or as having recessed filters. And the company contended that Barbara's success in quitting smoking in 2015 showed that she could have stopped earlier, potentially saving herself from lung cancer.

After deliberating for three days, the jury found in favor of codefendant Demoulas Super Markets, Inc., and found in favor of the plaintiffs on all but one of the breach of implied warranty claims against Philip Morris. As we have already noted, the jury awarded $8,014,000 in compensatory damages, consisting of

$2.5 million for Barbara's pain and suffering; $514,000 in medical expenses; and $1 million, $1.5 million, and $2.5 million, respectively, for Armand, Brian, and Meghan's loss of consortium. The jury also found Philip Morris liable for $1 billion in punitive damages based on both gross negligence and malicious, willful, wanton, or reckless conduct.

Thereafter, the judge found that Philip Morris had violated G. L. c. 93A in three respects. First, the judge found that the company committed a breach of the warranty of merchantability by selling unreasonably dangerous cigarettes to Barbara when, for decades, there were various safer alternatives that would have reduced the risks associated with the cigarettes it chose to sell instead. Second, the judge found that, after 1979, Philip Morris made false statements concealing material facts about the dangers and addictiveness of smoking while knowing that the statements were false and misleading and with the intent for consumers such as Barbara to rely on them. Specifically, the judge found that the company knowingly made false and misleading representations concerning Parliaments being "light" and about their recessed filters, and that Barbara relied on those statements to her detriment. Third, the judge found that Philip Morris entered into a concerted action and power of coercion conspiracy with other tobacco companies to misrepresent material facts concerning the dangers of smoking, to confuse the public, and to create doubt and mislead the public about the health hazards and addictive nature of smoking. The judge further found that the company's violations of G. L. c. 93A were knowing and willful. These broad factual findings were supported by over one hundred

subsidiary findings, which Philip Morris does not challenge in any way on appeal.[9]

Also posttrial, the parties filed cross motions for remittitur. Philip Morris sought remittitur of the punitive damages award to no more than the amount of the compensatory award or, in the alternative, a new trial. In response, the plaintiffs took the position that, while remittitur was appropriate, a remitted punitive damages award equal to seven times the compensatory award would comport with due process, and urged the judge to adopt that figure. In addition, Philip Morris filed a motion for a new trial on the ground that the entire verdict was the product of passion and prejudice.[10]

After a hearing, the judge allowed the cross motions for remittitur and reduced the punitive damages to seven times the compensatory damages award, or slightly more than $56 million. In doing so, the judge considered all three of the guideposts identified in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-586 (1996) (*BMW*), and concluded that the remitted amount was within constitutional limits, particularly

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[9] The judge awarded the plaintiffs their reasonable attorney's fees and costs. However, in light of the award of punitive damages, she did not impose multiple damages under G. L. c. 93A. She reserved the ability to revisit that decision should the punitive damages award be vacated on appeal.

[10] Philip Morris also filed three motions for judgment notwithstanding the verdict. One challenged the sufficiency of the evidence on the fraud and conspiracy claims; one challenged the sufficiency of the evidence with respect to the implied warranty and negligence claims; and one challenged the sufficiency of the evidence concerning the negligent marketing claim. All three motions were denied.

considering the nature of Philip Morris's conduct, the painful illness and death that conduct caused Barbara, and the deterrent function of punitive damages for a company of Philip Morris's immense wealth and profitability.

The judge rejected Philip Morris's claim that the jury were carried away by passion or prejudice, noting that the accusation was not supported by the record. Drawing in part on her own observations, the judge found that the jury's conduct throughout the lengthy trial demonstrated that their verdict was not affected by prejudice or passion. In particular, the judge noted the jurors' "pointed, thoughtful questions" for witnesses; the length of their deliberations; the jury's careful conduct of deliberations, including asking to view a defense exhibit and posing questions; the jury's return of a verdict that did not accept every theory of liability against Philip Morris and found no liability against the supermarket codefendant; the fact that the compensatory damages were less than requested by the plaintiffs; and that the jury drew nuanced distinctions in damages among the individual plaintiffs. These observations, combined with the fact that the jury were properly instructed as to the permissible bases for their verdict, and the fact that Philip Morris "offer[ed] virtually nothing other than the size of the award" to support its accusation of prejudice, led the judge to deny the defendant's motion for a new trial.

Philip Morris then appealed, seeking a new trial on all claims or, in the alternative, a new trial solely on punitive damages or further remittitur of the punitive award. We transferred the appeal to this court on our own initiative.

Discussion. We first turn to Philip Morris's arguments that are connected to the award of punitive damages and thereafter discuss its arguments concerning preemption and evidentiary error.

1. Motion for a new trial; alleged passion and prejudice on the part of the jury in awarding punitive damages. Punitive, also sometimes called exemplary, damages are designed "to punish the defendant and to deter future wrongdoing. *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399, 406 (2021), quoting *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). A "proper punitive damage award" is one that is "sufficient ... to send a clear message to the [defendant] of condemnation for its reprehensible behavior. *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 412 (2013), quoting *Clifton v. Massachusetts Bay Transp. Auth.*, 445 Mass. 611, 624 (2005). But a new trial may be warranted when the jury award damages that are "greatly disproportionate to the injury proven or represen[t] a miscarriage of justice," *Reckis v. Johnson & Johnson*, 471 Mass. 272, 299 (2015), cert. denied, 577 U.S. 1113 (2016), quoting *Labonte v. Hutchins & Wheeler*, 424 Mass. 813, 824 (1997), or "so great ... that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption," *Reckis*, 471 Mass. at 299, quoting *Bartley v. Phillips*, 317 Mass. 35, 41 (1944).

Pointing solely to the size of the jury's punitive damages award, Philip Morris asks that such a presumption be drawn here and that we determine that the judge abused her discretion in concluding otherwise. "Abuse of discretion in granting or refusing a new trial on the ground of excessive damages can so

seldom be found that actual instances in which this court has set aside the action of the trial judge ... are almost nonexistent, and it has repeatedly been stated that occasions when this court can do so are exceedingly rare" (quotations omitted). *Reckis*, 471 Mass. at 299, quoting *Loschi v. Massachusetts Port Auth.*, 361 Mass. 714, 715 (1972).

It is indeed true, as Philip Morris points out, that the jury's punitive damages award is the largest to have been awarded by a jury in Massachusetts (although not in the history of civil litigation elsewhere, including against Philip Morris).[11] However, such comparisons are of limited utility in assessing whether a particular verdict is justified, see *Reckis*, 471 Mass. at 303 n.47 (rejecting "dangerous game" of comparing verdicts across similar cases),

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[11] The jury's $1 billion punitive damages award substantially outstrips the next largest punitive damages award in this jurisdiction, a $150 million award against a different tobacco company (reduced to $50 million by the judge). See *Jones vs. R.J. Reynolds Tobacco Co.*, Mass. Super. Ct., No. 1684CV03277 (Suffolk County Apr. 10, 2024). That said, juries have awarded higher punitive damages in other jurisdictions. For example, a jury imposed a $3 billion award against Philip Morris in *Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 1650 (2005), cert. denied, 547 U.S. 1018 (2006), and similar awards have been granted against other defendants. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 481 (2008) ($5 billion); *Grefer v. Alpha Tech.*, 965 So. 2d 511, 514 (La. Ct. App. 2007), cert. denied sub nom. *Exxon Mobil Corp. v. Grefer*, 553 U.S. 1014 (2008) ($1 billion); *Pilliod v. Monsanto Co.*, 67 Cal. App. 5th 591, 600 (2021), cert. denied, 142 S. Ct. 2870 (2022) ($1 billion); *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 721-722 (Mo. Ct. App. 2020), cert. denied, 141 S. Ct. 2716 (2021) ($3.15 billion). In each of those cases, reviewing courts treated remittitur, rather than a new trial, as sufficient to cure any excess in the verdict.

because a punitive damages award is "the product of numerous, and sometimes intangible, factors. . . unique to the particular case before [the jury]. Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make," *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 457 (1993). Thus, whether a particular award is "so great" as to indicate prejudice or passion (citation omitted), *Reckis*, 471 Mass. at 299, should be determined principally by assessing whether it is disproportionate in light of the factors the jury could properly consider in the case before them—not by comparing it to awards in other cases. See *Bartley*, 317 Mass. at 41 (new trial should be granted when damages are "greatly disproportionate to the injury proved" [citation omitted]).

A motion for a new trial on grounds of excessive damages should be assessed "on a survey of the whole case. *Bartley*, 317 Mass. at 41, quoting *Davis v. Boston Elevated Ry.*, 235 Mass. 482, 496 (1920). The judge here conducted such a survey and made numerous findings based on the evidence and her firsthand observations of how the jury conducted its task. None of the judge's subsidiary findings is challenged as clearly erroneous on appeal. In these circumstances, our task is to determine whether the ultimate conclusion the judge drew from those findings—namely, that a new trial was not required --constitutes an abuse of discretion. See *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014), quoting *Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 15 (1st Cir. 2008) (abuse of discretion appears where judge makes "'a clear error of judgment in weighing' the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" [citation

omitted]). After surveying the whole case ourselves, we conclude that it does not, and we outline each of the salient considerations that lead us to this conclusion.

a. Jury instructions. We begin by observing that the jury were accurately instructed as to the appropriate bases for awarding punitive damages under G. L. c. 229, § 2, our wrongful death statute. That statute imposes a significant restraint on the award of punitive damages by requiring a heightened showing of culpability in order to award them. Specifically, punitive damages may only be awarded if "the decedent's death was caused by the malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant." G. L. c. 229, § 2. The judge instructed the jury faithfully to the language of the statute, and carefully explained the meaning of the phrases "malicious, willful, wanton or reckless conduct" and "gross negligence" in a way that conveyed to the jury the high burden needed to establish them.[12] In addition, the judge instructed the

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[12] The judge instructed:

"A defendant has acted maliciously, wantonly, willfully, or recklessly only when the defendant inflicts injury intentionally or it is so utterly indifferent to the rights of others that the defendant acts as if . . . such rights did not exist. The injury is then a willful and not a negligent wrong

"Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. Gross negligence is very great negligence. It is materially more lack of care than simple inattention. It is an aggravated act or omission which is more than a mere failure to exercise ordinary care.

"A defendant is grossly negligent if it showed no concern for how persons may be affected by its failure to act with

jury that punitive damages could only punish Philip Morris for conduct that caused Barbara's lung cancer and death, stressing that they could not punish the company for harm suffered by any other individual. "The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991).

The special verdict slip also tracked the language of the statute and of the instructions. Specifically, the verdict slip required the jury to separately consider whether Philip Morris engaged in malicious, willful, wanton, or reckless conduct, or was grossly negligent, and whether, in either situation, the conduct caused Barbara's death. In short, both the instructions and the verdict slip focused the jury on the high standard needed to award punitive damages.

In addition, the judge gave accurate guidance to the jury regarding the considerations they could take into account in determining the amount of any punitive damages award. Specifically, the judge instructed the jury that they could consider the character and nature of Philip Morris's conduct as well as the company's wealth as those related to determining an amount that would be sufficient to punish the company's conduct

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reasonable care. It is a needless and undeniable violation of legal duty respecting the rights of others.

"Gross negligence is something less than willful, wanton, and reckless conduct. It falls short of being such reckless disregard of probable consequences as is equivalent to a willful or intentional wrong."

and to deter any future acts.[13] See Restatement (Second) of Torts § 908(2) (1979) (character of defendant's conduct and defendant's wealth are proper considerations for punitive damages award). The judge also instructed the jury that they could consider the magnitude of any potential future harm if similar behavior were not deterred as well as any mitigating evidence demonstrating that there was no need for deterrence—considerations relevant to Philip Morris's defense that its prior bad conduct was a thing of the past.

The judge also instructed the jury that they were to apply the law as she gave it to them; that they were not to be swayed by prejudice, sympathy, or personal like or dislike for either side; and that they were not to infer that Philip Morris acted improperly based on the fact that it contested liability and was defending itself.

In short, the jury were properly instructed on the law governing the award of punitive damages, including the heightened showing required by G. L. c. 229, § 2; were cautioned against making a decision based on prejudice or sympathy; and were told that the company was not to be punished for defending itself. We presume that the jury followed the instructions when rendering their verdict, see *Reckis*, 471 Mass. at 304 n.49, and the record suggests no reason to displace that presumption here.

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[13] Philip Morris objected to including wealth as a permissible consideration in assessing the size of a punitive damages award. The judge properly overruled that objection. See *Laramie*, 488 Mass. at 419.

b. Evidence of the nature and duration of the defendant's conduct. The nature and duration of the defendant's conduct are "[p]erhaps the most important indici[a] of the reasonableness of a punitive damages award," *Aleo*, 466 Mass. at 414, quoting *BMW*, 517 U.S. at 575, and here there was virtually uncontested evidence showing Philip Morris's reprehensible conduct over decades. This included purposely designing its product to be addictive, targeting its advertising to children, and misleading the public as to the health dangers of cigarettes, all with full knowledge that cigarettes were the cause of widespread preventable death. Where, as here, the jury could have concluded, as the judge did, that the defendant's conduct was extremely reprehensible, a large punitive damages award may be the product of the jury's "exercise [of] a sound discretion," *Coffin v. Coffin*, 4 Mass. 1, 43 (1808), rather than of passion and prejudice.

The jury had before them the following evidence of Philip Morris's conduct. Philip Morris has long been in the business of manufacturing, marketing, and selling cigarettes, which are the leading cause of preventable death in the United States and the source of a worldwide epidemic of lung cancer. Smoking causes lung cancer because cigarette smoke contains multiple carcinogens that travel into the lungs when a smoker inhales. This relationship between smoking and lung cancer has been a matter of scientific consensus since approximately 1953. Because tobacco in its natural state produces smoke that is not easily inhalable, cigarette manufacturers use a process called flue-curing to increase the inhalability, and hence the carcinogenicity, of the tobacco in cigarettes. Cigarette companies, including Philip Morris, have designed

cigarettes for enhanced inhalability despite knowing since the 1950s the role inhalation plays in causing lung cancer and death.

No later than 1953, Philip Morris was aware of the adverse health effects of smoking and participated with other cigarette companies in a deliberate conspiracy to mislead the public about the nature and extent of those effects. This conspiracy, the existence of which was extensively corroborated by internal cigarette industry documents, was carried out by Philip Morris representatives who denied or cast doubt on the health effects of smoking cigarettes, as well as by published research funded by Philip Morris and other tobacco companies with the intent of obscuring the scientific consensus on the dangers of smoking. For example, Philip Morris publicly denied that there was any proof that cigarette smoke contained carcinogens, including in reports to the Surgeon General; it compared the dangers of cigarettes to those of applesauce or gummy bears and misleadingly stated that "if the company as a whole believed that cigarettes were really harmful, we would not be in the business. At the same time, company scientists were producing internal research showing that carcinogens are in fact ubiquitous in smoke.

The evidence also showed that cigarettes are highly addictive due to containing nicotine, a chemical that occurs naturally in tobacco plants. Because nicotine has addictive properties comparable to those of heroin or cocaine, addicted cigarette smokers who try to quit smoking suffer severe cravings and withdrawal symptoms. The addictive quality of cigarettes was not only known to Philip Morris, but intentionally amplified and commercialized. Philip Morris carefully

engineered its cigarettes to deliver the dosage of nicotine needed to keep smokers "hooked," internally analogizing customers to "a hungry rat in a cage" and acknowledging that without nicotine "the cigarette market would collapse. Nevertheless, as late as 1994, Philip Morris's president testified to Congress that nicotine was not addictive.

The company hid its knowledge of the harmful effects of smoking, including lung cancer and death, from the public and from health authorities, while simultaneously suppressing or destroying internal health-related research. The company's designers could control the addictiveness and toxicity of cigarettes, and Philip Morris intentionally designed its cigarettes to increase their addictiveness. During the same period when Philip Morris scientists were researching how much nicotine a cigarette must contain to create and maintain addiction, company leadership deliberately chose not to pursue research into the level of carcinogens in cigarettes that would substantially reduce smokers' risk of cancer. Philip Morris scientists developed and produced denicotinized cigarettes specifically for the company's then president, who wished to avoid becoming addicted.

There was also evidence that since at least the 1950s, Philip Morris's advertising included campaigns targeted at teenagers because (as one internal Philip Morris document put it), "Today's teenager is tomorrow's potential regular customer. ..." During the 1970s, Philip Morris's Marlboro brand became the most popular cigarette among teenagers, a fact the industry recognized as key to the company's future success. When Philip Morris scientists designed a

cigarette that was less carcinogenic than prevailing models, company executives refused to use that design for Marlboro cigarettes because of concern that it would reduce the brand's sales.

Eventually, in response to public concern over the health risks of smoking, Philip Morris developed what it called "health reassurance" cigarettes, including the Parliament Lights brand that Barbara smoked. While Philip Morris never affirmatively stated that Parliament Lights were healthier than other cigarettes (and knew, from internal research, that they were not), the company nonetheless marketed Parliament Lights by describing them as having a "recessed filter," by labeling them as "low tar" and "low nicotine," and via the word "light" itself, all of which the company understood from market research would create an impression in customers that Parliament Lights were safer than other cigarettes.[14] Philip Morris internally recognized that filters were an "advertising gimmick" rather than a health measure. At the same time Philip Morris was promoting Parliament Lights as a health reassurance product, it opposed development of products or information campaigns designed to help people quit smoking, such as by pressuring the makers of Nicorette gum, a smoking-cessation aid, not to publicize it.

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[14] Although Parliament Lights in fact had less nicotine than other cigarettes, there was evidence showing that Philip Morris was aware of the tendency of addicted smokers to smoke more cigarettes or inhale more deeply to compensate for reduced nicotine intake. This phenomenon, known as "compensation," means that smokers of light cigarettes are typically exposed to the same amount of nicotine and carcinogens as other cigarette smokers.

Philip Morris did not deny that there was a conspiracy among tobacco companies, that the purpose of that conspiracy was to mislead the public as to the dangers of smoking, or that the cigarettes that Barbara smoked were addictive, dangerous, cancer-causing products that led to her lung cancer and painful death.

The body of evidence concerning the company's reprehensible conduct over decades provided a robust basis upon which the jury could conclude without resort to passion or prejudice that the company had engaged in malicious, willful, wanton, or reckless conduct, and was grossly negligent, such that an award of punitive damages of significant magnitude was appropriate.

c. Harm to plaintiff. "Punitive damages are not intended to punish a defendant for its unlawful conduct generally, but to punish a defendant for its unlawful conduct that caused a plaintiff's specific harm." *Laramie*, 488 Mass. at 407. Here, there was ample evidence to show that Philip Morris's conduct caused Barbara's lung cancer and painful death.

Barbara became addicted to cigarettes by the time she was a teenager, and her addiction affected many aspects of her daily life thereafter. See supra. She was unable to quit smoking until 2015,[15] and her risk of lung cancer was directly proportional to the frequency

[15] Barbara's struggle in this regard was not unusual; although seventy percent of smokers indicate a desire to quit, only four percent of attempts are successful in the long term. The difficulty of the effort is compounded by exposure to cigarette advertising, which reinforces cigarette habits and enables smokers to rationalize their continued use despite widespread awareness of the health dangers of smoking.

and duration of her cigarette use over decades. Ultimately, her death of lung cancer was caused by her addiction to, and use of, Philip Morris's cigarettes. The jury could conclude that Barbara's addiction and death were caused by Philip Morris's decision to maintain nicotine levels at a level required to maintain addiction even while it knew of the harm that decision would cause smokers such as Barbara.

Philip Morris challenged none of the evidence concerning the addictive and ultimately fatal impact its conduct had on Barbara. Nor did it challenge the evidence concerning the pain and suffering she endured from smoking-induced lung cancer, including extreme pain, weakness, and weight loss, or the impact that her illness and premature death had on her husband and children.

d. Amount needed to punish and deter. "Punitive damages 'operate as "private fines" intended to punish the defendant and to deter future wrongdoing.'" *Laramie*, 488 Mass. at 406, quoting *Cooper Indus., Inc.*, 532 U.S. at 432. For this reason, evidence of Philip Morris's revenue and assets was admissible to help the jury determine how large an award would be necessary to achieve those permissible effects. See *Laramie*, 488 Mass. At 419. The jury heard that for the fiscal year ending December 31, 2021, the company's net revenue was approximately $21.8 billion and its net earnings were approximately $7.7 billion.[16] Thus, the $1 billion punitive damages figure ultimately awarded by the

[16] The company's financial performance in 2021 was not atypical. From 2017 to 2021, Philip Morris's yearly net revenues were approximately $21 billion, and its yearly net earnings ranged from around $5.3 billion to $7.7 billion.

jury represented roughly forty-eight days of Philip Morris's net earnings. A dispassionate and unprejudiced jury could conclude that a lesser award would not have been adequate to punish Philip Morris or deter its future misconduct in view of the company's revenue in combination with the extreme reprehensibility and harm caused by the company's conduct.

e. Other indicia of the jury's reasoned decision-making. As we have already noted, the judge relied in part on her own observations during the trial to conclude that the jury approached its task in a measured way. Her observations were buttressed by the following. First, the judge permitted the jurors to submit questions after each witness's testimony. The jury took all but one such opportunity, asking a total of seventy-one questions throughout the course of the trial. Our own review of the trial transcript shows that the jury's questions were focused, measured, and directed to the evidence. The questions demonstrate the care and attention with which the jury approached their task, and in no way suggest that the jury were inflamed by prejudice or passion.

Second, the jury did not rush to judgment. Instead, they deliberated for three days, asking several questions during that time. Of note, the jury asked to examine physically a product model introduced by the defense. Also of note, the jury asked to know "[w]ho or what entity receives punitive damages"—something that had not been made explicit in the instructions they had previously received.[17] Although we are

[17] The judge responded that punitive damages would go to Barbara's estate and redirected the jury's attention to the pages

hesitant to read too much into the jury's question, for purposes of this analysis it is safe to say that the question reflects the jury's attention to the details and consequences of their task and is at odds with a conclusion that they conducted their deliberations with passion or prejudice.

Third, the jury did not adopt wholesale the plaintiffs' view of liability or of damages. They rejected the claims against the supermarket codefendant, and also one of the theories of breach of implied warranty against Philip Morris. They also rejected plaintiffs' counsel's suggestion as to compensatory damages, both in the aggregate and as allocated among the individual plaintiffs, ultimately awarding $2.5 million less than requested.[18]

Fourth, this is not a case where counsel resorted to impermissible rhetoric or appealed to the jury's emotion or sympathy. Contrast *Fitzpatrick v. Wendy's Old Fashioned Hamburgers of N.Y., Inc.*, 487 Mass. 507, 509-510, 517 (2021) (plaintiff's closing statement improperly appealed to jurors' "emotions, passions, prejudices, or sympathies" [citation omitted]). Although counsel drew the jury's attention to Philip Morris's revenue in closing argument, he did so only for the permissible purpose of asking the jury to consider what amount might be necessary to serve a deterrent purpose. Plaintiffs' counsel did not suggest

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of the instructions concerning punitive damages if they were considering them.

[18] Plaintiffs' counsel suggested in closing that, in addition to the stipulated amount of Barbara's medical bills ($513,582.81), the jury award $2 million for Barbara's conscious pain and suffering; $5 million for Armand's loss of consortium; and $1.5 million each for Brian and Meghan's loss of consortium.

any particular amount of punitive damages, let alone any amount approaching the $1 billion ultimately awarded by the jury.

Taking the case as a whole, as we must, we conclude that although the sheer magnitude of the punitive damages award undeniably reflects that the jury held strong views about the amount needed to punish and deter Philip Morris for its conduct, the judge did not abuse her discretion when she concluded that the verdict was not the product of passion and prejudice and denied Philip Morris's motion for a new trial.

2. Due process excessiveness. We turn next to Philip Morris's argument that the punitive damages award—as remitted by the judge—is excessive under the due process clause of the Fourteenth Amendment to the United States Constitution. In essence, Philip Morris contends that, because the approximately $8 million compensatory damages award was "substantial," the punitive damages award should be reduced to no more than a one-to-one ratio in order to avoid constitutional excessiveness. Because due process "prohibits the imposition of a '"grossly excessive" punishment' on a tortfeasor," *Aleo*, 466 Mass. at 412-413, quoting *BMW*, 517 U.S. at 562, courts must "review the [amount of a punitive award] to ensure that it is reasonable and not simply a criminal penalty," *Aleo*, 466 Mass. at 413, quoting *Labonte*, 424 Mass. at 826. Our review of a punitive award's reasonableness is de novo. See *Cooper Indus., Inc.*, 532 U.S. at 436. See also *Commonwealth v. Martinez*, 487 Mass. 265, 267 (2021) (review of constitutional issues is de novo).

The assessment of the reasonableness of a punitive damages award for purposes of the due process clause is informed by three guideposts. BMW, 517 U.S. at 574-575. They are "(1) 'the degree of reprehensibility of the defendant's conduct,' (2) the ratio of the punitive award to the 'actual harm inflicted,' and (3) a comparison of 'the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.'" *Aleo*, 466 Mass. at 414, quoting *BMW*, 517 U.S. at 575-576, 580-581, 583. Although Philip Morris's argument asks us to focus only on the second guidepost, we consider all three.

a. Reprehensibility. The reprehensibility of a defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award. *Aleo*, 466 Mass. at 414, quoting *BMW*, 517 U.S. at 575. In assessing reprehensibility, we consider whether "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Aleo*, 466 Mass. at 414, quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (*State Farm*).

We need not repeat the evidence concerning the company's reprehensible conduct over the decades during which it conspired to conceal the harms of smoking from the public, resulting in millions of people's illness and death, with gross disregard for its

customers' health and safety.[19] That conduct resulted in Barbara's addiction to a product that ultimately caused her painful death by cancer, and the jury determined that the conduct was malicious, willful, wanton, or reckless as well as grossly negligent. The judge justifiably described the defendant's actions as "among the most reprehensible. See *Aleo*, 466 Mass. at 415 (finding "substantial" reprehensibility when defendant's "grossly negligent" conduct "caused grievous physical harm, evinced an indifference to the safety of others, and involved repeated actions").

b. Ratio. Philip Morris correctly acknowledges that there is no "bright line" or "mathematical formula" to determine whether a particular ratio between compensatory and punitive damages is constitutional. *BMW*, 517 U.S. at 582-583. Rather, the question is "whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred" (emphasis omitted). *Id.* at 581. The United States Supreme Court has remarked that while "few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process," there is no "rigid benchmark"; higher ratios may be constitutional to punish a "particularly egregious act [resulting] in only a small amount of economic damages," whereas "a

[19] While an award of punitive damages must be based on the harm caused to the plaintiff and not on harm done to nonparties, harm to nonparties may be considered in assessing the reprehensibility of a defendant's conduct. See *Philip Morris USA v. Williams*, 549 U.S. 346, 353-355 (2007). Cf. *State Farm*, 538 U.S. at 423 (where punitive damages are based in part on recidivism, "courts must ensure that the conduct in question replicates the prior transgressions").

lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" where compensatory damages are "substantial" (citation omitted). *State Farm,* 538 U.S. at 425. "The precise award in any case ... must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Here, the remitted $56 million punitive damages award was seven times the compensatory damages award and thus within the single-digit ratio generally treated as constitutional. See *Aleo*, 466 Mass. at 416-417. Philip Morris, however, argues that the "substantial" $8 million compensatory award merits a lower ratio. See *State Farm*, 538 U.S. at 425. In *State Farm*, the Supreme Court deemed "substantial" a $1 million compensatory award "for a year and a half of emotional distress," emphasizing that the harm was nonphysical, that the plaintiffs had "suffered only minor economic injuries," and that compensatory damages for emotional distress contain a condemnatory element that was "duplicated in the punitive award. *Id.* at 426. The Court thus concluded that, particularly "in light of the substantial compensatory damages awarded," the facts of the case "likely would justify a punitive damages award at or near the amount of compensatory damages. *Id.* at 429. On remand, the Supreme Court of Utah disagreed, and determined that "in light of all of the [Federal] reprehensibility factors," a nine-to-one ratio of punitive to compensatory damages was appropriate. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2004 UT 34, ¶ 41, cert. denied, 543 U.S. 874 (2004).

Just as *State Farm* depended on the facts presented in that case, so does this one. An amount that might

be "substantial" as compensation for economic or emotional harm might not be viewed as such when, as here, it serves as compensation for personal injury or death. See *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019), cert. denied sub nom. *Saccameno v. Ocwen Loan Servicing, LLC*, 590 U.S. 906 (2020) (treating $582,000 compensatory damages award as substantial in context of nonmalicious breach of contract, but noting that "[w]hat counts as substantial depends on the facts of the case, and an award of this size [or larger] might not mandate a 1:1 ratio on another set of facts"); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069 n.28 (10th Cir. 2016) ("the maximum of punitive damages that comports with due process is highly dependent upon the relevant facts"). Accordingly, we observed in *Aleo* that while the $2.64 million compensatory award in that case was substantial "by many measures, its significance pale[d] when viewed not as compensation for economic loss or emotional distress but for the loss of a young woman's life." *Aleo*, 466 Mass. at 417-418 (upholding punitive damages with ratio just under seven to one). See *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 723 (Mo. Ct. App. 2020), cert. denied, 141 S. Ct. 2716 (2021) (upholding punitive damages ratio of 5.72 to one with compensatory damages of $550 million in part because "[i]t is impossible to place monetary value on the physical, mental, and emotional anguish Plaintiffs suffered because of [ovarian cancer] caused by Defendants").

To be sure, the $8 million compensatory damages award in this case is a significant sum by many measures. But it is not an outlier in tobacco-related

wrongful death actions here or elsewhere,[20] and it was intended not only as compensation for Armand, Brian, and Meghan's loss of Barbara's companionship and care, but also for Barbara's own pain and suffering during her protracted battle with cancer, as well as her significant medical costs. We are accordingly not persuaded that $8 million is such "substantial" compensation as to require a reduced ratio with respect to punitive damages. We note further that neither this court nor the Supreme Court has ever held that the size of a compensatory award merits a reduced punitive damages ratio in a case such as this one, which involves knowing misconduct resulting in life-ending personal injury.

c. Comparable penalties. The third guidepost in assessing a punitive damages award's reasonableness is the comparison between the award and civil or criminal penalties available for comparable misconduct. *Aleo*, 466 Mass. at 418. A reviewing court should "accord substantial deference to legislative

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[20] See *Laramie*, 488 Mass. at 401 ($11 million compensatory award); *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 415 (2013) ($71 million, remitted to $35 million). See also *Boeken*, 127 Cal. App. 4th at 1650 ($5.5 million compensatory award); *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166, 170, 172 (Fla. Dist. Ct. App. 2017), cert. denied, 586 U.S. 1203 (2019) ($15 million); *Philip Morris USA, Inc. v. Cuculino*, 165 So. 3d 36, 38 (Fla. Dist. Ct. App. 2015) ($5 million, reduced from $12.5 million after apportionment); *Lorillard Tobacco Co. v. Alexander*, 123 So. 3d 67, 70 (Fla. Dist. Ct. App. 2013) ($8 million, reduced from $20 million after remittitur and apportionment); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 309-310 (Fla. Dist. Ct. App. 2012) ($5.5 million, reduced from $10.8 million after apportionment).

judgments concerning appropriate sanctions for the conduct at issue" (quotation and citation omitted). *Id.*

We begin by noting that the Legislature has declined to cap punitive damages for egregious misconduct resulting in wrongful death. The Massachusetts wrongful death statute authorizes a minimum punitive award of $5,000 where death was caused by the "malicious, willful, wanton or reckless conduct of the defendant or by the gross negligence of the defendant," with no maximum penalty. G. L. c. 229, § 2.

In addition, Philip Morris knowingly, intentionally, and willfully violated G. L. c. 93A[21] and, hence, its conduct could be penalized by trebling the plaintiffs' actual damages. See G. L. c. 93A, § 9 (3). The remitted punitive damages award was only three and one-half times the potential penalty under G. L. c. 93A, and we have previously approved a punitive award fourteen times higher than the applicable civil penalty in *Aleo*, noting that doing so was in line with decisions by the Supreme Court and other jurisdictions. See *Aleo*, 466 Mass. at 419-420, and cases cited.

Based on our review of the three guideposts, we uphold the judge's remittitur of the punitive damages award to $56 million. The extreme reprehensibility of Philip Morris's conduct clearly justifies a punitive damages ratio toward the upper end of the single-digit range. The compensatory damages award, while large, is not so substantial in comparison to the harm suffered as to require further remittitur. And the relationship between the remitted punitive damages

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[21] Philip Morris does not challenge the judge's G. L. c. 93A ruling on appeal.

award and comparable civil penalties is appropriate. The remitted award serves the goals of punishing Philip Morris's conduct and deterring similar future acts while comporting with due process.

3. Burden of proof for awarding punitive damages. Philip Morris asked the judge to adopt a clear and convincing evidence standard for the imposition of punitive damages and to instruct the jury accordingly. The judge properly declined to create new law in this regard, and instead instructed the jury consistent with our traditional standard of proof in civil cases: preponderance of the evidence. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 (1983) ("In a typical civil suit for money damages, plaintiffs must prove their case by a preponderance of the evidence"); *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd.*, 473 Mass. 297, 309 (2015) (*Doe No. 380316*) ("preponderance standard is generally applied in civil cases").

Philip Morris asks that we now adopt a clear and convincing evidence standard of proof for the imposition of punitive damages. That higher standard is not required under the Federal Constitution, see *Haslip*, 499 U.S. at 23 n.11, and Philip Morris does not argue that it is required under the Massachusetts Constitution. Instead, it argues that we should adopt the higher standard as a matter of our own authority because "particularly important individual interests or rights are at stake. *Doe No. 380316*, 473 Mass. at 309, quoting *Craven v. State Ethics Comm'n*, 390 Mass. 191, 200 (1983). We decline this invitation.

"Punitive damages are not allowed in this Commonwealth unless expressly authorized by statute." *Flesner v. Technical Communications Corp.*,

410 Mass. 805, 813 (1991). Here, punitive damages were awarded pursuant to the wrongful death statute, G. L. c. 229, § 2, which, although requiring a heightened showing of culpability ("malicious, willful, wanton or reckless conduct" or gross negligence) before punitive damages may be awarded, does not require proof by clear and convincing evidence. In the absence of a statutory directive to the contrary, we have historically, and in a variety of contexts, applied "the baseline rule that the fact finder in a civil case usually employs a fair preponderance of the evidence standard. *Andrews, petitioner*, 449 Mass. 587, 591, 595 (2007) (declining to depart from general civil rule, "which we have been hesitant to do in the past," for purposes of G. L. c. 123, § 9 [b], allowing discharge or transfer of civilly committed persons). See *Commonwealth v. James*, 493 Mass. 828, 838 (2024) (declining to adopt higher standard of proof for civil forfeiture statute, G. L. c. 276, § 3, in absence of legislative provision). We see no reason to deviate from that approach here. Accord *Freeman v. Alamo Mgt. Co.*, 221 Conn. 674, 682-683 (1992) (declining to impose clear and convincing standard for statutory punitive damages because "[a]bsent evidence of legislative intent to the contrary, we continue to presume that when a statutory private right of action includes multiple damages, the plaintiff's burden of proof is the same as that in other tort cases"). We have required proof by clear and convincing evidence in cases that implicate basic rights, such as liberty, parental rights, or freedom of speech. See *Doe No. 380316*, 473 Mass. At 314 (classification as sex offender); *MacDonald v. Caruso*, 467 Mass. 382, 389-390 (2014) (termination of abuse protection order by defendant); *Birchall, petitioner*, 454 Mass. 837, 852-

853 (2009) (civil contempt); *Adoption of Helen*, 429 Mass. 856, 859 (1999) (termination of parental rights); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 870 (1975) (libel against public figure). But what is at stake here is merely a punitive financial penalty.

Philip Morris nevertheless urges that punitive damages are "quasi-criminal" by virtue of their condemnatory function, *Cooper Indus., Inc.*, 532 U.S. at 432, and threaten important interests such as the ones described above. We are skeptical that punitive damages under the wrongful death statute expose a defendant to greater stigma than, for example, multiple damages imposed under G. L. c. 93A. Regardless, reputational harm is not comparable to the types of consequences, such as civil contempt or the loss of parental rights, that we have held cannot be imposed without clear and convincing evidence.

4. Bifurcation. A trial judge, other than one sitting in the District Court, may, under Mass. R. Civ. P. 42 (b), as amended, 423 Mass. 1402 (1996), bifurcate any claim or issue for trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy. "The decision to bifurcate is one within the sound discretion of the judge." *Adams v. Adams*, 459 Mass. 361, 392 (2011), S.C., 466 Mass. 1015 (2013). Here, Philip Morris argues that the judge abused her discretion in denying its motion to bifurcate the issue of punitive damages from the remainder of the trial and that as a result, introduction of evidence of the company's revenue prejudiced the jury's consideration of both liability and damages.

As we have already noted, evidence of the company's revenue was admissible with respect to the

appropriate measure of punitive damages. See *Laramie*, 488 Mass. at 419. In considering bifurcation, the judge could consider that the revenue evidence would be only a small fraction of the evidence at trial,[22] and that the jury would be instructed as to the limited use to which the evidence could be put. Moreover, the judge was entitled to rely on plaintiffs' counsel's representation to her that counsel did not intend to make any improper use of the evidence, but rather intended to use it solely for the purpose we approved of in *Laramie*. And, as it developed, plaintiffs' counsel neither urged nor suggested to the jury that the evidence could be used for any purpose other than to assess the measure of punitive damages needed to punish and deter the company's conduct. Finally, as we have already discussed at length, there is nothing in the record to suggest that evidence of Philip Morris's revenue caused the jury to be swept away by emotion or to render a verdict that was not firmly rooted in the evidence. In the circumstances, we discern neither an abuse of discretion in the decision to deny bifurcation nor any prejudice resulting from it. See *Dobos v. Driscoll*, 404 Mass. 634, 644-645, cert. denied sub nom. *Kehoe v. Dobos*, 493 U.S. 850 (1989) (noting no case "in which the decision of a judge not to bifurcate a civil proceeding has been the ground for reversal").

To the extent Philip Morris asks us to adopt a rule requiring bifurcation in all cases involving punitive damages because "evidence of a defendant's net worth

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[22] As it turned out, testimony from Philip Morris's chief financial officer (including his direct examination, cross-examination, and redirect examination) consumed only twenty of the 5,821 pages of trial transcript.

creates the potential that juries will use their verdicts to express biases against big businesses," *State Farm*, 538 U.S. at 417, quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994), we think no such rule is necessary. The concern, if and when it arises in any particular future case, can be adequately addressed through a trial judge's discretionary decisions to limit the amount of such evidence admitted or to bifurcate in appropriate circumstances, or through remittitur. See *State Farm*, 538 U.S. at 418.

5. Federal Labeling Act preemption. The Federal Labeling Act provides detailed requirements for the warning labels that must appear on every cigarette package sold in the United States. Furthermore, the Labeling Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter. 15 U.S.C. § 1334(b). The preemptive scope of the Labeling Act "is governed entirely by the express language in [15 U.S.C. § 1334]," which is to be read narrowly "in light of the presumption against the pre-emption of state police power regulations. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-518 (1992).

Both statutory and common-law State claims based on theories that a defendant "should have included additional, or more clearly stated, warnings" than those required by the Labeling Act, or that are based on theories that a defendant's advertising "neutralized the effect of federally mandated warning labels," are preempted by § 1334(b). *Cipollone*, 505 U.S. at 522, 524, 527. But the Labeling Act does not preempt

claims that are "predicated not on a duty 'based on smoking and health' but rather on a more general obligation," such as "the duty not to deceive. *Id.* at 528-529. In other words, the Labeling Act "pre-empts only *requirements and prohibitions*—i.e., rules—that are based on smoking and health," not claims that assert "harms related to smoking and health." *Altria Group, Inc. v. Good*, 555 U.S. 70, 84 (2008).

a. Admission of evidence. Philip Morris does not assert that any of the plaintiffs' claims were preempted by the Labeling Act. Instead, it argues that it was error to admit evidence relevant to those nonpreempted claims (fraud, conspiracy, and breach of warranty) because that evidence may have also supported a preempted claim—even though no such preempted claim was asserted in this case. Under this novel theory, Philip Morris contends that the judge erred in permitting the plaintiffs to cross-examine an expert witness concerning Philip Morris's decision to remove certain warning labels from brands it acquired from another cigarette manufacturer. That evidence was relevant to the plaintiffs' fraud and conspiracy claims because it tended to rebut Philip Morris's account of its efforts to avoid deceiving its customers. State law fraud and conspiracy claims alleging breach of the "duty not to deceive" are not preempted by the Labeling Act. *Cipollone*, 505 U.S. at 528-530.

The fact that the evidence might have also been relevant to an unasserted preempted claim does not mean that it could not be admitted in connection with a nonpreempted claim that was asserted. See *Altria Group, Inc.*, 555 U.S. at 82 n.9 (fact that evidence may have supported preempted claim does not bear on whether another claim is preempted by Labeling Act).

"There is nothing new in the recognition that the same conduct might violate multiple proscriptions. *Id.* Every Supreme Court case assessing preemption under the Labeling Act has done so by examining the nature of the claim asserted, not by looking to the evidence needed to prove the claim. See *id.* at 82-83 (State fraud claims not preempted by Labeling Act); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 549-551 (2001) (regulations targeting cigarettes are preempted); *Cipollone*, 505 U.S. at 520-530 (claim-by-claim preemption analysis).

Our case law is in accord. In *Laramie*, 488 Mass. at 414, Philip Morris argued that the Labeling Act preempted admission of Federal Trade Commission reports that included statements that few consumers "notice or pay attention to" warning labels on cigarette packaging. We disagreed, reasoning that because "Philip Morris argued at trial that Laramie fully understood the risks of smoking, in part due to the presence of the warning labels[, e]vidence that consumers did not notice or read the mandated warnings thus was relevant" to how consumers formed expectations about Philip Morris cigarettes and hence to the plaintiff's breach of warranty claim. *Id.* at 415. The same conclusion holds here.

b. Jury instructions. Philip Morris also argues that the judge should have instructed the jury that labels mandated by the Labeling Act are "adequate as a matter of law to warn [Barbara] and other members of the public of the hazards associated with smoking. The judge did not err in declining to give the proposed instruction. While the proposed instruction would have been correct had the plaintiffs asserted a failure to warn claim, it was misleading in the context of the

duty-not-to-deceive claim the plaintiffs actually asserted. See *Philip Morris USA Inc. v. McCall*, 234 So. 3d 4, 17-18 (Fla. Dist. Ct. App. 2017) (where plaintiff did not assert failure to warn, jury instruction that Labeling Act-compliant cigarette manufacturers "cannot be the subject of *any claim* that the advertising undermined or neutralized the warnings or made them less effective" was likely to confuse jury and was reversible error).

Along the same lines, Philip Morris argues that the judge should have given an instruction that Philip Morris could not be held "liable based on any claim that its advertising undermined or neutralized the Congressionally-mandated warnings or made them less effective." But because the plaintiffs did not assert any such claim, the proposed instruction risked confusing the jury by incorrectly implying that Federal law had some bearing on the claims that were before the jury for consideration.

Moreover, the judge instructed the jury that Federal law mandates warning labels on cigarette packages and advertisements and that "cigarette manufacturers are not required to provide any additional or stronger warnings"; the judge thus conveyed the import of the Labeling Act to the jury. "A trial judge has wide latitude in framing the language to be used in jury instructions as long as the instructions adequately explain the applicable law" (quotation and citation omitted). *Luppold v. Hanlon*, 495 Mass. 148, 158 (2025).

6. Failure to admit liability. Finally, Philip Morris contends that its due process right to defend itself in litigation, see *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process clause "prohibits

a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense'" [citation omitted]), was infringed when one of the plaintiffs' experts was permitted to testify that the company had never fully acknowledged the harmful effects of its products. The judge permitted the testimony on the ground that evidence of Philip Morris's present public position concerning its products was relevant to rebut the company's claim that it had been transparent about the health dangers of cigarettes since 1999.

The problem with Philip Morris's argument is that the record does not support it. Fairly read, the testimony cannot be understood to refer to Philip Morris's defense in litigation. Rather, its references to the company's website, newspapers, packaging, and "various other forums" would have made clear to the jury that the expert's testimony about what Philip Morris had admitted and acknowledged referred to Philip Morris's statements outside of the present litigation. Even if there were some possibility that the jury might draw a different inference from the testimony, any such risk was alleviated by the instruction that Philip Morris had the right to defend itself and that they could not "infer that [Philip Morris is] liable or otherwise acting improperly based on the fact that [it is] contesting liability and defending [itself]. Cf. *Evans*, 465 Mass. at 457 (no error in admitting evidence that could not be basis for liability but could be used in support of liability, where there was no risk of juror confusion).

Conclusion. For the reasons set out above, we affirm the judgment entered on December 14, 2023. We also affirm the orders entered on January 5, 2024, denying Philip Morris's motions for judgment notwithstanding the verdict.[23]

So ordered.

[23] A party that prevails on a claim under G. L. c. 93A is statutorily entitled to recover reasonable appellate attorney's fees and costs with respect to the claims on which it prevailed. See *Bonofiglio v. Commercial Union Ins. Co.*, 412 Mass. 612, 613-614 (1992). The party must have made the request for appellate attorney's fees in its brief. *Fabre v. Walton*, 441 Mass. 9, 10 (2004). Because the plaintiffs made such a request in their briefing, they may file a request for appellate attorney's fees and costs with this court within fourteen days of the date of the rescript of this opinion in accordance with the procedure described in *Fabre*, 441 Mass. at 10-11. The defendant shall then have fourteen days within which to respond.

Appendix B

MASSACHUSSETTS APPEALS COURT

No. SJC-13778

ARMAND FONTAINE,
Appellee,
v.
PHILIP MORRIS USA INC.,
Appellant.

Entered: May 21, 2025

DOCKET TEXT ORDER

ORDER: Case transferred to SJC sua sponte. *Notice/Attest.

Appendix C

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

No. 2081CV00169

ARMAND FONTAINE, individually and as Personal Representative of the Estate of Barbara Ellen Fontaine,

Plaintiff,

v.

PHILIP MORRIS USA INC., and DEMOULAS SUPERMARKETS, INC.,

Defendants.

Entered: Sept. 8, 2023

MEMORANDUM OF DECISION ON CROSS MOTIONS FOR NEW TRIAL OR REMITTITUR

Plaintiff Armand Fontaine, as executor of the estate of Barbara Ellen Fontaine brought this action against defendant Philip Morris USA Inc. At the end of trial, the jury awarded $8 million for compensatory damages (including loss of consortium for plaintiff and his two adult children), and $1 billion in punitive damages. Both parties now move for remittitur on the punitive damages. Cross motions for new trial or remittitur were heard on May 3, 2023. Specifically, the defendant challenges the punitive award as being

excessive. For the following reasons, the plaintiff's motion is ALLOWED, and the defendant's motion is ALLOWED in part and DENIED in part.

The $1 billion punitive-damages award in this case is the largest punitive-damages verdict in Massachusetts history. The award is 125 times larger than the $8 million compensatory-damages award. It is 100 times larger than the largest punitive award upheld on appeal in a Massachusetts tobacco case. It is 55 times larger than the largest award ever upheld in *any* Massachusetts case. It is twelve times larger than the largest punitive award ever returned by a Massachusetts jury. And still, this Court is loathe to disturb this jury's award or any jury award. However, for the reasons below (and at the behest of both parties), the Court reduces the punitive damages found by the jury from $1 billion to $56,098,000.

The defendant accuses the jury in this case of rendering a verdict that is the product of prejudice, partiality, and passion. However, as this Court had the opportunity to observe, the highly educated jury listened attentively to weeks of testimony, asked thoughtful questions during the trial and during deliberations, and rendered a verdict that was grounded in the instructions it was given and the evidence it heard - including the unrebutted evidence of the defendant's substantial wealth. There is no legal or other reason to order a new trial. There is also no need to rule on the defendant's constitutional arguments because plaintiff, recognizing that precedent imposes constitutional limits on the amount of a punitive damages award, proposed that the punitive damages be reduced to $56,098,000. The

request comports with the multiplier advised by the Massachusetts Supreme Judicial Court in *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398 (2013).

On a motion for remittitur, a court may only disturb an award of compensatory damages if it was unsupported by substantial evidence in the record, i.e., "greatly disproportionate to the injury proven or represented a miscarriage of justice." *Labonte,* 424 Mass. at 824 (citation omitted). The size of the verdict alone does not determine whether it is excessive; the judge must consider "whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." *Id.* at 825.

A judge has broad discretion to act on a motion for a remittitur. *Baudanza v. Comcast of Massachusetts Inc.,* 454 Mass. 622, 630 (2009); Powers v. H.B. Smith Co., 42 Mass. App. Ct. 657,665 (1997). The judge is not obliged to make the smallest modification possible, but rather may "bring the verdict anywhere within the range of verdicts supported by the evidence." *D'Annolfo v. Stoneham Hous. Auth.,* 375 Mass. 650,662 (1978). Pursuant to Mass. R. Civ. P. 59, if the judge grants a remittitur, the plaintiff may choose to accept the remitted amount or have a new trial on the issue of damages. *See Waucantuck Mills v. Magee Carpet Co.,* 225 Mass. 31, 33,113 N.E. 573 (1916)

I. The jury's punitive award was supported by evidence of the defendant's financial Condition.

Punitive damages are intended to punish and deter. *Dartt v. Browning-Ferris Indus. Inc. (Mass.),* 427 Mass. 1, 17 (1998). These goals are not served if the wealth of a defendant allows it to absorb the award with little or no discomfort. *Clifton v. Massachusetts Bay Transp. Auth.,* 445 Mass. 611, 624 (2005) ("proper punitive damage award" is one that is "sufficient ... to send a clear message to the defendant of condemnation for its reprehensible behavior"). It is a "difficult and uniquely human judgment that defies codification." *Aleo,* 466 Mass. at 413 (2013). For that reason, juries are entrusted with the decision and the courts do not review "the wisdom" of a jury's award of punitive damages. *Id.* There is no reason to question the jury's wisdom here because it was supported by the evidence.

Here, the amount of the jury's punitive damages award was supported by substantial evidence. A critical factor in determining an amount that will punish a defendant is the defendant's financial resources. The jury was instructed, consistent with Superior Court Model Jury Instruction 3.15, to consider defendant's "wealth, in order to determine what amount of money is needed to punish its conduct."

The evidence established that defendant's wealth was many multiples of billions of dollars. For example, the jury heard that defendant's annual revenues in 2019, 2020 and 2021 were over $21 billion, and that its annual profit each year was almost $8 billion.

These were profits after the defendant paid billions of dollars in regulatory fees and under the Master Settlement Agreement ("MSA"). For defendant, $1 billion is about six weeks of profit. The defendant did not contest any of this evidence. It did not present evidence of its financial condition, it did not claim that there was an amount it would be unable to pay, and it did not suggest a different amount of punitive damages. Given the unrebutted evidence of defendant's substantial financial condition, there is no basis to question the wisdom of the jury's punitive award.

To the extent that defendant rests its claim of excessiveness on comparing other punitive damage awards, that assertion fails. "[B]ecause no two cases are truly identical, meaningful comparisons of such awards are difficult to make." *Charles,* 96 Mass. App. Ct. at 351; *see also Dubuque v. Cumberland Farms, Inc.,* 93 Mass. App. Ct. 332,335 (2018) ("We decline to engage in the "dangerous game" of comparing an award in once case against an award in another."). The Court declines to engage in this side-by-side comparison of cases for the purpose of determining whether the punitive damage award is appropriate in this matter.

II. A constitutional remittitur comports with Federal and Massachusetts precedent.

United States Supreme Court precedent imposes some constitutional limits on the amount of a punitive damages award. Plaintiff proposes that the punitive damages be reduced to $56,098,000, in line with the 7 times multiplier approved by the Massachusetts Supreme Judicial Court in *Aleo.*

The starting point for the constitutional analysis is the three "guideposts" created by the United States Supreme Court. They are: (1) the reprehensibility of the defendant's misconduct; (2) the disparity between the plaintiffs harm and the punitive award; and (3) civil and criminal penalties for similar conduct. *BMW of N Am, Inc. v. Gore,* 517 U.S. 559, 574-86 (1996). Of the three, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 575. The defendant does not argue that its conduct was not reprehensible enough to justify the award in this case. Rather, it focuses exclusively on the relative values of the compensatory and punitive damage awards.

Alternatively, defendant suggests a multiplier of no more than four. As the defendant acknowledges, the Massachusetts Supreme Judicial Court rejected such a limitation in *Aleo.* 466 Mass. at 415-18. *Aleo* recognized that the United States Supreme Court has repeatedly refused to adopt a maximum permissible ratio. *Aleo* even cited decisions approving double-digit ratios of punitive to compensatory damages. *Id.* at 415-17. The Court's reasoning applies equally here.

Second, the Court rejected another argument made by defendant, that a lesser ratio is required when the compensatory damages award is substantial. The Court explained that even a substantial sum like $2,640,000 "pales when viewed not as compensation for economic loss or emotional distress but for the loss of a young woman's life." *Id.* at 418. The jury's award of $8 million in this case sought to compensate four people for a similar loss.

And it also provided redress for the awful experience of Mrs. Fontaine slowly and painfully succumbing to cancer.

Lastly, *Aleo* recognized that the most important factor was the degree of reprehensible conduct by the defendant. defendant's conduct in this case is far more reprehensible than the defendant's conduct in *Aleo*. The Court categorized the defendant's conduct in *Aleo* as the least blameworthy that is punishable by punitive damages, gross negligence. By contrast, the jury in this case found defendant's conduct to be malicious, willful, wanton or reckless. And there was ample evidence to support that. defendant purposefully designed its product to be as addictive as possible despite knowing that addictive smoking causes many fatal illnesses. The defendant targeted children like Mrs. Fontaine because they are easy to addict, and defendant wanted a steady supply of new customers to replace the customers who died. For almost five decades, defendant worked with every other major cigarette company to conceal and mislead the American public, the medical community, and government health agencies about the addictive and deadly nature of its products. Millions of people became ill and died as a result. The defendant knew this but continued anyway because it made hundreds of billions of dollars from selling cigarettes. The Florida Supreme Court has described this conduct by the cigarette companies as "among the most reprehensible." *Schoeff*, 232 So. 3d 294, 307-09 (Fla. 2017).

A higher ratio is completely appropriate in this case. Higher ratios have applied to less offensive

conduct. *See, e.g.*, *Campbell v. State Farm*, 98 P.3d 409, 413-19 (Utah 2004) (9:1 ratio for insurance bad faith); *cert denied* 125 S. Ct. 114 (2004); *In re Actos Products Liability Litigation*, 2014 WL 5461859 *55 (W.D. La. 2014) (25: 1 ratio for drug liability); *Cooley v. Lincoln Elec. Co.*, 776 F. Supp. 2d 511, 552-55 (N.D. Ohio 2011) (6.3:1 for toxic tort); *Letz v. Turbomeca Engine Corp.*, 975 S.W. 2d 155, 180 (Mo. App. 1997) (10.6: 1 ratio for product liability). Other courts have approved similarly high ratios in cigarette cases. *See, e.g.*, *R.J Reynolds Tobacco Co. v. Gerald,* 2022 WL 2528307 *31 (V.I. 2022) (9:1 ratio); *Bullockv. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382,400 (Cal. Ct. App. 2011) (16:1 ratio); *R.J. Reynolds Tobacco Co. v. Martin*, 53 So. 3d 1060, 1070 (Fla. 2010) (7.58:1). Here, the Court will impose a 7:1 ratio and reduce the punitive award to $56,098,000.

III. The defendant is not entitled to a new trial or a remittitur on the basis of "prejudice, partiality and passion" by the jury.

To the extent defendant seeks a new trial or remittitur because it claims the trial was affected by "prejudice, partiality and passion," its Its accusation lacks any foundation in the record. *See Dubuque v. Cumberland Farms, Inc.*, 93 Mass. App. Ct. 332, 334-35 (reversing remittitur because the accusation of bias "lacked a firm foundation in the record"). defendant offers virtually nothing other than the size of the award in support. The jury in this case was a highly educated jury that included, among others, a PhD in bioengineering, a PhD candidate, an engineer in the pharmaceutical industry, and special education teacher, a banker, and a corporate communications

executive. The jury's conduct throughout the trial made clear that it was not consumed by prejudice, partiality, and passion:

- Throughout a lengthy trial, the jurors asked pointed, thoughtful questions that reflected that they were listening and scrutinizing the testimony of the witnesses from different perspectives.
- The jurors deliberated over the course of three days to consider evidence presented during weeks of trial.
- The jury asked to see a demonstrative exhibit—a box of a cigarette brand (Accord) that Plaintiff had claimed was a safer alternative design. The jurors passed the box around, and some closely read the language on the box.
- The jury found for defendant and against Plaintiff on one of the suggested alternative safer designs (low tar cigarettes) for the warranty claims.
- The jury did not award the compensatory damages Plaintiff had requested for Mrs. Fontaine's husband. Plaintiff sought $5 million for his loss; the jury awarded one-fifth that amount, $1 million.
- The jury did not return equal damages for Mrs. Fontaine's children as requested; the jury decided that Mrs. Fontaine's son experienced less of a loss than her daughter did.
- The jury interrupted its deliberations to ask a question about punitive damages, again

reflecting that it did not blindly return an impassioned verdict against defendant.

All of this makes clear that the jury returned a thoughtful and deliberative verdict. defendant tries to blame the jury's punitive damages verdict on seven trial rulings, apparently claiming that the size of the punitive damages verdict makes clear that the rulings provoked the jurors' bias and animosity. Jurors are presumed to follow the court's instructions when deciding the case.

The relevant jury instructions told the jury:

- Function of Jury: "You should determine the facts based solely on a fair consideration of the evidence. You are not to be swayed by prejudice, sympathy, or personal likes or dislikes toward either side."
- Damages: "You must be guided by your common sense and your conscience, but not by emotion or sympathy."
- Punitive: "In determining ... the amount of [punitive] damages, you may not seek to punish [defendant] for any conduct except the conduct you found to have caused Mrs. Fontaine's lung cancer and death. You also may not seek to punish [defendant] for any harm suffered by any individuals other than Mrs. Fontaine and her family."
- Punitive: "In determining the amount of punitive damages, you may punish [defendant] only for its ... conduct that you have found was a cause of Barbara Fontaine's death. You may not assess punitive damages

for conduct which you did not find [defendant] liable, …

- Warranty:" ... you must then consider whether the Defendants' breach of warranty caused Mrs. Fontaine's injuries. Even if you find that a Defendant breached its warranty, that Defendant is not liable to Plaintiff unless its breach of warranty caused Mrs. Fontaine's harm."

More than bare conjecture is required to establish that the jurors abandoned their duty. *Reckis v Johnson & Johnson*, 471 Mass. 272, 304 n. 49 (2015) (rejecting defendants' argument that the size of the jury's award proved that the jury's decision was motivated by passion and prejudice because the jurors were instructed on the law governing their decision and jurors are presumed to follow the instructions in rendering their verdict); *Commonwealth v. McLeod*, 100 Mass. App. Ct. 1126 *2 (2022) ("speculation as to the jury's verdict is ill-advised and often fruitless"); *see generally Commonwealth v. Merry*, 453 Mass. 653, 661 (2001) (evidence is not sufficient if it requires "conjecture and speculation").

As to the warranty claim, this Court already rejected defendant's argument that the warranty verdicts are inconsistent. The defendant ignores that these were separate claims of liability against the defendants, and so the jury was asked to make separate causation findings. *See Evans v. Lorillard Tobacco Co.*, 465 Mass. 411,423 n. 7 (2013) (separation findings of causation are preferred when there are multiple claims). In fact, defendant waived this argument at trial. Both sides requested a separate

causation question as to Demoulas. And the causation evidence was different for the two defendants. The evidence established that Mrs. Fontaine smoked defendant brand cigarettes from the time she was a teenager in the early 1970s. As to Demoulas, there was evidence that she was buying cigarettes there when she met her husband in 1988. But there was no evidence about where she bought her cigarettes before then. Nor was there evidence that she only bought cigarettes from Demoulas after 1988. The jury could have rationally concluded that Mrs. Fontaine's smoking of defendant cigarettes throughout her entire smoking lifetime was a legal cause of her lung cancer and death, but that there was insufficient evidence that the cigarettes she bought from Demoulas were a legal cause. This was a jury that thoughtfully parsed out the claims and the evidence pertaining to each defendant.

III. The defendant's constitutional challenges are irrelevant because the Court grants remittitur.

The defendant asserts eleven arguments grounded in the Massachusetts Constitution and the United States Constitution. The Court need not consider these eleven arguments if it grants remittitur. Still, we respond to point out that none of defendant's arguments have been adopted in Massachusetts, and we explain why some have been expressly rejected by courts in other jurisdictions.

A. The defendant's claims that the punitive damages award violates due process because punishment and deterrence are no longer needed fails as a constitutional principle.

The defendant argues that punitive damage awards against it are no longer needed for punishment and deterrence. This argument fails for many reasons. None of the decisions cited by defendant addressed defendant's argument that a punitive damage award is unnecessary if punishment and deterrence is no longer necessary. Other courts have specifically rejected this argument. *See, e.g.*, *Kerrivan v. R.J. Reynolds Tobacco Co. and Philip Morris*, 953 F.3d 1196, 1208 n.8 (11th Cir. 2020). The defendant ignores that punitive damages serve a second purpose—deterring others from engaging in similar extreme misconduct.

The defendant cites compensatory damages paid in other cases as sufficient punishment. But compensatory damages and punitive damages serve distinct purposes, as the jury was instructed—"You must not use your damages award ... to punish the Defendants." And, as explained in the below discussion of *Philip Morris v. Williams*, 549 U.S. 346, 349-51, 355 (2007), damages paid to other victims are not relevant because the amount of the punitive assessment must be limited to conduct relating to the plaintiff before the Court.

The defendant also asserts that its MSA payments and its payment of regulatory fees have also amounted to a sufficient punishment so that plaintiffs in private lawsuits should no longer be able to request

punitive damages. This argument fails for the same reason; these payments are irrelevant because, pursuant to *Williams*, this jury was tasked with determining an amount of punitive damages based on the conduct that harmed Mrs. Fontaine and her family. Moreover, regulatory fees are not "punishment"; they are fees of a kind that are imposed on numerous industries for the cost of regulation. Nor, as the Massachusetts Supreme Judicial Court held in *Laramie*, are MSA payments a substitute for punitive damages based on the conduct that harmed the Fontaine family. 488 Mass. at 405-11.

ORDER

For the foregoing reasons, plaintiff's motion for remittitur is ALLOWED. The jury's punitive damages are reduced. from $1 billion to $56,098,000 by the Court. The defendant's motion for remittitur is ALLOWED as to remittitur and DENIED as to the amount and DENIED as to the request for new trial.

[handwritten: signature]
Honorable Shannon Frison
Justice of the Superior Court
September 8, 2023

Appendix D

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

No. 2081CV00169

ARMAND FONTAINE, individually and as Personal Representative of the Estate of Barbara Ellen Fontaine,

Plaintiff,

v.

PHILIP MORRIS USA INC., and DEMOULAS SUPERMARKETS, INC.,

Defendants.

Hearing Held: Aug. 12, 2022

EXCERPTS FROM PRETRIAL HEARING
Vol. 5

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[588]

* * *

MR. CHESIN TO THE COURT

And then otherwise, so what is on the agenda are papers No. 58, 59, 60, and 50 in that order.

Fifty-eight, 59, and 50 are all motions that I think we can table pending our discussions this weekend, which means the only one left to argue substantively

is Paper No. 60, about the Liggett warnings. And Ms. Olson is going to handle that argument.

THE COURT TO MS. OLSON

All right. Thank you. I'm all set. Whenever you're ready.

MS. OLSON TO THE COURT

Thank you, your Honor. So this motion asks your Honor to preclude plaintiff from introducing warning labels that a nonparty [589] cigarette manufacturer named Liggett voluntarily added to the packs of its cigarettes.

The background there is that in 1966, Congress passed the Federal Cigarette Labeling Act and required warnings to go on every pack of cigarettes sold in the United States.

That act specified everything about the warnings: Where they had to be, the font, the size, the language, of course.

And then a couple of years later, Congress amended that act to strengthen the language of the warning but also to include an express preemption provision.

The provision is very clear. It says no statement relating to smoking and health other than the warnings the act requires shall be required on any cigarette package.

The Supreme Court has recognized that the Labeling Act expresses Congress' determination that the prescribed federal warnings are "sufficient to achieve the purpose of informing the public of the health consequences of smoking."

Based on that provision, both the [590] United States Supreme Court and the Massachusetts Supreme Judicial Court have held that the Labeling Act expressly preempts any state law claim that's predicated on the contention that after 1969, cigarette manufacturers had a duty to provide warnings in addition to the warnings prescribed by the Labeling Act.

So that's why cases like this one, where the smoker didn't start smoking until after 1969, there's no claim for failure to warn. It's preemptive, and the plaintiffs can't bring it.

There's no allegation in this case or in any other case that Philip Morris failed to include the warnings that the Labeling Act requires on the packs of its cigarettes at any time after the act was passed.

So then here we get to the issue, and that's that in 1997, Liggett, a nonparty manufacturer, started including an additional warning on its packs. Nothing required it to do that, but it chose to. It has every right to. But all the other cigarette manufacturers, including Philip Morris, just kept with the Labeling Act warnings.

[591] That's something that the Labeling Act unequivocally authorized them to do. So two years later, in '99, Philip Morris bought three brands of cigarettes from Liggett; that's L&M, Lark, and Chesterfield.

Philip Morris began selling them in packs without the Liggett voluntary warning, the extra warning Liggett had chosen to add a couple of years earlier. These are brands that Ms. Fontaine never smoked.

And, again, there's no failure-to-warn claim in this case because it would be preemptive. But plaintiff still wants to introduce evidence that Philip Morris didn't continue using these warnings that Liggett voluntarily had added.

And plaintiff says that he should be able to do that because it shows that Philip Morris was concealing facts about the addictiveness of smoking and acting reprehensibly.

But, your Honor, that's a straightforward rejection of the Labeling Act's preemption provision as interpreted by the United [592] States Supreme Court and the Supreme Judicial Court. It's an attempt to circumvent express preemption and invite the jury to punish Philip Morris for failing to include warnings in addition to the federally mandated warnings. And that theory of liability is preempted on all fours.

Plaintiff hasn't cited any Massachusetts case where the Liggett warnings have come in, and that's because they haven't. So then that's the issue.

Then I just want to address one argument that's in plaintiffs' opposition, and that is plaintiff points out that we are going to introduce evidence that starting in the 2000s, Philip Morris started placing onserts and tear tapes on packs of Light cigarettes that said lights aren't safer than regular cigarettes.

And plaintiff is right that we're going to do that. But plaintiff is wrong that that somehow green-lights plaintiff to suggest that Philip Morris could in any way be liable or found to have done something wrong by not keeping Liggett's voluntary warnings on cigarette packs.

[593] You know, both the Liggett voluntary warnings and Philip Morris's onserts and tear tapes are on packs. Yes, true, but they're apples and oranges under the law.

Onserts and tear tapes saying lights aren't safer, those come in, and here is why: Plaintiff is claiming that Ms. Fontaine was defrauded into thinking that Light cigarettes were safer than regular cigarettes and that she saw ads and she believed them and she relied on them to think that Light cigarettes were safer than regular cigarettes.

Evidence that there were onserts and tear tapes on the actual packs that said Light cigarettes are not safer tends to contradict that allegation.

So, you know, we're certainly not suggesting that Philip Morris gets any points for doing the right thing by placing, you know, onserts and tear tapes on packs. But there's an issue in the case of whether Ms. Fontaine truly believed and really relied on Light cigarettes being safer and evidence that there were, you know, messages right on the packs of cigarettes [594] that she smoked, saying Lights aren't safer is certainly relevant to that issue.

And here is the important part. There's no federal statute saying that that evidence doesn't come in. There's no statute that says Philip Morris can't defend itself on a fraud claim by introducing evidence that it told smokers that Lights aren't safer.

But there is a federal statute that the United States Supreme Court and the Supreme Judicial Court have interpreted and held to mean that Philip Morris cannot be liable for not including any additional warnings on its pack, as long as it included the

federally mandated warnings under the Labeling Act, which it has, and there's no allegation that it hasn't.

So that's why the Liggett warnings cannot come in. Express preemption.

Plaintiff says that that's not fair. It's not fair if we get to put in the tear tape and onserts and plaintiff can't introduce the warnings. But the fact that plaintiff can't introduce the Liggett warnings and say PM did something wrong by not including those additional [595] warnings is a consequence of Congress choosing to expressly preempt claims predicated on the fact that a cigarette manufacturer chose not to include any additional warnings. That's the language.

So reasonable people can disagree about what is fair. But whether something is preempted doesn't hinge on a fairness analysis. If something is preempted, you know, it's preempted.

If we were in a hypothetical world where there wasn't a Labeling Act and there were no preemption, maybe plaintiff would have a failure-to-warn claim in the case and maybe they could introduce the Liggett voluntary warnings.

But that's a theory of liability that Congress chose to take away, and the consequences of that is the plaintiff absolutely cannot suggest that Philip Morris has done something wrong, could be liable or could be punished for not including any warnings in addition to those that Congress required in the Labeling Act. So thank you, your Honor.

THE COURT TO MS. OLSEN

Thank you.

MR. ROSENBLUM TO THE COURT

So, your Honor, this is [596] an issue where in our case in chief, we don't elicit this information. We don't attempt to elicit this information about what Ms. Olson told you happened, the history of the warning, the voluntary addictive labels and being taken off by Philip Morris.

This is very similar to when the defense tried to convince the Court that there was a constitutional prohibition about getting into information about their advocacy efforts or litigation efforts. And as the Evans court said, and as I argued to the Court, if we were offering it for the improper purpose, then that would be one thing. If we were offering that advocacy evidence to suggest they're liable for doing it, that might be a problem.

And here that's why their argument fails here. This is not a situation where preemption doesn't apply to the way in which we're going to use this evidence. We are not saying, ladies and gentlemen, they're liable because they failed to put on more words on the label than what Congress intended or they're liable because what they should have put on the [597] label is this, and they didn't do that.

That would be preemptive. That's not at all what we're doing. This is the same argument they wanted to make about FDA when they said, we're allowed to do this, but you can't allow plaintiff to cross-examine on this. And you've already ruled on that.

They're arguing the same thing here. What they're saying here—and it's not just about onserts and tear tapes. I'll tell you the additional evidence as well. What they're saying here is we get to get up and we

get to say to the jury that we did all these things on the packs. We put little onserts on the packs. We put tear tapes on the packs. And this is additional things they did too. Because Ms. Olson said, we're not suggesting we get credit for that. But that's not the way that they argue this to the jury. They absolutely argue it for mitigation as well.

And what they say is they'll say not only did Philip Morris put onserts and tear tapes on their packs, but you'll hear evidence that Philip Morris voluntarily—that's the word they [598] will use—created their own website, and starting in around 2000, they voluntarily put on their website information about smoking and health, that smoking causes lung cancer, that it can be deadly, the harms of smoking. And they put out some newspaper inserts as well that had similar information. All of this is presented to the jury.

One purpose is what Ms. Olson said, which is relating to the fraud claim, but the other purpose is to say, hey, what else are we supposed to do? Philip Morris had a website. We wanted to get the message out so that smokers had all the information they needed to make a decision.

Once they do that, once they introduce that issue—that's not us. That's them—once they do that, we're entitled to respond to that and say, wait a minute, when Philip Morris acquired these other three brands which had a voluntary label that said nicotine is addictive, Philip Morris chose to remove that language.

That's inconsistent with their theory. It's inconsistent with the notion that [599] Philip Morris wanted all their consumers in the public to have all

the information. Why did they remove those labels if that were the case?

It is not to suggest to the jury they're liable for doing it. It's to respond to the evidence that they're going to present on this topic.

That's why preemption doesn't play any role in this and, quite frankly, why almost all the constitutional arguments on any of the variety of issues that they've raised don't apply. Because we're not using them for the purposes for which they say.

Preemption does not apply to common law causes of action for fraud or conspiracy. That has been decided by the Supreme Court. There's no question about that.

Those are our claims in this case. But as it relates to admissible evidence, it is admissible for us to point out in response to what they're going to say. Otherwise, it's not the full picture and we're being unfairly prejudiced. We have no meaningful way to rebut their presentation that, hey, we were getting the [600] word out on all these things so smokers were fully aware of all the health hazards without us saying, but wait a minute, you acquired these brands and then you removed these labels. And that's the purpose for which we offer that evidence, your Honor.

THE COURT TO MR. ROSENBLUM

Thank you.

MS. OLSON TO THE COURT

Your Honor, just two things: Whether plaintiff is going to call it a theory of failure to warn or say what purpose they're using it for, plaintiff intends to suggest to the jury that there's something not right

about Philip Morris not including these additional warnings on cigarette packs beyond what the Labeling Act required them to do, and that's preempted.

Sometimes the parties do disagree on whether preemption applies in murkier contexts, but this is not one of them. We're talking about the actual pack of cigarettes and whether plaintiff can insinuate there's something wrong that Philip Morris didn't add another warning to the pack of cigarettes. And that's clearly preempted. They cannot do that.

[601]

And then just to the second point about whether—you know, kind of more about fairness or responding to our evidence, courts apply the law. They apply federal preemption. There's no second step where they're then to proceed to weigh the equities or counterbalance the effect of preemption. You know, if something is preempted, it's preempted. That's all. Thank you.

MR. ROSENBLUM TO THE COURT

Nothing further, your Honor. Thank you.

THE COURT TO COUNSEL

As to this motion, this subset regarding the Liggett warning labels, I'm going to deny the motion to preclude it.

The description of how it comes in, I think, makes a difference. Contingent about motivations and behavior, I think, can be rebutted. And these are squarely issues, I think, for the jury to determine when they are passing judgment, essentially, on Philip Morris's conduct.

So to the extent that the defense does present information about its attempts to better inform the public to change, to provide warnings, [602] to do advertisements that serve that purpose, information about removing such warnings on some other brands or on these particular brands, I think, is fair game as rebuttal to that evidence.

So if for some reason it's coming in in the case in chief or on Direct somehow, we can certainly revisit it. But I think given the description of how this has played out, I'm not going to preclude it at this time.

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Appendix E

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

No. 2081CV00169

ARMAND FONTAINE, individually and as Personal Representative of the Estate of Barbara Ellen Fontaine,

Plaintiff,

v.

PHILIP MORRIS USA INC., and DEMOULAS SUPERMARKETS, INC.,

Defendants.

Held: Aug. 29, 2022

EXCERPTS FROM JURY TRIAL
Vol. 20

[2911]

* * *

MR. ROSENBLUM TO DR. PROCTOR

Before Philip Morris purchased those brands from Liggett, did Liggett voluntarily place certain warnings on its packs relating to nicotine being addictive?

DR. PROCTOR TO MR. ROSENBLUM

Alone, among all the companies, Liggett placed a warning label on its own packs that said something like nicotine is addictive or smoking is addictive.

MR. ROSENBLUM TO DR. PROCTOR

Okay. So let's look at PDR716, which is a chalk.

DR. PROCTOR TO MR. ROSENBLUM

Right. This is the Chesterfield brand made by Liggett & Myers. It used to be the third largest brand in the country. But here in, I think it's '97, around then, voluntarily, Liggett puts a warning on its pack and is the only company to do this, ever. "Smoking is addictive."

MR. ROSENBLUM TO DR. PROCTOR

And when Philip Morris purchased those brands of cigarettes from Liggett, what did it do with those warnings?

DR. PROCTOR TO MR. ROSENBLUM

It took those warnings off completely. They never put them on again.

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Appendix F

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

No. 2081CV00169

ARMAND FONTAINE, individually and as Personal Representative of the Estate of Barbara Ellen Fontaine,

Plaintiff,

v.

PHILIP MORRIS USA INC., and DEMOULAS SUPERMARKETS, INC.,

Defendants.

Held: Sept. 13, 2022

EXCERPTS FROM JURY TRIAL
Vol. 32

[4880]

MR. ROSENBLUM TO MR. JUPE

Are you saying that Philip Morris did not put that on the website to be honest and transparent with its customers or are you saying they did do it to be honest and transparent with its customers?

MR. JUPE TO MR. ROSENBLUM

I think it's a clear depiction to customers of what our position was and our true—"honest,"

"transparent," these are all words that we considered the responsible thing to do, yes.

MR. ROSENBLUM TO MR. JUPE

Okay.

MR. JUPE TO MR. ROSENBLUM

But, again, it was to be clear in communications with our consumers.

MR. ROSENBLUM TO MR. JUPE

So we can at least agree that part of the rationale for Philip Morris was being transparent and being honest with its customers.

We can agree on that?

MR. JUPE TO MR. ROSENBLUM

Yeah, I'm good with that.

MR. ROSENBLUM TO MR. JUPE

All right. And so you know that in 1997, there was another tobacco company called Liggett; right?

MR. JUPE TO MR. ROSENBLUM

Yeah, Liggett & Myers, yes.

MR. ROSENBLUM TO MR. JUPE

Okay. And Liggett had brands of cigarettes, and on Liggett's brands of [4881] cigarettes, Liggett actually had voluntarily placed a warning on certain brands of its cigarettes that said "Warning: Smoking is addictive"; right?

MR. JUPE TO MR. ROSENBLUM

They said something along those lines, yes.

MR. ROSENBLUM TO MR. JUPE

Okay. Let's look at PDR 716.

BY MR. ROSENBLUM:

MR. ROSENBLUM TO MR. JUPE

So this is a demonstrative of—Chesterfield was a brand that was manufactured by Liggett?

MR. JUPE TO MR. ROSENBLUM

Yes.

MR. ROSENBLUM TO MR. JUPE

Okay. And so this is just one example of what their warning said on these packs of cigarettes in 1997, Chesterfield. "Warning: Smoking is addictive."

Do you see that?

MR. JUPE TO MR. ROSENBLUM

Yes. In 1997, is that what you said?

MR. ROSENBLUM TO MR. JUPE

That's what I said.

MR. JUPE TO MR. ROSENBLUM

Right. Yeah.

MR. ROSENBLUM TO MR. JUPE

And then two years later, in 1999—which I think is the same year that Philip Morris launched its website; right?

[4882] MR. JUPE TO MR. ROSENBLUM

Yes.

MR. ROSENBLUM TO MR. JUPE

In 1999, Philip Morris purchased three brands that were manufactured by Liggett: This brand, Chesterfield; I think L&M; and I think it was Lark, I believe.

Philip Morris purchased those three brands from Liggett in 1999, the same year that Philip Morris launched its website; right?

MR. JUPE TO MR. ROSENBLUM

Yes, I think it was around that time frame, give or take, yes, mm-hmm.

MR. ROSENBLUM TO MR. JUPE

And when Philip Morris purchased those brands, Philip Morris removed that label that Liggett had put on there, the label that "Warning: Smoking is addictive."

Philip Morris took that off, didn't they?

MR. JUPE TO MR. ROSENBLUM

We did, yes.

* * * * *

Appendix G

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

No. 2081CV00169

ARMAND FONTAINE, individually and as Personal Representative of the Estate of Barbara Ellen Fontaine,

Plaintiff,

v.

PHILIP MORRIS USA INC., and DEMOULAS SUPERMARKETS, INC.,

Defendants.

Held: Sept. 15, 2022

EXCERPTS FROM JURY TRIAL
Vol. 36

[5689]

MR. ROSENBLUM

* * *

And so they're suggesting that that is somehow mitigation, and I suggest to you that is aggravation. That is a reason to punish them. Okay? Because they weren't willing to do anything until they were forced to do it. They had to be sued in order for this to happen, and they're making it sound like, Hey, you know, we

voluntarily did all these wonderful things. Really? So let's talk about some of the wonderful things they did.

So they claim that they wanted to get the message out that nicotine was addictive. We put it right on our website.

Well, what did you also hear that they did? You heard that in 1997, Liggett had three brands of cigarettes, Chesterfield, L&M, and Lark; and that those cigarettes, Liggett, that tobacco company, put their own voluntary warning on those packs that said, "Nicotine is addictive."

Philip Morris bought those brands in 1999, the same year that they put up their [5690] website and they said they wanted to be honest and transparent with their consumers about nicotine being addictive.

So what did they do? They removed the labels. They removed them. They took them off. They didn't have to do that. That was their choice to make. That was their choice to make.

So in determining the sincerity of their argument and their efforts to actually educate the public, you should take that into consideration.

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