No. SJC-13070

COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT

PAMELA LARAMIE,
individually and as personal representative
of the Estate of Fred R. Laramie,

Plaintiff-Appellee,

v.

PHILIP MORRIS USA INC.,

Defendant-Appellant.

Appeal From the Commonwealth of Massachusetts Superior Court
Department of the Trial Court, Suffolk County
Case No. 1784-CV-02240-BLS1

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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IDENTITY & INTEREST OF AMICUS CURIAE*

Founded in 1977, Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Massachusetts. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To defend these values, WLF often appears as an amicus in state courts of last resort. *See, e.g.*, *Dunn v. Genzyme Corp.*, 486 Mass. 713 (2021); *Frlekin v. Apple*, 457 P.3d 526 (Cal. 2020); *Delisle v. Crane Co.*, 258 So. 3d 1219 (Fla. 2018).

The Court has invited amicus briefs on a vital question of law: is the plaintiff's claim for punitive damages barred by *res judicata* because the 1998 Master Settlement Agreement (MSA)—which settled litigation between the Massachusetts Attorney General and Philip Morris—extinguished the claim? The answer is yes. WLF is concerned that a decision failing to bar the plaintiff's punitive damages claim under

* No party, party's counsel, person, or entity other than WLF and its counsel authored this brief in whole or in part or contributed money to prepare or submit this brief. Neither WLF nor its counsel has represented a party to this appeal in another proceeding involving similar issues; nor has WLF or its counsel been a party or represented a party in any proceeding or transaction at issue here.

settled *res judicata* principles would discourage the settlement of *parens patriae* suits in the future. That would be a calamity for litigants, the judiciary, and the Commonwealth.

INTRODUCTION & SUMMARY OF ARGUMENT

Businesses "crave certainty as much as almost anything; certainty is what allows them to make long-term plans and long-term investments." Alan Greenspan & Adrian Woolridge, *Capitalism in America: A History* 258 (2018). The law craves certainty no less. "Litigation," observes legendary investor Charlie Munger, "is notoriously time-consuming, inefficient, costly, and unpredictable." Roger Lowenstein, *Buffett: The Making of an American Capitalist* 217 (2008). The entire purpose of *res judicata*, in fact, is "to conserve judicial resources, to prevent the unnecessary costs associated with multiple litigation, and to ensure the finality of judgments." *Martin v. Ring*, 401 Mass. 59, 61 (1987).

Perhaps nothing epitomizes the quest for certainty better than the 1998 Master Settlement Agreement, the largest civil-litigation settlement in American history. Fifty state attorneys general sued Philip Morris USA and other major tobacco companies for an array of alleged

smoking-related harms to the States and their citizens. Most of these *parens patriae* suits, including Massachusetts's, sought some form of punitive damages, both to punish the defendants for their conduct and to deter future public harm.

In a "landmark agreement," *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001), the defendants negotiated a $240 billion settlement with 46 States. As Philip Morris details in its opening brief, the defendants agreed under the MSA not only to end various practices the States' suits sought to enjoin but also to make sizable payments, in perpetuity, to each State. *Lopes v. Commonwealth*, 442 Mass. 170, 174 (2000). The MSA guaranteed Massachusetts alone around $9 billion over the first 25 years, followed by annual payments, in perpetuity, of around $300 million. *Id.* at 174-75.

In exchange, the settling States agreed to release certain claims against the defendants and to bar anyone seeking to vindicate the interests of the "general public" from bringing claims for "civil penalties and punitive damages" to punish the "past conduct" of the defendants. (RAIV/17, 23-24, 120) Individuals alleging smoking-related injuries may

still bring lawsuits, the MSA says, but only if they seek "solely . . . private or individual relief for separate and distinct injuries." (RAIV/24)

Punitive damages seek to vindicate the "broader function[s]" of "deterrence and retribution," *Aleo v. SLB Toys USA, Inc.*, 466 Mass. 398, 412 (2013), *not* to compensate the plaintiff "for separate and distinct injuries," (RAIV/24). So when the plaintiff brought a wrongful death suit seeking compensatory *and punitive* damages for the same "history of alleged wrongdoing . . . going back decades" (RAIII/227), Philip Morris moved to dismiss the punitive damages claim as precluded by the MSA's consent decree and final judgment. In a perfunctory analysis, however, the trial court denied that motion. (RAIV/294) The plaintiff then secured a verdict for $11 million in compensatory damages and $10 million in punitive damages.

The trial court's punitive damages award invites reversal. As Philip Morris has established it its opening brief, the decision below violates settled principles of *res judicata*, which makes a valid, final judgment binding on the parties and their privies, and bars further litigation of any matter resolved in the earlier action. *DeGiacomo v. City of Quincy*, 476 Mass. 38, 41 (2016); *Fabiano v. Philip Morris Inc.*, 54 A.D.3d 146, 151

(N.Y. App. Div. 2008); *Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552 (Ga. 2006). We will not repeat that analysis here.

Yet the impact of the decision below goes far beyond the unfairness of forcing Philip Morris to litigate a claim it has fully resolved and continues to pay for. Allowing the plaintiff's punitive-damages award to stand would discourage litigants from settling high-stakes litigation, undermining the Commonwealth's longstanding public policy in favor of settlement. Indeed, there will be little incentive for defendants to settle if a consent decree becomes an invitation for follow-on suits seeking to recover the same damages for the same alleged harm.

Nor is that all. The trial court's disregard for the MSA's plain terms, if affirmed by this Court, would interfere with the Massachusetts Attorney General's ability to negotiate settlements in *parens patriae* suits, which would unduly harm the public interest. Indeed, if one wanted to announce a rule that functioned as a lawsuit-generating machine, an evergreen source of billable hours for lawyers, one could hardly do better than to declare that consent decrees resolving *parens patriae* suits are for naught, or that the MSA does not mean what it says.

ARGUMENT

I. THE DECISION BELOW THREATENS TO UNDERMINE MASSACHUSETTS'S STRONG PUBLIC POLICY FAVORING SETTLEMENT.

Litigation is expensive. It's expensive for businesses, which must pay lawyers to argue and employees to miss work to testify. It's expensive for consumers and workers, who often cover businesses' costs through higher prices and lower wages. It's expensive for the judiciary, which must pay for "judges, attendants, light, heat, and power—and even ventilation in some courthouses." Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees on the Judiciary, 68th Cong., 1st Sess. (1924) (statement of Charles L. Bernheimer). And it's expensive for the average citizen; for just as corporate litigation expenses are really consumer and worker expenses, the judiciary's expenses are really taxpayer expenses.

The American civil-justice system imposes hundreds of billions of dollars in costs annually. In 2016 alone, such costs in Massachusetts approached $10 billion or around two percent of the Commonwealth's gross domestic product. U.S. Chamber Institute for Legal Reform, *Costs and Compensation of the U.S. Tort System*, 22 (Oct. 2018) <https://bit.ly/3sF3JFe>. Only about 57 cents of every dollar of those costs went

to compensating injured plaintiffs. *Id.* at 4. "The remaining 43 percent covered the cost of litigation of both sides, operating costs for the insurers, and profits to effectuate risk transfer." *Id.*

No surprise, then, that most cases settle. Massachusetts law "favors settlements of disputes, although some of the parties may have been in the wrong." *Loughery v. Cent. Trust Co.*, 258 Mass. 172, 176 (1927); *Polaroid Corp. v. Travelers Indem. Co.*, 414 Mass. 747, 767 (1993) (settlement of disputes is "a worthy goal because of court congestion"). A "negotiated compromise of a dispute avoids costly and time consuming litigation" and "preserves scarce judicial resources." *Crosby Valve, LLC v. OneBeacon Am. Ins. Co.*, 35 Mass. L. Rep. 202, 203 (Mass. Super. Ct. 2018).

The First Circuit, too, recognizes "the strong public policy in favor of settlements," especially in "very complex" cases. *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir. 2000). Respect for the finality of settlements is particularly warranted when the parties' negotiations lead to a consent decree. "That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length

and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

Parties who enter into settlements intend to be bound by them. And "where knowledgeable and fully represented parties choose" to resolve their disputes "in a carefully crafted document, negotiated over several months," they "are entitled to and should be held to the language they chose." *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 638 (2007). Enforcing settlement agreements thus "recognizes the autonomy of the parties to shape their own solution to a controversy rather than having one judicially imposed on them." *Crosby Value*, 35 Mass. L. Rep. at 203.

By permitting the plaintiff's punitive-damages claim to advance to the jury, however, the trial court deprived Philip Morris of one of the key inducements to settling: certainty. The consequences of that uncertainty transcend the interests of the parties. As this Court has recognized, "Settlement is favored because it minimizes the transaction costs of litigation." *Moloney v. Boston Five Cents Sav. Bank FSB*, 422 Mass. 431, 435 n.7 (1996). Injecting uncertainty into the ability of settlements to avoid follow-on litigation "skews the incentive structure of the settlement

decision." *Id.* Shorn of that certainty, "[s]ettlement would no longer represent a minimizing of transaction costs, and would not be favored as a device of economic efficiency." *Id.* Left to stand, the decision below would upend the finality of litigation settlements and chill future settlement negotiations in the Commonwealth.

Allowing the plaintiff's punitive-damages award to stand would severely undermine the strong public policy favoring settlement of disputes and cast doubt on the finality of virtually any agreement to settle litigation. Not only would that potentially throw open a Pandora's box of follow-on suits seeking to recover the same damages for the same alleged harm, it would overwhelm the already crowded dockets of the Commonwealth's courts.

"It defies logic and fundamental principles of fairness" to disregard the terms of a settlement agreement. *Correia v. DeSimone*, 34 Mass. App. Ct. 601, 604 (1993). The Court should vindicate the longstanding policy favoring litigation settlement and reverse the plaintiff's punitive damages award as barred by the MSA.

II. THE DECISION BELOW THREATENS TO UNDERMINE THE MASSACHUSETTS ATTORNEY GENERAL'S ABILITY TO SETTLE *PARENS PATRIAE* SUITS.

As bad as it may be to undermine confidence in everyday litigation settlements, doing so in the context of a *parens patriae* consent decree is far worse. When the Commonwealth's Attorney General sues to vindicate the interests of Massachusetts citizens as *parens patriae*, the need for finality upon settlement is even greater, given the vital public interest at stake.

The aim of *parens patriae* suits is to achieve broad compensation, to deter wrongful conduct by one or more defendants, and to focus on injuries to a broad swath of citizens. *See, e.g.*, *Commonwealth v. Sch. Conn. of Springfield*, 382 Mass 665, 665 n.1 (1981); *Commonwealth v. Wiseman*, 356 Mass. 251, 259 (1969). Such "*parens patriae* suits often serve as a substitute for private aggregate litigation." Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 Harv. L. Rev. 486, 511 (2012).

The Commonwealth, acting through its Attorney General, wields extraordinary powers unavailable to other litigants. When suing in its *parens patriae* capacity, it receives "special solicitude." *Massachusetts v.*

EPA, 549 U.S. 497, 520 (2007). Under Massachusetts law, the Attorney General has a "common law duty to represent the public interest and to enforce public rights." *Lowell Gas Co. v. Attorney General*, 377 Mass. 37, 48 (1979). The Attorney General can "take cognizance of all violations of law . . . affecting the general welfare of the people" and bring "such criminal or civil proceedings . . . as he may deem to be for the public interest." Mass. Gen. Laws ch. 12, § 10.

Above all, the States are best positioned to mitigate public harms, as 46 States have shown by securing the "landmark" MSA for their citizens. *See* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 Tul. L. Rev. 1859, 1860-75 (2000). By suing on behalf of all citizens as *parens patriae*, States can bring much larger damages claims than individual suits. This, in turn, makes defendants more likely to settle rather than risk ruinous liability.

The higher the stakes in *parens patriae* litigation, however, the greater the need for finality and certainty when resolving it. Indeed, the need to honor the terms of a consent decree has "particular force" when, as here, "a government actor committed to the protection of the public

interest has pulled the laboring oar in constructing the proposed settlement." *Cannons Eng'g Corp.*, 899 F.2d at 84. But if the Commonwealth is found not to be in privity with its citizens when negotiating settlements of *parens patriae* suits, or if plaintiffs' lawyers come to view such settlements as inviting endless follow-on claims seeking cumulative punitive-damages awards, then the incentive for defendants to settle with the Massachusetts Attorney General will disappear.

Corporate defendants—especially those subject to suit nationwide by consumers on state common-law and statutory claims—will think twice before striking a deal that leaves the door open to future claims for the same public harms. Under such a cloud of uncertainty, defendants would no longer be assured that they can buy their peace by settling. The upshot is that defendants will be far less inclined to settle, or will do so on terms far less favorable to the Commonwealth.

And that, in turn, would harm the Commonwealth. A swarm of follow-on litigation by private plaintiffs seeking to punish a defendant for the same public harms would interfere with the Attorney General's ability to negotiate a favorable settlement in future *parens patriae*

litigation. It would hamstring the Commonwealth's efforts to maximize recovery in a way that best furthers the public interest. In some cases, the Attorney General might be forced to litigate complex and difficult issues to the bitter end, risking an unfavorable outcome. Even if the Commonwealth ultimately were to prevail after protracted trial and appeal, recovery for victims, victim's families, and taxpayers would be unduly delayed.

Such real-world concerns easily transcend this case. For example, state attorneys general across the country, including in Massachusetts, have responded to the national opioid crisis by suing pharmaceutical manufacturers, distributors, and pharmacies in *parens patriae* actions. *See, e.g.,* Press Release, Office of Attorney General Maura Healey, *AG's Office Secures $573 Million Settlement With McKinsey for 'Turbocharging' Opioid Sales and Profiting From the Epidemic* (Feb. 4, 2021) <https://bit.ly.39xHTvO>. Some of these suits have settled. *See* Martha Bebinger, *Purdue Pharma Agrees To $270 Million Opioid Settlement With Oklahoma*, NPR (Mar. 26, 2019) <https://n.pr/3dx4iKY>. Others have not. *See* Lenny Bernstein, *Oklahoma Judge Lowers Johnson & Johnson Payment in Opioid Verdict*, Wash. Post, Nov. 15, 2019

<https://wapo.st/3wiwGsU>. Mindful that many States look to this Court as persuasive authority on novel questions of law, the Court should not erode the preclusive effect of *parens patriae* settlements. *See* Nick Cordova, Parens Patriae *and State Attorneys General: A Solution to Our Nation's Opioid Litigation?*, 44 Harv. J.L. & Pub. Pol'y 339, 361 (2021) (confirming that *parens patriae* preclusion "facilitates faster and larger settlements").

By maximizing recovery and securing a final settlement of punitive damages claims on behalf of all citizens, *parens patriae* settlements benefit the entire Commonwealth. Follow-on punitive damages awards, in contrast, benefit only a select few. If follow-on punitive damages claims can survive the MSA's final judgment, threatening perpetual punishment for the same public harms already resolved, then defendants will have no incentive to negotiate *parens patriae* settlements in the future. No one (besides trial lawyers) will benefit from that radical state of uncertainty.

CONCLUSION

This Court should reverse the plaintiff's punitive damages award and remand for entry of an amended judgment.

Dated: April 12, 2021 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Massachusetts Rules of Appellate Procedure 17(c)(9) and 20. The brief complies with the length limits of Rule 20(a)(A) because it contains 2,667 words, excluding those parts of the brief exempted by Rule 20(a)(2)(D). The brief complies with the typeface and type style requirements of Rule 20(a)(4)(B) because it was prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

Under Massachusetts Rule of Appellate Procedure 13(e), I certify that on April 12, 2021, I served via electronic mail a copy of the foregoing Brief of Washington Legal Foundation as Amicus Curiae in Support of Defendant-Appellant in the matter of *Laramie v. Philip Morris USA Inc.*, No SJC-13070, pending before the Commonwealth of Massachusetts Supreme Judicial Court, on the following:

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