COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Case No. SJC-11294

MICHAEL ALEO, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF ROBIN ALEO,

Plaintiff-Appellee,

v.

TOYS "R" US, INC., TOYSRUS.COM, LLC,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT FOR ESSEX COUNTY

BRIEF OF AMICUS CURIAE
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INTRODUCTION AND
INTEREST OF THE AMICUS CURIAE

The Retail Litigation Center ("RLC") is a public policy organization that identifies and contributes to legal proceedings affecting the retail industry. RLC's members include many of the country's largest and most innovative retailers. They employ millions of workers throughout the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

RLC submits this brief in response to the Court's call for amicus curiae briefs addressing "whether punitive damages based on gross negligence should be evaluated differently from punitive damages based on willful, wanton and reckless conduct." The Court should take this opportunity to answer that question in the affirmative. For reasons explained below, a punitive damages award predicated on a finding of gross negligence raises the most serious

constitutional concerns. That type of award requires careful judicial scrutiny to ensure that it is imposed only in circumstances where a defendant’s conduct is truly egregious, and only when the amount of the award is reasonable and not excessive.

RLC is concerned that the trial court below failed to apply the exacting analysis required by this Court’s and the U.S. Supreme Court’s precedents. It is especially concerned that punitive damages were sought and secured on the basis of manifestly improper considerations.

Specifically, the lower court’s decision affirming the punitive award rests on the perverse conclusion that retailers should be subject to massive punitive liability because they have taken positive, proactive steps to enhance safety by retaining third-party experts and contracting with manufacturers to certify the safety of their products. That the defendant in this case engaged in those common, widely accepted practices should have served as powerful evidence precluding any award of punitive damages. Instead, the trial court accepted the plaintiff’s invitation to shade those practices in a suspicious

light, fundamentally misunderstanding how the retail industry operates.

More broadly, the decision raises troubling questions as to whether a retailer should ever be subject to punitive damages for allegedly violating federal regulations that have never before been thought to apply. That is an especially relevant consideration here because the responsible federal agency has declined to take steps necessary to apply its regulation to the allegedly defective product on which the plaintiff’s lawsuit is based.

If it is not corrected, the lower court’s decision will deter the very type of responsible and proactive corporate behavior that the law and sound public policy should encourage. RLC therefore urges the Court to take this opportunity to clarify the analysis required when a plaintiff seeks punitive damages based on a finding of gross negligence. The Court should reaffirm the important constitutional limits on punitive damages awards and reverse the decision below.

SUMMARY OF ARGUMENT

I. This Court should make clear that an award of punitive damages based on gross negligence requires the most careful and exacting judicial scrutiny. Gross negligence is the least blameworthy conduct triggering potential punitive liability because, unlike willful, wanton, and reckless conduct, it is not quasi-criminal in nature. For that reason, among others, the vast majority of states do not allow punitive damages based on gross negligence. Where they are permitted, as in Massachusetts, special care is required to ensure that any award is reasonable, proportionate, and imposed only in appropriate cases. It is not enough that a jury makes a finding of gross negligence; punitive damages are reserved for only the most egregious cases. (See Section I, below.)

II. Courts reviewing a punitive damages award are responsible for ensuring that it is based on an "application of law" and not on the "decisionmaker's caprice" or other impermissible factors. State Farm Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003). In this case, the trial court departed from precedent and approved a punitive award based on manifestly improper considerations.

A. Contrary to the trial court's mistaken assumptions, it is appropriate, desirable, and sometimes required for retailers to rely on third-party experts and manufacturer warranties to ensure that the products they sell comply with applicable safety standards. Hiring independent, third-party testing laboratories is a common practice within the industry and, for some products, is the standard of care mandated by federal law. See, e.g., 15 U.S.C. § 2063(a)(2). Similarly, virtually every major retailer enters into purchase agreements with manufacturers that contain indemnification clauses requiring the manufacturer to bear responsibility in the event its products injure consumers. Because manufacturers have direct control over their manufacturing processes, it enhances safety and serves consumers' interests to require manufacturers to stand behind the quality of their products. Accordingly, there should be a strong presumption that when a retailer takes these positive, proactive steps, it has mitigated its potential exposure to punitive damages. As an important matter of law and sound public policy, this Court should reject and correct the trial court's

misguided assumptions to the contrary. (See Section II.A., below.)

B. The punitive damages award is also improper because it was imposed on the theory that the defendant had failed to comply with federal regulations when, in fact, there was substantial uncertainty as to whether the regulations actually applied. That contravenes the U.S. Supreme Court's warnings against meting out punishment when the governing legal regime is uncertain and the defendant does not persist in a course of conduct after it is adjudged unlawful. To do otherwise would deprive the defendant of "fair notice" of potential legal penalties, and interfere with regulatory judgments that in the first instance are properly the province of expert regulators, not juries. (See Section II.B., below.)

C. When improper considerations are put aside, no justification remains for imposing punitive damages in this case. At trial, the plaintiff relied heavily on improper arguments designed to inflame the passions of both the court and the jury. But it has not identified any evidence establishing the type of extraordinary, reprehensible conduct sufficient to

impose the heavy sanction of punitive damages. (See Section II.C., below.)

III. Even if there were some basis for an award of punitive damages in this case, the $18 million award is far beyond the constitutionally permissible limit. Precisely because gross negligence is the least reprehensible conduct triggering potential punitive liability, the ratio of punitive damages to compensatory damages should not exceed one-to-one when punitive damages are based on gross negligence and compensatory damages are substantial. Cf. State Farm, 528 U.S. at 426. The court below approved a roughly seven-to-one ratio by relying on factors that had already been taken into account when the jury awarded compensatory damages. It thus granted the plaintiff an unjustified and impermissible windfall. (See Section III, below.)

ARGUMENT

I. Punitive Damages Awards Predicated On Gross Negligence Should Receive The Most Exacting Judicial Scrutiny.

This Court and the U.S. Supreme Court have both recognized important limits on the extent to which a defendant may be subject to punitive damages. See Clifton v. MBTA, 445 Mass. 611, 623 (2005); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996). Both "[c]ommon law and constitutional principles" require that courts carefully scrutinize punitive damages awards to ensure they are reasonable and not arbitrary or excessive. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 826 (1997); Honda Motor Co. v. Oberg, 512 U.S. 415, 420 (1994). Moreover, punitive damages are permissible only when a defendant's conduct is "particularly outrageous or egregious." Haddad v. Wal-Mart Stores, 455 Mass. 91, 110 (2009); Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 18 (1998).

Because punitive damages, when imposed unwisely and without restraint, have a "devastating potential for harm," State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting)), a court is required to consider

three "main factors" when evaluating an award: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive damages to "the 'actual harm inflicted on the plaintiff'"; and (3) a comparison to available legislative penalties for comparable misconduct. Labonte, 424 Mass. at 826 (quoting Gore, 517 U.S. at 580). The "most important" of these is the relative degree of reprehensibility of a defendant's conduct. Gore, 517 U.S. at 575. Because punitive damages "serve the same purposes as criminal penalties" but are imposed without the same protections, State Farm, 538 U.S. at 417, they are permitted only "if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." Id. at 419.

This Court and the U.S. Supreme Court have both recognized that gross negligence lies at the bottom of the reprehensibility scale as compared to willful, wanton, and reckless conduct. See Altman v. Aronson, 231 Mass. 588, 592 (1919); Exxon Shipping Co. v. Baker, 554 U.S. 471, 512 (2008). In short, gross negligence is the "least blameworthy conduct triggering punitive liability." Exxon, 553 U.S. at

512; see also Gore, 517 U.S. at 576 ("trickery and deceit" are indisputably "more reprehensible than negligence"); Altman, 231 Mass. at 592 (gross negligence is "something less than the willful, wanton and reckless conduct"); see also Freeman v. MBTA, 12 Mass L. Rptr. 621, 2000 WL 1909777, at *7 (Super. Ct. 2000) (gross negligence is "conduct that is reprehensible at the lowest end of the range"). Gross negligence is less culpable than willful, wanton, and reckless conduct because it is not "quasicriminal in nature." Randolph's Case, 247 Mass. 245, 247 (1924). It therefore does not involve "the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." Id.; see also Montes v. MBTA, 446 Mass. 181, 186–87 (2006) (train's excessive speed and operator's inattention did not rise to the level of recklessness; they were "more consonant with concepts of negligence and gross negligence").

Gross negligence thus differs in kind (not merely degree) from willful, wanton, and reckless conduct, and this Court has been "careful to preserve the distinction." Boyd v. National R.R. Passenger Corp.,

446 Mass. 540, 548 (2006) (internal quotation marks omitted). As the Court noted long ago, whereas ordinary and gross negligence merely "differ in degree of inattention, . . . both differ in kind from willful and intentional conduct which is or ought to be known to have a tendency to injure." Altman, 231 Mass. at 592; Randolph's Case, 247 Mass. at 247 ("[s]erious and willful misconduct differs in kind from negligence or gross negligence"). The words "wanton" and "reckless" are "not merely rhetorical or vituperative expressions used instead of negligent or grossly negligent." Commonwealth v. Welansky, 316 Mass. 383, 399 (1944). To the contrary, they "express a difference in the degree of risk and in the voluntary taking of risk so marked, as compared with negligence, as to amount substantially and in the eyes of the law to a difference in kind." Id. at 399-400; see also Restatement (Second) of Torts § 500 cmt. g.

Because gross negligence differs in kind from willful, wanton, and reckless conduct, it has been held in many legal contexts to be an insufficient basis for imposing criminal or quasi-criminal penalties. For instance, gross negligence is not sufficiently serious or willful to permit a penalty of

double compensation under the Workers Compensation Act, G.L. c. 152, § 28, when an employer's conduct results in injury to an employee. See Drumm's Case, 74 Mass. App. Ct. 38, 41 (2009). The "serious and willful" conduct required under the statute is "much more than mere negligence, or even than gross or culpable negligence"; instead, it "resembles" willful, wanton, or reckless misconduct. Scaia's Case, 320 Mass. 432, 433-34 (1946).

Recognizing that negligence is not quasi-criminal in nature, the vast majority of states do not allow punitive damages based on any degree of negligence. See Robert W. Hammesfahr & Lori S. Nugent, Punitive Damages: A State by State Guide to Law and Practice § 7:3, at 267-68 (2012) (listing 43 out of 50 states that require intentional or reckless conduct for the imposition of punitive damages). In the minority of states, like this one, where punitive damages based on gross negligence are permitted in certain circumstances, special care is required to ensure that any award is reasonable, proportionate, and imposed only in appropriate cases. In particular, a court's analysis should be informed by three principles:

First, special care is required to ensure that the defendant's negligent conduct, regardless of how it may be labeled, rises to a level that is sufficiently egregious that public condemnation and punishment is warranted. See Haddad, 455 Mass. at 110. Precisely because the difference between negligence and gross negligence is only a matter of degree, there is a heightened risk that an award of punitive damages will be arbitrary and unreasonable. See State Farm, 538 U.S. at 418. Because of that heightened risk, courts must be especially vigilant to ensure that punitive damages awards predicated on gross negligence are not infected by improper considerations, bias, or whim. See id.

Second, in regulated industries like the retail industry, punitive damages awards based on gross negligence should be particularly disfavored because of their potential to interfere with the finely balanced risk-risk and cost-benefit tradeoffs that expert regulators are required to make. See, e.g., Stephen G. Breyer, Breaking the Vicious Circle 3-10 (1993). Especially when regulators have declined to exercise delegated authority to clarify whether particular products are subject to existing regulatory

requirements, there is a grave risk that parties will lack "fair notice" of the conduct that could subject them to punishment and the severity of the penalty that may be imposed. See State Farm, 538 U.S. at 417 (quoting Gore, 517 U.S. at 574).

That risk is heightened when the regulated party's conduct is at worst grossly negligent and, therefore, not so reprehensible that it rises to the level of a quasi-criminal act. In those circumstances, a court should be especially wary of accepting a plaintiff's invitation to pick up the blunt instrument of tort law, leave its sphere of judicial competence, and, in the course of upholding a punitive damages award, cross into the province of an industry regulator. See generally Carroll v. Otis Elevator Co., 896 F.2d 210, 217–18 (7th Cir. 1990) (Easterbrook, J., concurring).

Third, when compensatory damages are substantial, punitive damages awards based on gross negligence should not exceed a one-to-one ratio. Any greater ratio of punitive to compensatory damages exceeds constitutional limits and should not be permitted. See State Farm, 538 U.S. at 425–26.

II. The Trial Court Did Not Properly Evaluate The Award Of Punitive Damages.

The parties in this case dispute whether the record evidence supports a finding of gross negligence for liability purposes. See Appellants' Br. 38–41; Appellees' Br. 41–44. RLC has not reviewed the record in this case, but based on the trial court's decision below and on the parties submissions to this Court, it appears clear that the finding of gross negligence is wrong as a matter of law. The defendant's conduct is at worst negligent and the trial court's erroneous rulings should be reversed.

No matter how the liability questions are resolved, however, the Court's review of the punitive damages award requires a separate, de novo inquiry. See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431, 440 n.14 (2001). Courts are responsible for ensuring that, even when liability is imposed, any award of exemplary damages is based on an "application of law" and not on the "decisionmaker's caprice" or on other impermissible factors. State Farm, 538 U.S. at 418 (quoting Cooper, 532 U.S. at 436).

The court below failed to satisfy that solemn obligation. Instead of undertaking a rigorous analysis, the court upheld the punitive damages award based on improper considerations that reflect a misguided understanding of how retail industry practices work to protect consumers. It then compounded that error by allowing punitive damages on a theory that the defendant had failed to comply with federal regulatory requirements, even though the regulations were never before considered applicable to the product sold by the defendant. When those improper considerations are set aside, there is no other justification for an award of punitive damages in this case.

A. The Punitive Damages Award Is Based On Improper Considerations.

The United States retail industry is the largest in the world and, according to recent census data, accounts for more than $4.6 trillion in annual sales. <u>See</u> http://www.census.gov/retail (2011 data). Most retail stores have thousands of unique products on their shelves, with the largest retail stores carrying more than a hundred thousand unique products to satisfy diverse consumer demand. Data shows that

there are more than 25,000 new non-food products introduced each year by retail outlets in the United States. See, e.g., http://www.ers.usda.gov/topics/food-markets-prices/processing-marketing/new-products.aspx.

In this broad, complex, and quickly changing market environment, retailers must be able to rely on expert third-party consultants and manufacturer warranties to ensure that the products they sell satisfy consumer expectations and comply with applicable safety requirements. Most retailers cannot be subject-matter experts on all the products they sell, and most do not possess the technical expertise necessary to conduct extensive compliance testing. Moreover, the presence of duplicative layers of testing is costly and often diverts scarce resources from making more effective advancements in product safety.

By retaining third-party experts and by negotiating appropriate contracts with manufacturers, retailers are able to bring large quantities of products efficiently and safely to market, while keeping prices reasonable. Indeed, by all accounts, these practices help to improve safety. They provide consumers with assurances that independent experts are

carefully testing products, and they establish contractual incentives for manufacturers to stand by the quality and safety of their products.

The trial court's decision below threatens to destabilize this system by exposing retailers to massive punitive damages liability on the basis of common, responsible industry practices. This Court should make clear that, contrary to the trial court's mistaken assumptions, neither the use of a third-party expert nor the existence of a manufacturer indemnity agreement provides any support for an award of punitive damages. To the contrary, these reasonable, proactive, and widely accepted practices should be encouraged and their use should weigh heavily, if not conclusively, against punishing a defendant.

1. Retaining A Third-Party Expert To Test Consumer Products Should Be Encouraged And Should Not Be A Basis For Punitive Damages.

In upholding the punitive damages award, the trial court placed heavy emphasis on the defendant's reliance on a well-respected testing company, Bureau Veritas, to identify all applicable regulations and safety standards and to determine whether the product was in compliance with those requirements. A.1632

(complaining that defendant's in-house "safety assurance unit" was "woefully understaffed"). It criticized the defendant for not knowing that Bureau Veritas had failed to perform certain tests. Id. It held that the product's labels should have put the defendant on notice that the product did not comply with purportedly applicable federal requirements. See id. And it concluded that the defendant's conduct was "reprehensible" because the defendant should have known that consumers would not use the product as instructed. See id.

The court's analysis is misguided and confirms that it relied on "evidence" that should have had no "bearing as to the amount of punitive damages that should be awarded." State Farm, 538 U.S. at 418; id. (constitutional concerns "heightened" when decision-maker relies on irrelevant evidence). Relying on third-party experts to ensure product safety is not only a common practice within the industry, it is often the standard of care required under federal law. Express congressional policy encourages retailers to rely on third parties, providing a safe harbor from federal consumer product safety liability. 15 U.S.C. § 2068(b)(1), (2) (protecting any person who holds a

"certificate" confirming a product "conforms to all applicable . . . safety rules" or "who relies in good faith on the representation of the manufacturer or a distributor . . . that the product is not subject to an applicable product safety rule"). In fact, for certain children's products, Congress has affirmatively mandated independent third-party testing. Id. § 2063(a)(2).

Against this regulatory backdrop, most retailers rely on some form of third-party testing. For example, defendant Toys "R" Us engaged Bureau Veritas, a worldwide leader in certification and testing that large numbers of retailers rely on to ensure safe and compliant consumer products. Some retailers employ independent third parties (such as Bureau Veritas) to test all of the products they sell; others rely on third parties only when selling high-risk products or products for which there are applicable mandatory or voluntary safety standards. Some retailers engage third-party experts when they have no role in designing or manufacturing a product; others adopt the opposite approach and engage third-party experts only when they do help to design a product. In short, within the retail industry retaining third-party

experts like Bureau Veritas is about as common as retaining independent firms to audit a company's financial statements and controls. In both instances, relying on independent experts, in addition to or in lieu of the company's own internal processes, is recognized as an accepted and responsible practice.

In all events, the testing that occurs for consumer products is extensive and benefits consumers. Compliance testing covers everything from the Consumer Product Safety Commission standards governing small parts, sharp edges, and flammability, see 16 C.F.R. pt. 1500, to the Federal Trade Commission's labeling standards, see 16 C.F.R. pts. 500-03. There are also numerous voluntary standards, such as those set by ASTM International, and many retailers require that their suppliers comply with these standards. See http://www.astm.org. Some retailers rely on suppliers to conduct safety testing and to provide appropriate warranties, but require that the testing be performed in approved laboratories and that test results be available upon request. Other retailers enlist third-party consultants to assist with auditing manufacturers' quality systems and evaluating social and environmental responsibility measures, including

compliance with the Customs-Trade Partnership Against Terrorism program. See http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/.

Most relevant here, although some retailers are proud of their extensive in-house quality assurance departments, for many retailers a large internal department is often impractical — and can even be undesirable from a safety standpoint. In this case, given the number of products in a Toys "R" Us store, relying on independent third-party testing may well have been the only feasible, cost-effective approach for ensuring the safety and regulatory compliance of the defendant's full range of products. A retailer should not be penalized for taking that responsible approach to product safety. Nothing in the trial court's decision below, or in the plaintiff's brief, identifies any evidence that contradicts these basic points about how the retail industry operates.

2. Relying On Manufacturer Product Warranties Should Be Encouraged And Should Not Be A Basis For Punitive Damages.

The trial court's decision also casts doubt on retailers' ability to rely on manufacturers' product warranties. The court allowed the plaintiff to argue

that the defendant's indemnity agreement with the product's manufacturer was proof of gross negligence, A.2993, 3001; instructed the jury that counsel's argument was "proper"; and suggested the indemnity agreement was relevant to issues of liability and damages. A.3002-06, 3047. That was improper and should be corrected by this Court. Moreover, because the record does not disclose whether the jury based its verdict or its punitive damages award on impermissible considerations, the Court should order a new trial. Cf. Cicarelli v. School Dep't of Lowell, 70 Mass. App. Ct. 787, 791 (2007).

Virtually every major retailer enters into purchase agreements with manufacturers that contain indemnification clauses requiring the supplier to bear responsibility in the event its products cause injury to consumers. Many of these clauses indemnify the retailer against all product defects and any failure to comply with applicable regulatory requirements, as well as any intellectual property infringement. Moreover, many contracts include representations and warranties concerning the quality and safety of the manufacturer's products, including their compliance with applicable laws and regulations. Many retailers

include these provisions in all of their supplier contracts, and these arrangements cover most of the products sold in their stores.

Allowing retailers to negotiate these types of contractual arrangements is sound and sensible policy. Suppliers should stand behind their products. And indemnity agreements can help create the right incentives by putting suppliers on notice that they will be held responsible for harm caused by their products. In particular, these types of agreements properly allocate the economic risk to the product’s supplier, who is the party more likely to possess expert knowledge about the product and is in a better position to control all facets of the product, including its safety. These agreements thus improve product safety and ultimately benefit consumers by deterring suppliers from making defective products. See Richard A. Posner, Economic Analysis of Law § 6.8, at 241-42 (8th ed. 2011).

In this vein, the common law has long recognized the right of retailers to be indemnified for the products they purchase, even when purchases are made without a contract. See Fireside Motors, Inc. v. Nissan Motor Corp., 395 Mass. 366, 369-70 (1985)

(citing Restatement (Second) of Torts § 886B cmt. c); Stewart v. Roy Bros., Inc., 358 Mass. 446, 459 (1970) (common law indemnity arises "when one does not join in the negligent act but is exposed to derivative or vicarious liability for the wrongful act of another"). The common law has also long favored the general right of parties' freedom of contract. Cf. Beacon Hill Civic Ass'n v. Ristorante Toscano, Inc., 422 Mass. 318, 320 (1996); Akins' Case, 302 Mass. 562, 566 (1939).

The plaintiff's use of the indemnity agreement in this case was outrageous and highly prejudicial. Specifically, the plaintiff did not seek to use the agreement to show that the defendant has sufficient financial resources to pay the award, as in the vast majority of reported cases that discuss the issue. Courts have reached varying conclusions even as to that question. See, e.g., Mathie v. Fries, 121 F.3d 808, 815-16 (2d Cir. 1997) (permissible to refute defendant's argument of limited financial resources); Larez v. Holcomb, 16 F.3d 1513, 1520-21 (9th Cir. 1994) (not relevant because third party's finances not in issue); CSX Transp., Inc. v. Palank, 743 So. 2d 556, 562 (Fl. Ct. App. 1999) (punitive damages "not

determined from the assets of a third party"); City of West Allis v. Wisconsin Elec. Power Co., 248 Wis. 2d 10, 45-46 (Ct. App. 2001) (impermissible because it "diverts the jury's attention from the actual harm suffered"). Instead, the plaintiff told the jury here that the indemnification agreement meant that the retailer did not care about its customers because it knew it would not have to pay any financial penalties for harm caused by the products. See A.2993, 3001.

It is inexcusable that the trial court failed to prevent that extraordinarily improper argument and instead endorsed it when instructing the jury. This Court should reaffirm the importance of freedom of contract and firmly reject the trial court's misguided approach. It should also make clear that entering into standard agreements with manufacturers can improve product safety and should not under any circumstances be a basis for imposing punitive damages.

B. Punitive Damages Should Not Be Based On An Alleged Failure To Comply With Unsettled Or Uncertain Regulatory Requirements.

The trial court's mistaken and misguided assumptions about retail industry practices are part of a broader problem. Here, the trial court's

conclusion that the defendant negligently failed to comply with federal regulations was the driving force behind its approval of the punitive damages award. A.1631, 1635 (citing 16 C.F.R. § 1207). But the regulations had never before been applied — or even been thought to apply — to the product at issue. The uncertainty of the regulatory regime should have precluded an award of punitive damages altogether.

The U.S. Supreme Court has squarely rejected a punitive damages award in analogous circumstances. It explained that, where the governing legal regime is uncertain and there is no evidence the defendant persisted in a course of conduct after it had been adjudged unlawful, the defendant's violation of arguably applicable state statutory requirements is not an "aggravating factor[] associated with particularly reprehensible conduct." Gore, 517 U.S. at 576, 578-79. Absent a determination by a state court definitively construing the relevant statute, the defendant's interpretation of the statute, whether right or wrong, could not justify a $2 million award of punitive damages. See id. at 578.

That is consistent with the Court's repeated admonition that parties must receive "fair notice" of

the conduct that could give rise to punitive damages. See id. at 574. It also reflects that Court's recognition that holding parties to regulatory requirements that have not been interpreted to apply for "a very lengthy period" raises "acute" problems of "unfair surprise." Cf. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012). Due process requires "that laws give people of ordinary intelligence fair notice of what is prohibited." Brown v. Entertainment Merchs. Ass'n, 131 S. Ct. 2729, 2743 (2011) (Alito, J. concurring); see FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."). Although it may be possible for an entire industry to be in violation of regulatory standards without the federal agency noticing, "the 'more plausible hypothesis'" is that the industry practice is not unlawful. Christopher, 132 S. Ct. at 2168 (quoting Yi v. Sterling Collision Ctrs., Inc., 480 F.3d 505, 510–11 (7th Cir. 2007)).

Those principles apply with full force here and cast substantial doubt on the appropriateness of

awarding punitive damages in any amount. As noted, the lower court's decision upholding the punitive award turns on its conclusion that the defendant negligently failed to comply with federal regulations. A.1631, 1635 (citing 16 C.F.R. § 1207). And according to the court, that was "undoubtedly a major factor in the jury's verdict." A.1635. But as the Toy Industry Association, Inc. explains in its amicus brief, the Consumer Product Safety Commission has never promulgated a rule establishing that section 1207 applies to the type of product (i.e., constant air inflatable swimming pool slides) at issue in this litigation. In fact, the product did not even exist when the agency promulgated its regulations. The agency has never evaluated the product and authoritatively concluded that its regulations apply; nor has it ever found that applying its regulations is reasonably necessary to prevent an unreasonable risk of injury, as the statute requires. See 15 U.S.C. §§ 2058(f)(3)(A), 2060(c).

In these circumstances, punishing the defendant for allegedly failing to comply with the federal regulations raises serious concerns. The trial court noted that sanctions for regulatory violations could

reach $100,000 per violation. A.1635. That, of course, is several orders of magnitude less than the $18 million punitive award. It is also highly doubtful that the Consumer Product Safety Commission could have ever successfully enforced its regulations against the defendant and imposed that penalty. See, e.g., Aqua Slide 'N' Dive Corp. v. CPSC, 569 F.2d 831, 838 (5th Cir. 1978); D.D. Bean & Sons Co. v. CPSC, 574 F.2d 643, 651 (1st Cir. 1978); see also Hoctor v. USDA, 82 F.3d 165 (7th Cir. 1996) (discussing the problems with allowing agencies to enforce unclear regulatory requirements without first undertaking notice-and-comment rulemaking). In any event, where, as here, "the subject matter is technical" and "the relevant history and background are complex and extensive," Geier v. American Honda Motor Co., 529 U.S. 861, 883 (2000), the decision as to what penalties should apply for any alleged regulatory violation is best left in the first instance to the expert regulator, not to juries wielding hefty punitive damages awards.

More fundamentally, questions concerning what testing requirements apply to different consumer products involve careful trade-offs among competing

goals — not only to protect consumers, but also to ensure that they can obtain access to the products they demand at reasonable prices. Regulation through litigation (and especially through the imposition of punitive damages) upsets delicate federal policy balances and can impose significant costs on society. See generally W. Kip Viscusi, Does Product Liability Make Us Safer?, Regulation, Spring 2012, at 24, available at http://www.cato.org/sites/cato.org/files/serials/files/regulation/2012/4/v35n1-4.pdf; George L. Priest, The Culture of Modern Tort Law, 34 Val. U. L. Rev. 573, 574 (2000).

Regulation through the imposition of punitive damages in circumstances where regulations are unclear and the regulators have chosen not to act poses even greater concerns. Because punitive damages are, by definition, designed to deter future conduct, the trial court's decision in this case imposing punitive damages effectively turned the court into a regulator for the rest of the nation. If the decision is left uncorrected, retailers will have to adjust their behavior to conform to the trial court's newly announced interpretation of what the regulations require to avoid the risk of potentially massive

punitive damages liability in other states. That runs afoul of the Supreme Court's clear direction that state courts should not use "the punitive damages deterrent as a means of imposing [their] regulatory policies on the entire Nation." Gore, 517 U.S. at 585.

C. There Is No Justification For Awarding Punitive Damages In This Case.

RLC urges the Court to make clear that when a retailer relies in good faith on third-party consultants and manufacturers to ensure the safety of the products it sells, the retailer is acting responsibly and should not be subjected to punitive damages on that basis. If anything, there should be a strong presumption that a retailer that takes these steps has mitigated its potential exposure to punitive damages. Similarly, when a retailer is operating in an uncertain regulatory environment, punitive damages are never proper merely because the retailer is found to have negligently failed to comply with regulatory requirements.

In this case, once improper considerations are set aside, no justification remains for imposing a punitive sanction tantamount to a severe criminal

penalty. The trial court's decision itself identifies no other conduct that could support a finding of gross negligence, much less an award of punitive damages. A.1631-32. For his part, the plaintiff has tried to overcome that deficiency by arguing, first, that the defendant did not have any "written agreement" with the third-party consultant, see Appellees' Br. 42, and, second, that the defendant impermissibly relied on an unsigned agreement with the manufacturer, see id. at 47. In the plaintiff's view, the jury could have reasonably concluded that the defendant's "alleged oral instructions" were contrived to "defend this lawsuit." Id. at 43.

These contentions are, of course, hotly disputed. See Appellants' Reply Br. 13, 23–24. But more fundamentally, even if the plaintiff could prevail on the question of liability, none of these alleged omissions comes anywhere close to the type of egregious conduct that could justify an award of punitive damages. Even assuming the defendant in this case should have done more, the plaintiff has pointed to no evidence establishing extraordinary misconduct sufficiently reprehensible to support the imposition of punitive damages.

The trial court's statements to the contrary only confirm that it failed to undertake an appropriate analysis, relied on improper and arbitrary considerations, and lapsed into serious error. As noted above, its decision upholding the punitive damages award appears to be based on "evidence" that has no bearing on whether the defendant's conduct deserved public condemnation and severe punishment. State Farm, 538 U.S. at 418. In short, even assuming the defendant's conduct was "sufficiently reprehensible to give rise to tort liability," that alone does not "establish the high degree of culpability" sufficient to "warrant[] a substantial punitive damages award." Gore, 517 U.S. at 580.

III. When Punitive Damages Are Based On Gross Negligence And Compensatory Damages Are Substantial, A One-to-One Ratio Should Not Be Exceeded.

Even assuming some basis existed for a modest award of exemplary damages, the $18 million penalty imposed in this case is well above the constitutionally permissible range. The highest permissible ratio of punitive damages to compensatory damages should be significantly lower in cases involving gross negligence than those involving quasi-

criminal conduct. As noted above, courts are required to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." State Farm, 528 U.S. at 426. For that reason, the ratio of punitive damages to compensatory damages should not exceed one-to-one when compensatory damages are significant and the defendant has not engaged in willful, wanton, reckless, or other quasi-criminal conduct.

There is no "simple mathematical formula" for evaluating punitive damages awards. Id. at 424. "[I]n practice," however, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Id. at 425. A four-to-one ratio approaches the line of "constitutional impropriety," and "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. A higher ratio is permitted only when compensatory damages are not significant and the conduct is "particularly egregious." Id. at 425–26; see also id. at 429. The U.S. Supreme Court

reiterated this point, twice, in its Exxon decision. 554 U.S. at 514–15 & n.28.[1]

Applying these precedents, federal courts have held that — even with regard to conduct far more reprehensible than gross negligence — any ratio over one-to-one must be affirmatively justified by factors "such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act that has resulted in only a small amount of economic damages.'" Boerner v. Brown & Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005) (quoting Gore, 517 U.S. at 582); see also Bach v. First Union Nat'l Bank, 486 F.3d 150 (6th Cir. 2007) (reducing a 5.5:1 ratio to 1:1); Casumpang v. Int'l Longshore & Warehouse Union, Local 142, 411 F. Supp. 2d 1201, 1219 (D. Haw. 2005) (reducing a 4.1:1 ratio to 1:1); Richardson v. Tricom

[1] Although it arose under federal common law, Exxon "appl[ies] equally, if not with more force, in the context of [constitutional] due process." 4 Business and Commercial Litigation in Federal Courts § 42:66.70, at supp. 94-95 (Robert L. Haig ed., 2d ed. 2005 & supp. 2010); see also Jurinko v. Medical Protective Co., 305 F. App'x 13, 27 & n.15 (3d Cir. 2008); Leavey v. Unum Provident Corp., 295 F. App'x 255, 259 n.1 (9th Cir. 2008). Exxon's construction of common law principles also guides this Court's inquiry, which is "governed by common law and constitutional principles." Dartt, 427 Mass. at 18 (1998) (emphasis added).

Pictures & Prods., Inc., 334 F. Supp. 2d 1303, 1324 (S.D. Fla. 2004) (reducing a 2.5:1 ratio to 1:1).

To be sure, the plaintiff cites cases approving larger ratios. But almost all of those cases involved a finding of malice — that is, wanton, willful, or reckless behavior. See Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, 535 (Tenn. 2008) (affirming "the jury's finding of recklessness"); Union Pac. R.R. Co. v. Barber, 356 Ark. 268, 300 (2004) ("malice could be inferred" because the defendant acted "in reckless disregard of the consequences"); Boeken v. Philip Morris Inc., 26 Cal. Rptr. 3d 638, 645, 676–80 (Ct. App. 2005) (verdict based on "fraud by intentional misrepresentation," among other things); Wightman v. Consol. Rail Corp., 86 Ohio St. 3d 431, 436 (1999) ("[A]ctual malice on the part of Conrail had already been determined."); cf. CSX Transp., 743 So. 2d at 559 (record showed that defendant knew of staffing and inspection deficiencies due to governmental audit, that it systematically reduced its track maintenance employees in spite of this audit, and that it filed false safety inspection reports).

In any event, the trial court here did not rely on any of these cases in approving a ratio of roughly

seven-to-one. Instead, it dismissed the relevant case law and broke new ground by ruminating on factors unrelated to the proper constitutional inquiry. It first indicated that it believed compensatory damages were too low. A.1633 ("the jury could properly have returned an award even higher than $100,000 [for pain and suffering]" and a "damages figure higher than $2,540,000 [for wrongful death] may well have been justified"). It then speculated that the case fell within the exception for cases in which "'the monetary value of noneconomic harm [is] difficult to determine.'" A.1634 (quoting Gore, 517 U.S. at 575). The court's analysis began and ended with a single rhetorical question: "What could be more difficult to determine than the 'value' of the life of a young wife and mother?" Id.

In other words, the trial court got the constitutional analysis exactly backward. It concluded that a much higher ratio than one-to-one was justified because the compensatory damages were very large; indeed, it thought they could have been larger. That approach contravenes controlling precedent and fails on its own terms.

The value of the deceased's life was fully captured in the jury's compensatory damage award, and determining the amount of that award was within the jury's sound discretion. Gore's suggestion that punitive damages may be higher when "the injury is hard to detect," 517 U.S. at 582, refers to instances where the extent of injury is difficult to determine, not where the extent of injury is undisputed but the amount of damages is inherently subjective and left to the jury.

Punitive damages do not serve the same purposes as compensatory damages and should not be based on the same considerations. Cf. Tull v. United States, 481 U.S. 412, 422 (1987) (penalties are "intended to punish culpable individuals" not "to extract compensation"). In State Farm, the U.S. Supreme Court warned against "double count[ing]" by using the factors that justify a large compensatory damages award to also justify a substantial punitive damages award. 508 U.S. at 423; see also Gore, 517 U.S. at 593 (Breyer, J., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive,

damages that subsequent plaintiffs would also recover.”).

More fundamentally, the trial court’s approach eliminates an essential constraint on punitive damages awards in Massachusetts in precisely those circumstances where, because the defendant’s conduct is at the bottom of the scale of reprehensibility, punitive damages are most likely to be excessive. Punitive damages based on gross negligence are available in Massachusetts only in cases resulting in death. See G.L. c. 229, § 2. Accordingly, contrary to the trial court’s analysis, the jury’s finding that death resulted from a defendant’s actions cannot also be relied on when evaluating whether the punitive damages award is excessive. Because death is present in every case in Massachusetts where punitive damages are awarded based on gross negligence, a more exacting analysis is required.

The trial court’s failure to undertake that required analysis should be corrected. In addition, the Court should clarify that when punitive damages are based on gross negligence and compensatory damages are substantial, a one-to-one ratio of punitive to compensatory damages is at the outer limit of any

constitutionally permissible award. See generally, Dorothy H. Shapiro, Constitutional Limits On Punitive Damages: An Evaluation Of The Role Of Economic Theory In Prescribing Constitutional Constraints On Punitive Damage Awards, 10 Engage: J. Federalist Soc'y Prac. Groups 115 (2009) (explaining why under economic theory, punitive damages awards should be limited to a one-to-one ratio with certain exceptions not applicable here). Any decision to deviate above the one-to-one baseline should occur only in circumstances when a defendant's conduct is wanton, willful, or reckless, and only after applying an analysis much more rigorous than simply noting that death is involved. When compensatory damages are substantial, and a defendant's conduct is not quasi-criminal in nature, its conduct is simply not reprehensible enough to warrant severe penalties in the form of massive punitive damages.

CONCLUSION

For these reasons, the Court should clarify the heightened standards applicable to punitive damages awards based on gross negligence, and reverse the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the rules of the court that pertain to filing of briefs, this is to certify that the foregoing brief complies with the rules of this court, including but not limited to Mass. R. A. P. 16(k).

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief was served on counsel of record by overnight UPS on April 19, 2013 as follows:

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