No. 00-1117

In The United States Court of Appeals
For the First Circuit

LORILLARD TOBACCO CO., BROWN & WILLIAMSON TOBACCO CORP., R.J. REYNOLDS TOBACCO CO., AND PHILIP MORRIS INC.,
Plaintiffs-Appellants,

vs.

THOMAS REILLY, in his official capacity as Attorney General of Massachusetts,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Massachusetts

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BRIEF AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE, REQUESTING AFFIRMANCE

SUBMITTED BY AMERICAN MEDICAL ASSOCIATION, AMERICAN HEART ASSOCIATION, AMERICAN LUNG ASSOCIATION, AMERICAN CANCER SOCIETY, CENTER FOR SCIENCE IN THE PUBLIC INTEREST, PUBLIC CITIZEN, INC. AND THE MASSACHUSETTS MEDICAL SOCIETY

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CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for Amici Curiae, states the following, in compliance with Federal Rule of Appellate Procedure 26.1:

(1) Parent Corporations of Amici Curiae: None.

(2) Publicly held companies that own 10% or more of the stock of Amici Curiae: None.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

The following brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). According to the word-processing system used to prepare the brief (WordPerfect 8.0), it contains 6838 words, exclusive of the table of contents, table of citations and certificates of counsel.

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RULE 29(c)(3) STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Each of the following Amici Curiae share a common interest in supporting the Massachusetts Attorney General's efforts to protect the public, and especially children, from solicitations to use tobacco products. Amici have moved for leave to file this brief pursuant to Federal Rule of Appellate Procedure 29(b).

Amicus American Medical Association is a voluntary, nonprofit organization of approximately 290,000 physicians, dedicated to promoting the science and art of medicine and the improvement of public health.

Amicus American Heart Association is a not-for-profit health organization whose mission is to reduce disability and death from cardiovascular disease and stroke.

Amicus American Lung Association is a voluntary health organization whose mission is to prevent lung disease and promote lung health through public education, research and advocacy.

Amicus American Cancer Society is a nationwide community-based voluntary health organization dedicated to eliminating cancer as a major health problem, through research, education, advocacy and service.

Amicus Center for Science in the Public Interest advocates public health policies to reduce alcohol problems and has led efforts to restrict youth-oriented

advertising of alcoholic beverages.

Amicus Public Citizen, Inc., is a consumer advocacy organization representing the interests of its approximately 140,000 members and countless other Americans who believe that the tobacco industry should not be permitted to lure children into tobacco addiction.

Amicus The Massachusetts Medical Society, a voluntary, nonprofit organization founded in 1781, is the oldest continuous operating medical association in the United States with more than 17,500 physician and student members. Its purposes include the promoting of "medical institutions formed on liberal principals for the health, benefit and welfare of the citizens of [Massachusetts]." The Society has actively supported the Massachusetts Attorney General's recent efforts to regulate the sales and distribution of tobacco products.

ARGUMENT

I. THE REGULATIONS AT ISSUE REGULATE ONLY THE LOCATION OF TOBACCO ADVERTISING, NOT THE CONTENT OF THE ADVERTISING MESSAGE AND ARE THEREFORE NOT PREEMPTED BY FEDERAL LAW.

The central question raised by Plaintiffs' preemption challenge is whether Congress in 1969 intended to obliterate the police powers of state and local governments to regulate even the placement of tobacco advertising.

Plaintiffs have challenged certain regulations promulgated by the Attorney General of the Commonwealth of Massachusetts, 940 C.M.R. §§ 21.00-27.07 ("Regulations"), that prohibit the placement of publicly visible outdoor tobacco advertisements in any location within 1,000 feet of any public playground, elementary school or secondary school. § 21.04(5). The Regulations also bar point-of-sale cigarette or smokeless tobacco advertising placed lower than five feet from the floor of any retail establishment that is located within the same 1,000-foot zone. *Id*.

Plaintiffs maintain that the Regulations are preempted by § 5(b) of the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), Pub. L. No. 91-222, 84 Stat. 87 (1970), which provides: "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) (amending the Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) ("1965 Act")).

Plaintiffs contend that § 5(b) renders state and local governments powerless to impose *any* regulation on tobacco advertising if such measures are motivated, in any way, by health concerns. Under this ludicrous regime, cities and states whose legislators make the mistake of expressing concern about children's health will be powerless, for example, to prohibit tobacco billboards from being placed at entrances to elementary schools, forbid high school newspapers from publishing tobacco advertisements, or even bar tobacco companies from distributing free Joe Camel posters to first-graders. *See Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F. 3d 100, 105 (2d Cir. 1999).

Amici submit that Congress never intended to confine states and municipalities to such a bizarre legal strait-jacket. When Congress passed the 1969 Act, it intended to preempt only those state or municipal "requirement[s] or prohibition[s]" of health-based messages that affect the *content* of tobacco advertising. It never intended to preempt local ordinances that restrict the *locations* in which tobacco advertising is permitted to appear on certain media. The text of the statute as a whole, the legislative history and the prevailing case law to date all

strongly point to that conclusion.

A. Federalist Principles Demand An Inquiry Into Legislative History And The Use Of Other Aids To Construction To Understand And Limit The Scope Of An Express Preemption Provision

Where there is any doubt as to the reach of an explicit preemption statute, a reviewing court has an obligation to scrutinize the legislative history and use other extrinsic aids to construction, to avoid suppressing local self-rule beyond what Congress intended. This principle is embedded in the approach taken in *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992) – the only Supreme Court decision that interpreted § 5(b).

Though the Court was highly divided on the ultimate question in *Cipollone*, the Justices were united on the appropriate interpretive methodology to be employed: *Every* opinion in the case ventured beyond the literal text of § 5(b) in interpreting that section and used extrinsic aids, including legislative history, to ascertain Congress's true intentions. *Cipollone*, 505 U.S. at 513-515, 519-521, 529-30 (plurality opinion); 505 U.S. at 534-35, 539-542 (Blackmun, J., concurring in part and dissenting in part); 505 U.S. at 553 (Scalia, J., concurring in part and dissenting in part).

The Supreme Court's intensive inquiry into Congressional intent was prompted by its guardianship of our federalism – in particular, the fundamental

principle that the states' traditional police powers are not to be superseded unless Congress has clearly manifested its intention to do so. *Id.* at 516, 523 (plurality opinion); *id.* at 533 (Blackmun, J., concurring in part and dissenting in part). Accordingly, a majority of the Court agreed that § 5(b) must be given a narrow construction. *Id.* at 523 (plurality opinion); *id.* at 533-34 (Blackmun, J., concurring in part and dissenting in part).

If there were any lingering doubts that the Supreme Court requires reviewing courts to consider legislative history and other indicia of Congressional intent when interpreting a broadly worded express preemption provision, they have been eliminated by the Court's post-*Cipollone* decisions. *See, e.g., California Division of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 331-32 (1997); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86 (1996); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

The disputed phrases in § 5(b) – "requirement or prohibition," "based on smoking and health" and "with respect to the advertising or promotion of any cigarettes" – are potentially sweeping. *Cf. Blue Cross*, 541 U.S. at 655 (noting that, taken literally, the term "relate to" in ERISA's preemption provision could broadly preempt state laws). The "plain meaning" approach that Plaintiffs urge this Court to

adopt creates an unacceptable risk that it will mistakenly preempt more than Congress intended. This Court must be guided instead by the Supreme Court's command that "[t]he purpose of Congress" must be "'the ultimate touchstone' of pre-emption analysis." *Cipollone*, 505 U.S. at 516.

B. The Legislative History Of The 1965 And 1969 Acts, And A Fair Reading Of The Statute As A Whole, Support The Conclusion That § 5(b)'s Purpose Was To Protect The Tobacco Industry From Having To Alter The *Content* Of Its Brand Advertising

In 1964, Surgeon General Luther Terry issued his landmark Report tying cigarette smoking to lung cancer. U.S. Dep't of Health, Educ. & Welfare, U.S. Surgeon Gen.'s Advisory Comm., *Smoking and Health* (1964). Strong public reaction prompted the Federal Trade Commission and several states to consider requiring warnings on cigarette packages and in advertising. *Cipollone*, 505 U.S. at 513.

Congress stepped into this public health maelstrom by adopting the 1965 Act, which required cigarette packages to carry a warning that cigarette smoking was hazardous to health. In § 5(a) of the 1965 Act, Congress prohibited other government bodies from requiring the placement of any other statement on cigarette packs. Similarly, in § 5(b), Congress provided that: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this act."

These preemption provisions were set to expire on July 1, 1969. 1965 Act, § 10. As that date approached, the states again began entertaining proposals to toughen restrictions on cigarette advertising, *Cipollone*, 505 U.S. at 514-515, and the tobacco companies again faced the prospect that each of the fifty states (as well as cities and counties), might impose packaging and advertising requirements on the industry.

It was in that context that Congress adopted the 1969 Act, which banned cigarette ads from TV and radio, allowed the FTC to impose warning-label requirements on print advertisements after July 1, 1971, and stiffened the health warning requirements for cigarette packaging. It also amended § 5(b), introducing the present language: "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).

Obviously, the current version of § 5(b) is broader than the original. However, read in the light of this history, the salient change substituting "requirement or prohibition" for "statement" did not indicate that Congress intended to preempt anything other than state or local measures that affected advertising

content.[1] Rather, it indicates that Congress intended to preempt not only the affirmative act of requiring "statements" but any other affirmative or negative acts of states and municipalities that either imposed *or* forbade *health-related content* in tobacco advertising – as the court below concluded. *Lorillard Tobacco Co. v. Reilly*, 76 F. Supp. 2d 124, 132 (D. Mass. 1999).

This reading of § 5(b) is supported by the text of the 1969 Act as a whole. When Congress amended § 5(b), it let stand the express declaration of legislative intent found in the 1965 Act:

> It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby--

[1] Congress may also have intended § 5(b) to prevent states from enacting bans on cigarette advertising in all or most media, as the California State Senate had started to do in a bill passed in 1969. *Cipollone*, 505 U.S. at 515 n. 11. Such extreme measures obviously affect advertising content by eradicating it altogether. However, the Regulations at issue here are narrowly focused. They do not touch magazine and newspaper ads, clothing promotions, direct mail or Internet advertising, and they permit both outdoor and retail establishment advertising in zones that are less frequented by children.

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) *not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health*.

15 U.S.C. § 1331 (emphasis added).

In 1969, no less than in 1965, Congress sought to prevent state and local content regulation and thereby protect the tobacco and advertising industries from the burden of having to produce different ads to conform to each state or local regulation.

This point was clearly made in a 1969 House debate. Rep. Brock Adams (D-Wash.) introduced an amendment to allow states that prohibited cigarette sales to minors to require all cigarette advertising to include a warning that such sales were illegal. Rep. Lawrence Fountain (D-N.C.) spoke against the amendment, noting that it "would create utter chaos and virtually make impossible . . . the dissemination of nationally published magazines and indeed many locally published newspapers," and that it would force advertisers to create "fifty different advertising formats." 115 Cong. Rec. 16291 (1969). The Adams amendment failed. *Id. See also* H.R. Rep. No. 289, 91st Cong., 1st Sess. 33 (1969) (minority views of Reps. Jarman, Dingell and Adams).

After the House bill passed and was sent to the Senate, it was referred to the Senate Commerce Committee, whose members included Senator Frank Moss, an ardent foe of tobacco. Senator Moss was from Utah, which had enacted a ban on *all* point-of-sales and outdoor tobacco advertising forty years earlier. Laws Utah 1929 ch. 92. Utah's law had been upheld by the Supreme Court in *Packer Corp. v. Utah*, 285 U.S. 105 (1932). It was in force in 1969 and remains in force today. Utah Code Ann. § 76-10-102(1) (1995).

If there was even a remote possibility that the bill that became the 1969 Act would preempt Utah's ban, Senator Moss surely would have spoken against it. Yet Senator Moss was a Senate Manager of the bill. H.R. Rep. No. 897, 91st Cong., 1st Sess. 8 (1970). Neither he nor any other member of Congress ever voiced any concern that it would strip Utah of its sovereign authority to safeguard citizens from having tobacco advertising thrust upon them by billboards or point-of-purchase advertising.

The Senate's report on the bill reiterated that preemption was needed to "avoid the chaos created by a multiplicity of conflicting [state and local] regulations." S. Rep. No. 566, 91st Cong., 2d Sess. (1969), *reprinted in* 1970 U.S.C.C.A.N. at 2652, 2663. Section 5(b) was described as "narrowly phrased" and not intended to touch state power over sales to minors, taxation, indoor smoking, or

"similar police [power] regulations. It is limited entirely to State or local requirements or prohibition [sic] *in* the advertising of cigarettes." *Id*. (Emphasis added.)

These statements strongly indicate that Congress intended § 5(b) to prevent state or local interference with the content of cigarette advertisements. Yet there isn't the slightest indication in either the statute or the legislative history that Congress was concerned about cities or states telling the industry *where* tobacco advertisements could be displayed. In interpreting a broadly worded preemption statute, a reviewing court must recognize that Congress's silence with respect to a well-established state regulatory measure is a reliable indication that Congress did not intend to preempt that measure. *See Medtronic*, 518 U.S. at 491 (plurality opinion); *Dillingham*, 519 U.S. at 331-32.

If § 5(b) did not preempt Utah's broad state-wide prohibition against *all* outdoor and in-store cigarette advertising, it surely does not preempt the Attorney General's more modest restrictions. Unlike content regulations, location restrictions like the Regulations do not create the advertiser's nightmare that Congress sought to prevent when it adopted § 5(b). They do not require the tobacco companies to design and produce different advertisements to accommodate diverse state or local laws, do not impose any "confusing" burden on tobacco advertisers, let alone

impede "commerce and national economy," 1965 Act, § 1331, and therefore are not preempted by § 5(b).

Plaintiffs cite the Ninth Circuit's opinion in *Lindsey v. Tacoma-Pierce County Health Dep't.* 195 F.3d 1065 (9th Cir. 1999) in support of the opposite conclusion. (Pls.' Br. at 21.) In striking down Tacoma-Pierce County's ban on outdoor tobacco advertising on preemption grounds, the Ninth Circuit asserted, with no supporting analysis, that location-based restrictions would cause the national economy to be "impeded by diverse, nonuniform, and confusing cigarette advertising regulations." *Id.* at 1074-75.

Even a cursory consideration of the actual effect of location-based restrictions reveals the flaw in this argument. To place their advertisements on billboards, the tobacco companies presumably must contact the advertising firms that own the billboards to find out what is available. The effect of the Massachusetts' Regulations is simply that, henceforth, the advertising firms will have to tell them that fewer billboards are available in Massachusetts than before. There are no additional burdens placed on the tobacco companies – they will still have to make the same phone calls, write the same correspondence and sign the same contracts.[2] They will not have to redesign and manufacture ads specifically for

[2] This assumes that one of the Plaintiffs, or some future unknown tobacco

Massachusetts. They will simply have fewer billboard spots to choose from.

Similarly, the only burden created by the in-store regulations is that imposed on retail store owners in the protected zones to ensure that tobacco ads are kept at least five feet off the floor. No burden is place on the national tobacco manufacturers and their advertising agencies whatsoever. In short, the Regulations are no more "diverse, nonuniform and confusing" to the tobacco companies than have been existing state and local regulations on billboards.

C. The Case Law On § 5(b) Strongly Supports The Conclusion That Congress Intended To Preempt Only Those Requirements Or Prohibitions That Affect The Content Of Tobacco Brand Advertising

The "content/location" rule was first recognized by the U.S. Court of Appeals for the Fourth Circuit in *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, which upheld a Baltimore ordinance similar to the Regulations against both a First Amendment and a federal preemption challenge:

> Ordinance 307 limits only the *location* of signs that advertise cigarettes, but it does not address the *content* of such advertisements. The ordinance neither imposes a duty nor relieves a burden on

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company, breaches the Master Settlement Agreement with the state Attorneys General that they entered into in 1998 – raising the question of how Plaintiffs can complain of a "confusing" regulation that they have agreed to in another context.

> cigarette advertisers based on smoking and health . . . . A regulation with such a general relationship to cigarette smoking -- in contrast to a specific advertising 'prohibition based on smoking and health' -- is not preempted by the Federal Cigarette Labeling and Advertising Act.

63 F.3d 1318, 1324 (4th Cir. 1995), *vacated and remanded on other grounds*, 518 U.S. 1030 (1996), *modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

The content/location distinction has been embraced by the Seventh and Second Circuits, in *Federation of Advertising Industry Representatives, Inc. v. City of Chicago*, 189 F.3d 633 (7th Cir. 1999) and *Greater New York Metropolitan Food Council, Inc., v. Guiliani*, 195 F.3d 100 (2d Cir. 1999). Adopting the approach to § 5(b) advocated in this brief, these opinions examined the legislative history and statutory context of § 5(b), and concluded that location-based restrictions are not preempted because they simply do not impose "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" on the tobacco companies.

Against the weight of this authority, Plaintiffs urge this Court to follow *Lindsey v. Tacoma-Pierce County Health Dep't*. 195 F. 3d 1065 (9th Cir. 1999), and *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (D. Vt. 1998). The *Rockwood* opinion is of no moment, as it is at odds with the Second Circuit's more recent ruling in *Guiliani* and relied on a tunnel-visioned "plain meaning" approach to § 5(b). *Rockwood*, 21 F. Supp. 2d at 417-19.

Though taking a more sophisticated approach, the *Lindsey* opinion is equally at odds with Congressional purpose. It places considerable weight on the fact that *Cipollone* "never recognized a distinction between content regulations and . . . location regulations." 195 F. 3d at 1072. However, the *Cipollone* Court was not presented with a question that raised the content/location distinction, and it is in fact fully consistent with the content/location rule.

The question in *Cipollone* was whether § 5(b), under either the 1965 Act or the 1969 Act, preempted state common-law tort and breach-of-warranty claims. *Cipollone*, 505 U.S. at 512. The Court found that some claims were not preempted because they were not "imposed under state law," *id.* at 525 (plurality opinion), or were not "based on smoking and health."*Id.* at 528-29 (plurality opinion). All of the claims that the Court found *were* preempted under § 5(b) were aimed at regulating the *content* of tobacco advertising by challenging, varying or supplementing required statutory health warnings. (*See* Def.'s Br. at 24.)

The Ninth Circuit also relied on the different language used in § 5(a) of the 1965 and 1969 Acts, which preempts states from requiring any "statement relating to smoking and health" on cigarette packages that conform to the Act's labeling requirements. *Lindsey*, 195 F.3d at 1074. According to the Ninth Circuit, since § 5(a) clearly is limited to content restrictions, § 5(b), which uses broader language,

must not be limited to content restrictions. *Id.* This argument is easily deflated by the simpler explanation that § 5(b)'s broader language encompasses a broader *range* of *content* restrictions: It encompasses both affirmative requirements of health-related content in tobacco advertising and negative prohibitions of health-related content in tobacco advertising. *See Cipollone*, 504 U.S. 539-540 (Blackmun, J., concurring).

This Court has already adopted such an interpretation of § 5(b) in *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58 (1st Cir. 1997), which upheld a state law requiring tobacco manufacturers to disclose information on additives and nicotine levels to public health authorities. Specifically, this Court determined that the "relevant inquiry" in § 5(b) preemption cases "focuses not upon any relation between advertising and the motivation behind a state law, but upon the law itself and any connection it might have with advertising activities." *Id.* at 76-77.

Plaintiffs rely on *Harshbarger* to argue that a regulation is "based on smoking and health" within the meaning of § 5(b) whenever its "purpose and intended effect" is to protect public health. (Pls.' Br. at 12-13, citing *Harshbarger*, 122 F. 3d at 70-71). Plaintiffs misread *Harshbarger*. This Court found that the Disclosure Act was "based on smoking and health" because both its express purpose *and* its effect was to create "greater public awareness about the additives

and nicotine in tobacco products and the potential health effects of those ingredients." *Id.* at 70. Thus, it was requiring the tobacco companies to disclose health-related information, i.e., content. This Court ultimately found that the Disclosure Act was not preempted because the requirement it imposed on the tobacco companies was not sufficiently related to "advertising or promotion." *Id.* at 76-77. In other words, the Disclosure Act was "based on smoking and health" because it required the tobacco companies to submit health-related information but it was not preempted because it only required the dissemination of the information to the Department of Public Health, not on tobacco company advertising.

In the entire case law on § 5(b) to date, not one opinion has unearthed a single fact in the legislative history that is inconsistent with the content/location rule. Rather, the history points to the conclusion that, by "requirement," Congress intended to preempt state rules mandating the inclusion of health content in tobacco brand advertising, and, by "prohibition," Congress intended to preempt state rules mandating the exclusion of health-related content from tobacco brand advertising. Since the Regulations do not impose either a requirement or a prohibition that relates to tobacco advertising content, they are not preempted.

To find that the Regulations are preempted, a court must concluded that it was the “clear and manifest purpose of Congress” to strip the states of the power to

create zones where children learn and play free of solicitations to smoke. *Cipollone,* 505 U.S. at 518. Yet plaintiffs have not produced proof of such purpose because none exists. Congress was concerned only with preventing homegrown regulation of tobacco advertising messages. Zoning-like laws that remove tobacco billboards from neighborhoods where children are at risk and nuisance-abatement-type laws that require retail store tobacco displays, much like adult magazines, to be kept out of young children's sight, fall within the realm of traditional state exercises of police power and were never the concern of Congress.

II. THE REGULATIONS ARE FULLY CONSISTENT WITH THE FIRST AMENDMENT.

Amici agree with the Attorney General that the Regulations survive review under the commercial speech doctrine because they directly serve the substantial governmental objective of reducing tobacco consumption by minors. Amici wish to highlight four points that may not stand out in the Attorney General's more comprehensive treatment of the issue.

A. This Case Involves The Attorney General's Effort To Draw Reasonable Lines; Not To Suppress Speech.

Contrary to Plaintiffs' protestations, this is a case about line-drawing, not an all-out ban on Plaintiffs' expressive activities. To read Plaintiffs' brief, one might conclude that the State had imposed an outright ban on all advertising relating to

tobacco products. In fact, the Regulations leave open ample alternative means for the tobacco companies to communicate their selling message to adults who may legally purchase their products through newspapers, periodicals, direct mail, and so forth. That fact readily distinguishes this case from most of the First Amendment cases on which Plaintiffs rely, which dealt with all-out bans on price advertising. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) and *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 728 (1976).

This case instead addresses a classic question of line-drawing – namely, how the State may protect minors while at the same time permitting the tobacco companies to communicate their sales messages to adults. The Supreme Court has ruled repeatedly that courts owe significant deference to governmental judgments in such cases, and, because of the impossibility of regulating with absolute precision, some degree of over-inclusiveness is not only tolerated, it is expected. *See*, *e.g.*, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *United States v. Edge Broadcasting Co*, 509 U.S. 418, 432-34 (1993); *Board of Trustees v. Fox*, 492 U.S. 469, 479-80 (1989).

Here, the Attorney General has drawn a line to shield children from messages that ensnare them into experimenting with tobacco products. Surely nothing in the

First Amendment disables the State from forbidding tobacco companies from placing billboards in front of elementary schools or handing out flyers in playgrounds. Thus, the question here is whether the line drawn by the regulations is reasonably tailored to protect minors from targeted tobacco industry advertising. The answer to that question is clearly yes.

B. The District Court Applied The Proper Standard Of Review.

The First Amendment section of Plaintiffs' brief begins and ends with a caustic attack on the methodology employed by the District Court, accusing it of "rubber stamp[ing]" the Attorney General's decision, and applying a rational basis test instead of the "heightened scrutiny" that Plaintiffs maintain is required by *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Pls.' Br. at 23, 41).

Plaintiffs' attack is unwarranted. Even a cursory examination of the District Court's opinion refutes the idea that it applied rational basis review. The Court followed the analytical path laid down in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), and explicitly considered the reasonableness of the fit between the means selected by the Regulations and the State's legitimate interest in shielding minors from solicitations to use harmful adult-oriented products. Plaintiffs' repeated invocation of *44 Liquormart* – and not *Central Hudson* – suggests that their beef is with permissive nature of *Central*

Hudson itself. Even post-*Liquormart,* however, the *Central Hudson* test governs. *See Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923 (1999).

To be sure, *44 Liquormart* suggests that the Court will view with skepticism the use of information controls to manipulate consumer choice, especially where it appears that the state has given little attention to non-speech means of achieving the same end. *See* 517 U.S. at 509 (plurality opinion); *id.* at 518 (Thomas, J., concurring). Three points about *44 Liquormart* bear emphasis, however.

First, nothing in the Attorney General's Regulations approaches the paternalistic governmental intervention condemned in *44 Liquormart,* which involved a "complete ban[] on truthful, nonmisleading commercial speech." *Id.* at 502. In *44 Liquormart,* the Rhode Island legislature sought to keep adult consumers completely in the dark about liquor prices. The Regulations here aim to protect children from being lured into using a product so lethal that it cannot legally be sold to them. The paternalism toward adults rejected in *44 Liquormart* has nothing to do with the carefully measured protectionism toward children adopted by the Attorney General.

Second, the language in *44 Liquormart* on which Plaintiffs rely is *dicta*. Even where a "complete ban" was at issue, only four Justices called for heightened

scrutiny. *Id.* at 509 (plurality opinion); *id.* at 518 (Thomas, J., concurring).

Finally, in marked contrast to *44 Liquormart*, no serious argument can be made that the State has precipitously imposed speech restraints where less intrusive, non-speech solutions are available. Along with the federal government, Massachusetts has waged a war against teenage tobacco use for decades, utilizing education, enforcement, and counter-advertising. (Def's Mot. Summ. J. at 18). Despite such measures, the rate of tobacco use among children continues to skyrocket. Nationally, cigarette use among high school students has risen from 27.5% in 1991 to 36.4% in 1997. *Tobacco Use Among High School Students–United States, 1997,* Morbidity & Mortality Wkly. Rep. (U.S. Dep't of Health & Human Servs., Apr. 3, 1998), at 230. Overall, 42.7% of high school students use some form of tobacco. *Id.*

So long as the tobacco industry spends $6 billion a year to stimulate demand[3] – and deliberately targets many of those dollars at children[4] – supply restrictions of

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[3] *Tobacco Industry Ads and Promo Costs,* Tobacco-Free Youth R., Fall 1995, at 17.

[4] Industry documents show that tobacco company marketers have for decades targeted the "youth market." *See, e.g.*, FDA Tobacco Regulations, 61 Fed. Reg. 44,396, 44,480-81 (1996); John Mintz, et al., *Internal R.J. Reynolds Documents Detail Cigarette Marketing Aimed At Children*, WASH. POST, Jan. 15, 1998, A1; John Schwartz, *Philip Morris Memos Detail Teen Habits,* WASH. POST, Jan. 30, 1998, at A1.

the sort touted by industry cannot be effective. The Attorney General has rightly concluded that shielding minors from the industry's selling messages is the only way to make inroads on tobacco use by minors.

C. There Is Ample Evidentiary Support For The Attorney General's Regulations.

Notwithstanding Plaintiffs' one-sided presentation of the evidence, there is little doubt that shielding minors from the corrosive impact of tobacco advertising is critical to any effort to curb tobacco use by kids. More than 80% of all tobacco users began using tobacco before turning eighteen. *Id.* at 229. Both the FDA and the U.S. Surgeon General, after exhaustive study, have concluded that advertising plays a substantial role in influencing children to begin using tobacco. FDA Tobacco Regulations, 61 Fed. Reg. 44,396, 44,466 (1996); U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* iii (1994). These governmental findings are confirmed by overwhelming social science evidence proving the link between tobacco advertising

and experimentation with, and then addiction to, tobacco products by minors.[5]

Despite this mountain of evidence, Plaintiffs nonetheless suggest that the District Court had an obligation to resolve, presumably through a trial, the "dispute" Plaintiffs seek to manufacture about whether tobacco advertising in fact encourages kids to experiment with tobacco. (Pls.' Br. at 31-33). This argument is doubly flawed.

For one thing, the high evidentiary hurdle Plaintiffs erect is not supported by the case law. The Court's most recent pronouncement on this point explains: "[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed . . . we have permitted litigants to justify

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[5] *See, e.g., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998); Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT'L CANCER INST. 1538 (1995); John P. Pierce et. al., *Smoking Initiation by Adolescent Girls, 1944 Through 1988*, 271 JAMA 608 (1994); *Current Trends: Changes in the Cigarette Brand Preferences of Adolescent Smokers -- United States, 1989-1993*, MORBIDITY AND MORTALITY WKLY. REP. (Centers for Disease Control, Dep't of Health and Human Servs.), Aug. 19, 1994, at 577-581.

speech restrictions by reference to studies or anecdotes . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "'simple common sense.'" *Florida Bar,* 515 U.S. at 628-29 (citations omitted); *see also Edge Broadcasting,* 509 U.S. at 434.

For another, the question whether there is a direct nexus between tobacco advertising and youth consumption is one of legislative, not adjudicative, fact, and this Court is bound to give deference to the Attorney General's conclusions, not subject them to a trial. *See, e.g.*, *Edge Broadcasting,* 509 U.S. at 432-34; *Florida Bar*, 515 U.S. at 628 (accepting record compiled by the Florida State Bar); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996) (rejecting need for a trial); *Dunagin v. City of Oxford*, 718 F.2d 738, 748 (5th Cir. 1983) (same).

Thus, the Court's task is not to engage in an independent weighing of the evidence but rather to ensure that the Attorney General had a solid foundation for his conclusion that the Regulations will materially alleviate the scourge of tobacco use by minors. Because the Attorney General's conclusion on this score is consistent with the conclusions of the FDA, the Surgeon General, and the vast weight of scientific evidence, Plaintiffs' argument to the contrary rings hollow.

D. The Regulations Pass Constitutional Review Under The "Protection Of Youth" Rationale.

The Regulations at issue here enjoy an independent layer of protection based

on the well-grounded proposition that the Free Speech Clause does not prevent governments from enacting reasonable time, place and manner restrictions to protect children from patently harmful speech that is imposed on them by inherently intrusive media.

The Supreme Court has long recognized that governments, in their role as *parens patriae*, have the authority to enact reasonable measures to protect children from patently harmful speech. In *Prince v. Massachusetts*, the Court held that "the interests of society to protect the welfare of children, and the state's assertion of authority to that end" took precedence over the child's First Amendment rights. 321 U.S. 158, 165 (1944). In so ruling, the Court emphasized that the "state's authority over children's activities is broader than over like actions of adults." *Id.* at 168.

The Court later applied the same principle to state-imposed restrictions on freedom of speech. In *Ginsberg v. State of New York*, 390 U.S. 629, 631 (1968), the Court upheld a law prohibiting the sale to minors of materials depicting female nudity in a manner appealing to prurient interests. Citing *Prince*, the Court held that the state's power to protect children placed limits on the seller's First Amendment right to peddle such materials. *Id.* at 638-641; *see also id.* at 650 (Stewart, J., concurring). The *Ginsberg* principle has been upheld by the Court on numerous occasions, in the context of protecting children from "indecent" speech.

See, e.g., FCC v. Pacifica Found., 438 U.S. 726 (1978); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741-42 (1996) (Breyer, J., plurality).

In *Anheuser-Busch, Inc. v. Schmoke*, the Fourth Circuit applied this protection-of-youth doctrine to Baltimore's restrictions on outdoor sign alcohol advertising:

> Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented. This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media.
>
> 101 F.3d at 329.

The court supported its decision by citing to the Supreme Court decisions on indecent speech. *Id*. at 329-30.

Thus, the District Court's comparison of cigarette advertising with pornography in the instant case was perhaps more apt than the court suggested *Lorillard Tobacco Co. v. Reilly*, No. 99-11118-WGY, slip op. at 2 (D. Mass. Jan. 24, 2000). Indeed, Justice Blackmun, the author of the commercial speech doctrine (in *Virginia State Bd. of Pharm.*) once likened cigarette advertising to child pornography, stating that the "simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection customarily

granted to political speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 415 (1992) (Blackmun, J., concurring).

Plaintiffs' critique of the pornography/tobacco advertising analogy, which rests on the obvious distinction between sale of the product and advertising of a product, (Pls.' Br. at 22), is unpersuasive. The real force of the analogy is that states have greater authority to regulate pornography than other forms of "speech" because *children's exposure to the image or message* is harmful. If an ad for *Hustler* contained pornographic images, it would be subjected to the same regulatory restrictions as the magazine itself. Nor would Plaintiffs seriously dispute Massachusetts' authority to prevent *Hustler* from displaying one of its notorious pictorials on a billboard. States have the authority to limit the display of pornographic magazines in stores to "adults only" sections, much as the Regulations here seek to restrict the in-store placement of tobacco ads. *See Midwest Booksellers Ass'n v. City of Minneapolis*, 700 F.2d 1389 (8th Cir. 1985).

The argument for recognizing the authority of governments to restrict tobacco billboard advertising is actually *stronger* than the argument for restricting indecent speech. The notion that youngsters suffer psychological harm when they view female nudity was unproven, as the Supreme Court conceded in *Ginsberg*, 390 U.S. at 641-642. In contrast, "an adolescent decision made as an 11- or 12-year old

is going to result in a painful, premature and needless death for over five million of today's children . . . . They will, on average, die 12 years earlier." *News and Views From the Franklin County Prevention Institute*, Reuters, Nov. 14, 1996 (quoting Michael Ericksen, Director of the Office of Smoking and Health, Centers For Disease Control and Prevention).

Precisely because children "lack the ability to assess and analyze fully the information presented through commercial media," *Anheuser-Busch*, 101 F.3d at 329, they are more likely to fall prey to tobacco advertising messages than adults and begin experimenting with tobacco use before developing the intellect needed to fully appreciate the consequences of that decision. Tobacco advertising thus robs children of their right to make a choice that is truly free. Seventy percent of smokers aged 12 to 17 say that they already regret their decision to smoke and 66% say they want to quit. FDA Regulations, *supra*, at 44,398. By the time young smokers reach adulthood, they are already bound by the garrote of nicotine addiction.

If governments possess considerable authority to protect children from patently harmful speech, they possess still greater authority to protect captive children from patently harmful speech disseminated by intrusive media. The

Supreme Court has long recognized the government's authority to protect the right of all people, young and old alike, to go about their lives without having speech involuntarily imposed on them.

In *Packer Corp. v. Utah*, 285 U.S. 105 (1932), the Court upheld Utah's ban on all outdoor tobacco sign and point-of-purchase advertising, largely on the ground that the law was aimed at protecting minors. *Id*. at 108-110. The Court also emphasized that, while most advertising "is ordinarily seen as a matter of choice on the part of the observer," "[b]illboards, street car signs, and placards and such are in a class by themselves. . . . to be seen without the exercise of choice or volition on their part." *Id.* at 110 (citation omitted).

Although *Packer* was not a First Amendment case, the Court has subsequently applied this distinction between intrusive or "captive audience" speech, and speech that the recipient chooses to receive, in upholding government restrictions on speech against First Amendment challenges. In *Lehman v. City of Shaker Heights*, it upheld a city's refusal to sell advertising space on mass transit vehicles to candidates for public office, largely because "[t]he streetcar audience is a captive audience." 418 U.S. 298, 302 (1974) (plurality opinion); *id.* at 306-307 (Douglas, J., concurring) (emphasizing captive audience rationale). *Accord Kovacs v. Cooper*, 336 U.S. 77 (1949); *Rowan v. United States Post Office Dept.*, 397 U.S.

728 (1970).

The government's considerable authority to protect children from speech that is both harmful and intrusive was recently reaffirmed by the Supreme Court in *Denver*, where it held that "the need to protect children from exposure to patently offensive sex-related material" amply justified a federal statute allowing cable TV systems to ban such "indecent" programs over leased access channels. 518 U.S. at 743. The Court upheld the law — even though it inconvenienced adults who would have to rent videotapes to satisfy their appetite for such programming — largely because such programming can be seen by children "generally without sufficient prior warning to allow the recipient to avert his or her eyes or ears." *Id.* The same is true of the tobacco advertising subject to the Regulations.

CONCLUSION

For the reasons stated above, and by the Attorney General in his brief, this Court should (1) reverse that portion of the Final Judgment that declared invalid "the parameters of the point-of-sale Tobacco Regulations" at 940 Code Mass. Reg. § 21.04(5)(b), and (2) affirm the remainder of the Judgment.

Respectfully Submitted,

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