

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-11179

WILLIE EVANS, as Executor of the Estate
Of Marie R. Evans,
Plaintiff-Appellee,

v.

LORILLARD TOBACCO COMPANY,
Defendant-Appellant.

**BRIEF OF AMICI CURIAE THE AMERICAN LEGACY FOUNDATION,
THE AFRICAN AMERICAN TOBACCO CONTROL LEADERSHIP
COUNSEL, THE AMERICAN CANCER SOCIETY CANCER ACTION
NETWORK, THE AMERICAN HEART ASSOCIATION, THE AMERICAN
LUNG ASSOCIATION, THE AMERICAN MEDICAL ASSOCIATION,
THE AMERICAN PUBLIC HEALTH ASSOCIATION, ASIAN PACIFIC
PARTNERS FOR EMPOWERMENT - ADVOCACY AND LEADERSHIP,
THE CAMPAIGN FOR TOBACCO FREE KIDS, THE CITIZENS'
COMMISSION TO PROTECT THE TRUTH, THE FENWAY INSTITUTE
AT FENWAY HEALTH, LUNG CANCER ALLIANCE, MASSACHUSETTS
ASSOCIATION OF HEALTH BOARDS, THE NATIONAL ASSOCIATION
OF CHRONIC DISEASE DIRECTORS, AND PARTNERSHIP FOR
PREVENTION IN SUPPORT OF PLAINTIFF-APPELLEE**

Ellen Vargyas
American Legacy Foundation
1724 Massachusetts Avenue,
NW
Washington, DC 20036

Lisa G. Arrowood (BBO #
022330)
Katherine A.K. Mumma (BBO
665009)
Arrowood Peters LLP
10 Post Office Square,
1180-N
Boston, MA 02109
(617)849-6200

*Counsel to Amici Curiae
American Legacy Foundation
et al.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICI CURIAE.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

I. Lorillard's Conduct Is Particularly Reprehensible Under the Standard for the Award of Punitive Damages.....3

II. Menthol Cigarettes, Including Newports, Pose a Substantial, Distinct Risk of Harm to the General Public by Increasing the Number of Smokers.....6

A. Tobacco Use Continues At Epidemic Proportions With Smoking Remaining The Leading Cause of Preventable Death In The United States.....8

B. Smoking Is A Pediatric Epidemic.....10

C. Menthol Cigarettes Are the "Starter" Cigarette For Nearly Half Of All Teen Smokers And An Even Higher Percentage Of African-American Youth Smokers; Newport Dominates The Youth Menthol Market.....12

1. The Youngest and Newest Smokers Disproportionately Smoke Menthols.....12

2. Teen Menthol Smokers Show More Signs Of Nicotine Addiction.....15

3. Newport Is By Far The Most Popular Menthol Brand Among Teens And Its Popularity Is Growing.....18

D. Menthol Smokers, And Particularly African-American Menthol Smokers, Are Significantly

Less Successful In Quitting Than Non-Menthol
Smokers20

III. Lorillard's Conduct in Engineering and Marketing
Newports Has Exacerbated the Risks Newport's Pose
to the Public Health.....25

A. Lorillard Engineers Newport's To Have A Menthol
Level That Appeals To Young And New Smokers 25

B. Lorillard Has Heavily Marketed Newport's To The
Teen Market With A Particular Focus On
African-American Teens28

C. Lorillard's Marketing Has Also Targeted
African-Americans More Broadly33

CONCLUSION.....35

CERTIFICATE OF COMPLIANCE.....36

TABLE OF AUTHORITIES

Cases

BMW of North America, Inc. v. Gore, 517 U.S. 559
(1996)4

Burt v. Meyer, 400 Mass. 185 (1987).....3

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120
(2000).....8

Freeman v. Mass. Bay Turnpike Authority, No. 96-6932F
(Dec. 15, 2000)4

Labonte v. Hutchins & Wheeler, 424 Mass. 813 (1997).4

Philip Morris USA v. Williams, 549 U.S. 346 (2007)..4

Santos v. Lumbermen’s Mutual Casualty Co, 408 Mass. 70
(1990)3

Schulhof et al. v. Northeast Cellulose, Inc., et al.,
545 F. Supp. 1200 (1982)3

United States v. Philip Morris USA, Inc., 449 F.Supp
2d 1, 852 (D.D.C. 2006), aff’d, 566 F.3d 1095 (D.C.
Cir. 2009), cert. denied, 130 S. Ct. 3501 (2010)
.....passim

Statutes

21 U.S.C. § 387 (2009)6

Mass. Gen. Laws ch. 229, § 23

Other Authorities

Ahijevych et al, The Role of Menthol in Cigarettes as
a Reinforcer of Smoking Behavior, 12 Nicotine &
Tobacco Research (Suppl. 2) S 110 (2010)16

Bary, Will Lorillard Meet Its Match? Barrons.com
(March 23, 2009)19

Cantrell, KOOL isn't getting the starters, Brown & Williamson Tobacco Corp. Memorandum (Feb. 17, 1987) 26, 27

Centers for Disease Control, Cigarette Brand Preference Among Middle and High School Students Who Are Established Smokers -- United States, 2004 and 2006, Morbidity and Mortality Weekly Report, (Feb. 13, 2009)18, 19

Centers for Disease Control, Smoking-Attributable Mortality, Years of Potential Life Lost and Productivity Losses -- United States, 2000-2004, Morbidity and Mortality Weekly Report (November 14, 2008)8

Centers for Disease Control, Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years - United States, 2005-2010, Morbidity and Mortality Weekly Report (September 9, 2011)8

Cummings et al., Cigarette Advertising and Black-White Differences in Brand Preference, 102 Public Health Reports 698 (1987)34

Delnevo et al., Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non-Menthol Cigarettes, 41 Am. J. of Preventive Med. 357 (2011)21, 22, 23

Department of Health and Human Services, How Tobacco Smoke Causes Diseases: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General (2010)17

Department of Health and Human Services, Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General (2012)passim

Department of Health and Human Services, Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General, Executive Summary (2012)10, 11

Department of Health and Human Services, The Health Consequences of Smoking: A Report of the Surgeon General (May 27, 2004)10, 20

Doll, et al., Mortality From Cancer In Relation To Smoking: 50 Years Observations On British Doctors, 92 Brit. J. of Cancer 426 (2005)	20-21
Doll, et al., Mortality In Relation To Smoking: 50 years' Observations On Male British Doctors, 328 Brit. Med. J. 1519 (2004)	20
Gundersen et al., Exploring The Relationship Between Race/Ethnicity, Menthol Smoking, And Cessation, In A Nationally Representative Sample Of Adults, 49 Preventive Med. 553 (2009)	23
Hersey et al., Are Menthol Cigarettes a Starter Product for Youth?, 8 Nicotine & Tobacco Research 403-413 (June 2006)	14-15
Hersey et al., Menthol Cigarettes Contribute to the Appeal and Addiction Potential of Smoking for Youth, 12 Nicotine & Tobacco Research (Suppl. 2) S136 (2010)	16
Historical and Statutory Notes, 21 U.S.C. § 387 (2009)	11
Institute of Medicine, Ending the Tobacco Problem: A Blueprint for the Nation (2007)	20
Kaufman et al., Changes in Adolescent Cigarette Brand Preference, 1989 to 1996, 28 American Journal of Health Behavior 54 (2004)	19
Klausner, Menthol Cigarettes and Smoking Initiation: A Tobacco Industry Perspective, 20 Tobacco Control (Suppl. 2) ii12 (2011)	15, 26
Kreslake et al., Tobacco Industry Research On Consumer Sensory Perception Of Menthol Cigarettes And Its Role In Smoking Behavior, 10 Nicotine & Tobacco Research 7055 (2008)	25
Kreslake et al., Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults, 98 Am. J. of Pub. Health 1685 (2008)	27

Landrine et al, Cigarette Advertising in Black, Latino and White Magazines, 1998-2002: An Exploratory Investigation, 15 Ethnicity and Disease 63 (2005)33

Lee et al., Menthol: Putting the Pieces Together, 20 Tobacco Control (Suppl. 2) i11 (2011)16, 25, 26, 27

Levy et al., Quit Attempts and Quit Rates Among Menthol and Nonmenthol Smokers in the United States, 101 Am. J. of Pub. Health 1241 (2011)22, 23

National Cancer Institute, The Role of the Media in Promoting and Reducing Tobacco Use. Tobacco Control Monograph No. 19 (June 2008)28

Newport Cigarettes Business Analysis (Oct. 19, 1976).31

Proofing Stock for Ebony Advertisements, Bold Gold Newport34

Richter et al., Small Group Discussions on Menthol Cigarettes: Listening to Adult African-American Smokers in Atlanta, Georgia, 13 Ethnicity & Health 171 (2008)17

Rock et al., Menthol Cigarette Use Among Racial and Ethnic Groups in the United States, 2004-2008, 12 Nicotine & Tobacco Research (Suppl. 2) S117 (2010)12

Stahre et al., Racial/Ethnic Differences In Menthol Cigarette Smoking, Population Quit Ratios, And Utilization Of Evidence-Based Tobacco Cessation Treatments, 105 Addiction (Suppl.1) 75 (2010) ..22

Substance Abuse and Mental Health Services Administration, The National Survey on Drug Use and Health Report: Use of Menthol Cigarettes (November 19, 2009)12, 13

Substance Abuse and Mental Health Services Administration, The National Survey on Drug Use and Health Report: Recent Trends in Menthol Cigarette Use (November 18, 2011)13, 14, 21

**BRIEF OF AMICI CURIAE THE AMERICAN LEGACY
FOUNDATION, THE AFRICAN AMERICAN TOBACCO
CONTROL LEADERSHIP COUNSEL, THE AMERICAN CANCER
SOCIETY CANCER ACTION NETWORK, THE AMERICAN
HEART ASSOCIATION, THE AMERICAN LUNG
ASSOCIATION, THE AMERICAN MEDICAL ASSOCIATION,
THE AMERICAN PUBLIC HEALTH ASSOCIATION, ASIAN
PACIFIC PARTNERS FOR EMPOWERMENT - ADVOCACY AND
LEADERSHIP, THE CAMPAIGN FOR TOBACCO FREE KIDS,
THE CITIZENS' COMMISSION TO PROTECT THE TRUTH,
THE FENWAY INSTITUTE AT FENWAY HEALTH, LUNG
CANCER ALLIANCE, MASSACHUSETTS ASSOCIATION OF
HEALTH BOARDS, THE NATIONAL ASSOCIATION OF
CHRONIC DISEASE DIRECTORS, AND PARTNERSHIP FOR
PREVENTION IN SUPPORT OF PLAINTIFF-APPELLEE**

INTEREST OF AMICI CURIAE

Amici curiae are fifteen nonprofit public health organizations, consumer advocacy groups, and physicians' associations that for decades have worked to educate the public about and protect the public from the devastating health consequences of tobacco use, the leading cause of preventable death in the United States. Amici have broad expertise with regard to the health effects, product engineering and marketing of tobacco products, including the mentholated Newport cigarettes at issue in this case. Amici submit this brief to highlight the severe population-wide public health risks presented by menthol cigarettes, in general, and Newport

cigarettes, in particular. Linked both to increased rates of youth smoking initiation and lower rates of successful adult smoking cessation, menthol cigarettes account for increased smoking prevalence in the population and thereby a greater incidence of tobacco-caused death and disease. The Lorillard Tobacco Company has exacerbated these risks by engineering the menthol content of Newports to appeal to the youngest and newest smokers and targeting youth and African-Americans in its marketing strategies.

The information presented by Amici sheds important light on the grave and far reaching ramifications of this case for the public health, aiding the Court in its analysis of the reprehensibility of Lorillard's conduct in connection with the Court's evaluation of the punitive damage award in this case. A description of each organization is included in the appendix to the accompanying Motion for Leave to File.

STATEMENT OF THE CASE

Amici incorporate by reference the Statement of the Case contained in the brief of Plaintiff-Appellee Willie Evans, as Executor of the Estate of Marie R. Evans.

ARGUMENT

The purpose of punitive damages under Section 2 of Chapter 229 of the Massachusetts General Laws is to punish the defendant and deter future wrongdoing. See Santos v. Lumbermen's Mutual Casualty Co., 408 Mass. 70, 82 (1990) ("The purposes underlying the allowance of punitive damages [under the wrongful death statute, G. L. ch. 229, § 2] are punishment of the defendant and deterrence of future wrongdoing."); Burt v. Meyer, 400 Mass. 185, 188 (1987) (same); Schulhof et al. v. Northeast Cellulose, Inc., et al., 545 F. Supp. 1200, 1206 (1982) (same). Lorillard's conduct in developing and promoting Newport cigarettes, a product uniquely injurious to public health, to children like Ms. Evans was particularly reprehensible. Such conduct should subject Lorillard to a substantial punitive measure in order to remove the profit motive and deter similar conduct in the future.

I. Lorillard's Conduct Is Particularly Reprehensible Under the Standard for the Award of Punitive Damages

This Court has recognized that the standard for reviewing the reasonableness of a punitive damage award has three principal elements. These are: (1) the degree of reprehensibility of the defendant's

conduct; (2) the ratio of the punitive damages award to the actual harm inflicted upon the plaintiff; and (3) a comparison to the civil or criminal penalties that could be imposed for comparable misconduct. Labonte v. Hutchins & Wheeler, 424 Mass. 813, 862 (1997). See also Freeman v. Mass. Bay Turnpike Authority, No. 96-6932F (Dec. 15, 2000) (applying LaBonte factors to punitive damages under wrongful death statute). Of these, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." BMW of North America, Inc. v. Gore, 517 U.S. 559, 575 (1996). See also Freeman v. Mass. Bay Turnpike Authority, No. 96-6932F ("The first, and perhaps most important, factor is the degree of reprehensibility of the defendant's conduct.")

The analysis of reprehensibility properly takes into account the risks posed by a defendant's conduct to the general population. As the Supreme Court concluded in Philip Morris USA v. Williams, 549 U.S. 346, 355 (2007), "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of

harm to the general public, and so was particularly reprehensible." The reasoning is straightforward and unassailable: "[C]onduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." ¹ Id. at 357.

Lorillard's conduct imposed a substantial risk of harm to many. Tragic and needless as Ms. Evans' premature death as a direct result of smoking Newport cigarettes was, the greater tragedy is that her death was far from an isolated occurrence. To the contrary, Ms. Evans is a classic example of the Newport smoker: a very young, too often African-American, child targeted by the cigarette company's marketers, who becomes addicted and finds herself unable to quit despite repeated attempts, and falls ill and dies prematurely of tobacco-related disease as the direct result of her life-long addiction. The same conduct by the Lorillard Tobacco Company that caused Ms. Evans' death has - and continues to - put countless other persons, disproportionately African-Americans, at similar risk of premature death and disease.

¹Amici do not suggest that the punitive damages awarded in this case may be justified as a punishment of the Lorillard Tobacco Company for the harms it has inflicted on nonparties. This is not a permissible use of punitive damages. Philip Morris USA v. Williams at 353. Nor was it a basis relied upon below.

For the reasons set forth below, the conduct of the Lorillard Tobacco Company in developing and marketing the Newport brand is "particularly reprehensible" within the meaning of the applicable standard.

II. Menthol Cigarettes, Including Newports, Pose a Substantial, Distinct Risk of Harm to the General Public by Increasing the Number of Smokers

Substantial scientific research demonstrates that menthol cigarettes, very much including Newports which are the leading menthol brand, present distinct and lethal public health risks. These risks are above and beyond the risks posed by cigarettes more generally. They are particularly acute for African-Americans who smoke menthols at highly disproportionate rates.

First, menthol cigarettes, in general, and Newports, in particular, are closely associated with increased rates of youth smoking initiation and addiction. More than half of the newest and youngest smokers smoke menthols and the majority of these young menthol smokers smoke Newports. While this is true across all youth populations, the rates of menthol and Newport cigarette use are highest by far among African-American youth.

Second, adult menthol smokers have significantly less success in quitting smoking than non-menthol smokers. Some studies show a stronger association between menthol smoking and difficulty quitting among African-Americans who also smoke menthols at a far higher rate than smokers in general. By continuing to smoke, smokers are at greater risk of tobacco-caused death and disease than they would be if they had been able to stop.

Based on an exhaustive review of the scientific evidence, the Food and Drug Administration's Tobacco Products Scientific Advisory Committee (TPSAC) has confirmed that "the availability of menthol cigarettes has led to an increase in the number of smokers and that this increase does have adverse public health impact in the United States." Tobacco Products Scientific Advisory Committee, Menthol Cigarettes and Public Health: Review of the Scientific Evidence and Recommendations, at 220 (July 21, 2011) (TPSAC Report)², at <http://www.fda.gov/downloads/>

² TPSAC was created pursuant to the Family Smoking Prevention and Tobacco Control Act, 21 U.S.C. § 387q (2009). Based on its concern about menthol cigarettes, Congress required TPSAC to submit a report and recommendations on the impact of the use of menthol in cigarettes on the public health to the

AdvisoryCommittees/CommitteesMeetingMaterials/TobaccoP
roductsScientificAdvisoryCommittee/UCM269697.pdf (last
viewed October 16, 2012).

**A. Tobacco Use Continues at Epidemic
Proportions With Smoking Remaining the
Leading Cause of Preventable Death in the
United States**

An estimated 443,000 Americans die every year from tobacco related disease, Centers for Disease Control, Smoking-Attributable Mortality, Years of Potential Life Lost and Productivity Losses -- United States, 2000-2004, Morbidity and Mortality Weekly Report (November 14, 2008), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm> (last viewed October 16, 2012), making it "perhaps the single most significant threat to public health in the United States." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000). While smoking levels in the U.S. have declined over the years, tobacco use remains widespread. The most recent figures show that 45.3 million adults (19.3%) continue to smoke. Centers for Disease Control, Vital Signs: Current Cigarette Smoking Among Adults Aged ≥ 18 Years -

Secretary of the Department of Health and Human Services within one year of its creation. 21 U.S.C. § 387g(e) (2009).

United States, 2005-2010, Morbidity and Mortality Weekly Report (September 9, 2011), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6035a5.htm> (last viewed October 16, 2012). With regard to youth, about three million high school students, including nearly one in four high school seniors, are current smokers as are 624,000 middle school students. Department of Health and Human Services, Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General, at 135 (2012) (2012 Surgeon General Report), at <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/full-report.pdf> (last viewed October 16, 2012).

Despite decades of fraudulent assertions to the contrary by the tobacco industry very much including Lorillard Tobacco ("over the course of more than 50 years [the industry] lied, misrepresented, and deceived the American public . . . about the devastating health effects of smoking and environmental tobacco smoke . . .," United States v. Philip Morris USA, Inc., 449 F.Supp 2d 1, 1500 (D.D.C. 2006), aff'd, 566 F.3d 1095 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 3501 (2010)), it is now beyond dispute that cigarette smoking causes cancer, heart

disease, respiratory disease, low birth weight, sudden infant death syndrome and many other serious diseases and health effects. Department of Health and Human Services, The Health Consequences of Smoking: A Report of the Surgeon General (May 27, 2004) (2004 Surgeon General Report), at <http://www.surgeongeneral.gov/library/reports/smokingconsequences/index.html> (last viewed October 16, 2012). Given current smoking rates, very much including youth smoking rates, tobacco related death and disease will continue to afflict millions of Americans into the foreseeable future.

B. Smoking Is A Pediatric Epidemic

Smoking is not an adult choice. The vast majority of smokers start smoking when they are teenagers. Eighty-eight percent of adult smokers had their first cigarette when they were younger than eighteen. Department of Health and Human Services, Preventing Tobacco Use Among Youth and Young Adults: A Report of the Surgeon General, Executive Summary, at 1 (2012) (2012 Surgeon General Report, Executive Summary), at <http://www.surgeongeneral.gov/library/reports/preventing-youth-tobacco-use/exec-summary.pdf> (last viewed October 25, 2012). About 80% of these

teenagers continue to smoke into adulthood. Id. Of them, one-half will die, on average, thirteen years prematurely from a tobacco-related disease. Id. Because smoking initiation after adolescence is rare, id. at 2, tobacco use and its devastating health effects would recede without this steady stream of what the tobacco industry itself has referred to as "the only source of replacement smokers." United States v. Philip Morris USA, Inc., 449 F.Supp 2d at 973.

Based on these facts, the Surgeon General has labeled tobacco use a pediatric epidemic. 2012 Surgeon General Report, Executive Summary at 2. Congress reached the same conclusion, as evidenced by the first finding incorporated into the historic Family Smoking Prevention and Tobacco Control Act passed in 2009: "The use of tobacco products by the nation's children is a pediatric disease of considerable proportions that results in new generations of tobacco-dependent children and adults." 21 U.S.C. § 387 (2009) (Historical and Statutory Notes; Findings [1]). Tragically, both the Surgeon General and Congress were correct in their assessments.

C. Menthol Cigarettes Are the "Starter" Cigarette for Nearly Half of All Teen Smokers and an Even Higher Percentage of African-American Youth Smokers; Newport Dominates the Youth Menthol Market.

1. The Youngest and Newest Smokers Disproportionately Smoke Menthols

Menthols are the gateway cigarette for nearly half of all teen smokers and an even higher percentage of the very youngest smokers - middle school students. 2012 Surgeon General Report, supra, at 537. According to the 2009 National Survey on Drug Use and Health, nearly 34% of all smokers smoked menthols in 2008, including 31.5% of smokers aged 26 or older. Substance Abuse and Mental Health Services Administration, The National Survey on Drug Use and Health Report: Use of Menthol Cigarettes (November 19, 2009) (2009 NSDUH Menthol Report), at <http://www.samhsa.gov/data/2k9/134/134mentholcigarettes.htm> (last viewed October 16, 2012). In contrast, the percentage of adolescent smokers aged twelve to seventeen who smoked menthols was much higher -- 47.7%. Id. For African-American teens it was an extraordinarily high 71.9%. Rock et al., Menthol Cigarette Use Among Racial and Ethnic Groups in the United States, 2004-2008, 12 Nicotine & Tobacco

Research (Suppl. 2) S117 (2010)³ (relying on the 2009 NSDUH data).

The percentage of youth menthol smokers is even higher for recent youth initiates - twelve to seventeen year olds who started smoking in the past year. The 2009 NSDUH Menthol Report, supra, showed that 49.2% of new twelve to seventeen year old smokers smoked menthol cigarettes as compared to 43.8% of adolescent smokers who had smoked for more than a year. The percentage of new smokers (overwhelmingly teens) who smoke menthols has continued to rise reaching more than half (51.7%) in the period from 2007 to 2010. Substance Abuse and Mental Health Services Administration, The NSDUH Report: Recent Trends in Menthol Cigarette Use (November 18, 2011) (2011 NSDUH Menthol Report), at http://www.samhsa.gov/data/2k11/WEB_SR_088/WEB_SR_088.pdf (last viewed October 16, 2012).

Underscoring menthol's highly disproportionate appeal to the youngest and least experienced smokers, three-fifths of the very youngest smokers - middle schoolers - smoke menthol cigarettes. This includes

³ All non-legal articles for which no URL is provided are available in the supplied Addendum to the brief.

53% of white middle school smokers, 63% of Hispanic middle school smokers and 88% of African-American middle school smokers who use menthol brands. Hersey et al., Are Menthol Cigarettes a Starter Product for Youth?, 8 Nicotine & Tobacco Research 403-413 (June 2006).

Further confirming menthol's appeal to under-age smokers, rates of youth menthol cigarette use have remained stable for the most recently studied time period (2004 to 2010) while over the same period, rates of non-menthol cigarette use by youth have declined. 2011 NSDUH Menthol Report, supra. See also 2012 Surgeon General Report, supra, at 538.

A recent study of smokers aged sixteen to twenty-four provides additional evidence that menthol cigarettes serve as a starter product for youth by demonstrating that menthol smokers are more likely to switch to non-menthol cigarettes than the other way round. Villanti et al., Menthol Brand Switching Among Adolescents and Young Adults in the National Youth Smoking Cessation Survey, 102 American Journal of Public Health 1310 (2012). This pattern may in part explain the fact that a lower percentage of adult smokers than youth smokers are menthol smokers. TPSAC

Report, supra, at 115. Nonetheless, the overall rate of switching is low; therefore, "once smokers have chosen to be menthol smokers either early in life or later, there is very little switching to a non-menthol brand." Klausner, Menthol Cigarettes and Smoking Initiation: A Tobacco Industry Perspective, 20 Tobacco Control (Suppl. 2) ii12, ii18 (2011), at http://tobaccocontrol.bmj.com/content/20/Suppl_2/ii12.full (last viewed October 23, 2012). Loyal menthol smokers do, however, desire stronger menthol levels over time. Tobacco companies, very much including Lorillard, understand this phenomenon and market different menthol brands with a continuum of menthol levels to maintain these loyal menthol smokers as customers. Id.

The role of menthol cigarettes in increasing youth smoking initiation for the reasons set out above is supported and amplified in the TPSAC Report, supra Chapter 6. TPSAC agrees that the weight of the evidence confirms that "the availability of menthol cigarettes increases experimentation and regular smoking." Id. at 216.

2. Teen Menthol Smokers Show More Signs of Nicotine Addiction

Not only are menthols closely associated with youth tobacco initiation, recent studies show that youth who smoke menthols are significantly more likely to show signs of nicotine dependency than teens who smoke non-menthol cigarettes. Hersey et al., Menthol Cigarettes Contribute to the Appeal and Addiction Potential of Smoking for Youth, 12 Nicotine & Tobacco Research (Suppl. 2) S136 (2010). In particular, teen menthol smokers are significantly more likely than teen non-menthol smokers to need a cigarette within one hour after smoking their previous cigarette. *Id.* at S143. See also Ahijevych et al, The Role of Menthol in Cigarettes as a Reinforcer of Smoking Behavior, 12 Nicotine & Tobacco Research (Suppl. 2) S 110 (2010) (evidence review confirming that most studies show a relationship between menthol cigarette use and nicotine dependence, including for youth and African-American smokers); Lee et al., Menthol: Putting the Pieces Together, 20 Tobacco Control (Suppl. 2) ii1, ii2 (2011), at http://tobaccocontrol.bmj.com/content/20/Suppl_2/ii12. full (last viewed October 23, 2012) ("Studies focused

on youths have found smoking menthol cigarettes is significantly associated with indicators of nicotine dependency."); Wackowski et al., Menthol Cigarettes and Indicators of Tobacco Dependence Among Adolescents, 32 Addictive Behaviors 1964, 1968 (2007) ("High school menthol smokers are more likely to report symptoms of dependence compared to non-menthol smokers, even controlling for race, age and cigarette consumption."). The TPSAC Report, supra at 216, confirms that there is "clear evidence of a relationship between menthol cigarettes and nicotine addiction in youth."

The Surgeon General has explained that menthol contributes to addiction by making nicotine inhalation more pleasant. Department of Health and Human Services, How Tobacco Smoke Causes Diseases: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General, at 181 (2010), at http://www.surgeongeneral.gov/library/reports/tobaccosmoke/full_report.pdf (last viewed October 16, 2012). This applies to menthol smokers across-the-board. As one African-American smoker noted "I think I'm addicted twice, once to the menthol and then second to the tobacco." Richter et al.,

Small Group Discussions on Menthol Cigarettes:
Listening to Adult African-American Smokers in
Atlanta, Georgia, 13 Ethnicity & Health 171, 176
(2008).

**3. Newport Is By Far the Most Popular Menthol
Brand Among Teens and Its Popularity Is
Growing**

Newports have dominated the adolescent menthol market for over thirty years. 2012 Surgeon General Report, supra at 537. It is by far the most popular menthol brand among youth and is the second most popular cigarette brand (after Marlboro) among all youth smokers. According to the most recent data from the Centers for Disease Control and Prevention (CDC), Newport was the preferred brand of 26.4% of established middle school smokers and 21.4% of established high school smokers. CDC, Cigarette Brand Preference Among Middle and High School Students Who Are Established Smokers -- United States, 2004 and 2006, Morbidity and Mortality Weekly Report, (Feb. 13, 2009), at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5805a3.htm> (last viewed Oct. 16, 2012). (Established smokers are those who have smoked 25 or more cigarettes in their lifetime and at least one cigarette in the past 30 days.) As with menthol

smoking rates generally, the percentages of youth Newport smokers are much higher for African-American teens. Newports were smoked by 59.7% of African-American middle schoolers who smoke and 78.6% of African-American high school smokers. Id. The CDC noted in explanation that "[t]he tobacco industry has strategically targeted black communities in its advertisements and promotional efforts for menthol cigarettes." Id.

Independent research confirms that Newport's popularity among teens dramatically increased over time with the increases becoming more rapid by the 1990s. From 1989 to 1996 there was more than a threefold (347%) increase of Newport use among thirteen- to fourteen-year old smokers; nearly a doubling (189% increase) among fifteen-year-olds; and a 69% increase among sixteen- to eighteen-year-olds in reports of Newport purchases. Kaufman et al., Changes in Adolescent Cigarette Brand Preference, 1989 to 1996, 28 American Journal of Health Behavior 54 (2004). Business analysts confirm Newport's continuing popularity among new smokers. For example, a tobacco industry expert at Morgan Stanley noted that Newport is the choice of 17% of new smokers, even

though the brand has only a 10% share of the market as a whole. According to the analyst, "this is the most favorable skew among major cigarette makers." Bary, Will Lorillard Meet Its Match? Barrons.com (March 23, 2009), at <http://online.barrons.com/article/SB123759865690301469.html> (last viewed on Oct, 12, 2012).

D. Menthol Smokers, and Particularly African-American Menthol Smokers, Are Significantly Less Successful in Quitting Than Non-Menthol Smokers.

Aside from not starting to smoke in the first place, the next best thing that a smoker can do to protect his or her health is to quit. See, e.g., Institute of Medicine, Ending the Tobacco Problem: A Blueprint for the Nation 231-232 (2007), at http://books.nap.edu/openbook.php?record_id=11795 (last viewed October 26, 2012) (summarizing health benefits of quitting smoking); 2004 Surgeon General Report, *supra*, at 874 (finding that even modest reductions in smoking prevalence would save between 1.7 and 4 million premature deaths from smoking).

The earlier a smoker quits the better. Results from the fifty-year follow-up to the British Doctors' Study demonstrate the importance of quitting smoking

before age thirty to avoid tobacco-related mortality. Doll, et al., Mortality In Relation To Smoking: 50 years' Observations On Male British Doctors, 328 Brit. Med. J. 1519 (2004), at <http://www.bmj.com/content/328/7455/1519> (last viewed October 23, 2012); Doll, et al., Mortality From Cancer In Relation To Smoking: 50 Years Observations On British Doctors, 92 Brit. J. of Cancer 426 (2005), at <http://www.nature.com/bjc/journal/v92/n3/full/6602359a.html> (last viewed October 23, 2012).

Notwithstanding the unassailable and profound health benefits that accompany quitting smoking, the weight of nationally representative, published and peer-reviewed studies demonstrates that menthol smokers have a significantly harder time quitting smoking than non-menthol smokers even though they make more quit attempts. These differences apply to all menthol smokers but are starker for African-American menthol smokers. This is of enormous concern since nearly 85% of African-American smokers are menthol smokers. 2011 NSDUH Report, supra.

Three major recently published studies based on the data in the nationally representative Tobacco Use Supplement to the Current Population Survey (TUS-CPS)

sponsored by the National Cancer Institute and the CDC confirm that smokers of menthol cigarettes, across-the-board, are significantly less likely to be able to quit smoking than smokers of non-menthol cigarettes. Delnevo et al., Smoking-Cessation Prevalence Among U.S. Smokers of Menthol Versus Non-Menthol Cigarettes, 41 Am. J. of Preventive Med. 357 (2011); Levy et al., Quit Attempts and Quit Rates Among Menthol and Nonmenthol Smokers in the United States, 101 Am. J. of Pub. Health 1241 (2011); Trinidad et al., Menthol Cigarettes and Smoking Cessation among Racial/Ethnic Groups in the U.S., 105 Addiction (Suppl. 1) 84 (2010). The differential is heightened for African-American menthol smokers in spite of the fact that menthol smokers make more quit attempts than non-menthol smokers. Delnevo, supra; Levy, supra. It is also in spite of the fact that African-American menthol smokers reported a greater confidence that they could successfully quit. Trinidad, supra.

Two other recent studies using the National Cancer Institute-sponsored National Health Interview Survey Cancer Control Supplement have reached similar conclusions, particularly regarding the lower level of successful cessation among African-American menthol

smokers despite increased quit attempts. See Stahre et al., Racial/Ethnic Differences In Menthol Cigarette Smoking, Population Quit Ratios, And Utilization Of Evidence-Based Tobacco Cessation Treatments, 105 Addiction (Suppl.1) 75 (2010) (finding increased quit attempts among menthol as opposed to non-menthol smokers but significantly reduced cessation among African-American and Hispanic menthol smokers as compared to non-menthol smokers); Gundersen et al., Exploring The Relationship Between Race/Ethnicity, Menthol Smoking, And Cessation, In A Nationally Representative Sample Of Adults, 49 Preventive Med. 553 (2009) (finding statistically significant decrease in odds of cessation among non-white menthol smokers compared to non-white non-menthol smokers).

Amici recognize, as do the authors of the cited studies, that there are a small number of studies that do not find these relationships between menthol smoking and reduced success in smoking cessation. However, for the reasons the researchers set out, the cited studies not only constitute the majority of the findings but are the most persuasive as they are based on nationally representative data, use more reliable measures of smoking cessation and account for

potential differences by age, gender and race/ethnicity in their analyses.⁴

The real world implications of the fact that menthol smokers have a significantly harder time quitting than do non-menthol smokers are profound.

They are well summarized by Levy:

Contrary to tobacco industry claims, menthol is not simply a flavoring that caters to the taste preferences of certain demographic groups; the results of the present study are consistent with other findings that suggest it is harder for menthol smokers to stop smoking, exposing millions of smokers who want to quit but cannot do so to the known and devastating harms of smoking. Moreover, menthol smokers who would otherwise quit expose nonsmokers to the harms of secondhand smoke, and children who live in their households are more likely to have preventable episodes of asthma and ear infections and a higher propensity to adopt smoking themselves. Given the overwhelming disease and death caused by smoking, menthol has no redeeming value other than to make the poison go down more easily, maintain smoking among users who want to quit and exposing others to their smoking.

(Citations omitted.) Supra at 1247.

⁴ E.g. Delnevo, supra, at 357 (more limited clinical and community-based studies "not generalizable to the overall population of smokers"); Levy, supra, at 1246 (current study is "more recent, of larger scale, and more representative of the population than the earlier studies", also unlike earlier studies, "control[s] for important potential confounders").

III. Lorillard's Conduct in Engineering and Marketing Newports Has Exacerbated the Risks Newports Pose to the Public Health

Lorillard did not achieve Newports' market dominance by happenstance or luck. It has carefully engineered Newports to fuel youth smoking initiation and has aggressively marketed the brand to youth and African-Americans.

A. Lorillard Engineers Newports To Have A Menthol Level That Appeals to Young and New Smokers

Tobacco companies have long known that by covering up the harsh taste of tobacco and providing a cooling sensation, menthol cigarettes increase the ease of smoking. Lee et al., *Menthol: Putting the Pieces Together*, *supra* at ii1. They also have long known that menthol's cooling and minty properties are particularly attractive to young and inexperienced smokers, Kreslake et al., *Tobacco Industry Research On Consumer Sensory Perception Of Menthol Cigarettes And Its Role In Smoking Behavior*, 10 *Nicotine & Tobacco Research* 7055 (2008); Yerger, *Menthol's Potential Effects On Nicotine Dependence: A Tobacco Industry Perspective*, 20 *Tobacco Control* (Suppl. 2) ii29, at ii33 (2011), at <http://tobaccocontrol.bmj.com/>

content/20/Suppl_2/ii29.full (last viewed October 23, 2012).

As a tobacco executive frankly explained twenty-five years ago, "Menthol brands have been said to be good starter products because new smokers appear to know that menthol covers up some of the tobacco taste and they already know what menthol tastes like, vis-à-vis candy." Cantrell, KOOL isn't getting the starters, Brown & Williamson Tobacco Corp. Memorandum (Feb. 17, 1987), quoted in part in United States v. Philip Morris USA Inc., 449 F.Supp 2d at 1051, at <http://legacy.library.ucsf.edu/tid/gas01f00> (last viewed Oct. 16, 2012) (Cantrell Memorandum).

But there is much more to menthol's success with young smokers than just the minty taste. These cigarettes are highly engineered products with menthol levels carefully manipulated to appeal to various target markets. Lee et al., Menthol: Putting the Pieces Together, supra at i11. In the case of Newport, Lorillard has deliberately lowered its menthol levels to "smooth the smoke" and avoid "aversive effects for new smokers from the high levels that would stimulate pain. . . ." 2012 Surgeon General Report, supra, at 537. See also Klausner,

Menthol Cigarettes and Smoking Initiation: A Tobacco Industry Perspective, 20 Tobacco Control (Suppl. 2) ii12, ii18 (2011), at http://tobaccocontrol.bmj.com/content/20/Suppl_2/ii12.full (last viewed October 23, 2012).

In response to Lorillard's success, and proving the adage that imitation is the sincerest form of flattery, Newport's competitors have studied and sought to replicate its lower menthol levels in their own products in their efforts to attract young and new smokers. Kreslake et al., Tobacco Industry Control of Menthol in Cigarettes and Targeting of Adolescents and Young Adults, 98 Am. J. of Pub. Health 1685, 1686 (2008). See also 2012 Surgeon General Report, supra, at 537 ("[w]hen RJR introduced [a new brand] in the late 1980s targeting young Blacks, it provided lower levels of menthol similar to Newport"); Cantrell Memorandum, supra (Lorillard competitor Brown & Williamson noting that the "starters" that KOOL was not "getting" were smoking Newports due in large part the fact that "KOOL's menthol level is too high for starters."); Lee et al., Menthol: Putting the Pieces Together, supra, at ii2 ("1977 Philip Morris study found that the median age for Lorillard Tobacco

Company's Newport King smokers was the youngest for all cigarette brands. . . . By the 1980s all major menthol brands had low menthol varieties to target this market."). Nonetheless, despite its competitors' efforts, Lorillard has been able to maintain a strong dominance in the teen-age menthol market with its Newport brand.

B. Lorillard Has Heavily Marketed Newports to the Teen Market With a Particular Focus on African-American Teens

The Surgeon General has conclusively documented that "[p]romotion and advertising by the tobacco industry causes tobacco use, including its initiation among youth." (Emphasis in original.) 2012 Surgeon General Report, supra, at 508. Accord, National Cancer Institute, The Role of the Media in Promoting and Reducing Tobacco Use. Tobacco Control Monograph No. 19, at 260 (June 2008), at http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_complete.pdf (last viewed Oct. 16, 2012) ("Strong and consistent evidence . . . indicates that exposure to cigarette advertising influences nonsmoking adolescents to initiate smoking and to move toward regular smoking.") The Court in United States v

Philip Morris USA, 449 F. Supp. 2d at 980, offered a succinct explanation of how this works:

Cigarette marketing, which includes both advertising and promotion, is designed to play a key role in the process of recruiting young, new smokers by exposing young people to massive amounts of imagery associating positive qualities with cigarette smoking. Research in psychology and cognitive neuroscience demonstrates how powerful such imagery can be, particularly for young people, in suppressing perception of risk and encouraging behavior.

The facts bear out that youth smoke the most heavily advertised cigarettes at highly disproportionate rates. More than four out of five youth smokers buy Marlboros, Newports or Camels, the three most heavily advertised brands. United States v. Philip Morris USA, 449 F.Supp 2d at 1208. The Surgeon General has confirmed that advertising expenditures for Newports are second only to those for Marlboros. 2012 Surgeon General Report, supra, at 507. In contrast, fewer than half of smokers over the age of twenty-five purchase these brands. Id.

Lorillard has long recognized "that new teenage smokers were essential to [its] continued profitability," United States v. Phillip Morris USA, Inc., 449 F.Supp. 2d at 1518. It has also long recognized that young African-Americans were a key

African-Americans who have provided such a lucrative market for Newports.

First, these documents demonstrate how closely Lorillard tracked Newport's youngest customers over the course of decades and that it was fully aware of the brand's appeal to children and very young teens. For example, as early as 1969 Lorillard commissioned a study surveying the "literature published between 1967 and 1969 on the smoking behavior of children as young as eleven, as well as teenagers." (Emphasis added.) United States v. Philip Morris USA, Inc., 449 F.Supp 2d at 1032. A 1975 memo reported that "retailers continue to comment that the majority of consumers are younger people between 14 to 25 years of age." (Emphasis added.) Id. at 1033. A 1976 internal Lorillard business analysis described the Newport "[f]ranchise [as] very young", concluding that "Newport's SOM [share of market] among smokers 14-17 years old is significantly higher than brand's total SOM, reflecting strong appeal to young/new smokers." Newport Cigarettes Business Analysis, Bates Nos. 50112 3250, 50112 3262 (Oct. 19, 1976), at <http://legacy.library.ucsf.edu/tid/ksb59d00/pdf> (last viewed Oct. 16, 2012) (emphasis added). And a 1981

report prepared for Lorillard, entitled "An Exploratory Study for Newport Smoking and Purchase Behavior of Young Adults" reported that "[o]ne-half of these respondents began to smoke at ages 10 to 13, with most of the remainder starting to smoke between 14 to 17 years of age" United States v. Philip Morris USA, Inc., 449 F.Supp. 2d at 1035 (emphasis added). It also noted that the respondents "cited Newport as a brand used by those who are just starting to smoke." Id.

With regard to Lorillard's focus on African-American teens, a March 1978 report of a Lorillard field sales representatives' seminar, leaves nothing to the imagination as it sets out Lorillard's operative strategy: "Tie-in with any company who help black [sic] - 'we help them, they help us'. Target group age 16+." Id. at 1034. It goes on to outline a series of specific promotional ideas under the heading "How to Reach Younger Smokers: P.O.S. [point of sale] material, sampling [giving away free cigarettes], Black inner-city newspapers, [and] Tee-Shirt give aways." Id. And it considered additional youth oriented promotions such as "[s]cholarships for underprivileged youth," sponsoring youth sports teams,

and sponsoring Miss Black Teenager contests. Id. A June 1978 Lorillard memo titled "Black Marketing Research - Findings & Recommended Actions to Date" describes Newport as "definitely a starter brand" noting that "Black Newport and Kool smokers are even younger than the switching data would indicate." Id.

C. Lorillard's Marketing Has Also Targeted African-Americans More Broadly

Lorillard's focus on African-American teens is consistent with research findings that "menthol cigarettes are disproportionately marketed per capita to African-Americans" through the use of "tailored marketing strategies and messages." TPSAC Report, supra, at 92. Notably, menthol cigarettes, including Newports, are advertised across-the-board at much higher rates in Black-oriented magazines such as Ebony, Jet and Essence than in magazines oriented to the general public. See, e.g., Landrine et al, Cigarette Advertising in Black, Latino and White Magazines, 1998-2002: An Exploratory Investigation, 15 Ethnicity and Disease 63, 65 (2005) ("cigarette ads in the Black magazine continue to be for menthol brands, with the Black magazines 9.8 times more likely to have such ads than the White magazine, and 67% of

all cigarette ads in the Black magazine were ads for menthol brands."); Cummings et al., Cigarette Advertising and Black-White Differences in Brand Preference, 102 Public Health Reports 698, 700 (1987) ("magazines directed to black readers include a much greater proportion of ads for menthol cigarettes compared with magazines similar in content but directed to white readers.")

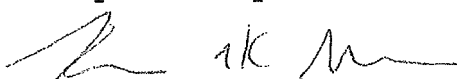
Lorillard's internal documents establish that it has been advertising Newports in black-oriented publications since at least the 1960s. For example, an ad reading "Bold Gold Newport" was placed in Ebony in 1968. Proofing Stock for Ebony Advertisements, Bold Gold Newport, at <http://legacy.library.ucsf.edu/tid/izw01e00/pdf> (last viewed Oct. 16, 2012). Lorillard ramped up this effort over the next few years. A 1974 Lorillard memo, with the subject line "Special Black Effort," underscores Lorillard's Newport marketing strategy as it states that "[o]bviously, the Black smoker is very important to the menthol segment, and this is a prime target for Newport marketing efforts." Toti, Special Black Effort, Smoke Signals: News about advertising from Lorillard (July 25, 1974), at

<http://legacy.library.ucsf.edu/tid/jcq13c00/pdf> (last viewed Oct. 16, 2012).

CONCLUSION

For the foregoing reasons, Amici urge this Court to affirm the decision below.

Respectfully submitted,



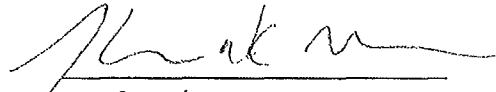
Lisa G. Arrowood (BBO #
022330)
larrowood@arrowoodpeters.com
Katherine A.K. Mumma (BBO #
665009)
kmumma@arrowoodpeters.com
10 Post Office Square, 1180-
N
Boston, MA 02109
(617) 849-6200
Of Counsel

Ellen Vargyas
American Legacy Foundation
1724 Massachusetts Avenue NW
Washington, DC 20036
(202) 454-5592

October 26, 2012

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the Massachusetts Rules of Appellate Procedure and the Rules of the Massachusetts Supreme Judicial Court that pertain to the filing of briefs.



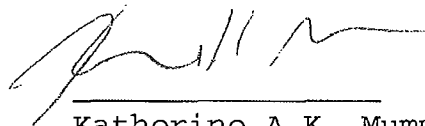
Katherine A.K. Mumma
(BBO # 665009)

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this 24th day of October, 2012, two copies of the foregoing Brief of the American Legacy Foundation and Others as Amicus Curiae in Support of Plaintiff-Appellee were served by hand on the following counsel of record:

Andrew J. McElaney, Jr.
Nutter, McClennen & Fish, LLP
Seaport West
155 Seaport Blvd.
Boston, MA 02210

Michael D. Weisman
Davis, Malm & D'Agostine, P.C.
One Boston Place
Boston, MA 02109



Katherine A.K. Mumma
BBO # 665009

