

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-11641

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STEVEN P. ABDOW, STEPHANIE C. CRIMMONS, JOSEPH A.  
CURATONE, GERI EDDINS, MARK A. GOTTLIEB, CELESTE B.  
MEYERS, KRISTIAN M. MINEAU, KATHLEEN CONLEY NORBUT,  
JOHN F. RIBEIRO, and SUSAN C. TUCKER,

Plaintiffs/Appellants

v.

GEORGE DUCHARME, ET AL., DANIEL RIZZO, ET AL., and  
DOMENIC J. SARNO, ET AL.,

Interveners/Appellants,

v.

ATTORNEY GENERAL and SECRETARY OF THE COMMONWEALTH,  
Defendants/Appellees.

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**BRIEF OF AMICUS CURIAE PUBLIC HEALTH ADVOCACY  
INSTITUTE IN SUPPORT OF APPELLANTS**

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**CORPORATE DISCLOSURE STATEMENT**

Amicus curiae Public Health Advocacy Institute ("PHAI") states, pursuant to S.J.C. Rule 1:21(b)(i), that it is a 26 U.S.C. § 501(c)(3) nonprofit, public interest organization, incorporated in Massachusetts in 1979 and headquartered in Boston. PHAI is a non-profit, non-stock corporation with no parents or subsidiaries.

**STATEMENT OF INTEREST OF THE AMICI CURIAE**

Amicus curiae Public Health Advocacy Institute ("PHAI") is a nonprofit organization incorporated in Massachusetts in 1979 and headquartered in Boston. PHAI is a legal research center focused on public health law. PHAI's goal is to support and enhance a commitment to public health in those that shape public policy through law. We are committed to research in public health law, public health policy development; legal technical assistance; and collaborative work at the intersection of law and public health. The present case is of concern to PHAI because it seeks to prevent a devastating public health impact that legalized casino gambling would create in the Commonwealth.

Through litigation, legislation, regulation and ballot initiative, the Commonwealth has engaged in a protracted battle to mitigate the grievous harm the tobacco industry has caused. The Amicus Curiae has devoted decades to both study and contribute to this effort. The casino gambling industry shares much in common with the tobacco industry, and the People deserve the opportunity to exclude them from the Commonwealth. Amicus Curiae can provide the court with insight into the similarities between the tobacco industry and the gambling industry and, based on our understanding of these similarities, shed a unique light on the harm to the public health that legalized casino and slots parlor gambling would cause to residents of the Commonwealth.

### **INTRODUCTION**

Legalized casino gambling causes devastating effects on the public's health, including not only the gambler but also their families, neighbors, communities and others with whom they interact. Massachusetts voters should not be denied the opportunity to be heard directly on the question of whether to invite a predatory and toxic industry to do business in the Commonwealth.

The harm caused by the tobacco industry's products has been the archetype of a commercial threat to public health, and in considering the introduction of gambling industry casinos into Massachusetts, much can be learned from the object lesson of considering the tobacco industry as a disease vector. Through litigation, legislation, regulation and ballot initiative, the Commonwealth has engaged in a protracted battle to mitigate the grievous harm the tobacco industry has caused. Massachusetts has been a national leader on implementing tobacco prevention policies, and we believe our citizens have a similar desire to avoid another public health epidemic by repealing the 2011 amendments to Chapter 194.

Both the tobacco and casino industries profit from preying upon society's most vulnerable members. The voters of the Commonwealth should be allowed to act on their own behalf in expressing an opinion of this type of predatory behavior. The power of the citizen ballot initiative is the ultimate in personal responsibility, agency and self-determination. Therefore, this Court should compel the Attorney General to certify the Plaintiffs'/Appellants' petition.

## **SUMMARY OF ARGUMENT**

The case below is an action aimed at overturning the Attorney General's decision to deny certifying an Initiative Petition entitled "An Act Relative to Illegal Gaming" for inclusion on the Commonwealth's election ballot in November, 2014. If the Petition is not certified, the Commonwealth will promote and authorize, pursuant to Chapter 194 of the Acts of 2011, certain forms of gambling previously illegal in the Commonwealth.

Legalized casino gambling causes devastating effects on the public's health, including not only the gambler but also their families, neighbors, communities and others with whom they interact. Massachusetts voters should not be denied the opportunity to be heard directly on the question of whether to invite a predatory and toxic industry to do business in the Commonwealth.

The harm caused by the tobacco industry's products has been the archetype of a commercial threat to public health, and in considering the introduction of gambling industry casinos into Massachusetts, much can be learned from the object lesson of considering the tobacco industry as a disease vector. The

predatory gambling industry shares much in common with the tobacco industry, and the People deserve the opportunity to exclude it from the Commonwealth. For example, casinos employ electronic gambling machines that are designed to addict their customers in a way that is similar to how the tobacco industry formulates its cigarettes to be addictive by manipulating their nicotine levels and other ingredients. Mirroring the tobacco industry's strategy of creating scientific doubt where none truly exists, the casino industry has co-opted and corrupted scholarship on the effects of gambling through the use of front groups that funnel money to beholden scientists who are able to sanitize its origin. Borrowing another tobacco industry technique of shaping the debate around its products, by creating a misleading lexicon and using euphemisms, the casino industry has tried to influence debate, deflect criticism and mislead the public about its role as a disease vector. And finally, by employing personal and corporate responsibility rhetoric honed by the tobacco industry, the casino industry hopes to gain and maintain social acceptability and stave off litigation, regulation and citizen-driven activism.

Both the tobacco and casino industries profit from preying upon society's most vulnerable members, acting as disease vectors which adversely affect the physical, emotional and social health of the individual users and the communities where use of the products is prevalent. The voters of the Commonwealth should be allowed to act on their own behalf in expressing an opinion of this type of predatory behavior. The power of the citizen ballot initiative is the ultimate in personal responsibility, agency and self-determination. Therefore, this Court should compel the Attorney General to certify the Plaintiffs'/Appellants' petition.

#### **ARGUMENT**

I. Massachusetts Voters Should Not Be Denied The Opportunity To Be Heard Directly On The Question Of Whether To Invite A Predatory And Toxic Industry To Do Business In The Commonwealth.

Legalized casino gambling causes devastating effects on the public's health, including not only the gambler but also their families, neighbors, communities and others with whom they interact.<sup>1</sup>

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<sup>1</sup> See Toronto Public Health, The Health Impacts of Gambling Expansion in Toronto - Technical Report (Nov. 2012), <http://www.toronto.ca/legdocs/mmis/2012/h1/bgrd/backgr>

Gamblers of all ages, from underage youth to adult to seniors suffer negative consequences of gambling, which includes health morbidities, psychological and social trauma, financial difficulty and even death.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-V"), which is published by the American Psychiatric Association as a diagnostic tool and is based upon peer reviewed empirical research, recognizes "Gambling Disorder" as a psychological condition.<sup>2</sup> It lists functional consequences of Gambling Disorders, concluding that "[a]reas of psychosocial, health, and mental health functioning may be adversely affected by gambling disorders," and states that "[i]ndividuals with gambling disorder have poor general health and utilize medical services at high rates."<sup>3</sup>

In supporting this conclusion, the DSM-V cites numerous studies, including one that concluded that at-risk, problem and pathological gamblers suffer psychiatric and physical comorbidities such as

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[oundfile-51873.pdf at 13-16](#) [hereinafter Toronto Public Health].

<sup>2</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 312.31 (F63.0) (Fifth Edition 2013).

<sup>3</sup> See id.

anxiety, depression, substance abuse, and stress-related diseases (e.g., hypertension, cardiac disease, cirrhosis, angina, and tachycardia).<sup>4</sup> Even those who gamble only five times a year can suffer associated adverse health consequences.<sup>5</sup> This constellation of health conditions causes gamblers to utilize medical care at a higher rate than non-gamblers, which not surprisingly "suggests that gambling problems may affect healthcare costs and medical expenditures."<sup>6</sup> Legalized gambling has also been associated with elevated suicide levels.<sup>7</sup> Those particularly affected adversely by legalized gambling include society's most vulnerable members, including the poor, minorities and the elderly.<sup>8</sup>

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<sup>4</sup> Benjamin J. Morasco et al., Health Problems and Medical Utilization Associated With Gambling Disorders: Results From the National Epidemiologic Survey on Alcohol and Related Condition, 66 Psych. Med 976 (2006).

<sup>5</sup> Id. at 980.

<sup>6</sup> Id.

<sup>7</sup> See, e.g., David M. Ledgerwood & Mancy M. Petry, Gambling and Suicidality in Treatment-Seeking Pathological Gamblers, 192(10) J. Nervous & Mental Disease (2004); David P. Phillips et al., Elevated Suicide Levels Associated With Legalized Gambling, 27(4) Suicide & Life-Threatening Behav. 373 (1997).

<sup>8</sup> See John W. Welte et al., The Relationship of Ecological and Geographical Factors to Gambling Behavior and Pathology, 20(4) J. Gambling Stud. 405 (2004) (finding that poor neighborhoods suffered from significant levels of problem/pathological gambling



Legalized gambling not only affects the individuals who gamble, but also creates a burden on their families and society as a whole. Excessive gambling, which depending upon its severity can be called "disordered gambling," "problem gambling" or "pathological gambling," also causes ripple effects that extend to gamblers' families, friends, work colleagues, communities and anyone with whom they interact.<sup>9</sup> Disordered gambling is associated with higher rates of divorce, domestic violence, familial psychological problems, financial instability or even impoverishment, and criminal behavior.<sup>10</sup>

The depth and breadth of the consequences of predatory gambling should not be underestimated. The American Gaming Association ("AGA"), the casino industry's trade group, claims that only 1% of the

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due to geographical proximity to casinos); Analucia A. Alegria et al., Disordered Gambling Among Racial and Ethnic Groups in the US: Results From the National Epidemiologic Survey on Alcohol and Related Conditions, 14(3) CNS Spectr. 132 (2009) (concluding that Blacks and Native/Asian Americans have a higher prevalence rate of disordered gambling than among Whites); Luxana Connie Tirachaimongkol et al., Pathways to Problem Gambling in Seniors, 53 J. Geront. Soc. Work 531 (2010) (examining gambling's effect on elderly).

<sup>9</sup> See Toronto Public Health, *supra* note 1, at 16.

<sup>10</sup> See *id.*

population meets the clinical definition of disordered gambling, an estimation which encompasses the entire population, including those who do not gamble at all.<sup>11</sup> According to the Massachusetts Council on Compulsive Gambling, based on national estimates, this translates into approximately 150,000 to 200,000 Massachusetts residents who have experienced disordered gambling.<sup>12</sup> But these statistics do not tell the whole story; measuring the number of disordered gamblers against only the gambling population, the percentage of disordered gamblers rises to an estimated 20 percent.<sup>13</sup> Casinos rely heavily on profits generated from disordered gamblers. Studies undertaken in the United States, Australia and Canada concluded that problem gamblers generate between 30 and 60 percent of total gambling revenues.<sup>14</sup> Moreover, casino profits are on

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<sup>11</sup> See American Gaming Association, Fact Sheet: Gambling Disorders (undated), <http://www.americangaming.org/industry-resources/research/fact-sheets/gambling-disorders>.

<sup>12</sup> See Massachusetts Council on Compulsive Gambling, Facts About Disordered Gambling (Feb. 21, 2014 11:43 AM), available at <http://50.87.144.117/~mccg/wp-content/uploads/2014/01/General-Fact-Sheet-110113.pdf>.

<sup>13</sup> See NATASHA DOW SCHÜLL, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS 15 (2012) [hereinafter Schüll].

<sup>14</sup> See id. at 16, 320 n. 59 (2012); Institute For American Values, Why Casinos Matter: Thirty-One Evidence-Based Propositions From the Health and Social Sciences (2013),

the rise, with the AGA reporting in 2013 that "total consumer spending on gambling at commercial casinos . . . rose 4.8 percent in 2012 to \$37.34 billion."<sup>15</sup> According to an opinion poll the AGA commissioned in 2012, "more than one-third (34 percent) of Americans visited a casino in the past 12 months."<sup>16</sup> Thus, disordered gambling on whatever range of the spectrum is a growing problem and one about which the citizens of the Commonwealth should be allowed to make their opinion known via the ballot box before inviting such a toxic industry into their state.

II. Through Litigation, Legislation, Regulation and Ballot Initiative, The Commonwealth Has Engaged In A Protracted Battle To Mitigate The Grievous Harm The Tobacco Industry Has Caused.

The commercialization of a dangerous product that threatens both individual and public health has been called an "industrial epidemic," which is "driven at least in part by corporations and their allies who

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<http://americanvalues.org/catalog/pdfs/why-casinos-matter.pdf> at 39-40.

<sup>15</sup> American Gaming Association, 2013 State of the States: The AGA Survey of Casino Entertainment (2013), <http://americanvalues.org/catalog/pdfs/why-casinos-matter.pdf> at 2.

<sup>16</sup> Id. at 3.

promote a product that is also a disease agent.”<sup>17</sup> The harm caused by the tobacco industry’s products has been the archetype of the industrial epidemic, and in considering the introduction of gambling industry casinos into Massachusetts, much can be learned from the object lesson of treating the tobacco industry as a disease vector.

Public health and tobacco control advocates have combatted and attempted to ameliorate the toxic effects of tobacco product use on every possible policy front, through litigation, legislation, regulation and ballot initiative.<sup>18</sup> Non-policy measures have included medical treatment of disease, cessation services and education. In 2013 in Evans v. Lorillard Tobacco Co., 465 Mass. 411 (Mass. 2013), this Court upheld a jury’s verdict awarding compensation to the estate of a smoker who died in her

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<sup>17</sup> René I. Jahiel & Thomas F. Babor, Industrial Epidemics: Public Health Advocacy and the Alcohol Industry: Lessons From Other Fields, 102 *Addiction* 1335 (2007).

<sup>18</sup> The U.S. Surgeon General recently released a report commemorating the fifty-year effort to address the adverse health effects of smoking. See U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *THE HEALTH CONSEQUENCES OF SMOKING - 50 YEARS OF PROGRESS. A REPORT OF THE SURGEON GENERAL (2014)* [hereinafter 2014 Surgeon General’s Report], available at <http://www.surgeongeneral.gov/library/reports/50-years-of-progress/>.

50s and who began smoking free cigarettes that the defendant gave to her as a child near her neighborhood playground. This Court essentially found that cigarettes that cause addiction and disease may breach the implied warranty of merchantability because they are unreasonably dangerous and defective in their design. Here Petitioners seek certification of a ballot question about legalizing other unreasonably dangerous and addictive products.

Cases are still pending in Massachusetts regarding whether the tobacco industry fraudulently and deceptively marketed its "light cigarettes" as delivering less tar and nicotine,<sup>19</sup> and whether tobacco manufacturers must pay for medical monitoring of some Massachusetts smokers, after this Court made clear that toxic tort liability encompasses such damages.<sup>20</sup> Successful legislative and regulatory efforts have included banning smoking in public places and workplaces,<sup>21</sup> levying one of the nation's highest cigarette excise taxes which reduces smoking,

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<sup>19</sup> Aspinall v. Philip Morris Cos., Inc., 2014 Mass. Super. LEXIS 26 (Mass. 2014).

<sup>20</sup> Donovan v. Philip Morris USA, Inc., 455 Mass. 215 (Mass. 2009).

<sup>21</sup> G.L. c. 270, § 22.

particularly among youth,<sup>22</sup> requiring mandatory manufacturer disclosure of ingredients and nicotine yield ratings in tobacco products,<sup>23</sup> and, reminiscent of the facts of the Evans case, banning the sale or gift of tobacco to minors.<sup>24</sup>

One of the most significant tobacco control achievement in the Commonwealth's history was the passage of a ballot initiative (known as "Question 1") in 1992, which increased the state's cigarette excise tax in order to create a health protection fund for education regarding the use of tobacco.<sup>25</sup> Not merely a sin tax on smoking, Question 1 allowed the citizens to establish the Massachusetts Tobacco Control Program, which funded health and education initiatives for schools and local communities, media counter-marketing, a state Quitline, and other health programs.<sup>26</sup> Since the passage of Question One, Massachusetts has been a national leader on

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<sup>22</sup> G.L. c. 64C.

<sup>23</sup> G.L. c. 94, § 307B.

<sup>24</sup> G.L. c. 270, § 6.

<sup>25</sup> See Massachusetts Tobacco Tax Initiative, Question 1 (1992), [http://ballotpedia.org/Massachusetts Tobacco Tax Initiative, Question 1 %281992%29](http://ballotpedia.org/Massachusetts_Tobacco_Tax_Initiative,_Question_1_%281992%29).

<sup>26</sup> See Howard K. Koh, An Analysis of the Successful 1992 Massachusetts Tobacco Tax Initiative, 5(3) Tob. Control 220, 224 (1996).

implementing tobacco prevention policies, and the Plaintiffs/Appellants believe our citizens have a similar desire to avoid the need for such rigorous prevention efforts to mitigate the harms from disordered gambling by repealing the 2011 amendments to Chapter 194.

III. The Predatory Gambling Industry Shares Much In Common With The Tobacco Industry, And The People Deserve The Opportunity To Exclude It From The Commonwealth.

Both the tobacco and casino industries profit from preying upon society's most vulnerable members, acting as disease vectors<sup>27</sup> which adversely affect the physical, emotional and social health of the individual users and the communities where use of the products is prevalent.<sup>28</sup> Many of the casinos' tactics

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<sup>27</sup> See Sara D. Guardino & Richard A. Daynard, Tobacco Industry Lawyers As "Disease Vectors", 16(4) Tob. Control 224 (2007); accord Jahiel & Babor, supra note 17.

<sup>28</sup> See, e.g., Dorie E. Apollonio & Ruth E. Malone, Marketing to the Marginalised: Tobacco Industry Targeting of the Homeless and Mentally Ill, 14(6) Tob. Control 409 (2005); Valerie B. Yerger et al., Racialized Geography, Corporate Activity, and Health Disparities: Tobacco Industry Targeting of Inner Cities, 18(Supp. 4) J. Health Care for the Poor and Underserved 10 (2007); Amy Zietlow, Seniors in Casino Land: Tough Luck for Older Americans, (2014) <http://americanvalues.org/catalog/pdfs/seniors-in-casino-land.pdf>; John W. Welte et al., The Relationship of Ecological and Geographical Factors to

mirror those of the tobacco industry, which in 2006 was found by a federal court to be in violation of federal civil racketeering and fraud laws.<sup>29</sup> Though there are numerous points of similarity and comparison, we will focus on the four most egregious ways the casino industry is following the tobacco industry's reprehensible playbook.

A. Casinos Employ Electronic Gambling Machines That Are Designed To Addict Their Customers

Contrary to the remembered vision of the old fashioned casino that provided table games such as craps and blackjack while offering only a few mechanical slot machines colloquially known as "one-armed bandits," modern casinos, such as the ones proposed for establishment in Massachusetts, rely heavily on computerized electronic gambling machines ("EGMs") to attract and hold their customers' attention and money.<sup>30</sup> These EGMs are purposely designed and carefully engineered to be highly

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Gambling Behavior and Pathology, 20(4) J. Gambling Stud. 405 (2004).

<sup>29</sup> See generally U.S. v. Philip Morris USA, Inc., 449 F.Supp. 2d 1 (D.D.C. 2006).

<sup>30</sup> See generally Schüll, supra note 13 (describing in comprehensive detail the history of casino game evolution and design).



addictive through various aspects of their construction, design and the environment that surrounds them. EGMs are so effective in this regard that they have been analogized to crack cocaine in terms of their potency and destructiveness.<sup>31</sup> A seminal and influential study on the issue found that "[w]hen machines are the primary form, [pathological gambling] occurs significantly faster," and asserting that EGMs "'deliver' their 'active ingredient' more rapidly, continuously and directly than the traditional forms of gambling."<sup>32</sup> Even lower down the gambling disorder spectrum, EGMs have a powerful hold on their users. For instance, an Australian study estimated that problem or at-risk gamblers spent about 53% of the total money expended on hotel and club casino EGMs in 2005-06, and concluded that "the EGM industry's most problematic consumers (from both

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<sup>31</sup> See Robert B. Breen & Mark Zimmerman, Rapid Onset of Pathological Gambling in Machine Gamblers, 18(1) J. Gambling Stud. 31, 42 (2002). But see Nicki Dowling et al., Electronic Gaming Machines: Are They the 'Crack-Cocaine' of Gambling?, 100 Addiction 33, 39, 42 (2005) (finding that study of empirical literature on this hypothesis is inconclusive and warrants further study, but conceding that "there is very little debate regarding the 'addictive' potential of EGMs . . . [T]he association between EGMs and problem gambling cannot be discounted.").

<sup>32</sup> Breen & Zimmerman, supra note 31.

public relations and public health perspectives) are their best customers.”<sup>33</sup>

EGMs are designed to attract gamblers, reduce their cognitive, emotional or moral agency over their decisions about whether to continue gambling, and cause them to maximize their expenditures even when it is clearly not in their best interests.<sup>34</sup> By utilizing the purposeful granting of “intermittent rewards” or payouts, the EGM designers are able to mesmerize their customers in ways that other casino games cannot by tapping directly into their brains’ cognitive and psychological functions.<sup>35</sup> This method of granting intermittent rewards, which can be likened to a parent who only sometimes and erratically grants approval to a needy child, helps explain the EGMs’ “ability to hook so deeply into a player’s cerebral cortex [because it] derives from one of the more powerful human feedback mechanisms.”<sup>36</sup> This primal and trance-like submission to continued and repeat gambling is

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<sup>33</sup> Charles Livingstone & Richard Woolley, Risky Business: A Few Provocations on the Regulation of Electronic Gambling Machines, 7(3) Int’l Gambling Stud. 361, 365-366 (2007).

<sup>34</sup> See id. at 369.

<sup>35</sup> See Gary Rivlin, The Tug of the Newfangled Slot Machines, N.Y. TIMES, May 9, 2004.

<sup>36</sup> Id.

often referred to by compulsive gamblers as "the zone."<sup>37</sup> As one professor of psychiatry and gambling scholar opined, "No other form of gambling manipulates the human mind as beautifully as these machines. I think that's why that's the most popular form of gambling with which people get into trouble."<sup>38</sup> Another kind of manipulation is built in to EGMs, in the form of results programmed to show false near misses in order to cause what behavioral psychologists call the "frustration theory of persistence."<sup>39</sup>

The Ontario Problem Gambling Helpline's data shows that casino table game and slot gambling in particular are cited most frequently by gamblers who call seeking help.<sup>40</sup> The casino industry itself is on record declaring its dependence on EGMs for the bulk of its profits, with AGA President Frank J. Fahrenkopf, Jr. stating in 2003 that "It's the slot machine that drives the industry today," and that over

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<sup>37</sup> Schüll, supra note 13, at 166-181. For more discussion about EGMs' ability to transport gamblers into a trance-like "zone" which undermines their agency over their judgment and recognition of their own best interest, see infra notes 94-105 and accompanying text.

<sup>38</sup> Rivlin, supra note 35.

<sup>39</sup> See Schüll, supra note 13, at 92-96.

<sup>40</sup> See Toronto Public Health, supra note 1, at 12.

85 percent of the industry's profits derive from addictive EGMs.<sup>41</sup>

Allowing casinos to open in Massachusetts will have grave implications for public health. A Canadian review of 33 studies examining gambling rates before and after the introduction of casinos showed that 2/3 of the studies found an increase in problem gambling and/or negative social impacts.<sup>42</sup> Moreover, legalizing casinos will "normalize" gambling as a common and socially accepted activity, particularly because they are receiving the state's imprimatur.<sup>43</sup>

Tobacco products have been recognized widely not only to be addictive, but to be purposely designed that way.<sup>44</sup> Among the many findings of fact that D.C.

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<sup>41</sup> See Schüll, supra note 13, at 5.

<sup>42</sup> Robert J. Williams et al., Prevention of Problem Gambling: A Comprehensive Review of the Evidence, and Identified Best Practices, Report Prepared For the Ontario Problem Gambling Research Centre and the Ontario Ministry Of Health and Long Term Care, (October 1, 2012), <https://www.uleth.ca/dspace/bitstream/handle/10133/3121/2012-prevention-opgrc.pdf?sequence=3>.

<sup>43</sup> See Charles Livingstone, "Gamble Responsibly" is an Ad, Not a Deterrent, (May 16, 2012), <http://www.abc.net.au/unleashed/4014800.html>; Livingstone & Woolley, supra note 33, at 370-372.

<sup>44</sup> See, e.g., 2014 Surgeon General's Report, supra note 18; ROBERT N. PROCTOR, GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION (2011); ALAN M. BRANDT, THE CIGARETTE CENTURY: THE RISE, FALL AND DEADLY PERSISTENCE OF THE PRODUCT THAT DEFINED AMERICA (2007); DAVID KESSLER, A

District Court Judge Gladys Kessler made in the course of the 2006 racketeering trial of the tobacco industry was that the defendants had purposely manufactured their products to be addictive and had manipulated the nicotine levels in order to retain customers and generate more profits.<sup>45</sup> Perhaps most emblematic of the tobacco industry's venal and reckless approach to its customers' health and safety was this statement made in 1963 by Addison Yeaman, then General Counsel to Brown & Williamson Tobacco Corp.:

Moreover, nicotine is addictive.  
We are, then, in the business of  
selling nicotine, an addictive  
drug . . .<sup>46</sup>

This statement was made in a memo marked "strictly private and confidential" just prior to the release of the landmark 1964 Surgeon General's report linking smoking to disease, the impact of which the memo addressed with concern and spoke of attempting to minimize its impact. In drawing an analogy between

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QUESTION OF INTENT: A GREAT AMERICAN BATTLE WITH A DEADLY INDUSTRY (2001).

<sup>45</sup>U.S. v. Philip Morris USA, Inc., 449 F.Supp. 2d at 208-384.

<sup>46</sup> Addison Yeaman, Implications of Battelle Hippo I & II and the Griffith Filter, (July 17, 1963), <http://legacy.library.ucsf.edu/tid/xrc72d00/pdf>.

the casino industry's use of EGMs and the tobacco industry's products, it has been said:

Both industries supply control-impairing products that, used as intended, will inevitably cause some users to suffer profoundly. They will suffer because the products, used as intended, will cause them to use the product in harmful quantities. . . . The EGM industry unambiguously depends on [customers'] losses of this magnitude. Without them revenues would be more than halved."<sup>47</sup>

A ballot question allowing Massachusetts voters the opportunity to repeal the legalization of casinos may help to avert another enormous public health epidemic.

- B. The casino industry has co-opted and corrupted scholarship on the effects of gambling through the use of front groups that funnel money to beholden scientists who are able to sanitize its origin.

In response to the first scientific studies linking smoking and disease, the major tobacco companies gathered in 1953 at New York's Plaza Hotel to strategize about how to face this existential

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<sup>47</sup> James Doughney, Ethical Blindness, EGMs and Public Policy: A Tentative Essay Comparing the EGM and Tobacco Industries, 5 Int'l J. Mental Health Addiction 311, 315, 317 (2007).

challenge to their product's commercial viability.<sup>48</sup> The companies jointly hired prominent public relations firm Hill & Knowlton to shape a message that would reassure customers that it was safe to continue consuming their products. The immediate result of these meetings was the placement of a full-page advertisement called "A Frank Statement to Cigarette Smokers" in hundreds of American newspapers.<sup>49</sup> The ad announced the tobacco industry's commitment to safeguarding the public health and funding research "into all phases of tobacco use and health." Yet while stating "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business," the ad also pointed out that "[d]istinguished authorities point out . . . [t]hat there is no proof that cigarette smoking" causes lung cancer.<sup>50</sup>

The Frank Statement ad also debuted the creation of the Tobacco Industry Research Committee ("TIRC") (later called the Council for Tobacco Research

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<sup>48</sup> See Brandt, supra note 44, at 165-166.

<sup>49</sup> See STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS 33-35 (1996).

<sup>50</sup> Tobacco Industry Research Committee, A Frank Statement to Cigarette Smokers, (January 4, 1954), <http://legacy.library.ucsf.edu/tid/qxp91e00>.

("CTR")), a supposedly objective and independent body free of industry influence which would make grants to "independent" scientific researchers to prove or disprove the theory that cigarettes caused cancer and other diseases. This was merely public relations puffery and kabuki theater, for the truth is that TIRC began its life as a sower of doubt in search of scientists willing to obfuscate for as long as possible about the link between smoking and disease.<sup>51</sup> Privately, tobacco industry insiders frankly admitted that they used TIRC and later CTR as a public relations mouthpiece to voice their dogma of maintaining an "open controversy" about the effects of cigarette smoking.<sup>52</sup> The fact is that the tobacco industry perpetuated a fraud on the American people in funding specious studies that had little or nothing to do with bolstering what legitimate scientists were proving repeatedly, that smoking causes disease and death.<sup>53</sup> In 2006, Judge Kessler ruled that the

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<sup>51</sup> Brandt, supra note 44, at passim; Glantz, supra note 49, at 35-46.

<sup>52</sup> See Glantz, supra note 49, at 40-44.

<sup>53</sup> See Lissy C. Friedman et al., How Tobacco-Friendly Science Escapes Scrutiny in the Courtroom, (95) (Supp. 1) Am. J. Pub. Health S16 (2005) (describing the tobacco industry's specious and dishonest use of scientists to advance its corporate and public



creation of TIRC and CTR, as well as industry trade group the Tobacco Institute, contributed significantly to the tobacco industry's fraudulent enterprise and violation of civil racketeering laws.<sup>54</sup> The industry's witness development program, referred to internally as "Project Whitecoat," came in for Judge Kessler's withering disapprobation, with her observation that the program, led by industry lawyers, was geared towards avoiding liability rather than the search for scientific truth.<sup>55</sup>

The gambling industry's crisis came in 1996, as a result of a federally created National Gambling Impact Study Commission, whose role was to study legalized gambling and assess its impact on society.<sup>56</sup> AGA founder and president Frank Fahrenkopf warned his compatriots about avoiding the problems the tobacco industry encountered and to be proactive about admitting that "pathological gambling" exists, though the AGA minimize it by characterizing it as a pre-existing condition aggravated by gambling that was not

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relations agenda) [hereinafter Tobacco-Friendly Science].

<sup>54</sup> U.S. v. Philip Morris, 449 F.Supp. 2d at 41-87.

<sup>55</sup> Id. at 87-91.

<sup>56</sup> See Schüll, supra note 13, at 260-261.

the norm and not a prevalent issue among the casino industry's customer base.<sup>57</sup> So the allocation of responsibility was focused on a small group of medically and psychologically unsound people, rather than the industry itself.

In 1996, on Fahrenkopf's urging and with the backing of the AGA, the casino industry trade group which appears to play a role similar to that of the Tobacco Institute, established the National Center for Responsible Gaming (NCRG), a scientific granting organization that seems to parallel the tobacco industry's TIRC/CTR.<sup>58</sup> In touting the NCRG, Fahrenkopf claimed "Even the opponents of gaming have to now accept that the NCRG is a meaningful institution that is doing great things to try to help that one percent of people who can't gamble responsibly."<sup>59</sup> In reality, the NCRG has acted as the same type of fig leaf for the gambling industry's embarrassing problems and potential legal liability (i.e., the financial ruin, devastated health and even suicide of many of its

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<sup>57</sup> See *id.* at 261.

<sup>58</sup> See *id.*

<sup>59</sup> Charles Anderer, Lifetime Achiever, Casino Journal (May 5, 2013), <http://www.casinojournal.com/articles/print/87618-lifetime-achiever>.

customers). NCRG's board of directors is dominated by industry representatives and the AGA Executive Director.<sup>60</sup> Much like the tobacco industry's Project Whitecoat, which funded pliant scientists and researchers willing to be beholden to a well-funded pariah industry that guided and sometimes censored their research,<sup>61</sup> many researchers and scientists have accepted NCRG funds, including some at prestigious universities.<sup>62</sup> They are not studying how the casino industry's business practices and games promote addiction or how to avert the harm they cause, but rather are looking for some sort of constitutional explanation or genetic marker indicating an identifiable predisposition for pathological

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<sup>60</sup> See Schüll, supra note 13, at 262.

<sup>61</sup> See Tobacco-Friendly Science, supra note 53; Lisa A. Bero, Tobacco Industry Manipulation of Research, 120 Public Health Reports 200 (2005); Deborah E. Barnes & Lisa Bero, Industry-Funded Research and Conflict of Interest: An analysis of Research Sponsored by the Tobacco Industry Through the Center for Indoor Air Research, 21(3) J. Health Pol. & Law 515 (1996); Michele E. Bloch, Tobacco Industry Funding of Biomedical Research, 3(4) Tob. Control 297 (1994).

<sup>62</sup> See Lesley Stahl, Slot Machines: The Big Gamble (CBS television broadcast Jan. 7, 2011), <http://www.cbsnews.com/news/slot-machines-the-big-gamble-07-01-2011/> (linking to Sixty Minutes investigation of the gambling industry and the scientists who receive funds from it).

gambling.<sup>63</sup> This echoes the tobacco industry's search for the specific "mechanism" that can definitively cause cancer, rather than acknowledging that cigarettes certainly contribute to a large number of cancer deaths.<sup>64</sup> NCRG grant recipients also argue that there are benefits to gambling that must be taken into account when weighing gambling's costs.

There has been pushback from the academic community on the ethics of accepting gambling industry money. One report details the many ways the gambling industry dispenses its largesse to researchers.<sup>65</sup> In addition to the direct transfer of funding to researchers from NCRG, the gambling industry uses even more complex and multi-layered methods for laundering its funds through intermediary groups and committees to funnel

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<sup>63</sup> See Schüll, supra note 13, at 263.

<sup>64</sup> See Lissy C. Friedman, Philip Morris's Website and Television Commercials use New Language to Mislead the Public Into Believing It Has Changed Its Stance on Smoking and Disease, 16 Tob. Control e9 (2007), <http://tobaccocontrol.bmj.com/content/16/6/e9.full.pdf+html> [hereinafter Phillip Morris's Website] (quoting tobacco industry executives under oath in smoker injury cases asserting that since no one knows the mechanism of what causes cancer, cigarettes cannot be definitively identified as one of those causes).

<sup>65</sup> See Peter J. Adams, Ways in Which Gambling Researchers Receive Funding From Gambling Industry Sources, 11(2) Int'l Gamb. Stud. 145 (2001).

funds to prestigious institutions whose prestige will burnish their results.<sup>66</sup> In other studies, the author also drew an analogy between various health journals' refusal to publish studies funded by tobacco industry money and the need for similar fortitude and high standards with regard to publishing industry-sponsored gambling research.<sup>67</sup>

When science is suspect and institutions we should be able to trust to tell us the truth about scientific matters are, sometimes invisibly, paid by industries they should be scrutinizing, the People should be entitled to circumvent a legislative process misinformed by such specious scholarship to affirm the truth that gambling destroys lives and communities.

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<sup>66</sup> See id.

<sup>67</sup> See Peter J. Adams, Reducing the Moral Jeopardy Associated With Receiving Funds From the Proceeds of Gambling, 17 J. Gamb. Issues (August 2006), <http://jgi.camh.net/doi/abs/10.4309/jgi.2006.17.1>; Peter J. Adams, Assessing Whether to Receive Funding Support From Tobacco, Alcohol, Gambling and Other Dangerous Consumption Industries, 102 *Addiction* 1027 (2007). Accord Ruth E. Malone, Changing Tobacco Control's Policy on Tobacco Industry-Funded Research, 22(1) *Tob. Control* 1 (2013); Ruth E. Malone and Lisa A. Bero, Chasing the Dollar: Why Scientists Should Decline Tobacco Industry Funding, 57(8) *J. Epid. & Community Health* 546 (2003).

- C. By creating a misleading lexicon and using euphemisms, the casino industry has tried to influence debate, deflect criticism and mislead the public about its role as a disease vector.

George Orwell's Nineteen Eighty-Four presciently illustrated how governments and powerful business interests can influence public opinion through the use of linguistic jujitsu, or what he called "Newspeak."<sup>68</sup> The tobacco industry has mastered the use of Newspeak in an effort to protect its power and influence and its business model that thrives on being allowed to cause the illness and death of up to half its customers with impunity.<sup>69</sup> One particularly egregious example is the Tobacco Institute's "Truth Squad," which was fronted by Gray Robertson, President of Healthy Buildings International ("HBI"), an indoor air quality assessment company whose largest (and perhaps only) client was the Tobacco Institute.<sup>70</sup> Robertson received public relations

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<sup>68</sup> GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

<sup>69</sup> World Health Organization, Tobacco Fact Sheet No. 339 (July 2013), <http://www.who.int/mediacentre/factsheets/fs339/en/>

<sup>70</sup> See Lissy C. Friedman, Tobacco Industry Use of Corporate Social Responsibility Tactics as a Sword and

training from the Tobacco Institute and made numerous media appearances to dispute the dangers of secondhand smoke and tout filtration as a viable alternative to banning indoor smoking.<sup>71</sup> Through an HBI whistleblower's disclosure on a national news broadcast and later under oath at a Congressional hearing investigating HBI's practices, the public learned that Robertson and HBI falsified indoor air quality assessments to lessen the reported impact of secondhand smoke and imply that ventilation was responsible for improved air quality.<sup>72</sup>

In true Orwellian fashion, the tobacco industry also frequently uses what one author has called "distancing euphemisms."<sup>73</sup> Thus, cigarette ingredients that cause disease are referred to as "biologically active" and "controversial compounds;" nicotine's effect on the smoker's system is called "impact" and "satisfaction" and "flavor;" addiction is minimized as merely

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a Shield on Secondhand Smoke Issues, 37(4) J Law, Med. & Ethics 819 (2009) [hereinafter Sword & Shield].

<sup>71</sup> See Tobacco-Friendly Science, supra note 53, at S18.

<sup>72</sup> See id.

<sup>73</sup> PHILIP J. HILTS, SMOKE SCREEN 217 (1996).

"habituation;" and underage smokers are referred to as "young adult smokers."<sup>74</sup> It has been suggested that the purpose of employing euphemisms is not only to blunt criticism of the product and its manufacturers, but also to reassure and comfort their employees "against the harsh effect of plain language descriptions of what they are doing."<sup>75</sup>

The gambling industry embraces the use of euphemisms and a more favorable alternative lexicon as fervently as the tobacco industry.<sup>76</sup>

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<sup>74</sup> Id. See also Adrienne B. Mejia & Pamela Ling, Tobacco Industry Consumer Research on Smokeless Tobacco Users and Product Development, 100(1) Am. J. Pub. Health 78 (2010) (discussing smoker "satisfaction," as "a common tobacco industry euphemism for the physiological effects of nicotine."); Jeff Collin et al., Complicity in Contraband: British American Tobacco and Cigarette Smuggling in Asia, 13(Supp. II) Tob. Control ii104 (2004) (explaining tobacco industry use of euphemisms such as "general trade" and "unofficial imports" to refer to smuggled cigarettes); K. Michael Cummings et al., Marketing to America's Youth: Evidence From Corporate Documents, 11(Supp. I) Tob. Control i5 (2002) (claiming that "young adult smoker" is "merely a euphemism used to define teenagers"); David A. Kessler, Statement on Nicotine-Containing Cigarettes, 3(2) Tob. Control 148 (1994) (identifying industry euphemisms such as "satisfaction," "impact" and "strength" as referring to nicotine's effects).

<sup>75</sup> Hilts, supra note 73, at 217.

<sup>76</sup> See Ashlee Humphreys & Kathryn A. Latour, Framing the Game: Assessing the Impact of Cultural Representations on Consumer Perceptions of Legitimacy,



It employs language that marginalizes those whom the industry harms while distancing itself from the harm it causes. For example, according to the casino industry, the act of availing oneself of a casino's services is not gambling, it's "gaming,"<sup>77</sup> which implies that the activity is about entertainment and fun, not the grim reality of satisfying an addicted gambler's unquenchable desire to spend time on a gambling device.<sup>78</sup> In a press interview, AGA President Fahrenkopf eschewed the concept of gambling addiction in favor of "non-responsible gaming," once again shifting responsibility onto casino customers and away from the proprietors of those establishments

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40(4) J. Consumer Res. 773 (2013); Shaeda Isani, Discourse and Counter Discourse in the "Sin" Industries: The Case of the Gambling Industry in the United States, La Revue du Geras Asp 51-52 (2007), <http://asp.revues.org/554>.

<sup>77</sup> American Gaming Association, Gaming vs Gambling: Fact Sheet (undated but accessed April 9, 2014), <http://www.americangaming.org/industry-resources/research/fact-sheets/gaming-vs-gambling>.

<sup>78</sup> See University of Chicago Press, Press Release: Why Are Consumers More Likely to Participate in Online Gaming Than Gambling? (Sept. 10, 2013), <http://press.uchicago.edu/pressReleases/2013/September/0910HumphreyJCR.html>; Merrill Perlman, Place Your Bets: The Difference Between "Gambling" and "Gaming," Columbia Journalism Review (September 30, 2013), [http://www.cjr.org/language\\_corner/place\\_your\\_bets.php](http://www.cjr.org/language_corner/place_your_bets.php)

who are profiting from their addictive and destructive effects.<sup>79</sup> Above all, the gambling industry wants to distract attention from the basic fact that it thrives on the suffering of its customers.<sup>80</sup>

- D. Employing personal and corporate responsibility rhetoric, the casino industry hopes to gain and maintain social acceptability and stave off litigation, regulation and citizen-driven activism.

The tobacco industry mastered<sup>81</sup> the use of personal and corporate responsibility rhetoric in order to protect its business interests against litigation<sup>82</sup> and tighter

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<sup>79</sup> Anderer, supra note 59.

<sup>80</sup> See David Yoong et al., 'This Is Not Gambling But Gaming': Methods of Promoting a Lottery Gaming Company in a Malaysian Daily, 24(2) Discourse & Soc'y 229, 236 (2013); Merrill Perlman, Place Your Bets: The Difference Between "Gambling" and "Gaming," Columbia Journalism Review (September 30, 2013), [http://www.cjr.org/language\\_corner/place\\_your\\_bets.php](http://www.cjr.org/language_corner/place_your_bets.php)

<sup>81</sup> See Pamela Mejia et al., Who Is Responsible? The Origins of Personal Responsibility Rhetoric in News Coverage of the Tobacco Industry, Am. J. Pub. Health (2014) (forthcoming); Lori Dorfman et al., Cigarettes Become a Dangerous Product: Tobacco in the Rearview Mirror, 1952-1965, 104(1) Am. J. Pub. Health 37 (2014).

<sup>82</sup> See Robert L. Rabin, A Sociological History of the Tobacco Tort Litigation, 44(4) Stanford L Rev. 853 (1992); Harvard Law Review, Note: Plaintiff's Conduct as a Defense to Claims against Cigarette Manufacturers, 99 Harv. L. Rev. 809 (1986); Richard A. Daynard & Mark Gottlieb, Casting Blame on the Tobacco

regulatory and tobacco control measures,<sup>83</sup> to maintain social acceptability<sup>84</sup> and to create doubt<sup>85</sup> about the linkage between its products and health harms. Other industries have copied and improved upon Big Tobacco's

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Victim: Impact on Assumption of the Risk and Related Defenses in The United States Tobacco Litigation, Norwegian Ministry of Health and Care Services (2000), <http://www.regjeringen.no/nb/dep/hod/dok/nouer/2000/nou-2000-16/22.html?id=359483>; Robert N. Proctor, Everyone Knew But No One Had Proof: Tobacco Industry Use of Medical History Expertise in the US Courts, 15(Supp. IV) Tob. Control 117 (2006).

<sup>83</sup> See Ruth Malone, Tactics Corporations Use to Influence Health and Health Policy and What We Can Do To Counter Them, in THE BOTTOM LINE OR PUBLIC HEALTH 169-172 (William H Wiist ed., 2010); Patricia A. McDaniel & Ruth E. Malone, Understanding Philip Morris's Pursuit of US Government Regulation of Tobacco, 14(3) Tob. Control 193, 197-198 (2005); Peter Benson, Tobacco Talk: Reflections on Corporate Power and the Legal Framing of Consumption, 24(4) Med. Anthropology Q. 500 (2010); Constance A. Nathanson, Collective Actors and Corporate Targets in Tobacco Control: A Cross-National Comparison, 32(3) Health, Educ & Behav. 337 (2005); Amanda Fallin et al., "To Quarterback behind the Scenes, Third-Party Efforts": The Tobacco Industry and The Tea Party, Tob. Control, Epub ahead of print (February 20, 2013), <http://tobaccocontrol.bmj.com/content/early/2013/02/07/tobaccocontrol-2012-050815.abstract>; Naphtali Offen et al., Forcing the Navy to Sell Cigarettes on Ships: How the Tobacco Industry and Politicians Torpedoed Navy Tobacco Control, 101(3) Amer. J. Pub. Health 404, 406 (2001).

<sup>84</sup> See Sword & Shield, supra note 70; Philip Morris's Website, supra note 64.

<sup>85</sup> See DAVID MICHAELS, DOUBT IS THEIR PRODUCT: HOW INDUSTRY'S ASSAULT ON SCIENCE THREATENS YOUR HEALTH 3-11 (2008).

playbook, including manufacturers of soda,<sup>86</sup> junk food<sup>87</sup> and alcohol.<sup>88</sup> The casino industry is following suit, emphasizing personal responsibility for its customers while denying any portion of responsibility for itself, and posing as a responsible and benign entertainment industry. Far from hiding that the tobacco industry has inspired its own tactics, the casino industry has embraced the connection.

In 2013, AGA President Frank Fahrenkopf told a Casino Journal interviewer that he was close friends with a Tobacco Institute executive and was inspired by that trade organization's experience in facing down criticism of its products.<sup>89</sup>

Notable in this interview is Fahrenkopf's semantic classification of casino customers with

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<sup>86</sup> See Dorfman et al., Soda and Tobacco Industry Corporate Social Responsibility Campaigns: How Do They Compare?, 9(6) *PloS Medicine* e1001241 (2012), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3378589/>.

<sup>87</sup> See Kelly D. Brownell & Kenneth E. Warner, The Perils of Ignoring History: Big Tobacco Played Dirty and Millions Died. How Similar is Big Food?, 81(1) *Milbank Q.* 259 (2009).

<sup>88</sup> See Sungwon Yoon & Tai-Hing Lam, The Illusion Of Righteousness: Corporate Social Responsibility Practices Of The Alcohol Industry 13 *BMC Public Health* 630 (2013), <http://www.biomedcentral.com/content/pdf/1471-2458-13-630.pdf>.

<sup>89</sup> Anderer, supra note 59.

disordered gambling as lacking the personal or moral responsibility to "gamble responsibly," and his implication that the harm they suffer is entirely self-inflicted. The less Orwellian and more commonsense way of viewing the harm disordered gamblers suffer is that they have been lured and victimized by a predatory industry, which one scholar opined was even worse than the tobacco industry in that while a safe cigarette is a chimera, casino game designers and operators could employ harm avoiding mechanisms in their products but choose not to in favor of greater profits.<sup>90</sup> It is the casino industry that "in making that choice - a free, unforced choice made in the interests of profit - acts causally" to create harm and suffering for disordered gamblers.<sup>91</sup> Possibly even more egregious is the government's complicity in this victimization by licensing these casinos, thus making them partners in causing the

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<sup>90</sup> See Doughney, supra note 47, at 317 (stating "That the [casino] industry does not genuinely act to avoid avoidable harm to identifiable individuals makes that harm intrinsically worse" than the tobacco industry's inability to make its products safe); See Livingstone & Woolley, supra note 33, at 367 (describing the harm-reduction strategies that are available and ignored by many EGM designers and casinos).

<sup>91</sup> Doughney, supra note 47, at 317-318.

harm.<sup>92</sup> Describing the government's moral and legal duty to its citizens in entering a partnership with predatory gambling casinos, researchers have observed:

Governments either lack an understanding of the actually existing nature of the EGM system and its impacts on the freedom of individuals to make safe consumption decisions; or, enthralled by revenue, they lack the will to act; or perhaps both.<sup>93</sup>

Despite the casino industry's attempts at framing gambling as a fun and relatively harmless form of entertainment that people engage in rationally and with complete agency over and responsibility for their actions, casino industry insiders and spokespeople have acknowledged not only the existence of the addled state of mind known by disordered gamblers as "the zone,"<sup>94</sup> but have declared openly their intention to transport their customers there with the utmost speed and to keep them there as long as possible. For instance, an employee of Silicon Gaming explained the concept of "the zone" to a researcher, acknowledging that "Our best customers are not interested in entertainment - they want to be totally absorbed, they

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<sup>92</sup> See id. at 318.

<sup>93</sup> Livingstone & Woolley, supra note 33, at 372.

<sup>94</sup> See Schüll, supra note 13, at 166-181.

want to get into the rhythm.”<sup>95</sup> A senior Bally’s executive put it even more bluntly, admitting that “We’re not in the entertainment business; this is still gambling.”<sup>96</sup> A casino operator addressing the Global Gaming Expo conference declared “Gambling is not a movie, it’s about continuing to play.”<sup>97</sup>

This candor about the casino industry’s venal, purposeful and callous cultivation of disordered gambling in its customers is reminiscent of tobacco executive Addison Yeaman’s statement that “We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms.”<sup>98</sup> Moreover, the fact that casino customers are gambling against their own best interests in an effort to relieve stress or feed a compulsion is analogous to the reason that most smokers continue to smoke even though they wish they could quit - they are addicted to nicotine, the addiction has altered their brain chemistry, and they

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<sup>95</sup> Id. at 168.

<sup>96</sup> Id. at 170.

<sup>97</sup> Id. at 169. This drive to continue playing at all costs is also known by both gamblers and casinos as “time on device,” and becomes an end in itself valued above reaping actual winnings. See id. at 3, 58-68.

<sup>98</sup> See Yeaman, supra note 46.

suffer severe discomfort if they stop satisfying their addiction. They are not smoking for pleasure, they are smoking because they have to.<sup>99</sup>

The reason for encouraging this "zone" state in customers is that casinos know that the longer customers play, the more they are likely to lose,<sup>100</sup> and with disordered gambling, the point of the activity is not to be entertained or to win a jackpot but to "play to extinction."<sup>101</sup> As one gambler observed:

You reach an extreme point where you don't even delude yourself that you're in control of anything but strapping yourself into a machine and staying there until you lose. . . . All that stuff that draws you in the beginning - the screen, the choice, the

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<sup>99</sup> See Evans, 465 Mass. at 420 (stating "Nicotine is as or more addictive than any other drug of abuse, including heroin and cocaine"); Haglund v. Philip Morris, Inc., 446 Mass. 741, 751 (Mass. 2006) (inferring from Philip Morris's acknowledgment that nicotine in cigarettes makes smoking addictive and that its "product was consciously designed to induce cigarette dependency in the ordinary smoker."); U.S. v. Philip Morris, 449 F.Supp. 2d at 309-315 (finding tobacco "Defendants recognized the need to determine 'minimum' and 'optimum' nicotine delivery levels in order to provide sufficient 'impact' and 'satisfaction' to cigarette smokers.").

<sup>100</sup> See Schüll, supra note 13, at 86-90 (explaining how EGMs' computerized virtual "wheels" are manufactured to deceive customers about how likely they are to win and over time to diminish the odds of a win).

<sup>101</sup> See id. at 74-75.



decisions, the skill - is stripped away and you accept the certainty of chance: the proof is the zero at the end.<sup>102</sup>

In many cases, the act of gambling compulsively is a stress reliever. Queried on this topic, one gambler explained:

I was so exhausted that I actually wanted to lose, so that I could go home," and "[T]here's a weird satisfaction - no, not a satisfaction, a relief - when I lose. When it's all gone, and I have no choice to play anymore, I can go home and sleep.<sup>103</sup>

Research has shown that "the zone" disables gamblers so that "operational flow overrules agentic gratification."<sup>104</sup> When EGM gamblers fall into the trance-like zone state which the EGM designers and casino owners encourage, it has been said that "no rational action is possible."<sup>105</sup> Even when casino customers are able to penetrate their befogged zone state and comprehend the magnitude of their losses, casino employees often proactively pursue them in an effort to encourage further gambling. One casino has employed "Luck Ambassadors" to observe signs of

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<sup>102</sup> Id. at 224.

<sup>103</sup> Id. at 225.

<sup>104</sup> Id. at 177.

<sup>105</sup> Id. at 97.

despondency in gamblers who seemed about to stop playing, or what it referred to as their "pain point,"<sup>106</sup> and to intervene by approaching them with the greeting "Hi! Are you feeling lucky today?" and offering them money, free meal vouchers or other perquisites.<sup>107</sup>

The voters of the Commonwealth should be allowed to act on their own behalf in expressing an opinion of this type of predatory behavior. The power of the citizen ballot initiative is the ultimate in personal responsibility, agency and self-determination. Therefore, this Court should compel the Attorney General to certify the Plaintiffs'/Appellants' petition.

#### **CONCLUSION**

For the foregoing reasons, the Court should enter an order declaring that the Petition does not contain an excluded matter and is eligible to be placed on the ballot for the State election in November 2014.

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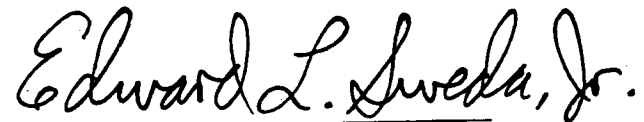
<sup>106</sup> See Schüll, supra note 13, at 154.

<sup>107</sup> See id. at 154, 169.

Respectfully submitted,

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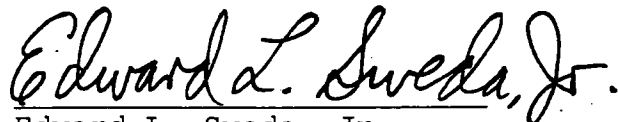
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Dated: April 15, 2014

**CERTIFICATE OF COMPLIANCE**  
**WITH MASS. R. APP. P. 16(k)**

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, the undersigned counsel hereby certifies that the foregoing brief complies with all applicable appellate rules.

  
Edward L. Sweda, Jr.  
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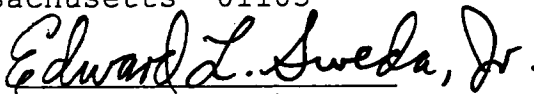
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