[ORAL ARGUMENT NOT YET SCHEDULED]

Case Nos. 06-5267, 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, 07-5103 (Consolidated)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff-Appellee and Cross-Appellant,	)
and	)
TOBACCO-FREE KIDS ACTION FUND, *et al.*,	)
Intervenors,	)
v.	)
PHILIP MORRIS USA INC., (f/k/a Philip Morris, Inc.), *et al.*,	)
Defendants-Appellants and Cross-Appellees.	)

Appeal from the Judgment of the United States District Court for the District of Columbia

RESPONSE AND REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
BWH	Brown & Williamson Holdings
CIAR	The Center for Indoor Air Research
CTR	Council for Tobacco Research
Defs.' Br.	Proof Brief of Defendants-Appellants
ERISA	Employee Retirement Income Security Act
ERP	Philip Morris USA Inc. External Research Program
ETS	Environmental tobacco smoke (also known as second-hand smoke)
FDA	Food & Drug Administration
FTC	Federal Trade Commission
Labeling Act	Federal Cigarette Labeling & Advertising Act, 15 U.S.C. §§ 1331 *et seq.*
Lorillard	Lorillard Tobacco Company
MSA	Master Settlement Agreement
PMUSA	Philip Morris USA Inc.
RICO	Racketeer Influenced & Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*
RJR	R.J. Reynolds Tobacco Company
SEC	U.S. Securities and Exchange Commission
TI	Tobacco Institute

TIRC	Tobacco Industry Research Committee
U.S. Br.	Proof Brief for the United States of America

INTRODUCTION & SUMMARY OF THE ARGUMENT

Despite what the district court believed, this case is not a forum for policy arguments about tobacco. This is a RICO case, which means the government was required to prove the specific, well-established, statutorily defined elements of the RICO statute. Throughout its brief, as it did at trial, the government attempts to sidestep these requirements with policy arguments. But the government's policy goals cannot hide the facts that the district court's decision is riddled with error and that the government failed, and in many cases did not even attempt, to prove the elements of a RICO claim.

Faced with the district court's errors and its own failure of proof at trial, the government ignores many of the legal errors identified in defendants' opening brief, abandons legal arguments that were the basis of its case, and even admits that it presented no evidence on at least one required element of its claim. These tactics only confirm that the judgment should be reversed and judgment entered for defendants.

First, judgment should be entered for defendants because the government failed to satisfy the specific intent element of the mail and wire fraud statutes. On appeal, the government disavows completely the "collective knowledge" theory of specific intent that it repeatedly urged at trial. It now concedes that, as this Court held in *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir.

1996), specific intent must be supported by a finding that "a *person* with authority to act on behalf of the corporation possessed the requisite wrongful intent." U.S. Br. at 115 (emphasis added). The district court made no such finding. Instead, it erred as a matter of law by holding that "[s]pecific intent may be established by the *collective* knowledge of each *defendant* and of the *enterprise* as a whole." JA3310 (emphasis added). Because "there is no reason to give [the government] a second chance to flesh out a claim that should have been fleshed out the first time around," *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001), judgment should be entered for defendants.

Second, the government's failure to allege a cognizable "enterprise" provides an additional ground for reversal. Consistent with Congress' objectives in enacting RICO -- preventing illegal activity by criminal gangs and other groups of individuals -- 18 U.S.C. § 1961(4) plainly states that only *individuals* may constitute an associated-in-fact enterprise. The government does not even try to explain how the district court's holding that an association-in-fact of *corporations* may constitute a RICO enterprise can be squared with this statutory language. Instead, the government contends that this Court is foreclosed from applying RICO's plain text by *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988) -- a case that involved *no* corporate defendants, the reasoning of which has been undercut by a subsequent Supreme Court decision.

Third, the judgment must be reversed because the government failed to satisfy the jurisdictional requirement that it prove that defendants are likely to commit future RICO violations. The government does not even attempt to defend the district court's erroneous and unprecedented ruling that *defendants* not only bore the burden of proof, but were required to show that it was "absolutely clear" that no future RICO violations will occur. While that error by itself requires reversal, judgment must be entered for defendants because the government offers nothing to satisfy the correct legal standard -- that future violations are *reasonably likely* in the face of the MSA. Rather, the undisputed evidence shows that, nearly a decade ago, the MSA permanently dismantled the trade organizations through which the "enterprise" allegedly operated and enjoined individual defendants from making fraudulent statements.

Fourth, the judgment must be vacated because the district court failed to identify which of the alleged racketeering acts formed the supposed "pattern of racketeering activity." Defs.' Br. at 60-64. Thus, there is no basis for finding that any defendant engaged in a "pattern of racketeering activity" and no way that the government can show that there is a "causal connection between the conduct enjoined or mandated and the violation found." *Microsoft Corp.*, 253 F.3d at 105 (quotation omitted).

Any one of these four errors, standing alone, requires that the judgment be overturned. But the district court compounded its errors with additional rulings relating to each fraud scheme alleged by the government. The government ignores many of these errors and fails to defend other aspects of the district court's decision. For example:

- Low Tar Descriptors -- The government offers no response to defendants' arguments that (1) the government failed to prove -- as it must under the fraud statutes -- that the descriptors were false under *all* reasonable interpretations; (2) the FTC's *conceded* approval of the numerical tar ratings is irreconcilable with the district court's finding that descriptors based on those tar ratings are fraudulent and its ban on those descriptors; and (3) the ban on descriptors is an unconstitutional abridgement of speech. Each of these errors is sufficient to dispose of the government's "descriptors" claim, regardless of whether the FTC approved the descriptors. But the FTC *did* approve the descriptors, and the government may not attack FTC-approved conduct as criminal racketeering.

- Materiality and Purpose to Defraud -- With the exception of the descriptors (which were not fraudulent), the government offered no evidence that defendants' challenged statements were material -- *i.e.*, designed to induce reasonable consumers to purchase cigarettes. Recognizing this complete failure of proof, the government seeks to sidestep its burden by contending that this requirement need not be established through *evidence* and can somehow encompass alleged fraud having no reasonable relationship to consumers' purchasing decisions.

- ETS/Addiction -- The fraud statutes and the First Amendment preclude penalizing either scientific opinions or debates about terms like "addiction" that are subject to multiple interpretations and definitions. The government does not dispute this and further concedes that defendants' statements about ETS were intended to influence contemplated regulation, and the district court made the same finding about all "predicate acts" related to addiction.

- First Amendment -- The government does not dispute that the First Amendment protects statements about public policy absent extraordinary circumstances not present here. It contends only that penalizing "fraud" is permissible under the First Amendment. But that is true only for knowing falsehoods made with the purpose and reasonably likely effect of inducing commercial transactions -- not, as here, for speech uttered without any finding of specific intent to defraud or for protected speech intended to influence government regulation.

Finally, the district court erred in imposing the remedies that it ordered, such as corrective communications, which violate the First Amendment and are improperly directed at the allegedly lingering effects of past misstatements, contrary to this Court's decision in *United States v. Philip Morris USA Inc.*, 396 F.3d 1190 (D.C. Cir. 2005). The government's cross-appeal suffers from this same flaw -- it seeks relief to remedy the *effects* of *past* RICO violations on consumers, even though *Philip Morris* plainly held that RICO remedies may be aimed only at stopping *future violations* by *defendants*.

The government's complete failure to satisfy basic legal and evidentiary requirements of RICO requires that the judgment be reversed and judgment entered for defendants.

STANDARD OF REVIEW

The government claims that the standard of proof on the fraud issues in this case is "preponderance of the evidence," relying upon *Sedima SPRL v. Imrex Co.*, 473 U.S. 479, 491 (1985). U.S. Br. at 78. But *Sedima* did "not decide the standard of proof issue," *id.*, and courts in this Circuit have consistently held that "proof of

civil fraud in general . . . requires clear and convincing evidence." *Shepherd v. ABC*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); *see also Armstrong v. Accrediting Council for Continuing Educ. & Training, Inc.*, 961 F. Supp. 305, 309 (D.D.C. 1997); *Ago v. Begg, Inc.*, 705 F. Supp. 613, 616 (D.D.C. 1988), *aff'd.*, 911 F.2d 819 (D.C. Cir 1990). This is particularly true in fraud cases implicating protected speech. *Illinois ex. rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620-21 (2003); *see* JA3298.

The government fails even to mention *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984), which supplants the clearly erroneous standard with an "independent examination" standard in cases implicating the First Amendment. Defs.' Br. at 20-21. Instead, the government cites FTC false advertising cases, which are inapposite. Defs.' Br. at 21 n.9. Finally, because the district court adopted the government's proposed findings verbatim -- another fact that the government does not dispute -- those findings should be reviewed with close scrutiny. *S. Pac. Commc'ns v. AT&T*, 740 F.2d 980, 983-84 (D.C. Cir. 1984); Defs.' Br. at 21-22.

ARGUMENT

PART ONE: OVERARCHING LEGAL ERRORS

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN BASING ITS FINDING OF SPECIFIC INTENT TO DEFRAUD ON DEFENDANTS' COLLECTIVE KNOWLEDGE

The district court ignored both the law of this Circuit and unanimous holdings of other circuits when it held that the specific intent required under the mail and wire fraud statutes could be found by examining the collective knowledge of each defendant corporation (and, indeed, the enterprise as a whole), rather than the individual intent of specific corporate employees. The district court's reliance on this supposed "collective knowledge" is expressly foreclosed by this Court's decision in *Saba v. Compagnie Nationale Air France*, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996). The government does not even acknowledge the district court's ruling, let alone attempt to defend it. Indeed, the government on appeal *abandons* the position that it advocated throughout the trial and the district court adopted -- that whether "the particular [corporate] representative knew or believed the statement to be false [is] immaterial," JA9043 -- and concedes that "specific intent requires that a person with authority to act on behalf of the corporation possessed the requisite wrongful intent." U.S. Br. at 114-15.

In an effort to salvage its case notwithstanding this about-face, the government pretends that the district court applied the correct legal standard. U.S. Br. at 114-15. But the district court did not hold that specific intent requires proof

"that a person with authority to act on behalf of the corporation possessed the requisite wrongful intent." *Id*. Rather, it held just the opposite: defendants "should be held liable when the totality of circumstances demonstrate that such corporation *collectively* knew what it was doing or saying was false . . . even if it is *impossible* to determine the state of mind of the *individual* agent or officer at the time." JA3313 (emphases added).

Although the district court cited *Saba*'s holding that the "aggregation of different states of minds of various corporate actors is [not] sufficient to demonstrate specific intent," JA3312, it clearly did not follow that decision. Rather than apply *Saba*, the court reversed course in the very next breath. It expressly "*rejected* the theory of specific intent which Defendants advocate" -- the very same theory this Court adopted in *Saba* -- *i.e.*, "requiring that a corporate state of mind can only be established by looking at each individual corporate agent at the time s/he acted." JA3312 (emphasis added).

The district court confirmed throughout its opinion that it was rejecting *Saba*'s holding on specific intent -- a holding that the court dismissed as a "somewhat Delphic footnote" that does not "bear the weight which Defendants place on it." JA3312 n.34. Thus, the district court failed to follow *Saba* when it held that it was enough that defendants "collectively possessed knowledge demonstrating the fraudulent nature of their public statements," JA3311; that "a

company's specific intent may be inferred from all of the circumstantial evidence including the company's collective knowledge," JA3313; and that "specific intent was established by each defendant's collective knowledge and the collective knowledge of the Enterprise of which it was a part." JA3316.[1] Even the title of the relevant section of the opinion rejects *Saba*: "Specific Intent May Be Established By the Collective Knowledge of Each Defendant and of the Enterprise as a Whole." JA3310.

Because it adopted the wrong standard, the district court failed to make the necessary finding for any RICO claim based on mail or wire fraud: that a specific employee acted with specific intent to defraud. Indeed, the opinion does not identify *any* individual connected with *any* defendant who said *anything* he or she did not believe to be factually correct. The three examples provided by the court confirm that it used the erroneous "collective intent" standard as its touchstone for finding specific intent:

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[1] *See also* JA3313 ("Specific intent of individual Defendants and their employees can be inferred from the collective knowledge of each Defendant company itself."); JA3305 ("Defendants have acted willfully and intentionally to further the Enterprise's scheme to defraud by making statements which were directly contrary to the internal, collective knowledge of each individual Defendant and the Enterprise as a whole."); JA3311 ("[E]vidence [establishes] that Defendants, collectively, possessed knowledge demonstrating the fraudulent nature of their public statements.").

1. The district court found that TI's questioning "whether smoking or nicotine is addictive" purportedly contradicted the "*companies*'" alleged collective "knowledge" of addiction. JA3314 (emphasis added). But the court simply *attributed* the companies' collective knowledge of addiction to TI without finding that any individual who spoke on behalf of TI shared this view.

2. A PMUSA "nicotine researcher" thought that nicotine was a "drug," which allegedly was inconsistent with the company's public statements. JA3315. But there is no evidence that PMUSA's upper management was aware of or agreed with this researcher's views on the semantic question of whether nicotine is a "drug."

3. One employee's internal statement about the real "cessation" effects of quitting smoking, JA3244, was actually *no different* from defendants' public statements, which openly acknowledged the withdrawal effects of smoking cessation. *See infra* at 65-66.

None of these episodes even remotely suggests that any individual said anything he or she did not believe. Nor do any of the 15 alleged "examples" the government provided in its post-trial brief (but not its findings of fact): they simply are a list of individuals who made statements that the government conclusorily contends are inconsistent with defendants' *collective* knowledge. Similarly, the district court's assertion that defendants' executives "would

reasonably be expected to have knowledge of the company's internal research," JA3315, amounts to a conclusive presumption that executives possess the collective knowledge of the entire corporation -- exactly what *Saba* forbids. The district court did not identify any executive who believed that any particular statement that he made was false. Nor did the district court find that any executive was aware of any "internal research" that contradicted any public statements made or authorized by that executive. The district court's erroneous "collective knowledge" standard thus finds *intentionally* false a public statement asserting "X" solely because some employee of the corporate defendant at some point in time said "non-X."

Nor is there any finding that any individual "recklessly disregarded" any fact that they were aware of or believed.[2] In an apparent attempt to have this Court supply the missing findings, the government devotes a lengthy discussion to "facts" that it contends somehow demonstrate "reckless disregard." But the district court made no finding that any individual employee recklessly disregarded the

[2] There is no allegation or finding here that defendants *manufactured* "willful blindness" of the executives who spoke for them. The court did not identify any artificial screening mechanism designed to keep executives in the dark. The absence of any finding of "reckless disregard" by keeping public spokespersons in the dark is particularly significant because the court specifically noted that such actions could establish specific intent. JA3313.

truth or falsity of any statement -- a necessary finding that this Court simply cannot supply.

Beyond that, even assuming that defendants sometimes took measures to protect certain documents, such as those linking them to a particular consultant, from public disclosure, U.S. Br. at 118-19, or did not publicly announce internal meetings, U.S. Br. at 118, those facts in no way suggest that individual employees who made public statements knew or believed anything contrary to what they said. The argument that the "modus operandi" of the scheme *itself* somehow establishes specific intent, U.S. Br. at 118, would effectively eliminate specific intent as a separate requirement by converting *all* schemes into "specific intent" frauds. In any event, the government's modus operandi theory -- which was not a basis for the district court's specific intent finding -- suffers from the same flaws as the "collective knowledge" approach. It would impute to the public speaker the knowledge or intent of other employees who were involved in the events that supposedly demonstrate the modus operandi.

Finally, the errors on specific intent require not simply reversal, but the entry of judgment for defendants because the government deliberately invited the error. Throughout the trial, the government repeatedly told the district court that "we are not going to focus on evidence that the particular [corporate] representative knew or believed the statement to be false because that's immaterial," JA9043; *see also*

JA9108, JA9348; and that "the government's proof will rest on … collective knowledge." JA9043. Because the government had ample opportunity to attempt to prove its claim, "there is no reason to give [the government] a second chance to flesh out a claim that should have been fleshed out the first time around." *Microsoft Corp.*, 253 F.3d at 84 (reversing district court's ruling outright instead of remanding for new trial). Furthermore, because the government's choice of strategy affected the evidence and arguments at trial, it would be unfair and prejudicial to remand for findings on this tainted record. And the government, in any event, waived any right to additional fact-finding by failing to submit proposed findings of fact concerning the specific intent of individual agents. *See, e.g.*, *McCarthy & Burke P.C. v. Nat'l Cleaning Contractors, Inc.*, No. 95-7007, 1995 WL 761829 (D.C. Cir. Dec. 4, 1995) (party "may not advance arguments that depend upon subsidiary factual findings the [party] did not request and that the district court, therefore, did not make").

II. THE DISTRICT COURT ERRED IN FINDING AN ENTERPRISE BECAUSE AN ASSOCIATION-IN-FACT OF CORPORATIONS CANNOT BE A RICO ENTERPRISE

Defendants' opening brief demonstrated that RICO's plain language and structure establish that a corporation cannot be held liable as part of an association-in-fact enterprise. Remarkably, the government does not address this showing and provides *no* analysis of the statute's language or structure. Instead, the government

argues that this Court is constrained by *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), to ignore the statutory language, even though *Perholtz*'s holding is entirely distinguishable and its reasoning has been undercut by subsequent Supreme Court precedent.

The unambiguous text of RICO does not permit a corporation to be held liable as part of an association-in-fact enterprise. Such an enterprise is statutorily defined to "include[] … any union or group of *individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added). A corporation, however, is not an "individual" -- a fact that the government conceded before the Supreme Court and that is clear from the statute itself, which distinguishes between "corporations" and "individuals." *See* Brief for the United States as *Amicus Curiae* at 6, *Mohawk Indus. Inc. v. Williams*, 2006 WL 680358 (2006) (No. 05-465). Nor does the introductory word "includes" render § 1961(4) a merely illustrative list of RICO enterprises, because:

- § 1961(4) itself uses "includes" to introduce an exhaustive list, since the list plainly *is* exhaustive with respect to the first half of § 1961(4) -- *viz.*, "'enterprise' *includes* any individual, partnership, corporation, association, or *other legal entity*";

- Three other definitions in § 1961 likewise use "includes" to introduce unquestionably exclusive definitions;

- No other definition in § 1961 uses "includes" to introduce a non-exhaustive list; and

- Where RICO does introduce a non-exhaustive list, it uses the phrase "including, *but not limited to*," 18 U.S.C. § 1964(a).

Defs.' Br. at 32-35. The government does not address any of these textual arguments, inexplicably dismissing them as "policy arguments." U.S. Br. at 83.

Instead, the government makes erroneous arguments untethered to the statutory text. *First*, the government argues that this Court resolved this issue in *Perholtz*. U.S. Br. at 80-81. But all of the defendants in *Perholtz* were natural persons -- *i.e.*, "individuals" within the meaning of § 1961(4). Defs.' Br. at 36-37. Thus, at most, *Perholtz* held that individuals who form an association-in-fact cannot escape liability merely by adding corporations to their association. That holding is a far cry from the district court's holding here that an association-in-fact enterprise may consist entirely of corporations.

The government does not address this critical distinction. Instead, it argues that here, as in *Perholtz*, the government alleged an association-in-fact enterprise comprised of both individuals and corporations. U.S. Br. at 86. This, however, does not change the fact that no corporation was a defendant or held liable in *Perholtz* and that case therefore did not hold that corporations may be held liable as part of an association-in-fact enterprise. Thus, any suggestion in *Perholtz* that a group of corporations may constitute an association-in-fact enterprise goes beyond "its actual holding." *United States v. Kemp*, 12 F.3d 1140, 1142 (D.C. Cir. 1994).

Second, the government virtually ignores the Supreme Court's subsequent decision in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), which undercuts *Perholtz*'s reasoning. Defs.' Br. at 37-38. The government misses the point in urging that the issue resolved in *Cedric Kushner* -- "[w]hether an individual is distinct from the corporation he control[led]" -- was different from the issue in *Perholtz*. U.S. Br. at 85-86.

Perholtz suggested that an individual who formed a corporate shell could not be held liable unless that individual and his shell corporation could *together* be found to constitute an association-in-fact enterprise. 842 F.2d at 353. To prevent an individual from escaping liability by forming a corporate shell, the *Perholtz* Court was driven to hold that individuals could be liable even if the association-in-fact enterprise included corporations. *Id*. *Cedric Kushner*, however, eliminates *Perholtz*'s concern by holding that individuals who form corporate shells can be liable under RICO -- with the corporation itself constituting the "enterprise," notwithstanding RICO's "distinctiveness" requirement. An individual criminal (*i.e.*, the RICO "person") who conducts the affairs of this enterprise (*i.e.*, the corporation) through a "pattern of racketeering activity" thus would already be liable under RICO without expanding the definition of enterprise. 533 U.S. at 163-64. Because *Cedric Kushner* eliminates the driving rationale of *Perholtz*, it undermines any binding effect *Perholtz* might otherwise have. *See, e.g.*, *Dellums*

v. United States Nuclear Regulatory Comm'n, 863 F.2d 968, 978 n.11 (D.C. Cir. 1988) (*en banc* review is not necessary to "formally bur[y]" circuit precedent that is "out of step" with intervening Supreme Court precedent); *Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (panel is not bound by prior panel's decision "where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent").

Third, the government notes that other courts have found that corporations can be held liable as part of association-in-fact enterprises. U.S. Br. at 81-82, 87. Only one of the cases cited by the government, however, was decided after *Cedric Kushner* and, in that case, the defendants did not challenge the validity of an association-in-fact that included corporations. *See United States v. Najjar*, 300 F.3d 466, 484-85 (4th Cir. 2002). In addition, the government greatly overstates the strength of the case law addressing this issue. Several of the cases, for example, hold that a "corporation" is an "individual" under § 1961(4) -- a rationale that even the government rejects.[3] And in many others, no party argued that a corporation could not be part of an association-in-fact enterprise and,

[3] *See, e.g., United States v. Navarro-Ordas*, 770 F.2d 959, 969 n.19 (11th Cir. 1985); *United States v. Blinder*, 10 F.3d 1468, 1473 (9th Cir. 1993); *United States v. Feldman*, 853 F.2d 648, 655-56 (9th Cir. 1988).

consequently, the courts either did not address the issue at all,[4] or their comments were dicta.[5] Finally, several of the cases are distinguishable because, like *Perholtz*, the defendants were natural persons, not corporations.[6]

Fourth, the government contends that its counter-textual interpretation is necessary because liability otherwise would turn on defendants' "tactical decision" regarding "their organizational form." U.S. Br. at 88. But federal law already prohibits "two or more persons [from] conspir[ing] … to commit any offense against the United States." 18 U.S.C. § 371. Thus, if, as the government suggests, defendants gathered to launch an "informal association [to commit fraud] rather than 'the incorporation of a formal association,'" U.S. Br. at 88, the government

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[4] *See Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-64 (2d Cir. 1995); *Najjar*, 300 F.3d at 484-85; *Ocean Energy II, Inc. v. Alexander & Alexander Inc.*, 868 F.2d 740, 748-49 (5th Cir. 1989); *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1274-77 (11th Cir. 2000); *McCullough v. Suter*, 757 F.2d 142, 143-44 (7th Cir. 1985); *United States v. Vogt*, 910 F.2d 1184, 1193-94 (4th Cir. 1990).

[5] *See Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983); *River City Mkts., Inc. v. Fleming Foods W., Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992).

[6] *See, e.g.*, *United States v. Aimone*, 715 F.2d 822, 825 (3d Cir. 1983); *United States v. Masters*, 924 F.2d 1362, 1365 (7th Cir. 1991); *Feldman*, 853 F.2d at 652; *Navarro-Ordas*, 770 F.2d at 961; *McCullough*, 757 F.2d at 143; *United States v. Huber*, 603 F.2d 387, 390 (2d Cir. 1979); *United States v. London*, 66 F.3d 1227, 1230 (1st Cir. 1995); *Blinder*, 10 F.3d at 1470-71; *Vogt*, 910 F.2d at 1187.

had a ready-made remedy -- prosecution for conspiracy to violate the fraud statutes.

Finally, the government appears to suggest that Congress, by failing to amend RICO, implicitly adopted the appellate courts' erroneous interpretation of § 1961(4). U.S. Br. at 82. But "Congress does not express its intent by a failure to legislate." *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998). Moreover, lower court decisions "represent neither a settled judicial construction, nor one which [courts] should be justified in presuming Congress, by its silence, impliedly approved." *United States v. Powell*, 379 U.S. 48, 55 n.13 (1964) (internal citation omitted).

Because defendants cannot constitute a "group of *individuals* associated in fact," 18 U.S.C. § 1961(4) (emphasis added), the judgment should be reversed and judgment entered for defendants.

III. THE DISTRICT COURT ERRED IN CONCLUDING THAT DEFENDANTS ARE LIKELY TO VIOLATE RICO NOTWITHSTANDING THE MSA'S INJUNCTIONS

Under 18 U.S.C. § 1964(a), which expressly limits district courts' jurisdiction to forward-looking remedies designed to "prevent and restrain" RICO violations, the government was required to prove that defendants were reasonably likely to commit future RICO violations. *Philip Morris*, 396 F.3d at 1198. As demonstrated in our opening brief: (1) the MSA, which required dissolution of the

joint organizations through which defendants allegedly carried out the "enterprise" and prohibits fraud, rebutted as a matter of law the district court's presumption that future violations are likely because defendants purportedly violated RICO *in the past*; (2) the district court adopted an erroneous legal standard requiring defendants to make it "absolutely clear" that future illegal conduct was not feasible; and (3) in any event, defendants have irreversibly abandoned the conduct upon which the judgment was based. The government ignores the first two points and distorts the third. The government's failure to prove that defendants are reasonable likely to commit future RICO violations given the MSA requires that the judgment be reversed and judgment entered for defendants.

A. The MSA Makes Future RICO Violations Unlikely

It is black-letter law that "one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972). Where, as here, the defendants are already enjoined from engaging in the relevant conduct, the proper standard for imposing an additional injunction is whether "there is a realistic prospect that the violations alleged in [the] complaint will continue notwithstanding" the extant injunctions. *Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 355 (8th Cir. 1998) (quotation omitted); *see also United States v. Jones*, 136 F.3d 342, 348 (4th Cir. 1998); *Ellis v. Gallatin Steel*

Co., 390 F.3d 461, 475-76 (6th Cir. 2004). This standard required the government to show how future RICO violations were likely in light of MSA provisions that prohibit future frauds and required the dissolution of the joint organizations that allegedly were the vehicles for the enterprise. The government failed to satisfy this requirement.

First, the government failed to show how future RICO violations are likely in light of the government's concession that the entities that were the supposed vehicles for the enterprise activity -- TIRC/CTR, TI, CIAR, and related entities, *see* Defs.' Br. at 46-47 -- were disbanded under the MSA. U.S. Br. at 187. The government's assertion that defendants have created *other* organizations to replace them, U.S. Br. at 184, is untrue.

These other entities are *not* joint organizations of which defendants are a part, and the district court made no findings that any of these organizations is involved in ongoing misconduct. No defendant is a member of the "Tobacco Documentation Centre," JA7863-64, and the most recent finding relating to that organization concerns conduct that occurred 16 years ago. JA1932-33. Defendants are also not members of the "International Society of the Built Environment," an organization of scientists that publishes a scientific journal and hosts conferences. JA3073. The "Tobacco Manufacturers Association" is a trade association of *British* tobacco manufacturers (and therefore does not include most

of the defendants), and the most recent mention of it in the opinion concerned conduct that occurred eight years ago. JA1920.

The government also is incorrect in asserting that PMUSA's External Research Program ("ERP") is a shell for the former CIAR through which defendants "conspired to circumvent" the MSA. U.S. Br. at 186-89. The government quotes from a 1998 letter from Lorillard's general counsel proposing that defendants discuss a "plan to reinstate CIAR" after the MSA, U.S. Br. at 188, but ignores the uncontroverted evidence that PMUSA *rejected* this proposal. JA9103. It is undisputed that the PMUSA ERP, as its name implies, is *a PMUSA-only entity* and involves no other defendant. JA9094. Although PMUSA leased the former CIAR facilities and hired some former CIAR employees, the PMUSA ERP was not a successor to CIAR and has never been a "joint" entity. JA9094-103. And if there were any attempt to reconstitute CIAR as a joint organization, it would be subject to all the proscriptions of the MSA. JA6968.

In short, the undisputed facts establish that the MSA has abolished *all* of the organizations through which defendants could operate a RICO enterprise and precludes the creation of any such future organization. In the absence of any future enterprise, there can be no future *RICO* violations because RICO "outlaw[s] the commission of . . . predicate acts *only* when those acts were the vehicle through which a defendant 'conduct[ed] or participat[ed] . . . in the conduct of [the]

enterprise's affairs.'" *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 954-55 (D.C. Cir. 1990) (en banc) (citation omitted) (emphasis added).

Second, the MSA bars defendants from engaging in individual future frauds. The government argues that defendants are likely to violate RICO because the MSA's inspection and document production provisions have expired or will be expiring, U.S. Br. at 195-96, but the injunctions restricting defendants' behavior -- including those prohibiting joint conduct -- continue in perpetuity. And state attorneys general have and retain broad investigatory and enforcement powers totally apart from the MSA's inspection and document production provisions.

Finally, the government does not attempt to defend the district court's "finding" -- pivotal to the district court's opinion -- that the States are somehow unable or unwilling to enforce the MSA's injunctions because of "limited resources." JA3221, JA3225. This "finding" was unsupported by the record and utterly belied by the millions of dollars defendants pay the States annually precisely for this purpose. Defs.' Br. at 50. The government instead complains that "the MSA provides a highly balkanized framework" for RICO enforcement. U.S. Br. at 197. This simply ignores the coordination of the states' MSA enforcement efforts by the National Association of Attorneys General. JA6983-85. In any event, the issue here is not whether the government can devise a better

method of enforcing RICO, but whether defendants are likely to commit future RICO violations. Given the MSA's strictures, defendants are not.

B. The District Court Adopted An Erroneous Legal Standard

Lacking any showing by the government that defendants are reasonably likely to commit future RICO violations despite the MSA, the district court adopted an erroneous legal standard that relieved the government of its burden by effectively deeming the MSA irrelevant. As shown in defendants' opening brief, the court erroneously held (1) that "the requisite 'reasonable likelihood' of future violations may be established by inferences drawn from *past conduct alone*," JA3335 (emphasis added); and (2) that the burden is on the *defendant* to "demonstrat[e] that 'subsequent events [like the MSA] made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur,'" JA3342 n.46 (emphases added). Defs.' Br. at 40-44.

First, the adoption of a standard that focused exclusively on past conduct allowed the district court to ignore the MSA's injunctions. But the MSA is central to the future violations issue because an additional injunction is appropriate only if "there is a realistic prospect that the violations . . . will continue notwithstanding" the extant injunctions. *Comfort Lake Ass'n*, 138 F.3d at 355 (quotation omitted). It was plain error to treat 50 sweeping State injunctions as if they do not affect the likelihood of future violations.

The government halfheartedly tries to distinguish *Comfort Lake Ass'n* (but does not even address defendants' other cases), arguing that it "merely held that the plaintiff's request for an injunction against future violations of a pollution permit became moot when the permit was terminated." U.S. Br. at 187. On the contrary, *Comfort Lake* held that courts may presume that past violations will continue, and may apply the "absolutely clear" standard, only "when a defendant claims that its *voluntary* action has mooted a controversy." 138 F.3d at 355 (emphasis added). The strictures of the MSA are binding through enforceable decrees and are not "voluntary" in any sense of the word.[7]

Second, the district court erroneously shifted the burden to defendants to prove that future violations were unlikely. It is "[t]he *moving party*," however, that "must satisfy the court that relief is needed." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (emphasis added). This is especially true under § 1964(a) because, in the absence of proof that future violations are reasonably likely, there is no jurisdiction.

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[7] Even absent the MSA, however, it would be error to presume future violations from past conduct *alone*, as the district court did here. It is established law that the government "needs to go beyond the mere fact of past violations" and "offer positive proof of the likelihood that the wrongdoing will recur." *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir. 1978). In any event, given the proscriptions in the MSA and the *Comfort Lake* standard, it is clear error to focus exclusively on past conduct.

Finally, the "absolutely clear" standard applies only where the issue is whether a defendant's subsequent actions have *mooted* a controversy. That standard has no basis in traditional equitable principles or § 1964(a) and does not apply where, as here, the issue is whether defendants are reasonably likely to commit future violations. *Comfort Lake*, 138 F.3d at 355.

C. Defendants Are Not Engaged In Ongoing Fraud

The government attempts to argue that defendants continue to engage in fraud notwithstanding the MSA, but its allegations -- which essentially abandon the findings upon which the district court relied -- are baseless. They are also irrelevant because any future RICO violation requires an *enterprise* and defendants are barred by the MSA from constituting one.

The Health Risks of Smoking. There is no likelihood that defendants will engage in any future fraud relating to the health risks of smoking. Defendants have publicly admitted for years that smoking causes lung cancer and other serious diseases, Defs.' Br. at 53-54 -- admissions that cannot be retracted -- and the MSA already forbids misrepresentations concerning the health consequences of smoking. JA6970. The government's only response is to assert that one defendant, after acquiring certain cigarette brands, removed voluntary warnings that differed from those required by federal law. U.S. Br. at 191. It can hardly be "fraud," however,

to revise the package-warnings to include only the exact language required by Congress. 15 U.S.C. § 1334.

Addiction. Defendants have admitted publicly for years that cigarette smoking is addictive, and the MSA precludes fraudulent statements relating to addiction. Defs.' Br. at 54-56. The government claims that defendants are committing criminal fraud by failing to add "that nicotine is the drug delivered by cigarettes that creates and sustains addiction" and "that the reason quitting smoking is so difficult, and not simply a function of individual will power, is because of its addictive nature." U.S. Br. at 192. But it is irrelevant whether it is nicotine (or something else) that *causes* smoking to be addictive, and the "will power" statement is similarly beside the point, so the addition of these statements is hardly needed to avoid "fraud."

Nicotine Manipulation. Defendants' statements denying nicotine manipulation are true, protected by the First Amendment, JA3246 n.15, and immaterial. U.S. Br. at 168-69, 192-93; Defs.' Br. at 96-97. Therefore, denials of nicotine manipulation cannot be ongoing fraud.

Low Tar Cigarettes. Defendants' low tar descriptors are not fraudulent. *See infra* at 32-50. Even assuming *arguendo* that the descriptors would be fraudulent if not accompanied by information about "smokers' compensation," U.S. Br. at

193, all defendants for the past several years have provided such information, Defs.' Br. at 56-58 -- a point the government does not dispute.

Youth Marketing. As the government concedes, youth marketing does not violate the mail and wire fraud statutes or RICO (which is why the government's claim focused only on defendants' *denial* of such marketing). Thus, any risk that defendants will market to youth in the future -- a risk that is impossible to square with the MSA's prohibition of such activity, JA6955-56 -- does not provide a basis for finding a likelihood of future *RICO* violations.

D. As A Passive Holding Company, BWH Is Not Likely To Commit Future RICO Violations

The government concedes that BWH exists solely as a passive holding company. U.S. Br. at 214. Since BWH is not an operating entity, there is no reasonable likelihood it will commit future RICO violations. Nor is there any reason for this issue to be "addressed by the district court in the first instance." U.S. Br. at 214 n.36. First, the business combination from which BWH emerged as a holding company occurred two years before the district court's decision. Second, the record clearly and unequivocally demonstrates that BWH does not manufacture, market or sell tobacco anywhere in the world. Defs.' Br. at 58-59. Third, at no point in this litigation (or otherwise) has the government ever presented any evidence contesting this fact. In light of the government's concession that BWH is not an operating company, there is no factual dispute

requiring the district court's resolution. *See LaSalle Extension Univ. v. FTC*, 627 F.2d 481, 485 (D.C. Cir. 1980) ("When the record as a whole reveals no substantive issue concerning a material fact, we will not elevate form over function by requiring further district court proceedings to supplement the findings."); *see also Lee v. Interstate Fire & Cas. Co.*, 86 F.3d 101, 105 (7th Cir. 1996) (holding remand inappropriate where "plaintiffs, who bear the burden of persuasion (and of production), have never suggested that [the purported issue of fact] matter[s] or asked for an opportunity to submit evidence [on that point]").

* * *

The government's failure to demonstrate that defendants are likely to engage in future RICO violations requires that judgment be reversed and entered for defendants.

IV. THE DISTRICT COURT ERRED IN IMPOSING LIABILITY WHILE FAILING TO IDENTIFY ANY ACTS OF RACKETEERING

A violation of 18 U.S.C. § 1962(c) requires, at a minimum, the commission of at least two or more *completed* predicate criminal acts that comprise a "pattern of racketeering activity." 18 U.S.C. §§ 1961(1), 1961(5), 1962(c); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989). The government concedes that, in determining whether defendants violated RICO, the district court was limited to the 148 predicate acts of mail and wire fraud alleged by the government. U.S. Br. at 6. The district court, however, never identified which of the acts

formed the supposed "pattern of racketeering activity." The district court deemed such findings unnecessary, finding it sufficient "that the defendants devised a scheme intended to defraud which included one or more of the individual component schemes alleged." JA3235. This approach is flawed, and the government offers no defense of it.

First, the district court never actually concluded that *any* of the alleged predicate acts was a completed act of mail or wire fraud. The district court's opinion contains no findings that even one of the alleged predicate acts was committed in furtherance of a scheme to defraud, undertaken with specific intent, related to a material fact, and intended to deprive another of money or property. The district court therefore failed to find the most elemental prerequisite for the imposition of RICO liability: the commission of the actual predicate crimes underlying the alleged "pattern of racketeering activity."

Second, given the district court's approach, there can be no showing that the district court's remedies are tailored to "prevent and restrain" future RICO violations, *Philip Morris*, 396 F.3d at 1198, or that there exists a "causal connection between the conduct enjoined or mandated and the violation found." *Microsoft Corp.*, 253 F.3d at 105 (quotation omitted). Because there is no way to know which of the charged predicate acts the district court believed to constitute the "pattern of racketeering activity," it is impossible to determine whether a

reasonable relationship exists between any of the specific remedies entered by the district court and any RICO violation.

The government does not suggest that the district court made the requisite findings as to the charged predicate acts. Nor has the government refuted in any way the comprehensive chart appended to defendants' opening brief, which analyzed each predicate act and itemized the government's failure of proof. Defs.' Br., Ex. 1. Instead, the government argues that it proved, and the district court found, that certain alleged predicate acts involved use of the mails. U.S. Br. at 135-40. Mailing, however, is just *one* element of a mail or wire fraud claim and obviously does not establish the *other* elements.

The government also requests affirmance on the ground that the district court *could have* found specific acts of mail and wire fraud because the government supposedly "demonstrated that each defendant committed 'at least two acts of racketeering activity.'" U.S. Br. at 135. Even if true (which defendants deny), this argument is too little, too late. The government cannot escape the consequences of its strategic decisions by asking this Court to make findings the district court was required to make.

PART TWO: ERRORS WITH RESPECT TO SPECIFIC SCHEMES

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING FRAUD WITH RESPECT TO LIGHT CIGARETTES

As demonstrated in defendants' opening brief, the judgment and remedies relating to the "light/low tar fraud" scheme must be vacated as a matter of law because the judgment (1) improperly finds the descriptors fraudulent, (2) ignores the FTC's conceded approval of tar and nicotine yield disclosures and its approval of descriptors based on those ratings, (3) violates the First Amendment, and (4) improperly applies U.S. law to regulate the sale of cigarettes wholly outside the U.S. Defs.' Br. at 65-91.

A. The Descriptors Were Not Fraudulent

By asserting violations of the fraud statutes as predicate acts, the government bore a heavy burden: it was required to "negate *any reasonable interpretations* that would make a defendant's statement factually correct." *United States v. Migliaccio*, 34 F.3d 1517, 1525 (10th Cir. 1994) (emphasis added); Defs.' Br. at 81-82 (collecting cases). The government does not dispute this standard here but did not even attempt to satisfy it below. Defs.' Br. at 82-84.

Nor could it. The descriptors are true because they accurately reflect the FTC's official test method results. As the Fifth Circuit recognized, the descriptors "*cannot constitute fraud*" because "[c]igarettes labeled as 'light' and 'low-tar' *do deliver less tar and nicotine as measured by the only government-sanctioned*

methodology for their measurement." *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007) (emphases added); *see also, e.g.*, *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 652 (S.D.N.Y. 2007) ("There is also no dispute that the allegedly misleading terms accurately describe the results of the FTC testing method."). These courts' interpretations cannot, as a matter of law, be "unreasonable."

Of course, the district court did not find that the descriptors are literally false; instead, the court found that light descriptors "*implied* a health benefit as a result of the lowered tar levels." JA2611 (emphasis added). But there is no evidence in the record to support the conclusion -- which the government did not even attempt to prove and the court did not find -- that this was the *only* "reasonable interpretation[]." To the contrary, the evidence cited by the court showed at most only that *some* smokers in the past "believed that the use of the term 'low tar' conveyed relative safety compared to full flavor cigarettes." *See, e.g.*, JA2616 (citing a 1993 Gallup survey). Thus, a perfectly "reasonable interpretation" is that the descriptors related to other issues (such as taste) and not *any health claims*, so there can be no fraud.

Moreover, as the government acknowledged and the district court found, there is a "dose-response" relationship between smoking and disease; the less tar and nicotine exposure, the lower the associated lung cancer risk. JA2486; JA9080.

The government alleged and the district court found that light cigarettes fail to reduce the risk of disease only for smokers who compensate completely such that they "inhale essentially the same amount of nicotine and tar as they would from full flavor cigarettes." JA2488. Thus, even under the *government's* case, if descriptors are construed as implied health claims, such claims would be true for smokers who did not adjust their smoking behavior by "smoking more cigarettes" or "inhaling smoke more deeply." U.S. Br. at 131. And it is not a remotely reasonable, much less the *only* reasonable, interpretation of the descriptors as implying that light cigarettes are healthier *even if* they are smoked in a way that draws the same amount of tar as would be derived from a regular cigarette. Nor is there any evidence or finding that any consumer construed the descriptors in such a counter-intuitive way.[8]

[8] Two amici briefs rely extensively upon evidence of some consumers' supposed perceptions. *See* Amicus Curiae Brief of Society for Research on Nicotine and Tobacco, Lung Cancer Alliance, Community Anti-Drug Coalition of America, National Latino Council on Alcohol and Tobacco Prevention, and American College of Occupational and Environmental Medicine in Support of Appellee Urging Affirmance ("Society Amici Br."), at 8-9 (Nov. 26, 2007); Amicus Curiae Brief of Public Citizen, Inc., American College of Preventative Medicine, American Public Health Association, Association of Maternal and Child Health Programs, National Association of Local Boards of Health, and the Oncology Nursing Society in Support of Appellee Urging Affirmance ("Public Citizen Amici Br."), at 5 (Nov. 26, 2007). None of this evidence addresses the critical issue, *i.e.*, whether consumers believed that light cigarettes were healthier *even if compensation was complete*. Moreover, the court should not consider this

The government utterly fails to respond to this argument.[9] For this reason alone, the district court's judgment with respect to light cigarettes must be vacated.

B. The District Court's Findings Are Inconsistent With The FTC's Regulatory Policies And Approval Of Descriptors And Are Therefore Impermissible

1. The Fraud Findings Here Are Inconsistent With The FTC's Conceded Approval Of Numerical Tar Ratings

Three undisputed facts demonstrate that the use of descriptors cannot be fraudulent. First, as the government itself concedes, the FTC *approved* defendants' disclosure of FTC Method results. U.S. Br. at 159. Indeed, as the district court found, the FTC compelled an industry agreement *requiring* such disclosure in all advertisements. JA2482-83; Defs.' Br. at 67-68. Second, as this Court has recognized, the *only* purpose of the FTC's disclosure requirement was to enable "consumers [to] rely on tar ratings to make comparative assessments of the health effects of cigarettes" because the disclosures "bear significance only insofar as they implicate health matters." *FTC v. Brown & Williamson Tobacco Corp.*,

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evidence because it was not in the record below. *See, e.g., Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 773 (9th Cir. 1992).

[9] The only response comes from the Society Amici, who argue that light descriptors are "literally *false*" because -- in amici's view -- such cigarettes "fail to provide a health benefit," regardless of "actual tar and nicotine deliveries." Society Amici Br. at 23 (emphasis in original). This argument ignores the government's theory and the court's findings that there is a "dose-response" relationship between exposure to tar and disease. JA2486; JA9080.

778 F.2d 35, 41, 42 n.4 (D.C. Cir. 1985). Indeed, the FTC's contemporaneous explanation confirms that it compelled manufacturers to advertise yield measurements to "lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette." JA4511; Defs.' Br. at 67-68. Third, the descriptors at issue have at all relevant times been defined by and accurately reflected FTC Method results. *Clinton*, 498 F. Supp. 2d at 652.

Cast in the light of these facts, the government's theory of fraudulent descriptors simply does not hold up. This FTC mandate is facially irreconcilable with the fraud rationale of the district court, which found the descriptors misleading precisely because some consumers purportedly use them as a shorthand reference to the FTC Method results in making comparative assessments of the health effects of cigarettes. The FTC believes that its numerical tar ratings are relevant to the relative health risks of different cigarettes and therefore should be provided to consumers, while the district court believes that numerical tar ratings do not reflect relative health risks and therefore descriptors of those measurements must be kept from consumers. Defendants' accurate *descriptions* of FTC-measured yields, however, cannot be fraudulent health information unless those yield measurements are themselves fraudulent. And the FTC's approval and requirement of the numerical tar ratings to facilitate "comparative assessments of the health effects of cigarettes" shows they are not misleading. The finding that

the descriptors are fraudulent because they are designed to facilitate "comparative assessments of the health effects of cigarettes" is thus irreconcilable with *conceded* FTC policy.

Moreover, the *result* of the district court's ban on descriptors, when coupled with the FTC's mandate, is an irrational and internally contradictory regulatory regime where numerical tar ratings *must* be provided to consumers but descriptions of those tar ratings must *not*. This is a paradigmatic example of "collid[ing]" regulatory requirements, antithetical to the rule forbidding courts from applying general statutes in a manner that produces results inconsistent with an agency's regulatory actions. *Pan Am. Airways, Inc. v. United States*, 371 U.S. 296, 310 (1963); Defs.' Br. at 72-74; *infra* at 47-50.

The government suggests that the FTC's rating system "was not designed to form the basis for descriptors or other . . . implied health claims." U.S. Br. at 161. This is nonsense. The express statements of both this Court and the FTC make clear that the avowed purpose of requiring information concerning relative tar ratings was to provide consumers with information concerning relative health risks. Nor can the government even suggest what *other* conceivable purpose the FTC hoped would be served by those numbers.

In short, the district court's condemnation of defendants' description of FTC-measured yields is irreconcilable with the FTC's *conceded* approval of those

ratings and its mandate that those ratings be disclosed, wholly apart from whether the FTC approved the descriptors themselves.

2. The Fraud Findings Are Inconsistent With The FTC's Approval Of Light Descriptors

In any event, the FTC *did* approve the use of light descriptors. Indeed, the government cannot offer any reasonable explanation as to *why* the FTC would have approved the disclosure of FTC-measured yields as legitimate health information but *not* have approved accurate descriptions of those ratings.

The government contends illogically that the FTC did not approve the descriptors because they were more "influential" with consumers than tar ratings. U.S. Br. at 161. Since even the government concedes that the FTC wanted to inform consumers of the differences in yields between cigarette brands, it cannot plausibly argue that the FTC would have deliberately chosen an ineffective means to achieve its objective (disclosure of FTC-measured ratings), and simultaneously disapproved of a means that the government claims is *more* effective (descriptors).

Nor can the government explain why -- if the FTC had in fact drawn this technical distinction -- *the FTC has never taken action against descriptors*. *See*, *e.g.*, *Clinton*, 498 F. Supp. 2d at 652 ("[T]here is no dispute that the FTC has declined to *disallow* those terms in response to several invitations to do so.") (emphasis in original). Such failure to take action by the agency "charged with . . . enforcement" must be given "great weight." *Bankamerica Corp. v. United States*,

462 U.S. 122, 130 (1983). The *Bankamerica* Court rejected an interpretation of a Clayton Act provision based in part on the government's failure to act consistent with that interpretation "for over 60 years":

> We find it difficult to believe that the Department of Justice and the Federal Trade Commission . . . would have overlooked or ignored the pervasive and open practice [at issue] had it been thought contrary to the law.

Id. at 130-31; *see also Nat'l Classification Comm. v. United States*, 746 F.2d 886, 892 (D.C. Cir. 1984) ("We cannot ignore what amounts to a lengthy period of awesome inaction on the part of the agency."). Since descriptors have been a "pervasive and open practice" for decades,[10] and since all concede that the FTC repeatedly *examined* their use, the government cannot explain why the FTC never took action against descriptors if it never approved their use.

In any event, this is not an instance of mere FTC inaction -- to the contrary, the FTC repeatedly and specifically *approved* the use of descriptors as short-hand references to FTC-measured yields. The government (like its amici) simply ignores the FTC's 1967 statement of its "enforcement policy" on descriptors, which explicitly set forth this authorization:

> [T]he Commission's current enforcement policy in regard to statements of, and *representations relating to,*

[10] Indeed, the government itself used descriptors such as "low tar and nicotine" in public service ads aired in the 1970s. *See, e.g.*, JA3516.

> *tar and nicotine content of cigarettes* may be formulated as follows: As a general rule, *the Commission will not challenge such statements* [*or*] *representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the Federal Trade Commission* . . . . Advertisements which correctly report official FTC tar and nicotine yield data are within this category.

JA4295 (emphases added).[11] The FTC also told Congress that "*the Commission would not challenge statements or representations of or relating to tar and nicotine content of cigarettes*" if "fully substantiated" by the FTC method. JA4458 (emphasis added); *see also* Defs.' Br. at 68. The descriptors unquestionably fall within this authorization -- they are "representations" "relating to tar and nicotine" that are "fully substantiated by" the FTC Method.[12]

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[11] The government merely notes that the same statement also prohibits the representation that a particular brand is "safe" or "safer." U.S. Br. at 160. But there is no allegation that defendants *said* light cigarettes were "safer"; the allegation, rather, is that the descriptors are fraudulent precisely because they are based on FTC-measured tar and nicotine yields.

[12] The government relies heavily on *Good v. Altria Group, Inc.*, 501 F.3d 29, 54 (1st Cir. 2007), as holding that the FTC did not authorize descriptors, but the court there never addressed the FTC's 1967 policy statement. The Supreme Court has granted review in *Good*, -- S. Ct. --, 2008 WL 161478 (Jan. 18, 2008), and the decision is inconsistent with numerous other decisions. *See, e.g.*, *Brown*, 479 F.3d at 392-93; *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 50 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006); *Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010, at *2, 7 (E.D. Mich. Oct. 25, 2005); *Clinton*, 498 F. Supp. 2d at 652; *Watson v. Philip Morris Cos.*, 420 F.3d 852, 862 (8th Cir. 2005), *rev'd on other grounds*, 127 S. Ct. 2301 (2007).

The FTC's "enforcement policy" is also reflected in two consent decrees. *See* Defs.' Br. at 68-69. The government distorts both decrees as supposedly reflecting only the policy that "certain tar and nicotine claims consistent with [FTC] test results can still amount to unfair or deceptive acts or practices." U.S. Br. at 160 (citation omitted).

The 1971 consent decree concerned the FTC's challenge of advertisements that were *inconsistent* with FTC Method results -- *i.e.*, certain brands advertised as relatively low in tar actually had relatively high FTC-measured yields. *In re Am. Brands, Inc*., 79 F.T.C. 255, 259 (1971); JA4544-45. While prohibiting this practice, the FTC specifically approved the use of descriptors such as "'low,' 'lower,' or 'reduced' or like qualifying terms," if substantiated by FTC Method results. JA4544-45. The government ignores this language in the decree.

Similarly, the 1995 consent decree resolved an FTC challenge to an advertisement allegedly implying that FTC-measured tar yields reflected the precise amount of tar smokers would actually inhale. *See In re Am. Tobacco Co.*, 119 F.T.C. 3 (1995). Although the FTC prohibited this practice -- since it was never the intent of the FTC Method to predict actual tar deliveries to individual smokers, *see, e.g.*, JA2483-85 -- it expressly permitted statements communicating FTC Method results "*with* or without *an express or implied representation that [the] brand is 'low,' 'lower,' or 'lowest,' in tar and/or nicotine*." *In re Am.*

Tobacco Co., 119 F.T.C. at 11 (emphases added). Again, the government ignores this language.[13]

The government points out that consent decrees are "binding only on the parties." U.S. Br. at 160. This truism is irrelevant, however, because the FTC can and often does express policy and indicate approval of conduct through consent decrees. This Court has recognized that "[a]gencies often have a choice of proceeding by adjudication, rather than rulemaking. . . . *Orders handed down in adjudications may establish broad legal principles.*" *Cent. Tex. Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) (emphasis added). As then-FTC Chairman Oliver explained to Congress, the FTC uses exemplary enforcement actions and resulting consent decrees to set policies for an entire industry:

> Oliver . . . described the FTC's preference for informal regulation via the use of enforcement actions and consent orders rather than formal rulemaking. Oliver stated that it is "more efficient" to bring a single case against one industry actor than to use scarce resources to engage in rulemaking and that in "the case of the cigarette industry," it was "entirely reasonable to suppose that one action against [one] cigarette company would have an

[13] The Public Citizen Amici argue that the consent decrees should be disregarded based on 15 U.S.C. § 57b(e). Public Citizen Amici Br. at 10. Section 57b(e), however, merely permits state and federal authorities to pursue remedies in addition to those permitted under the FTC Act when a party has violated the FTC's rules and policies. The provision does not authorize the imposition of liability for conduct that was permitted by the FTC.

> effect on all of them, and that you would not have to make a rule."

Price, 848 N.E.2d at 49 (quoting *Hearing Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the H. Comm. on Energy and Commerce*, 100th Cong. 17-18 (1987)). Indeed, when an agency permits one industry member to engage in certain conduct in a consent decree, it cannot prohibit similarly situated competitors from engaging in the same conduct. *See, e.g.*, *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985).

Cognizant of the FTC's practice, the Illinois Supreme Court recognized that consent decrees authorize conduct for other similarly-situated tobacco manufacturers. *Price*, 848 N.E.2d at 45 ("[A] consent order may serve as authorization for nonparties to the order to follow its directives."); *see also Watson*, 420 F.3d at 862 (recognizing based on the 1971 consent decree that the FTC has determined that the use of a "low tar descriptor in conjunction with its cigarettes' FTC rating" is "*not* . . . deceptive") (emphasis in original).

The government contends that defendants' arguments are inconsistent with a petition that a single defendant (PMUSA) filed with the FTC. U.S. Br. at 159. But the very premise of that petition was that the FTC "has *specifically permitted* the use of descriptors such as 'low,' 'lower,' and 'reduced' tar that reflect the [FTC] Method's yield measurements." JA7874 (emphasis added). PMUSA merely asked the FTC to consider a *new* regulatory program in light of new scientific

developments. JA7875. The FTC's failure to act on that petition to date is only further proof that it continues to authorize the use of descriptors.

Similarly, the 1998 notice and comment relied upon by the government, U.S. Br. at 153-58, arose out of FTC questions as to whether it should *change* its regime in light of then-newly emerging science. *See Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48,158 (Sept. 12, 1998). Nowhere in the notice and comment did the FTC disavow the authorization it provided in its 1967 "enforcement policy" statement or reject the policies expressed in its consent decrees. And defendants were simply expressing their view at the time that there was no need for the FTC to take action with respect to descriptors because "[*c*]*hanges* in the established use of those terms could lead to substantial confusion." JA6917 (emphasis added).

Finally, the government argues at length that defendants somehow deceived the FTC about "compensation" and the limitations of the FTC Method. U.S. Br. at 147-58. The premise of this argument is that the FTC is so gullible that it relies only on industry statements to determine how best to regulate. This is irrelevant and untrue.

The only relevant issue is that the FTC approved descriptors, not why it did so. This is particularly true because the government is not alleging that the FTC violated the APA by failing to examine the relevant factors. If the FTC believes it

has been deceived, it has the authority to take action, *see* 15 U.S.C. § 45(a)(2) -- yet it has not done so. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (state-law claims based on alleged fraud upon an agency are conflict preempted because they would infringe upon the agency's inherent powers to protect itself against deceit); *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir. 1994) (RICO case holding that "applying a general exception for fraud on the regulators would be inconsistent with this line of Supreme Court cases"). In addition, statements made to the FTC were intended to influence regulation and thus protected under *Noerr-Pennington*. *See infra* at 68-71; Defs.' Br. at 106-11.

In any event, this attack on the FTC's competence is belied by the record. As the district court found, the FTC's press release announcing the commencement of its program "clearly described the limitations of the standardized test method it was adopting." JA2483-85; *see also Watson*, 420 F.3d at 862 ("The FTC was well-aware of the limitations of the [FTC] Method."); *Price*, 848 N.E.2d at 9 (same). And contrary to the government's allegations of deceit, TI even issued a press release at the time stating that the FTC Method was "unsound" and that the "'tar' and nicotine results" produced by the FTC Method "may be inaccurate [and] misleading" to consumers. *See, e.g.*, JA4261.

Since then, the FTC has repeatedly investigated allegations that its program was misleading because of compensation. Defs.' Br. at 69-70 (summarizing FTC

investigations); *see also Price*, 848 N.E.2d at 14. During one of those investigations, Brown & Williamson contended that "the entire FTC rating system is itself misleading" because "many smokers 'compensate' -- they change their smoking habits to receive more tar and nicotine from low-rated cigarettes . . . than the FTC ratings would suggest." *FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981, 984-85 (D.D.C. 1983), *reversed by* 778 F.2d 35 (D.C. Cir. 1985). The FTC defended its policy (and the district court there agreed) on the ground that, although the "FTC smoking machine does not and is not intended to duplicate actual smoking behavior," it does "tell a smoker the relative amounts of tar and nicotine he would receive in his mouth if he smoked two cigarettes in the same manner." *Id.* at 982. Thus, a "smoker who avoids engaging in compensatory behavior would still receive tar and nicotine into his mouth in rough proportion to the FTC numbers" and "the system does provide legitimate comparative information to consumers who wish to reduce the health hazards the Surgeon General has concluded are inherent in cigarette smoking." *Id.* at 985-86.

On every occasion that the FTC has considered "compensation"-based criticism of its program, the FTC has declined to change it. *See, e.g.*, *Watson*, 420 F.3d at 861 ("Although the FTC recognized these problems and solicited comment on them, the FTC ultimately chose to continue using the [FTC] Method."). Even today, more than six years after the National Cancer Institute concluded that there

was "no convincing evidence that changes in cigarette design . . . have resulted in an important decrease in the disease burden," JA7720, the FTC has declined to take action against descriptors or otherwise change its regulatory program.[14]

3. Government Approval Defeats RICO Liability

The government makes the astonishing argument that FTC approval does not prevent courts from criminalizing descriptors under a general fraud statute. U.S. Br. at 160, 163-67. But the government does not even attempt to contest the legal principle that a defendant cannot have the requisite "specific intent" to defraud where the conduct in question was approved by a government agency, particularly given the fundamental due process rights implicated. Defs.' Br. at 80-81.

The government attempts to distinguish the litany of cases holding that, where an agency has taken specific action pursuant to its statutory authority, a

[14] In a recent submission to Congress, the FTC explained that, although the FTC Method "may be misleading to individual consumers who rely on the ratings it produces as indicators of the amount of tar and nicotine they actually will get from their cigarettes," it had nevertheless acceded to requests from "public health agencies" to "postpone its proposed modifications to the test method until a broader review of unresolved scientific issues surrounding the system could be addressed," and the FTC testing regime remains in place while that review continues. Prepared Statement of the Federal Trade Commission Before the Committee on Commerce, Science, and Transportation – United States Senate, at 7, 9-12 (Nov. 13, 2007), available at http://www.ftc.gov/os/testimony/P064508tobacco.pdf.

court may not upset the regulatory regime by applying a general statute, such as RICO, particularly where it produces inconsistent results. Defs.' Br. at 72-75 (collecting cases). The government argues that the FTC's authorization cannot immunize conduct from RICO liability because the FTC's jurisdiction is not "exclusive," since the "commission's regulations [do not] 'occupy the field'" by wholly displacing prosecutions under federal fraud statutes or state consumer protection laws. U.S. Br. at 163-67 (quoting *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 989-90 (D.C. Cir. 1985)).

The government misses the point entirely. The issue is not whether the FTC's regulation is so exclusive that it displaces all the state and federal statutes covering the same subject matter. The issue is whether conduct specifically approved by a regulatory agency may be punished under a general criminal fraud statute. Regardless of the exclusivity of an agency's jurisdiction, a conflict between a general statute and specific regulatory action must be resolved in favor of the regulatory action unless Congress has demonstrated a contrary intent. *See, e.g.*, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 387 (1973).

For instance, the SEC's power to regulate financial activity is not "exclusive" and does not displace overlapping federal laws. Courts are nonetheless precluded from applying the antitrust laws to underwriting practices regulated by the SEC, even though the "SEC has *disapproved* . . . the conduct that

the antitrust complainants attack," simply because there is a "*risk*" of "conflicting guidance, requirements, duties, privileges, or standards of conduct." *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2392, 2394 (2007) (second emphasis added). Indeed, in *Credit Suisse*, the government acknowledged that such immunity extends to any activities that are "inextricably intertwined" with conduct that is "expressly or implicitly *authorized* under the securities laws." Brief for the United States as Amicus Curiae at 12-13, *Credit Suisse Sec. (USA) LLC v. Billing*, 2007 WL 173649 (2007) (No. 05-1157) (emphasis added).

The government's own preemption cases make clear that the question is whether the government's specific enforcement of a general statute is "*inconsistent*" with the FTC's "rule" or policy, and such "questions of preemption [can] be answered with relatively little difficulty" where, as here, "the Commission had defined with specificity the acts or practices it deemed unfair or deceptive." *Am. Fin. Servs. Ass'n*, 767 F.2d at 990 (emphasis added) (quotation omitted). This standard for displacing *state law*, where a separate sovereign has independent authority and responsibility to protect its citizens' welfare, applies *a fortiori* to efforts by one federal agency to interfere and disrupt the actions of an agency of the same sovereign.

In the face of this authority, the government points to 15 U.S.C. § 51, *see* U.S. Br. at 166, which provides that the FTC Act does not "alter, modify, or repeal

. . . the Acts to regulate commerce," including the fraud statutes. The issue, however, is not whether the FTC Act "altered" or "repealed" RICO or the fraud statutes, but whether those statutes were ever intended by Congress to apply to conduct undertaken pursuant to an agency's *specific* exercise of regulatory authority. The rule, as recognized even by the government, is that an action "'approved by the governing regulatory agency . . . is *per se* reasonable and unassailable in judicial proceedings' including a civil RICO action." U.S. Br. at 167 (citations omitted).

C. The Ban On Descriptors Violates The First Amendment's Commercial Speech Protections

The district court's usurpation and disruption of FTC policy-making authority defeats any claim that its ban on descriptors directly and narrowly advances a substantial government interest. Consequently, this restriction on commercial speech violates the test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Defs.' Br. at 84-89.

The government does not dispute that the FTC is the entity designated by Congress to protect tobacco consumers against deception, or that the Justice Department and the district court have no comparable authority. Since the FTC's actions demonstrate a government policy to *inform* consumers about relative tar

yields as measured by the FTC Method, there cannot be a substantial interest in *prohibiting* accurate descriptions of those same yields.

Nor does the government dispute that the regime created by the district court, where tar ratings are required but descriptions of those ratings are banned, cannot "directly and materially advance" any coherent interest. The Supreme Court has invalidated far more consistent regulatory schemes solely because they contained minor exceptions. *See, e.g.*, *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193-94 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995); Defs.' Br. at 86-89. The ban also is "more extensive than necessary" both because it extends beyond the FTC's regulatory regime and because disclaimers about "compensation" would be more than sufficient to avoid any potential consumer confusion. *Central Hudson*, 447 U.S. at 566.

D. The District Court Erred In Enjoining The Use Of Descriptors In Foreign Countries

Although the government urged the district court to enjoin the use of descriptors in foreign countries,[15] the government now entirely runs away from that ruling. The government's brief never once even mentions the ban on foreign descriptors. Nor does the government suggest that Congress intended to allow courts enforcing RICO to so invade the sovereignty of foreign nations.

[15] *See* JA3508.

There was no evidence below that the use of descriptors abroad has *any* effect inside the U.S. Defs.' Br. at 90-91. The government attempts to duck the issue by arguing that "the injunction should not be read to govern overseas activities with no domestic effect." U.S. Br. at 216. But there is no other way to read the ban on foreign descriptors, so it must be reversed.[16]

VI. DEFENDANTS' STATEMENTS WERE NOT MATERIAL OR INTENDED TO DEFRAUD CONSUMERS OF MONEY

Defendants' opening brief showed that (except for light descriptors) there was no finding or evidence that defendants' statements were made with an intent to defraud consumers of "money or property," *Cleveland v. United States*, 531 U.S. 12, 19 (2000), and no finding or evidence that they were "material" -- *i.e.*, of importance to a reasonable person in determining his choice of action in the transaction in question. *Neder v. United States*, 527 U.S. 1, 22 n.5 (1999); *United States v. Winstead*, 74 F.3d 1313, 1320 (D.C. Cir. 1996); *see also* Defs.' Br. at 92-98. The government's failure to prove this element requires that the judgment be vacated and judgment entered for defendants on all claims other than those relating to light cigarettes (which fail for the independent reasons described above).

[16] Indeed, applying the government's very own reasoning, the solely extraterritorial sale and marketing of tobacco (irrespective of where that tobacco is manufactured) are beyond the scope of this injunction, for such conduct undeniably resides within the heartland of "overseas activities with no domestic effect." U.S. Br. at 215-16.

1. The government ignores completely the legal requirement that only misrepresentations *intended* to deprive victims of "money or property" violate the mail and wire fraud statutes. *McNally v. United States*, 483 U.S. 350, 360 (1987). Nor does the government identify any evidence showing that defendants' statements were made for this purpose. Indeed, the government *concedes,* for example, that the purpose of defendants' statements regarding ETS was to forestall anti-smoking *regulation*, U.S. Br. at 27, and not to defraud anyone of money. Such statements are not covered by the fraud statutes and are protected by the First Amendment. Defs.' Br. at 106-17.

2. The mail and wire fraud statutes also criminalize only *material* falsehoods, *i.e.*, those of importance to reasonable persons in deciding whether to purchase cigarettes. *Neder*, 527 U.S. at 22 n.5; *Winstead*, 74 F.3d at 1320 (mail fraud requires that the alleged falsehood "would be of importance to a reasonable person in making a decision about a particular matter or transaction"); *see also* JA3316-17 ("materiality is a fundamental element" of fraud). The government identifies no evidence that defendants' statements were *material* to *consumers* -- let alone evidence sufficient to satisfy the applicable clear and convincing evidence standard -- but instead erroneously claims that the court could find materiality based on its own "experience." U.S. Br. at 123. The government also erroneously

contends that materiality is "self-evident" here because defendants allegedly spent millions of advertising dollars on the statements. *Id.* at 123-28.

As a threshold matter, even if findings of materiality could be based on a judge's "experience" rather than evidence, the district court *failed to make* specific materiality findings on virtually all of the alleged schemes -- *e.g.*, ETS, nicotine addiction, nicotine manipulation, and youth marketing. Surely the judge must at least *find* materiality, even if based only on her own "experience."

In any event, the government is wrong that materiality findings may be based entirely on a judge's own personal "experience and understanding of human nature." U.S. Br. at 123 (citation omitted). The government cannot cite a single case supporting its astounding suggestion that civil plaintiffs need not prove this "fundamental element" of fraud. Surely the government would not suggest that materiality could be presumed in criminal prosecutions under the fraud statutes. *See United States v. Gaudin*, 515 U.S. 506 (1995). But courts have no more authority to dispense with evidentiary requirements in civil than in criminal cases. *Central Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 183-84 (6th Cir. 1993) ("[P]laintiff must prove each prong of the predicate offense, or 'racketeering activity,' to maintain a civil action under the RICO statute.").

The government invokes an analogy to administrative law and erroneously contends that the FTC need not support its materiality findings with evidence.

U.S. Br. at 123. However, the evidentiary requirements imposed on expert federal agencies have no bearing here, since the only reason this Court defers to district court factual findings is because the district court has reviewed and weighed the *evidence* in the particular case. In any event, it is black-letter law that even the FTC must support its determinations of materiality with "substantial evidence." *See, e.g.*, *Thompson Med. Co. v. FTC*, 791 F.2d 189, 196 (D.C. Cir. 1986).[17]

The government also relies heavily on a quotation from *Brown & Williamson*, a case that had nothing to do with materiality. U.S. Br. at 123. *Brown & Williamson* dealt only with whether a "self-evident[ly]" misleading statement was a "deception." 778 F.2d at 41. And even in that different context, the Court did not "state that a judge may make such a finding without evidence," even with respect to "self-evidently" untrue statements. *Id*. at 40. Moreover, if a statement is at all ambiguous, a court "cannot make a finding of deceptiveness unless the parties provide 'evidence of substance' about what 'the person to whom the

[17] While it is true that the FTC generally presumes that an advertising claim concerning safety is material, *see Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000), that is of no relevance here. Where -- as here -- materiality is disputed, even the "Commission deem[s] it 'necessary to look beyond a simple presumption of materiality to the particular facts.'" *Id*. at 787. Moreover, "[b]ecause of the Commission's cumulative expertise in such matters, a reviewing court may refuse to overturn an FTC adjudication of false advertising where it would reject such a finding by a district court relying on similar evidence of deception." *Brown & Williamson*, 778 F.2d at 40 n.1.

advertisement is addressed find[s] to be the message.'" *Id.* at 40-41 (quoting *Am. Brands, Inc. v. R.J. Reynolds Tobacco Co.*, 413 F. Supp. 1352, 1357 (S.D.N.Y. 1976)). Here, there was no such "evidence of substance" concerning materiality.

Nor could the district court find materiality based merely on the money spent on product advertising. Virtually none of the alleged factual misstatements appeared in the product advertising upon which defendants spent "millions upon millions." JA3317; *see also* U.S. Br. at 128. Instead, they appeared in press releases, congressional testimony, op-ed pieces, a few issue ads, and similar parts of a public relations and lobbying effort to influence public debate and regulation (or to respond to hostile media investigations). Excluding advertisements concerning light cigarettes (where materiality is not contested), only 12 of the thousands of statements identified in the opinion (far less than 1%) were in advertisements directed at the general public.[18]

3. It is significant that the government chose not to introduce any evidence about what consumers thought about defendants' statements. In contrast

[18] The government makes the baffling suggestion that funding TI somehow constitutes a "vast expenditure of *advertising* dollars." U.S. Br. at 128 (emphasis added). TI was not engaged in commercial advertising; rather, its purpose was to influence public debate and policy, which is protected speech. Thus, even accepting the government's characterization of TI's "misinformation" campaign, the only reasonable inference is those statements were directed to Congress and the "public" about policy issues, not fraudulently to induce consumers to purchase cigarettes.

to the evidence it introduced on consumers' perceptions of light cigarettes, the government did not provide a single document, expert, or survey suggesting that anyone believes that smoking is healthy, or that the debates about "addiction," nicotine manipulation, youth marketing, or ETS were important to purchasing decisions.

Even now, the government fails to offer even any *explanation* of why defendants' statements on these subjects would have been material to consumers. The government *concedes* that denying youth marketing is immaterial, U.S. Br. at 132-33, and it *concedes* that the ETS debate was a "public/political issue," where defendants' statements were directed at the "general public with pamphlets, newsletters and press releases," not at consumers through advertising. *Id*. at 27, 132. The government also does not deny that consumers are indifferent to whether the nicotine in cigarettes occurs naturally or because of "manipulation" and are also indifferent to what word is used to describe the difficulty that smokers face in quitting smoking. Nor does the government dispute that, because "the adverse health consequences of tobacco [are] well-known" in modern times, *FDA v. Brown & Williamson*, 529 U.S. 120, 138 (2000), and because every cigarette package has contained health warnings for over 40 years, no "reasonable [consumer] would be misled" by defendants' long-ceased statements "when the truth is under his nose in black and white (many times over)." *Assoc. in Adolescent Psychiatry, S.C. v.*

Home Life Ins. Co., 941 F.2d 561, 570 (7th Cir. 1991). Rather, the government relies on the district court's unsupported assertion that some unidentified percentage of smokers paid attention to such statements "in the early days." U.S. Br. at 127; *see also* Defs.' Br. at 96-97.

4. Finally, the government invokes cases holding that fraud can be actionable when directed at "gullible" victims possessing "monumental credulity" even if a reasonable person would not have believed the statements. U.S. Br. at 124-25. But these cases are inapposite for two reasons. *First*, the government confuses the standard for determining whether a falsehood is material with the standard for determining whether a falsehood is excused because the victims are "gullible." The government's cases do not even address the materiality requirement, but instead address whether falsehoods with the purpose and effect of fraudulently inducing a transaction can be excused because the victim was more likely than a "reasonable person" to believe the statement. The materiality requirement, by contrast, turns on whether a statement, *if believed*, would be important to a reasonable consumer's purchasing decision. The mere fact that a gullible person may have believed a statement does not mean that the statement was material -- *i.e.*, related to a fact that would be important to a consumer. And, in assessing whether the asserted fact *is* important, the standard is whether it would be important to a *reasonable* consumer. *Neder*, 527 U.S. at 22 n.5; *Winstead*, 74

F.3d at 1320. Any other standard would eliminate the materiality requirement by converting every falsehood, no matter how unrelated to consumers' purchasing decisions, into a material falsehood.

Second, with respect to materiality, the only time courts depart from the reasonable person standard is when the speaker "knows or has reason to know that [the] recipient regards, or is likely to regard, the matter as important . . . although a reasonable man would not so regard it." *Neder*, 527 U.S. at 22 n.5 (citing Restatement (Second) of Torts § 538 (1977)). Both common sense and the comments to the Restatement make clear that this alternative standard does not apply unless the speaker "practices upon another's idiosyncrasies" and "knows that the recipient, because of his own peculiarities, is likely to attach importance to it." Restatement (Second) of Torts § 538 cmt. f. By definition, then, this alternative approach to materiality is limited to situations where -- as in the cases cited by the government -- the alleged fraud was directed at particularly "gullible" victims and not the public at large. The public at large *is*, collectively, the average "reasonable person." This is why the government can cite no case that has ever applied an "unreasonable victim" standard in a mass consumer fraud case and why the FTC, whose decisions the government relies on in defending the district court's speech restrictions, U.S. Br. at 73, applies the "reasonable consumer" standard in determining whether advertising directed to the general public is false. *Novartis*

Corp. v. FTC, 223 F.3d 783, 786 (D.C. Cir. 2000). Moreover, it would violate the First Amendment to penalize statements to the general public which would not be significant to a reasonable consumer. *See infra* at 69-71.

In short, the government failed to prove that any of defendants' statements, other than the descriptors, was material to consumers or intended to deprive consumers of their money. Because the government failed to prove these essential elements and, as discussed above, the descriptors were not fraudulent, judgment should be entered for defendants.

VII. DEFENDANTS' ETS STATEMENTS WERE NOT FRAUDULENT

In the opening brief, defendants showed that their opinions and participation in the complex scientific debate over ETS' health effects were not fraudulent. Defs.' Br. at 99-104. Because a "statement of opinion cannot constitute fraud," *de Magno v. United States*, 636 F.2d 714, 720 n.9 (D.C. Cir. 1980), and because "there is no such thing as a 'false' opinion," *Ollman v. Evans*, 750 F.2d 970, 975-76 (D.C. Cir. 1984) (en banc), "taking one side of a medical or scientific dispute" of this sort cannot constitute fraud. *Luckey v. Baxter Healthcare Corp*., 183 F.3d 730, 733 (7th Cir. 1999). The only possible exception is where it is clear that the defendant did not subjectively believe its assertions or, perhaps, if its assertions were entirely devoid of legitimate support -- a burden that the government has not come even close to satisfying. Defs.' Br. at 100.

The fact that defendants possessed studies showing that ETS contains carcinogens and has toxic effects on animals when applied in high doses does not suggest that defendants did not believe their statements about the effect of ETS, at real-life exposure levels, on the incidence of disease in healthy humans. *See, e.g.*, *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1070 (6th Cir. 1993) (animal studies "present[] too wide an 'analytical gap' for reasonable inferences on causation" in humans). Indeed, the public health community has long known that ETS contains carcinogens and toxins, but still took decades to conclude that ETS causes disease in humans. Defs.' Br. at 101-02; JA4112-250 (collecting published articles between 1954 and 1966 identifying carcinogens in mainstream cigarette smoke).[19] More generally, the government's own theory of fraud -- that defendants attacked and mischaracterized studies based upon publicly available information -- defeats any suggestion that defendants had unique knowledge about ETS not known to the government or public health organizations.[20]

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[19] Equally unfounded is the government's reliance on a statement by TI observing that Professor Mantel found a "mathematical error" in a 1981 Japanese study on ETS. That one industry consultant and the director of the German cigarette trade association disagreed with Professor Mantel's finding does not mean that Mantel was wrong about this complicated statistical issue, much less that TI believed that Mantel's criticism was false. *See* U.S. Br. at 32-33; JA2986-87.

[20] For this reason, the rule in *Kropinski v. World Plan Executive Council-U.S.*, 853 F.2d 948, 953 (D.C. Cir. 1988), allowing fraud claims against opinions when the

The government contends that defendants' criticism of "studies" by federal agencies and "scientific literature" was fraud. U.S. Br. at 25-28. But it ignores that, far from finding defendants' statements fraudulent, a federal court *agreed* with defendant's criticisms and held that the EPA's conclusions were "arbitrary and capricious" more than a decade *after* the Surgeon General announced a scientific "consensus" on the health effects of ETS. *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 438, 463 (M.D.N.C. 1998), *vacated on other grounds*, 313 F.3d 852 (4th Cir. 2002). It cannot be fraud for defendants to make statements about these studies indistinguishable from those made by a federal district court.

Furthermore, regardless of whether defendants' statements were contrary to the scientific consensus, criminalizing such dissent would improperly chill the free expression necessary for the development of science. *See Bailey v. Huggins Diagnostic & Rehab. Ctr. Inc.*, 952 P.2d 768, 773 (Col. Ct. App. 1997) ("To subject authors of . . . opinions to the risk of multiple claims for personal injuries . . . based solely upon the majoritarian view that the opinion is 'false,' would impose an intolerable burden upon the author [and] have a ruinous and unjustifiable

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speaker implies knowledge of facts "unavailable to the listener," has no application here, and has never been applied to statements concerning *public* studies.

chilling effect upon free speech."). Courts have repeatedly warned against punishing or burdening scientific assertions.[21]

Here, imposing liability on defendants' ETS statements would be even more troubling because, as the government concedes, those statements were designed to influence public and political opinion about regulation. U.S. Br. at 27 (describing ETS as defendants' "biggest *public/political* issue" designed to forestall regulation requiring, *inter alia*, "segregated facilities") (emphasis added). The First Amendment does not permit, and the fraud statutes do not authorize, punishing the expression of sincerely held views on matters of public importance.

The government and the district court also make much of the fact that defendants provided funds to scientists and public interest organizations, such as the Washington Legal Foundation, that did not disclose their industry funding.

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[21] *See Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 993-94 (E.D.N.Y. 1977) ("Merck's right to publish free of fear of liability is guaranteed by the First Amendment."); *Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir.1994) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation."); *Oxycal Labs., Inc. v Jeffers*, 909 F. Supp. 719, 724 (S.D. Cal. 1995) ("The Court cannot inquire into the validity of . . . scientific theories, nor should it."); *McMillan v. Togus Regional Office, Dep't of Veteran Affairs*, 294 F. Supp. 2d 305, 317 (E.D.N.Y. 2003) ("Our technology and lives depend on modern science. Any unnecessary intervention by the courts in the complex debate and interplay among the scientists that comprises modern science can only distort and confuse."), *aff'd*, 120 Fed. Appx. 849 (2d Cir. 2005); *Apicella v. McNeil Labs., Inc.*, 66 F.R.D. 78, 85 (E.D.N.Y. 1975) ("Free communication in the vital area of health, just as in politics, should be encouraged.").

U.S. Br. at 33-35; JA3126. But there is no evidence that the scientists' reports were either factually false or reflected opinions that the scientists did not hold, and the mere fact that some defendants funded these reports does not render them criminally fraudulent.

VIII. DEFENDANTS' DENIALS OF CIGARETTES' ADDICTIVENESS WERE NOT FRAUDULENT

As defendants' opening brief establishes, defendants never denied that it was difficult to quit smoking, but instead merely resisted efforts by Congress and federal agencies to label cigarettes "addictive," because that pejorative term equated smokers with those addicted to controlled substances such as crack cocaine and heroin. Defendants' advocacy of one side of that semantic -- and long since ended -- debate cannot constitute fraud.

"Addiction" is an amorphous term that could connote "severe physical dependence" and "intoxication," of the sort associated with crack and heroin (as the Surgeon General interpreted the phrase until 1988), JA2070-71, or instead merely pharmacological effects that produce only "*unpleasant* withdrawal *sensations* when a person stops using it," JA2075 (emphases added) (the very different interpretation adopted by the Surgeon General in 1988). JA2076-77. The amorphous nature of the term was reflected by "the public health community['s] struggle[] with the classification of nicotine" as addictive, JA2071, which produced a wide variety of conclusions among leading government and private

organizations.[22] Indeed, as the district court recognized, "the scientific and medical community" has thrown up its hands and, like "the tobacco industry itself," used "the terms 'drug addiction' and 'drug dependence' interchangeably." JA2082-83.

Even the government's selective quotations reveal that defendants always conceded that withdrawal from smoking "can cause sleeplessness, irritation, depression and other uncomfortable symptoms." U.S. Br. at 43. This description *echoed* that of the public and private health agencies and defendants' internal statements.[23] Thus, the semantic dispute solely concerned which label to attach to these agreed-upon withdrawal sensations. Even in that regard, defendants only disagreed that smoking was addictive "in a drug sense, in the sense that we apply it to heroin or cocaine," because, among other things, there was no "chemical addiction" or "chemical" or "physical dependence." U.S. Br. at 129. This cannot have been fraudulent because a reasonable interpretation of "addiction" was the

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[22] For example, the National Institute of Drug Abuse concluded that nicotine was a "*dependence*-producing drug" because "attempts to stop . . . lead to *discomfort*," JA2073, JA2197 (emphases added), the American Psychological Association characterized it as "nicotine *dependence*," JA2077 (emphasis added), and the FDA did not decide until *1996* that nicotine was "addictive." JA2078-79.

[23] *See*, *e.g.*, JA2068 (Scientific community's description of the withdrawal symptoms experienced by "approximately 80%" of habitual smokers was "irritability, lethargy, restlessness, sleeplessness, anxiety, depression, hunger and weight gain"); JA3244 (quoting internal document that "a realistic view of cessation would show 'a restless, nervous, constipated husband'"); JA2089.

traditional one, in which the label applied only to "intoxicating" drugs like crack and heroin, which produce severe "chemical dependence" and far more serious withdrawal symptoms.

While the district court opined that defendants were "distort[ing]" the "terminology of addiction," JA3243, this means only that defendants candidly resisted federal agencies' efforts to *change* "the terminology of addiction." It is undisputed that defendants openly informed the public about the basis for their disagreement by stating that, "in order to include smoking as an addiction, one must redefine that term." JA2204.[24]

In all events, defendants' past resistance to the latest terminology cannot constitute fraud for three additional reasons. *First*, because both "smokers and nonsmokers agree that quitting [smoking] is difficult," JA2082, the debate over the exact word used to label that difficulty is described is not material. The government produced no evidence to the contrary.

Second, the only relevant question in the consumer fraud context is what the "person to whom the advertisement is addressed find[s] to be the message."

[24] Recognizing this flaw, the government seeks to change its theory on appeal and argues that defendants committed fraud when they supposedly denied that cigarettes created "dependence." U.S. Br. at 128-29. But there was no evidence that defendants ever denied that cigarettes create a "dependency," the district court made no such findings, and there was no claim that any such denial would be fraudulent.

Brown & Williamson Tobacco Corp., 778 F.2d at 40. There is no evidence that consumers disagreed with defendants' view that the "addictive drug" label should be affixed only to drugs causing severe physical dependence and withdrawal symptoms far worse than "irritation" and "sleeplessness." U.S. Br. at 43.

Finally, *all* of defendants' challenged public denials of "addiction" are protected under *Noerr-Pennington* because they related to potential regulatory activities, and were made in testimony, summaries of testimony, or contemporaneous news broadcasts concerning those regulatory efforts. Defs.' Br. at 108-10; JA3295, JA3297.[25]

[25] Apparently recognizing that there is no basis for finding defendants' denials of "addiction" fraudulent, the district court and the government change the subject and also contend that defendants believed that nicotine was a "drug" and had some secret knowledge that this drug had pharmacological effects. JA3244; U.S. Br. at 41-46. This is both irrelevant and untrue. There is not even a claim here that denying nicotine is a "drug" could possibly constitute fraud. *See FDA v. Brown & Williamson*, 529 U.S. 120, 136 (2000). Nor did the government claim that defendants' alleged denial that nicotine has pharmacological effects constituted fraud. Moreover, as a factual matter, the district court's own findings plainly establish that knowledge of these effects were not uniquely or unusually within defendants' possession. For example, the district court found that a "highly respected reference book" that was "published with the *financial support of Philip Morris*" "summarized" the *existing literature*, which was that "nicotine is a powerful and potent nerve acting drug." JA2071-72 (emphases added) (also citing other studies from "1942" and "1945" on "nicotine withdrawal syndrome.").

IX. THE DISTRICT COURT'S APPLICATION OF THE FRAUD STATUTES VIOLATES THE FIRST AMENDMENT

The government does *not* dispute that a substantial majority of the allegedly fraudulent statements were designed either to persuade the government not to expand regulation or to participate in the ongoing public debate about tobacco. Defs.' Br. at 107-17. Nor does the government even attempt to claim that the First Amendment allows it to punish such speech. Rather, the government argues only that it is permissible to punish falsehoods contained in commercial speech. But this truism does not support penalizing the speech directed to public issues here.

First, the government does not dispute that the decision below was predicated on petitioning activity by defendants and does not defend the district court's crimped notion that *Noerr-Pennington* protects only speech specifically directed to a congressional committee. Defs.' Br. at 109. The government's argument that *Noerr-Pennington* does not protect falsehoods made in the public arena, U.S. Br. at 168-69, ignores the fact that *Noerr* itself involved a public campaign of misleading statements that utilized biased research and distorted empirical evidence. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988) ("A publicity campaign directed at the general public, seeking legislative or executive action, enjoys antitrust immunity, even when the campaign employs unethical and deceptive methods."); *Davric*

Main Corp. v. Rancourt, 216 F.3d 143, 147 (1st Cir. 2000) (The *Noerr-Pennington* doctrine "applies to 'petitions' before legislatures, administrative agencies, and courts. Even false statements presented to support such petitions are protected.") (citations omitted).[26]

Second, the government does not dispute that good faith discussion of issues of public significance is protected speech. Defs.' Br. at 111-17. Rather, the government merely recites the truism that "fraud" is not protected by the First Amendment's speech clause. U.S. Br. at 167-70. But in order for speech to be "fraudulent," it must not only be false, but be (1) made with a specific intent to defraud and (2) material. *See, e.g., Illinois ex. rel. Madigan*, 538 U.S. at 620 (characterizing these requirements as being "[o]f prime importance"); Brief for the United States as *Amicus Curia*e at 9-10, 17-19, *Nike, Inc. v. Kasky*, 2003 WL 899100 (2003) (No. 02-575).

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[26] *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), merely held that *Noerr* protection does not extend to knowingly false petitions in the *adjudicative* process, *see id.* at 1254-55, based on the Supreme Court's holding that "[m]isrepresentations, *condoned in the political arena*, are not immunized when used in the adjudicatory process." *Id.* at 1255 (emphasis added) (quoting *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972)). The parenthetical description in *Edmondson & Gallagher v. Alban Towers Tenants Ass'n*, 48 F.3d 1260, 1267 (D.C. Cir. 1995) (cited at U.S. Br. at 169), obviously does not change or alter *Whelan* itself. *See id.* at 1266 (noting that it was not reaching any *Noerr-Pennington* issue). The other case cited by the government -- *McDonald v. Smith*, 472 U.S. 479 (1985) -- did not even concern *Noerr*.

The district court's collective intent theory, however, effectively eliminated the scienter requirement, in violation of long established First Amendment principles. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 287 (1964) ("The mere presence of stories in the file does not, of course, establish that the *Times* 'knew' the advertisement was false," even applying a *respondeat superior* theory.). And the court also penalized speech absent any evidence or finding that any of the alleged misrepresentations (other than those concerning light cigarettes) was material to any actual consumer's purchase of cigarettes, which the government recognized was unconstitutional in *Nike*. *See* Brief for the United States as Amicus Curiae at 9-10, 23, *Nike*.[27] At a minimum, the evidence must demonstrate that a reasonable person would likely rely on the statement -- and in the context of the decades-long mass fraud alleged here, the complete absence of any such evidence defeats any fraud allegation.

[27] The government's *Nike* argument that speech may be more liberally suppressed where the government has "the exclusive authority to prosecute" is wrong. *First*, RICO, like the California statute in *Nike*, has a private right of action. *See* 18 U.S.C. § 1964(c). *Second*, as defendants showed in the opening brief, Defs.' Br. at 116 n.44, the First Amendment is most centrally directed toward regulation of speech by the government. *See Philadelphia Newspapers Ass'n v. Hepps*, 475 U.S. 767, 777 (1986). *Third*, any presumption of neutrality underlying government enforcement is undermined by the facts of this case, where President Clinton effectively directed the Department of Justice to sue an entire industry in a State of the Union speech. *See* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2386, 2392 (2001); *see also* JA7922.

The government's argument that no such evidence is required, and that speech may be suppressed even if it bears no reasonable relationship to any purchasing decision, is at war with the bedrock First Amendment principle that the government has no interest in suppressing speech that does no harm and this Court's specific rejection of the "unreasonable person" concept as a First Amendment standard. *See, e.g., Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 897-98 & n.8 (D.C. Cir. 1984) (rejecting as insufficient "[t]hat some small number of careless readers might be misled" by challenged speech, and noting that any ambiguity in this regard must be resolved in favor of protecting the speech); *see also*, *e.g.*, *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (rejecting effort "to reduce the adult population . . . to reading only what is fit for children").

Finally, the government's reliance on false advertising cases is inapposite because the speech here is not "commercial." Defs.' Br. at 117. In any event, any conceivable commercial speech here is "inextricably intertwined" with fully protected speech and, as the government recently acknowledged, the Supreme Court has held "that the exacting First Amendment standards applicable to noncommercial speech apply as well to . . . limitations on commercial speech" when the two forms of speech are so "intertwined." Brief for the United States as Amicus Curiae at 14, *Credit Suisse Securities (USA) LLC* (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988)).

PART THREE: ERRORS RELATING TO THE APPLICATION OF RICO

X. THE GOVERNMENT HAS NOT SHOWN THAT DEFENDANTS CONSTITUTED AN "ENTERPRISE"

To be subject to liability under § 1962(c), a person must associate with an "enterprise" and conduct or participate in the conduct of its affairs through a pattern of racketeering activity. Significantly, the government does not contest defendants' argument that the alleged enterprise here did *not* engage in a number of the activities enjoined by the district court (even assuming that an "enterprise" existed for some purposes). For example, the district court did not find that defendants acted jointly -- or conducted the affairs of the alleged "enterprise" -- with respect to light cigarettes. The *only* evidence in this regard is that all defendants marketed such cigarettes, but the government *agrees* that parallel business conduct, such as marketing competing diet colas, does not establish joint activity. U.S. Br. at 91. It argues, rather, that such competition can *become* joint RICO activity if "Coke and Pepsi . . . form[ed] a 'Cola Institute' in order to spread misinformation about the dangers of their products." *Id.* But the government points to *no* actions by TI or any other organization, or any joint activity between any defendants, to spread misinformation about light cigarettes.[28] Rather, as with

[28] The government points to two instances where one defendant *ceased* making public statements about a *competitor's* low-tar cigarettes. U.S. Br. at 99-101. It is not fraud to stop *criticizing* a *competitor's* products.

Coke and Pepsi, defendants here marketed and sold light cigarettes as competitors, not conspirators. Likewise, the government identifies no evidence -- and there is none -- that defendants acted in concert to manipulate nicotine, deny "marketing to youth," or suppress research or documents. Once again, the government refers only to conduct by *individual defendants* for their own purposes, which cannot fairly be characterized as an "enterprise's affairs." U.S. Br. 38-40.

Furthermore, the government does not even attempt to defend the legally insufficient finding that defendants' "common purpose" -- another essential prerequisite of a RICO "enterprise" -- was to maximize profits. Defs.' Br. at 122. Instead, the government claims that "[t]he district court did *not* define the purpose of defendants' enterprise as a mere interest in enhancing profits," but rather described the purpose as to "attract and retain customers by deceiving them about the toxicity and addictiveness of cigarettes." U.S. Br. at 89-90. But in the very first sentence of the section of its opinion entitled "Defendants' Enterprise Had a Common Purpose," the district court stated that the "central shared objective of Defendants has been to *maximize profits of the cigarette company Defendants* by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud existing and potential smokers." JA3263 (emphasis added). Moreover, if correct, the government's alleged "common purpose" further confirms that the numerous alleged schemes discussed above were *not* part of any

purported enterprise, since those alleged schemes are unrelated to any "purpose" of "deceiving [customers] about the toxicity and addictiveness of cigarettes." U.S. Br. at 89.

The government and the district court also failed to name a single individual who was allegedly part of the enterprise, even though the government concedes the need to prove "'the existence of a continuing core of personnel.'" U.S. Br. at 92 (quoting *Perholtz*, 842 F.2d at 355). Indeed, the government never identifies *any* individual who committed racketeering acts. And since such identification is crucial to determining whether any particular act is in furtherance of the "enterprise's affairs, not just [each defendant's] own affairs," *Cedric Kushner*, 533 U.S. at 163, the government cannot establish the requisite "nexus . . . between the enterprise and the racketeering activity." *First Capital Asset Mgmt., Inc. v. Satinwood, Inc*., 385 F.3d 159, 174 (2d Cir. 2004); *see also Yellow Bus Lines*, 913 F.2d at 954.

At bottom, the government's entire case rests on the assertion that every employee of every defendant was part of the alleged RICO "enterprise" and, therefore, all defendants are liable under RICO for *any* wrong committed by *any* employee of *any* defendant for the purpose of maximizing profits. The government cannot cite any principle of logic or law to support such an unbounded application of RICO.

Finally, like the district court, the government fails to identify any "enterprise" that "is an entity separate and apart from the pattern of [racketeering] activity in which it engages." *United States v. Turkette*, 452 U.S. 576, 583 (1981); *see also Perholtz*, 842 F.2d at 363 ("[T]he enterprise is not *equivalent* to the pattern of racketeering . . . activity.") (emphasis in original).[29] The government asserts that defendants' "common purpose" "has been to attract and retain customers by deceiving them about the toxicity and addictiveness of cigarettes" and then asserts that this "common purpose" is what "define[s] the enterprise." U.S. Br. at 89-90. But this improperly conflates the "enterprise" with the alleged "pattern of racketeering" -- elements that are separate and distinct under the RICO statute. *See Turkette*, 452 U.S. at 583.

[29] *Perholtz* held that the evidence used to prove an enterprise may overlap with that used to show "proof of the pattern." 842 F.2d at 367. That case does not, however, support the government's more radical notion that it proved an enterprise simply because defendants have purportedly engaged in acts of "deception." *See id*. at 366 ("the government is required to prove that [RICO defendants] are bound together by some form of organization so that they function as a continuing unit, and thus constitute an 'enterprise'"); *see also Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003) ("The enterprise is not the pattern of racketeering activity.").

XI. THE DISTRICT COURT'S ERRORS ALSO REQUIRE THE REVERSAL OF ITS RULING THAT DEFENDANTS VIOLATED 18 U.S.C. § 1962(d)

Because the district court erred in concluding that defendants' conduct violated section 1962(c), this Court should also reverse the district court's ruling that defendants violated 18 U.S.C. § 1962(d). Where, as here, the conduct that is the subject of an alleged conspiracy does not violate one of RICO's substantive provisions, there can be no liability under § 1962(d). Defs.' Br. at 126.

The government observes that it is possible for a defendant to be held liable under § 1962(d) even if the defendant did not personally engage in conduct that violated one of RICO's substantive provisions. U.S. Br. at 141-45. But this is beside the point. Section 1962(d) prohibits only conspiracies "to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). Thus, a "conspiracy" to engage in conduct that, if completed, would not itself violate RICO does not violate § 1962(d). *See, e.g.*, *Salinas v. United States*, 522 U.S. 52, 65 (1997) (defendant liable for conspiracy under RICO only if common "endeavor" would, "if completed . . . satisfy all of the elements of a substantive criminal offense.").

PART FOUR: REMEDIAL ISSUES

XII. THE DISTRICT COURT'S CORRECTIVE STATEMENTS REMEDY WAS ERRONEOUS

A. The Corrective Statements Order Violates Section 1964(a)

As demonstrated in defendants' opening brief, the district court's requirement that defendants make and fund "corrective communications" must be vacated because this backward-looking remedy is not permissible under § 1964(a). The government does not contest that corrective statements are inherently designed to correct lingering misimpressions caused by *past* statements. Nor can the government contest that this Court held in *Philip Morris* that RICO does not permit such backward-looking remedies. The government nonetheless argues that corrective statements are somehow consistent with § 1964(a) because "fraud by its nature is on-going until corrected." U.S. Br. at 205. Relying exclusively on two decisions decided under the FTC Act,[30] the government thus contends that corrective communications can always be required to correct the effects of past misconduct, because false impressions "live[] on after the false advertising ceases." U.S. Br. at 206 (citation and internal punctuation omitted).

The government's argument is incorrect for at least three reasons. *First*, *Warner-Lambert* and *Novartis* are irrelevant because the FTC Act under which

[30] *Novartis Corp. v. FTC*, 223 F.3d 783 (D.C. Cir. 2000); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977).

they were decided permits remedies that "dissipate the future effects of a company's past wrongful conduct," *Warner-Lambert*, 562 F.2d at 761 & n.60, while *Philip Morris* squarely held that RICO does *not* permit remedies "focused on correcting the effects of past wrongdoing." 396 F.3d at 1198.[31] Consequently, if consumers are "deceived" about a product's properties by virtue of a company's prior misstatements, the FTC is authorized to undo that prior harm, but federal courts are not similarly empowered under § 1964(a) to rectify prior harms. Moreover, the FTC Act reaches statements which, even unintentionally, have a "tendency to deceive," while RICO reaches only knowing falsehoods. *Brown & Williamson Tobacco Corp.*, 778 F.2d at 40; *Winstead*, 74 F.3d at 1317; *FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 635 (7th Cir. 2005) ("The FTC is not, however, required to prove intent to deceive.").

Second, even if the FTC Act, as interpreted in *Warner-Lambert* and *Novartis*, were controlling, those cases authorized corrective statements only *accompanying future advertising*. Here, however, the required corrective statements are wholly untethered to future advertising and are required even if defendants never advertise at all. JA1621-26.

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[31] Likewise, the FTC Act prohibits statements with a "tendency to deceive," regardless of the intent of the speaker, *see, e.g.*, *Brown & Williamson Tobacco Corp.*, 778 F.2d at 40. In contrast, the fraud statutes prohibit only knowing falsehoods undertaken with specific intent to defraud.

Finally, *Warner-Lambert* and *Novartis* rested upon specific determinations, supported by abundant evidence, that actual consumer confusion about the issues subject to corrective statements would linger into the future in the absence of correction. *See Warner-Lambert*, 562 F.2d at 762-63; *Novartis*, 223 F.3d at 787-88. Here, the district court did not and could not make any such finding because the evidence overwhelmingly demonstrated that consumers have understood the health risks associated with smoking for decades. The health risks of smoking have been widely publicized since the 1950s, JA9054, every pack of cigarettes sold since 1966 has contained congressionally prescribed health warnings, and the public overwhelmingly appreciates the health risks associated with smoking. *See, e.g.*, JA6315-17 (documenting 1992 Gallup study revealing 99% of teenagers and 96% of adults believed that smoking was harmful to health).

B. The Corrective Statements Order Violates The First Amendment

Defendants' opening brief demonstrated that the commercial speech standard does not apply to the corrective statements order. Furthermore, that order in any event fails to satisfy even the more liberal, inapplicable test for coerced commercial speech. Defs.' Br. at 129-30. The government has not refuted either argument.

With respect to whether the commercial speech standard applies, the government misses the point entirely in arguing that defendants' *previous*

statements were commercial speech. U.S. Br. at 208. The relevant question under the First Amendment is not whether the *past* speech was commercial, but whether the *compelled* speech is commercial. The exception to the ordinary standards governing compelled speech applies only to speech required to be made "*in* commercial advertising." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (emphasis added). Thus, in *Zauderer*, the Supreme Court held that the attorney's speech enjoyed diminished constitutional protection only because the regulation in question required the provision of "factual information *in his advertising*." *Id.* (emphasis added). The requirement that defendants must make corrective statements in freestanding publications, wholly apart from any advertising, plainly does not fall within this exception for purely factual disclaimers attendant to commercial speech.

Thus, the coerced speech here is governed by the strict test applicable to coerced non-commercial speech. Under this standard, "the First Amendment direct[s] that government not dictate the content of speech absent *compelling necessity*, and then, only by means *precisely tailored*." *Riley*, 487 U.S. at 800-01 (emphases added). No one suggests that the corrective statements order can survive this exacting scrutiny.

Nor can the order satisfy even the less exacting standard governing compelled commercial speech. The government merely repeats its citations of

Warner-Lambert and *Novartis*, U.S. Br. at 207-08, suggesting that those two FTC cases impose a blanket rule exempting corrective statements from First Amendment scrutiny. Of course, there is no such blanket rule, as other corrective statement cases make clear. For example, in *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157 (7th Cir. 1977), the Seventh Circuit rejected a corrective statements order on free speech grounds because, as here, the order "would require [the trade association] to argue the other side of the controversy [over the health effects of cholesterol in egg yolks], thus interfering unnecessarily with the effective presentation of the pro-egg position." *Id.* at 164.

Furthermore, to justify a compelled commercial disclosure, the government must offer adequate evidence demonstrating that actual consumer confusion exists. *See, e.g.*, *Ibanez v. Florida Dep't of Bus. & Prof'l Reg. Bd. of Accountancy*, 512 U.S. 136, 146 (1994); *see also Warner-Lambert Co.*, 562 F.2d at 762; *Novartis*, 223 F.3d at 787. Here, however, with the exception of light cigarettes, the government offered *no evidence* of consumer beliefs. The absence of such evidence renders the order unconstitutional even under the First Amendment standard used in the FTC cases. *See, e.g.*, *Nat'l Comm'n on Egg Nutrition*, 570

F.2d at 164 (distinguishing *Warner-Lambert* on the ground that "the record here, unlike that" case did not demonstrate ongoing consumer confusion).[32]

C. The Countertop And Header Displays Are Impermissible

The government brushes aside the severe hardships that requiring counter-top and header displays will impose on innocent retailers, reasoning that such retailers can simply stop dealing with defendants. U.S. Br. at 210. The government simply ignores the numerous cases -- as well as the express language of 18 U.S.C. § 1964(a) -- requiring consideration of the burdens upon third parties. Defs.' Br. at 130-31. The injunctions in those cases were improper, even though the third parties were not "bound" by the injunctions, because they were adversely affected. The government does not dispute that the countertop and header display requirements will present retailers with the Hobson's choice of either accepting highly burdensome display requirements or forgoing a lucrative segment of the retail business. *See, e.g.*, JA1648; JA1644.

The government's only response to defendants' argument that the order irrationally requires retailers to erect three or more separate, substantially identical

[32] Moreover, any further "corrective" statements would be redundant of the existing congressionally mandated warnings and the massive public education campaigns that have been carried out for decades to "saturation" effect, JA1198-99, and would consequently fail the reasonable relation to a government interest requirement of *Central Hudson Gas & Elec. Corp.*, 447 U.S. 557, 566 (1980).

signs is to assert -- in direct contradiction to the plain terms of the order -- that it "simply ensures that no defendant will evade its corrective advertising costs by free-riding on the expenditures another defendant has already made." U.S. Br. at 210. But imposing a needlessly redundant requirement that harms retailers and concededly cannot benefit consumers cannot be justified by a desire to prevent "free-riding" -- an issue the district court never mentioned.

D. The Package "Onsert" Requirement Violates The Labeling Act

The government's only response to defendants' showing that the "onsert" requirement violates the Labeling Act is to manufacture a supposed distinction between statements required to be on a "cigarette package" and statements "supplied along with the cigarette pack" -- meaning an onsert affixed to the outside of the package. U.S. Br. at 209-10. But this trivial distinction based on the manner by which warnings are affixed ignores that the fundamental purpose of the Labeling Act is to "unequivocally preclude[]the requirement of any additional statements on cigarette packages beyond those provided" by statute. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001). Package "onserts" are, in fact, "a type of external *package label*," not something meaningfully separate from it. *United States v. Star Scientific, Inc.*, 205 F. Supp. 2d 482, 484 (D. Md. 2002) (emphasis added). PMUSA's voluntary use of package onserts, U.S. Br. at 209, is irrelevant to whether a federal court can mandate their use.

E. The District Court Failed To Give Defendants Adequate Notice And Opportunity To Be Heard Before Imposing The Corrective Statements Remedy

The corrective communications order also is flawed because the government waited until after trial to propose that remedy; consequently, the record contains no adequate factual support for it, in contravention of *Microsoft Corp.*, 253 F.3d at 101-03. The government's only response is that there will be further proceedings regarding the precise *content* of the corrective statements. U.S. Br. at 200. But these proceedings will not provide defendants with the requisite opportunity to contest the *propriety* of the remedy. Indeed, the very fact that the district court required corrective statements without knowing what they will even say further demonstrates that the court made no meaningful assessment of their need or propriety.

XIII. THE DISTRICT COURT'S GENERAL INJUNCTIONS ARE IMPERMISSIBLY VAGUE

As defendants explained in their opening brief, the district court's general "obey the law" injunctions are impermissibly vague. Defs.' Br. at 135-37. While conceding that "obey the law" injunctions are impermissible, the government argues that the opinion somehow injects enough specificity to satisfy Rule 65(d) and due process. U.S. Br. at 211-12. The sprawling 1,653-page opinion, however, only exacerbates the problem. As explained, the court's thousands of "findings" express general disapproval of a wide range of practices without ever specifying

which acts violated RICO. Thus, defendants must, on pain of contempt, speculate as to what the district court believed would be an "act of racketeering" or a "material false, misleading, or deceptive statement or representation." This approach violates the requirement that "[e]very order granting an injunction and every restraining order . . . shall be specific in its terms [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Fed. R. Civ. P. 65(d) (emphasis added).

The cases cited by the government, U.S. Br. at 212, are not to the contrary. In the one case involving a RICO injunction -- *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995) -- the defendant did not challenge the vague provision of the injunction, so the court never addressed the issue. In *McLendon v. Continental Can Co*., 908 F.2d 1171 (3d Cir. 1990), the district court enjoined the defendant's specific "liability avoidance plan" that violated ERISA and therefore did *not* impose an "'obey the law' injunction." *Id.* at 1182. And the Second Circuit has made clear that *SEC v. Manor Nursing Centers., Inc*, 458 F.2d 1082 (2d Cir. 1972), should not be read to authorize obey-the-law injunctions like the ones here. *See, e.g.*, *Sterling Drug, Inc. v. Bayer AG*, 14 F.3d 733, 748-49 (2d Cir. 1994).

Finally, with respect to the chilling effect that will result from the injunctions' vague speech restriction, the government argues that "there is no constitutional defect in an injunction requiring defendants to deal honestly with

their customers." U.S. Br. at 213. But an order requiring defendants to "deal honestly" is no different from an order requiring defendants to "obey the law." Invariably, the only way to avoid violating such injunctions is to avoid speaking altogether -- a sanction prohibited by the First Amendment. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991).

XIV. THE DISTRICT COURT'S APPLICATION OF THE INJUNCTIONS TO NON-PARTY SUBSIDIARIES IS IMPROPER

Defendants' opening brief demonstrated that application of the remedial order to defendants' non-party subsidiaries (1) violates Fed. R. Civ. P. 65(d) because the subsidiaries are acting neither as "agents" of, nor in "active concert or participation" with, any defendant to violate the injunction; and (2) violates due process because the subsidiaries were never served with process or provided an opportunity to contest the government's claims or the relief ordered. Defs.' Br. at 138-41; *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108-12 (1969). *The government offers no response to either argument.* This failure to respond constitutes waiver. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 340 (D.C. Cir. 2004).

Instead, the government argues that application of the injunctions to subsidiaries is necessary "to ensure that defendants cannot evade their obligations under the injunction through corporate reorganization." U.S. Br. at 214. But that explanation hardly entitles the district court to violate Rule 65(d) or due process.

In any event, as the government concedes, paragraph 20 of the district court's remedial order already prevents defendants from evading the court's injunctions by selling domestic cigarette businesses or key aspects of those businesses.

Finally, the government correctly rejects the notion that the order could properly extend to non-party subsidiaries selling or marketing tobacco products solely abroad, conceding that "the injunction should not be read to govern overseas activities with no domestic effect." U.S. Br. at 215-16; *see also* Defs.' Br. at 138-41. Accordingly, to the extent the order purports to extend to subsidiaries selling cigarettes abroad, it fails for the same reason as the prohibition on foreign descriptors. *See supra* at 51-52.

XV. THE CROSS APPEAL SHOULD BE DENIED

The government argues that the district court should have granted three additional remedies -- (1) a multi-billion dollar nationwide smoking cessation program; (2) multi-billion dollar funding of a massive public education campaign to warn the public about the risks of smoking; and (3) the establishment of a court-appointed "monitor" to supervise defendants' activities. The first two remedies are foreclosed as a matter of law by this Court's decision in *Philip Morris*. 396 F.3d at 1198. The monitoring remedy was properly denied as unconstitutional -- a finding the government does not even contest. This Court should affirm the district court's denial of these proposed remedies.

A. The District Court Correctly Held That *Philip Morris* Forecloses The Government's Cessation And Education Remedies

In *Philip Morris*, this Court held that disgorgement was not an available remedy under § 1964(a) because that provision permits only remedies "that 'prevent and restrain' future violations" of RICO. 396 F.3d at 1200. This Court explained that "jurisdiction is limited to forward-looking remedies that are aimed at future violations" and that the only permissible remedies are those "directed toward future conduct" and "preventing future violations." *Id*. at 1198, 1200. By contrast, disgorgement is "focused on remedying the *effects* of *past* misconduct" -- by stripping defendants of their ill-gotten gains -- and is "awarded without respect to whether defendant will act unlawfully in the future." *Id*. at 1198 (emphases added). There was no ambiguity on this point: § 1964(a) authorizes only remedies that "prevent and restrain" *future RICO violations*.[33]

The district court correctly held that the proposed smoking cessation and public education programs are barred by this square holding. JA3377-78. Like disgorgement, those remedies are not "aimed at future violations" or "directed toward future conduct," but are instead "awarded without respect to whether

[33] *See also id.* at 1198 (provision designed to ensure that defendants "cannot commit violations in the future"); *id*. (the "goal of the RICO section . . . here is to prevent or restrain future violations"); *id*. at 1199 ('"[R]estrain' is only aimed at future actions, 'prevent' is even more so.").

defendant will act unlawfully in the future." *Philip Morris*, 396 F.3d at 1198. Educating the *public* about tobacco's characteristics and helping the *public* quit smoking are simply not directed at *defendants'* future behavior, much less potential future RICO violations. Rather, these remedies are aimed solely at the *consumers* of defendants' products, to help them overcome the alleged confusion and addiction that purportedly are attributable to defendants' alleged *prior* falsehoods. Indeed, the government's own expert acknowledged that the purpose of the cessation program was to "mitigate the damage that has been caused by [defendants' past] conduct." JA9156. And the government concedes that the public education campaign is "designed to counteract" defendants' prior "campaign of disinformation." U.S. Br. at 218.

Consequently, both proposed remedies are plainly irreconcilable with *Philip Morris*' oft-repeated admonition that § 1964(a) permits only remedies directed at *future violations*. The government's contrary argument is nothing more than an ill-disguised and improper request to reverse this Court's prior decision.

1. *Philip Morris* Forecloses The Government's Attempt To Seek Remedies To Prevent The Future Effects Of Past Violations

The government argues that, although *Philip Morris* and the language of § 1964(a) concededly foreclose remedies aimed at the *past* effects of prior violations,

they somehow allow remedies directed at the present and future effects of prior violations. U.S. Br. at 222. This argument is meritless.

First, the government's argument is squarely foreclosed by *Philip Morris*. Its holding that "jurisdiction [under § 1964(a)] is limited to forward-looking remedies that are aimed at *future* violations," 396 F.3d at 1198, clearly precludes remedies aimed at *past* violations, regardless of whether these prior frauds have continuing effects. This Court's equally clear statement that § 1964(a) does not permit equitable relief "focused on remedying the effects of past misconduct," draws no distinction between "past" effects and "present or future" effects. *Id.* Thus, whether its language is construed "strictly," U.S. Br. at 222, or broadly, nothing in *Philip Morris* even begins to support the government's argument.

Indeed, because "ill-gotten gains" themselves are an ongoing effect of a past fraud, the holding in *Philip Morris* necessarily extended to present and future effects of past violations. If consumers were unjustly deprived of money by past fraud, they suffer today and in the future by having less money than they otherwise would have. Likewise, to the extent that defendants retain the "ill gotten gains," they have more money today than they would have had in the absence of the fraud. But *Philip Morris* squarely held that ill-gotten gains with such a present effect -- *i.e.*, those that are currently "available" to defendants -- cannot be disgorged any more than ill-gotten gains that are no longer in defendants'

possession. 396 F.3d at 1200-01. The government's "future effect" rule would also clearly authorize disgorgement of *future* profits traceable to past fraud, a result incompatible with the dismissal of the disgorgement remedy in its entirety.

Second, as noted in *Philip Morris*, § 1964(a)'s plain language authorizes only orders that "prevent and restrain *violations*." It does not authorize courts to prevent and restrain the mere "*effects* of violations." If Congress had wanted to extend jurisdiction to prevent the *effects* of violations, it would have said so. But it did not. And since one cannot "prevent and restrain" that which has already occurred, § 1964(a) applies only to *future* violations. In the prior appeal, no one urged that § 1964(a) could be interpreted to permit remedies aimed at the effects of past violations[34] and no court has ever so interpreted the statute.[35]

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[34] Neither the government nor the dissent in *Philip Morris* argued that § 1964(a) authorized remedies to address the present effects of past violations. Instead, they argued that §1964(a) does not "limit[] the district court's jurisdiction in equity" to order such retrospective remedies and, alternatively, that "disgorgement may encourage guilty defendants to obey the law in the future." 396 F.3d at 1222 (Tatel, J., dissenting); *see also* Brief for the United States at 17-18, 20, *United States v. Philip Morris USA, Inc.*, 2004 WL 1950638 (D.C. Cir. 2005) (No. 04-5252).

[35] *See, e.g.*, *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345, 354-55 (5th Cir. 2003) ("remedies are available only to prohibit ongoing and future conduct"); *Carson*, 52 F.3d at 1182 (§ 1964(a) does not "afford broader redress" than "foreclosing future violations"). Even those decisions that have permitted limited forms of disgorgement recognize that § 1964(a) is limited to preventing future *violations* and does not extend to future effects flowing from past violations.

Finally, the government's argument makes no sense. Section 1964(a) either allows relief directed at the effects of past violations or it does not: there is no basis in the statutory language, legislative history, case law, or logic for deeming one subset of effects remediable although others are not. Moreover, as noted, disgorgement would be directed at the "present and future effects" of prior wrongdoing. Since courts cannot cure this lingering monetary effect caused by prior RICO violations through disgorgement they also cannot cure the lingering informational and addictive effects caused by such violations.[36]

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[36] Nor is the government's argument aided by its invocation of the *Philip Morris dissenting* opinion for the proposition that the antitrust laws have been construed to permit remedies addressing the ongoing effects of past misconduct. U.S. Br. at 224. This same argument (and the same authority) was invoked by the government in the prior appeal, Brief for the United States at 27-29, and was rejected by this Court. The cited cases are readily distinguishable because they refer to effects that give rise to continued *violations*. For example, some of the decisions concerned divestment of interests that created anticompetitive market power. *E.g.*, *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944); *Ford Motor Co. v. United States*, 405 U.S. 562, 573-77 (1972). But this Court's prior decision recognized that divestment is a means to prevent future violations, *Philip Morris*, 396 F.3d at 1198, 1201, and that is particularly true in antitrust cases, where anticompetitive combinations or acquisitions amount to ongoing violations of the antitrust laws that must be dissolved, *see*, *e.g.*, *Crescent Amusement*, 323 U.S. at 189, much like the rescission of an ongoing contract that furthers extortion. U.S. Br. at 223-24. Here, by contrast, any future violation of RICO or the fraud statutes would have to result from ongoing *acts*, not mere ongoing conditions. Moreover, divestment, although plainly different from disgorgement, is even less analogous to the proposed remedies than that concededly forbidden remedy. Both *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950), and *United States v. E.I. DuPont de Nemours & Co.*, 353 U.S. 586 (1957), are completely inapposite because the

2. The Smoking Cessation And Public Education Remedies Cannot Be Justified By The Government's "Inoculation" Theory

The government also half-heartedly offers two additional arguments in an attempt to salvage its cessation and public education remedies. *First*, the government advances a convoluted theory that these remedies would diminish defendants' incentives to commit future frauds. U.S. Br. at 223-26. Although the government's theory is not entirely clear, it fails under any interpretation.

If the theory is that these remedies would make future violations less likely by reducing defendants' incentives to commit fraud -- whether by helping addicted smokers quit or by making a supposedly more-educated public less susceptible to being misled -- it is identical to the deterrence theory already expressly rejected by this Court:

> It is true, as the Government points out, that disgorgement may act to "prevent and restrain" future violations by general deterrence insofar as it makes RICO violations unprofitable. However, as the Second Circuit also observed, this argument goes too far. "If this were adequate justification, the phrase 'prevent and restrain' would read 'prevent, restrain, and discourage' and would allow any remedy that inflicts pain."

Philip Morris, 396 F.3d at 1200 (citation omitted). This Court's holding that notions of deterrence could not transform disgorgement into a permissible

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remedies in *United States Gypsum Co.* were geared to preventing future violations and *DuPont* did not even concern remedial issues.

"forward looking" remedy applies *a fortiori* here, because smoking cessation and public education would at most indirectly diminish profits while disgorgement would do so directly.

Moreover, the government does not even attempt to show how this indirect, hypothetical deterrence serves any meaningful purpose when defendants already face extensive prohibitory injunctions and judicial oversight. The government never explains how defendants might manage to engage in mass consumer fraud in violation of any specific prohibitory injunctions that may be permitted here without being detected by the government or punished by the district court. As Judge Williams' concurring opinion in *Philip Morris* noted, it is "almost inconceivable" that profit-reducing incentives "would materially alter [defendants'] readiness to persist in violations in the face of all of RICO's explicit remedies." 396 F.3d at 1205 (Williams, J. concurring). And basic rules of equity, as well as common sense and Due Process, prohibit *presuming* that defendants will violate injunctions in the future. *See, e.g., Nat'l Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1309 (8th Cir. 1988); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-45 (1974).[37]

[37] For these reasons, if the government's theory is that the "inoculation" would mitigate the impact of future frauds on consumers, it is plainly improper. Again, it is directed at the *effects* on *consumers'* behavior, rather than at defendants' future conduct, and simply *assumes* future violations.

The government's second theory is that its public education remedy is justified as long as "consumers continue to make purchasing decisions based on the false belief" caused by past statements. U.S. Br. at 218 (quoting *Novartis*, 223 F.2d at 787). In support, the government relies again on *Novartis* and *Warner-Lambert*, the FTC cases that permitted "corrective communications" remedies to "rebut" the lingering confusion caused by the defendant's "prior [false] claims." *Id.* (quoting *Warner-Lambert*, 562 F.2d at 769). But, as explained above, *supra* at 77-78, the analogy to the FTC Act is misplaced. Corrective communications are permissible under the FTC Act because that statute grants equitable power to "dissipate future effects of a company's past wrongful conduct." *Warner-Lambert*, 562 F.2d at 761 n.60. The whole point of *Philip Morris*, however, is that § 1964(a) is not a generalized "grant of equitable jurisdiction" to undo the effects of prior wrongs, because it does *not* permit injunctions "focused on remedying the effects of past misconduct." 396 F.3d at 1198-99. Thus, the fact that corrective communications are permissible under the FTC Act does not suggest that § 1964(a) authorizes such relief any more than the availability of disgorgement under the FTC Act suggests parallel authority under RICO. *See FTC v. Gem Merchants*, 87 F.3d 466, 469 (11th Cir. 1996).

To the extent that the government is urging that mere continued sales -- without any continuing misrepresentation -- constitute *fraud* simply

because some consumers may still be confused by past falsehoods, U.S. Br. at 218, such an argument is unsupported by the law or evidence. *First*, the argument is waived because it was never made below. *Kattan v. District of Columbia*, 995 F.2d 274, 278 (D.C. Cir. 1993). *Second*, no case suggests that the fraud statutes -- which, unlike the FTC Act, require a knowing falsehood, *see supra* at 78 -- criminalize continued sales simply because consumers are confused by past misstatements. Surely the government would not contend that *non*-defendant manufacturers commit criminal fraud every time they sell a cigarette unless they affirmatively correct existing confusion. U.S. Br. at 218. But the only difference between defendants and non-defendant tobacco companies is that defendants purportedly contributed to consumers' confusion through past violations, which is not a distinction supporting relief because correcting the effects of past violations is precisely what *Philip Morris* precludes. *Finally*, as noted, *see supra* at 79, there is no evidence of lingering confusion that requires correction, much less that supports an extensive public education campaign *on top of* the corrective communications ordered by the district court.

B. The District Court Did Not Abuse Its Discretion In Declining To Appoint A Monitor

The government requested below an elaborate system of "monitors" that would have usurped the district court's responsibility to determine defendants' compliance with its decree and severely interfered with the conduct of defendants'

businesses. *See* JA1415-18. Relying on *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003), the district court held that the government's proposal would violate Article III of the Constitution. JA3381-83. The government does not even try to defend its proposed program under Article III, but urges that the court was somehow obliged *sua sponte* to craft an alternative, constitutional "monitoring" plan. Even now, the government supplies no details concerning what this hypothetical monitoring program would look like. In any event, a court bears no responsibility to rehabilitate flawed remedial proposals from a party, and the district court acted well within its discretion in denying the government's unconstitutional proposal.

C. The Intervenors' Appeal Is Meritless And Should Be Dismissed

Finally, the intervenors ask for an additional remedy that not even the government seeks to impose -- a series of automatic penalties if youth smoking rates do not fall to various target levels in the next several years. The district court correctly rejected this proposal because it was not aimed at preventing or restraining future RICO violations. As noted, *supra* at 28, marketing to youth is concededly not a RICO violation. Moreover, the proposed penalties triggered by youth smoking levels were additionally defective because (1) the remedy is not aimed at preventing or restraining future violations because youth smoking levels are affected by numerous factors over which defendants have no control; and

(2) such civil penalties cannot constitutionally be imposed without a jury trial. *Tull v. United States*, 481 U.S. 412, 422 (1987).

This Court, however, need not even reach this issue because the intervenors' appeal was improper and should be dismissed. *First*, allowing the intervenors to seek remedies in addition to those sought by the government would improperly contravene Congress' decision to give the government *sole* discretion to bring an action under § 1964(a) and determine which remedies to pursue. *See, e.g.*, Brief for the United States as Amicus Curiae at 6-14, *Scheidler v. Nat'l Org. for Women*, 2005 WL 2138277.[38] Where, as here, intervention would be inconsistent with the congressional objectives underlying the statute, it should be denied. *See United States v. Hooker Chems. & Plastics Corp*, 749 F.2d 968, 988 (2d Cir. 1984) (courts considering intervention "must be careful not to open a back door to the courthouse when Congress deliberately closed the front door"); *Marshall v. United States Postal Serv.*, 481 F. Supp. 179, 181 (D.D.C. 1979).

Second, the intervenors lack Article III standing, a prerequisite for intervening in a lawsuit. *Jones v. Prince George's County, Md.*, 348 F.3d 1014,

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[38] *See also Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1083 (9th Cir. 1986) ("[T]he inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.") (emphasis in original).

1016-17 (D.C. Cir. 2003). As an initial matter, the intervenors have no injury-in-fact because their claimed injuries -- that the children of some members may one day be tempted to take up smoking[39] or that they may spend money on anti-smoking programs -- are purely conjectural, *see Va. State Corp. Comm'n v. FERC*, 468 F.3d 845, 848 (D.C. Cir. 2006), and "the type of abstract concern that does not impart standing." *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) (internal quotations citation omitted). Furthermore, the intervenors cannot establish the necessary causal connection between their claimed injuries and any ongoing or future RICO violations. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Whether or not the intervenors actually will have to expend additional resources to discourage smoking is entirely within their own control; such "self-inflicted harm" due to their "own budgetary choices" is not an "injury" for standing purposes. *Nat'l Treasury Employees Union*, 101 F.3d at 1429; *see also Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994).

[39] *See* JA1299-304, JA1338-43, JA1324-29, JA1330-33.

CONCLUSION

For the reasons stated above, defendants respectfully request that this Court reverse the judgment in its entirety and remand the case with instructions to enter judgment for defendants.

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Respectfully submitted,

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I hereby certify that this brief contains 23,799 words (exclusive of the table of contents, the table of authorities, the glossary, and this certificate), and that the brief (taken together with the other briefs for Defendants-Appellants) therefore complies with the word limit set forth in this Court's scheduling order.

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