[NOT SCHEDULED FOR ORAL ARGUMENT]

Nos. 13-5028 & 14-5161

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHILIP MORRIS USA, INC., et al.,

Defendants-Appellants,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici.

1. Parties.

a. The United States of America was the plaintiff in the district court proceedings and is the appellee in this appeal.

b. The following entities were the defendants in the district court: Philip Morris USA Inc. (formerly Philip Morris Inc.); Altria Group, Inc. (formerly Philip Morris Companies, Inc.); R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corp.; Lorillard Tobacco Company; American Tobacco Company; British American Tobacco, P.L.C.; British American Tobacco (Investments) Ltd.; The Council for Tobacco Research–U.S.A., Inc.; The Tobacco Institute, Inc.; and Liggett Group, Inc.

The following defendants are listed as the appellants in this appeal: Philip Morris USA Inc.; Altria Group, Inc.; R.J. Reynolds Tobacco

Company; Brown & Williamson Tobacco Corporation; and Lorillard Tobacco Company.

c. The following entities were intervenors in the district court: American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; National African American Tobacco Prevention Network; Tobacco-Free Kids Action Fund; Smithkline Beecham Corporation; Glaxosmithkline Consumer Healthcare, L.P.; Pharmacia Corporation; Elan Corporation, PLC; Novartis Consumer Health Inc.; Pfizer, Inc.; and Impax Laboratories, Inc.

Counsel for the following intervenors have entered appearances in this appeal: American Cancer Society; American Heart Association; American Lung Association; Americans for Nonsmokers' Rights; National African American Tobacco Prevention; and Tobacco-Free Kids Action Fund.

2. Amici.

The following entities were amici in the district court: Citizens' Commission to Protect the Truth; Regents of the University of California;

Tobacco Control Legal Consortium; Essential Action; City and County of San Francisco; Asian-Pacific Islander American Health Forum; San Francisco African American Tobacco Free Project; Black Network in Children's Emotional Health; the Attorneys General of Arkansas, Connecticut, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Tennessee, Vermont, Washington, Wisconsin, Wyoming, and District of Columbia; National Association of Black Owned Broadcasters; Fox Broadcasting Company; National Newspaper Publishers Association; National Association for the Advancement of Colored People; Viacom Inc.; A&E Television Networks, LLC; Interactive One, LLC; Radio One, Inc.; TV One, LLC; Univision Communications Inc.; CW Television Network; Little Rock Sun; and Turner Broadcasting System, Inc.

On appeal, the Washington Legal Foundation has filed an amicus brief in support of Defendants-Appellants, and the Tobacco Control Legal Consortium has sought and obtained the parties' consent to file an amicus brief in support of Appellees.

B. Rulings Under Review.

Defendants-Appellants seek review of the district court's memorandum opinion and order of June 2, 2014 (Docket No. 6094), and accompanying order of June 2, 2014 (Docket No. 6095). Defendants-Appellants also seek review of the district court's memorandum opinion of November 27, 2013 (Docket No. 5991), and accompanying order of November 27, 2013 (Docket No. 5992).

C. Related Cases.

This case was previously before this Court in the following appeals: *United States v. Philip Morris Inc.*, No. 01-5244; *United States v. Philip Morris Inc.*, No. 02-5210; *United States v. British American Tobacco (Investments) Ltd.*, Nos. 04-5207 and 04-5208 ; *United States v. Philip Morris USA Inc.*, No. 04-5252; *United States v. British American Tobacco Australia Services Ltd.*, Nos. 04-5358 and 05-5129; *United States v. Philip Morris USA Inc.*, Nos. 06-5267, 06-5268, 06-5269, 06-5270, 06-5271, 06-5272, 06-5332, 06-5367, 07-5102, and 07-5103; *United States v. Philip Morris USA Inc.*, No. 11-5145; *United States v. Philip Morris USA Inc.*, No. 11-5146.

GLOSSARY

FDA	Food and Drug Administration
JA	Joint Appendix
MSA	Master Settlement Agreement
RICO	Racketeer Influenced and Corrupt Organizations Act

STATEMENT OF THE ISSUE

In this civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* (RICO), the district court found that Defendants for decades operated an illegal racketeering enterprise in violation of 18 U.S.C. § 1962(c) and conspired to do so in violation of 18 U.S.C. § 1962(d). Exercising its remedial authority under 18 U.S.C. § 1964(a), the court ordered Defendants to issue corrective statements to prevent and restrain them from committing future RICO violations, as the district court found them likely to do. The issue presented is whether the text of the corrective statements is consistent with this Court's prior decision upholding the district court's use of a corrective-statement remedy under 18 U.S.C. § 1964(a) and the Constitution.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

The government initiated this RICO action against various tobacco company Defendants in 1999. In 2006, after a nine-month bench trial, the

district court made over 4,000 factual findings, and concluded that Defendants for decades operated an illegal racketeering enterprise in violation of 18 U.S.C. § 1962(c) and conspired to do so in violation of 18 U.S.C. § 1962(d). *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) ("*Liability Opinion*"). In fashioning a remedy designed to prevent and restrain future violations under 18 U.S.C. § 1964(a), the court ordered Defendants to issue corrective statements on five specified topics.

In *United States v. Philip Morris USA Inc.*, 566 F.3d 1095 (D.C. Cir. 2009) ("*Affirmance Opinion*"), this Court upheld the corrective statements as a proper exercise of the district court's authority under RICO and held that appropriately crafted corrective statements would not violate the First Amendment.

On remand, the district court determined the text of these statements and specified how Defendants must disseminate them. Defendants now challenge certain aspects of the text and implementation of the corrective statements.

A. PRIOR PROCEEDINGS

1. The 2006 District Court Decision

In August 2006, the district court entered final judgment against Defendants, finding "overwhelming evidence" that Defendants maintained, and continued to maintain, an illegal racketeering enterprise, and that each defendant "participated in the conduct, management, and operation of the Enterprise," in violation of 18 U.S.C. § 1962(c), as well as conspired to do so in violation of 18 U.S.C. § 1962(d). *Liability Opinion*, 449 F. Supp. 2d. at 27, 851-906.

The district court's findings of fact detailed Defendants' massive, decades-long campaign to deceive American consumers about the health dangers of cigarettes. The court particularized Defendants' coordinated efforts to mislead the public about the toxicity and addictiveness of cigarettes, including the dangers that cigarettes pose to smokers' health, *Liability Opinion*, 449 F. Supp. 2d. at 146-208, and the hazards to which environmental tobacco smoke exposed nonsmokers, *id.* at 692-801. The court recounted Defendants' deceptions regarding the addictiveness of

nicotine and cigarette smoking, *id.* at 208-308, even as Defendants manipulated nicotine levels to create and sustain addiction in smokers, *id.* at 308-84. These deceptions were epitomized in the misleading marketing of "health assurance" cigarettes, such as "light" and "low tar" products, which Defendants knew to be as hazardous and addictive as conventional cigarettes. *Id.* at 430-561. Defendants further magnified the effects of their fraud by targeting smokers under the age of twenty-one, a population particularly susceptible to their deceptive messages, while consistently denying such youth marketing. *Id.* at 561-692. And in furtherance of the conspiracy, Defendants suppressed, concealed, and destroyed information and documents to advance the goals of the enterprise. *Id.* at 801-39.

In crafting an order to remedy these RICO violations, the district court recognized that 18 U.S.C. § 1964(a)'s provision empowering courts to issue orders to "prevent and restrain violations of section 1962" extends only "'to forward-looking remedies that are aimed at future violations.'" *Liability Opinion*, 449 F. Supp. 2d at 908-09, 920-21 (quoting *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005)). The district

court thus undertook to determine whether Defendants' "past unlawful conduct indicates a reasonable likelihood of further violation(s) in the future." *Liability Opinion*, 449 F. Supp. 2d at 909 (internal quotation marks omitted). The district court found that based on the overwhelming evidence, Defendants were reasonably like to commit further RICO violations in the future. *See id.* at 908-19.[1]

The court examined in detail the "likelihood that Defendants' RICO violations will continue" in each of the five specific areas as to which the court ultimately ordered remedies. *Id.* at 911. The court found that "Defendants' practices have not materially changed in most of the Enterprise's activities, including: denial that [environmental tobacco smoke] causes disease, denial that Defendants market to youth, denial of the addictiveness of nicotine, denial of manipulation of the design and

[1] The court concluded that although some defendants had committed past violations of section 1962(c) and (d), they were not reasonably likely to commit future RICO violations. *See Liability Opinion*, 449 F. Supp. 2d at 915-19 (concluding that two trade organizations and Liggett were not reasonably likely to commit such violations). The court therefore did not impose any remedies on these defendants, and these defendants are not parties to this appeal.

content of cigarettes, suppression of information and research, and claims that light and low tar cigarettes are less hazardous than full-flavor cigarettes." *Id.*; *see also id.* at 911-13 (addressing likelihood of future RICO violations in each area addressed by the corrective statements).

The district court found that "an injunction ordering Defendants to issue corrective statements is appropriate and necessary to prevent and restrain them from making fraudulent public statements on smoking and health matters in the future." *Liability Opinion*, 449 F. Supp. 2d at 926. The court rejected Defendants' argument that the First Amendment barred such corrective statements, which the court determined are "necessary to prevent current and future advertisements from becoming themselves part of the continuing deception of the public," and which the court concluded were "narrowly tailored to prevent Defendants from continuing to disseminate fraudulent public statements and marketing messages by requiring them to issue truthful corrective communications." *Id.* at 926-27 (internal quotation marks omitted). Because the court found that "[t]he evidence identifies the various venues in which Defendants have made

their fraudulent public statements about cigarettes, including, but not limited to, newspapers, television, magazines, onserts, and Internet websites," the district court decided to "structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages." *Id.* at 927-28. The court identified the five areas in which it would order Defendants to make corrective statements: addiction; the adverse health effects of smoking; the adverse health effects of exposure to environmental tobacco smoke; Defendants' manipulation of physical and chemical design of cigarettes; and light and low tar cigarettes. *Id.* at 928. The court deferred deciding on "the exact wording of these statements" until further briefing by the parties. *Id.*

2. This Court's 2009 Decision

This Court affirmed "in large part" the district court's finding of liability, "remanding only for dismissal of the trade organizations," and "largely affirm[ed] the remedial order," including corrective statements on the specified topics. *Affirmance Opinion*, 566 F.3d at 1105. In appealing the

district court's decision, Defendants did not argue that any of the court's 4,088 specific factual findings about their conduct was clearly erroneous, and challenged only "the district court's findings regarding both RICO and the underlying fraud, as well as the remedies the court imposed." *Id.* at 1110; *see* Addendum A8, A10, Transcript, Oral Arguments in Case No. 06-5267 (D.C. Cir. Oct. 14, 2008) (Defendants' counsel) (representing that although Defendants did not "agree with the fact findings of the district court," they were "bringing legal challenges to the court" and "haven't challenged . . . any fact finding").

In addition to rejecting "Defendants' challenges to RICO liability" and "their general challenges to fraud liability," *Affirmance Opinion*, 566 F.3d at 1110, this Court upheld the district court's finding that there existed a reasonable likelihood that Defendants would commit future RICO violations. *Id.* at 1131.[2] Noting that the district court had "carefully

[2] In a more recent appeal, this Court upheld the district court's 2011 ruling that future RICO violations remained reasonably likely notwithstanding the 2009 enactment of the Family Smoking Prevention and Tobacco Control Act. *United States v. Philip Morris USA Inc.*, 686 F.3d 832,

Continued on next page.

articulated" and "conscientiously applied" the correct legal standard regarding future violations, giving "appropriate weight to the inferences drawn from Defendants' past conduct," this Court found that the district court's factual findings regarding future violations were supported by sufficient evidence and "up[held] the district court's decision to order remedies." *Id.* at 1132-34.[3]

This Court also rejected Defendants' argument that the district court's imposition of corrective statements on the five specified topics violated the First Amendment. *See Affirmance Opinion*, 566 F.3d at 1142-45. This Court dismissed Defendants' argument that the corrective statements warranted strict scrutiny, making clear that "Defendants' various claims—denying the adverse effects of cigarettes and nicotine in relation to health

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836-37 (D.C. Cir. 2012) (discussing Pub. L. No. 111–31, 123 Stat. 1776 (2009)).

[3] This Court vacated the district court's judgment against the Council for Tobacco Research and the Tobacco Institute as moot, and remanded for further fact finding and clarification regarding Brown & Williamson Holdings. *See Affirmance Opinion*, 566 F.3d at 1135. These entities are not appellants here.

and addiction—constitute commercial speech." *Id.* at 1143. The "intentionally fraudulent character of the [Defendants'] noncommercial public statements" intertwined with their commercial speech "undermines any claim for more exacting scrutiny." *Id.* at 1144. This Court concluded that there was "no reason to think" that the district court's corrective-statement remedy was not "sufficiently narrowly tailored to achieve a substantial government interest—in this case, preventing Defendants from committing future RICO violations" and "preventing Defendants from deceiving consumers." *Id.*

This Court noted that "[t]he district court has not yet determined the content of the corrective statements," and emphasized that when it did so, it "must ensure the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech." *Affirmance Opinion*, 566 F.3d at 1144 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). This Court concluded that under *Zauderer*, "the court must confine the statements to 'purely factual and uncontroversial information,' geared towards thwarting prospective efforts by Defendants

to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." *Id.* at 1144-45 (quoting *Zauderer*, 471 U.S. at 651). The Court concluded that "[a]ssuming the corrective advertising once drafted meets these requirements, it is a permissible restraint on Defendants' commercial speech." *Id.*

This Court vacated the district court's order regarding one particular media channel—retail point-of-sale—and remanded that aspect of the remedial order for further evaluation by the district court. *See Affirmance Opinion*, 566 F.3d at 1141-42. It rejected, however, Defendants' challenge to the district court's requirement that the corrective statements be disseminated via cigarette package onserts. *Id.* at 1140-41. Defendants did not challenge the other three media channels—television, newspapers, and company websites—or the scope of dissemination the district court ordered. *See* Brief for Defendants-Appellants, No. 06-5267 (D.C. Cir. May 19, 2008), 2008 WL 2682541, at *127-35.

B. PROCEEDINGS ON REMAND

1. On remand, the district court determined the text of the five corrective statements:

> **A. Adverse Health Effects of Smoking**
>
> A Federal Court has ruled that the Defendant tobacco companies[4] deliberately deceived the American public about the health effects of smoking, and has ordered those companies to make this statement. Here is the truth:
>
> • Smoking kills, on average, 1200 Americans. Every day.
> • More people die every year from smoking than from murder, AIDS, suicide, drugs, car crashes, and alcohol, **combined**.
> • Smoking causes heart disease, emphysema, acute myeloid leukemia, and cancer of the mouth, esophagus, larynx, lung, stomach, kidney, bladder, and pancreas.
> • Smoking also causes reduced fertility, low birth weight in newborns, and cancer of the cervix.
>
> **B. Addictiveness of Smoking and Nicotine**
>
> A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the addictiveness of smoking and nicotine, and has ordered those companies to make this statement. Here is the truth:
>
> • Smoking is highly addictive. Nicotine is the addictive drug in tobacco.

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[4] The statements disseminated by newspaper and television will specify Defendants—Altria, R.J. Reynolds Tobacco, Lorillard, and Philip Morris USA—in a rotating order. *See, e.g.*, JA438, 440. The statements disseminated as package "onserts" and on company websites will list first the Defendant manufacturer of the relevant brand. *See, e.g.*, JA446, 453.

• Cigarette companies intentionally designed cigarettes with enough nicotine to create and sustain addiction.
• It's not easy to quit.
• When you smoke, the nicotine actually changes the brain—that's why quitting is so hard.

C. Lack of Significant Health Benefit From Smoking "Low Tar," "Light," "Ultra Light," "Mild," and "Natural" Cigarettes

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public by falsely selling and advertising low tar and light cigarettes as less harmful than regular cigarettes, and has ordered those companies to make this statement. Here is the truth:

• Many smokers switch to low tar and light cigarettes rather than quitting because they think low tar and light cigarettes are less harmful. They are **not**.
• "Low tar" and filtered cigarette smokers inhale essentially the same amount of tar and nicotine as they would from regular cigarettes.
• **All** cigarettes cause cancer, lung disease, heart attacks, and premature death—lights, low tar, ultra lights, and naturals. There is no safe cigarette.

D. Manipulation of Cigarette Design and Composition to Ensure Optimum Nicotine Delivery

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about designing cigarettes to enhance the delivery of nicotine, and has ordered those companies to make this statement. Here is the truth:

• Defendant tobacco companies intentionally designed cigarettes to make them more addictive.
• Cigarette companies control the impact and delivery of nicotine in many ways, including designing filters and selecting cigarette paper to maximize the ingestion of nicotine, adding ammonia to make the

cigarette taste less harsh, and controlling the physical and chemical make-up of the tobacco blend.

• When you smoke, the nicotine actually changes the brain—that's why quitting is so hard.

E. Adverse Health Effects of Exposure to Secondhand Smoke

A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of secondhand smoke, and has ordered those companies to make this statement. Here is the truth:

• Secondhand smoke kills over 38,000 Americans per year.

• Secondhand smoke causes lung cancer and coronary heart disease in adults who do **not** smoke.

• Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, severe asthma, and reduced lung function.

• There is no safe level of exposure to secondhand smoke.

JA 169-72 (November 2012 order setting out text of statements), JA437 (June 2014 order making small modifications to the text at the parties' request).

In formulating these statements, the district court recognized that its broad discretion to determine the statements' content was constrained by "the terms of the underlying statute, as well as the Constitution." JA172-73. The district court rejected Defendants' arguments that "certain portions of the Statements violate the First Amendment." JA174. The court

emphasized that the statements were purely factual, and that "[e]very sentence of the Corrective Statements is based in specific Findings of Fact." JA185 (citing its Appendix A to the order, JA216-23).

The court noted Defendants' objection to the first sentence of each statement, which refers to the court's finding that Defendants had deliberately deceived the public with respect to the topic of the warning, *e.g.*, "A Federal Court has ruled that the Defendant tobacco companies deliberately deceived the American public about the health effects of smoking, and has ordered those companies to make this statement." The court explained that Defendants "fail[ed] to raise any substantive argument against the *content* of the preamble, which does nothing more than state that a federal court ruled that Defendant tobacco companies deceived the public about the topic of that particular Statement and ordered them to issue an accurate Statement." JA185-86. After marshalling an illustrative list of factual findings that "the tobacco companies perpetuated fraud and deceived the public regarding the addictiveness of cigarettes and nicotine," and noting that "[s]imilar findings of fraud were made as to each of the

other topics addressed," it concluded that "there is simply no support for Defendants' argument that the language of the preamble text is not 'factual.'" JA186-87. The court further explained that "[g]iven the lengthy record detailing Defendants' deceptions over the last several decades, and the finding, affirmed twice by the Court of Appeals, that Defendants are likely to commit future RICO violations, the preamble language provides important and necessary context for the consumer to understand the accurate information that follows." JA206.

The court similarly rejected Defendants' assertion that the statements are "controversial" and therefore trench on their First Amendment rights. JA192-99. The court noted that "controversial" as relevant to the *Zauderer* analysis must "mean more than that Defendants simply disagree with a particular proposition that has been decided against them." JA192. The court observed that the Defendants' attack on the preambles as "unprecedented" was "hyperbole" and "ignores the fact that the government regularly requires wrongdoers to make similar disclosures in a number of different contexts." JA193-96 (discussing similar authority of

the Federal Trade Commission, National Labor Relations Board, and the National Highway Traffic Safety Administration).

The court explained that the reference to its fact findings in this case would not be rendered controversial even if, as Defendants asserted, other courts had reached different conclusions. The findings, the court observed, "are the law of this case" and "differing findings in another case do not create a legal 'controversy.'" JA196-97. In any event, Defendants had not pointed to any decisions that actually absolved them of liability on the ground that they did not engage in fraudulent activities. JA197.

The district court further concluded that the corrective statements are consistent with the framework for evaluating restrictions on commercial speech set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), if that framework, rather than the *Zauderer* analysis, were applicable. JA207-13. The district court observed that "simple common sense, as well as deference to the guidance" from this Court supports its "conclusion that 'reveal[ing] the previously hidden truth' about the products and 'correct[ing] Defendants' campaign

of deceptive marketing' will prevent and restrain future RICO violations." JA209 (alterations in original; internal quotation marks omitted) (quoting *Affirmance Opinion*, 566 F.3d at 1140).

The district court rejected Defendants' assertion that their proposed statements "advance the same government interest with less encroachment on their First Amendment rights," JA209, finding that Defendants' proposed statements "would be less effective at preventing and restraining such future violations." JA212. For example, with respect to the corrective statement concerning environmental tobacco smoke, the court observed that Defendants' proposed statement "would allow Defendants, once the two-year publication period expires, to falsely deny that secondhand smoke causes disease," because "Defendants' proposed statements depict this well-established fact as if it were a mere opinion held by public health officials, rather than representing a consensus held by the scientific community at large." JA212. By contrast, because the court-ordered statement ensures "that consumers know that Defendants have misled the public in the past on the issue of secondhand smoke in addition to putting

forth the *fact* that a scientific consensus on this subject exists, Defendants will be less likely to attempt to argue in the future that such a consensus does not exist." JA212.

Finally, the district court rejected Defendants' argument that the corrective statements' preambles violate the Due Process Clause because they have "an exclusively punitive purpose." JA213. The court explained that the statements' purpose "is not punitive, but corrective," and that courts in a variety contexts have "upheld decisions ordering defendants to admit wrongdoing and publish corrections" outside the criminal justice system. JA212-13.

2. The district court ordered the parties to work with a Special Master to reach a consent order implementing the corrective-statement remedy. JA215. The order, issued after extensive consultations, requires Defendants to disseminate the statements through: full newspaper pages in print and online editions of various specified newspapers on a defined schedule; television "spots" over 52 weeks; Defendants' corporate and brand websites; any future "social media that promotes or advertises

cigarettes" if feasible; and "onserts" affixed to specified quantities of cigarette packaging over two years. JA439-56.

SUMMARY OF ARGUMENT

After a nine-month bench trial, the district court found that the defendant cigarette manufacturers for decades operated an illegal racketeering enterprise and conspired to do so in violation of RICO. In fashioning a remedy designed to prevent and restrain future RICO violations, the district court ordered Defendants to issue corrective statements on five specified topics related to cigarettes and health.

This Court affirmed the judgment of liability and upheld the corrective statements as a proper exercise of the district court's authority under RICO. This Court rejected Defendants' contention that corrective statements would violate the First Amendment, and indicated that the statements may convey "purely factual and uncontroversial information" designed to "thwart[] prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to

advertise in a manner that builds on consumers' existing misperceptions." *Affirmance Opinion*, 566 F.3d at 1144-45.

On remand, the district court heeded this Court's guidance, and Defendants provide no basis to set aside any part of the text of the corrective statements. To the contrary, Defendants largely reprise contentions that have already been rejected by this Court. *Compare* Def. Br. 18, 22, 49 (asserting that the corrective statements should be subject to strict scrutiny), *with Affirmance Opinion*, 566 F.3d at 1143-44 (rejecting Defendants' arguments that the corrective statements "cannot be considered commercial speech" and that the "less rigorous commercial speech standard does not apply").

As the district court explained, "[e]very sentence of the Corrective Statements is based in specific Findings of Fact." JA185. Defendants declined to challenge those factual findings in their prior appeal, and they cannot do so now. Likewise, Defendants cannot contest the accuracy of the introductory sentences in the corrective statements informing consumers that the district court in this case found that Defendants deliberately

deceived the American public about the health effects of smoking. The district court acted well within its discretion in concluding that making consumers aware of "prior deceptions" and the resultant "existing misperceptions" was essential to prevent Defendants from again deceiving consumers, or "capitaliz[ing]" on former deceptions, in their future commercial speech. *Affirmance Opinion*, 566 F.3d at 1144-45.

STANDARD OF REVIEW

This Court reviews the district court's conclusions of law *de novo* and otherwise reviews for abuse of discretion the court's decision to issue an injunction to prevent and restrain future RICO violations. *Affirmance Opinion*, 566 F.3d at 1110.

ARGUMENT

I. THE TEXT OF THE CORRECTIVE STATEMENTS COMPORTS WITH THIS COURT'S PRIOR INSTRUCTIONS.

A. This Court Held That The District Court Could Require Defendants To Issue Corrective Statements On Five Specified Topics Consistent With Its Equitable Authority Under RICO And The First Amendment.

In affirming the district court's liability ruling, this Court also affirmed that court's order requiring corrective statements that "address

five topics: (1) the adverse health effects of smoking; (2) the addictiveness of smoking and nicotine; (3) the lack of any significant health benefit from smoking light cigarettes; (4) the manufacturers' manipulation of cigarette design and composition to ensure optimum nicotine delivery; and (5) the adverse health effects of exposure to secondhand smoke." *Affirmance Opinion*, 566 F.3d at 1138 (citing *Liability Opinion,* 449 F. Supp. 2d at 938-39). This Court held that the corrective-statement requirement was a proper exercise of the court's equitable authority under RICO and was consistent with the First Amendment.

This Court explained that "[a] district court that finds a defendant civilly liable for violating RICO has jurisdiction 'to prevent and restrain violations of [RICO] by issuing appropriate orders.'" *Affirmance Opinion*, 566 F.3d at 1139 (alteration in original) (quoting 18 U.S.C. § 1964(a)). This Court noted that "Congress limited relief under section 1964(a) to forward-looking remedies aimed at preventing and restraining future RICO violations." *Id.*

Applying this standard, this Court held that "requiring Defendants to issue corrective statements will 'prevent and restrain them from making fraudulent public statements on smoking and health matters in the future.'" *Affirmance Opinion*, 566 F.3d at 1140 (quoting *Liability Opinion*, 449 F. Supp. 2d at 926). This Court explained that "Defendants will be impaired in making false and misleading assurances about, for instance, smoking-related diseases or the addictiveness of nicotine—as the district court found they continue to do—if they must at the same time communicate the opposite, truthful message about these matters to consumers." *Id.* (citing *Liability Opinion*, 449 F. Supp. 2d at 925-26). This Court emphasized that "[r]equiring Defendants to reveal the previously hidden truth about their products will prevent and restrain them from disseminating false and misleading statements, thereby violating RICO, in the future." *Id.*

This Court rejected Defendants' contention that the corrective statements "cannot be considered commercial speech" and that they "do not directly and materially advance a substantial government interest,"

observing that "Defendants' arguments misunderstand the commercial speech doctrine and misstate the commercial speech standard." *Affirmance Opinion*, 566 F.3d at 1143. This Court explained that "[t]he issue of corrective advertising's possible peripheral impact on protected speech does not affect the character of the burdened speech, but rather bears on whether the remedy is sufficiently narrowly tailored to achieve a substantial government interest—in this case, preventing Defendants from committing future RICO violations. We have no reason to think it is not." *Id*. at 1144. This Court noted the district court's findings that, "for over fifty years, Defendants violated RICO by making false and fraudulent statements to consumers about their products," that "Defendants [are] reasonably likely to commit similar violations in the future," and that "the corrective statements were necessary to counteract these anticipated violations." *Id.* (citations omitted). Accordingly, "contrary to Defendants' argument, the publication of corrective statements addressing Defendants' false assertions is adequately tailored to preventing Defendants from deceiving consumers." *Id.*

This Court noted that "[t]he district court has not yet determined the content of the corrective statements," and declared that "[a]s the validity of its order relies on the commercial nature of the speech it burdens, the court must ensure the corrective disclosures are carefully phrased so they do not impermissibly chill protected speech." *Id.* at 1144 (citing *Zauderer*, 471 U.S. at 651). "Consequently, the court must confine the statements to 'purely factual and uncontroversial information,'" *id.* (quoting *Zauderer*, 471 U.S. at 651), "geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." *Id.* at 1144-45. Thus, "[a]ssuming the corrective advertising once drafted meets these requirements, it is a permissible restraint on Defendants' commercial speech." *Id.* at 1145.

B. The District Court Based Every Sentence Of Each Statement On Its Findings Of Fact And Designed The Statements To Thwart Prospective Efforts By Defendants To Mislead Consumers Or Capitalize On Their Prior Deceptions.

The district court heeded this Court's guidance. The corrective statements required by the district court are an entirely proper exercise of

its equitable authority under RICO and are fully consistent with the First Amendment.

1. Defendants identify no errors or defects in the five corrective statements.

As the district court observed, "[e]very sentence of the Corrective Statements is based in specific Findings of Fact." JA185. Indeed, the district court included an annotated version of the corrective statements providing citations to its voluminous findings to support the accuracy of each line. JA216-223.

In attacking the text of the statements, as in other parts of their argument, Defendants seek to re-litigate this Court's previous decisions in this case. Defendants object, for example, to the phrase "Here is the truth," contending that the district court was required to make "findings regarding public beliefs on the subject matter of the bulleted statements" before it could order a statement to correct the "claimed misimpressions held by the public regarding cigarettes or smoking and health." Br. 40.[5]

[5] In any event, Defendants did not raise a challenge to this portion of the statements below, forfeiting the argument now. *See* Docket No. 5881

Continued on next page.

But this Court has already upheld the district court's finding that Defendants' representations regarding these five areas were intentionally misleading and has endorsed the propriety of corrective statements in these areas. *See, e.g., Affirmance Opinion*, 566 F.3d at 1121 (listing examples of factual findings as well as noting the "hundreds more findings" demonstrating Defendants' specific intent to defraud in each area); *id.* at 1138-45 (upholding corrective statements "concerning the topics about which [Defendants] had previously misled consumers" and specifying the five areas).[6]

(Mar. 3, 2011) (Appendix) (objecting to the preambles in general as "confessional" but not objecting to "Here is the truth" as containing "implications" unsupported by fact findings); *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1207 n.6 (D.C. Cir. 2013) (court "not obliged to consider [a] late-stage reformulation of appellants' challenge").

[6] Even when prior fraud has not been established, the Supreme Court has refused to ignore common sense determinations that the possibility of deception exists and warrants correction. "When the possibility of deception is as self-evident as it is in this case, we need not require the State to conduct a survey of the public before it [may] determine that the advertisement had a tendency to mislead." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 251 (2010) (alteration in original; ellipsis and internal quotation marks omitted).

In a similar vein, Defendants assert that it is incorrect that "the district court found that [they] 'deceived the American public.'" Br. 38-39. Unable to deny their intent and effort to deceive, they base this challenge on the premise that their decades-long conspiracy to defraud and deceive might not have been effective. *See* Br. 17-18. But to "deceive" is "[t]o practice deceit." *The American Heritage Dictionary* 470 (4th ed. 2006); *The Merriam-Webster Dictionary* 126 (new ed. 2005) ("to use or practice deceit"). The district court and this Court agreed that Defendants "deceived" the public and engaged in "deceit" regarding the five identified topics.[7]

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[7] *See, e.g.*, *Liability Opinion*, 449 F. Supp. 2d at 852 ("[O]ver the course of more than 50 years, Defendants lied, misrepresented, and *deceived* the American public . . . about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal – to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.") (emphasis added); *Affirmance Opinion*, 566 F.3d at 1105 (affirming Defendants' liability "for conducting the affairs of their joint enterprise through a pattern of mail and wire fraud in a scheme to *deceive* American consumers") (emphasis added); *Affirmance Opinion*, 566 F.3d at 1124 (noting that "Defendants' liability rests on *deceits* perpetrated

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Whether or not Defendants' deliberate fraud on the public was successful vis-à-vis any particular individual is irrelevant to the accuracy of the district court's word choices to convey this fraud.

Defendants likewise err in urging that the district court could not properly require a corrective statement concerning light and low tar cigarettes (Statement C), even though this Court has already approved corrective statements about light and low tar cigarettes. *See Affirmance Opinion*, 566 F.3d at 1138-40. And they also seek to reopen previously determined issues by arguing that the passage of the Family Smoking Prevention and Tobacco Control Act in 2010 ("Tobacco Control Act"), which restricts the use of the "light" and "low tar" descriptors, obviates the need for a corrective statement about this topic, and renders it impermissibly backward-looking. Br. 55-56. In making this argument,

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with knowledge of their falsity") (emphasis added); *see also, e.g., Liability Opinion*, 499 F. Supp. 2d at 900 ("Defendants' attempts to prove that consumers disregarded or disbelieved their statements about the safety hazards associated with smoking are not to be believed. The clear weight of the evidence shows that Defendants took advantage of and exploited their customers' lack of knowledge concerning cigarette use and nicotine addiction.") (citation omitted).

Defendants seek to re-litigate issues that this Court decided against them in 2012. *See United States v. Philip Morris USA Inc.*, 686 F.3d 832, 837 (D.C. Cir. 2012). In that appeal, Defendants argued that that the passage of the Tobacco Control Act eliminated the likelihood that they would commit future RICO violations. There, as here, Defendants asserted that "[t]here is no reasonable likelihood that Defendants will engage in the future in the activity targeted by these injunctions . . . because the FDA Act prohibits the use of 'light' and 'low tar' descriptors." Brief for the Appellants, No. 11-5145, 2011 WL 6179449, at *24 (D.C. Cir. Dec. 12, 2011); *see also id*. at *46-48. This Court rejected Defendants' contention, which "assumes the defendants' compliance with the Tobacco Control Act." *Philip Morris USA Inc.*, 686 F.3d at 836. This Court explained that, "in light of the defendants' history of non-compliance with various legal requirements, there was no reason for the district court to make such an assumption." *Id*. "Indeed, the [district] court expressly found the Tobacco Control Act was not likely to produce compliance when RICO and the Master Settlement Agreement ('MSA') had failed to do so in the past." *Id*. (citing *United States v. Philip*

Morris USA, Inc., 787 F. Supp. 2d 68, 76 (D.D.C. 2011)). This Court held that "[i]f the defendants were not deterred by the possibility of RICO liability, the district court reasonably found the defendants were not likely to be deterred by the Tobacco Control Act either." *Philip Morris*, 686 F.3d at 837; *see also id*. at 837 n.1 (concluding that the same "finding—that the Tobacco Control Act was unlikely to produce compliance where other laws had failed—also justifies the district court's refusal to vacate the portions of the injunctions that overlapped with certain restrictions in the Act").

Defendants mistakenly complain that the corrective statements regarding their past deceptions "fail[] to identify the time period covered by the district court's findings," Br. 40, so that the statements might be read to refer to their ongoing actions. But the statements use the past tense to refer to Defendants' fraudulent conduct, and the district court was not obliged to identify the precise moment in time when each deception ceased, an undertaking that would involve a new trial. It should be noted, moreover, that Defendants' suggestion that their deceptions and misstatements had ceased well before trial is incorrect. They assert, for

example, that they "all . . . for more than a decade, have unequivocally declared that cigarette smoking causes disease and is addictive." Br. 40. But as this Court observed, "[t]he district court acknowledged Defendants' varying degrees of lip service to these facts, but . . . [concluded that] 'Defendants' essential position on the relationship of smoking and health remains virtually unchanged' from the fraudulent positions [they] first took in the 1950s." *Affirmance Opinion*, 566 F.3d at 1134 (quoting *Liability Opinion*, 449 F. Supp. 2d at 204); *see also Liability Opinion*, 449 F. Supp. 2d at 204-08 (citing corporate statements and statements from Defendants' executives).

Defendants take issue with Statement B's assertion that they "intentionally designed cigarettes with enough nicotine to create and sustain addition," arguing that "even without any adjustments made by Defendants, all cigarettes would be addictive." Br. 41. But Defendants do not deny they "adjusted" nicotine levels—nor could they do so given the district court's extensive findings on that score. *See, e.g.*, *Liability Opinion*, 449 F. Supp. 2d at 308-83. The district court appropriately concluded that,

in order to prevent and restrain such future violations, Defendants should communicate truthful messages about their nicotine manipulation.

Similarly flawed is Defendants' quarrel with the statement: "Cigarette companies control the impact and delivery of nicotine in many ways, including designing filters and selecting cigarette paper to maximize the ingestion of nicotine, adding ammonia to make the cigarette taste less harsh, and controlling the physical and chemical make-up of the tobacco blend." Br. 12, 41. Contrary to Defendants' assertion, this statement does not assert that all Defendants "add ammonia to all cigarettes." Br. 42. Rather, the statement accurately identifies adding ammonia as one of the "many ways" Defendants control nicotine impact and delivery; the statements do not say that it is a universal practice with respect to all cigarettes. Moreover, the district court found, based on the evidence, that all Defendants did in fact manipulate ammonia in their cigarettes. *See, e.g.*, *Liability Opinion*, 449 F. Supp. 2d at 356 ("By 1993, all the cigarette company Defendants used some form of ammonia technology in some of their

cigarette products."); *see also id.* at 371 (noting that "Lorillard continued to use additives to affect smoke pH and produce ammonia.").

Equally unavailing is Defendants' quibble with the statements' reference to the ways in which they design cigarettes to "maximize the ingestion of nicotine." Br. 41-42. In Defendants' view, the findings support a statement that they merely designed cigarettes to "*control* nicotine delivery." Br. 41 (citing JA221 n.37). But the fact findings make clear—as the statements indicate—that Defendants used physical cigarette design to enhance the release and consumption of nicotine. *See Liability Opinion*, 449 F. Supp. 2d at 320 (internal company document discussing using "all means to maximize nicotine content of tobaccos and delivery to the cigarette smoke . . . [including] agricultural practices, leaf purchase program, blending, processing, nicotine transfer efficiency, casing levels, added nicotine, selective filtration, effect of wrapping materials'') (alterations in original); *id.* at 374 (noting a defendant's study about how nicotine migration from tobacco to "the outer periphery [of a cigarette] for the purpose of increasing the amount of nicotine in mainstream smoke . . .

could be maximized"). Defendants' suggestion that their manipulation of nicotine delivery to smokers was merely a benign attempt to "reduc[e] tar and nicotine yields," Br. 41-42 (alteration in original; internal quotation marks omitted), flies in the face of the court's findings of fact. The district court's factual findings detail Defendants' efforts to create and sustain addiction—while publicly denying such efforts—via nicotine delivery. *See, e.g.*, *Liability Opinion*, 449 F. Supp. 2d at 338 ("In the context of these fraud claims, what is relevant is that Defendants firmly believed, as demonstrated by their internal documents, that they could—and did—control nicotine delivery to the smoker by manipulating the design of their cigarettes, and then lied about their knowledge and conduct to the American consumer.").

Finally, Defendants take issue with two discrete points in Statement C. First, they argue that "the statement is not factual when it says that '"Low tar" and filtered cigarette smokers inhale essentially the same amount of tar and nicotine as they would from regular cigarettes.'" Br. 42-43. The district court identified the findings of fact that support this

statement. *See* JA219-20 n.30; *Liability Opinion*, 449 F. Supp. 2d at 438 ("Because each smoker smokes to obtain his or her own particular nicotine quota, smokers end up inhaling essentially the same amount of nicotine—and tar—from so-called 'low tar and nicotine' cigarettes as they would inhale from regular, 'full flavor' cigarettes.").[8] Defendants also argue that this statement is inaccurate because compensation—the phenomenon by which "the smoker will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine," *Liability Opinion*, 449 F. Supp.

[8] Defendants assert that this statement offers—by implication—inaccurate commentary regarding unfiltered cigarettes. Br. 42-43. The statement, however, says nothing about unfiltered cigarettes. In any event, even if properly read to imply that filtered cigarettes can be as dangerous as unfiltered cigarettes, that implication would be supported by the factual findings here. *See, e.g., Liability Opinion*, 449 F. Supp. 2d at 446 (citing studies "confirm[ing] that low tar and filtered cigarettes are no less harmful than conventional delivery and unfiltered cigarettes"); *id.* at 449 (comparing health risks between groups "smoking mostly high-tar, unfiltered cigarettes" and those "smoking filtered cigarettes with much lower machine-measured tar and nicotine yields" and finding that "despite the substantive reduction in tar yield of the cigarettes smoked in [the second group], lung cancer disease risks increased rather than decreased in comparison to" the first group).

2d at 467—is not "complete across smokers." Br. 43. The Statement correctly conveys that smokers inhale "essentially" the same amount of tar and nicotine, an assertion well supported by the unchallenged findings. *See, e.g., Liability Opinion*, 449 F. Supp. 2d at 438 ("Virtually all smokers, over 95%, compensate for nicotine. . . . Because compensation is essentially complete, low tar cigarette smokers inhale essentially the same amount of tar and nicotine as they would from full flavor cigarettes."); *see generally id.* at 431-44 (discussing lack of health benefits of "light" and "low tar" cigarettes and compensation); *see also Affirmance Opinion*, 566 F.3d at 1121 (noting evidence of executives' knowledge of "the concept of smoker compensation, which makes light cigarettes no less harmful than regular cigarettes and possibly more").

2. The district court's fact findings are not "controversial."

Aside from these unfounded quarrels, Defendants argue that it is immaterial that the corrective statements are tethered to the specific fact findings made by the district court after trial in this case. Defendants assert that the facts are "controversial," and purportedly trench on Defendants'

First Amendment interests, because—by Defendants' account—"[a] substantial number of judges and juries have rejected allegations of fraud against Defendants identical to those . . . in this case." Br. 34-35.

If Defendants wished to challenge the district court's fact-findings in this case, they were free to do so. But they chose not to. *See supra* p. 8. Defendants cannot circumscribe the remedial order by asserting that other courts have reached or could have reached different conclusions. As the district court explained, to be "controversial" must "mean more than that Defendants simply disagree with a particular proposition that has been decided against them." JA192.

In any event, as the district court noted, Defendants did not establish that any of the decisions on which they rely actually absolved them of liability on the basis that they did not engage in fraudulent activities. *See* JA196-97. Defendants declined to introduce any documentation to support their characterizations of these rulings. Insofar as we have been able to determine, the verdicts in cases cited by Defendants do not necessarily conflict with the corrective statements' references to Defendants' deceptive

activities. The cited cases involve general verdicts, different theories of liability (such as product liability), claims limited to different timeframes, or rulings based on non-merits defenses. *See, e.g.*, *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d 1014, 1035 (C.D. Cal. 2009) (discussing *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA, Inc.*, 818 N.E.2d 1140 (N.Y. 2004), and noting that "no previous case appears to include an ultimate finding of fact absolving tobacco companies of liability on the basis that they *did not engage* in fraudulent activities," but "[r]ather, the verdicts in favor of the tobacco companies are based on issues such as standing, absence of harm, or plaintiffs' non-reliance on the fraud"); *see also* Docket No. 5935, Ex. 2 (May 27, 2011) (Appendix 1) (summarizing exhibits submitted by the United States regarding cases cited by Defendants).

3. Disclosing that Defendants made deceptive statements is not controversial and is integral to the functioning of the corrective statements.

Defendants also seek to discover First Amendment and RICO concerns in the first two sentences of each of the five corrective statements. The first sentence states that "[a] Federal Court has ruled that the

Defendant tobacco companies deliberately deceived the American public" about the topic addressed in that section, and that the court "has ordered those companies to make this statement." JA158-60. The second sentence introduces facts specific to that topic with the statement "[h]ere is the truth." JA158-60.

Each preamble "does nothing more than state that a federal court ruled that Defendant tobacco companies deceived the public about the topic of the particular Statement and ordered them to issue an accurate Statement." JA185-86 (noting that Defendants "fail[ed] to raise any substantive argument against the *content* of the preamble"). There is simply nothing "controversial" about the fact that the district court found that Defendants deceived the American public with respect to each of the five topics.

The corrective statements are designed to prospectively correct, and the district court properly concluded that it was crucial that consumers be aware that a correction is in fact being made. As the court explained, the first two sentences of each corrective statement "provide[] important and

necessary context for the consumer to understand the accurate information that follows." JA206. The statements "protect consumers from deception" by first "alert[ing] the consumer[s] to the fact that they have been misinformed, and then provid[ing] the accurate information." JA195 (internal quotation marks omitted). The district court acted well within its discretion in concluding that making consumers aware of "prior deceptions" and their own resultant "existing misperceptions" was essential to prevent Defendants from in future again deceiving consumers, or "capitaliz[ing]" on their previous deceptions in their future commercial speech. *Affirmance Opinion*, 566 F.3d at 1144-45.

The introductory sentences serve the additional purpose of decreasing the risk that Defendants will, in the future, deny the product information described accurately in the corrective statements. Although Defendants characterize their own proposed corrective statements (which lack the introductory sentences) as less burdensome than those crafted by the district court, Br. 50-51, the district court properly found that Defendants' proposal "would be less effective at preventing and

restraining . . . future [RICO] violations," and thus less likely to further the purpose of the corrective statements. JA212. For example, with respect to the danger of environmental tobacco smoke, "Defendants' proposed statements depict this well-established fact as if it were a mere opinion held by public health officials, rather than representing a consensus held by the scientific community at large." JA212. "By ensuring that consumers know that Defendants have misled the public in the past on the issue of secondhand smoke in addition to putting forth the *fact* that a scientific consensus on this subject exists, Defendants will be less likely to attempt to argue in the future that such a consensus does not exist." JA212. Thus, the district court concluded, statements omitting references to past deception, per Defendants' proposal, "do not advance the interest in preventing future consumer deception to the same extent as the final Corrective Statements." JA212-13. The district court's efforts to prevent Defendants from engaging in such future fraud are particularly appropriate given its findings about the temporal scope of Defendants' past violations, which spanned five decades and included multiple instances of fraudulent

activity to evade governmental attempts to inform the public of the dangers of cigarettes.[9]

Indeed, Defendants' willingness to disavow facts relevant to consumers' purchase of their product is on display even in their appellate brief. Despite the district court's extensive factual findings regarding nicotine manipulation, *see Liability Opinion*, 449 F. Supp. 2d at 308-83, Defendants still characterize their past conduct as including merely "*alleged* nicotine manipulation." Br. 55 (emphasis added). Similarly, they discuss their "*alleged*[]" design of "cigarettes . . . to create and sustain addiction," Br. 17, the "*alleged* inaccuracy of [their] public statements about smoking

[9] *See, e.g.*, *Liability Opinion*, 449 F. Supp. 2d at 855 (discussing Defendants' "concerted[] efforts to attack and undermine the studies in mainstream scientific publications such as the Reports of the Surgeon General"); *id.* at 187-98 (describing efforts to falsely refute the Surgeon General's 1964 report); *id.* at 792- 94 (describing Defendants' efforts to discredit Environmental Protection Agency studies); *Affirmance Opinion*, 566 F.3d at 1133 ("Defendants began to evade and at times even violate the MSA's prohibitions almost immediately after signing the agreement"); *id.* ("[T]hough the MSA required Defendants to dissolve [the Center for Indoor Air Research], only two days after signing the MSA Lorillard's general counsel wrote Philip Morris, Reynolds, and Brown & Williamson asking to discuss the status of the plan to reinstate [the Center for Indoor Air Research].") (quotation marks omitted).

and health," Br. 30, adding ammonia as "one of several methods *allegedly* used by Defendants," Br. 42, and their "*allegedly* fraudulent marketing of 'light' cigarettes," Br. 59 (emphases added; omission in original). The district court's factual findings, unchallenged on appeal, are not mere "allegations."

Defendants' arguments with respect to the two introductory sentences are of a piece with their broader contention that the statements cannot properly refer to their past conduct, *see, e.g.*, Br. 30, 55-56, an argument squarely foreclosed by this Court's prior decision, which approved the proposed topics of the statements, including one dealing with Defendants' "manipulation of cigarette design and composition to ensure optimum nicotine delivery." *See Affirmance Opinion*, 566 F.3d at 1138-40.

The district court noted that the Defendants' attack on the introductory sentences as "unprecedented" was marked by "hyperbole" and "ignores the fact that the government regularly requires wrongdoers to make similar disclosures in a number of different contexts," JA193-96,

including disclosures about the entity's violation of federal law. *See, e.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 155-56, 158 (1951) (upholding as a permissible restraint on the press an injunction under the Sherman Act requiring a newspaper publisher to insert into its newspaper a weekly notice "fairly and fully appris[ing]" its readers of the antitrust judgment against it); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1384-87 (D.C. Cir. 1983) (upholding an order under the National Labor Relations Act that a company publish in local newspapers, and a corporate president personally read aloud, a notice with a preamble stating, *see Conair Corp.*, 261 NLRB 1189, 1199 (1982), that the National Labor Relations Board "found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice"); *Novartis Corp. v. FTC*, 223 F.3d 783, 786, 788-89 (D.C. Cir. 2000) (upholding against a First Amendment challenge a required disclosure that "there is no evidence" that a corporation's pain reliever "is more effective" than other pain relievers); *Daniel Chapter One v. FTC*, 405 F. App'x 505, 506 (D.C. Cir. 2010) (rejecting First Amendment challenge to order requiring company to mail

letters to its customer on its own letterhead stating, *see In re Daniel Chapter One*, No. 9329, 2010 WL 387917 (F.T.C. Jan. 25, 2010), at *4 (Attachment A) that "the Federal Trade Commission . . . has found our advertising claims . . . deceptive").[10]

Defendants' invocation of *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), entirely misses the mark. Br. 26-29. There, this Court concluded that FDA-mandated graphic warnings on tobacco products did not involve "purely factual and uncontroversial" disclosures or "accurate statement[s] to which the *Zauderer* standard may be applied." *R.J. Reynolds*, 696 F.3d at 1216 (internal quotation marks and citation omitted). The required images, the Court concluded, "are not meant to be interpreted literally," "could be misinterpreted by consumers," and "are primarily

[10] Defendants' hyperbole is typified by their insistence that "[t]he district court's corrective statements . . . require Defendants to vilify, humiliate, and shame themselves to the American public based on the district court's characterization of their past conduct." Br. 50. Defendants are simply required to take steps to correct a fraud prospectively. Perhaps most telling is Defendants' reference to "the district court's *characterization* of their past conduct." *Id.* (emphasis added). What Defendants describe as a "characterization" is an accurate account of findings of fact in this case.

intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning." *Id.*

In contrast, the corrective statements here involve only straightforward text designed to be interpreted literally by consumers in order to prevent deception, not to elicit an emotional response. JA186-87 (noting that "[t]he required disclosures in [*Reynolds* and this case] contain vastly different content, were issued under different statutes, and serve different government interests"). The district court noted that the statements "do not attempt to 'shock' the reader or elicit embarrassment," JA191-92, but rather are "aimed at correcting misleading speech and preventing deception of consumers," JA198 (noting that "[t]here can be no question that this is the purpose of the Corrective Statements").

Indeed, *R.J. Reynolds* specifically distinguished the graphic warnings at issue in that case from the corrective statements at issue here. The Court noted that "FDA has not shown that the graphic warnings were designed to correct any false or misleading claims made by cigarette manufacturers in the past," *R.J. Reynolds*, 696 F.3d at 1216, and noted that "[s]uch matters

are the subject of a pending—and entirely separate—line of litigation against the Companies." *Id.* at 1216 n.10 (citing *Affirmance Opinion*, 566 F.3d 1095 (D.C. Cir. 2009)). [11]

Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), is equally unhelpful to Defendants. There, the Federal Trade Commission ordered Listerine's manufacturer to issue a corrective advertising statement: "Contrary to prior advertising, Listerine will not help prevent colds or sore throats or lessen their severity." *Id.* at 763. This Court largely upheld this order, concluding that "the accumulated impact of past [misleading] advertising . . . necessitates disclosure in future advertising." *Id.* at 761; *see also R.J. Reynolds*, 696 F.3d at 1215 (distinguishing *Warner-Lambert* on the

[11] This Court recently clarified *en banc* that the *Zauderer* standard for reviewing compelled commercial disclosures is not limited to preventing consumer deception. *See American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 22-23 (D.C. Cir. 2014) (overruling *R.J. Reynolds* in relevant part). Even prior to that decision, however, this Court's previous opinion recognized that the RICO violations here involve fraud on consumers and that preventing such violations is a substantial government interest warranting mandated disclosures. *See Affirmance Opinion*, 566 F.3d at 1144. Preventing such violations would have fit comfortably within *Zauderer*'s anti-deception rationale even prior to *American Meat*.

basis that "the disclosure statement [there] was required as part of a corrective order which the Commission found necessary to 'dissipate the effects of respondent's deceptive representations'").

This Court modified the order to eliminate the introductory clause "Contrary to prior advertising." *Warner-Lambert*, 562 F.2d at 763-64. It concluded that, "[o]n these facts, the confessional preamble to the disclosure is not warranted." *Id.* at 763. The Court reasoned that the introductory language there could "serve only two purposes: either to attract attention that a correction follows or to humiliate the advertiser." *Id*. The first purpose was served by other provisions in the order, the Court concluded. *Id.* Regarding the second purpose, given that the record there could "could support a finding" that Listerine's misleading advertising had been done in "good faith," the Court concluded that while the preamble "might be called for in an egregious case of deliberate deception," that was not such a case. *Id.*

Here, in contrast, both this Court and the district court specifically identified a different—and substantial—government purpose: to

"prevent[] Defendants from committing future RICO violations" and "from deceiving consumers." *Affirmance Opinion*, 566 F.3d at 1144. As discussed above, the disclosure of Defendants' prior deceptions is crucial to preventing them from "capitaliz[ing] on" those deceptions or "build[ing] on" the resultant consumer "misperceptions." *Id.* at 1144-45.

Similarly, the language of the corrective statements in no way mirrors the "conflict free" label requirement imposed on certain companies using minerals mined in regions potentially affected by the Congo war. *See National Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 371 (D.C. Cir. 2014) (deciding that a company was entitled to "disagree with [the label's suggestion] of its moral responsibility" and "convey that message through silence") (internal quotation marks omitted), *reh'g granted* (Nov. 18, 2014); Br. 27-28. If Defendants had not been found liable for conspiring to deceive the American public, they might be able to invoke their default interest in conveying a "message" disclaiming this liability "through silence." But where the government is advancing its interest in preventing consumer

deception—particularly in cases of actual fraud—any such background interest gives away to reasonably crafted efforts to prevent such deception.

4. The district court did not abuse its discretion by requiring Defendants to disseminate the statements through the same media that they used in perpetrating their fraud.

Defendants argue briefly (Br. 46-47) that the district court abused its discretion by ordering Defendants to disseminate the statements through various media—television, newspapers, the Internet, and onserts affixed to cigarette packaging. In affirming the corrective-statement remedy, this Court explained that the district court "chose these media in order to 'structure a remedy which uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages.'" *Affirmance Opinion*, 566 F.3d at 1142 (quoting *Liability Opinion*, 449 F. Supp. 2d at 928); *see also* JA214-15; *Liability Opinion*, 449 F. Supp. 2d at 927 ("The evidence identifies the various venues in which Defendants have made their fraudulent public statements about cigarettes, including, but not limited to, newspapers, television, magazines, onsets, and Internet websites.").

In its previous opinion, this Court upheld the corrective statements' dissemination via television, newspapers, the Internet, and packaging onserts, rejecting Defendants' arguments to the extent that they challenged the media channels at issue in this appeal. *See Affirmance Opinion*, 566 F.3d at 1138, 1140-41 (describing the court order regarding all media channels, noting Defendants' challenge only to the point-of-sale and onsert requirements, and rejecting the latter); Brief for Defendants-Appellants, No. 06-5267 (D.C. Cir. May 19, 2008), 2008 WL 2682541, at *127-35. Defendants cannot properly renew their challenges now or object to publication routes that they did not previously challenge.[12]

[12] Under the current district court order, the scope of dissemination is comparable to that which the district court ordered in 2006. *Compare Liability Opinion*, 449 F. Supp. 2d at 938-41 (Order # 1015, providing, *inter alia*, that statements are to be placed "on any publicly-accessible website of each Defendant"), *with* Docket No. 6081 at 9 (noting changes parties agreed to make to list of newspapers "while maintaining a cumulative print circulation broadly comparable to Order #1015," and proposing no changes to the frequency or duration of each Defendant's television and onsert obligations), *and* JA437 (narrowing the website requirement to only "Defendant websites that promote or advertise cigarettes").

In any event, Defendants offer no reason why the scope of the dissemination order is out of proportion to the magnitude of their "massive, sustained, and highly sophisticated marketing and promotional campaigns" to spread false and misleading information about cigarettes for decades. *Liability Opinion*, 449 F. Supp. 2d at 860; *see Warner-Lambert*, 562 F.2d at 763-64 (rejecting challenge to requirement that manufacturer include corrective disclosure in its advertising until it had expended its average advertising budget, noting this formula was "reasonably related to the violation [the Federal Trade Commission] found").

5. Defendants' remaining First Amendment contentions reprise insubstantial arguments already rejected by this Court.

Defendants' lengthy discussion (Br. 22-29) of the circumstances in which commercial speech disclosures can be required is largely beside the point: this Court has already approved the corrective-statement remedy, making clear the statements involve commercial speech subject to the "less rigorous" standards for reviewing government burdens on such speech. *Affirmance Opinion*, 566 F.3d at 1142-45. And, as the previous discussion

demonstrates, the corrective statements contain "'purely factual and uncontroversial information,' . . . geared towards thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions by continuing to advertise in a manner that builds on consumers' existing misperceptions." *Id.* at 1144-45 (quoting *Zauderer*, 471 U.S. at 651).

Defendants assert that the corrective statements are subject to strict scrutiny, Br. 49, arguing that the corrective statements are not commercial speech because they involve disclosures about their past deceptions regarding their products. Br. 49; *see* Br. 18, 22. Defendants once more seek to re-litigate previous decisions. This Court rejected Defendants' arguments that the corrective statements are not commercial speech, noting that the "level of scrutiny depends on the nature of the speech that the corrective statements burden." *Affirmance Opinion*, 566 F.3d at 1143. "Defendants' various claims—denying the adverse effects of cigarettes and nicotine in relation to health and addiction—constitute commercial speech." *Id*. at 1144. Corrective statements to remedy this fraudulent

commercial speech are "clearly imposed . . . as a burden on Defendants' current and future commercial speech." *Id.* at 1143. There is thus no basis for strict scrutiny.

Defendants contend that the *Zauderer* standards for mandated commercial disclosures do not apply here and that the corrective statements run afoul of the framework in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), for evaluating restrictions on commercial speech. Br. 50. That challenge is foreclosed; as discussed above, this Court instructed the district court to draft "purely factual and uncontroversial" statement text, in accordance with *Zauderer*, and the district court complied. And even were the *Zauderer* standards for mandated commercial disclosures somehow inapplicable here, the district court explained that the statements were narrowly tailored to achieve the government's interest under *Central Hudson*. *See* JA207-13. A requirement that Defendants disclose the fact of their past deceptions about cigarettes obviously not only helps ensure the accuracy of commercial information about cigarettes in the marketplace, but also

advances the government's substantial interest in preventing and restraining Defendants from once again practicing such deception via future RICO violations. *See Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 415 (D.C. Cir. 2012) (requirement that airlines display the total airfare price most prominently in any advertisement "clearly and directly advanced" the "government interest—ensuring the accuracy of commercial information in the marketplace").

Defendants' attempt to cast the statements' text as overbroad by divorcing their conduct from their product is foreclosed and meritless. As noted above, *see supra* p. 45, this Court has already specifically approved a statement dedicated to Defendants' past conduct. And in any event, contrary to Defendants' repeated arguments, Br. 2, 16-18, 55-57, disclosure of Defendants' past deceptions *about their products* is hardly unrelated to those products or consumers' information about them. Defendants' previous fraud was about cigarettes themselves: they "previously misled consumers" about *cigarettes'* adverse health effect, *cigarettes'* nicotine and addictiveness, the lack of health benefits from smoking "light" or "low tar"

cigarettes, their own manipulations of *cigarettes* to ensure optimum nicotine delivery, and the adverse health effects of exposure to secondhand smoke from *cigarettes*. *Affirmance Opinion*, 566 F.3d at 1138. This Court has already affirmed that these deceptive statements are material to a reasonable consumer. *See id.* at 1122-23 (all topics of the corrective statements "would be a matter of importance to a reasonable person deciding to purchase cigarettes"). Given how closely married disclosures about Defendants' products—and deceptions about their products—are to the products themselves and consumers' purchase of them, the relationship between the required disclosure and the goods offered is satisfied here, however that relationship is defined. *See American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26-27 (D.C. Cir. 2014) (*en banc*) (finding it unnecessary to "decide on the precise scope or character" of the requisite relationship between the disclosure and the commercial offering, where "the facts conveyed are directly informative of intrinsic characteristics of the product" being sold).

II. THE CORRECTIVE STATEMENTS ARE NOT A CRIMINAL SANCTION.

Section 1964(a), which authorizes courts to impose civil RICO remedial measures such as the corrective statements here, does not implicate the constitutional due process protections that attend criminal penalties. Rather than identifying the legal framework relevant to their largely unexplained suggestion that the civil remedial RICO order here is "'so punitive'" as to render the proceeding criminal, Defendants intimate that the civil–criminal distinction turns on their subjective reaction to or the potential "collateral consequences" of a particular remedy. Br. 57-58 (quoting *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993)) (contending that the statements will force Defendants to "publicly shame themselves").

This subjective approach has no basis in law. The legal framework governing the civil–criminal divide makes clear that the corrective statements are indeed the civil—not criminal—sanction that Congress and the district court plainly intended. First, courts must examine congressional intent in imposing a particular remedial measure, looking to see whether Congress "indicated either expressly or impliedly a

preference" for either a criminal or civil label. *United States v. Ward*, 448 U.S. 242, 248 (1980). Here, looking to congressional intent in enacting section 1964 and providing courts with remedial authority thereunder, there can be no doubt that "Congress intended to impose a civil penalty" upon those in Defendants' position. *Id.* at 249; *see* 18 U.S.C. § 1964 (listing "Civil remedies" for violations of 18 U.S.C. § 1962); *cf. id.* § 1963 (providing for "Criminal penalties" for violations of 18 U.S.C. § 1962).

Where Congress has made clear that it "intended to allow imposition of [a statutory penalty] without regard to the procedural protections and restrictions available in criminal prosecutions," courts examine whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention." *Ward*, 448 U.S. at 249. As the Supreme Court has repeatedly emphasized, "'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.'" *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)); *see Hudson v. United States*, 522 U.S. 93, 100 (1997) (emphasizing the "clearest proof" standard and noting

that "these factors must be considered in relation to the statute on its face") (internal quotation marks and citation omitted).

The corrective statements ordered by the district court are not punitive in either purpose or effect, let alone so decidedly punitive as to clear the very high bar the Supreme Court has set out to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Ward*, 448 U.S. at 249 (internal quotation marks and citation omitted; alteration in original). Defendants do not explain their assertion that the statements "serve principally to denigrate and punish Defendants, rather than to prevent and restrain future wrongdoing." Br. 57-58. But as the district court explained, the preamble is not designed as a "confessional" serving a "punitive purpose," but rather as a corrective measure, providing important context to consumers and preventing Defendants from again disseminating false or misleading statements on the topics of their prior fraud. *See, e.g.*, JA186, 206, 213-14. And as discussed above, the statements' other references to Defendants' prior conduct serve an important corrective

function in preventing and restraining Defendants from again engaging in fraudulent statements about these topics.

Defendants cite no precedent in support of their apparent theory that any civil remedy that requires dissemination of information about a liability finding is automatically rendered a criminal sanction. Indeed, such a theory is inconsistent with other civil contexts in which Defendants must "admit wrongdoing and publish corrections." JA213-14; *see supra* pp. 45-47. Equally misplaced is Defendants' suggestion that because criminal sanctions *can* involve "public airing of one's offense," any sanction involving such airing is necessarily criminal. *United States v. Gementera*, 379 F.3d 596, 607 (9th Cir. 2004) (cited at Br. 58). This reasoning would render most forms of civil sanction criminal; criminal penalties certainly can involve the payment of fines and the imposition of injunctions, two very traditional forms of civil penalty. And Defendants' complaint that "plaintiffs in other cases might invoke the statements in an effort to foreclose Defendants from making legal arguments inconsistent with the statements" is both legally irrelevant and perplexing. Br. 58. Defendants

do not explain how this fact could possibly transform a civil remedy under section 1964(a) into a criminal one. And in any event, the statements do nothing more than recite the incontestable fact that a federal court has made rulings about Defendants' behavior in this case; other plaintiffs may attempt to invoke that ruling whether or not Defendants are required to include that fact in the corrective statements.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 2014

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

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I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,423 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Melissa N. Patterson
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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I further certify that I will cause 8 paper copies of this brief to be filed with the Court.

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ADDENDUM

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5267

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
AND TOBACCO-FREE KIDS ACTION FUND, ET AL.,
INTERVENORS

v.

PHILIP MORRIS USA, INC. F/K/A PHILIP MORRIS, INC.,
ET AL., DEFENDANTS-APPELLANTS

Tues. Oct. 14, 2008

APPEARANCES:

ON BEHALF OF THE APPELLANTS:
MICHAEL A. CARVIN, ESQ.
MIGUEL A. ESTRADA, ESQ.

ON BEHALF OF THE APPELLEES:
MARK B. STERN, ESQ. (DOJ)

ON BEHALF OF THE INTERVENORS:
HOWARD C. CRYSTAL, ESQ.

Before: Chief Judge SENTELLE and Circuit Judges TATEL and BROWN

ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ.
ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. And may it please the Court. My name is Miguel Estrada. I'm counsel for Philip Morris USA, and I, and I will speak on behalf of all defendants to the lights issue, the future violations issue, and the remedies issue.

Let me start with the lights. The government's position in this case is that it is perfectly lawful for the [26] defendants to tell a consumer that a pack of cigarettes has per cigarette 16 milligrams of tar under the FTC measure, and that another pack has 11 milligrams of tar, but that it is criminal fraud to tell the consumer that 11 is lower than 16. To call this position incomprehensible, as Judge Alito did in the argument last week, doesn't quite do it justice. It is now the case, and it has never been the case, that the use of descriptors is fraudulent or even false because they correctly characterize the outcomes of the FTC-authorized tests since 1966.

Now the government's theory in the case, and which Judge Kessler accepted, is entirely this. This would not be fraud. This would not be false but for compensation. Because of the fact that a consumer may puff more deeply or smoke more cigarettes, this has now become fraud. Now this was—

JUDGE TATEL: Well isn't her, isn't her reason for that that the, that the companies knew that? When, in other words, when they said, when they say that it's a low-tar cigarette, they knew, based on their own research, that in fact it wasn't because of compensatory smoking?

MR. ESTRADA: I did not hear the first part of the question.

JUDGE TATEL: Oh, I'm sorry. Is this better? My question was, didn't the, didn't the District court say that extractly, the phrase low-tar is not inaccurate, but that [27] based on the company's own research about compensatory smoking that they knew that in fact they weren't low-tar because of the way smokers compensate?

MR. ESTRADA: See but—

JUDGE TATEL: That's her theory, right?

MR. ESTRADA: Yes. And that's exactly right.

JUDGE TATEL: Yes.

MR. ESTRADA: At finding, I believe, 2068, she explains that the way consumers compensate is by puffing more deeply on the one hand or smoking more cigarettes.

JUDGE TATEL: Right. And the companies—

JUDGE SENTELLE: (Indiscernible.)

JUDGE TATEL: Yes, and the companies knew that based on their own research.

MR. ESTRADA: Everybody knew it, Judge Tatel. That's, that's the problem.

JUDGE TATEL: Well but the point is, the point is in terms of whether it's fraudulent or not—

MR. ESTRADA: Well but—

JUDGE TATEL: —if the companies knew it—

MR. ESTRADA: —but on that, we can go to the record. I mean, on the one hand, just as a matter of law,

it is unreasonable to say that a consumer could think that, that he would get the prescribed amount solely on the basis of, of smoking more units of the product. And the fact is, in 1966, [28] and this is in the record, when the FTC was conducting hearings on this issue, the companies did tell the FTC that a smoker might be compelled to get his nicotine fix by smoking more, and that's Joint Exhibit 47, 48—

JUDGE TATEL: Right.

MR. ESTRADA: —at page 131. This was known in 1966. Now on whether consumers would puff more deeply, the issue has been sort of speak, ventilated ad nauseam in this courthouse. The *Brown & Williamson* litigation came here in 1983. You may recall that the whole issue in the litigation was compensation. And both the FTC, Judge Cazelle (phonetic sp.) and this Court were fully aware that compensation was going on and that there were two types of it. You could smoke more or take deeper puffs. And the FTC, Judge Cazelle and this Court all said, it is irrelevant because everybody has known from 1966 that the point of the system is to tell the consumer how much tar they would get compared to another cigarette if they smoked the two cigarettes in the same way. It was never from the get-go any sort of a claim, by the agency mind you, that, that this was, that any of these numbers had any bearing on the amount of tar or nicotine that a, that a consumer would get.

JUDGE TATEL: Is there, is there a difference in your, is there a difference between, I, I think your point about low tar. Your point there is that low tar reflects the [29] actual numbers, right? Low tar identifies cigarettes that in fact have low tar, correct?

MR. ESTRADA: Yes.

JUDGE TATEL: But what about, what about the phrases like, like light? And I ask that because of the District court. The District court has this finding. She says, there are lights of certain brands with higher tar levels than regulars of other brands from the same company. And there are also lights and regulars of the same brand that have the same FTC tar rating. Now so what she's saying there is that these, that the labels, light, are being used inconsistently, that they don't always reflect low tar.

MR. ESTRADA: Well I think there—

JUDGE TATEL: Is that, by the way, you don't challenge that fact finding, do it?

MR. ESTRADA: We haven't challenged any fact—

JUDGE TATEL: Right.

MR. ESTRADA: —any fact finding, Judge Tatel.

JUDGE TATEL: Okay. So that, that's a fact finding—

MR. ESTRADA: (Indiscernible) arguments are purely legal.

JUDGE TATEL: Yes.

MR. ESTRADA: The key point about something like lights is that there is, that no consumer gets the same [30] message from hearing, lights.

JUDGE TATEL: No, but in terms of, you were saying that the labels accurately describe—

MR. ESTRADA: But they do, and that's the point—

JUDGE TATEL: —the level. Let me, let me just finish. You say the labels accurately describe the tar level in the cigarettes, but here, you have a finding that that's not the case, that they are inaccurate.

MR. ESTRADA: Well, no. Whether they are accurate or inaccurate I would think is a legal conclusion. But in fact, the finding is—

JUDGE TATEL: Well let me go back. I thought you said they're just, they're, they're just true. They are literally true.

MR. ESTRADA: They are true.

JUDGE TATEL: That's your argument.

MR. ESTRADA: They're literally true. They're actually true.

JUDGE TATEL: But, but here, here you have a finding. Here you have a finding that you haven't challenged which suggests that's not the case.

MR. ESTRADA: Well because what, what is going on with lights as opposed to low tars, that lights are a particular kind of low-tar cigarette. And what lights do accurately describe is that they are, that they have lower tar [31] than the regular pack of the small brand, and also have, have also the meaning that—

JUDGE TATEL: Well actually, that's inconsistent with this finding.

MR. ESTRADA: I don't believe so, because I don't believe she was making any findings as between brands. But in any event, it also conveys a taste message. And of course, look, we have a large, a dispute in the District court on the question of whether, whether the defen-

dants intended a health message or a taste message. Our position is that we intended a taste message. * * *

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[118]

ORAL ARGUMENT OF MIGUEL A. ESTRADA, ESQ.
ON BEHALF OF THE APPELLANT

MR. ESTRADA: Thank you, Your Honor. I have some quick points.

I don't want to be misquoted as having said that I agree with the fact findings of the district court. What I said is, we're bringing legal challenges to the court. Obviously, we disagree with a lot of what Judge Kessler had to say, and just because she calls something a finding also does not make it a finding. As you know, the Supreme Court said in *Pullman Standard v. Swint*, you have (indiscernible) of law and fact, and if you have made a legal error in your approach to the facts, you know, the judgment may be set aside on that basis.

Frankly, after you get a trial in which 60 years of your conduct out on trial, and an appeal in which even with [119] more pages, you cannot possibly address all of that. It is the only thing that we could do to sort of bring the, the unfairness and the injustice of the whole, of the whole process in front of the court, and to highlight that this is the type of case that was tried purportedly under a federal criminal trial under circumstances that never would have been permitted if it were a criminal trial.

* * * * *