[OPINION ISSUED MAY 22, 2009]

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

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee and Cross-Appellant,

and

TOBACCO-FREE KIDS ACTION FUND, et al.,

Intervenors,

v.

PHILIP MORRIS USA INC. (f/k/a Philip Morris, Inc.), et al.,

Defendants-Appellants and Cross-Appellees.

Appeal From The Judgment Of The United States District Court
For The District Of Columbia

DEFENDANTS' MOTION TO STAY ISSUANCE OF THE MANDATE PENDING THE FILING AND DISPOSITION OF PETITIONS FOR WRITS OF CERTIORARI[1]

Pursuant to FED. R. APP. P. 41(d)(2) and D.C. Circuit Rule 41(a)(2), Defendants respectfully move this Court to stay issuance of its mandate pending the fil-

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[1] This motion is filed on behalf of Defendants Philip Morris USA Inc., R.J. Reynolds Tobacco Company, Lorillard Tobacco Company, Altria Group, Inc., and British American Tobacco (Investments) Limited.

ing and disposition of timely petitions for writs of certiorari. This Court recognized the substantial nature of the arguments raised by Defendants—and the risk of irreparable harm confronting Defendants—when it issued a stay pending appeal. For similar reasons, a stay is also warranted pending the filing and disposition of Defendants' petitions for certiorari.

A stay is appropriate because the Panel's opinion raises substantial questions for certiorari, including: (1) whether a court of appeals is required to undertake de novo review of factual findings in a case that squarely implicates a defendant's First Amendment rights; (2) whether corporations can be part of an "association in fact" RICO enterprise; and (3) whether jurisdiction over this case was extinguished by the enactment of new federal legislation that imposes comprehensive regulation on every aspect of Defendants' business. The balance of equities also weighs strongly in favor of a stay because, in the absence of a stay, Defendants would be required to incur substantial, unrecoverable expenses to comply with the district court's injunctions during the pendency of their petitions for certiorari. No other party would be prejudiced by the issuance of a stay because Defendants' business will continue to be subject to stringent government oversight by the States and the federal Government while their petitions for certiorari are pending.

INTRODUCTION

The Government brought this suit under the Racketeer Influenced and Corrupt Organizations Act ("RICO") alleging that Defendants had conspired to deceive the public about the health effects and addictiveness of smoking cigarettes. After five years of pre-trial proceedings, an interlocutory appeal to this Court, and a nine-month bench trial, the district court found that Defendants had violated RICO by purportedly engaging in a scheme to defraud the public about the health risks and addictiveness of smoking. The district court found that Defendants were reasonably likely to commit future RICO violations and issued injunctive relief that required Defendants, among other things, to remove "light" and "low tar" descriptors from the packages and brand names of their cigarettes; to make corrective statements about the adverse health effects of smoking on cigarette packages, in advertisements, and at thousands of retail locations nationwide; to comply with new and burdensome document disclosure obligations well beyond those already imposed on Defendants by the Master Settlement Agreement ("MSA") with the States; and to refrain from any future acts of racketeering.

The district court refused to stay its judgment pending appeal, but, on Defendants' motion, this Court found that Defendants had "satisfied the stringent standards required for a stay pending appeal" and issued a stay that will remain in

force until the issuance of this Court's mandate. Stay Order at 1 (Oct. 31, 2006) (per curiam).

The Panel affirmed the district court's judgment in all significant respects. The Panel held that Defendants had formed an "association in fact" RICO enterprise, and concluded that Defendants were likely to commit future RICO violations—even though they had entered into the MSA with the States in 1998, which categorically prohibited Defendants from engaging in the racketeering activity alleged by the Government.[2] In reviewing the district court's findings on this (and every other) issue, the Panel applied the clearly erroneous standard of review (slip op. 45), rather than undertaking an independent review of the district court's factual findings. The Panel applied this "highly deferential" standard (*id.*) despite the fact that the Government's RICO allegations were premised on Defendants' constitutionally protected speech, including statements that Defendants had made in legislative and regulatory forums as part of the public-health debate about smoking.

Shortly after the Panel issued its opinion, Congress enacted the Family Smoking Prevention and Tobacco Control Act ("FDA Act"), Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009), which subjects every aspect of Defendants' busi-

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[2] Altria Group, Inc., is not a party to the MSA because it is a holding company that neither manufactures nor markets cigarettes. BATCo is also not subject to the provisions of the MSA because it is an English corporation organized under the laws of England and Wales that does not manufacture, market, sell, or advertise cigarettes in the United States.

ness to comprehensive oversight by the Food and Drug Administration ("FDA"). On July 31, 2009, Defendants petitioned for rehearing or rehearing en banc on the grounds that both the Panel and the full Court should consider the effect of that intervening legislation and reconsider several aspects of the Panel's decision.

This Court denied Defendants' petitions for rehearing or rehearing en banc on September 22, 2009.

ARGUMENT

This Court stays issuance of its mandate pending the filing and disposition of a petition for a writ of certiorari where "the certiorari petition would present a substantial question and . . . there is good cause for a stay." FED. R. APP. P. 41(d)(2)(A); *see also* D.C. Circuit Rule 41(a)(2).

The Panel's opinion raises substantial questions for certiorari, among them: (1) whether the Panel was required to undertake an independent review of the district court's factual findings, which imposed RICO liability based on Defendants' constitutionally protected participation in a public-health debate about the health risks of smoking; (2) whether a corporation can constitute part of an "association in fact" RICO enterprise; and (3) whether the FDA Act extinguished jurisdiction over this case by eliminating any reasonable likelihood of future RICO violations. Other substantial questions include whether Congress intended RICO to apply extraterritorially to foreign conduct by a foreign national with no direct, substantial,

and foreseeable effects in the United States; whether the fraud statutes and First Amendment permit allowing a corporation's specific intent to defraud to be proven through the collective knowledge of various employees, instead of the actual specific intent of one or more particular employees; and whether the district court's injunctions are impermissibly vague and overbroad.

Moreover, "there is good cause for a stay" because Defendants would suffer irreparable harm if they were required to comply with the district court's injunctions pending the disposition of their petitions for certiorari. Defendants would be required to expend substantial, unrecoverable funds to adhere to the injunctions during the pendency of their petitions. In contrast, no party would be prejudiced by the issuance of a stay.

Defendants repeatedly sought to elicit the Government's position on the stay. We were advised on Friday, September 25, that the Government would not be able to formulate a position on the requested stay before the filing of this motion, but that it intends to file a response to the motion in due course.

A stay of this Court's mandate is therefore warranted.

I. The Panel Contravened Supreme Court Precedent And Exacerbated An Existing Circuit Split By Failing To Undertake An Independent Review Of The District Court's Factual Findings.

Defendants' petitions for certiorari will raise the substantial question whether a court of appeals is required to undertake de novo review of a district

court's factual findings in a case that directly implicates a defendant's First Amendment rights.

The Supreme Court has held that, "in cases raising First Amendment issues," appellate courts must perform "an independent examination of the whole record" to ensure that the judgment does not unconstitutionally intrude "on the field of free expression." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). The Panel nevertheless applied the "highly deferential" clearly erroneous standard of review (slip op. 45) when examining the district court's findings, which imposed RICO liability based on Defendants' "core" First Amendment speech in legislative, regulatory, and other public forums as part of the public-health debate on smoking (*Brown v. Hartlage*, 456 U.S. 45, 52 (1982)) and their constitutionally protected commercial speech. *See In re R.M.J.*, 455 U.S. 191, 203 (1982).

The Panel's failure to undertake an independent examination of the district court's findings directly conflicts with the Supreme Court's decision in *Bose* and its progeny. *See*, *e.g.*, *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143-49 (1994). It also deepened an existing circuit split as to whether the First Amendment requires independent appellate review in false advertising cases. *Compare Byrum v. Landreth*, 566 F.3d 442, 448 n.5 (5th Cir. 2009) (independent appellate review), *Falanga v. State Bar of Ga.*, 150 F.3d 1333, 1347 (11th Cir.

1998), *and Revo v. Disciplinary Bd.*, 106 F.3d 929, 932 (10th Cir. 1997), *with FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 (D.C. Cir. 1985) (clearly erroneous review).

These conflicts with Supreme Court precedent and the decisions of other courts of appeals provide a substantial basis for seeking Supreme Court review of the Panel's decision. *See* Sup. Ct. R. 10(a), (c). Moreover, the importance of Supreme Court review is underscored by the Panel's acknowledgment that it may have reached a different conclusion on several issues in this case if it had independently examined the record. *See*, *e.g.*, slip op. 61. Accordingly, Supreme Court review would not only provide much-needed clarification on an important issue of First Amendment law but could also significantly alter the outcome of this exceptionally important case.

II. The Panel's Holding That Corporations Can Form An "Association In Fact" RICO Enterprise Conflicts With The Statute's Text And Purpose.

The Panel's opinion also directly presents the important and unsettled question whether a group of corporations can form an "association in fact" RICO enterprise.

Under RICO, an "'[e]nterprise' includes [1] any *individual*, partnership, *corporation*, or other legal entity, or [2] any union or *group of individuals* associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (emphases added). Despite the fact that the statute distinguishes between individuals and corporations

and limits "association in fact" enterprises to "group[s] of *individuals*," the Panel held that *corporations* associated in fact can constitute a RICO enterprise. That conclusion is inconsistent with basic canons of statutory interpretation. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (Where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted). It also greatly expands RICO beyond its statutory purpose of "address[ing] the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981). There is no indication in the statutory text or legislative history that Congress intended RICO—a statute designed to *protect* businesses from organized crime—also to reach criminal activity by groups of businesses.

Several Justices of the Supreme Court have already expressed significant skepticism about whether RICO extends to groups of corporations associated in fact. *See* Oral Argument Tr., *Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). This case provides the Court with an ideal vehicle for squarely addressing and authoritatively resolving that question.

III. The Newly Enacted FDA Act Extinguishes Jurisdiction Over This Case.

Shortly after the Panel issued its opinion, Congress enacted the FDA Act, which imposes detailed federal regulatory oversight on the design, manufacturing,

and marketing of cigarettes. That new federal regulatory framework eliminates any reasonable possibility that Defendants will commit future acts of racketeering and therefore extinguishes the district court's jurisdiction over this case, which was limited to "prevent[ing] and restrain[ing]" future RICO violations. 18 U.S.C. § 1964(a); *see also United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1198 (D.C. Cir.), *cert. denied*, 546 U.S. 960 (2005). At a minimum, the FDA Act's prohibition on the use of "low tar" descriptors moots the district court's overlapping injunction prohibiting Defendants from using descriptors in their packaging and advertising. There is a substantial likelihood that the Supreme Court will grant plenary review of this important jurisdictional issue or, alternatively, remand the case for this Court and the district court to consider this question in the first instance.

The FDA Act specifically targeted Defendants' alleged misconduct at issue in this case (§ 2(47-49)), and eliminated any reasonable likelihood that Defendants will commit future RICO violations. For example, the district court found that Defendants violated RICO by marketing "low tar" cigarettes; falsely denying the manipulation of nicotine yields; and failing to admit that nicotine is addictive. *See* slip op. 60-61. The FDA Act, however, prohibits Defendants from using "low tar" descriptors (absent a finding by the FDA that a product "significantly reduce[s] harm"), § 911(g)(1); affords the FDA broad authority to regulate nicotine delivery,

§§ 904(a)(2), 907(a)(4); and requires that cigarette packages include a printed statement that "Cigarettes are addictive" as one of several rotating warnings, § 201(a).

In light of this significant intervening change in the law, the Supreme Court is likely, at a minimum, to remand this case for further consideration of the district court's continuing jurisdiction under RICO. Indeed, the Supreme Court has expressly acknowledged its practice of granting petitions for certiorari, vacating the decision below, and remanding "in light of a wide range of developments, including . . . new federal statutes." *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996); *see*, *e.g.*, *Am. Bible Society v. Richie*, 522 U.S. 1011 (1997); *Bd. of Educ. v. Russman*, 521 U.S. 1114 (1997). There is a compelling basis for further consideration of this case because the newly enacted FDA Act not only profoundly alters the legal backdrop against which this case was decided but also extinguishes the district court's jurisdiction over the case by eliminating any reasonable likelihood of future RICO violations.

IV. The Balance Of Equities Weighs Strongly In Favor Of A Stay.

In addition to the substantial questions that will be raised by Defendants' petitions for certiorari, there is "good cause for a stay" because Defendants will suffer irreparable harm if they are required to comply with the obligations imposed by

the district court's injunctions during the pendency of their petitions. In contrast, no party would be prejudiced by the issuance of a stay.

This Court recognized at the outset of this appeal that the balance of equities weighed in favor of a stay. The Court concluded that Defendants "ha[d] satisfied the stringent standards required for a stay pending appeal" (Stay Order at 1 (Oct. 31, 2006) (per curiam)), including that, "without such relief," Defendants would "be irreparably injured"; that issuance of the stay would not "substantially harm other parties interested in the proceedings"; and that issuance of the stay would be consistent with the public interest. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The balance of equities also weighs in favor of a continued stay pending the filing and disposition of Defendants' petitions for certiorari.

In the absence of a stay, Defendants will be required to expend significant and unrecoverable resources to comply with the district court's injunctions. For example, Defendants will be required to redesign their advertising and to purchase newspaper space and television time to disseminate corrective statements about the health risks and addictiveness of smoking. Specifically, the district court ordered Defendants to make corrective statements about

> addiction (that both nicotine and cigarette smoking are addictive); the adverse health effects of smoking (all the diseases which smoking has been proven to cause); the adverse health effects of exposure to [environmental tobacco smoke ("ETS")] (all the diseases which exposure

> to ETS has been proven to cause); their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine); and light and low tar cigarettes (that they are no less hazardous than full-flavor cigarettes).

United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1, 928 (D.D.C. 2006).

To comply with these obligations, Defendants will be required to incur the significant expense of publishing these corrective statements in newspapers and disseminating them through television advertisements, package onserts, and their corporate websites. *Id.* Defendants' task of complying with these requirements will be complicated by the necessity of attempting to reconcile their advertising obligations under the district court's injunctions with their obligations under the newly enacted FDA Act, which imposes its own extensive advertising requirements on Defendants.

The district court also expanded the document disclosure obligations already imposed on Defendants under the terms of the MSA, which requires all Defendants to maintain publicly accessible physical depositories of litigation-related documents and all Defendants other than BATCo to maintain Internet Document Websites. The district court ordered "Defendants to provide complete and accurate information about any documents they withhold [from these depositories] on grounds of privilege or other protection, including confidentiality." *Philip Morris USA Inc.*, 449 F. Supp. 2d at 931. In that regard, the court required Defendants "to

provide full bibliographic information for all withheld documents," including titles and a summary of the basis for the privilege or confidentiality assertion. *Id.* To satisfy this obligation, Defendants will be required to undertake the time-consuming and financially burdensome task of reviewing and redacting—line by line—hundreds of thousands of privileged and trade secret documents.

Even if the Supreme Court ultimately reverses the Panel's decision, Defendants will be unable to recover the costs of complying with the district court's injunctions during the pendency of their petitions for certiorari. The Supreme Court has repeatedly held that such premature exposure to unrecoverable expenses is sufficient to warrant a stay. *See*, *e.g.*, *Ry. Labor Executives Ass'n v. Gibbons*, 448 U.S. 1301, 1305 (1980) (Stevens, J., in chambers) (finding "a sufficient showing of irreparable damage ha[d] been made" to support injunctive relief where there was a risk that the absence of such relief would force one party to make "substantial payments that would be . . . unrecoverable"); *Edelman v. Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., in chambers) (granting a stay where it was extremely unlikely that the petitioner would have been able to recover his funds if he prevailed before the Supreme Court).

A stay could also conserve valuable judicial resources by postponing the district court's resolution of the issues remanded by this Court until the Supreme Court's disposition of Defendants' petitions. Moreover, neither the Government

nor Intervenors will suffer any significant or irreparable harm if this Court issues a stay. Indeed, the Government itself sought a stay of the district court proceedings in this case pending the filing and disposition of its petition for a writ of certiorari from this Court's earlier decision holding that the disgorgement of profits is not a remedy available under RICO. *Philip Morris USA Inc.*, 396 F.3d 1190. In any event, even if this Court stays enforcement of the district court's injunctions, the public will continue to receive extensive information about the adverse health effects of smoking from Defendants' websites and advertisements, as well as from public-health authorities. Moreover, Defendants' business will continue to be subject to close regulatory oversight by the States under the provisions of the MSA and by federal government agencies including but not limited to the FDA and the FTC—which will also advance Intervenors' interest in ensuring that Defendants' business is subject to stringent government regulation.

CONCLUSION

This Court should stay issuance of its mandate pending the filing and disposition of Defendants' timely petitions for writs of certiorari.

Dated: September 28, 2009

Respectfully submitted.

/s/ Robert F. McDermott, Jr.
Robert F. McDermott, Jr.
rfmcdermott@jonesday.com
Michael A. Carvin
Peter J. Biersteker
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700

Counsel for R. J. Reynolds Tobacco Company

/s/ Michael B. Minton
Michael B. Minton
mminton@thompsoncoburn.com
A. Elizabeth Blackwell
THOMPSON COBURN LLP
One U.S. Bank Plaza, Suite 2900
St. Louis, Missouri 63101-1693
Telephone: (314) 552-6000
Facsimile: (314) 552-7000

Counsel for Lorillard Tobacco Company

/s/ Miguel A. Estrada
Miguel A. Estrada
mestrada@gibsondunn.com
Amir C. Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 530-9616

James M. Rosenthal
Robert A. McCarter
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Counsel for Philip Morris USA Inc.

/s/ Guy Miller Struve
Guy Miller Struve
guy.struve@davispolk.com
Charles S. Duggan
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4192
Facsimile: (212) 450-3192

Counsel for Altria Group, Inc.

Gene E. Voigts
SHOOK, HARDY & BACON
2555 Grand Boulevard
Kansas City, Missouri 64018-2613
Telephone: (816) 474-6550
Facsimile: (816) 421-5547

Counsel for Lorillard Tobacco Company

/s/ David L. Wallace
David L. Wallace
dwallace@chadbourne.com
Benjamin C. Rubinstein
CHADBOURNE & PARKE LLP
30 Rockefeller Plaza
New York, New York 10112
Telephone: (212) 408-5100
Facsimile: (212) 541-5369

Alan E. Untereiner
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W. Suite 411
Washington, D.C. 20006
Telephone: (202) 775-4500
Facsimile: (202) 775-4510

Counsel for British American Tobacco (Investments) Limited

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2009, I caused copies of the foregoing Motion to Stay Issuance of the Mandate to be served on the following counsel by the means specified below.

E-mail:

Mark R. Freeman
Alisa B. Klein
Appellate Staff, Civil Division
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Room 7228
Washington, D.C. 20530
(202) 514-5714
mark.freeman2@usdoj.gov
alisa.klein@usdoj.gov

Attorneys for the United States of America

Katherine A. Meyer
Howard M. Crystal
Meyer Glitzenstein & Crystal
1601 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20009
(202) 558-5206
howardcrystal@meyerglitz.com

Attorneys for Intervenors

First-class mail:

John K. Crisham
Kirkland & Ellis LLP
655 15th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 879-5000

David M. Bernick
Stephen R. Patton
Renee D. Smith
Kirkland & Ellis LLP
200 East Randolph Drive, Suite 5900
Chicago, Illinois 60601
(312) 861-2000

Attorneys for Defendant-Appellant
Brown & Williamson Holdings, Inc.

Deborah J. Israel
Womble Carlyle Sandridge & Rice PLLC
1401 Eye Street, N.W.
Seventh Floor
Washington, D.C. 20005
(202) 467-6900

Attorneys for Defendant-Appellant
The Council for Tobacco Research-USA, Inc.

Keith Allan Teel
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20001-2401
(202) 662-6000

Attorneys for Defendant-Appellant
The Tobacco Institute, Inc.

Peter A. Woolson
P.A. Woolson
217 East Redwood Street
Suite 1500
Baltimore, Maryland 21202
(410) 625-0000

Leonard A. Feiwus
Kasowitz, Benson, Torres & Friedman
1633 Broadway
New York, New York 10019
(212) 506-1700

Attorneys for Defendant Liggett Group, Inc.

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae* Chamber of Commerce
of the United States of America

Scott A. Sinder
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Attorneys for *Amicus Curiae* The National Association
of Convenience Stores

Andrew G. McBride
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Daniel J. Popeo
Washington Legal Foundation
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

Attorneys for *Amici Curiae* The Washington Legal Foundation and the National Association of Manufacturers

Stephen Kohn
Kohn, Kohn & Colapinto, LLP
3233 P Street, N.W.
Washington, D.C. 20007
(202) 342-6980

Christopher N. Banthin
Public Health Advocacy Institute, Inc.
102 The Fenway, Suite 117
Boston, Massachusetts 02115
(617) 373-2026

Attorneys for *Amici Curiae* The American Medical Association, et al.

Harvey Kurzweil
Dewey & LeBoeuf LLP
1301 Avenue of the Americas
New York, New York 10019
(212) 259-6915

Attorneys for *Amicus Curiae* The Citizens' Commission to Protect the Truth

Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for *Amici Curiae* Public Citizen, Inc., et al.

Michael D. Hausfeld
Cohen, Milstein, Hausfeld & Toll, PLLC
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 408-4600

Attorneys for *Amici Curiae* Society for Research on Nicotine and Tobacco, et al.

William C. Lieblich
National Association of Attorneys General
2030 M Street, N.W., 8th Floor
Washington, D.C. 20036
(202) 326-6004

Attorneys for *Amici Curiae* State of Alaska, et al.

David C. Vladeck
Federal Trade Commission
General Counsel
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2234

Attorneys for *Amicus Curiae* Tobacco Control Legal Consortium

Kerry Scott Lane, MD
901 45th Street
West Palm Beach, Florida 33401

Pro se for *Amicus Curiae* Kerry Scott Lane, MD

/s/ Miguel A. Estrada
Miguel A. Estrada