[NOT SCHEDULED FOR ORAL ARGUMENT]

Nos. 13-5028 & 14-5161

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
No. 99-2496 (Hon. Gladys Kessler)

BRIEF OF *AMICUS CURIAE* TOBACCO CONTROL LEGAL CONSORTIUM IN SUPPORT OF PLAINTIFF-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *Amicus curiae* Tobacco Control Legal Consortium certifies as follows:

Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellees.

Ruling Under Review

References to the rulings at issue appear in the Brief for Appellees.

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.

CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

The general nature and purpose of Amicus is explained in the Statement of Interest at the beginning of the body of this brief.

CERTIFICATE OF COUNSEL

Amicus is not aware of any other organization or individual that plans to file an *amicus curiae* brief in support of Plaintiff-Appellee. For reasons explained in the Statement of Interest at the beginning of the body of this brief, *Amicus* believes that its expertise and familiarity with the history of this case will be useful to the Court.

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*Authorities upon which *Amicus* chiefly relies are marked with asterisks.

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GLOSSARY

AMI	American Meat Institute
AOB	Appellants' Opening Brief
B&W	Brown & Williamson Tobacco Corporation[1]
BAT	British American Tobacco Company[2]
CEO	Chief Executive Officer
EPA	Environmental Protection Agency
FDA	Food & Drug Administration
FTC	Federal Trade Commission
NAM	National Association of Manufacturers
NCI	National Cancer Institute
P.M.	Philip Morris Companies [in internal company memos]
RJR	R.J. Reynolds Tobacco Company
SEC	Securities & Exchange Commission

[1] R.J. Reynolds Tobacco Co. is successor in liability to B&W.
[2] BAT was a defendant in the district court, and was the parent of B&W.

INTEREST OF *AMICUS CURIAE*

The Tobacco Control Legal Consortium is a national network of non-profit legal centers[3] providing technical assistance to public officials, health professionals and advocates concerning legal issues related to tobacco and public health.[4]

The Consortium serves as *amicus curiae* in cases where its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance, including earlier stages of this litigation. Many of the Consortium's briefs – in the United States Supreme Court, United States Courts of Appeals, and state courts around the nation – have addressed First Amendment claims brought by the tobacco industry to challenge government regulation.

The Consortium exists to protect the public from the devastating health consequences of tobacco use. It has a strong interest in ensuring that the public is informed as effectively as possible about the dangers of smoking, and a consequent interest in ensuring that the industry's decades-long efforts to thwart that goal are unsuccessful.

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[3] The legal centers affiliated with the Consortium are listed in the Appendix.

[4] *Amicus* has received the parties' consent to file this brief. No counsel of any party to this proceeding authored any part of this brief. No party or party's counsel – or any person other than *amicus* – contributed any money to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The constitutionality of the challenged corrective statements cannot be evaluated in a historical vacuum. As documented by the district court, for the past six decades the defendant tobacco companies have intentionally and successfully misled the public, regulators, and the courts about their products. They have obscured public understanding of the dangers of tobacco use through a well-financed and deliberate campaign of deception involving suppression of scientific evidence, hiding and destruction of documents, and enlistment of supposedly objective research institutions and scientific experts that were paid by the tobacco industry to sow doubt and confusion. In light of the enduring impact of that history of deception, the corrective statements easily withstand First Amendment review.

The tobacco company speech that would be burdened is commercial speech – speech disseminated "in attempts to persuade the public to purchase cigarettes." *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1144 (D.C. Cir. 2009). The corrective statements – including the preambles to which Defendants principally object – are factual statements that are uncontroversially true. They therefore need only be reasonably related to a legitimate government interest. *Zauderer v. Office of Disc.*

Counsel, 471 U.S. 626 (1985); *American Meat Institute [AMI] v. United States Dept. of Agriculture*, 760 F.3d 18 (D.C. Cir. 2014) (*en banc*).

There is no genuine controversy about the truth of the preambles; to the contrary, the failure of some courts to find the companies liable for fraud results in part from the very sort of misconduct at issue in this case – tobacco companies' success in concealing evidence and interfering with legal process. Any other definition of "controversial" – having to do with whether the statements might arouse strong reactions, or paint the tobacco companies in an unflattering light – imports issues irrelevant to the *Zauderer* framework, and threatens to impose a heckler's veto on the provision of vital information to consumers.

The preambles easily withstand *Zauderer* review. They are reasonably related to the government's goal of "thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions," *Philip Morris*, 566 F.3d at 1144-45, because they (1) dispel public confusion resulting from industry-sponsored "independent" research questioning the hazards of smoking, (2) attract attention sufficiently to overcome unconscious bias in favor of older beliefs, and (3) alert consumers to ongoing tobacco company deception.

In light of the scale of tobacco industry deception and the magnitude of its human costs, as well as the enormous potential benefits of the corrective statements, any burden on the tobacco companies' speech is far from "undue." Given that the constitutionally protected interest in *not* divulging information relevant to consumers' assessments of commercial products is "minimal," *Zauderer*, 471 U.S. at 650, the burdens on the tobacco companies' commercial speech – necessitated by their own deliberate deception – cannot be a reason to strike down corrective statements that could provide millions of consumers with potentially life-saving information.

ARGUMENT

I. THE DEFENDANT TOBACCO COMPANIES HAVE LIED FOR DECADES ABOUT THEIR PRODUCTS TO COURTS, TO REGULATORS, AND TO THE PUBLIC.

Each of the prescribed corrective statements is an appropriate remedy to decades of fraud.

A. Defendants Lied About The Deadly Effects Of Smoking.

Corrective statements about the lethal toll of tobacco are a necessary response to decades of deception and suppression of information. For more than half a century, the tobacco industry "disputed scientific findings linking smoking and disease knowing their assertions were false." *United States v.*

Philip Morris USA, Inc., 449 F. Supp. 2d 1, 180 (D.D.C. 2006). Moreover, "they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an 'open question.'" *Id.* at 208.

Documents discovered in litigation demonstrate that Defendants have privately known for sixty years that smoking causes serious disease. R.J. Reynolds [RJR] internal research reports, for example, acknowledged:

- "[C]linical data tend to confirm the relationship between heavy and prolonged tobacco smoking and incidence of cancer of the lung" (1953). *Id.* at 165.

- "Obviously, the amount of evidence accumulated to indict cigarette smoke as a health hazard is overwhelming. The evidence challenging this indictment is scant" (1962). *Id.* at 167.

- None of the "data acquired in our studies or in studies conducted elsewhere is inconsistent with … data indicting cigarette smoke as a health hazard" (1964). *Id.* at 180.

Nevertheless, RJR was still advertising in 1984 that the relation between smoking and disease remained "an open scientific controversy" and that "[s]tudies which conclude that smoking causes disease have regularly ignored significant evidence to the contrary." *Id.* at 201. As recently as 1998, an RJR Vice President told a Minnesota newspaper: "It's not

scientifically established that smoking by itself causes disease." Nadine-Rae Leavell, *The Low-Tar Lie*, 8 Tobacco Control 433, 436, 437 n.40.

In 1997 – four decades after Philip Morris's internal documents acknowledged that cigarettes cause lung cancer, *see Philip Morris*, 449 F. Supp. 2d at 165-66 – the company's CEO declared that if cigarettes were shown to cause lung cancer, he would "probably … shut [the] company down instantly." *Id.* at 205. In 1994 the CEOs of RJR, Lorillard, Liggett, Philip Morris, and Brown & Williamson [B&W] all declared to Congress that smoking had not been proven to cause cancer. *Id.* at 204.

The tobacco industry also obscured the dangers of smoking by conducting and publicizing supposedly independent research that purported to call those dangers into question. Announcing its "paramount" interest in public health, *id.* at 40, the industry in 1953 created "a sophisticated public relations vehicle – based on the premise of conducting independent scientific research – to deny the harms of smoking and reassure the public," *id.* at 41, with research programs controlled by the tobacco companies, *id.* at 49, that provided close to half a billion dollars in funding by the end of the century. *Id.* at 46.

Meanwhile, the industry did everything it could to suppress genuine research. For example, a 1966 Philip Morris internal report showing that

cigarette smoke inhalation led to higher rates of emphysema in animals was marked "[n]ot to be taken from this room" and never released. *Id.* at 180. After RJR scientists demonstrated links between smoking and a host of diseases in animals, in 1970 the research division was suddenly closed, years of records destroyed, and the entire research staff fired. *Id.* at 182. After independent research in the early 1970s demonstrated lung cancer in dogs forced to inhale cigarette smoke, industry representatives infiltrated the National Cancer Institute's Tobacco Working Group in an effort to block it from replicating the research. *Id.* at 114-15.

B. Defendants Lied About The Addictiveness of Nicotine.

Similarly, while the cigarette companies "internally acknowledged that smoking and nicotine are addictive … for decades [they] publicly denied and distorted the truth about the addictive nature of their products, [and] suppressed research revealing the addictiveness of nicotine." *Philip Morris*, 566 F.3d at 1107. Industry obfuscation was a deliberately orchestrated strategy. *See, e.g.*, *Philip Morris*, 449 F. Supp. 2d at 290 (1980 Tobacco Institute internal memorandum: publicly admitting that nicotine was addictive would undermine litigation defense that smoking is a "free choice").

Defendants' denials that cigarettes are addictive persisted into the twenty-first century. As recently as 2005, the President of Lorillard stated that the company did not take a "public position" and did not know whether nicotine was addictive. *Id.* at 287-88. RJR's CEO stated in 2004 that the company would not agree that nicotine is an addictive drug. In 1994 the CEOs of Philip Morris, RJR, American Tobacco, B&W, Lorillard, and Liggett all denied under oath to a Congressional committee that nicotine is addictive. *Id.* at 272, 278-81.

The tobacco companies knew that these denials were false decades earlier. *See id.* at 238 (1959 internal British American Tobacco [BAT] memorandum: "To lower nicotine too much might end up destroying the nicotine habit in a large number of consumers and prevent it from ever being acquired by new smokers"); *id.* at 239 (1962 "Private and Confidential" memorandum from BAT scientific director: "[W]e now possess a knowledge of the effects of nicotine far more extensive than exists in published scientific literature"); *id.* at 223 (1974 presentation by company scientist to Philip Morris's president: it is "simply not an adequate explanation to say that smoking is a habit, or that it is social behavior").

The district court also found "overwhelming evidence" that tobacco companies "endeavored to keep the extensive research and data they had

accumulated out of the public domain and out of the hands of the public health community by denying that such data existed, by refusing to disclose it, and by shutting down or censoring laboratories and research projects … investigating … nicotine." *Id.* at 307. To cite just one example, after a 1983 letter from Philip Morris's counsel recommended the suppression of major in-house nicotine research, the lab was suddenly closed. The lead scientist was warned against disseminating the lab's findings, with threats to sue him under a confidentiality agreement. *Id.* at 294-95.

Meanwhile, the industry repeatedly arranged for purportedly independent scientists to testify at Congressional hearings and to state publicly that there was no scientific evidence that cigarettes were addictive, hiding that the scientists were paid by the tobacco companies and that their statements were reviewed in advance by tobacco company lawyers. *Id.* at 282-85.

The hidden truth about addiction was central to the companies' business model. *See, e.g., id.* at 235 (1982 memo from staff scientist to RJR vice president: most smokers "would stop using if they could," and if smokers were able to stop smoking when they wanted, RJR would "go out of business"); *id.* at 291 (1977 Philip Morris memo labeled "CONFIDENTIAL": without nicotine "the cigarette market would collapse,

P.M. would collapse, and we'd all lose our jobs and consulting fees").

C. Defendants Lied About Allegedly Safer Versions Of Their Products.

Despite knowing "for decades that filtered and low tar cigarettes do not offer a meaningful reduction of risk," tobacco companies "engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Philip Morris*, 566 F.3d at 1124.

For example, "as part of [a] scheme to defraud smokers, Defendants withheld and suppressed their extensive knowledge" of the phenomenon whereby addicted smokers unconsciously take larger puffs from cigarettes with lower tar and nicotine levels. *Id.* at 1125. *See also* William Hamilton *et al.*, *Smokers' Responses to Advertisements for Regular and Light Cigarettes and Potential Reduced-Risk Tobacco Products (PREPS)*, 6 [Supp. 6] Nicotine & Tobacco Research S353, S354 (2004) (B&W Vice President, 1980: "It would not serve the industry well for smokers to understand that their actual smoking behavior undermines their intent in choosing low-tar products"). As recently as 2003, Altria and RJR opposed shareholder proposals requiring them to inform customers about the actual health risks of smoking "light" cigarettes. *Philip Morris*, 449 F. Supp. 2d at 528-29, 537.

The purpose of the campaign of deception is clear. *See, e.g.*, *Philip Morris*, 449 F. Supp. 2d at 496 (1986 B&W memo: "Quitters may be discouraged from quitting, or at least kept in the market longer"); National Cancer Institute, Smoking and Tobacco Control Monograph 13, *Risks Associated with Smoking Cigarettes with Low Machine-Measure Yields of Tar and Nicotine*, 221 (2001)[5] (1985 BAT memo: "It is useful to consider lights more as a third alternative to quitting and cutting down").

The campaign was highly successful. By 2006, low tar brands accounted for 92.7% of the cigarette market, in large part because they were believed to be less dangerous. FTC Cigarette Report for 2006, 7 (2009).[6]

D. Defendants Manipulated Nicotine Delivery Levels To Foster Addiction – And Lied About It.

For more than half a century, tobacco companies have cynically profited from their hidden knowledge of nicotine addiction by secretly "manipulat[ing] nicotine delivery in cigarettes to create and sustain addiction." *Philip Morris*, 566 F.3d at 1107. From the 1950s through at least the 1990s, each of the companies devoted extensive resources to determining how much nicotine is needed to maintain addiction and to designing cigarettes to deliver the requisite amount through a variety of

[5] *Available at* http://cancercontrol.cancer.gov/tcrb/monographs/13/index.html.
[6] *Available at* http://www.ftc.gov/os/2009/08/090812cigarettereport.pdf.

physical and chemical techniques. *Philip Morris*, 449 F. Supp. 2d at 309-74.

"Despite the overwhelming evidence …, Defendants have denied, repeatedly and publicly, that they manipulate nicotine content and delivery in cigarettes in order to create and sustain addiction." *Id.* at 374. For example, in 1994 executives of all six companies involved in this litigation denied under oath to a congressional committee that they manipulated nicotine levels, *id.* at 375-80 – statements contradicted by their own internal documents. The companies issued similar false denials throughout the 1990s in public statements, newspaper advertisements, and submissions to government bodies. *Id.* at 380-83.

E. Defendants Lied About The Deadly Effects Of Second-Hand Smoke.

As with earlier evidence that smoking is dangerous, the tobacco industry responded to concerns about the dangers of secondhand smoke by publicly trumpeting its intention to fund independent research to learn the truth, while privately working "to undermine independent research, to fund research designed and controlled to generate industry-favorable results, and to suppress adverse research results." *Philip Morris*, 449 F. Supp. 2d at 723.

Internal industry documents illustrate this strategy of deception. *See, e.g., id.* at 730 (BAT memo: "The aim of [the International Committee on Smoking Issues] is defensive research aimed at throwing up a smoke screen

and to throw doubt on smoking research findings which show smoke causes diseases"); *id.* at 741 (Philip Morris scientist noting advantages of using the Center for Indoor Air Research to fund research "so as to 'hide' industry involvement").

Tobacco company representatives "closely supervised and, when necessary, altered" the results of nominally independent research on secondhand smoke funded surreptitiously by the industry. *Id.* at 777. The industry trained "a cadre of seemingly independent consultants to support the industry's position on secondhand smoke," *id.* at 759, sponsored numerous symposia featuring industry-trained and subsidized scientists without revealing their substantial financial ties" to the industry, *id.* at 800-01, and publicized the results as "independent scientific statements," indicating (falsely) that there was ongoing scientific controversy about whether secondhand smoke was hazardous. *Id.* at 768. Industry-funded scientists also regularly intervened – without disclosing their affiliation – to criticize proposed regulation. *See, e.g.*, *id.* at 791-93 (industry consultants submitted "independent" critical comments on EPA's proposed Risk Assessment of secondhand smoke, "foster[ing] the impression that a large number of scientists existed who, independent of the tobacco industry, opposed the proposal"). At the time of the district court's decision, there

was "credible evidence that [this] Consultancy Program [was] still operational." *Id.* at 799.

II. THE CORRECTIVE STATEMENTS – INCLUDING PREAMBLES – EASILY PASS FIRST AMENDMENT REVIEW.

When "factual and uncontroversial" disclosures are required in the context of commercial speech, the commercial speaker's First Amendment rights are not violated so long as the disclosure requirements are "reasonably related" to the government's interest and are not unduly burdensome. *Zauderer*, 471 U.S. at 651. The history reviewed above makes clear that the ordered corrective statements, including the preambles to which Defendants principally object, are "reasonably related" – indeed essential – to effectively educating potential consumers of tobacco products, and that any burden thereby imposed on the tobacco companies' speech is neither "unjustified" nor "undue." *Id.*

Commercial speech that has been held to be "misleading … is not protected by the First Amendment." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). Consequently, "the State may ban commercial expression that is fraudulent or deceptive without further justification." *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). Indeed, "where the record indicates that a particular form or method of advertising has in fact been deceptive," *In re R. M. J.*, 455 U.S. 191, 202 (1982), no further First

Amendment scrutiny is required. *Id.* at 203. Given that "the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed," *Zauderer*, 471 U.S. at 651 n.14, the First Amendment cannot be offended by mandated disclosures that correct fraudulent commercial speech, when that speech could have been constitutionally banned. At the very least, the companies' adjudicated record of deception calls for more deferential than usual First Amendment review of measures designed to correct that deception.

In any event, the criteria set out in *Zauderer* for constitutionally acceptable disclosure mandates are readily met in this case.

A. Any Speech Burdened By The Mandated Preambles Is Commercial Speech Relating To Defendants' Products.

1. The Burdened Speech is Commercial Speech.

This Court has already made clear that the speech burdened by the mandated corrective statements is the "current and future commercial speech" of the tobacco companies. *Philip Morris*, 566 F.3d at 1143. The companies' "fraudulent representations about the safety of their products" constitute commercial speech, because they were disseminated "in attempts to persuade the public to purchase cigarettes." *Id.* at 1144.

Likewise, for each of the five preambles, the finding that the companies "deliberately deceived the American public" was based on the

companies' deceptive *commercial* speech. Any future speech that might be burdened would involve tobacco companies' efforts to persuade the public to buy their products by minimizing their dangers. This would remain true even if some consumers infer – not unreasonably – that the tobacco companies are generally untrustworthy.

2. The Burdened Speech is About Defendants' Products.

Defendants' specious arguments that the mandated preambles are not about the tobacco companies' products, Appellants' Opening Brief [AOB] at 23-25, 28-29, 34, 49, fail to establish that the speech at issue is not commercial or for some other reason falls outside the scope of *Zauderer*.

First, what determines whether *Zauderer* review applies is not whether the preambles are speech about tobacco products, but whether the speech that would be burdened is commercial speech promoting those products. *See Philip Morris*, 566 F.3d at 1143 ("the level of [First Amendment] scrutiny depends on the nature of the speech that the corrective statements burden," not on "[t]he context of the corrective statements"). The speech that might be burdened is claims about the safety of tobacco products, issued in order to persuade consumers to purchase them.

In any event, the distinction Defendants seek to draw between statements about their products and statements about their conduct, AOB at

23-29, is unfounded, as made clear by the most relevant authority they cite. *See AMI*, 760 F.3d 18. When this Court stated that to fall under the rule of *Zauderer*, "the disclosure mandated must relate to the good or service offered by the regulated party," *id.* at 26, the intended contrast was with disclosures related to products of other parties or otherwise entirely unrelated to the business of the regulated party: "The First Amendment does not tolerate a government effort to compel disclosures unrelated to the product or service – for example, a compelled disclosure on all food packages (not just cigarette packages) that cigarette smoking causes cancer." *Id.* at 33 n.1 (Kavanaugh, J., concurring in judgment). By contrast, disclosures that cigarette manufacturers consistently lied to consumers about the dangers of their products, or that they manipulated nicotine delivery to ensure addiction, are highly relevant to consumers' assessment of "the efficacy, safety, and quality" of their products. *Philip Morris*, 566 F.3d at 1143.

If the category of statements related to a product were construed as narrowly as Defendants would have it, the mandated disclosures in *AMI* itself could not have passed muster. The countries where a meat animal was born, raised, and slaughtered, *AMI*, 760 F.3d at 20, are no more intrinsic qualities of the resulting products than are the measures tobacco companies

took to ensure that cigarettes would deliver addictive quantities of nicotine. Both histories are naturally of concern to consumers and convey significant information about the product to consumers – indeed, the history of producers' manipulation of nicotine delivery far more so than the geographic origin of meat.

The other authorities cited by Defendants have no bearing. The warnings and disclaimers reviewed in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), *overruled on other grounds by AMI*, 760 F.3d 18, and *National Ass'n of Mfrs. [NAM] v. SEC*, 748 F.3d 359 (D.C. Cir. 2014), *reh'g granted*, Nov. 18, 2014, were rejected not because they were not about the products, but because they were found to be not "factual and uncontroversial." *Reynolds*, 696 F.3d at 1217; *NAM*, 748 F.3d at 371. The preambles considered in *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977), were rejected not because they were not about the product, but because they were "more intrusive than necessary" under the circumstances. *Id.* at 763.

In fact, with respect to the companies' "conduct" in designing cigarettes to ensure addiction, the law of this case is already established. *See Philip Morris*, 566 F.3d at 1138 (approving corrective statements about "the

manufacturers' manipulation of cigarette design and composition to ensure optimum nicotine delivery").

B. The Mandated Preambles Are Factual And Uncontroversial.

"Factual" statements, as the term is employed in determining whether *Zauderer* review applies, are statements made true or false by objective, discoverable facts; they contrast with statements of opinion, taste, or ideology. *See NAM*, 748 F.3d at 371 (finding that "conflict-free" labels may be ideological rather than factual); *Reynolds*, 696 F.3d at 1217 (holding certain images non-factual because they do not convey information); *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 556 (6th Cir. 2012) ("distinguishing between a fact and a personal or political opinion controls whether a required disclosure is reviewed under *Zauderer's* rational-basis rule"); *Entm't Software Ass'n v. Blagojevich*, 469 F.3d 641, 652 (7th Cir. 2006) (required labels were not factual, because definition of "sexually explicit" is "subjective" and "far more opinion-based than the question of whether a particular chemical is within any given product").

A factual statement is "uncontroversial" within the meaning of *Zauderer* if there is no reasonable controversy about its truth. *See AMI*, 760 F.3d at 27 ("AMI does not disagree with the truth of the facts required to be disclosed, so there is no claim that they are controversial in that sense");

Reynolds, 696 F.3d at 1216 (*Zauderer* standard applies only to "indisputably accurate" statements); *Disc. Tobacco*, 674 F.3d at 560 (asking whether required warnings were "accurate" as well as factual to determine whether *Zauderer* review applied); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114 (2d Cir. 2001) ("mandated disclosure of *accurate*, factual, commercial information" is reviewed under *Zauderer*) (emphasis added).

The corrective disclosures mandated here – including the preambles – are factual statements that are uncontroversially true.

1. Other Courts' Decisions Provide No Reason to Doubt that the Preambles are Uncontroversially True.

There is no merit to Defendants' contentions that decisions of other courts call the uncontroversial truth of the prescribed preambles into question.[7] Each of the district court's findings was supported by multiple documents from the companies' own records. It is hard to imagine how any conspiracy to commit fraud could be demonstrated more conclusively.

Moreover, to the extent that the tobacco companies prevailed in earlier litigation, their victories were in large part due to the very sorts of suppression of evidence at issue here. *See* Mark Morrissey, Re: Destruction

[7] Technically, even if other decisions provided reason to doubt the district court's findings – and they emphatically do not – it is factual and uncontroversially true that "A Federal Court has ruled …" and "has ordered…."

of Documents, Bates No. 507647971 (Nov. 1, 1991)[8] (Note to RJR senior brand manager: "As we discussed . . . this is what I'm going to destroy . . . under our current scrutiny"); T. E. Davies, *Note for Mr. Langford – Smoking and Health*, Bates No. 202315515-16 (Nov. 10, 1970)[9] (memorandum between BAT attorneys: "You might … suggest that files … be gone through … so that any offending documents are removed"); Thomas Osdene, [untitled handwritten note from Philip Morris's Director of Science and Technology], Bates No. 1000130803 (Undated)[10] ("Ok to phone & telex these documents will be destroyed"). In fact Philip Morris was sanctioned *in this case* for destruction of evidence, involving "at least eleven employees hold[ing] some of the highest, most responsible positions in the company." *United States v. Philip Morris USA, Inc.*, No. 99-2496 (Memorandum and Opinion D.D.C. July 21, 2004) at 2.

Defendants have also relied on harassment, intimidation, and sheer ability to outspend plaintiffs. *See* Mike Jordan, Memorandum to S&H Attorneys (Apr. 28, 1988)[11] (former counsel for RJR: "the way we won these cases was … by making that other son of a bitch spend all his" money); B.A. Mackintosh, *Draft Report Prepared by RJR Outside Legal*

[8] *At* http://tobaccodocuments.org/youth/AmRJR19911101.Lt.html.
[9] *At* http://tobaccodocuments.org/ness/41332.html.
[10] *At* http://tobaccodocuments.org/landman/183546.html.
[11] *At* http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif.

Counsel, Bates No. 507916453-54 (Jan. 20, 1987)[12] (recommending that the defense "[i]ntimidate plaintiff's experts"); *Training Materials for Counsel in Smoking & Health Litigation* – Vol. VII, Bates No. 282011028 (1982)[13] (private investigators should be retained; all relatives should be identified and interviewed, as should "'remote' subjects . . . (e.g. high school friends, former co-workers, etc.)"). In one illustrative personal injury case, RJR deposed "anyone and everyone remotely connected with Plaintiff, including childhood friends, … former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived." William Townsley & Dale Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 Cal. W. L. Rev. 275, 297 (1989). Plaintiff's mother was deposed for days. *Id.*

Notwithstanding such obstacles, the district court is not the only fact-finder to have found Defendants liable for conspiring to deceive consumers. *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1257 n.4 (Fla. 2006) (upholding jury findings that tobacco companies "agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes"); *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-70 (Or.

[12] *At* http://tobaccodocuments.org/bliley_rjr/507916450-6480.html.
[13] *At* http://tobaccodocuments.org/ness/38753.html.

2006) *vacated sub nom. Philip Morris USA v. Williams*, 549 U.S. 346 (2007), *adhered to on reconsideration*, 176 P.3d 1255 (Or. 2008) (summarizing jury findings that Philip Morris and RJR were liable for fraud for intentionally misrepresenting the dangers and addictiveness of smoking); *Bullock v. Philip Morris USA Inc.*, 42 Cal. Rptr. 3d 140, 153-56 (Cal. App. 2006), *as modified on denial of reh'g*, *review granted and opinion superseded*, 141 P.3d 718 (Cal. 2006) (upholding jury findings of liability for concealing and misrepresenting the dangers of smoking); *Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 1650 (2005) (upholding jury findings of "fraud by intentional misrepresentation, fraudulent concealment, [and] false promise"); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29, 54 (Cal. App. 2004), *review granted and opinion superseded sub nom. Henley v. Morris*, 88 P.3d 497 (Cal. 2004) (upholding jury findings of intentional misrepresentation, fraudulent concealment, and fraudulent promise).

The tobacco companies' attempt to paint as controversial the well-established facts about their fraudulent conduct is nothing other than a reprise of their infamous "open question" strategy. *See, e.g., Philip Morris*, 449 F. Supp. 2d at 191-92 (1967 internal B&W memorandum: "Doubt is our product since it is the best means of competing with the 'body of fact'…. It is also a means of establishing a controversy"). Just as they continued to

characterize as controversial the connection between smoking and disease, the addictiveness of nicotine, the hazards of secondhand smoke, and the extent of compensatory smoking of "light" cigarettes" long after each of these facts was conclusively established, so they now describe their adjudicated – and painstakingly documented – fraud as, e.g., "alleged misstatements," AOB at 32, "alleged past wrongdoing," *id.* at 33, "alleged misconduct," *id.*, "alleged deception," *id.* at 33 n.10, "alleged inaccuracy," *id.* at 39, "allegedly fraudulent marketing," *id.* at 73, "purportedly engaging in 'nicotine manipulation.'" *Id.* at 34.[14] The truth of the prescribed preambles is no more controversial than any of the other "controversies" historically manufactured by the tobacco companies.

2. That Defendants' Fraud Is Appalling Does Not Make It Controversial That It Occurred.

The only sense of "controversial" relevant to the *Zauderer* standard concerns controversy about the truth of a statement. Defendants' characterizations of the prescribed preambles as "inflammatory," AOB at 10, 13, 29, or "incendiary," *id.* at 18, 52 – even if they were accurate – would not change the fact that the preambles are factual and uncontroversially true. Factual and uncontroversially true statements – an accurate cancer diagnosis, an accurate news story about a murder – may arouse strong emotional

[14] *See also* AOB at 3, 17, 42, 53, 59 (more of same).

responses. "Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions." *Disc. Tobacco*, 674 F.3d at 569. Nor does it make their truth controversial.

The authorities cited by Defendants do not indicate otherwise. The graphic warnings reviewed in *Reynolds v. FDA*, 696 F.3d 1205, were found problematic not because they might evoke a strong emotional response, but because they were "*primarily* intended to evoke an emotional response" or to shock *rather than* provide information. *Id.* at 1216 (emphasis added). In fact, the court found that several of the warnings "did not convey *any* … information at all, much less make an 'accurate statement.'" *Id.* The preambles here, by contrast, do accurately convey information – information that is likely to be of interest and use to consumers.

The required disclaimer in *NAM v. SEC*, 748 F.3d 359, failed review under *Zauderer* because it conveyed a judgment whose truth was highly controversial. Even someone "who condemns the atrocities of the Congo war in the strongest terms," the court observed, may not agree that purchasers of products containing trace quantities of minerals from the Democratic Republic of Congo bear moral responsibility for war in that

country. *Id.* at 371. The challenged preambles, by contrast, assert no proposition whose truth could reasonably be disputed.

That the prescribed preambles reflect poorly on Defendants, *see* AOB at 2, 20, 25-26 30-31 (complaining of the "confessional" or shaming nature of the preambles), does not take the preambles or other disclosures of tobacco company misconduct outside the ambit of *Zauderer*, nor does the possibility that they might "engender widespread public ill-will and anger." Defendants anticipate such a response, based on the "high reprehensibility" of their conduct in manipulating nicotine delivery. AOB at 34 (quoting *Bullock*, 42 Cal. Rptr. 3d at 174). Defendants apparently posit a regime under which wrongdoers' right to hide their misconduct *increases* as the misconduct grows more serious. Such a rule of law has little to recommend it, and has never been adopted by any court.

C. The Preambles Are Reasonably Related To Correcting Confusion Engendered By Defendants' Misrepresentations And To Preventing Future Misrepresentations.

The mandated statements are reasonably related – perhaps essential – to "thwarting prospective efforts by Defendants to either directly mislead consumers or capitalize on their prior deceptions." *Philip Morris*, 566 F.3d at 1144-45. The preambles are needed because (1) the prescribed warnings will be difficult to assimilate for consumers confused by earlier

announcements of "independent" research questioning the hazards of smoking, (2) an attention-getting jolt is needed to overcome unconscious bias in favor of older beliefs, and (3) tobacco company deception is a moving target.

As an initial matter, mandated disclosures need not be the least restrictive means of advancing the relevant government interest in order to withstand First Amendment challenge. *Zauderer*, 471 U.S. at 651. *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-51 (2010) (rejecting contention that challenged disclosure requirements must be no more extensive than necessary). Even the more stringent standard of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), does not require establishing that no less restrictive alternatives would be effective. *See AMI*, 760 F.3d at 26 ("Notwithstanding the reference to 'narrow tailoring,' the [Supreme] Court has made clear that the government's burden on the final *Central Hudson* factor is to show a 'reasonable fit,' or a 'reasonable proportion,' between means and ends") (quoting earlier cases).

In any event, the preambles ordered by the district court are actually a very necessary ingredient of the corrective statements.

1. The Preambles are a Needed Corrective to Misrepresentations about the Tobacco industry's Concern for Public Health.

The preambles concerning past deception are themselves corrective statements, countering long-offered assurances by Defendants that they were disinterested seekers of truth about any harm caused by tobacco and that they prioritized the health of their customers. *See, e.g.*, *Philip Morris*, 449 F. Supp. 2d at 39 (quoting 1954 industry promise to fund independent research into tobacco and health, declaring that "an interest in people's health" was "paramount to every other consideration in our business"); *id.* at 723 (describing 1984 advertisement that criticized research linking second-hand smoke and disease and announced, "No one wants to know the answers more than R.J. Reynolds. This is why we are providing major funding for scientific research … to independent scientists who are free to publish whatever they find"). Because these assurances were made in an effort "to persuade the public to purchase cigarettes," *Philip Morris*, 566 F.3d at 1144, they were commercial speech. And because the effects of the deceptive assurances endure, corrective statements may constitutionally be mandated. *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000).

Audiences confused by past announcements of "independent" research disputing the dangers of smoking are likely to respond to accurate

statements about those dangers by imagining that the issue is an "open question" – precisely the attitude the industry has sought to engender. The preambles are needed to make clear that the conflict between current corrective statements and past assertions are the result not of unsettled science, but of deliberate deception.

2. The Preambles are Needed to Counter Confirmation Bias.

The preambles must be as forceful and attention-attracting as possible, to counter the well-documented phenomenon of confirmation bias, the tendency to prioritize information that confirms pre-existing beliefs. *See, e.g.*, Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 R. Gen. Psych. 175 (1998). Many psychological studies have demonstrated that beliefs tend to persist even after the initial reasons on which they were based have been discredited. *See, e.g.*, Craig Anderson *et al.*, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. Personality & Social Psych. 1037 (1980). Experiments show that people's judgments give greater weight to bits of information received earlier in a series. Jonathan Baron, *Thinking and Deciding*, 197-200 (3rd ed. 2000). It is thus unsurprising that consumers are still influenced by assurances that smoking and second-hand

smoke are safe,[15] that light cigarettes reduce risk, or that cigarettes are not addictive, even after they have received subsequent accurate warnings to the contrary. Being confronted with the fact that they were deliberately deceived can help move consumers out of their cognitive inertia, because it will gain their attention. *See* Vivian Peters, *The Persistence of Stereotypic Beliefs: a Cognitive View*, in Advances in Consumer Research, v. 10 (Richard Bagozzi & Alice Tybout, eds. 1983) (confirmation bias could perhaps be overcome through "a concrete, vivid discrediting of the evidential base").

3. The Preambles are Necessary Because Industry Deception is a Moving Target.

Because the content of tobacco industry deception is constantly evolving, it is insufficient simply to correct certain past misrepresentations. Consumers need to be alerted to the general pattern of deception in order to make an informed evaluation of current industry claims. Given the tobacco industry's progression from claiming that smoking has health *benefits*, *Philip Morris*, 449 F. Supp. 2d at 431, to denials of the hazards of smoking,

[15] While it is unlikely that many consumers still believe that smoking is completely safe, there is ample evidence that most significantly underestimate the dangers. *See Philip Morris*, 449 F. Supp. 2d at 578. In particular, "most youth, at a time when they are deciding whether to start smoking, have a very inadequate understanding of the medical consequences." *Id.* at 579. This is especially troubling, given that "over 80% of smokers start smoking before they turn eighteen." *Id.* at 562.

see supra at sec. IA, to falsely insinuating that primitive filters significantly reduced risk, R.W. Pollay & T. Dewhirst, *The Dark Side of Marketing Seemingly "Light" Cigarettes*, 11 Tob. Control (Supp. I) i18, i18-i19 (2002), to falsely insinuating that "light" cigarettes significantly reduced risk, *see supra* at sec. IC, it is reasonable to require that consumers be warned of that history of deception when considering, for example, RJR's claims that Advance, a modified tobacco cigarette, has "[l]ess toxins," quoted in National Cancer Institute [NCI], Smoking and Tobacco Control Monograph 19, *The Role of the Media in Promoting and Reducing Tobacco Use* 310 (2008),[16] or that Eclipse, a heated-tobacco product, "responds to concerns about certain illnesses caused by smoking, including cancer." Quoted in *id.* at 111.

Such warnings are needed. In their absence, 91% of smokers in a 2004 study believed that Eclipse was safer than conventional cigarettes after they were read RJR statements, while 24% believed Eclipse was *completely* safe. Linda Pederson & David Nelson, *Literature Review and Summary of Perceptions, Attitudes, Beliefs, and Marketing of Potentially Reduced Exposure Products*, 9 Nicotine & Tobacco Research 525, 530 (2007). In reality, Eclipse produces tar levels similar to those of "light" cigarettes. *Id.*

[16] *Available at* http://cancercontrol.cancer.gov/tcrb/monographs/19/index.html.

at 532. Several studies have found that ads for such alternative tobacco products reduce smokers' interest in quitting. NCI Monograph 19 at 461.

D. The Mandated Preambles Are Not Unduly Burdensome.

The preambles may well impose some burden on the tobacco companies' future commercial speech: many listeners may be more skeptical of the companies' future statements, though individuals will use their own judgment – and reach varying conclusions – as to how much credence to give to the findings of a federal court. But in light of the scale and human costs of the tobacco companies' deceptions, and the informative value of the preambles, that burden can hardly be characterized as "undue." Of course, the tobacco companies would prefer consumers not to know about their adjudicated history of deception, but it is relevant to consumers' assessment of their products, and so their constitutionally protected interest in *not* divulging that information is "minimal." *Zauderer*, 471 U.S. at 650. Consumers are not a criminal jury that must not be influenced by knowledge of a defendant's prior misconduct.

The various other burdens of which the tobacco companies complain are attributable to their own actions – that is, eminently "due." The companies' contention that the media in which the corrective statements are to be placed are "needlessly duplicative," AOB at 46, invites the question

why they used those same "multiple, overlapping channels of communication," *id.* at 45, to disseminate their own deceptive messages. *See Philip Morris*, 449 F. Supp. 2d at 928 (remedy "uses the same vehicles which Defendants have themselves historically used to promulgate false smoking and health messages"). That the remedies derive from "an opinion issued nearly ten years ago" and "a lawsuit filed fifteen years ago," AOB at 19, speaks only to Defendants' success in delaying their implementation. That some of the misconduct "occurred as long as six decades ago," *id.* at 19, 40, simply reflects the duration of the companies' continuing pattern of deception. Defendants' claim that there is no evidence that they "ever specifically denied" that smoking kills 1200 Americans a day, *id.* at 40, is true only because they so steadfastly denied that smoking kills *anyone*.

The burden on the tobacco companies' speech is not undue.

In fact, declarations that the tobacco companies were ordered to make the statements that follow, far from burdening the companies' speech, actually *mitigate* any arguable First Amendment burden, because they make clear that what follows is not the companies' own message. Requiring a private speaker to convey a message of the government's choosing is less offensive to the First Amendment when an observer is unlikely to attribute the message to the private speaker. *See Johanns v Livestock Mktg. Ass'n*,

544 U.S. 550, 564 n.7 (2005) (after finding that speech funded by involuntary assessments on beef producers did not offend the First Amendment, noting that "[i]f a viewer would identify the speech as [that of the objecting beef producers], … the analysis would be different"). *See also Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009) (finding monuments on government land constitutional in part because "there is little chance that observers will fail to appreciate the [governmental] identity of the speaker"). The preambles would lead observers similarly not to attribute the corrective statements to the tobacco companies, thereby lessening the First Amendment burden.

CONCLUSION

Evaluated in light of the extraordinary history of lethal deception they are designed to counter, the mandated corrective statements readily pass First Amendment review. The district court's order should be affirmed.

DATED: December 8, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B). The brief contains 6980 words, according to Microsoft Word, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: December 8, 2014

/s/ Thomas Bennigson
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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I caused to be filed electronically via the Court's CM/ECF System, and thereby served on all counsel registered to receive electronic notices, a true and correct copy of this Brief of *Amicus Curiae* Tobacco Control Legal Consortium.

On December 8, 2014 I will cause true and correct copies of this Notice to be mailed to the following counsel:

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APPENDIX

Tobacco Control Legal Consortium

The Tobacco Control Legal Consortium is based at the Public Health Law Center, Inc., of the William Mitchell College of Law in St. Paul, Minnesota. Affiliated legal centers include: ChangeLab Solutions, Oakland, California; Legal Resource Center for Tobacco Regulation, Litigation & Advocacy, at University of Maryland School of Law, Baltimore, Maryland; Public Health Advocacy Institute, at Northeastern University School of Law, Boston, Massachusetts; Smoke-Free Environments Law Project, at Center for Social Gerontology, Ann Arbor, Michigan; Tobacco Control Policy and Legal Resource Center at New Jersey GASP, Summit, New Jersey; and Center for Public Health and Tobacco Policy at New England Law | Boston.