SCHEDULED FOR ARGUMENT ON FEBRUARY 23, 2015

Nos. 13-5028 & 14-5161

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

TOBACCO-FREE KIDS ACTION FUND, *et al.*,

Plaintiff-Intervenors-Appellees,

v.

PHILIP MORRIS USA INC., *et al.*,

Defendants-Appellants.

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

BRIEF FOR THE PLAINTIFF-INTERVENORS TOBACCO-FREE KIDS ACTION FUND, *et al.*

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties And Amici

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for the United States.

CORPORATE DISCLOSURE STATEMENT

The Tobacco Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, and Americans for Nonsmokers' Rights, are non-profit education and advocacy organizations dedicated to a number of public health issues, including working to prevent and reduce tobacco use and its harms. The National African American Tobacco Prevention Network is a national non-profit organization dedicated to facilitating the development and implementation of comprehensive and community competent tobacco control programs to benefit communities and people of African descent. None of these Intervenors has any parent companies or issues any stock or partnership shares.

B. Rulings Under Review

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

C. Related Cases

References to prior appeals before this Court appear in the Brief for Appellants.

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STATEMENT OF THE ISSUES

1. Whether defendants may re-litigate the corrective statements remedy detailed in the district court's 2006 Remedial Order (JA39-44).

2. Whether the district court abused its discretion in requiring corrective statements accurately summarizing the court's massive factual findings, including defendants' deliberate deceptions.

STATEMENT OF THE CASE

This case concerns the most pervasive and harmful fraud ever perpetrated on the American people, in which the largest cigarette companies conspired for decades to deliberately deceive the public about the toxicity and addictiveness of their product – a product that, when used precisely as intended, inflicts massive suffering and premature death on millions of Americans. The Public Health Intervenors are six national nonprofit public health organizations – Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers' Rights, and National African American Tobacco Prevention Network – who intervened to advocate for appropriate remedies. *See United States v. Philip Morris USA Inc.*, No. 99-2496 (GK), 2005 WL 1830815, at *6 (D.D.C. July 22, 2005) ("In a case of this magnitude, which could potentially affect the health and welfare of the American public . . . it will serve the public interest for major public health organizations, such as Intervenors,

who have long experience with smoking and health issues, to contribute their perspectives on what appropriate and legally permissible remedies may be imposed should liability be found.").

After considering almost 14,000 exhibits, the written testimony of 162 witnesses, and the live testimony of 84 witnesses in a nine-month bench trial, the district court made thousands of findings demonstrating that defendants engaged in a massive campaign of fraud and deception to convince the public, and particularly young people, to smoke cigarettes, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. *See United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part*, 566 F.3d 1095 (D.C. Cir. 2009) ("*Affirmance Opinion*").

Upon finding that defendants' fraud will continue, the court considered *eight* categories of remedies, finding only four appropriate – including the corrective statements remedy. That remedy requires the companies to place statements in multiple media addressing smoking's adverse health effects (Statement A); the nature of cigarette addiction (Statement B); the truth about "light" and "low tar" brands (Statement C); defendants' nicotine manipulation (Statement D); and the health impacts of second-hand smoke (Statement E).

This Court affirmed almost all of the district court's findings and remedies, 566 F.3d 1095, and has since rejected two additional appeals. *See United States v. Philip Morris USA Inc.*, 686 F.3d 832 (D.C. Cir. 2012) ("*Vacatur Appeal*"); *United States v. Philip Morris USA Inc.*, 686 F.3d 839 (D.C. Cir. 2012). The district court subsequently determined the precise language of the statements (JA161), and with this *fourth* appeal defendants are raising issues long resolved, and otherwise ignoring the district court's broad discretion to impose statements accurately summarizing the truth about cigarettes and defendants' misconduct.

STATEMENT OF FACTS

A. The District Court's Factual Findings

Because the district court's thousands of factual findings, including those accurately summarized in the corrective statements, demonstrate that the language in the statements is well within the district court's broad discretion, it is important to summarize them in some detail.

1. Factual Findings Summarized In The Corrective Statements

a. The Cigarette's Devastating Health Effects And Defendants' Campaigns To Deceive The Public About Those Effects

The district court made hundreds of factual findings that smoking cigarettes causes numerous devastating diseases. *E.g.*, 449 F. Supp. 2d at 146-148 (Findings

of Fact ("FF") 510-533). These include heart disease (FF514); emphysema (FF515-16); acute myloid leukemia (FF529); and cancers of the mouth (FF521), esophagus (FF519), larynx (FF520), lung (FF512-13), stomach (FF530), kidney (FF519), bladder (FF517) and pancreas (FF522). The court found cigarette smoking causes reduced fertility (FF527), low birthweight in newborns (FF528), and cancer of the cervix (FF531).

The court found that "[s]moking is a cause of significant disease and death," "kill[ing] 440,000 Americans every year, or more than 1,200 every single day," 449 F. Supp. 2d at 855 – "substantially greater than the combined annual number of deaths due to illegal drug use, alcohol consumption, automobile accidents, fires, homicides, suicides, and AIDS." *Id.* at 146 (FF510); *see also id.* ("Approximately one out of every five deaths that occur in the United States is caused by cigarette smoking.").

The court further found that while defendants were *aware* of these adverse health effects *for decades* (*e.g.*, FF594-609, FF664-705), they systematically *denied* that cigarettes cause these devastating health effects. *E.g.*, FF610-641; FF706-821. As the court summarized, defendants responded to "the scientific consensus that smoking causes lung cancer *with a campaign of proactive and reactive responses to scientific evidence that was designed to mislead the public about the health*

consequences of smoking . . . ." FF706 (emphasis added). This included, e.g., advertisements claiming "there is still no proof that cigarette smoking is a cause of lung cancer – or any other disease" (FF709); publications stating that "a causal relationship between smokers and illness or death had not been established" (FF716); and statements such as "[n]o one knows whether cigarette smoking causes any human disease or in any way impairs human health" (FF717). As one industry document explained, "*[d]oubt is our product since it is the best means of competing with the 'body of fact' that exists in the mind of the general public*." FF726 (emphasis added).

Defendants contested *none* of these factual findings on appeal, and Statement A is thus entirely factual and accurate.

b. The Cigarette's Addictive Properties And Defendants' Deceptions Regarding Addiction

The district court detailed the pernicious nature of cigarette addiction, including the effects of nicotine that cause and sustain addiction. FF833-840. The court detailed that nicotine produces changes in the brain's structure, in turn causing the craving for additional nicotine. *E.g.*, FF836. As a result, it is very difficult to quit smoking. FF868-881.

The court further found that for decades defendants *understood* these properties, harnessing them to ensure cigarettes delivered the necessary levels of

nicotine. *E.g.*, FF882-1145. At the same time, defendants systematically, emphatically, and publicly *denied* that smoking is addictive. FF1146-1365; *see, e.g.*, FF1156 (Philip Morris advertising stating, "Philip Morris does not believe cigarette smoking is addictive"); FF1220 ("CLAIMS THAT CIGARETTES ARE ADDICTIVE CONTRADICT COMMON SENSE") (capitals in original); FF1227 ("there is nothing about smoking, or about the nicotine in cigarettes, that would prevent smokers from quitting"). As one internal defendant memorandum explained, "[w]e are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms." FF1082.

Defendants contested *none* of these factual findings on appeal, *see* 566 F.3d at 1127, and thus Statement B is also entirely factual and accurate.

c. "Light" and "Low Tar" Cigarettes, And Defendants' Health Reassurance Brand Fraud

The district court also made more than one hundred findings that "light," "low tar," and similar brands are no healthier than regular cigarettes. FF2023-2145. Instead, smokers "modify their smoking behavior, or 'compensate,' for the reduced nicotine yields," FF2026 – as a result of which they "inhale essentially the same amount of tar and nicotine as they would from full flavor cigarettes . . . ." FF2074.

The court also found that while defendants were long aware of these facts, FF2146- 2229, and at the same time understood that consumers switch to these

brands *believing* they will be less harmful, FF2230-2345, they systematically *denied* the truth about these cigarettes, promoting them as "health-reassurance" brands (FF2377-2625) – thereby capturing much of the cigarette market. FF2378 ("81.9% of total cigarette sales in 1998" were "low tar" brands). For example, for more than thirty years Philip Morris advertised Marlboro Lights as providing "lowered tar and nicotine." FF2420; *see also, e.g.*, FF2484 (RJR advertisements stated "[t]he Camel World of satisfaction comes to low tar smoking"); FF2598 (Lorillard executive explaining "KENT was marketed as a 'safer' cigarette for the smoker who was concerned about smoking and health.").

None of these factual findings was contested on appeal, 566 F.3d at 1124-1126, and thus Statement C is likewise both factual and accurate.

d. Defendants' Manipulation Of Cigarette Design To Ensure Addiction And Denials Of This Conduct

In hundreds of additional factual findings the district court also explained how defendants design cigarettes to control the impact and delivery of nicotine. FF1366-1704; *e.g.* FF1366 ("Defendants have designed their cigarettes to precisely control nicotine delivery levels"). These design features include filters and paper (FF1581-91), controlling the makeup of the tobacco blend (FF1517-72), and additives such as ammonia to speed nicotine absorption and make cigarettes taste less harsh. FF1592-1695; FF1636.

The court also made numerous findings that defendants consistently denied this conduct. FF1705-1757. For example, in a *New York Times* advertisement in 1994 Philip Morris stated it "does not 'manipulate' nicotine levels" (FF1732); an RJR spokesperson told the same newspaper that "nicotine levels were not a 'design characteristic' in developing cigarettes" (FF1747); and the Lorillard CEO publicly stated that "Lorillard does not take any steps to assure a minimum level of nicotine in our products." FF1725.

None of these factual findings was contested on appeal, and thus Statement D is also both factual and accurate.

e. The Harms Of Secondhand Smoke And Defendants' Efforts To Conceal Them

Finally, the district court detailed how secondhand smoke causes diseases in nonsmokers and is particularly dangerous to children. FF3303-3361. The court found secondhand smoke causes lung cancer and coronary heart disease in adult nonsmokers, *e.g.*, FF3351-52, and, in children, increases risks for SIDS [sudden infant death syndrome], severe respiratory infections, ear disease, and asthma, and reduces functioning of the lungs. FF3350, 3353. The court found there is no safe level of secondhand smoke, FF3358, and that, to the contrary, secondhand smoke kills many thousands of Americans every year, approximately 3,000 from lung cancer alone. FF3341.

The court also made numerous findings that while defendants were *long aware* of these effects, FF3362-3429, they systematically denied them. FF3793-3862; *e.g.* FF3798 ("no claim of adverse health effect of cigarette smoke on a healthy nonsmoker has yet been proved"); FF3801 (RJR advertisement stating "there is little evidence – and certainly nothing which proves scientifically – that cigarette smoke causes disease in nonsmokers").

Once again, defendants did not contest these findings on appeal, 566 F.3d at 1126-27, and thus, Statement E is also entirely factual and accurate.

2. The District Court's *Additional* Findings Of Egregious Misconduct.

In considering defendants' arguments, it is also critical to emphasize some of the most egregious *additional* findings not even mentioned in the corrective statements. For example, the statements will not inform the public that defendants:

- "repeatedly attack[ed] scientific studies that demonstrated the harms of cigarette smoke and insist[ed] on the notion of an 'open question' regarding cigarette smoking and health" (FF60);

- "spent billions of dollars every year on their marketing activities in order to encourage *young people* to try and then continue purchasing their cigarette products in order to provide the replacement smokers they need to survive" (FF3301) (emphasis added); *see also, e.g.*, FF2630-3302 (youth marketing findings);

and

- "suppressed, concealed, and terminated scientific research; they destroyed documents including scientific reports and studies; and they repeatedly and intentionally improperly asserted the attorney-client and work product privileges over many thousands of documents (not just pages) . . . (FF4034); *see also* FF3863-4035 (document suppression and destruction findings).

B. The District Court's Limited Equitable Remedies.

To "prevent and restrain" this massive fraud, 18 U.S.C. § 1964, which the district court found likely to continue, 449 F. Supp. 2d at 908-19, plaintiffs urged eight distinct remedies, including national smoking cessation programs and corporate structural changes. *Id.* at 933-936. The district court rejected four of these remedies, imposing only the most narrow remedies proposed, including corrective statements. JA37-53.

Explaining that "the [c]ourt will structure a remedy which uses the same vehicles which [d]efendants have themselves historically used to promulgate false smoking and health messages," 449 F. Supp. 2d at 928, the district court directed defendants to issue corrective statements on television, in newspapers, on cigarette pack onserts, on defendants' own websites, and at the point-of-sale. JA39-44. The court also identified the specific *scope* of corrective statements exposure for each, as follows:

- in onserts on all packs sold for twelve weeks over the course of two years;
- in television spots by each defendant once per week for a year;
- in a separate newspaper ad by each defendant in specific papers;
- on defendants' websites, indefinitely; and
- at certain retail outlets (an issue pending on remand, 566 F.3d at 1141-42).

JA39-44.

The district court also identified the specific *topics* of the corrective statements, including that they would encompass defendants' *conduct*. Thus, the court explained that, among other areas, it would direct "Defendants to make corrective statements about . . . *their manipulation of physical and chemical design of cigarettes (that Defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine)*." 449 F. Supp. 2d at 928 (emphasis added).

C. Prior Appeals

This Court upheld each of the district court's liability findings against Appellants and, with the exception of the remand regarding point-of-sale, affirmed the Remedial Order, which is based on the premise that defendants misconduct is likely to continue. *Id.* at 1131-1134. With regard to the corrective statements remedy, the Court rejected defendants' asserted violations of their due process and First Amendment rights, finding corrective statements appropriate to "reveal the

previously hidden truth" about defendants' product. *Id.* at 1140. The Court also specifically rejected defendants' arguments that the remedy was inappropriate under RICO Section 1964, finding the statements will prevent and restrain further fraud, which is likely to continue. *Id.* at 1131-35.

After passage of the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) ("Smoking Prevention Act"), defendants sought vacatur, asserting that there necessarily would be no further RICO violations. *Vacatur Appeal*, 686 F.3d at 835. This Court rejected the argument, again affirming the district court's conclusion that further legal violations remain likely. *Id.* at 836. Thus, even with regard to matters expressly *prohibited* by the new Act – such as the use of health descriptors like "light" and "low tar" – the Court affirmed the district court's conclusion that a ban on descriptors remains appropriate. *Id.* at 837 n.1.

D. The District Court's Corrective Statements Language.

In the meantime, after the *Affirmance Opinion* and remand, the United States proposed specific corrective statements language. JA153-56. These included, *inter alia*, directing defendants to say:

- "We told Congress under oath that we believed nicotine is not addictive."

- "We falsely marketed low tar and light cigarettes as less harmful than regular cigarettes to keep people smoking and sustain our profits."

- "We control nicotine delivery to create and sustain smokers' addiction, because that's how we keep customers coming back."

Id.

On November 12, 2012, the district court determined the final text of the corrective statements, adopting *some* aspects of the United States' proposal, and rejecting others (including the foregoing proposals). Looking at "the *entirety* of the Defendants' deceptive scheme," and the "massive scope of Defendants' campaign of deception and fraud," JA205-206, the court concluded that its chosen language was necessary and appropriate 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 consumer' existing misperceptions.'" JA179 (quoting *Affirmance Opinion*, 566 F.3d at 1144-45); *see also* JA205 ("The length of time this went on and the scope of the manipulation of information that was given to consumers went far beyond a single advertising campaign making a single claim that a health benefit existed when it did not.").

As regards the preamble language in particular – as to which much of the present appeal is directed – the district court explained that, "[g]iven the lengthy record detailing Defendants' deceptions over the last several decades," and the

finding that these deceptions will continue, by "alert[ing] the consumer to the fact that they have been misinformed, and then provid[ing] the accurate information," the preambles provide "*important and necessary context for the consumer to understand the accurate information that follows*." JA195 and 206 (emphasis added). In sum, the court concluded that since the statements contain "purely factual and uncontroversial" information under *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985), and are aimed at thwarting further deception, they are appropriate. JA185-207. The Court also concluded that the statements alternatively satisfy the more rigorous First Amendment test under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). JA207-213.

To address the "complexity" of implementation, the court directed the parties to mediate over the statements' appearance in the various media required by the 2006 Remedial Order, *id.*, Appendix B (JA224), and in June 2014 approved the parties' Joint Consent Order resolving those issues. JA436.

SUMMARY OF ARGUMENT

1. In the *Affirmance Opinion* this Court considered and rejected First Amendment and other challenges to the corrective statements remedy. 566 F.3d at 1138-1145. That remedy specified that each defendant will place corrective statements on television, in newspapers, on cigarette packs, and on their websites, delineating the precise coverage in each. *Id.* The specific topics for the statements – including addressing defendants' nicotine "manipulation" – were also addressed. *Id.* at 1138. Accordingly, defendants may not re-litigate these aspects of the corrective statements remedy. *See, e.g.*, *United States v. Thomas*, 572 F.3d 945, 949 (D.C. Cir. 2009).

2. The district court's chosen corrective statements are well within the court's broad discretion under RICO Section 1964, and are entirely permissible under the First Amendment. They accurately summarize the court's massive factual findings, and are "geared towards thwarting prospective efforts by [d]efendants to either directly mislead consumers or capitalize on their prior deceptions." *Affirmance Opinion*, 566 F.3d at 1144-45. The district court was also not required to consider additional alternatives before finally deciding on the precise language of disclosures first mandated more than eight years ago. *Zauderer*, 471 U.S. at 651.

ARGUMENT

I. DEFENDANTS MAY NOT CHALLENGE THE VENUES FOR, OR QUANTITY OF, THE CORRECTIVE STATEMENTS, OR WHETHER THE CORRECTIVE STATEMENTS MAY ADDRESS DEFENDANTS' CONDUCT.

Absent extraordinary circumstances, a party may not wait until a *second appeal* to challenge a district court ruling previously appealed. Rather, "a legal decision made at one stage of litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, [governs] future stages of the same litigation . . . ." *Thomas*, 572 F.3d at 949 (citations omitted). Thus, for example, in *Palmer v. Kelly*, 17 F.3d 1490 (D.C. Cir. 1994), after the District of Columbia had failed to appeal the district court's conclusion that alleged discrimination was ongoing, this Court precluded the City from pursuing the issue in a *second* appeal, explaining the argument should have been raised in the *first* appeal, and the City's "failure to appeal on [those] grounds [then] cannot now be corrected." *Id.* at 1495-96

Applying these principles here, defendants may not challenge the venues for, and required exposure of, the corrective statements, or whether the statements may address defendants' conduct.

A. The Corrective Statements' Venues And Dissemination Details, And References To Defendants' Conduct, Were Resolved In 2006 And Affirmed On Appeal.

The 2006 Remedial Order resolved the precise *scope* of the corrective statements, specifying the five separate venues and *exposure level* for each. JA39-44. On appeal, this Court expressly rejected defendants' argument that they had no opportunity to challenge these details, explaining the government had outlined the "details of its recommended publication campaign," and defendants had responded. 566 F.3d at 1139; *see also* Brief of Def.-Appellants, No. 06-5267, *et al*., 2008 WL 2682541, at *134 (D.C. Cir. May 19, 2008) (challenging the district court's "extensive program of publication and distribution required by the remedial order"); *accord* Def's. Resp. and Reply, No. 06-5267, *et al.*, 2008 WL 2682536, at *84 (D.C. Cir. May 19, 2008) (asserting that "further proceedings regarding the precise *content* of the corrective statements . . . will not provide defendants with the requisite opportunity to contest the *propriety* of the remedy") (emphasis in original).

The 2006 Order similarly identified the precise *topics* defendants would address, including defendants' *conduct.* JA39. In particular, one of those specific topics originally identified was, "*Defendants' manipulation of cigarette design and composition to ensure optimum nicotine delivery . . . .*" *Id.* (emphasis added). Therefore, on appeal this Court recognized that the remedy it upheld will address

defendants' *conduct* in their "manipulation of cigarette design and composition . . . ." 566 F.3d at 1138; *see also id.* at 1107 ("[d]efendants . . . manipulated nicotine delivery in cigarettes to create and sustain addiction.").

B. Defendants Therefore May Not Pursue These Issues Now.

In the present appeal, defendants challenge whether the district court may require corrective statements in "multiple, overlapping channels of communication." Defendants' Brief ("Def. Br.") at 45. However, *these issues were resolved in the 2006 decision*. *See supra* at 11.

Defendants also challenge whether the corrective statements may address their conduct – such as, e.g., stating that they "intentionally designed cigarettes to make them more addictive," and that they "have been found liable for intentionally lying to and deceiving the American people." Def. Br. at 30, 34. However, the 2006 Remedial Order also spelled out the statement topics, including defendants' *conduct* – i.e., that defendants engaged in the "manipulation of cigarette design and composition . . . ." JA39; *see also* 449 F. Supp. 2d at 928 (statement will explain that "defendants do manipulate design of cigarettes in order to enhance the delivery of nicotine").

Accordingly, defendants simply may not pursue these issues now. *Thomas*, 572 F.3d at 949; *see also Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 17

(D.C. Cir. 1980). While the 2006 Remedial Order did not determine that, in addition to addressing their conduct in manipulating nicotine levels, the statements might also address other aspects of defendants' conduct, defendants' repeated argument that the First Amendment categorically bars the district court from fashioning corrective statements concerning their well substantiated fraudulent *conduct* has already been resolved, and defendants may not re-litigate the issue.[1]

II. THE CORRECTIVE STATEMENTS ARE WELL WITHIN BOTH THE DISTRICT COURT'S BROAD REMEDIAL POWERS AND FIRST AMENDMENT CONSTRAINTS.

Having found defendants responsible for massive RICO violations, the district court had broad discretion to craft appropriate injunctive relief. *E.g.*, *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 491 n.10 (1985). Defendants have not demonstrated that the district court abused its broad discretion in selecting the corrective statements language. *E.g.*, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *Kapche v. Holder*, 677 F.3d 454, 470 (D.C. Cir. 2012).

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1 While defendants note that the 2014 Consent Order itself does not preclude them from challenging the multiple media for the corrective statements, Def. Br. at 15, that has no bearing on whether the issue is waived in light of the prior appeal. Defendants also may not rely on that Order's incorporation of the specific corrective statements exposure resolved in 2006 to claim a renewed opportunity to challenge that exposure, for the parties agreed they would not rely on the Consent Order in this appeal. Consent Order § VI.5 (JA457).

A. Defendants Mischaracterize the Applicable Legal Standards.

Before turning to defendants' particular arguments, it is critical to set the record straight on the *legal standards* that apply here.

With regard to RICO Section 1964, that provision – which must "be liberally construed to effectuate its remedial purposes," *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (citations omitted) – does not limit the corrective statements to identifying the *properties* of cigarettes, as defendants argue. Def. Br. at 53-56. Rather, as this Court explained in the *Affirmance Opinion*, in crafting remedies in this case "*breadth is warranted* to prevent further violations where [, as here,] a proclivity for unlawful conduct has been shown." 566 F.3d at 1137 (citations omitted) (emphasis added); *see also Vacatur Appeal*, 686 F.3d at 832-34 (reiterating that "broad'" and "sweeping" remedies are warranted given that "[d]efendants' RICO violations will continue in most of the areas in which they have committed violations in the past" and their "countless [future] 'opportunities' and temptations to take similar unlawful actions in order to maximize their revenues").

Accordingly, this Court approved *all five* topics of the corrective statements, including "the manufacturers' *manipulation* of cigarette design and composition to ensure optimum nicotine delivery." 566 F.3d at 1138 (emphasis added). As the Court found, these statements – which address not only cigarette properties, but

defendants' *fraud directly related to those properties* – will "prevent and restrain" RICO violations because "[d]efendants will be impaired in *making false and misleading assurances* . . . if they must at the same time communicate the opposite, truthful message about these matters to consumers." *Id.* at 1140 (emphasis added).[2]

Defendants similarly mischaracterize First Amendment standards, arguing that commercial disclosures must be limited to "a product's characteristics," rather than a "manufacturer's conduct." Def. Br. at 22-29. This Court has already explained that the district court may craft factual "corrective statements *addressing Defendants' false assertions*," *Affirmance Opinion*, 566 F.3d at 1144 (emphasis added), as well as their "*manipulation* of cigarette design and composition to ensure optimum nicotine delivery." *Id.* at 1138 (emphasis added). Thus, the appropriate

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2 Defendants' effort to compare the corrective statements to the disgorgement remedy, *e.g.*, Def. Br. at 54, is unavailing. The statements neither punish defendants for past misdeeds, nor seek to remedy the effects of past conduct, but rather are predicated on undisturbed factual findings that the misconduct *will continue*. *See United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1198 (D.C. Cir. 2005) (approving "forward-looking remedies that are aimed at future violations"); *see also id.* at 1203 (Williams, J., concurring) (having "before it the history of the defendant, including his past wrongs," the district court may "decree relief targeted to his *plausible future behavior*") (emphasis added). It is similarly not "backward- looking" to require a corrective statement on "light" and "low tar" cigarettes, Def. Br. at 55, for, as noted (*see supra* at 12), this Court already rejected defendants' argument that the Smoking Prevention Act warrants lifting the district court's remedies. 686 F.3d 837 n.1. Moreover, defendants continue to sell those cigarettes under other names. *See infra* at 32 (discussing transition from "light" to colored packs).

issue is not whether the statements touch on defendants' *conduct*, but rather whether, in doing so, they are statements of undisputable facts. *E.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010) (stating the "constitutionally protected interest in *not* providing the required factual information is minimal") (citations omitted); *Spirit Airlines, Inc. v. Dep't of Transp.*, 687 F.3d 403, 412 (D.C. Cir. 2012).

Moreover, contrary to defendants' arguments, the term "factual and uncontroversial," 566 F.3d at 1144, is a legal couplet of two terms with a unitary meaning, simply constraining disclosures to accurate statements of indisputable facts – i.e., facts rather than opinions, and uncontroversial, as opposed to facts subject to legitimate dispute. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 559 n.8 (6th Cir. 2012) (explaining that the terms "factual and uncontroversial" do not appear in *Milavetz*, where the Supreme Court made clear the test simply requires "factual" and "accurate" information, which is then subject to rational basis review). As long as the corrective statements are factually accurate, they are thus also necessarily uncontroversial. *See also, e.g., Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 34 (D.C. Cir. 2014) (en banc) (Kavanaugh, J., concurring) (explaining a disclosure cannot be "controversial" where it is "factually straightforward, evenhanded, and readily understood"); *cf. Doe v. Boland*, 698 F.3d

877, 881-82 (6th Cir. 2012) (discussing other "meaning-reinforcing redundancies" such as "null and void" and "arbitrary and capricious"). In sum, the statements may not only touch on defendants' conduct, they may accurately inform the public of defendants' *mis*conduct, even if that information could be upsetting to a reasonable listener. *Discount Tobacco*, 674 F.3d at 569 ("Facts can disconcert, displease, provoke an emotional response, spark controversy, and even overwhelm reason, but that does not magically turn such facts into opinions").

B. The Corrective Statements *Preambles* Are Permissible Under Section 1964 and The First Amendment.

Repeatedly mischaracterizing the corrective statements preambles as "confessions," Defendants argue that the preambles violate Section 1964 and the First Amendment. Def. Br. at 3, 30-32. They are mistaken.

As a threshold matter, defendants do not – and cannot – dispute that the preambles *are factually accurate* in stating that, "[a] Federal Court has ruled that Defendant tobacco companies deliberately deceived the American public," for that is an extremely mild summary of *precisely what occurred here*. Rather, defendants seek to distort how the public will *understand* these terms, erroneously claiming that saying they "deliberately deceived the American public" suggests every American was, in fact, deceived. Def. Br. at 38-39.

To the contrary, by using the terms "deceived the American public," the court is obviously referring to defendants' overall efforts to deceive, not whether all individuals were in fact deceived. No reasonable reader would conclude otherwise. *See also Affirmance Opinion*, 566 F.3d at 1123 (finding that "reasonable purchasers of cigarettes would consider" defendants' deceptions to be "important" by addressing "initial reservations (or lingering qualms) about the potential for cancer, the risk of addiction, or the hazardous effects of secondhand smoke for friends, family, and others who may be exposed"); *accord* FF2707 ("[m]ost people do not possess a meaningful knowledge of the adverse health effects of smoking"). The fact that defendants sustained their massive campaigns of fraud for decades also demonstrates their success, for deceiving the American public was the entire *raison de'tre* of defendants' coordinated RICO enterprise. *See, e.g.*, *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977) ("[I]t is more than a little peculiar to hear petitioner assert that its [untruthful] commercials really have no effect on consumer belief.").

Defendants also cannot demonstrate some ulterior purpose to "evoke emotion" divorced from facts. Def. Br. at 30-31. As the district court explained, the statements' "simple declarative sentences and basic, uncomplicated language," JA193, are in no manner comparable to the particular graphic warning labels found

to violate the First Amendment in *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205 (D.C. Cir. 2012), which included "graphic images such as a man smoking through a tracheotomy hole [and] a woman crying," JA187 – images that the FDA itself conceded were "not meant to be interpreted literally," and which the Court found neither "purely factual" nor "accurate." 696 F.3d at 1216-17. Here, where the statements "contain no pictures and merely disclose facts," JA188, concerns about appeals to emotions are simply not implicated.[3]

In any event, the First Amendment does not constrain the district court from directing defendants to translate and summarize the court's factual findings simply because those findings may evoke a strong reaction. *See, e.g.*, *Discount Tobacco*, 674 F.3d at 569 (explaining that the only relevant question is "whether the disclosure conveys factual information or an opinion, not . . . whether the disclosure emotionally affects its audience or incites controversy"); *cf. Fund for Animals v. Frizzell*, 530 F.2d 982, 988 n.15 (D.C. Cir. 1975) (a decision is not "highly controversial" simply because "some people may be highly agitated"); *see also Warner-Lambert Co.*, 562 F.2d at 759, 763 (explaining that a preamble addressing a defendants' misconduct can be permissible in an "egregious case of deliberate

3 The Public Health Intervenors had urged the district court to include graphic photographs in some of the corrective statements media, *see* JA129-132, but the district court rejected this approach.

deception"); *cf. United States v. Arnold*, 740 F.3d 1032, 1035 (5th Cir. 2014) (rejecting First Amendment challenge to mandated disclosure of sex offender status).[4]

Defendants also erroneously claim, Def. Br. at 26, that *Zauderer* somehow overruled this Circuit's precedent in *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 762 (D.C. Cir. 1977), when, in fact, neither *Zauderer* nor its progeny in this Circuit address the applicable standard for disclosures designed to combat *a massive campaign of deliberate deceptions*. Thus, in addition to largely ignoring the critical distinction between *prohibiting* commercial speech (subject to the stricter First Amendment test under *Central Hudson*, but inapplicable here) and requiring *additional speech* (subject to the more deferential *Zauderer* test), defendants' extended exegesis on First Amendment jurisprudence, Def. Br. at 22-29, completely

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4 For this reason, defendants' efforts to rely on focus group reactions to the government's proposed statements, Def. Br. at 31-32 and nn. 7 and 9, are also unavailing. Those reactions are also irrelevant because they concern the *government's proposals*, which, as noted, *see supra* at 13, were more hard-hitting than those ultimately chosen. *See, e.g.*, JA154-55.

Defendants get no farther arguing the statements are inaccurate because other courts disagree. Def. Br. at 34-38. The statements begin with "*a Federal Court has ruled*," which, again, is entirely accurate. Defendants also fail to point to a *single*, specific factual finding made by the district court on which another court – or jury – has *made a contrary factual finding*. *See also, e.g.*, FF745 (tobacco attorney memorandum explaining that, "[w]hile we have not lost a liability case, *this is not because juries have rejected the anti-smoking arguments*.") (emphasis added).

ignores that *none* of their precedents involve the massive, deliberate misconduct the court found here, let alone findings that such conduct *will continue*.

In short, if this case is not the epitome of an "egregious case of deliberate deception," as discussed in *Warner-Lambert*, 562 F.2d at 763, permitting a corrective statement that includes a direct reference to defendants' deceptions, it is impossible to imagine what case could meet that test. The district court made overwhelming findings that defendants not only *make* a deadly product, but *deceive consumers* about its toxicity; not only *sell* an addictive product, but have *denied* it is addictive at the same time they use that very feature to insure continued sales as their customers inevitably die; and not only sell a product that *harms non-smokers*, but have *disputed* that harm as well. *See supra* at 3-9. The court also found that "[t]here is a reasonable likelihood that Defendants RICO violations *will continue in most of the areas in which they have committed violations in the past.*" 449 F. Supp. 2d at 911 (emphasis added). Under these circumstances, the court was well within its broad remedial discretion in concluding that only by understanding past industry deception would consumers be less likely to be deceived in the future, and thus would defendants be meaningfully thwarted from continuing their deceptive campaigns. JA206 (finding the "preamble language provides important and

necessary context for the consumer to understand the accurate information that follows").

Defendants identify *no* precedent suggesting that, under these remarkable and highly disturbing facts, the First Amendment prevents the Court from requiring corrective statements that not only tell the truth about cigarettes, but also disclose the existence of the defendants' coordinated campaigns of deception, which, as the district court found, *see* JA212, is necessary to sufficiently curb this misconduct in the future. Indeed, as this Court has already observed, "[r]equiring defendants to reveal the *previously hidden truth* about their product will prevent and restrain them from disseminating false and misleading statements, thereby violating RICO, in the future." *Affirmance Opinion*, 566 F.3d at 1140 (emphasis added). The only way to inform the public that the truth was "previously hidden" is to inform them of the companies' deliberate deceptions.

Moreover, applicable precedents demonstrate this approach is entirely appropriate. *See, e.g.*, *Daniel Chapter One v. FTC*, 405 F. App'x 505 (D.C. Cir. 2010). Contrary to defendants' argument, Def. Br. at 32-33 n.10, in *Daniel Chapter One* this Court approved a strikingly similar corrective disclosure requiring a company to inform consumers that:

> the Federal Trade Commission *has found our advertising claims for these products to be deceptive* because they were not substantiated by competent and reliable scientific evidence . . . .

In re Daniel Chapter One, 2010 WL 387917, at *4 (FTC Jan. 25, 2010) (emphasis added), *aff'd Daniel Chapter One v. FTC*, 405 F. App'x at 506 (finding the disclosure "carefully tailored to protect [consumers] from deception"). While defendants endeavor (Def. Br. at 32 n.10) to distinguish this precedent on the grounds that the corrective statements here cover much broader misconduct and exposure (entirely appropriate given the exponentially broader fraud at issue), they do not contest that this precedent is fundamentally at odds with their argument that the First Amendment does not permit a statement informing the public that an agency (or here, a court) "has found" that a company deceived the public about the company's product. *See also, e.g., United Food & Commercial Workers Int'l Union, AFL-CIO v. NLRB*, 852 F.2d 1344, 1348-49 (D.C. Cir. 1988), *aff'g Monfort of Colo., Inc.*, 284 N.L.R.B. 1429, 1429-30, 1481 at ¶ 2(g) (1987) (affirming the mandated disclosure: "The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice") (N.L.R.B. opinion attached as Ex. 2 to United States' Corr. Stmts. Reply (Docket No. 5891, Mar. 16, 2011)).

Defendants also ignore that the *Affirmance Opinion* already rejected defendants' First Amendment challenge to the district court's considerably more *far-reaching* remedy enjoining defendants from making "*any* material false, misleading, or deceptive statement . . . concerning cigarettes." 566 F.3d at 1136 (emphasis added) (citation omitted). Recognizing the breadth of such a speech prohibition, this Court explained that while "broad, . . . breadth is warranted 'to prevent further violations where, [as here], a *proclivity for unlawful conduct has been shown*.'" *Id.* at 1137 (citations omitted) (emphasis added). Given that blanket *prohibitions* on speech are subject to considerably more exacting scrutiny than requiring *more speech*, the fact that the *Affirmance Opinion* upheld these broad prohibitions further demonstrates that the preambles fall well within First Amendment constraints.

C. The Remainder Of The Corrective Statements Are Also Permissible.

Defendants' complaints about other word choices in the corrective statements also must fail.

1. *Stating "Here is the truth" does not suggest that every defendant affirmatively lied about every fact.* Def. Br. at 40. The preamble states that defendants deceived the public about each one of five topics and then reveals key, truthful facts on each topic. This is entirely appropriate. *See, e.g.*, 566 F.3d at

1118 (explaining that while remedies must be "tailored to the violation found," this merely means "the remedy needs to be tailored to the *scheme* to defraud," not every specific act in furtherance of the scheme) (emphasis added). Thus, for example, stating that smoking kills 1,200 Americans, on average, daily, does not suggest that defendants specifically denied the 1,200 number, but rather reflects that defendants engaged in massive fraud designed to suppress the adverse health effects of smoking, which, contrary to that fraud, actually kills large numbers of people. *See, e.g.*, FF510.

2. *The statements need not include a "time period covered by the district court's findings."* Def. Br. at 40. The statements are predicated on the district court's finding – twice affirmed by this Court – that defendants' misconduct *will continue*. Therefore, it is a *non-sequitur* for defendants to argue that a timeframe is necessary because otherwise the statements imply that defendants "are engaged in ongoing deceptions." Def. Br. at 40. That is the *entire premise of the district court's remedies, including the corrective statements*, and, as explained in the *Affirmance Opinion*, even additional advertising which simply "'fails to rebut the prior claims [builds] upon those claims [and thereby] continues the deception . . . .'" 566 F.3d at 1145 (quoting *Warner-Lambert Co.*, 562 F.2d at 769).

Moreover, contrary to defendants' bald claim that "there have been no violations" since 2006, Def. Br. at 7 n.1, deceptions *have continued*. For example, defendants switched from "light" and "low tar" descriptors to "Gold" and other colored packs, telling consumers that they could find their "lights" by color – which consumers associate with a healthier product, *e.g.*, FF2413 ("the lighter the cigarette package color, the lower its tar content is perceived to be by consumers"). *See* Int. Suppl. Br. on Corr. Stmts. (Docket No. 5986) (Sept. 24, 2012) at 8-10 (explaining defendants' switch to colored packs) (citing Duff Wilson, *F.D.A. Seeks Explanation of Marlboro Marketing*, N.Y. Times, June 17, 2010, at B6 (reporting that "notes [were] placed on the last packs of Marlboro Lights reading, 'Your Marlboro Lights package is changing, but your cigarette stays the same,' and explaining, '[i]n the future, ask for Marlboro in the gold pack'")); *see also* United States Corrective Statements Reply (Docket No. 5891, Mar. 16, 2011), Ex. 18 (showing Marlboro note).

3. *Statements B and D accurately summarize the court's nicotine manipulation findings* (Def. Br. at 41). Even assuming defendant can re-litigate the issue, defendants' arguments regarding their manipulation of nicotine distorts the corrective statements' plain meaning, and should be rejected.

The district court made hundreds of undisturbed factual findings concerning defendants' manipulation of cigarette design features to ensure delivery of the requisite quantity of nicotine to create and sustain addiction. FF1366-1704. As the court explained, "*[e]very aspect* of a cigarette is precisely tailored to ensure that a cigarette smoker can pick up virtually any cigarette on the market and obtain an addictive dose of nicotine," including "additives, burn accelerants, ash conditioners, and buffering substances," as well as "filter design, paper selection and perforation, ventilation holes, leaf blending, and use of additives (such as ammonia) to control the PH of cigarette smoke." FF1368 (emphasis added). As the court summarized, "Defendants have designed their cigarettes to *precisely* control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction." FF1366 (emphasis added); FF1508 ("[C]igarettes are specifically designed to deliver a range of nicotine doses so that a smoker can obtain her optimal dose from virtually any cigarette . . . ."); FF1508-1572.

Defendants quarrel with stating, in Statement B, that they "intentionally designed cigarettes with enough nicotine to create and sustain addiction," and, in Statement D, that they "intentionally designed cigarettes to make them more addictive," on the grounds that all cigarettes are addictive. Def. Br. at 41. This is pure sophistry, for, as the court found – and summarizes in this statement – the

reason all cigarettes are addictive is that *defendants make them that way*. Through extensive research, defendants determined the precise dose of nicotine necessary for addiction. *See* FF1371-1402. They then ensured that their cigarettes provided that dose, including the development of techniques to reduce tar levels (thereby allowing the companies to market the products as "low tar") while *maintaining* sufficient doses of nicotine for addiction. FF1403-1492; 1573-1591. These statements are thus entirely accurate.

Defendants also mischaracterize another portion of Statement D, claiming the court cannot use the words "maximize the ingestion of nicotine." Def. Br. at 41. Defendants ignore that the court refers to this technique as one of the "many ways" defendants "control the impact and delivery of nicotine," explaining their "designing filters and selecting cigarette paper *to maximize the ingestion of nicotine*." JA159 (emphasis added).

Again, this is entirely consistent with the court's findings. *E.g.*, FF1427 (discussing efforts to "*maximize* nicotine content of tobaccos and delivery to the cigarette smoke") (emphasis added); FF1703 (discussing Lorillard's "studying means by which nicotine migration – the redistribution of nicotine within a cigarette from the tobacco to the outer periphery for the purpose of increasing the amount of nicotine in mainstream smoke – could be *maximized*") (emphasis added). Indeed,

the court found that defendants used these design techniques as a means to reduce tar levels while at the same time maximizing nicotine. *E.g.*, FF1427 (quoting R.J. Reynolds document discussing "proceeding with tar reduction programs maintaining *maximum nicotine deliveries* in the smoke") (emphasis added). This language is thus also entirely accurate.[5]

4. *Statement D accurately states that "adding ammonia" is one of the "many ways" defendants manipulate cigarette design and impact nicotine delivery* (Def. Br. at 42). The district court found that "[a]mmonia compounds are among the most frequently used additives, measured by volume, in the industry," FF1610, and that "[b]y 1993, *all the cigarette company Defendants used some form of ammonia technology in some of their cigarette products*," including Lorillard. FF1611; *see also* FF1680-1686 (discussing Lorillard). The court further found that they do so both because ammonia changes the PH balance in a manner influencing nicotine delivery and that it makes cigarettes more palatable. FF1592-1615.

Defendants' suggestion that the statement implies all cigarettes contain ammonia is baseless, but, more important, their claim that Lorillard does not add

5 The fact that, as defendants note, the court found they designed cigarettes to deliver *at least* the minimum nicotine dose necessary for addiction, Def. Br. at 42, in no manner conflicts with the court's findings that these design features were utilized to *maximize* the dose of nicotine that could be delivered, particularly with reduced tar blends.

ammonia to its cigarettes is both unsupported by any evidence in the record, and was not raised below. Accordingly, there is no reason for the Court to consider this argument now. *E.g., Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1043 (D.C. Cir. 2003).

5. *Statement C accurately summarizes the court's "light" cigarette findings* (Def. Br. at 42-43). Defendants claim that the public may understand the term "regular cigarettes" in Statement C to refer to those without filters. Def. Br. at 43. However, they ignore that the *preamble* makes clear the term "regular" refers to cigarettes that were not sold as "light" or "low tar." JA159 (defendants presented "low tar and light cigarettes as less harmful *than regular cigarettes*") (emphasis added). Moreover, as the district court found, and the particular language defendants challenge explains, one of the ways in which defendants ensured adequate nicotine delivery in "light/low tar products" was to manipulate the *filters*. FF1581 ("Defendants took steps to design a filter that would register a lower tar level according to the FTC method but would not reduce transfer into the body," in order to "create a filter that, while lowering tar, would deliver a sufficient dose of nicotine to the lungs in order to sustain a smoker's addiction"). Thus, the comparison between "Low tar and filtered cigarettes" and "regular cigarettes" does

not suggest that regular cigarettes are unfiltered, but rather reflects that manipulating the filters has been one aspect of defendants' "low tar" fraud. *See* FF1581-1591.

There is also no basis for defendants' challenge to the language explaining that, due to smoker compensation, smokers inhale "essentially the same amount" of tar and nicotine even if they smoke "low tar" or "light" (now called, e.g., "Gold," *see supra* at 32) brands. Def. Br. at 43. This was *precisely the court's finding*. FF2072 ("Because each smoker smokes to obtain his or her 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." This is referred to as 'complete' compensation.") (emphasis added); FF2074 (same). Defendants opportunity to challenge these findings has long since expired.

D. The District Court Was Not Required To Further Diminish The Reach And Effectiveness Of The Corrective Statements.

Finally, defendants erroneously argue that the district court erred because it could have adequately achieved its goals with more limited statements and distribution. Def. Br. at 44-47. This misapprehends the applicable legal test.

As the Supreme Court has explained, even for speech *prohibitions*, "the 'least restrictive means' test has no role in the commercial speech context." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (citations omitted). Rather, there

simply needs to be an appropriate "fit," one that "is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served . . . .'" *Id.* The test for that "fit" is even more lenient in the context of an affirmative disclosure, where the disclosure need only be "*reasonably related* to the State's interest in preventing deception of consumers." *Zauderer*, 471 U.S. at 651 (emphasis added); *see also R.J. Reynolds*, 696 F.3d at 1212 (factual and uncontroversial disclosures are subject to "rational-basis review").

The district court's approach amply meets this test, and hence there are no grounds for questioning whether an even more limited remedy would be equally effective. *See Fla. Bar.*, 515 U.S. at 628 (rejecting argument that speech restriction must be justified by empirical data, explaining that "history, consensus and 'simple common sense'" can be sufficient) (citations omitted); *Zauderer*, 471 U.S. at 652-53 (empirical data are unnecessary where "the possibility of deception is [ ] self-evident"); *Spirit Airlines, Inc.*, 687 F.3d at 413-414. As this Court explained in upholding the corrective statements remedy against defendants' original appeal, "the intentionally fraudulent character of [Defendants'] noncommercial public statements *undermines any claim for more exacting scrutiny*." *Affirmance Opinion*, 566 F.3d at 1144 (emphasis added).

Moreover, as discussed, the statements could have been significantly *stronger*, including graphic elements (as Intervenors urged, *see supra* at 25 n.3), more inflammatory language (as the United States proposed, *see supra* at 13), or references to even more egregious aspects of defendants' fraud (as summarized above, *see supra* at 9-10). Given these myriad alternatives, the statements are considerably more *modest* than necessary.

As the district court concluded, "[b]y ensuring that consumers know that Defendants have misled the public in the past . . . in addition to putting forth the *fact* that a scientific consensus on th[ese] subject[s] exists, Defendants will be less likely to attempt to argue in the future that such a consensus does not exist." JA212 (emphasis added). This is more than sufficient for First Amendment purposes. *See also, e.g.*, *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999) ("[T]he government's interest in preventing consumer fraud/confusion may well take on added importance in the context of a product . . . that can affect the public's health.").[6]

6 Defendants' claim that the statements should be limited to "public health information," Def. Br. at 51, also contradicts their argument below. Def. Resp. To Proposed Corr. Stmts. at 15 (Docket No. 5881, Mar. 3, 2011) (arguing the statements may not serve a "public-health function.").

Defendants' complaint that the corrective statements exposure should have been more limited, Def. Br. at 45-47, is also unconvincing in light of defendants' own marketing efforts. In *Warner-Lambert*, this Court expressly approved "tying the quantity of correction required to the investment in deception." 562 F.2d at 771. Here, the record shows defendants spend *billions* annually on their ongoing marketing efforts. *See* FF2639 ("In 2002, the last year for which data is available, the tobacco companies spent $12.47 billion" in marketing, advertising and promotion); *see also* FTC Cigarette Report for 2011, Table 2C-2E (issued 2013) (showing billions spent per year since 2002).[7] Accordingly, since the corrective statements remedy will cost a *tiny fraction* of that amount, the court certainly was not required to diminish it further. *See also Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000) (affirming continuation of corrective advertising campaign until company "ha[d] expended on Doan's advertising a sum equal to the average spent annually during the eight years of the challenged campaign").[8]

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7 Available at http://www.ftc.gov/reports/federal-trade-commission-cigarette-report-2011 (last visited Dec. 8, 2014).

8 The district court's 2006 Remedial Order did not include the internet home pages of covered newspapers; rather, that was included in the parties' negotiated Consent Order. *Compare* JA41-44 *with* JA441-442. Similarly, while the Remedial Order directed that the statements appear in a "prominent position" on all of defendants' websites (JA39), the Consent Order limits both the websites and the required prominence. JA445-453. However, because the parties agreed not to

Accordingly, the district court's corrective statements remedy was well within its broad discretion.[9]

CONCLUSION

The district court should be affirmed.

December 8, 2014

Respectfully submitted,

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invoke the Consent Order here, *see* Consent Order § VI.5 (JA457), it is not appropriate for defendants to suggest that this Court limit the corrective statements exposure to print and Internet homepages of newspapers. Def. Br. at 46-47.

9 Defendants' "due process" complaints, Def. Br. at 57-59, merely repackage their other arguments and should be rejected for the same reasons. Indeed, this Court has already determined both that (a) the corrective statements may address defendants' "manipulation of cigarette design and composition to ensure optimum nicotine delivery," 566 F.3d at 1138, which defendants now assert raises the "most acute" due process concerns, Def. Br. at 58-59, and (b) the defendants did not "suffer[] a denial of due process" in the imposition of this remedy. 566 F.3d at 1139.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I hereby certify that the foregoing Brief for the Public Health Intervenors contains 8,746 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/ Howard M. Crystal
Howard M. Crystal

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2014, I electronically filed the foregoing Brief for the Public Health Intervenors with the Clerk of the D.C. Circuit, by using the CM/ECF system. All participants in this appeal are CM/ECF users, and will be served by the CM/ECF system.

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