Appeal No. 13-5792/13-5881

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MERCK SHARP & DOHME CORP.,
Plaintiff-Appellant/Cross-Appellee,

v.

JACK CONWAY, in his official capacity as
Attorney General of the Commonwealth of Kentucky,
Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky
No. 3:11-cv-0051 (Hon. Danny C. Reeves)

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN BANKERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-5792/13-5881 Case Name: Merck Sharp & Dohme Corp. v. Jack Conway, in his official capacity as Attorney General of the Commonwealth of Kentucky

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Pursuant to 6th Cir. R. 26.1, Chamber of Commerce of the United States of America
Name of Party
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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

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CERTIFICATE OF SERVICE

I certify that on July 12, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Lisa S. Blatt

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

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Pursuant to 6th Cir. R. 26.1, American Bankers Association
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No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents more than three million U.S. businesses and professional organizations of every size and in every industry sector and geographic region of the country. One of the Chamber's key functions is to represent the interests of its members before the courts, Congress, and the Executive Branch. The Chamber has filed many *amicus* briefs in cases of vital concern to the nation's business community, including cases addressing the constitutional, ethical, and policy issues surrounding the controversial practice of state and local governments hiring private attorneys on a contingency-fee basis.

The American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. ABA members hold an overwhelming majority—approximately 95 percent—of the domestic assets of the U.S. banking industry. The ABA frequently submits *amicus* briefs in cases that affect the banking industry and its members.

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[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than Amici, their members, or their counsel made such a monetary contribution. Amici are simultaneously filing a motion for leave pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

The Chamber and the ABA have a strong interest in this case, as their members are being targeted with increasing frequency by private contingency-fee lawyers prosecuting civil-penalty and other enforcement actions on behalf of state and local governments across the country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lawyers for the government are "the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.*

In this case, the Kentucky Attorney General hired private plaintiffs' lawyers to prosecute the State's civil-penalty action against Merck in exchange for a contingency fee. The private contingency-fee lawyers prosecuting Merck thus have a substantial personal financial stake in the outcome of the case that conflicts with every prosecutor's duty to seek justice on behalf of the public. And sure enough, as the district court below recognized, the private lawyers took steps to maximize and multiply the monetary penalties sought against Merck. *See* Mem. Op. and Order at 23 ("MSJ Order"), R.E. 104, Page ID#3196.

In accordance with longstanding Supreme Court precedent, the district court correctly held that "Merck has a due process right to a neutral prosecution, free

from any financial arrangement that would tempt the government attorney or his outside counsel to tip the scale." *Id.* at 8-9, Page ID#3181-82. The district court erred, however, in holding that due process nonetheless permits the contingency-fee arrangement here as long as a government lawyer "retains full control over the course of the litigation." *Id.* at 9, Page ID#3182 (internal quotation marks omitted).

The Supreme Court's bar against arrangements that could compromise a judge or prosecutor's impartiality in a case is "categorical," *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987), and a "per se rule," *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 62 (1972) (White, J., dissenting). The Court has recognized no exception to this bar based on "control" or otherwise. To the contrary, the Court has concluded that a categorical approach is required because no "procedural safeguard" can remedy the fundamental structural conflict that exists when a judge or prosecutor has a personal financial interest in a case. *Id.* at 61. And even if the judge or prosecutor did not in fact act out of self-interest, the Court has reasoned, no safeguard can eliminate the "appearance of impropriety." *Young*, 481 U.S. at 811.

The district court's "control" theory runs afoul of both principles. Government control of private contingency-fee lawyers is not a meaningful safeguard either in theory or in practice. Such control, moreover, cannot erase the

appearance of impropriety, as reflected by the widespread condemnation of these contingency-fee arrangements by the federal government, former state attorneys general, public policy organizations, and legal scholars.

This Court, as the first federal appellate court to consider the issue, should step back and strike down the contingency-fee scheme here as facially unconstitutional irrespective of any government lawyer's purported "control" over the State's civil-penalty action against Merck.

ARGUMENT

DUE PROCESS BARS THE GOVERNMENT'S USE OF PRIVATE CONTINGENCY-FEE LAWYERS IN CIVIL-PENALTY ACTIONS WITHOUT REGARD TO ANY "CONTROL" EXCEPTION

The Supreme Court consistently has condemned any financial or other arrangement that might undermine a judge's impartiality, *see Tumey v. Ohio*, 273 U.S. 510, 523-24 (1927), or distort a criminal or civil prosecutor's duty to pursue justice rather than personal interests. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality opinion); *see also Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980). In doing so, the Court has held that the bar on such arrangements is "categorical," *Young*, 481 U.S. at 814, and imposes a "per se rule." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 62 (1972) (White, J., dissenting) (taking issue with majority's categorical approach).

The decision below runs afoul of this categorical due-process bar. The district court adopted an exception that allows private, profit-motivated lawyers to prosecute a civil-penalty action on behalf of the government in exchange for a contingency fee, so long as a government lawyer maintains "control" over the case as a "safeguard[]" against the private prosecutors' partiality. MSJ Order at 8-9, R.E. 104, Page ID#3181-82.

The Supreme Court has never recognized such a "control" exception, and indeed has repeatedly rejected arguments that other procedural safeguards might minimize the risk that a judge or prosecutor's personal interest in a case will improperly influence proceedings. The bar against self-interested judges and prosecutors is categorical, the Supreme Court has reasoned, because no safeguard can eliminate either the risk of improper influence or the appearance of impropriety. That is the case with the district court's "control" exception here.

A. Due Process Categorically Bars Contingency-Fee Counsel From Prosecuting Quasi-Criminal Enforcement Actions

In rejecting arrangements that could compromise a judge or prosecutor's impartiality, the Supreme Court has adopted and repeatedly applied a categorical bar in a variety of settings.

In the context of judges, for instance, the Court in *Tumey* reversed convictions rendered by a village mayor's court where the mayor's neutrality as a judge was jeopardized because he was paid a portion of the criminal fines he

imposed, whereas he received no payment for acquittals. 273 U.S. at 520-21. The Court held that "it certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." *Id.* at 523.

The Court applied a per se rule based on the mere risk that the mayor could be improperly influenced by his financial self-interest in convictions, and refused to engage in a factual inquiry into whether that risk had materialized. *Id.* Thus, the Court found it irrelevant that the mayor received only a modest sum from the fines he imposed—$12 in one case and roughly $100 per month—or that many mayors would not be influenced by such amounts. *Id.* at 532. Nor did it matter that the mayor's self-interest allegedly had no impact on the outcome of the case because "the evidence show[ed] clearly that the defendant was guilty." *Id.* at 535. As the Court explained, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.* at 532; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878 (2009) (quoting same).

Similarly, in *Ward*, 409 U.S. 57, the Court invalidated an arrangement where fines imposed by a mayor's court accounted for a substantial portion of municipal revenues, even though the mayor-judge did not personally receive any payment. Again, the Court applied a "per se rule," *id.* at 62 (White, J., dissenting), based on the "possible temptation" that "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60 (majority opinion). The Court rejected any factual inquiry into whether the mayor had been improperly influenced. *Id.* Nor was the Court persuaded by a supposed check on the mayor's impartiality, rejecting the government's argument that "any unfairness at the trial level can be corrected on appeal and trial de novo . . . ." *Id.* at 61. As the Court explained, "[t]his 'procedural safeguard' does not guarantee a fair trial in the mayor's court" in the first instance, as due process requires. *Id.*

In the context of prosecutors, the Court likewise has held that any arrangement that could undermine a prosecutor's duty to pursue justice over personal interest is categorically barred. While prosecutors need not have the same degree of impartiality as judges, *see Marshall*, 446 U.S. at 248, prosecutors serve a unique function in the judicial process as "both an administrator of justice and an advocate." *United States v. Young*, 470 U.S. 1, 9 n.6 (1985) (citation and internal quotation marks omitted). A prosecutor is "the representative not of an ordinary

party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). As such, a prosecutor's interest is not that the government "shall win a case, but that justice shall be done." *Id.*; *see also Brady v. Maryland*, 373 U.S. 83, 87 n.2 (1963) ("[T]he government wins its point when justice is done in its courts." (internal quotation marks omitted)).[2]

In *Young v. United States ex rel. Vuitton et Fils S.A.*, the Court "establish[ed] a categorical rule against the appointment of an interested prosecutor" to pursue a criminal contempt action on behalf of the government. 481 U.S. at 814. There, the defendant in a civil case was charged with criminal contempt, and the judge appointed the plaintiff's private lawyer as a special prosecutor to pursue the charge. *Id.* at 790-92. Finding the appointment improper, the Court stated that "[p]rivate attorneys appointed to prosecute a criminal contempt action represent the United States" and are "appointed solely to pursue the public interest in vindication of the court's authority." *Id.* at 804. Thus, they "should be as disinterested as a public prosecutor who undertakes such a prosecution." *Id.* Because the plaintiff's lawyer "may be tempted to bring a tenuously supported

[2] *See also, e.g.*, *Connick v. Thompson*, 131 S. Ct. 1350, 1365 (2011) ("The role of a prosecutor is to see that justice is done."); *Gannett Co. v. DePasquale*, 443 U.S. 368, 384 n.12 (1979) ("The responsibility of the prosecutor as a representative of the public . . . requires him to be sensitive to the due process rights of a defendant to a fair trial.").

prosecution if such a course promises financial or legal rewards for the private client," the arrangement was improper. *Id.* at 805.

The Court rejected an argument that oversight by the judge in a contempt proceeding could safeguard against self-interested conduct by a private prosecutor. *Id.* at 807. Inevitably, the Court explained, many critical decisions in a prosecution will be "made outside the supervision of the court." *Id.* at 807. The error in appointing a self-interested prosecutor is "so fundamental and pervasive that [it] require[s] reversal without regard to the facts or circumstances of the particular case." *Id.* at 809 (plurality) (internal quotation marks omitted).

The Court in *Marshall* confirmed that "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." 446 U.S. at 242. There, the Court held that "[a] scheme injecting a personal interest, financial or otherwise, into the [civil] enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. The Court, however, found no such constitutional concerns had arisen, because "[n]o government official stands to profit economically from vigorous enforcement" of the statute at issue. *Id.* at 250.

While *Marshall* recognized that "the standards of neutrality for prosecutors are not necessarily as stringent as those applicable to judicial or quasi-judicial

officers," the Court later clarified that this "difference in treatment is relevant to *whether* a conflict is found, however, not to its gravity once identified." *Young*, 481 U.S. at 810-11. In other words, once, as here, the conflict is established, the standards are the same and a categorical bar is warranted.

Here, the private contingency-fee lawyers prosecuting Merck indisputably have a financial self-interest that conflicts with every prosecutor's duty to seek justice on behalf of the public. Thus, the district court's decision allowing the contingency-fee arrangement runs afoul of the *per se* rule established by the Supreme Court's jurisprudence. As the above cases show, the Court has consistently refused to engage in case-by-case factual inquiries into whether an arrangement that injected judicial or prosecutorial self-interest into a case in fact resulted in an impartial proceeding, choosing instead a categorical bar. The Court thus has repeatedly rejected arguments that various procedural "safeguards" might cure the taint from a self-interested judge or prosecutor. Yet, the district court here adopted a case-by-case approach examining whether in fact a government's lawyer's "control" over the State's civil-penalty action against Merck provided an adequate "safeguard[]" against the private contingency-fee lawyers' financial interest in the case. MSJ Order at 8-9, R.E. 104, Page ID#3181-82.

The district court's fundamental error was to disregard the Supreme Court's precedents in favor of a handful of decisions from other courts that have adopted a

"control" exception, and a student note in a law journal. *Id.* at 8-11, Page ID#3181-84. The first of those cases, *City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1997), held that government lawyers' control over the case supported the government's use of private contingency-fee lawyers, but the court cited no authority for this proposition. The remaining decisions simply followed *Philip Morris*—or cited one another—without regard to Supreme Court precedent to the contrary. *See Cnty. of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 852-53 (Cal. Ct. App. 2008) (citing *Philip Morris* to support a "control" exception); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 475-76 (R.I. 2008) (citing the California Court of Appeal's decision in *Cnty. of Santa Clara*); *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21, 31 n.7 (Cal. 2010) (citing the Rhode Island Supreme Court's decision in *State v. Lead Indus.*).

As for the student note cited by the district court, the student merely referenced these same decisions (or others that cite them) and provides no independent support. Indeed, the student note criticizes the decisions as imposing an unrealistic or "highly suspect" standard. Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 615 & nn.16-17 (2009).

The "control" exception thus appears to have emerged from thin air and been perpetuated by reciprocal citations among state appellate courts that did not

grapple with the Supreme Court's *per se* approach. This Court, as the first federal appellate court to consider the issue, should reject the "control" exception and apply the categorical rule established by the Supreme Court.

B. Government Counsel's "Control" Cannot Cure the Structural Problem With Financially Self-Interested Private Prosecutors

The Supreme Court's categorical bar on any arrangement that gives a judge or prosecutor a personal interest in a case is necessary to "preserve[] both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citations and internal quotation marks omitted). The contingency-fee arrangements here violate both the "appearance and reality of fairness," *id.*, that the Supreme Court's jurisprudence demands. Contrary to the decision below, a government lawyer's supposed "control" over the State's civil-penalty action against Merck cannot restore either the appearance or reality of fairness.

1. "Control" Cannot Restore the Reality of Fairness

The "control" exception indulges in a fiction that the government's use of self-interested private prosecutors can be rendered fair through supervision by other lawyers who are not tainted by improper financial incentives. In fact, "control" cannot cure the basic structural problems inherent in hiring prosecutors who have a personal financial stake in the matter.

First, the "control" theory ignores the overwhelming financial incentive that contingency fees give the private lawyers to find ways, directly or indirectly, to steer the litigation. Contingency-fee prosecutors have incentives that, under any "realistic appraisal of psychological tendencies and human weaknesses," *Marshall*, 446 U.S. at 252 (citation omitted), create a structural conflict between the pursuit of justice and their personal interest in obtaining a substantial financial recovery. Under the contingency-fee agreement here, the private lawyers are entitled to eighteen percent of any recovery if they win, but nothing if they lose. *See* Cost Proposal, R.E. 64-8, Page ID#1037. The private lawyers also agreed to front all expenses, an investment they would lose if Merck paid no civil penalties in the action. *Id.* This arrangement inherently skews their decision-making and thus denies fundamental fairness at every stage of the prosecution.

For example, a private lawyer appointed as a prosecutor "may be tempted to bring a tenuously supported prosecution if such a course promises [personal] financial . . . rewards." *Young*, 481 U.S. at 805. Beyond the decision to bring a case, "private attorneys who operate on contingent fee agreements have a financial incentive to maximize money recoveries—an incentive that would be congruent with clients' interest in private actions but frequently is in tension with a State's public interest role." *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcommittee on the*

Constitution of the House Comm. on the Judiciary, 112th Cong. 48 (2012) (testimony of James R. Copland, Director, Center for Legal Policy, Manhattan Institute for Policy Research) (hereinafter "*Contingent Fees* Hearing"). Unlike a contingency-fee lawyer who gets paid based on the amount of any recovery, "[t]he government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants." Howard M. Erichson, *Coattail Class Actions: Reflections on* Microsoft, *Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000).

This case illustrates the potential for mischief when prosecutors are motivated by financial self-interest in the outcome of a case. As the district court acknowledged, the private profit-seeking lawyers representing the State here sought to multiply the number of Merck's alleged statutory violations, which would increase their personal financial gain, in addition to seeking the maximum civil penalties for each violation. MSJ Order at 23, R. 104, Page ID#3196. With respect to this critical question of what relief would be in the public's interest, the district court found that the Kentucky AG's office showed a "disconcerting" and "disappointingly casual approach." *Id.*

Second, the district court's "control" theory also ignores the inherent limitations on a government lawyer's ability to control self-interested private prosecutors who, as here, were hired to play a "lead role" in the litigation. *Id.* at

15, Page ID#3188. "[A]s long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the 'facts' to the [government lawyers] and their staff." David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 329 (2001). "Thus, even when the [government lawyers] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [government lawyers] and their staff may lack the necessary information to shape litigation outcomes." *Id.*

Here, the district court's standard allows the profit-motivated lawyers to "exercise their professional skills in putting a lot of the litigation together," MSJ Order at 26, R.E. 104, Page ID#3199 (quoting Dep. of Elizabeth Natter at 317-18, R.E. 77-1, Page ID#2421-22), giving them the ability to indirectly control the proceedings. And the Kentucky assistant attorney general's involvement here—signing pleadings, showing up for court, and emailing and participating in a "weekly conference call" with the State's private contingency-fee lawyers, *see* Merck Br. 21—does not equate to meaningful control.

Third, the "control" theory ignores the inability of courts to police whether it is the government or private lawyers on a litigation team who are in fact

controlling the ongoing case. "[A]s a practical matter, it is impossible to see how a reviewing court could assure itself, in the individual case, that such control is in fact being exercised." Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 106 (2010). This is especially true because "the communications between the state attorneys general and the contingency fee lawyers typically are protected by the attorney-client privilege and the work product doctrine." Douglas F. McMeyer et al., *Contingency Fee Plaintiffs' Counsel and the Public Good?*, In-House Defense Quarterly, Winter 2011, at 4. Here, the Kentucky AG's office objected on privilege grounds to virtually any inquiry by Merck into the question of control. *See* Merck Br. 25-27.

Finally, the "control" theory ignores the basic nature of a contingency-fee transaction for both the government and private lawyers involved. On one hand, state attorneys general hire private contingency-fee lawyers because their own offices supposedly lack adequate staff and expertise to manage the litigation themselves. Here, the district court recognized that "the original purpose of retaining outside counsel in *Merck I* was to remove the burden on the AG's office of having to litigate the action in such complex and distant proceedings." MSJ Order at 30, R.E. 104, Page ID#3203. On the other hand, the private lawyers invest substantial amounts of their own money in pursuing the litigation on the

assumption that they will have the ability to manage their investment. Neither party to this arrangement would have a reason to participate if government counsel "retain[ed] full control of the litigation," as the district court theorized. *Id.* at 9, Page ID#3182.

In sum, the control theory is a convenient fiction that defies any real-world understanding of the incentives and opportunities for private contingency-fee prosecutors to pursue their financial self-interest rather than justice on behalf of the public. As the Court recognized in *Young*, "[a]ppointment of an interested prosecutor is . . . an error whose effects are pervasive." 481 U.S. at 812. That is why, once the Court determines that an improper influence or conflict exists, a categorical approach applies, and courts should not engage in the fruitless enterprise of trying to discern whether a prosecutor's self-interest polluted a case:

> Such an appointment calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record.

481 U.S. at 812-13 (emphasis in original); *see also id.* at 807 (a prosecutor's "considerable discretion" involves many "decisions, critical to the conduct of a prosecution, [that] are all made outside the supervision of the court"); *cf. United States v. Gonzalez-Lopez*, 548 U.S. 140, 150-51 (2006) (recognizing it would be

virtually "impossible" to detect what subtle differences result from a particular lawyer's involvement in a case).

2. "Control" Cannot Overcome the Appearance of Impropriety

Even indulging in the fiction that government counsel's control could neutralize the contingency-fee prosecutors' structural conflict of interest, the "appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system." *Young*, 481 U.S. at 811. Thus, in *Young*, the Court found it irrelevant whether such an appointment caused actual harm, for "what is at stake is the public perception of the integrity of our criminal justice system." *Id.*; *accord id.* at 813 ("Public confidence in the disinterested conduct of [a prosecutor] is essential.").

Contingency-fee prosecutors diminish the public's faith in the fairness of civil government prosecutions. These arrangements frequently result in allegations that government officials are doling out contingency-fee agreements to lawyers who make substantial political-campaign contributions. *See* Editorial, *The State Lawsuit Racket: A Case Study in the Politician-Trial Lawyer Partnership*, Wall St. J., Apr. 8, 2009, at A12 (reporting that named partner of a firm pursuing a contingency-fee contract with Pennsylvania made large campaign contributions); Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-bid Contract to Litigate for the State*, Wall. St. J., Apr. 16, 2009, at A14 (similar in Mississippi,

New Mexico, Louisiana, and Arkansas); Am. Tort Reform Ass'n et al., *Beyond Reproach?: Fostering Integrity and Public Trust in the Office of State Attorneys General* (2010) (similar in Alabama, Mississippi, New Mexico, Louisiana, and New York).

Indeed, "[c]ontingency fee contracts have routinely been awarded to law firms that are among the largest contributors to the attorney general's election campaign." Richard A. Samp, *Growing Concern Over Contingency Fee Agreements Between Attorneys General and Private Attorneys*, BNA Insights, 2012 WL 4811135, at *3 (B.N.A. 2012) (documenting numerous "pay to play" scandals); *see also Contingent Fees* Hearing, *supra*, at 55 (documenting pay-to-play scandals in AG cases against the pharmaceutical and other industries); Lester Brinkman, Lawyer Barons 431 (Cambridge Univ. Press 2011) ("[C]ontingency fee agreements also allow states' attorneys general—85 percent of whom are elected—to institute a system of political patronage in which friends, former colleagues, and big ticket donors are awarded lucrative contracts in exchange for campaign contributions and other benefits.").

Contingency-fee agreements also create the appearance of giving private lawyers an undue windfall at taxpayers' expense. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10 (reporting

controversy over government agreement to give contingency fee lawyers half of any recovery in public environmental suit against poultry companies); Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers Inc.: A Report on the Alliance Between State AGs and the Plaintiffs' Bar* 1-22 (2011) (discussing pay-to-play, ethical, and policy controversy over contingency-fee agreements). As Judge William H. Pryor of the Eleventh Circuit, then the Alabama attorney general, aptly explained:

> The use of contingent-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder, May 18, 2001, at 4.

The appearance of impropriety has only increased in light of the recent explosion of contingency-fee agreements with government entities. "[T]rial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills." Martin Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, Research Roundtable, Northwestern Law School, at 7 (2008) (quoting Walter Olson, *Tort Travesty*, Center for Legal Policy (2007)); *accord* Samp, 2012 WL 4811135, at *5

("The debate over government use of contingency fee attorneys has heated up considerably within the past several years.").

Based on these concerns, contingency-fee arrangements like the one here have been widely condemned even within government as antithetical to fundamental fairness in judicial proceedings. The Executive Branch in 2007 banned the federal government from paying lawyers a contingency fee. *See Protecting American Taxpayers from Payment of Contingency Fees*, Exec. Order No. 13,433, 72 Fed. Reg. 28441 (May 16, 2007). This prohibition, which has remained in effect during both the Bush and Obama administrations, reflects the "policy of the United States" that the fees of lawyers representing the government should never be "contingent upon the outcome of litigation." *Id.*

The United States Congress also has recognized that it is improper for a lawyer to represent the government where he or she has a financial interest in the outcome of the case. Under federal law, any federal officer or employee with a nontrivial "financial interest" in an adjudicative proceeding is barred from "participat[ing] personally and substantially" on behalf of the government, including by "the rendering of advice." 18 U.S.C. § 208(a). The criminal and civil penalties for violating this restriction include up to five years imprisonment and fines of up to "$50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, whichever amount is

greater." *Id.* § 216(b). And recently the House held hearings on the use of contingency fees by state attorneys general. *See Contingent Fee* Hearing, *supra*.

Former state attorneys general and other state government prosecutors, too, have criticized the government's use of private contingency-fee lawyers. In addition to the former Alabama AG, *see* Pryor, *supra*, at 4, the former Iowa AG criticized these arrangements, stating that her office employed private lawyers exclusively on an hourly basis so that there would be "no doubt that prosecutorial neutrality prevails." Bonnie Campbell, *Penny-wise, Pound Foolish: Hiring Contingent-fee Lawyers To Bring Public Lawsuits Only Looks Like Justice of the Cheap*, LegalTimes.com, at 4, Aug. 18, 2003. And in another case challenging a contingency-fee arrangement with government entities in California, the California District Attorneys Association, which represents thousands of prosecutors throughout the state, explained in an *amicus* brief that "[p]ermitting contingent fee attorneys to represent public law enforcement interests will necessarily and inevitably inject improper personal financial interests into the balancing process required in civil law enforcement cases and will undermine [public] confidence in the civil law enforcement justice system." Brief of Cal. Dist. Attorneys Ass'n as Amicus Curiae Supporting Respondent, *Cnty. of Santa Clara v. Atlantic Richfield Co.*, No. S163681, 2009 WL 1541982, at *3 (Cal. Apr. 27, 2009).

Allowing the government to pay private lawyers to prosecute civil-penalty and other quasi-criminal cases on a contingency-fee basis thus erodes public trust in the prosecutorial function and creates an appearance of impropriety that the illusion of "control" cannot cure.

* * * * *

Kentucky indisputably could not pay its own assistant attorney general a contingency fee to prosecute Merck on the theory that her supervisor was paid on a salary basis. Nor could Kentucky pay a contingency fee to a private lawyer to prosecute a criminal case on the theory that the government attorney to whom she reports had ultimate decision-making power. There is no meaningful distinction between those examples and this case. In all instances, the conflict infects how the financially self-interested prosecutor thinks, acts, and makes recommendations to his or her state colleagues and client. And in all instances, the conflict creates an appearance of impropriety that undermines the public's confidence in the judicial process. This Court should reverse the district court and strike down the contingency-fee arrangement here as facially unconstitutional irrespective of any government lawyer's supposed "control" over the litigation.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed, and summary judgment should be granted in favor of Merck.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,321 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, the foregoing *Brief of the Chamber of Commerce of the United States and the American Bankers Association as* Amici Curiae *in Support of Plaintiff-Appellant and Reversal* was electronically filed with the Court via the Court's appellate CM/ECF system, and a copy of the brief was served on all counsel of record by operation of the CM/ECF system on the same date.

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Cost Proposal (Aug. 5, 2010), R.E. 64-8, Page ID#1033-1037

Dep. of Elizabeth Natter (Nov. 22, 2012), R.E. 77-1, Page ID#2104-2439

Mem. Op. and Order (May 24, 2013), R.E. 104, Page ID#3174-3206