Nos. 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 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
Hon. Danny C. Reeves
Case No. 3:11-cv-0051-DCR-EBA

BRIEF OF *AMICUS CURIAE* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT

Martin H. Redish
Northwestern University
School of Law
375 E. Chicago Avenue
Chicago, IL 60611
(312) 503-8545

Jeffrey S. Bucholtz
Karen F. Grohman
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Counsel for Amicus Curiae
Pharmaceutical Research and Manufacturers of America

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Rules of this Court, *Amicus Curiae* states as follows:

Amicus is not a subsidiary or affiliate of any publicly owned corporation.

No publicly owned corporation or its affiliate, not a party to the appeal, has a substantial financial interest in the outcome of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. Foundational Precepts of Due Process Dictate That Attorneys Who Exercise the Coercive Power of the State Through Litigation Be Motivated by the Neutral Pursuit of the Public Interest, Rather Than Private Gain. 4

II. Because of the Important Due Process Interests at Stake and the Impossibility of Monitoring the Relationship of the Attorney General's Office and Private Attorneys, *Any* Involvement by Private Contingency Fee Attorneys in Coercive Litigation Brought by the Commonwealth Violates Due Process. 10

III. At the Very Least, a Heavy Burden Should Be Placed on the Attorney General's Office to Establish That It Is Truly Exercising Control Over the Litigation. 15

CONCLUSION 18

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986) 8

Berger v. United States,
295 U.S. 78 (1935) 5, 8

Dick v. Scroggy,
882 F.2d 192 (6th Cir. 1989) 9

EEOC v. New Enter. Stone & Lime Co.,
74 F.R.D. 628 (W.D. Pa. 1977) 6

Freeport-McMoran Oil & Gas Co. v. FERC,
962 F.2d 45 (D.C. Cir. 1992) 6

In re Murchison,
349 U.S. 133 (1955) 14

Joint Anti-Fascist Refugee Comm. v. McGrath,
341 U.S. 123 (1951) 14

Larkin v. Grendel's Den, Inc.,
459 U.S. 116 (1982) 7

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980) 9, 10

Offutt v. United States,
348 U.S. 11 (1954) 14

Tumey v. Ohio,
273 U.S. 510 (1927) 8

United States v. Witmer,
835 F. Supp. 208 (M.D. Pa. 1993) 6

Ward v. Village of Monroeville,
409 U.S. 57 (1972) 8

Young v. U.S. ex rel. Vuitton et Fils S.A.,
481 U.S. 787 (1987) 7

Constitutional Provisions

U.S. Const. amend. V 4

U.S. Const. amend. XIV 4

Other Authorities

Berenson, Steven K.,
Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?,
41 B.C. L. Rev. 789 (2000) 6

Green, Bruce A.,
Must Government Lawyers "Seek Justice" in Civil Litigation?,
9 Widener J. Pub. L. 235 (2000) 6

Mashaw, Jerry L.,
Administrative Due Process: The Quest for a Dignitary Theory,
61 B.U. L. Rev. 885 (1981) 15

Redish, Martin H. & Lawrence C. Marshall,
Adjudicatory Independence and the Values of Procedural Due Process,
95 Yale L.J. 455 (1986) 15

Redish, Martin H.,
Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications,
18 Sup. Ct. Econ. Rev. 77 (2010) 12, 13

INTEREST OF THE *AMICUS CURIAE*[1]

PhRMA is a voluntary nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's member companies are dedicated to discovering medicines that enable patients to lead longer, healthier, and more productive lives. During 2012 alone, PhRMA members invested an estimated $48.5 billion in efforts to research and develop new medicines. PhRMA has frequently filed amicus curiae briefs in cases raising matters of significance to its members. The present case is of great importance to PhRMA and its members, because it turns on fundamental issues of procedural due process in suits brought by States seeking to penalize corporate defendants, many of which—including the defendant in the present case—are pharmaceutical companies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *Amicus Curiae* submits this brief in order to emphasize to this Court two key points about the role of the Due Process Clause in a democratic society. First, the constitutional guarantee of due process of law represents the foundational means of insuring that a democratic government maintains the dignity of its citizens and treats them with respect. It is therefore vitally important that the

[1] No party or any counsel for a party in this appeal authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. No person or entity other than *Amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

judiciary enforcing the Due Process Clause assure itself that those wielding the coercive power of the State act not out of narrow personal interest but rather solely out of the neutral pursuit of the public interest. Second, because the Due Process Clause is designed to insure the legitimacy of a democratic government in the eyes of its citizens, as a constitutional matter the appearance of fairness is as important as actual fairness. Therefore, in enforcing the Due Process Clause, the judiciary must prohibit *any* involvement in the enforcement of coercive state power by lawyers who have a direct and personal financial interest in the outcome of the litigation process initiated to exercise that coercive power.

These principles follow from well-established precepts of American constitutional and political theory and long accepted postulates of constitutional law as regularly enunciated by the Supreme Court. However, the court below declined to recognize them, adopting instead the analysis of state courts that have overlooked these principles and allowed States to pursue private pecuniary interests rather than the public good by enlisting contingency fee attorneys to bring what are supposed to be state enforcement actions. The Commonwealth's desire to enlist private attorneys who stand to gain financially if, and only if, the Commonwealth prevails must yield in light of the constitutional stature of the foundational guarantee of basic fairness in judicial proceedings.

Once private contingency fee attorneys are introduced into the process of enforcement of State authority, no remedial measures can remove the taint. On the contrary, to recognize the possibility that any arrangement can be fashioned that would constitutionally validate the Commonwealth's reliance on private contingency fee attorneys would inevitably invite subterfuge, circumvention and confusion, rendering any reviewing court incapable of policing the Commonwealth's behavior. Given that private contingency fee counsel are presumably retained for their expertise and to alleviate the burdens on the Attorney General's Office, it is difficult to imagine a scenario where the Attorney General's Office would engage contingency fee counsel but nonetheless retain full control and disentangle the self-interested opinions of private counsel from the disinterested pursuit of the public good.

For these reasons, this Court should hold that under no circumstances may an Attorney General employ private contingency fee attorneys in a legal action enforcing a State's coercive authority against its individual or corporate citizens, regardless of how their contractual arrangement is worded or how much the Attorney General pledges to follow it. Under the Due Process Clause, the decision of the District Court granting Appellee's motion for summary judgment should be reversed, and summary judgment should be entered for the Appellant.

ARGUMENT

I. Foundational Precepts of Due Process Dictate That Attorneys Who Exercise the Coercive Power of the State Through Litigation Be Motivated by the Neutral Pursuit of the Public Interest, Rather Than Private Gain.

Underlying the words of the Constitution's directives are important normative precepts of political theory which shape the fundamental relationship between government and citizen in the manner dictated by our nation's commitment to democracy. Nowhere is this more true than in the case of the Due Process Clauses of the Fifth and Fourteenth Amendments. U.S. Const. amends. V, cl. 4; XIV, §1. The constitutional directive that government may not deprive citizens of life, liberty, or property without due process of law represents the legal outgrowth of the implicit social compact between government and citizen in a democratic society. The due process guarantee requires that when the State exercises its coercive power over its citizens, it must treat those citizens fairly, with dignity and respect. In exercising its authority, government, as representative of the people, must therefore employ fair and rational procedures to act solely in a manner designed to advance justice and the public interest.

To assure achievement of these ends, those exercising the power of the State must have as their goal advancement and protection of the interests of the people whom they represent and on behalf of whom they work. Where those exercising the power of the State act in pursuit primarily of their self-serving private interests

rather than those of their constituents, they abuse the power of the State by using it as a device for private gain. In so doing, they necessarily violate the democratic social compact by employing the State's coercive power for purposes other than pursuit of the public interest, and as a result deprive the affected citizens of their property without due process of law.

These constitutional limitations apply to attorneys invoking the power of the State as well as to adjudicators. While of course attorneys acting on behalf of government cannot be expected to demonstrate the total neutrality demanded of judges, it is nevertheless essential that those attorneys act in accordance with their obligations as servants of the people, rather than private individuals acting in pursuit of direct personal gain. As the Supreme Court has stated, an attorney who exercises governmental power "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; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

Although *Berger* concerned government attorneys involved in a criminal prosecution, other courts have recognized that the same constitutional principles apply in any case in which the coercive power of the State is exercised, criminal or civil. The D.C. Circuit, for example, has written that while the Supreme Court in

Berger was speaking of government prosecutors, "no one, to our knowledge . . ., has suggested that the principle does not apply with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992); *see also United States v. Witmer*, 835 F. Supp. 208, 214-15 (M.D. Pa. 1993); *EEOC v. New Enter. Stone & Lime Co.*, 74 F.R.D. 628, 632-33 (W.D. Pa. 1977); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 Widener J. Pub. L. 235, 256 (2000) ("Judicial decisions and other professional writings take the view that, even outside the context of criminal prosecutions, government litigators have a different role and different ethical responsibilities from lawyers representing private litigants."). In the words of one commentator, "where the represented entity is the government, which is in at least one sense nothing more than the representative of all the people, the supplanting of public values with private ones seems particularly inappropriate." Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 814 (2000).

Government can no more circumvent this obligation of neutrality by delegating its enforcement power to private attorneys than it can avoid the dictate of the Establishment Clause by closing public schools and instead supporting religious schools that purport to be private. In both instances, direct governmental

delegation of its authority leaves the private recipient of State power subject to the strictures of the Fourteenth Amendment. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126-27 (1982). Thus, when government employs private attorneys to invoke the State's coercive authority, those attorneys are as bound by the constitutional limits imposed by the Due Process Clause as are employees of the State. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 804 (1987) ("A private attorney appointed to prosecute a criminal contempt therefore certainly should be as disinterested as a public prosecutor who undertakes such a prosecution.").

Private contingent fee attorneys, such as those in the present case, make money only when they win. They make nothing when they lose. Moreover, because these attorneys are paid a percentage of the award, the larger the award, the larger their private take. When these attorneys represent private clients, a plausible case can be made that they serve an important function in our system by assuring that those injured victims who lack the financial resources to retain an attorney may seek justice in the courts. But no valid rationale exists for permitting a government attorney to enforce State authority in the courts under an arrangement where he or she is paid only if the government is victorious. Such a financial arrangement, when the private contingency fee attorney has been delegated coercive State power, likewise runs afoul of standards of due process.

As the Supreme Court correctly admonished in *Berger*, the government's obligation is to seek justice and govern impartially, not to pursue an interest driven by winning a lawsuit. 295 U.S. at 88.

The Supreme Court has long recognized that any arrangement under which an adjudicator receives greater compensation for a conviction than for an acquittal unambiguously violates procedural due process. *Tumey v. Ohio*, 273 U.S. 510 (1927); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). This is so even where there has been no showing of any actual impropriety in the judge's decision making process. In *Tumey*, for example, there had been no evidence that the judge had taken his personal financial interest into account in reaching his decision. But the Supreme Court considered the *potential* financial influence to constitute an evil in itself. *Tumey*, 273 U.S. at 533. This was no doubt because it would be impossible to demonstrate, in the individual case, that the judge's decision was or was not actually influenced by his financial interest. It was a sufficiently fatal defect that it *might* have been.

For the same basic reasons, any system in which private contingency fee attorneys are vested with the power of the State should be deemed a violation of due process. Indeed, the all-or-nothing nature of attorney compensation inherent in the contingency fee structure presents the same dangers that *Tumey*'s doctrine of

neutrality is designed to avoid. It is all but inconceivable that an attorney whose entire compensation turns exclusively on the outcome of litigation and the amount of an award will be able to exhibit the neutrality of decision making required of attorneys enforcing the State's coercive power.

An attorney whose sole obligation is to pursue justice and the public interest may ultimately conclude that pursuit of a particular litigation no longer serves that interest or that the size of penalties to be imposed on a defendant should be tempered in the interests of justice, or that some form of non-monetary relief serves the interests of the people more than would monetary relief. In stark contrast, private contingency fee attorneys cannot reasonably make decisions on the basis of such criteria because their income is directly and solely tied to the amount of monetary relief they can win for the Commonwealth in a lawsuit such as this one. At the very least, there exists a significant danger that personal financial interests will influence the attorney's decision making under these circumstances.

To be sure, "[t]he rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *see also Dick v. Scroggy*, 882 F.2d 192, 197 (6th Cir. 1989). But *Marshall*—which did not have occasion to address the practice of placing the State's enforcement power into the hands of private parties—recognized that due

process constraints require vigilance against the danger that "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision." 446 U.S. at 249-50. Here the Commonwealth has delegated its duty to pursue the *common* wealth to private attorneys who cannot be expected to pursue anything other than their own personal financial interest. Because that delegation risks—indeed, guarantees—that "irrelevant or impermissible factors" will drive what should be the Commonwealth's publicly minded decision making, the contingency fee arrangement here "raise[s] serious constitutional questions." *Id*. at 250.

For these reasons, this Court should hold that the Attorney General's use of private contingency fee attorneys to enforce the Commonwealth's coercive power through resort to the litigation process constitutes a violation of the Fourteenth Amendment's Due Process Clause.

II. Because of the Important Due Process Interests at Stake and the Impossibility of Monitoring the Relationship of the Attorney General's Office and Private Attorneys, *Any* Involvement by Private Contingency Fee Attorneys in Coercive Litigation Brought by the Commonwealth Violates Due Process.

Some state court decisions have recognized the due process concerns triggered by the State's use of private contingent fee attorneys in the exercise of its coercive power, but have nevertheless concluded that these constitutional problems may be cured by some level of assurance that State officials will exercise ultimate

authority in the conduct of the case. The District Court adopted the reasoning of these decisions even though it fully recognized the constitutional dangers triggered by the very fact that private contingency fee attorneys are involved in the litigation at all. These decisions, however, are neither binding nor persuasive. To the contrary, they are extremely dangerous to the meaningful enforcement of the protections of the Due Process Clause because they effectively impose no restriction on the State at all, as subject as they are to easy and undetectable manipulation and circumvention. The *Amicus Curiae* therefore respectfully urges this Court to adopt a *categorical bar* to a State's use of private contingent fee attorneys in litigation brought to exercise its coercive power.

The first difficulty with any doctrinal approach which permits a State to employ private contingent fee attorneys as long as State officials exercise continuing control is its inherent incoherence. "Presumably, the contingent fee lawyers are hired for the very reason that they will employ their expertise in shaping and conducting litigation. The greater the control the state is forced to exercise over the private attorneys, the less effective the strategy of using them becomes. Yet the less the state controls the day-to-day operation of the private attorneys, the greater the threat to constitutional values and dictates. Thus, it is far too facile to simply assume . . . that the state's exercise of such control is both possible as a theoretical matter and likely as a practical matter." Martin H. Redish,

Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications, 18 Sup. Ct. Econ. Rev. 77, 106 (2010).

The second difficulty with the case-by-case approach is the practical impossibility of actually monitoring the day-to-day relationship between Commonwealth attorneys and the private contingency fee attorneys whom they have employed. The District Court focused much of its attention on specific contractual provisions that purported to retain final decision making authority in the Attorney General. But mere words on a piece of paper cannot be allowed to purify an arrangement so inherently fraught with constitutional danger. The fact that Commonwealth officials say that they retain ultimate authority to make decisions in no way means that they will actually exercise that power, let alone do so independently with the public interest in mind rather than being influenced by the self-interested recommendations of private attorneys. Indeed, given the expertise of the private attorneys—a fact that presumably led to their retention in the first place—it is inevitable that any ultimate exercise of decision making power on the part of the Attorney General's Office would be tempered with substantial deference to the recommendations of its outside contingency fee counsel.

Nor should a reviewing court be satisfied by the fact that a member of the Attorney General's staff is able to exhibit some modicum of familiarity with the case during a deposition for which she has been prepared by the Commonwealth's

own contingency fee counsel. Reliance on such a showing to permit the practice would invite subterfuge and circumvention, particularly given the State's ability to assert privilege over litigation-related questions. In this context, it is worthy of note that the Commonwealth wrote and then rewrote its contract with private counsel in this case. In its initial contract, the Attorney General's Office retained its right to direct the litigation. Then, during the pendency of this case, the Attorney General revised its contract to include additional language stating that it "shall have final authority over all aspects of this litigation." Dist. Ct. MSJ Order at 4, R.E. 104 (May 24, 2013). The Commonwealth's most knowledgeable witness testified that the new language "would be a good idea" in light of the present lawsuit. Natter Dep. 231:18-232:6, R.E. 77-1 (Mar. 21, 2013). Ultimately, there will be no way to determine, in the individual case, whether such language is inserted for anything more than show. *See* Redish, 18 Sup. Ct. Econ. Rev. at 106 ("Purely as a practical matter, it is impossible to see how a reviewing court could assure itself, in the individual case, that . . . control is in fact being exercised [by state officials].").

Because it is impossible to determine the accuracy of the Attorney General's assertions of continuing control in the individual case, permitting such a showing to be made as a means of validating the Commonwealth's use of private contingent fee attorneys violates two core elements of procedural due process: the appearance

of fairness and transparency of process. As to the former concern, it is well established that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). The fair procedures required by the Due Process Clause "generat[e] the feeling, so important to a popular government, that justice has been done." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). The interest in preserving the appearance of fairness, the Supreme Court has stated, demands "a stringent rule [which] may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison*, 349 U.S. 133, 136 (1955). Thus, the Supreme Court has correctly adopted a *prophylactic approach* to due process in order to ensure the appearance of fairness. The Court is willing to err on the side of neutrality and due process, rather than risk the possibility of an undetected (and undetectable) skewing of the neutrality of a government official's decision making process.

Application of such a prophylactic approach to the present context demonstrates that any doubt concerning the Attorney General's assertion of continuing control must be resolved against the Attorney General. Because in every case it will, at the very least, be extremely difficult to determine the accuracy of the Attorney General's assertion of control, this Court should categorically

reject the use of private contingent fee attorneys by the State, in *any* capacity, in the exercise of the State's coercive power.

Of almost equal importance in the due process calculus is the need to preserve the transparency of the procedures used to deprive citizens of liberty or property. *See* Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 485-86 (1986); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. Rev. 885, 901 (1981). In order to ensure that their rights have been respected, litigants must be able to determine whether government officials have engaged in practices which threaten those rights. By adopting a policing standard which enables government officials to circumvent important constitutional limitations on their behavior with such ease, the approach of the court below contravenes the core due process value of transparency.

III. At the Very Least, a Heavy Burden Should Be Placed on the Attorney General's Office to Establish That It Is Truly Exercising Control Over the Litigation.

For the foregoing reasons, the *Amicus Curiae* submits that the inherent dangers in the Attorney General's retention of private contingent fee attorneys to pursue a case like this should be fatal. But even if the Court were to reject these arguments and instead accept or assume that private contingent fee attorneys may be employed as long as continuing control is exercised by State officials, those

State officials must bear a heavy evidentiary burden to demonstrate their compliance with the continuing control standard. Otherwise, the ease with which State officials may circumvent due process protections through subterfuge and confusion would render those protections hollow indeed.

The court below, however, adopted a presumption *in favor of* a finding of control by Commonwealth officials. R.E. 104 at 18. As demonstrated in more detail in Appellant's brief, the District Court overlooked or misinterpreted substantial evidence that established that even the Commonwealth's most knowledgeable representative knew little of the proceedings and lacked basic facts necessary to demonstrate *any* level of control over the underlying litigation. Absent its reliance on so sweeping a presumption in favor of the Attorney General's claim of continuing control, the District Court could not have found the absence of any reasonable factual issue concerning the question of who actually exercised control over the conduct of the litigation.

More fundamentally, it makes no sense to presume in this context that the Attorney General is pursuing this case "in a manner consistent with his duty to seek justice as well as his ethical and professional obligations to the Commonwealth of Kentucky." *Id.* Even the District Court recognized that the Attorney General's reliance on private contingency fee counsel created a danger that the disinterested justice-seeking required by the Due Process Clause could be

distorted by private self-interest, in violation of Merck's "due process right to a neutral prosecution." *See id*. at 8. Yet having recognized this danger that the disinterested justice-seeking ordinarily expected of a State official is at serious risk here, the District Court then invoked a presumption to brush that concern aside. It may be true that the Attorney General, as "the chief law officer of the Commonwealth," is ordinarily entitled to a presumption that he is seeking justice in a neutral fashion. *Id*. at 18. But that is because ordinarily he is not subject to influence by self-interested private lawyers.

If this Court were to conclude that private contingency fee attorneys may be employed by the Commonwealth as long as Commonwealth officials exercise continuing control, then at the very least it should place a heavy evidentiary burden on the Attorney General to demonstrate that he is in fact exercising such control. Formalistic reference to contractual provisions should not be accepted as a sufficient basis on which to make the requisite showing. It is only in this way that this Court could preserve the vitally important values of procedural due process that are seriously undermined by permitting the Attorney General to employ private contingent fee attorneys in litigation brought to enforce the State's coercive power.

* * * * *

This Court should reverse the decision below based on two fundamental principles, either of which, standing alone, calls for reversal. First, under no circumstances is it constitutionally appropriate for the Attorney General to employ private contingent fee attorneys, whose personal financial interests inevitably dominate their strategic choices and recommendations during the course of litigation, in litigation brought to enforce coercive State power. Second, in the alternative, at the very least there should be a heavy evidentiary burden on the Attorney General to establish that his office exercised continuing control over all important decisions in the course of the litigation despite the ubiquitous presence of expert plaintiffs' attorneys in the conduct of that litigation. Requiring the Attorney General to establish actual control is the opposite of the approach that the District Court took, which presumed the key fact of control without a sufficient evidentiary basis—and indeed while overlooking or minimizing the contrary evidence presented by Merck in a manner not permitted on a motion for summary judgment.

CONCLUSION

For these reasons, the *Amicus Curiae* respectfully requests that this Court reverse the decision of the United States District Court for the Eastern District of

Kentucky awarding summary judgment to the Attorney General of Kentucky and order that summary judgment be awarded to Appellant.

Respectfully submitted.

/s/ Jeffrey S. Bucholtz

Jeffrey S. Bucholtz
Karen F. Grohman
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
jbucholtz@kslaw.com

Martin H. Redish
Northwestern University
School of Law
375 E. Chicago Avenue
Chicago, IL 60611
(312) 503-8545

Counsel for Amicus Curiae
Pharmaceutical Research and Manufacturers of America

July 12, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a) and 6th Circuit Rule 32(a), I certify that this brief complies with the length limitations set forth in Federal Rule of Appellate Procedure 32(a)(7) because it contains 4,193 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii) and 6th Circuit Rule 28(b).

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I certify that on July 12, 2013, I served the foregoing via CM/ECF.

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz
Counsel for Amicus Curiae