IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Respondent, v. JANSSEN PHARMACEUTICA, INC., trading as "JANSSEN, LP," Petitioner.	No. 24 EAP 2009

AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC.

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

Charles H. Moellenberg, Jr. (PA No. 54740)
Leon F. DeJulius, Jr. (PA No. 90383)
Stephanie M. Chmiel (PA No. 200543)
JONES DAY
500 Grant Street, Suite 4500
Pittsburgh, PA 15219-2502
Telephone: (412) 391 -3939

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the over 4,000 Chamber members located in Pennsylvania, countless others do business in the Commonwealth and are directly affected by its litigation climate. The Chamber advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files amicus briefs in cases raising issues of vital concern to the nation's business community. This case is of particular interest to the Chamber and its members because permitting the Commonwealth's counsel to "contract out" its sovereign power to private attorneys can lead to prosecution of government lawsuits on the basis of private profitability, not public interest. Agreements that provide private attorneys with the right to a percentage of the recovery in a *parens patriae* action brought to protect the public interest violate principles of due process, ethics, and fundamental fairness. They also divert public funds from use in public programs without appropriate democratic checks and balances. The Chamber has a strong interest in ensuring that the government not be permitted to hire out its police power to private attorneys with a profit interest in the outcome of a case, lest members find themselves targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained by the constitutional safeguards and ethical obligations accompanying the exercise of the government's authority.

INTRODUCTION

An impartial government, not influenced by personal pecuniary interests, is a cornerstone of due process. Financial interest should not cloud the judgment or discretion of a lawyer acting for the government on whether to sue, whom to sue, what claims to assert, what remedies to

seek, how to prosecute the case, or how best to resolve a lawsuit filed on the public's behalf. As the California Supreme Court recognized:

> Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.

People ex rel. Clancy v. Superior Court, 705 P. 2d 347, 351 (Cal. 1985). Based on these cherished principles, the California Supreme Court held that an attorney who represents the government's interests in a quasi-sovereign civil action must be "absolutely neutral," with no stake in the litigation from even a small contingent fee. *Id.* at 352. The rule tolerates no exception, just as public trust allows no financial taint, and good ethics condones no compromise.

The public interest and fair-minded justice, not a government attorney's potential windfall, must be paramount in any decision. Public trust in the government's fair use of its sovereign and quasi-sovereign powers and in the integrity of the judicial process is essential to our democracy. *See* The Federalist No. 78 (Alexander Hamilton) (J. Pole ed. 2005) (advocating the importance of "public and private confidence" in judicial integrity in order to avoid "universal distrust and distress"). This is true in civil as well as criminal cases.

The public trust should never be delegated under the guise of government control to financially self-interested attorneys who would be tempted to place their personal gain above the interests of justice. In this case, government control appears to be a paper fiction. No lawyer from the Commonwealth has even entered an appearance in this case, and the contingent fee lawyers from Texas, rather than a Pennsylvania public official, verified the complaint. While perhaps mundane, the lack of any transparency or legislative oversight in awarding a contact

potentially worth millions of dollars has created the impression that political patronage was for sale and threatens to undermine the public's faith in the judicial system.

This Court alone regulates attorney conduct and polices the constitutional spheres of authority in which each branch of government operates. The Court should provide clear guidance that prohibits the award of these types of secret contingency fee agreements and ensure that the Commonwealth's use of contingent fee counsel complies with the due process requirements of the state and federal Constitutions and with sound judicial policy. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *See Tumey v. Ohio,* 273 U.S. 510, 532 (1927). In this day of "pay-to-play" headlines, this Court's rejection of the fee arrangement in this case is essential to preserve public confidence in the judiciary and to nip in the bud the taint of private financial self-interest influencing litigation by the government.

ARGUMENT

I. THE GOVERNMENT CANNOT DELEGATE ITS SOVEREIGN OR QUASI-SOVEREIGN AUTHORITY TO FINANCIALLY INTERESTED PRIVATE COUNSEL.

The contingency fee lawyers filed this lawsuit, based in part on the Commonwealth's sovereign and *parens patriae* authority, asserting that the manufacturer's improper marketing of Risperdal caused the Commonwealth to pay for off-label prescriptions. *See* Compl. ¶¶ 1, 10-11, 13, Counts I-II, IV, Prayers for Relief. The lawyers are seeking civil penalties for false claims, punitive damages, and reimbursement for *all* Risperdal prescriptions for which the Commonwealth paid through its Medicaid or Pharmaceutical Assistance Contract for the Elderly programs. The Commonwealth's sovereign authority provides its unique ability to prosecute

civil or criminal penalties. *See Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1143 (Pa. Commw. Ct. 2005).

This lawsuit, accordingly, was brought in the name of the People purporting to protect the public interest. It raises a substantial public health issue of off-label use of prescription drugs, vitally important to thousands of citizens whom the Commonwealth claims to represent as *parens patriae*. The Commonwealth's *parens patriae* (or as is sometimes called, quasi-sovereign) authority permits the Commonwealth in certain circumstances to exert its "interest in [protecting] the health and well-being—both physical and economic—of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *see also Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1143 (Pa. Commw. Ct. 2005) (recognizing that quasi-sovereign interests are required to maintain an action based on the Commonwealth's *parens patriae* authority). Indeed, the *parens patriae* authority of a state "derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of a legal disability." *In re Terwilliger*, 450 A.2d 1376, 1381 (Pa. Super. Ct. 1982).[1]

Cases filed under the Commonwealth's sovereign and quasi-sovereign powers are far different from lawsuits seeking to protect the Commonwealth's own monetary or proprietary interests. *See TAP Pharmaceutical Products, Inc.*, 885 A.2d at 1143. It is a solemn obligation, with the lives and health of a multitude hanging in the balance. It is in these special classes of

[1] There is no suggestion that the individuals taking Risperdal are in fact under a legal disability, but the *parens patriae* suit presents them as unable to express and protect their own interests. Because contingency fee counsel could not succeed in bringing this case as a class action, they have recruited a government plaintiff to exercise its *parens patriae* authority and bring statewide, aggregated claims. This approach raises other serious constitutional and policy concerns for another day. *See, e.g.*, James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 Hofstra L. Rev. 329 (2005).

cases when due process protections over the ability of financially interested counsel to represent the government are the strongest.

A. Government Attorneys, Acting As Ministers Of Justice When Representing The Government In Its Sovereign Or *Parens Patriae* Capacity, Cannot Have A Financial Interest.

A government lawyer "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…is not that it shall win a case, but that justice shall be done." *See Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, the legal profession and the public are entitled to expect that "an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." ABA Comm. on Prof'l Ethics, Formal Op. 192 (1939); *see also* 65 Pa. Cons. Stat. § 1101.1 (1998) (declaring that "public office is a public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust."); Model Code of Prof'l Responsibility EC 8-8 (1983) ("A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."); 28 U.S.C. § 528 (disqualifying "any officer or employee of the Department of Justice" from participating in litigation that "may result in a personal, financial, or political conflict of interest, or the appearance thereof"). Under these principles, the public has "assurance that those who would wield [the state's] power will be guided solely by their sense of public responsibility for the attainment of justice," and will not be influenced by consideration of personal benefit. *Young v. United States*, 481 U.S. 787, 814 (1987).

This Court has repeatedly recognized that the judicial system must work without bias in order to validate the public trust. "The citizens of this Commonwealth have a right not only to expect neutrality and fairness in the adjudication of legal cases, but also, they have a right to be absolutely certain this neutrality and fairness will actually be applied in every case." *County of Allegheny v. Commonwealth*, 534 A.2d 760, 765 (Pa. 1987) (holding that the then-applicable scheme for county funding of the judicial system conflicted with the Pennsylvania Constitution's mandate for a unified judicial system). Thus, where the "independence, integrity and impartiality of the judicial system [is] threatened," this Court "ha[s] not hesitated to promulgate regulations and directives." *In re Stout*, 559 A.2d 489, 496 (Pa. 1989). It is "this Court's core obligation in regulating attorney conduct . . . to protect the citizens of our Commonwealth, to secure the public's interest in competent legal representation, and to ensure the integrity of our legal system." *Office of Disciplinary Counsel v. Marcone*, 855 A.2d 654, 661 (Pa. 2004).

This Court thus has held, in the context of a criminal prosecutor, that the government lawyer must be financially neutral. A government lawyer, "unlike a private attorney, must exercise independent judgment in prosecuting a case and has the responsibility of a minister of justice and not simply that of an advocate." *Commonwealth v. Eskridge*, 604 A.2d 700, 701 (Pa. 1992). To that end, "[w]hile a private attorney must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf, a prosecutor must abandon the prosecution if, in his professional judgment, justice will be promoted by doing so." *Id.* at 701 (internal citations and quotations omitted). The government lawyer, accordingly, cannot have a financial interest in the outcome of the case: a defendant has "'a right to have his case reviewed by an administrator of justice with his mind on the public purpose, not by an advocate whose judgment may be blurred by subjective reasons.'" *Id.* (quoting *Commonwealth v.*

Dunlap, 233 Pa. Super. 38, 46 (1975) (Hoffman, J. dissenting)); *see also Commonwealth v. Lutes*, 793 A.2d 949, 956 (Pa. Super. Ct. 2002) (a conflict of interest exists where district attorney has a financial interest in the outcome of the case); *Commonwealth v. Balenger*, 704 A.2d 1385, 1389-90 (Pa. Super. Ct. 1997) (same).

Although this Court has not specifically addressed the duties of a civil prosecutor, there is no reason that these rules should be any different or vary from the general ethical requirements required of all public officials. As the D.C. Circuit has explained, "no one . . . has suggested that the principle [of neutrality and duty to do justice] does not apply with equal force to the government's civil lawyers." *Freeport-McMoRan Oil & Gas v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992). It is time for this Court, too, to set forth unmistakable rules of conduct for attorneys representing the government in civil actions brought by the government as sovereign.

1. The Constitution Guarantees A Financially Neutral Civil Prosecutor.

Neutrality standards for government prosecutors are not only required by basic ethical rules and judicial policy, but are enforceable by constitutional norms as well. Entrusting the government's powers "to private persons whose interests may be and often are adverse" to the public's interest takes government out of the hands of publicly accountable, "presumptively disinterested" officials. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The result is governmental "delegation in its most obnoxious form," in violation of due process. *Id.*

The United States Supreme Court, for example, in *Marshall v. Jerrico, Inc.* explained that because *civil* "[p]rosecutors are also public officials, they too must serve the public interest." 446 U.S. 238, 242, 249 (1980). There, a regional office of the Employment Standards Administration assessed civil penalties against Jerrico, Inc. *Id.* at 240. Because the regional office could receive revenue by imposing civil penalties, Jerrico argued that the prosecutor had an improper financial interest in the enforcement process in violation of due process. *Id.* at 241.

Under those facts, the Court found no constitutional violation because it was "plain that no official's salary [was] affected by the levels of the penalties" collected in the "government's enforcement actions;" thus, any "influence alleged to impose bias is exceptionally remote" and indirect. *Id.* at 245, 250. As the Court further explained, however, where civil penalties are being sought, "[a] scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. That is the precise "scheme" here, where the government is seeking civil penalties and punitive damages through which the contingency fee lawyers would benefit financially.

As the Supreme Court recently explained in a different context, when determining the potential for bias, the due process clause requires "a realistic appraisal of psychological tendencies and human weakness" to determine if the "average" person would be tempted "not to hold the balance nice, clear, and true." *Caperton v. A. T. Massey Coal Co.*, ___ U.S. ___, 129 S.Ct. 2252, 2263 (2009). This "objective" standard "do[es] not require proof of actual bias." *Id.* There should be no question that the potential recovery of millions of dollars would "possibl[y] tempt" an "average" lawyer to pursue a private gain. *See id.* at 2263-64. Certainly, the public would think so.

Citing the due process clause, the California Supreme Court in *Clancy* likewise explained the dangers of allowing private contingent fee lawyers to represent the government's quasi-sovereign interests in a civil case. In that case, a City had hired a private attorney on a contingent fee basis to bring an action against an adult book store to abate a public nuisance. The private attorney would receive $30 per hour for an unsuccessful case and $60 per hour for a

successful case — a pittance compared to the fees potentially available to the Commonwealth's retained lawyers in this case. 705 P.2d at 350.

The *Clancy* Court rejected the private attorney's contingent fee arrangement, holding that attorneys representing the government and the People of California in this "class" of quasi-sovereign actions must be "*absolutely neutral*" and that "*[a]ny* financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* at 352 (emphases added). The California Supreme Court emphasized that government attorneys "must act with the impartiality required of those who govern" and that the "proper function of the judicial process as a whole" requires the process itself to be free from any apparent taint to the general public. *Id.* at 350-351 (quotation marks and brackets omitted). Based on these fundamental principles of neutrality, the Court struck the City's fee arrangement, as it provided the attorney "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.* at 351.

That Clancy was not a government employee did not matter. The Court explained that "a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring that he is not a public official." *Id.* The same, higher standards apply to all lawyers, without exception, who represent the government. "The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards."[2] *Id.* The Commonwealth's attorneys cannot evade the due process, ethical and policy limitations

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[2]The cases cited by the Commonwealth in opposing the Petition for Review and likely to be cited in its response brief, are inapposite as they do not deal with the government's sovereign or quasi-sovereign interests. As the California Supreme Court explained in *Clancy*, the government typically remains free to hire contingency fee counsel in cases where it is asserting a proprietary claim of a type that a private plaintiff could bring. 705 P.2d at 352. The Commonwealth's cited authority involves exactly those types of claims. *See City and County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130 (N.D. Cal. 1977) (contingency fee counsel allowed in lawsuit including ordinary tort claims like fraud, breach of warranty, and unjust enrichment); *Philip Morris, Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998) (same).

preventing them from having a financial interest in the outcome by delegating their powers and responsibilities to others.

2. The Commonwealth's Use of Contingency Fee Counsel Here Violates Due Process.

Contingent fee counsel in this case cannot live up to the constitutionally required standards of neutrality as they have a huge, direct financial interest in the outcome of the litigation. Counsel stand to recover millions of dollars if successful—far more than the $30 an hour increase in compensation at issue in *Clancy*. The arrangement in *Clancy* also did not transfer the entire risk of litigation to the outside attorney, nor did it tie compensation to the size of the recovery. Here, if contingency fee counsel are unsuccessful, they will lose their entire investment in working up the case.

Where, as here, private counsel are investing millions of dollars and hope to recover many more millions of dollars, no reasonable person can suggest that counsel's *sole* interest is that of the public's. Commentator after commentator has expressed deep concern about the effect of this financial self-interest on the fair representation of the public's interest. *See* Robert A. Levy, *The New Business of Government Sponsored Litigation*, 9 Kan. J.L. & Pub. Pol'y 592, 598 (2001) ("We cannot, in a free society, condone private lawyers enforcing public law with an incentive kicker to increase the penalties."); *see* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 590 (1994) ("A private prosecutor, who is being paid handsomely to convict someone, cannot also, without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly."); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 39-42 (1989) (discussing cases barring use of contingency fee agreements due to the danger of corrupting justice); Richard O. Faulk and

John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 973-74 (2007) ("It certainly makes sense that an attorney cannot guarantee neutrality in a case in which he will not be paid unless he wins.").

Unquestionably, outside counsel's incentive under the contingent fee agreement in this case is to win and win big. To that end, counsel are seeking civil penalties and punitive damages in addition to money damages. *See* Janssen's Ex. B, Compl., Prayers for Relief to Counts I-V. Counsel also contend that most Risperdal prescriptions were "medically unnecessary" and seek recovery of *all* payments for those prescriptions. *Id.* ¶¶25, 31, 34-36. However, "the 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). Government attorneys could not paper over this serious, inherent conflict by claiming that their superiors have no financial interest; the financial interest of an assistant district attorney handling a case is not excused because the district attorney has no financial conflict. Accordingly, neither can private lawyers standing in the shoes of government attorneys and wielding their authority escape because their employer has no financial interest.

The due process principle of neutrality is compromised when public officials, who would never think of using their offices for personal benefit, delegate their power to private contingency fee lawyers who look to enrich themselves. The Commonwealth does not, and constitutionally cannot, pay police officers a bounty for each arrest, prosecutors a bonus for each conviction, or judges a percentage of damage awards to the state or counties. Any such financial conflict of interest is abhorrent to due process and fair play.

Counsel here are not representing an individual client, but instead purport to represent the Commonwealth's citizens and to seek recovery on their behalf. *See* Janssen's Ex. B, Compl. ¶¶10, 11, 13. Counsel's decisions in this lawsuit will affect the affordability and in many cases the availability of prescription drugs that doctors have determined are medically necessary and have prescribed for the Commonwealth's citizens. Their decisions also will affect the First Amendment constitutional rights of Janssen to truthfully and accurately promote its product and of doctors and citizens to hear potentially helpful health information.[3] Counsel with a mammoth financial interest to find every prescription to be "medically unnecessary" should not be permitted to insert themselves into the doctor-patient relationship and to make decisions affecting individual patients and public health. One would surely object to the ethical problem of a company paying a physician for each prescription he or she wrote, or the government rewarding a physician for each prescription or treatment terminated. The ethical odor in this case is no different than if the government were to reward a lawyer for inducing a client's guilty plea or a client's agreement to stop or reduce disability benefits.

Moreover, by prohibiting the Commonwealth from settling the case for non-monetary relief without defendants' payment of attorney fees (Appendix C, ¶3), the agreement also impedes the government's freedom to solve a perceived public health problem. Particularly in public health, monetary relief is not always the best solution. Prospective programs or regulatory action instead of lawsuits oftentimes are preferable and can be agreed to or recommended to resolve litigation.[4]

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[3] *See, e.g., Washington Legal Foundation v. Friedman*, 13 F. Supp. 2d 51, 61 (D.D.C. 1998) (upholding a challenge to the FDA's attempted restrictions on dissemination of information regarding off-label uses of prescription drugs), *vacated on other grounds by Washington Legal Foundation v. Henney*, 202 F.3d 331 (D.C. Cir. 2000).

[4] One could imagine, for example, that the Commonwealth could save millions of dollars in the future through a prospective program in which it defines "medically necessary" and compensable uses of Risperdal, and

Pushing the lawsuit until some monetary recovery is made is the only solution that makes any financial sense to contingent fee counsel. As one commentator explained in the context of litigation brought under the government's *parens patriae* authority: "[I]t is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work." David A. Dana, *Public Interest and Private Lawyers: Toward A Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. 315, 326 (2001).[5] They are investors in a venture for profit, and they are in a position, because of their expertise and financial resources, to exert considerable influence over the government's litigation strategy.

The Commonwealth's ability to protect public health is severely limited by the contingent fee agreement in this case. Where neutral government lawyers have never even entered an appearance and the complaint was verified by contingent fee counsel, the risk that counsel could steer important government programs based on profit motive rather than public interest is heightened.[6]

(continued...)

Janssen educates doctors regarding the prohibition on billing for prohibited off-label uses. The legislature, with its ability to hold hearings and investigate, could also devise a global regulatory solution to ensure that the Commonwealth's interests are protected in all prescription drug cases, but deserving patients do not suffer the loss of vital medications. Practical or regulatory solutions, however, are unlikely to generate a sufficient fee for counsel.

[5] *See also Id.* at 323 ("Sometimes public interest considerations dictate dropping litigation altogether or focusing on non monetary relief more than monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims or some fraction of them, in return for non monetary concessions.")

[6] The situation here is far removed from that in *State v. Lead Industries Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008). There, the Rhode Island Supreme Court retroactively affirmed the use of contingent fee counsel by the State Attorney General based largely on "the special nature of the constitutional office of Attorney General." 951 A.2d at 470. It allowed the Attorney General to hire contingent fee counsel only with exacting limitations of control: the public attorney must be "personally involved in all stages of the litigation" and exercise "absolute," "total" and publicly evident control over both the "course and conduct" of the case, which can include the "de minimis" and "relatively petty decisions." *Id.* at 475, 476 n.51, 477. The Rhode Island Supreme Court's meaning of "control" is

In the public's eyes and all too often in reality, "money talks." As a famous Polish writer said, "Money changes all the iron rules into rubber bands." Ryszard Kapuscinski, *Shah of Shahs*, 1985. The choice of defendants, theories, claims and remedies are all potentially influenced by the size and type of recovery that could potentially be extracted from a defendant.[7] The due process clause prohibits disrupting these public decisions through the introduction of personal pecuniary interests—even if the judiciary itself remains unbiased. *See, e.g.*, *Young*, 481 U.S. at 809 (appointing a private attorney to prosecute a contempt action that benefited the attorney's client violates due process); *Ganger v. Peyton*, 379 F.2d 709, 713-14 (4th Cir. 1967) (due process violation where prosecutor also represented the defendant's ex-wife in her divorce from the defendant). Under the circumstances of this case, there is no financial neutrality and due process is violated.

B. Public Policy Prohibits Contingency Fee Contracts Under These Circumstances.

The constitutional and ethical rules prohibiting the Commonwealth's use of a contingency fee agreement here align with sound judicial policy. In many areas of law, contingency fees continue to be proscribed because of the risk of introducing an improper financial interest. Where the government, which has the power to tax and regulate, resorts to

(continued...)

not the same "control" envisioned by the General Counsel's Office here, which has not even entered an appearance in this case. And the Rhode Island Supreme Court expressed considerable trepidation, saying that it might change its mind in the next case. *Id.* at 475 n.50. It is noteworthy that, unlike here, the Rhode Island Supreme Court faced the contingency fee issue at the end of the case—after nine years and two trials. By upholding the contingency fee agreement, it was able to decide the merits and to preserve outside counsel's obligation to pay all litigation costs when its decision dismissing the public nuisance claim turned defendants into the prevailing parties.

[7] The incentives to bring a lawsuit and then to shape it to maximize the financial recovery are not there when only government officials or even hourly outside counsel are used. No matter the outcome of the litigation, they will be paid. Nor are lawyers left penniless and out-of-pocket on expenses in the event of a non-monetary settlement or if changed circumstances no longer warrant the lawsuit. While hourly billing has potential, different problems, there is no incentive for non-contingent fee counsel to shape the lawsuit through the selection of defendants, theories, claims or remedies in the same way as contingent fee counsel.

contingent fee counsel, the courts' skepticism is even higher, because of the grave risk that contingency fee agreements create an appearance of impropriety. *See City of Hialeah Gardens v. John L. Adams & Co., Inc.*, 599 So.2d 1322, 1325 (Fla. Dist. Ct. App. 1992) ("For our citizens to support our institutions of government, they must have confidence in the integrity of public officials and in their actions, and among other things, they have a right to expect good faith and honest dealings in expenditure of the public treasury. As between the innocent tax paying public and those who would gain from contingent contracts with public entities or agencies, we come down on the side of the tax payer.").

For example:

- Thirty-two states, including Pennsylvania, prohibit contingency fee agreements to pay attorneys to petition the government because of "the potential for abuse in public decision-making." *Sholer v. State ex rel. Dep't of Public Safety*, 149 P.3d 1040, 1046 (Okla. Civ. App. 2006); 18 Pa. Cons. Stat. § 7515 ("No person may compensate or incur an obligation to compensate any person to engage in lobbying for compensation contingent in whole or in part upon the passage, defeat, approval or veto of legislation.").[8] This blanket prohibition applies even though government representatives have no financial interest and total control over their vote.
- Criminal prosecutors have long been prohibited from accepting contingent fees. *See Baca v. Padilla,* 190 P. 730, 731 (N.M. 1920) (finding it would be against state public policy to compensate a private prosecutor under a contingency fee arrangement, reasoning that a private prosecutor's "personal interests would be subserved best by securing the conviction of the defendant, and this regardless of the question as to whether or not the defendants were guilty or innocent"); *State v. Storm,* 661 A.2d 790, 794 (N.J. 1995) (holding that the victim's counsel in a civil action could not also act as the private prosecutor against the defendant in the criminal action due to

[8] *See also* 10 U.S.C. § 2306(b); *Providence Tool Co. v. Norris*, 69 U.S. 45, 54-55 (1864) (holding that contingency fees for procuring government contracts are against public policy, reasoning that "[t]hey tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."); *Marshall v. Baltimore & Ohio R.R. Co.* 57 U.S. 314, 335 (1853) (invalidating a contingency fee lobbying contract, stating that "[l]egislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors."); *City of Hialeah Gardens*, 599 So.2d at 1323-24 (reasoning that contingency fee contracts for services to procure a government contract are contrary to public policy because "[t]here is a legitimate public policy concern that such contingent fee arrangements promote the temptation to use improper means to gain success."); *Bereano v. State Ethics Comm'n*, 944 A.2d 538 (Md. 2008); *Holt v. City of Maumelle*, 817 S.W.2d 208, 211(Ark. 1991); *Rome v. Upton*, 648 N.E.2d 1085, 1088 (Ill. App. Ct. 1995).

counsel's financial incentive to convict the defendant). Contingency fee agreements, likewise, are prohibited for criminal defense lawyers out of risk of an undue and unfair influence on the judicial system. Pa. R. Prof. Conduct 1.5(d)(2); *Baca*, 190 P. at 731; *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818, 823 (E.D. Pa. 1972) (granting writ of habeas corpus because defense attorney, whose payment depended on a not-guilty finding, failed to present offer of plea bargain: "To put it bluntly, by advising the persistence in a not guilty plea, [the attorney] had nothing to lose but his client's life.").

- Contingency fees are barred in divorce cases because they provide incentives that are not in the public interest, such as discouraging reconciliation, and they risk the manipulation of the form of recovery to maximize profit. *See, e.g.*, Pa. R. Prof. Conduct 1.5(d)(1) (prohibiting contingency fees based on the amount of alimony or support obtained in a divorce action); *McCrary v. McCrary,* 764 P.2d 522, 525 (Okla. 1988) ("Public policy encourages reconciliation between the parties. A contingency fee arrangement, based on the amount recovered in a divorce case, gives the attorney a personal interest in the litigation thus serving as an impediment to reconciliation."); *In re Jarvis*, 869 P.2d 671, 674 (Kan. 1994) (by tying the attorney's fee to the amount recovered through alimony or property settlements "self interest would encourage the attorney to seek a maximum maintenance award at the expense of other parts of the decree. . .").
- Even expert witnesses are prohibited from being paid under a contingency fee agreement due to concerns that the fee would influence their testimony. *Merva v. Workers' Compensation Appeal Bd.*, 784 A.2d 222, 230 (Pa. Commw. Ct. 2001) ("Fee agreements with expert witnesses that exceed the legal fee provided for other witnesses are now permitted. . . but only if such expert fees are not 'contingent on the outcome of the controversy.'" (quoting Restatement of Contracts § 552)).

The potential for the appearance of impropriety based on contingency fees applies with equal force here. As one commentator explained, a contingency fee contract between a state and private attorney is "a sure-fire catalyst for the abuse of power." Robert A. Levy, *The New Business of Government Sponsored Litigation*, 9 Kan. J.L. & Pub. Pol'y at 598.[9] As the *Wall Street Journal* has pointed out with regard to this case, there is an appearance that political

[9] *See also Litigation in Mississippi Today: A Symposium Luncheon Featuring Attorney General Dick Thornburgh*, 71 Miss. L.J. 505, 511 (2001) ("Recent lawsuits involving lawful products . . . promote a kind of regulation by litigation, where trial lawyers take the place of legislators. A development described . . . as not healthy."); D. Thornburgh, *Commentary, The HMO Dilemma; What's the Fairest Battlefield in the Fight for Better Health Care? The Courts Should Be Used To Redress Harms and Not As a Vehicle To Change the System*, L.A. Times, April 23, 2000, at Part 5 ("[P]laintiff attorneys now are targeting the deep pockets of managed health care insurance companies. Their goal, according to one of the lead attorneys, Richard Scruggs, is not to redress alleged wrongs but to 'change this unconscionable [health care] system through the courts.' Very dramatic. Yet not very democratic.")

patronage is for sale as Bailey Perrin has received several lucrative contingent fee contracts similar to this one after making large donations to high-ranking political figures. *The Pay-to-Sue Business: Write a check, get a no-bid contract to litigate for the state*, Wall Street Journal, Apr. 16, 2009 at Review & Outlook. Whether or not true, the public questions tarnish the appearance of justice and fair play.

The examples of political favoritism and dangers of corruption from members of both political parties are well-reported:

- Former Texas Attorney General Dan Morales was sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees to a long-time friend who did little work on the state's tobacco litigation;[10]
- South Carolina Attorney General Charles Condon handpicked seven law firms to represent the state in the tobacco litigation, six of which included the attorney general's friends or political supporters;[11]
- Missouri Attorney General Jay Nixon selected five law firms that had made over $500,000 in political contributions over the preceding eight years, most to him and his party, to handle the state's participation in the tobacco litigation, for which they eventually received $111 million in fees;[12]
- In 1996, then-Attorney General Carla Stovall of Kansas hired her former law partners at Entz & Chanay to serve as local counsel in the State's tobacco lawsuit.[13] Attorney General Stovall testified that she asked her former law firm to take the case "as a favor" in part due to the "personal loyalty."[14] In addition to accepting the case that resulted in a "jackpot" fee award, Entz & Chanay performed other "favors" for Attorney General Stovall during her campaign and contributed money to her campaign effort;[15]

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[10] *See* John Moritz, *Morales Gets 4 Years in Prison*, Forth Worth Star Telegram, Nov. 1, 2003, at 1A.

[11] *See* Assoc. Press, *Lawyer Fees Weren't S.C.'s, Official Says*, Charlotte Observer, May 2, 2000, at 1Y.

[12] Editorial, *All Aboard the Gravy Train*, St. Louis Post-Dispatch, Sept. 17, 2000, at B2; John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar 8* (U.S. Chamber Inst. for Legal Reform, 2004), available at http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf.

[13] *See* Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 14, 2000, at 16 (testimony of Carla Stovall, Attorney General of Kansas), at http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-14-00b.pdf.

[14] *Id.* at 17.

[15] *See* John L. Peterson, *Payment for Law Firm Draws Fire; Hearing Continues in Case Involving Tobacco Litigation*, Kansas City Star, Feb. 17, 2000, at B3.

- Oklahoma Attorney General Drew Edmondson retained three private plaintiffs' firms to sue poultry companies for water pollution in an agreement that entitled them to receive up to half of the recovery;[16] and
- In 1994, Louisiana Attorney General Richard Ieyoub proposed to hire fourteen law firms — including many past contributors to his campaigns — to pursue environmental claims on behalf of his office.[17]

In contrast, other public officials have wisely decided not to use contingency fee counsel for public interest, *parens patriae* litigation. And, they have found no imperative need to use contingency fee counsel to litigate effectively. As Bonnie Campbell, the former Attorney General of Iowa explained,

> In Iowa, where I was attorney general, we resolved the issue quite simply. When it was necessary to retain private counsel, we paid an hourly fee. Furthermore, the decision to retain outside legal assistance required approval from an executive council that included the governor and other senior elected officials. Thus, ultimate decision-making power remained with public officials and was not clouded by the desire for personal financial gain.
>
> There are times when private attorneys can help advance the public interest, but they must always be the servant of the public, not the master. When a state decides to litigate, there must be no doubt that prosecutorial neutrality prevails.

Penny-wise, Pound Foolish: Hiring Contingent-fee Lawyers to Bring Public Lawsuits Only Looks Like Justice on the Cheap, LegalTimes.com, at 4, Aug. 18, 2003.[18] The Commonwealth's

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[16] *See* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10.

[17] Editorial, *Ieyoub's Expedition*, New Orleans Times Picayune, Nov. 28, 1994, at B6. Upon a challenge, the Louisiana Supreme Court invalidated the contingency fee agreements. *See Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997).

[18] Former New York Attorney General Eliot Spitzer, considered one of the most aggressive and activist state attorneys general, did not enter into contingency fee agreements with private lawyers. *See* Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government Sponsored Litigation*, Conference Proceedings, at 7 (Wash., D.C., June 22, 1999) (transcript of remarks). In the multi-state tobacco suits, the attorneys general of some states, such as Virginia, also opted not to hire contingency fee attorneys and instead pursued the litigation with available resources. *See* Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8. The federal government also pursues litigation without hiring lawyers on a contingency fee basis. *See* Executive Order 13433, "Protecting American Taxpayers from Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 16, 2007).

implicit argument that the "ends justify the means" is not only repulsive to due process, good ethics and prudent policy, but it cannot withstand scrutiny in actual practice.

The moral is to remove financial temptation in order to maintain public trust. *Cf. Caperton,* 129 S. Ct. at 2259-61. This Court stands as the guardian of ethics and due process in the courtroom. It should tolerate no exception to the bedrock principle that government representatives, especially when acting as *parens patriae* or in its sovereign capacity, have a unique obligation to serve the People, impartially treat all persons, and safeguard the public trust. Without this Court's intervention, in this day of "pay-to-play" headlines, these cases will continue to arise and public confidence will continue to erode. The Court should act now to preserve the appearance of propriety and instill public faith in an impartial legal process. There can be no appearance of justice when the government's counsel has a financial stake in the lawsuit.

II. THE CONTINGENCY FEE CONTRACT VIOLATES THE SEPARATION OF POWERS DOCTRINE.

The contingency fee contract also violates Pennsylvania's separation of powers doctrine. "One of the distinct and enduring qualities of our system of government is its foundation upon separated powers." *Commonwealth v. Mockaitis,* 834 A.2d 488, 499 (Pa. 2003). To protect individual liberty, foster democratic decision-making and ensure democratic accountability, no one branch of government can act beyond its sphere of authority; no branch is superior to another. *Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008); *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977) ("Under the principle of separation of the powers of government, however, no branch should exercise the functions exclusively committed to another branch."). When one branch of government usurps the authority of another, the action is unconstitutional and this Court has the duty to strike it down. *Mockaitis*, 834 A.2d at 499.

Pennsylvania's Constitution gives the legislative branch exclusive authority over the Commonwealth's raising and spending of money. Subject to minor exceptions, none of which is relevant here, the Constitution states, "No money shall be paid out of the treasury, except on appropriations made by law and on warrant issued by the proper officers." Pa. Const. art. III, § 24. As this Court has explained, this provision provides "the General Assembly the exclusive power to pay money out of the state treasury without regard to the source of the funds." *Shapp v. Sloan*, 391 A.2d 595, 603 (Pa. 1978); *see also Snyder v. Snyder*, 620 A.2d 1133, 1137 (Pa. 1993) (reasoning that "the spending power resides exclusively with the legislature"). In contrast, the Executive is constitutionally prohibited from spending Commonwealth funds without express legislative approval. *Id.*

Here, the General Counsel's Office overstepped its sphere of authority and violated the separation of powers doctrine by appropriating a portion of the Commonwealth's recovery as payment to the private contingent fee lawyers. By law, any recovery that the Commonwealth receives must be "paid into the state treasury within sixty days" after collection. 72 Pa. Stat. Ann. § 4663. Rather than pay the full amount into the Treasury, however, the General Counsel's Office has agreed to siphon off as much as fifteen percent "of the actual recovery to the Commonwealth by way of settlement or judgment" for payments to its lawyers. *See* Contingency Fee Contract ¶ 1 [attached as Ex. C to Application For Extraordinary Relief Of Ortho-McNeil-Janssen Pharmaceuticals, Inc.]. These attorneys' fees would not be awarded in addition to the money owed to the Commonwealth; they would be taken out of the money due and owed the Commonwealth. Under the contingent fee contract, the Commonwealth would recover only part of its money and stands to lose tens of millions of dollars.

The General Counsel's Office has no constitutional or legislative authority to take a cut of the Commonwealth's money before it returns the money to the Treasury. To be sure, lawyers who do not remit the *total* recovery received on behalf of the Commonwealth are subject to criminal penalties. 72 Pa. Stat. Ann. § 4663. The General Assembly has passed laws to authorize the Executive to retain or to use a portion of the recovery proceeds when it has intended the funds to be used for that purpose. The General Assembly, for example, has authorized the Commonwealth's Department of Justice to pay "informers" out of any recovery and to remit the remaining amount to the Treasury. *See* 71 P.S. § 826.5. Unlike other states, no law permits the General Counsel's Office to divert any of the recovered funds to pay private counsel.

Nor did the General Assembly provide a special general exception to the General Counsel's Office. The General Counsel's Office, for instance, has no authority unilaterally to sign a contract that would divert fifteen percent of the recovery toward a public health program or to increase school funding. *See Process Gas Consumers Group v. Pennsylvania Public Utility Comm'n*, 511 A.2d 1315 (Pa. 1986) (holding that the Public Utility Commission violated the separation of powers doctrine by directing that excess revenues be used to fund conservation programs). The General Counsel's decision to contract away fifteen percent of the Commonwealth's money on private attorneys is no different. The General Counsel is not paying the outside attorneys from funds appropriated for the use of that office. The General Counsel's office has not requested or received any legislative appropriation or approval for the contingency fee contract with Bailey Perrin, even though only the General Assembly has the authority to decide how to spend the Commonwealth's money. *See Shapp*, 391 A.2d at 603 ("[N]owhere in

our Constitution is the executive branch given any right or authority to appropriate public monies for any purpose.").

A similar case from the Supreme Court of Louisiana illustrates the fallacy of the General Counsel's argument. In *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997), the court examined a contingency fee contract under which the Louisiana Attorney General retained private attorneys to investigate and prosecute environmental damage claims on behalf of the state. The *Meredith* court noted that, "under the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power." *Id.* at 481. As the court acknowledged, while the Louisiana Constitution does not provide for such fee arrangements, the Louisiana legislature, in certain instances, has allowed the Louisiana Attorney General to enter into particular contingency fee contracts by express grants of statutory authority. *Id.* at 482. The court concluded, however, that neither the Louisiana Constitution nor any statute granted the Louisiana Attorney General express authority to pay contingency fees to private attorneys to help enforce Louisiana's environmental laws. *Id.* at 484. The court thus held, "[u]ntil the Legislature enacts a statute authorizing the Attorney General to enter into contingency fee contracts, the Contract is invalid and may not be implemented or enforced." *Id.*; *see also* Office of the State Auditor, Mississippi, Informational Review: MCI Tax Settlement With the State of Mississippi (2006) 2-4, 13, *available at* www.osa/state.ms.us/documents/performance/mci-tax-review06.pdf. (auditor findings that the Attorney General had acted beyond the scope of his constitutional and statutory authority by paying private lawyers out of funds that were not in his legislatively-approved budget and which should have been placed in the Treasury for public benefit).

Here too, the General Counsel's Office had no authority to enter into the contingency fee contract diverting public funds. By contracting away a portion of the Commonwealth's money, the Office of Governor's Counsel invaded the General Assembly's exclusive constitutional sphere of power. *See, e.g.*, *Commonwealth v. Stern*, 701 A.2d 568, 570 (Pa. 1997) (recognizing the principle that one branch may not exercise the powers exclusively granted to another branch); *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977) ("Under the principle of separation of the powers of government, however, no branch should exercise the functions exclusively committed to another branch."). Without this constitutionally required legislative check, nothing stops the General Counsel's Office or another agency from circumventing the legislature by running its own sub-Treasury and funding its own pet projects out of funds recovered on the Commonwealth's behalf.

In sum, neither glib explanations nor financial constraints can erase the constitutional transgressions. Constitutional safeguards are most essential when the government cries need, emergency, or crisis.[19] Budgets do not justify the sacrifice of good ethics and fair play in the courtroom.

The issue is this: Outside contingency fee attorneys pitch a lawsuit to a government as "free money," with "no cost, no risk." The government says that no viable alternative exists, it needs to retain and use outside counsel, and it can benefit from the litigation gains with no downside cost. The government and its outside attorneys proclaim that public health, and public coffers, will be well served. But, the People's representatives have not spoken; they have been

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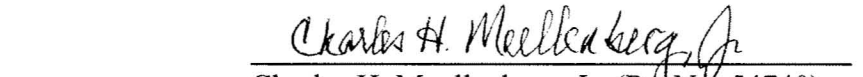
[19] As the United States Supreme Court has explained, "the Bill of Rights in general, and the Due Process Clause in particular...were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). *See also City & County of San Francisco v. Philip Morris,* 957 F. Supp. 1130, 1136 n. 3 (N.D. Cal. 1997) (rejecting the "public policy" argument that "a contingent fee arrangement is necessary...to make it feasible for the financially strapped government entities to match resources with the wealthy [corporate] defendants.").

shut out. Accountability has vanished. Public officials are, or appear to be, beholden. When money appears to influence decisions in lawsuits brought on behalf of the People, public trust dissipates. The illusion of free money with no downside, in reality, is fool's gold. The cost is the integrity of the judicial system.

CONCLUSION

The Court should grant Janssen's Motion to Disqualify Bailey Perrin Bailey LLP in this action.

Respectfully submitted,



Charles H. Moellenberg, Jr. (PA No. 54740)
Leon F. DeJulius, Jr. (PA No. 90383)
Stephanie M. Chmiel (PA No. 200543)
JONES DAY
500 Grant Street, 45th Floor
Pittsburgh, PA 15219
(412) 391-3939

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

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Amicus Curiae Brief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R. A. P. 121:

Service by Overnight Mail as Follows:

Prothonotary
Supreme Court of Pennsylvania
Eastern District
468 City Hall
Philadelphia, PA 19107

Service by First Class Mail as Follows:

Edward M. Postner, Esquire
Kenneth A. Murphy, Esquire
David J. Antczak, Esquire
Joanne C. Lewers, Esquire
DRINKER BIDDLE & REATH LLP
One Logan Square, 18th & Cherry Streets
Philadelphia, PA 19103-6996
(215) 988-2700

Attorneys for Defendant and Applicant Ortho-McNeil-Janssen Pharamceuticals, Inc. (f/k/a Janssen Pharmaceutica Inc.)

Stewart L. Cohen, Esquire
William D. Marvin, Esquire
COHEN, PLACITELLA & ROTH, P.C.
Two Commerce Square, Suite 2900
2001 Market Street
Philadelphia, PA 19103
(215) 567-3500

Fletcher V. Trammell, Esquire
BAILEY PERRIN BAILEY LLP
440 Louisiana Street, Suite 2100
Houston, TX 77002
(713) 425-7100

Robert E.J. Curran, Esquire
8 West Front Street
Media, PA 19063
(610) 565-0505

Counsel for Plaintiff Commonwealth of Pennsylvania

Dated: August 10, 2009

Charles H. Moellenberg, Jr.

Charles H. Moellenberg, Jr. (PA No. 54740)
Leon F. DeJulius, Jr. (PA No. 90383)
Stephanie M. Chmiel (PA No. 200543)
JONES DAY
500 Grant Street, Suite 4500

Pittsburgh, PA 15219-2502
Telephone: (412) 391 -3939

Counsel for Amicus Curiae
Chamber of Commerce of the United States of America