

In the  
**Supreme Court of the United States**

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PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC.,  
R. J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO  
COMPANY, AND THE TOBACCO INSTITUTE, INC.,

PETITIONERS,

v.

DEANIA M. JACKSON, ET AL.,

RESPONDENTS.

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**On Application To Stay Judgment Of The Louisiana  
Court Of Appeal, Fourth Circuit, Pending Disposition Of A  
Petition For A Writ Of Certiorari**

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**REPLY IN SUPPORT OF APPLICATION TO STAY JUDGMENT**

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## REPLY IN SUPPORT OF APPLICATION TO STAY JUDGMENT

Respondents' submission is largely an exercise in distraction and misdirection. They claim that "[a]dditional delay of the smoking cessation remedy" will cause class members to suffer "very real harms" (Memorandum in Opposition ("Opp.") 1, 30), but they do not dispute that free smoking cessation services are already available to every class member. Stay Application ("Stay App.") 5, 38 & n.4 (detailing record evidence of free services); see also, *e.g.*, <http://www.quitwithusla.org>. They contend that the Court is unlikely to grant review, but only after ignoring and mischaracterizing the important federal question addressed in our stay application. Opp. 12–13; compare Stay App. 2. And they repeatedly argue that a stay is unwarranted merely because this case has gone on for many years and there have been numerous appeals. Opp. 1–3, 7, 14, 17, 24. But longevity alone is never sufficient to establish compliance with the minimum requirements of due process.

This case has taken time to adjudicate precisely because of the many errors at trial that the appellate courts refused to remedy. Indeed, because this case was tried to judgment, the record is unusually well-developed and presents this Court with an ideal vehicle for review. As the record establishes, petitioners consistently protested that stripping them of basic defenses and holding them liable without requiring respondents to prove the basic elements of their claims broke every rule of fundamental due process. That the Louisiana courts repeatedly rejected petitioners' federal due process arguments shows that those arguments have been fully

preserved, not that the arguments are incorrect or unworthy of this Court's consideration.<sup>1</sup>

On the arguments germane to the stay application, respondents have nothing persuasive to say. They cannot deny that this massive imposition of liability resulted from a "class proceeding" in which defendants did not even have a full opportunity to cross-examine the class representatives. Nor can they deny that every time defendants prevailed on a seemingly dispositive issue, the Louisiana courts simply moved the goal posts. Equally telling is the one thing that respondents *will not* say: Respondents do not deny that, in the absence of a stay, they will seek to begin immediate dissipation of petitioners' \$270 million and then fight tooth and nail against the return of any remaining funds. For the reasons set forth in the stay application and below, the Court should stay execution of the judgment pending the timely filing and disposition of a petition for certiorari.

**I. There Is A Reasonable Probability That Certiorari Will Be Granted Or That, At Minimum, This Case Will Be Held for *Wal-Mart*.**

As the application explains, the petition for certiorari will raise the following question: Are there any federal due process limits on class-action adjudication in the state courts, or are state courts free to employ the class-action device to impose massive liability notwithstanding a failure to prove any individual plaintiff's claims,

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<sup>1</sup> Respondents contend that the Louisiana Supreme Court's denial of a stay should weigh heavily against issuance of a stay by this Court. Opp. 11. But for nearly the last two decades, it appears that the Louisiana Supreme Court has *never* granted a stay pending the disposition of a petition for certiorari in this Court. (Diligent research indicates that the most recent issuance of such a stay occurred in *Nicholson & Loop Inc. v. Carl E. Woodward, Inc.*, 590 So. 2d 577 (La. 1991).) Apparently, the Louisiana Supreme Court takes the view that, if a stay is appropriate during the pendency of a petition for certiorari, it is up to this Court to grant it.

and a denial of defendants' fundamental rights to dispute liability issues and raise defenses through cross-examination and otherwise? Stay App. 2. The stay application also shows that further review is reasonably probable because the due process issues raised by this case are important and recurring, the decision below conflicts with multiple decisions of this Court and the lower courts, and this case is an excellent vehicle for providing much-needed guidance on the extent to which the Due Process Clause establishes minimum requirements in the context of class-action litigation. Stay App. 21–28. Finally, as the application notes, the petition is at least likely to be held for *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (pet. for cert. filed Aug. 25, 2010), and, for that reason as well, a stay is warranted. Stay App. 27–28.

In contending that this Court will decline review, respondents ignore the question addressed in the application and make up a classic strawman. According to respondents, the petition will ask whether the “justice system in Louisiana” is “lawless,” and will request that this Court exert “supervisory control over an entire state court system” based on a complaint that “the Louisiana courts did not correctly apply their own law.” Opp. 12–13. This is untrue. The application did not take issue with the Louisiana courts generally; it did very much argue that the Louisiana courts denied due process of law to the applicants in this particular case.

As to this, respondents have no meaningful response. They make no effort to dispute the conflicts between the decision below and multiple decisions of this Court and of lower courts. Stay App. 22–26. They admit, as they must, that this Court's decisions establish “that due process requires an ‘opportunity to present every

available defense.” Opp. 14 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). And they do not deny that due process also requires a meaningful opportunity to be heard and to dispute all liability issues.<sup>2</sup>

Respondents principally contend that petitioners’ due process arguments are nothing more than an effort to second-guess the Louisiana courts on questions of state law. Opp. 12–14. But the Louisiana Court of Appeal could not have been clearer in acknowledging that it was authorizing a *departure* from clearly established Louisiana law — and doing so *only* because this case involved a class action in which aggregate liability of the “class as a whole” supposedly was at issue. See, e.g., *Scott*, 949 So. 2d at 1277 (while acknowledging that “[p]roof of fraud requires causation in the form of reliance,” exempting respondents from that requirement on the theory that this was a class action in which only “reliance by the class as a whole” was in issue, with no need to prove actual reliance by any real person). The Court of Appeal itself thus recognized that the trial court had dispensed with state substantive-law requirements, and went on to acknowledge that it would permit the dispensation in class actions, though not for individual suits. It is difficult to imagine a clearer example of a state court declaring that the

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<sup>2</sup> Respondents complain that we failed to “point[] to a single, specific affirmative defense that was disallowed.” Opp. 15. But the stay application repeatedly and specifically identified the disallowed affirmative defenses of prescription, comparative fault, and failure to mitigate. Stay App. 6–7, 8, 9, 12, 13; see also *id.* at 15–16 (citing *Scott*, 949 So. 2d at 1279–82). Equally unfounded is respondents’ suggestion that our due process challenge to the wholesale nullification of the affirmative defenses “invites an extremely fact-intensive undertaking.” Opp. 15. No “fact-intensive” inquiry is necessary to recognize that such defenses were nullified on purely legal grounds by the stroke of a pen, without trial, on a classwide basis. See *Scott v. American Tobacco Co.*, 949 So. 2d 1266, 1279–82 (La. Ct. App. 2007).

class-action vehicle permits the abandonment of established state-law defenses and liability elements that apply to an individual plaintiff's claim. But due process does not allow courts to impose liability without *any* plaintiff proving a claim or to make up law as the case proceeds, changing the rules as necessary to uphold a class verdict that would never stand in an individual case.

Contrary to respondents' assertions, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), does not suggest that the "aggregate liability" of a unitary "class as a whole" can "be proper, apparently without violating due process." Opp. 16. Indeed, the "national aggregate liability approach" to which *Amchem* referred and which respondents cite was an unadopted legislative proposal, not a judicial solution. See 521 U.S. at 597–98. Respondents' attempted reliance on *Sosna v. Iowa*, 419 U.S. 393, 399 (1975), and *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972), is even a greater stretch. All the Court held in *Sosna* and *Dunn* is that the mootness of a class representative's claim does not moot the case if others in the class have live claims. It is one thing to allow a class action to continue based on the fully litigated claims of the class representative; it is quite another to dispense with any meaningful opportunity to test any class representative's claims. The latter happened here, and nothing in *Sosna*, *Dunn*, or any other case supports such a fundamental deprivation of due process.

Respondents also fail to offer any justification for the denial of petitioners' fundamental due process right to cross-examine the class representatives at trial on central liability elements and defenses. According to respondents, because petitioners were able to ask some minimal questions on cross-examination, that

ought to have been enough. Opp. 19–20 & n.21. But in a case that seeks to hold defendants liable to class representatives and the “class as a whole,” the key liability issue at trial is whether the defendants’ misrepresentations or omissions caused any plaintiff (much less all of them) to start smoking and prevented smokers from stopping smoking. Yet, remarkably, this is exactly what petitioners were not allowed to ask Scott and Jackson — or any other plaintiff. See 2003-03-24 Tr. 16857–58 (“I will not allow questions of these class representatives having to do with individualized issues of prescription, individualized issues with regard to the effect of nicotine, individualized reasons for either starting smoking or stopping smoking.”); see also 2003-03-27 Tr. 17396; 2003-03-31 Tr. 17516–17. Petitioners were held liable to pay for alleged fraud and improper advertising, yet were barred from cross-examining Scott and Jackson on addiction, fraud, or advertising. As a result, the jury did not hear that Scott and Jackson never even saw the alleged misrepresentations and were not influenced by cigarette advertising. Nor were petitioners permitted to cross-examine Scott and Jackson on their claimed injury, on proximate cause, on reliance, or on any of their individualized affirmative defenses. Indeed, the trial judge warned defense counsel that he would hold them in contempt in front of the jury if they even tried to raise such issues on cross-examination. See 2003-03-27 Tr. 17261–62.<sup>3</sup>

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<sup>3</sup> All of that flatly contradicts respondents’ suggestions that petitioners’ only defenses were classwide — *e.g.*, that the dangers of smoking were “common knowledge” and therefore “no one could have detrimentally relied” (Opp 5; see also *id.* at 15) — and that petitioners therefore had ample opportunity to present them. Petitioners sought to ask *these* named plaintiffs about their individual reasons for starting and continuing to smoke. Because the lower courts blocked that line of inquiry, no plaintiff ever proved that his or her smoking

Respondents' assertion that "the class needed and remained eligible for relief" even if the representative plaintiffs had already quit (Opp. 21) is beside the point. The question is whether petitioners were wrongly deprived of their cross-examination rights before the jury rendered a finding of *liability*, not whether a particular *remedy* is necessary. If due process means anything in this context, it demands a full opportunity to cross-examine the class representatives before claims are used as a basis for class-wide liability. Yet that is precisely what petitioners were denied here.

Taking a page from the Court of Appeal, respondents assert that petitioners "limited their due process complaint to a request for a new *jury* trial" after the case was remanded to the trial court in 2007 for a determination of the number of smokers eligible to participate in the cessation program. Opp. 9–10 (emphasis added); *id.* at 23–24. They cite nothing to support that assertion except a statement in the Court of Appeal's 2010 decision (*id.* at 10 n.16, quoting *Scott v. American Tobacco Co.*, 36 So. 3d 1046, 1054 (La. Ct. App. 2010)), which in turn cited nothing at all. Respondents and the Court of Appeal are demonstrably wrong. On remand from the first appeal, petitioners requested further evidentiary proceedings and the right to be heard *with or without* a jury regarding the number of smokers eligible to participate in the cessation program (*e.g.*, R.3:592, 599, 604, 667, 674; 6/30/08 Hearing Tr. at 24, 30) — and continued to press that right in the second appeal.<sup>4</sup>

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was caused by defendants' alleged wrongdoing, as opposed to by personal preferences and choices.

<sup>4</sup> Remarkably, even as respondents assert that petitioners were not entitled to a hearing after the Court of Appeal struck down a \$130 million advertising campaign and ruled that

Moreover, on remand and in the 2010 appeal, petitioners continued to assert and fully preserved their due process objections to all *prior* proceedings in the case — and the Louisiana courts never suggested otherwise. The due process objections that petitioners intend to raise in this Court are therefore squarely presented for review.

Finally, respondents' attempt to distinguish this case from the pending petition for certiorari in *Wal-Mart* is baseless. Respondents concede that the second question presented in *Wal-Mart* asks whether the class-action at issue there violates "the Due Process Clause." Opp. 18 (quoting *Wal-Mart* Pet. at i). Respondents assert, however, that Wal-Mart's due process "question cannot fairly be said to be at issue in this case" (Opp. 18), but then quote from the portion of the *Wal-Mart* petition raising a separate *statutory* argument. Respondents all but ignore the pages that follow, which argue explicitly that the Ninth Circuit's sharply divided en banc decision "violates Wal-Mart's 'right to litigate the issues raised,' which is 'guaranteed . . . by the Due Process Clause,' *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), **and includes the right 'to present every available defense,'** *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)." *Wal-Mart* Pet. 30 (emphasis added). That is *precisely* the issue here: As explained above, the Court of Appeal

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only pre-1988 smokers could be included in the class, they fault petitioners for failing to "offer the appeals court rebuttal evidence" regarding the proper class size or utilization rate (Opp. 23). But respondents do not explain how such evidence could possibly have been in the record, since the trial court had *rejected* petitioners' arguments on both issues (ruling before trial that the Louisiana Product Liability Law did not invalidate any class members' claims, and ruling on remand in 2008 that petitioners could not present evidence on either the proper class size or utilization). In effect, respondents insist that the trial court would have permitted petitioners to develop evidence of what a more limited class size and utilization rate would be in the event that the trial court's determinations were later reversed on appeal. That defies all common sense and reason.

acknowledged that certain elements and defenses were firmly established as a matter of Louisiana law but held that that did not matter because these claims were tried *en masse*.<sup>5</sup>

It is no answer to say (Opp. 18) that the *Wal-Mart* case arises on appeal of the class-certification order, whereas this case arises after trial. In *Wal-Mart*, the trial court proposed — and the Ninth Circuit refused to disturb — a trial plan that stripped the defendant of its due process right to litigate individualized defenses. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 627 & n.57 (9th Cir. 2010) (en banc). In any event, there is no constitutionally meaningful difference between, on the one hand, certifying a class so disparate and expansive as to prevent defendants from presenting individualized liability issues and defenses and, on the other hand, holding that individualized liability issues and defenses are simply not available because the claim at issue runs to the “class as a whole.” If anything, the latter situation represents a more glaring violation of due process rights. But the end result is essentially the same: Defenses and liability elements that are available as a matter of the underlying substantive law are eliminated solely by virtue of the class-action procedural device. If the petition in *Wal-Mart* is granted (as we respectfully predict it will be) and the judgment reversed (as we respectfully submit

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<sup>5</sup> Even if *Wal-Mart* is decided based on the text of Fed. R. Civ. P. 23 or the Rules Enabling Act, 28 U.S.C. § 2072, the Court may well conclude that such a reading is supported by the need to avoid the constitutional difficulties that would arise from a contrary construction. Even such indirect guidance would severely undermine the decision below, which rests on the deeply flawed belief that due process imposes no meaningful limits on class-action procedures.

it should be), it follows *a fortiori* that the decisions below should be vacated or reversed.

## II. Petitioners Face Irreparable Harm.

Respondents assert that the harm to petitioners should be measured “in light of the harm visited upon members of the class.” Opp. 24. But respondents do not dispute — nor could they — that free smoking cessation services “are already widely available in Louisiana.” Stay App. 5, 38 & n.4 (detailing record evidence of same); see also, *e.g.*, <http://www.quitwithusla.org>. Respondents’ refusal to confront this crucial fact confirms that their opposition to this stay application has little to do with any immediate need of the class members and everything to do with their desire to gain access to funds that petitioners will be unable to recover in the event they ultimately prevail in this litigation.

Respondents also attempt — but fail — to create the illusion that petitioners have little to lose in the event a stay is denied. For starters, respondents do not dispute that the tap will be opened immediately upon petitioners’ payment of the \$270 million. They assert only that, “[t]o date, the trial judge has always held off on next steps when he was aware that further writs were being sought by Petitioners” (Opp. 25), but they do not suggest that they would acquiesce in such a restraint if the judgment is not stayed. To the contrary, respondents’ vigorous opposition to this stay request is proof positive that they intend to seek *immediate* access to these funds. Likewise, respondents’ assertion that expenditures for “cessation aids” will not “rapidly eat up \$240 million” (Opp. 26) recognizes that petitioners’ funds will immediately be dissipated to purchase and distribute such items. Cf. *Great*

*Am. Indem. Co. v. Dauzat*, 157 So. 2d 308, 311 (La. Ct. App. 1963) (“in cases . . . in which the party receiving the money payment has disposed of it, in good faith at the time of the disposal, the payor may not follow it into the hands of third parties”). Indeed, if review is granted, it is unlikely this Court would render a decision before 2012, forcing petitioners to fund at least two years — some \$62 million (*Scott*, 36 So. 3d at 1059) — of the cessation program without any real hope of recovering the disbursed funds.

The damage will be still worse if respondents also obtain attorney’s fees and costs in the interim. Respondents do not deny that they will seek an immediate award of many millions of dollars. All they say is that “courts often take some time to determine appropriate fees” and that they are precluded from accepting “an unreasonable fee.” Opp. 29. But because the state courts will evaluate the reasonableness of any fee against the size of the current award, which as we have shown is grossly inflated (at least twenty times what the record would support) and predicated on pure speculation, the fee award would be grossly excessive even if Respondents were ultimately to prevail on the underlying *liability* issues. Stay App. 34–35.<sup>6</sup>

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<sup>6</sup> In an attempt to show that the Court of Appeal’s award is reasonable, respondents deny that the court assumed that *every* smoker who began smoking prior to 1988 would use the program — a 100% utilization rate that far exceeded even respondents’ most optimistic projections at trial. Opp. 10 n.17. Respondents’ assertion is flatly refuted by the Court of Appeal’s own opinion. See 36 So. 3d at 1057, 1059 & n.19. The Fourth Circuit’s use of the 100% figure is the only reason that the amount (without interest) it ordered petitioners to pay (\$241 million) is only slightly less than what the trial court ordered (\$263.5 million), even though the Court of Appeal had guessed that the number of class members with claims not barred by the LPLA was “at least 210,000” out of a total of 505,949 on which the trial court based its calculation. See Stay App. 18–19.

Respondents also criticize petitioners for “fail[ing] to explain why” “they would have trouble recouping attorney’s fees” in the event that liability is vacated or reduced. Opp. 30 n.25. But respondents stop short of conceding that petitioners would be *entitled* to the return of such payments. All respondents seem willing to acknowledge is that petitioners may have the opportunity to *fight* for the return of their money, assuming it has not already been spent by the recipients, which is no answer at all.

Respondents are similarly coy in explaining what will happen to money that is not actually spent in support of the cessation program or respondents’ attorneys. Like the courts below, all they will say is that petitioners can “*assert* a claim to any unspent or surplus funds from that program.” Opp. 3 (emphasis added); see also 36 So. 2d at 1060 (reserving “unto the tobacco companies at the termination of the ten-year smoking cessation program the right to assert its [sic] claims to any unspent or surplus funds”). And respondents have repeatedly told the Louisiana courts that they will strenuously oppose any attempt by petitioners to claim any unspent funds.

Respondents likewise say nothing about another category of funds — potentially millions of dollars — that will almost surely evaporate if the judgment is not stayed. Respondents acknowledge that petitioners would be required to pay “the stipulated administrative fee of \$11,501,928” (Opp. 10) upon execution of the judgment, but do not explain how (or even if) such funds would be returned to petitioners if the judgment is vacated or modified. Similarly, respondents note that funds not yet disbursed will be “held in an interest-bearing account” (Opp. 10–11), but they do not even address La. Rev. Stat. Ann. § 13:1305(D), which provides that

50% of the interest on any funds held in the registry account “shall be transferred to . . . the Judicial Expense Fund.” See Stay App. 37 (citing same).

As the application explains (at 36), payment of substantial funds that cannot be recouped constitutes irreparable harm. Respondents’ refusal to disclaim their intention to seek immediate disbursements, attorney’s fees, and administrative costs that could quickly add up to many millions of dollars — coupled with their failure to explain how that money would be recovered in the event of a reversal — confirms that petitioners will suffer irreparable harm if a stay is denied.

Finally, respondents contend that this Court should ignore the numerous decisions in which the inability to recoup funds has sufficed to establish irreparable injury, claiming that those cases are “also” about “making massive changes to complex administrative systems.” Opp. 26. But those cases are not concerned principally with injuries to governmental functions; they focus on the simple reality that funds paid out to set up and fund benefit programs — like the cessation program contemplated here — are virtually impossible to recover. See, e.g., *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers) (“it is unlikely that disputed payments made pursuant to the District Court’s judgment could be recovered”); *Heckler v. Turner*, 468 U.S. 1305, 1308 (1984) (“it is extremely unlikely that the Secretary would be able to recover funds improperly paid out”).<sup>7</sup>

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<sup>7</sup> In claiming that the “core concern” in *Heckler v. Lopez*, 463 U.S. 1328 (1983) (Rehnquist, J., in chambers), was “the administrative burden the injunction placed on public officials,” respondents must recast that decision’s specific focus on unrecoverable payments as mere “concern with the scope of the injunction.” Opp. 27. But see 463 U.S. at 1331. Respondents take a similar tack (Opp. 27) with *Barnes v. E-Systems, Inc. Group Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301 (1991) (Scalia, J., in chambers), dismissing as “abstract” the opinion’s stated concern over “ultimate noncollection because of the taxpayer’s exhaustion

### III. The Balance Of Equities Weighs Strongly In Favor Of A Stay.

Notwithstanding the risk of irreparable harm faced by petitioners in the absence of a stay, respondents contend that the balance of equities “strongly militates” against a stay. Opp. 29. Respondents’ submission is largely dependent on their claim that any “[a]dditional delay of the smoking cessation remedy” during the pendency of the petition for certiorari will cause class members to suffer “very real harms.” Opp. 1, 30. Here again, however, respondents do not deny that free smoking cessation services are now widely available in Louisiana. Indeed, they point to nothing included in the lower courts’ smoking cessation program (which includes nicotine gum, patches, and telephone counseling) that is not *already* available at no cost to Louisiana smokers. And there is nothing to prevent those class members who (unlike the class representatives) have not quit smoking from using these free services while the petition is under consideration by this Court. In these circumstances, entry of a stay will not deprive respondents of any needed treatment.

Perhaps recognizing this fact, respondents fall back on the “burden on the State’s health care system” stemming from health care costs and “smoking-caused productivity losses.” Opp. 33. But those issues were long ago resolved in the

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of the funds,” *id.* at 1304. Respondents claim (Opp. 28) that *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996), was really about the “permanent loss of goodwill,” but that simply cannot be squared with the opinion’s text. See 109 F.3d at 426 (“The threat of unrecoverable economic loss . . . does qualify as irreparable harm.”); *ibid.* (identifying lost goodwill as a *separate* form of irreparable harm). Respondents say nothing at all about *Mori v. International Bhd. of Boilermakers, Local Lodge No. 6*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (irreparable injury where \$150,000 held in escrow “would be very difficult to recover” in the absence of a stay), or *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (irreparable injury where restitution remedy unavailable).

Louisiana Attorney General's lawsuit against these same defendants, which resulted in billions of dollars being paid to the State by the tobacco industry. Plaintiffs cannot recycle those claims to defeat a stay here. In any event, the cessation program, assuming it survives this Court's review, will run for ten years (and offset ten years of the costs identified by respondents) regardless of when it begins. The balance of the equities clearly favors entry of a stay.

### CONCLUSION

The Court should stay execution of the judgment below pending the timely filing and disposition of a petition for certiorari.

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DATED: September 23, 2010