No. 06-1545

IN THE

Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., *et al.*,
Petitioners,

v.

HOWARD A. ENGLE, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents declined to provide consent (except that counsel would have consented had WLF agreed to file its brief weeks in advance of the filing deadline – a condition that WLF was unable to meet), thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

In particular, WLF regularly participates in tort reform efforts. WLF is concerned that economic development and consumer welfare not be impeded by excessive and improperly certified class action litigation. To that end, WLF regularly participates in court proceedings touching upon the proper scope of class action litigation. *See, e.g., Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (2005); *Linder v. Thrifty Oil Co.*, 23 Cal. App. 4th 429 (2000). WLF also participated in this case as an *amicus curiae* when it was before the Florida Supreme Court.

WLF also has frequently appeared as *amicus curiae* in this and other federal courts in cases involving federal preemption issues, to point out the economic inefficiencies often created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Bates v. Dow AgroSciences LLC,* 544 U.S. 431 (2005); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001);

Geier v. American Honda Motor Co., 529 U.S. 861 (2000). WLF supports preservation of the policy of national uniformity embodied in the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (the "Labeling Act"). That policy strongly reinforces First Amendment values – it limits the authority of States to restrict constitutionally protected advertising by imposing tort liability on advertisers.

WLF fully supports Petitioners' efforts to obtain review of the two Questions Presented in their petition. WLF is especially interested in participating in these proceedings, however, because of its dismay over the manner in which this entire lawsuit has been handled by the Florida courts. WLF believes that something has gone seriously wrong here. The trial court adopted a trial plan that ran roughshod over defendants' constitutional rights. It tolerated egregious misconduct by counsel for the plaintiffs, misconduct apparently designed to persuade the jury to ignore the law in arriving at a verdict. It certified a massive plaintiff class, with little apparent regard for how the claims of individual class members could be adjudicated. After Phase II of the proceedings, it entered a $145 *billion* judgment against the defendants, even though the claims of 99.999% of the class members had not yet been decided. The Florida Supreme Court upheld most of the Phase I jury findings in favor of the plaintiff class and ordered that they be given preclusive effect in subsequent individual trials, even though those generalized findings cannot be tied in a meaningful manner to any single class member. The trial judge stated that he had disdain for the entire concept of federal preemption law, while the Florida appellate courts simply refused to rule on Petitioners' consistently-asserted argument that the Labeling Act preempted all of the plaintiffs' claims. As a result of the highly irregular proceedings conducted to date, Petitioners now find themselves facing thousands of trials with the rules stacked against them, and the prospect of massive liability judgments.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It is filing due solely to its interest in ensuring further judicial review of the important issues raised by this case. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits a state court from giving preclusive effect to a jury verdict when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's finding of wrongful conduct.

2. Whether, merely by invoking characterizations such as "fraud" or "negligence," a plaintiff may evade federal preemption under this Court's ruling in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), which holds that the Federal Cigarette Labeling and Advertising Act preempts state-law liability based, *inter alia*, on allegations that cigarette manufacturers failed to warn about the dangers of smoking or marketed cigarettes in ways that "neutralized" the federally mandated warnings.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth fully in the motion accompanying this brief.[1] In brief, WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

WLF fully supports Petitioners' efforts to obtain review of the two Questions Presented in their petition. WLF is filing separately to express its dismay over the manner in which this entire lawsuit has been handled by the Florida courts. WLF believes that review is particularly warranted because of the highly irregular nature of the proceedings below and in light of the enormous financial stakes at issue.

STATEMENT OF THE CASE

Petitioners (the major U.S. cigarette manufacturers as well as two industry organizations) seek review of a Florida Supreme Court decision that upheld large damage awards to two plaintiffs and left in place substantial portions of the jury findings in a class action brought on behalf of hundreds of thousands of Florida smokers. Respondents (collectively, the "plaintiffs" or the "plaintiff class") claim to have suffered, or are suffering, from illnesses caused by their addiction to

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

cigarettes. They charge that Petitioners' wrongful conduct caused their illnesses.

The trial court initially certified the case as a nationwide class action; it defined the class as all U.S. citizens and residents, and their survivors, who suffer or have suffered from illnesses caused by their addiction to cigarettes. On interlocutory appeal, the Florida Court of Appeal in 1996 reduced the size of the class to include Florida smokers only.

The trial court thereafter adopted a three-phase trial plan. Phase I consisted of a year-long trial of so-called "common" issues related exclusively to Petitioners' conduct. During that phase, the trial court barred any evidence relating to any identifiable class member's knowledge, conduct, medical condition, or other circumstances. Instead, the plaintiffs' evidence focused on a broad range of conduct alleged to have been engaged in by Petitioners over more than half a century. At the end of Phase 1, the jury found that smoking causes certain diseases and that cigarettes are addictive or dependence producing. The Phase 1 jury also made general findings regarding some aspects of Petitioners' conduct – including that Petitioners were "negligent," sold cigarettes that were "defective," and intentionally misled smokers regarding the health effects of smoking. Pet. 7.

In Phase II-A, which lasted five months, the jury heard evidence relating specifically to three plaintiffs chosen by class counsel. It determined that unspecified conduct found wrongful in Phase I was the legal cause of injury suffered by those individuals. They were awarded compensatory damages of $12.7 million. The jury made no finding regarding punitive damages.

In Phase II-B, the jury determined the amount of punitive damages for the entire class to be $145 billion, without

allocation of that amount to any class member. Indeed, because the claims of only three individual class members had been tried up to that point, Petitioners' liability to any other class members had not yet been established – and still has not been established. Nonetheless, in November 2000, the trial court issued a judgment directing Petitioners not only to pay the compensatory award but also to immediately deposit the $145 billion in punitive damages into the court registry for the benefit of the entire class. Pet. App. 8a. The court further ordered that interest on the punitive damages award would begin accruing immediately. *Id.* Petitioners appealed that judgment before the start of Phase III, which was to consist of a series of individual trials at which Petitioners' liability to all remaining class members (numbering in the hundreds of thousands) was to be determined.

The Florida Third District Court of Appeal reversed the final judgment and remanded with instructions that the class be decertified. *Id.* 68a-126a. The appeals court concluded, "The present case presents a classic example of the inherent dangers that arise when a complex mass tort action is improperly certified." *Id.* 126a. The court said that Phase II-A proceedings (*i.e.*, the trials of the individual claims of the three class representatives) "conclusively established" that class certification had been improper because "individualized issues predominate and render further proceedings unmanageable," *id.* 79a, and because class representation was not "superior" to individual suits. *Id.* 81a-83a. The court also held that awarding and ordering payment of class-wide punitive damages improperly put "the cart before the horse." The court explained that the trial court had erred by:

> a) improperly requiring the defendants to pay punitive damages for theoretical injuries to hundreds of thousands of class members, without a determination that defendants are liable for such injuries; b) precluding the

> constitutionally required comparison of punitive damages and compensatory damages; and c) eliminating the jury's discretion to assess punitive damages based upon the individual class members' varying circumstances.

Id. 88a.

The appeals court also held that plaintiffs' counsel's "improper race-based appeals for nullification caused irreparable prejudice and require reversal." *Id.* 103a. The court described counsel's argument as "inflammatory" and "egregious" and stated that the trial judge "abdicat[ed]" his "most basic duty" in the face of counsel's misconduct. *Id.* 112a, 117a, 116a n.44. The court deemed it "obvious" that "the 'runaway' jury award was largely the result of numerous improper comments by counsel directing the jury to disregard limitations on punitive damages." *Id.* 103a. The appeals court noted that Petitioners objected "repeatedly" to these improper comments; and that even though the trial judge sustained some of the objections, those actions were insufficient to eliminate the prejudice because it was not possible to "unring the bell." *Id.* Having reversed the trial court's judgment on other grounds, the appeals court did not address Petitioners' argument that all of the plaintiffs' claims were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* (the "Labeling Act").

By a 4-2 vote, the Florida Supreme Court reversed much of the appeals court's decision. Pet. App. 1a-67a. The Supreme Court held, contrary to the appeals court and without explanation, that the trial court "did not abuse its discretion in certifying the class." *Id.* 27a. The Supreme Court's apparent motivation was a desire to avoid wasting the significant judicial resources that went into the Phase I and Phase II-A trials. Although acknowledging (as had the appeals court) that the overwhelming weight of case law from other jurisdictions

rejects class certification in tort actions brought by smokers against the cigarette industry, *id.* 26a & n.9, the Supreme Court said that those cases were distinguishable because here a "trial on all common issues" had already occurred at the time that the class certification issue was being reviewed. *Id.* The Supreme Court opined, "Invalidating the completed class action proceedings on manageability and superiority grounds after a trial has occurred does not accord with common sense or logic." *Id.* 26a-27a.

The Supreme Court went on to conclude unanimously that continued class treatment for Phase III of the trial plan was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." *Id.* 27a. The court nonetheless held, by a 4-2 vote, that the requirement that the class be decertified did not require invalidation of the Phase I jury findings. Rather, the court held, the "pragmatic solution" was to retain all the Phase I findings except those that involved "highly individualized determinations" (identified by the court as those relating to the plaintiffs' claims for fraud and intentional infliction of emotional distress) and one the court deemed "premature" (that Petitioners' conduct rose to a level that would permit an award of punitive damages). *Id.* 30a-31a.

The Supreme Court also overturned the appeals court's ruling that the remarks of plaintiffs' counsel to the jury required reversal. *Id.* 33a-39a. While acknowledging that "trial counsel ventured very close to the line of reversible error on a number of occasions" during the Phase I trial, *id.* 33a, and that there was "absolutely no justification" for a series of racially charged remarks made during closing argument for the purpose of "incit[ing] racial passions," *id.* 38a, the Supreme Court concluded that "under the totality of the circumstances" reversal was not warranted. *Id.* 39a. The Supreme Court also reinstated the compensatory damage awards in favor of two of

the three class representatives whose claims were tried in Phase II-A (Angie Della Vecchia and Mary Farnan). *Id.* 39a-43a. The appeals court had held that judgment should have been entered against them because their claims did not accrue until after the cut-off date for class membership. *Id.* 95a n.23. The Supreme Court disagreed, finding that their claims had accrued by November 21, 1996, which the court deemed the appropriate cut-off date. *Id.* 40a-42a.

The Supreme Court agreed with the appeals court that the $145 billion punitive damages award could not stand. The Supreme Court held that the trial court "erred in allowing the jury to determine a lump sum amount before it determined the amount of total compensatory damages for the class." *Id.* 16a. It also held that the award was excessive as a matter of federal constitutional and Florida law. *Id.* 19a-23a. The court did not rule on Petitioners' argument that the Labeling Act preempted all of the plaintiffs' claims, an argument which the appeals court had not considered because it reversed on other grounds but which Petitioners had brought to the Supreme Court's attention. The court held that in any subsequent trial of claims brought by any individual class plaintiff against Petitioners, the Phase I jury findings (except as noted above) would be "given res judicata effect," provided that the plaintiff filed suit within one year. *Id.* 45a.

Justice Wells, joined by Justice Bell, dissented in part. *Id.* 53a-65a. While agreeing with the decision to overturn the punitive damages award, he argued that the case was *never* a proper class action and that it was improper to give res judicata effect to the Phase I jury findings. *Id.* 57a-58a. He also argued that the remarks of plaintiffs' counsel were "offensive" and "extreme" and required reversal. *Id.* 64a-65a.

In their motion for rehearing before the Florida Supreme Court, Petitioners reiterated the arguments that form the basis

of this petition: giving effect to the Phase I jury findings would violate their due process rights, and their Labeling Act preemption claims still needed to be addressed. The court denied the motion without directly addressing either argument. *Id.* 187a-189a. Similarly, the appeals court on remand denied without comment Petitioners' request that it address the preemption issue and all other issues not yet ruled on by the Florida appellate courts. Thus, Petitioners are faced with substantial final judgments in favor of Farnan and Della Vecchia, as well as the prospect of thousands upon thousands of trials at which Petitioners will be bound by numerous Phase I jury findings – even though they have never received any explanation from the state appeals courts as to why their significant arguments based on governing federal law were rejected.

REASONS FOR GRANTING THE PETITION

This petition raises issues of exceptional importance. State and federal courts across the country have turned with increasing frequency to class action devices in the name of efficiency; class actions are often viewed as a appropriate means of reducing the judicial resources necessary to resolve tort actions alleged to affect massive numbers of consumers. As the petition ably demonstrates, all too often the due process rights of defendants and absent class members are sacrificed in such proceedings in the name of efficiency. Factual and legal issues alleged to be common to the class are decided on a class-wide basis and are deemed binding on all parties, often without any showing that the findings have any bearing on the claims of individual class members. Thus, as here, a jury may be asked to determine – based on a massive quantity of evidence spanning many years – whether a defendant acted negligently toward the class as a whole, and then a generalized jury finding of negligence ends up being used to preclude the defendant from demonstrating that its actions in relation to a specific class member were not negligent. Review is

warranted to allow this Court an opportunity to provide lower courts with an urgently needed reminder that while class actions can be helpful tools in improving judicial efficiency, they should never be employed at the cost of litigants' due process rights.

WLF fully supports Petitioners' contention that review is warranted on both their due process and preemption claims. WLF writes separately because of its dismay over the manner in which the Florida courts have handled this entire lawsuit – a lawsuit raising multi-billion dollar damage claims that could bankrupt an entire industry. Something has gone seriously wrong here, and the Court should not sit by and allow this injustice to continue.

Given its focus on the two Questions Presented, the petition by necessity only briefly touches on the highly irregular nature of the proceedings below. The trial court adopted a trial plan that ran roughshod over defendants' constitutional rights. It tolerated egregious misconduct by counsel for the plaintiffs, misconduct apparently designed to persuade the jury to ignore the law in arriving at a verdict. It certified a massive plaintiff class, with little apparent regard for how the claims of individual class members could be adjudicated. It gave jury instructions that seriously prejudiced Petitioners and approved a verdict form that allowed the jury to make misconduct findings untethered to any identifiable pieces of evidence – findings that were then supposed to be used in future proceedings even though there was no way to tell what specific facts the first jury had found. After Phase II of the proceedings, it entered a $145 *billion* judgment against the defendants, even though the claims of 99.999% of the class members had not yet been decided. In a blatant effort to force Petitioners to capitulate and abandon appeals, it ordered the entire $145 billion deposited immediately into the court

registry. The trial judge openly expressed his disdain for the entire concept of federal preemption law.

The Florida Supreme Court's shortcomings in handling this case are almost as extensive. It upheld most of the Phase I jury findings in favor of the plaintiff class and ordered that they be given preclusive effect in subsequent individual trials, even though those generalized findings cannot be tied in a meaningful manner to any single class member. The court simply refused to rule on Petitioners' consistently-asserted argument that the Labeling Act preempted all of the plaintiffs' claims. It repeatedly valued supposed judicial efficiency over the rights of litigants. For example, it upheld the class certification order on the ground that failing to do so would result in wasting the judicial resources devoted to the Phase I and Phase II-A trials, all the while recognizing that case law overwhelming opposes class certification in cases of this sort because of its unfairness to the litigants.

As a result of the highly irregular proceedings conducted to date, Petitioners find themselves facing thousands of trials with the rules stacked against them, and the prospect of massive liability judgments. Particularly in light of the huge financial stakes at issue, review is warranted to correct this miscarriage of justice.

Review is also warranted because the Florida proceedings are not unique. Rather, they exemplify the tendency of many state and federal courts to adopt inappropriate shortcuts when faced with large numbers of claims. This Court does not, of course, sit in review of state rules governing when multiple claims should be consolidated as class actions. Nonetheless, experience has shown that, where plaintiff classes are certified despite the predominance of individual issues over issues common to the class, courts inevitably must sacrifice the due process rights of litigants to allow the cases to move forward.

Review is warranted to provide guidance to state and federal courts regarding constitutional limits on such procedures.

I. REVIEW IS WARRANTED BECAUSE THE FLORIDA JUDICIAL SYSTEM WENT SERIOUSLY AWRY IN THESE PROCEEDINGS

Commentators have long recognized that courts are constantly tempted to bend substantive law to make class actions more manageable. *See. e.g.,* Jack B. Weinstein, *Some Thoughts on the "Abusiveness" of Class Actions,* 58 F.R.D. 299, 301-02 (1973). Courts throughout the nation, including this Court, have emphatically condemned such attempts to tailor the substantive law to accommodate the procedural concerns implicated by class actions. *See, e.g., Phillips Petroleum, Inc. v. Shutts*, 472 U.S. 797, 820-21 (1985) (holding that a court "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a 'common question of law'"; Court rejected such reasoning as "something of a 'bootstrap' argument"); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1020 (7th Cir. 2002) ("Tempting as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights may be respected"), *cert. denied*, 537 U.S. 1105 (2003).

Unfortunately, as the record makes all too clear, the Florida courts succumbed to those temptations in this case. Despite the implausibility of assertions that there are more than a handful of issues of fact common to all class plaintiffs, the trial court devised a trial plan that entailed a year-long trial devoted to examining the conduct of Petitioners over more than half a century. It certainly saved judicial resources to allow the jury to make generalized findings, based on that half-century of evidence, regarding whether Petitioners acted

negligently or sold defective products – and to make those findings binding on Petitioners with respect to all class plaintiffs. It also saved resources, after a year-long trial, not to declare a mistrial despite closing arguments by plaintiffs' counsel that the Florida court deemed "improper," "race-based," and having "absolutely no justification." It also saved resources for the Florida Supreme Court not to throw out the Phase I jury findings despite overturning the trial court's trial plan on the ground that Phase III was "not feasible because individualized issues such as legal causation, comparative fault, and damages predominate." Pet. App. 27a. But for all the reasons set forth in the petition, all those resource-saving decisions were made at the expense of Petitioners' due process rights. Review is warranted to send a strong message to federal and state courts that while use of resource-saving class action devices is often appropriate, courts must at the same time fully respect all parties' legal rights.

Review is particularly warranted because of the highly irregular nature of the proceedings in this case. WLF is writing separately in order to highlight some of the more egregious irregularities.

A. The Backwards Trial Plan

The trial plan adopted by the trial court – over the objections of Petitioners – made no logical sense. It called for the jury to determine whether to award punitive damages to the entire 700,000-person plaintiff class (Phase II-B) before determining whether Petitioners were liable for injuries suffered by any class plaintiffs and whether those class members were entitled to compensatory damages (Phase III).[2]

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[2] The only exception is that the jury did determine Petitioners' liability to three hand-picked class representatives during Phase II-A.

As the Court of Appeal noted, proceeding in that order "place[d] the proverbial 'cart before the horse.'" Pet. App. 99a. The Florida Supreme Court agreed that awarding punitive damages before determining the plaintiff class's right to compensatory damages "violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed." *Id.* 16a. Moreover, by placing entitlement to punitive damages in Phase I, the plan allowed massive amounts of highly prejudicial evidence relevant only to punitive damages to be introduced at a time when the jury had not determined that the defendants were liable to a single individual plaintiff.

The only perspective from which this backward trial plan made sense was the perspective of one seeking to force Petitioners to capitulate and enter into a massive settlement as the only alternative to staving off bankruptcy. Indeed, the post-Phase II-B orders issued by the trial court indicate precisely such an intent. Petitioners were ordered to deposit the entire $145 billion punitive damages judgment into the Court registry, and the court further ordered that interest on the award would begin accruing immediately. Needless to say, Petitioners lacked the financial resources to comply with that order. The result was that Petitioners' ability even to appeal the trial court's judgment was thrown into serious question.[3]

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[3] As numerous commentators have recognized, defendants that face a large certified class and hence enormous potential damages are "under intense pressure to settle." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.) (Posner, C.J.), *cert. denied*, 516 U.S. 1984 (1995). Such settlements – whether entered into before trial or during the appeals process – can in many instances legitimately be deemed "blackmail settlements." Henry Friendly, *Federal Jurisdiction: A General View*, at 120 (1973). WLF deems it particularly inappropriate for trial courts to structure class action trial plans in a manner designed

(continued...)

B. Attorney Misconduct

Every court that has addressed the issue has agreed that remarks made by plaintiffs' counsel to the jury throughout the Phase I trial were grossly inappropriate. The appeals court held that counsel's "improper race-based appeals for nullification caused irreparable prejudice and require[d] reversal." Pet. App. 103a. The Florida Supreme Court agreed that there was "absolutely no justification" for a series of racially charged remarks made during closing argument for the purpose of "incit[ing] racial passion," *id.* 38a, and that plaintiffs' counsel "ventured very close to the line of reversible error on a number of occasions." *Id.* 33a. The court ultimately decided that the improper remarks were insufficient to mandate reversal – a reversal that would have entailed throwing out more than a year's worth of judicial proceedings. WLF wishes to highlight the extent of the attorney misconduct. The need for review by this Court is heightened by the fact that these proceedings were tainted by misconduct – particularly because, the record shows, the misconduct was premeditated.

Plaintiffs' counsel "began making racially charged arguments on the first day of trial" – before a jury whose six members included four African-Americans. *Id.* 104a. In his opening statement, he told jurors that Petitioners "study races" and "divide the American consumer up into groups," including "white" and "black." *Id.* Counsel later: (1) presented a witness who testified that Petitioners' advertising had "perpetuated" the racial segregation of America through the 1980s; and (2) suggested that arguing that there were "two sides" to the lawsuit was like arguing that there were "two sides" to genocide, slavery, and the Holocaust. *Id.* 104-106a.

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[3](...continued)
to ratchet up settlement pressures to an even higher level.

In response to Petitioners' arguments that federal law explicitly protected the right to sell cigarettes, counsel repeatedly urged the jury to nullify the law. Over Petitioners' objection, counsel was permitted to argue, "[The defendants say] [i]t's a legal product. Legal don't make it right." *Id.* 106a. He repeatedly urged the jury to fight what he called "unjust laws," citing the civil disobedience of Martin Luther King and Rosa Parks. *Id.* 107a. He urged the jury not to "get all teary-eyed about the law" because, "Historically, the law has been used as an instrument of oppression and exploitation." *Id.* 105a. He noted that the courthouse in which the case was being tried had once had "drinking fountains which said Whites Only." *Id.* 107a n.36. Petitioners objected to all these comments, and the judge sustained some of the objections; but he rejected Petitioners' mistrial motions, reasoning that it would be "foolish" to "lose the opportunity to get the case resolved" after devoting 11 months to a trial. *Id.* 109a.

Moreover, the evidence demonstrated that counsel's improper and prejudicial remarks were premeditated. The appeals court recounted at length passages from a book published by counsel in 1992, in which he boasted of prevailing in a case after making arguments virtually identical to those described above. *Id.* 110a n.37. He explained in the book that by discussing Martin Luther King and the unjust laws King fought against, he could persuade jurors to nullify laws – and that no amount of warnings from a trial judge can eliminate the prejudice created by his arguments. *Id.*[4] Regard-

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[4] *See* Stanley Rosenblatt, *Murder of Mercy: Euthanasia on Trial* (1992). As recounted by the Florida Court of Appeal, Mr. Rosenblatt's book sets forth his time-tested strategy for successfully urging juries to ignore the law:

> Plaintiffs' counsel, Mr. Rosenblatt, declares in his book that:
>
> (continued...)

less whether this type of intentional misconduct is sufficient by itself to mandate a mistrial, its presence heightens the sense of injustice that pervades these proceedings and strengthens the case for granting review.

C. The Runaway Jury

The appeals court concluded that the jury's huge damage awards were grossly excessive and deemed it "obvious" that "the 'runaway' jury award was largely the result of numerous improper comments by counsel directing the jury to disregard

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[4](...continued)

"When the law conflicts with common sense, common decency and simply fairness and justice, it is the law that must yield." Although he concedes that attorneys cannot explicitly tell a jury to "ignore the law," Mr. Rosenblatt boasts of his ability to persuade juries "in a subtle way" to nullify the law: "The area I would need to spend the most time on [during trial] was my 'Piss on the Law' theme. Whenever I came close to being direct on that subject the State would object, and their objections would always be sustained. I had to figure a way to tell the jury in a subtle way that they should disregard the law."

The book describes Mr. Rosenblatt's tactics for obtaining jury nullification through racial pandering and references to unjust laws: "I assured [my clients] that I would get out my words about Martin Luther King and the unjust laws he fought against. That guaranteed that the prosecutors would be on their feet in a flash, but the black juror, the black male alternate, and the white jurors would know exactly where I was coming from." A review of the comments made during the Phase I closing and those referred to in the book, reveals Mr. Rosenblatt followed the script he had laid out in his book almost to the letter. Plaintiffs' counsel, Mr. Rosenblatt, was well aware that the nullification arguments and racial appeals he presented to the jury in this case would result in incurable prejudice.

Id.

limitations on punitive damages." *Id.* 103a. As "proof" that the jury was infected by prejudice, the appeals court cited the $790 million punitive damage award entered against the Liggett defendants, an amount 23 times greater than their net worth. *Id.* 118a-120a. The appeals court noted that there was "no evidence" that the Liggett defendants had any early knowledge of the health effects of smoking, "no evidence to support any punitive award" against them, and no claim that any of the class representatives purchased Liggett cigarettes. *Id.* The court concluded, "The only explanation for this clearly improper verdict against a company whose cigarettes none of these plaintiffs ever used, is that the integrity of the entire trial was compromised as a result of the trial errors and improper conduct of counsel." *Id.* 120a. WLF respectfully suggests that review is particularly warranted in light of the appeals court's finding that the "integrity" of the entire trial was compromised.

D. Improper Jury Instructions

The "trial errors" of which the appeals court spoke included jury instructions phrased in a manner that was deeply prejudicial to Petitioners. One particularly egregious example was a jury instruction regarding "causation." A central claim in the plaintiffs' case was that Petitioners fraudulently asserted, beginning in the 1950s, that a causal link between smoking and health had not been "scientifically" proven. Petitioners responded that their statements regarding "scientific" causation were accurate because, in the 1950s, no one had demonstrated a *biological mechanism* by which exposure to cigarette smoke leads to disease. Counsel for Petitioners premised their closing argument on assurances from the trial judge that he would instruct the jury that the statements at issue were not actionable so long as causation had not been demonstrated in this strict scientific sense. T. 36317-20. Nonetheless, contrary to those assurances and contrary to Florida law, the trial judge (at the request of plaintiffs' counsel) changed the "causation"

instruction after Petitioners had presented most of their closing argument to the jury. The new instruction stated that in determining whether the tobacco industry had lied, the jury should determine whether in the 1950s smoking could be said to be the "legal" cause of disease – a far more lenient standard. T. 37562. The court's about-face not only distorted what had been said by tobacco industry officials but also was highly prejudicial. Petitioners were blind-sided by the last-minute change and lost credibility with the jury when the judge's instructions contradicted counsel's explanation to the jury regarding what was meant by causation.

E. Failure to Resolve Federal Claims

The petition raises two issues: whether the Due Process Clause prohibits Florida from giving preclusive effect to the Phase I jury findings when it is impossible to discern which of numerous alternative grounds formed the basis for the jury's findings of wrongful conduct; and whether the Labeling Act preempts the plaintiffs' claims. Despite Petitioners' repeated efforts to persuade the Florida appellate courts to address those issues, they have never done so – other than to deny Petitioners' requests without explanation. The failure of state courts to address federal issues that have been properly raised is a serious abdication of their constitutional responsibilities. *See, e.g., Howlett v. Rose,* 496 U.S. 356 (1990).

WLF respectfully suggests that the failure of the Florida courts to address these important federal issues serves to increase the cert-worthiness of this case. State courts should not be rewarded for refusing to address federal issues by being given an exemption from U.S. Supreme Court review. Other state courts have demonstrated their commitment to respecting the broad preemptive sweep of the Labeling Act. *See, e.g., In re Tobacco Cases II,* ___ Cal. 4th ___, 2007 Cal. LEXIS 8189 (Cal. Aug. 2, 2007). Florida courts should be expected to do

the same. At the very least, the Court should grant the petition, vacate the judgment, and remand the case with directions that the Florida appellate courts address whether the plaintiffs' claims are preempted by the Labeling Act.

To be fair, the trial judge did not ignore the Labeling Act. Rather, he simply expressed a clear disdain for federal preemption of state law tort actions and made clear that he would find a way to avoid application of preemption doctrine. The trial court said that "preemption doesn't apply to modern science and what's happening today"; it "boils my blood and boggles my mind" that Congress would restrict State's power to regulate cigarette labeling and advertising; "I have to figure how to get around it, thank you very much, preemption"; and "I have so much trouble – . . . intellectually accepting that concept [preemption] . . . Because it is flat-out so wrong in my opinion . . . with all due respect to the Supreme Court." T. 16621-23, 32623. Those comments strongly suggest that the sole Florida court to address Petitioners' preemption arguments did not give them a fair and proper hearing.

II. REVIEW IS WARRANTED BECAUSE THE FLORIDA PROCEEDINGS EXEMPLIFY THE COMMON TENDENCY OF BOTH STATE AND FEDERAL COURTS TO ADOPT INAPPROPRIATE SHORTCUTS WHEN FACED WITH LARGE NUMBERS OF CLAIMS

Review is also warranted because the Florida proceedings are not unique. Rather, they exemplify the tendency of many state and federal courts to adopt inappropriate shortcuts when faced with large numbers of claims. For example, a recent news story highlighted a trend among plaintiffs' lawyers: repackaging product liability claims as claims arising under consumer-protection laws and thereby significantly increasing the chances that they can obtain certification of massive

plaintiff classes. A. Bronstad, "A New Use for Consumer Class Actions," *National Law Journal* (July 9, 2007) at 1.

State courts regularly are asked to certify nationwide class actions in cases raising common law claims. Such nationwide class actions often face an intractable problem: it is difficult to assert that common issues of law predominate over legal issues applicable to individual class members if each plaintiff is deemed governed by the laws of his state of residency. A number of state courts have "solved" this dilemma by applying a dubious shortcut: they apply the laws of a single State to the claims of all class members. *See, e.g., Ysbrand v. DaimlerChrysler Corp.*, 2003 Ok. 17 (2003), *cert. denied*, 542 U.S. 937 (2004); *Peterson v. BASF Corp.*, 675 N.W.2d 51 (Minn. 2004), *vacated and remanded on other grounds*, 544 U.S. 1012 (2005), *aff'd*, 711 N.W.2d 470 (Minn.), *cert. denied,* 127 S. Ct. 579 (2006).[5] Here, the Florida courts took another, equally problematic, shortcut: they simply asserted that the issues tried on a class-wide basis were "common" – even though the wildly diverse set of evidence introduced in Phase I had no relationship with the experiences of any particular class member and even though much of that evidence would simply have been irrelevant to and inadmissible in the trial of any individual plaintiff.

Nor is inappropriate certification of plaintiff classes confined to state courts. In *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), the Ninth Circuit upheld certification of a class of 1.5 million employees raising claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* A

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[5] *See also Hall v. Sprint Spectrum L.P.*, ___ N.E. 2d ___, 2007 WL 1892679 (Ill. App. June 27, 2007) (upholding certification of 48-state class action against wireless communications provider); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151 (Mo. App. 2000); *In re West Virginia Rezulin Litigation*, 214 W.Va. 52 (2003).

dissenting judge argued that by adopting procedural shortcuts to facilitate class-wide adjudication, the district court adopted a trial plan that ran roughshod over the defendant's due process rights. *Id.* at 1245-49 (Kleinfeld, J., dissenting).

This Court has recognized in recent decisions the importance of protecting defendants from the costs of unwarranted and abusive lawsuits. For example, in *Bell Atlantic Corp v. Twombly*, 127 S. Ct. 1955, 1967 (2007), the Court held that Fed.R.Civ.P. 8 (which establishes minimum requirements for complaints) must be read sufficiently stringently to weed out implausible claims at the pleadings stage, because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings." Similarly, in *Tellabs, Inc. v. Makor Issues & Rights, Inc.*, 127 S. Ct. 2499, 2508 (2007), the Court raised the pleading requirements for plaintiffs seeking to file securities fraud litigation, in recognition of Congress's desire to weed out "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and manipulation by class action lawyers." *See also Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S. Ct. 2705, 2718 (2007) (eliminating *per se* condemnation of vertical price constraints, in an effort to eliminate unnecessary costs on the business community imposed by antitrust litigation). WLF respectfully suggests that the Court's expressed interest in controlling unnecessary litigation costs warrants granting review in this case, for the purpose of ensuring that class action devices are not employed in a manner that ignores the due process rights of litigants.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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