

No. 06-633

In The
Supreme Court of the United States

PHILIP MORRIS USA, INC., et al.,

Petitioners,

v.

THE STATE OF MINNESOTA, COUNCIL
OF INDEPENDENT TOBACCO
MANUFACTURERS OF AMERICA, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The Minnesota Supreme Court**

**CONDITIONAL CROSS-PETITION FOR A WRIT OF
CERTIORARI OF COUNCIL OF INDEPENDENT
TOBACCO MANUFACTURERS OF AMERICA**

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QUESTIONS PRESENTED

Petitioners argue the imposition of the Minnesota Health Impact Fee ("HIF") on Petitioners' cigarettes violates the Contracts Clause based on their Settlement Agreement with Minnesota – a Settlement Agreement in which Petitioners waived their First Amendment rights. Petitioners seek selective enforcement of the HIF, namely, enjoining enforcement of the HIF against their cigarettes while allowing enforcement of the HIF on cigarettes made by others. Respondent Cross-Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA"), an association of tobacco manufacturers who are not parties to the Settlement Agreement and have not waived any of their First Amendment rights, argued selective enforcement of the HIF would violate the First Amendment and Equal Protection Clause. The trial court enjoined the HIF as a violation of the Settlement Agreement and ruled selective enforcement of the HIF was unconstitutional. The Minnesota Supreme Court reversed, holding the HIF did not violate the Settlement Agreement; therefore, it did not reach the issue of selective enforcement. The questions presented are:

1. Would selective enforcement of the HIF violate the First Amendment by taxing products made by parties who have refused to surrender their First Amendment rights and exempting products made by manufacturers who have surrendered their First Amendment rights?

QUESTIONS PRESENTED – Continued

2. Would selective enforcement of the HIF violate the Equal Protection Clause by discriminating based on a party's refusal to surrender its First Amendment rights and by drawing fundamentally unfair, arbitrary and capricious distinctions without any legitimate and rational legislative purpose?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding are as follows. Petitioners are Philip Morris USA, Inc.; R.J. Reynolds Tobacco Company; Lorillard Tobacco Company; A.H. Hermel Candy & Tobacco Co.; Henry's Foods, Inc.; Sandstrom's Inc.; Johnson Candy and Tobacco Co. of Brainerd, Inc.; M. Amundson Cigar & Candy Company, LLP; The Watson Companies, Inc.; Granite City Jobbing Company, Inc.; Minter-Weisman Co.; Segal Wholesale, Inc.; and Tyler Wholesale, Inc. Respondents are the State of Minnesota; Intervenor Council of Independent Tobacco Manufacturers of America; and Intervenor Commonwealth Brands, Inc. Governor Tim Pawlenty participated as an *amicus curiae* in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Respondent-Cross-Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") is a Virginia non-stock corporation, which is an association of small, independent tobacco manufacturers. CITMA has no parent corporation and no publicly held company owns 10% or more of CITMA's stock.

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**CONDITIONAL CROSS-PETITION
FOR A WRIT OF CERTIORARI**

Respondent-Cross-Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") respectfully submits this conditional cross-petition for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

OPINIONS AND ORDERS ENTERED IN THE CASE

The Minnesota Supreme Court's opinion is reported at 713 N.W.2d 350, and is set forth in Petitioners' Appendix at 1a-27a. The Order and Memorandum of the Ramsey County District Court is set forth in Petitioners' Appendix at 28a-38a.

BASIS FOR SUPREME COURT JURISDICTION

The Minnesota Supreme Court filed its judgment on June 21, 2006. Petitioners' Appendix at 39a-40a. This Court granted Petitioners an extension of time to file their petition for writ of certiorari up to and including November 3, 2006. Petitioners filed their Petition for Writ of Certiorari on November 3, 2006. This Court docketed Petitioners' Petition for Writ of Certiorari on November 6, 2006. CITMA timely submits this Conditional Cross-Petition for Writ of Certiorari. Sup. Ct. R. 12(5). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances." U.S. Const., Amend. I. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. The HIF, Minn. Stat. § 256.9658 (2006), is set forth in Petitioners' Appendix at 43a-44a. Minnesota's "Fee in Lieu of Settlement" statute, Minn. Stat. § 297F.24 (2006), which imposes a fee of \$0.35 per pack of cigarettes solely on those cigarettes made by manufacturers other than Petitioners, is set forth in CITMA's Appendix, *infra*, at pages App. 75-App. 76.

STATEMENT OF THE CASE

I. The Minnesota Tobacco Lawsuit

The State of Minnesota ("State") sued the major cigarette manufacturers (hereafter referred to as "Petitioners") in 1994 (hereafter referred to as the "Minnesota Tobacco Lawsuit"). In the Minnesota Tobacco Lawsuit, the State alleged Petitioners knew "for decades from their own internal studies that their products are deadly and addictive," yet engaged in a "unified campaign of deceit and misrepresentation" in an effort to conceal this information. App. 49. The State asserted nine causes of action, including claims for consumer fraud, deceptive trade practices, false advertising, and anti-trust violations. App. 50. The

State sought injunctive relief, compensatory damages, and punitive damages for Petitioners' "willful indifference to the rights and safety of others" based on their conduct in selling their cigarettes. App. 50.

The State did not sue CITMA or any of its members. App. 50. The State has never accused CITMA or any of its members of engaging in any unlawful conduct in selling their tobacco products. App. 53.

II. Petitioners Surrendered Certain Of Their First Amendment Rights In The Settlement Of The Minnesota Tobacco Lawsuit.

In 1998, the State and Petitioners settled the Minnesota Tobacco Lawsuit. App. 50. Under the terms of the written Settlement Agreement, Petitioners agreed, among other things, to surrender certain of their fundamental First Amendment rights. Petitioners' Appendix at 110a, 112a-113a. Petitioners agreed to numerous restrictions on their constitutionally protected rights to freedom of speech and to petition the government for a redress of grievances, including the right to lobby the government and to challenge the constitutionality of certain laws regarding tobacco products. Petitioners' Appendix at 110, 112a-113a. These restrictions on constitutional rights included advertising restrictions far more onerous than the State could constitutionally impose on tobacco product manufacturers directly, such as removing all tobacco billboards and eliminating all tobacco ads on buses, taxis and bus shelters, ceasing payments to movie and television producers and ceasing distribution of promotional items, such as hats and t-shirts, bearing their products' brand names. Petitioners' Appendix at 112a-113a. Petitioners also promised not to oppose certain legislation impacting the

