No. 06-633

IN THE
SUPREME COURT OF THE UNITED STATES

PHILIP MORRIS USA, INC., ET AL.,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In 1994, the State of Minnesota brought state common law and statutory claims against Petitioners in Minnesota state court. On May 8, 1998, the State and Petitioners entered into a Settlement Agreement, which contained mutual release-of-claims provisions. Seven years later, the Minnesota Legislature enacted legislation that imposed a fee on all cigarettes. Petitioners invoked the continuing jurisdiction of the state court over the Settlement Agreement and brought a motion to enforce that Agreement. Petitioners argued that the Legislature's fee was a "released claim" under the Settlement Agreement and consequently could not be enforced against them or their products without breaching the Agreement and/or violating the Contract Clauses of the United States and Minnesota Constitutions. The State asserted that the fee was a valid legislative exaction not prohibited by the Settlement Agreement. Thus, the threshold issue before the state court was interpretation of the Settlement Agreement. The Minnesota Supreme Court interpreted the contract under state law, including the state-law doctrine of unmistakability, and held that it did not surrender the State's sovereign legislative powers in language "too clear to admit of doubt." Based on that construction, the court summarily rejected Petitioners' state Contract Clause argument, and did not mention the analogous federal clause. Assuming, however, that the state court resolved Petitioners' federal Contract Clause challenge, the question presented is whether the Minnesota Supreme Court properly applied the doctrine of unmistakability in harmony with the protections afforded by the federal Contract Clause.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent State of Minnesota respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion and judgment in this case. The Minnesota Supreme Court's opinion is published at 713 N.W.2d 350 (Minn. 2006), and is reproduced in Petitioners' Appendix ("Pet. App.") at Pet. App. 1a-27a. The trial court's Order on Petitioners' Motion for Enforcement of the Settlement Agreement, which is unpublished, is reproduced at Pet. App. 28a-38a.

STATEMENT OF JURISDICTION

Petitioners incorrectly invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). The Minnesota Supreme Court neither addressed nor resolved any federal question. Instead, the state court applied state law to summarily reject Petitioners' state contract clause challenge. Thus, an adequate and independent state ground supports the court's decision and precludes jurisdiction in this Court. *See infra* at 6-12.

STATEMENT OF THE CASE

The State, through its attorney general, brought suit against Petitioners and others in 1994, asserting state common law and statutory claims in connection with Petitioners' marketing and distribution of cigarettes. Pet. App. 3a, 50a, 97a. In May 1998, after a lengthy trial but before the jury returned a verdict, the State and Petitioners entered into a Settlement Agreement to resolve the State's legal claims. Pet. App. 96a. Among other

benefits, that Agreement resolved "all claims" between the State and Petitioners. Pet. App. 107a. The term "claims" was defined as follows:

> [T]he State of Minnesota shall release and forever discharge [Petitioners] . . . from any and all manner of *civil claims, demands, actions, suits and causes of action, damages whenever incurred, liabilities of any nature whatsoever, including civil penalties, as well as costs, expenses and attorneys' fees*, known or unknown, suspected or unsuspected, accrued or unaccrued, *whether legal, equitable or statutory* ("Claims") that the State of Minnesota (including any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, as follows:
>
> > for past conduct, as to any Claims relating to the subject matter of this action . . . ; and
> >
> > for future conduct, only as to monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products.

Pet. App. 107a-08a (emphasis added).

Seven years later, on July 14, 2005, Minnesota's governor signed into law a Tobacco Health Impact Fee effective August 1, 2005. *See* Act of July 14, 2005, ch. 4, art. 4, §§ 1-6, 2005 Minn. Laws (1st Sp. Sess.) 2541-44 (codified at Minn. Stat. § 256.9658) ("the HIF Act"). Pet. App. 43a-44a. The HIF Act imposes a 75-cent per-pack fee on cigarettes. Pet. App. 43a. Minnesota law requires this fee to be passed on to the consumer. Pet. App. 9a. In enacting the HIF Act, the legislature stated that the

purpose of the fee was to "recover for the state health costs related to or caused by tobacco use and to reduce tobacco use, particularly by youths." Pet. App. 43a.

On August 26, 2005, Petitioners moved to enforce the Settlement Agreement in the Minnesota state district court that retained jurisdiction over that Agreement. Pet. App. 89a, 98a. Petitioners argued that, because the Settlement Agreement released them (and their distributors) from any and all "claims" to recover state healthcare costs attributable to tobacco use, enforcement of the HIF breached the Agreement and violated the Contract Clauses of the United States and Minnesota Constitutions. Pet. App. 91a-92a. The State opposed the Motion arguing that, properly construed, the Agreement does not bar collection of the HIF. Respondent's Appendix ("Resp. App.") 46a. The state district court found the HIF Act barred by the Settlement Agreement and granted Petitioners' Motion. Pet. App. 29a-30a.

The State petitioned for review in the Minnesota Supreme Court, arguing that the Settlement Agreement released only adjudicatory claims and did not prohibit future legislation. Resp. App. 49a-50a. Any other construction, the state argued, would limit the state's sovereign powers and, under state law, such a waiver would have to be set forth in terms "too clear to admit of doubt." Resp. App. 49a. Once the Agreement was properly construed under state law, the State argued, there was no violation of the Settlement Agreement and no impairment under the Contract Clause. Resp. App. 11a-12a, 20a-22a, 50a-51a.

In an Order dated May 16, 2006, the Minnesota Supreme Court first found that Petitioners do not bear the economic burden of the HIF Act, even though one of the

express purposes of the Act is recover healthcare costs of the State. Pet. App. 8a-9a. Next, the court recognized that construing the release language with the breadth Petitioners urged would work a surrender of sovereign power. Thus, the court concluded that the state law doctrine of unmistakability announced in *State v. Great Northern Railway Co*., 119 N.W. 202 (Minn. 1908), *aff'd, Great Northern Railway Co. v. State*, 216 U.S. 206 (1910) applied. Pet. App. 14a, 21a. Concluding that the Agreement did not surrender the State's sovereign power in terms "too clear to admit of doubt," the Minnesota court summarily rejected Petitioners' *state* Contract Clause challenge. Pet. App. 24a-25a. No other constitutional challenge, state or federal, was considered or resolved in the Minnesota Supreme Court's decision.

REASONS FOR DENYING THE PETITION

The Petition does not present a proper occasion for this Court to assert jurisdiction. The Minnesota Supreme Court applied state law doctrines of contract construction to determine that the Agreement did not preclude the state from imposing the fee on Petitioners' products. The court rejected Petitioners' broad reading of the Agreement and then summarily rejected their state constitutional challenge. The court neither addressed nor resolved a federal question. Thus, the jurisdiction that Petitioners invoke under 28 U.S.C. § 1257(a) does not exist.

Second, the Minnesota Supreme Court correctly recognized that the unmistakability doctrine—state and federal—protects state regulatory powers from undue restriction by the Contract Clauses. Thus, even if the court had applied the federal doctrine, it would have done so correctly and in a manner that preserves the protections of the federal Contract Clause.

Third, Petitioners inaccurately portray the lower courts' application of the principles drawn from the plurality opinions in *United States v. Winstar*. As have two federal circuit courts, the Minnesota Supreme Court correctly recognized that on factual situations such as those presented here, the doctrine is properly applied to proprietary contracts. Any uncertainty that Petitioners perceive concerning application of the unmistakability doctrine stems from issues that are not presented by this case; thus, any clarification urged by Petitioners would be purely advisory as it would not apply to the facts presented.

I. ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE MINNESOTA SUPREME COURT'S DECISION. THE PETITION THEREFORE FAILS TO INVOKE THIS COURT'S JURISDICTION.

The Minnesota Supreme Court construed a settlement agreement governed by *Minnesota state law* that was executed to resolve *Minnesota state law claims* brought in *Minnesota state court*. *See* Pet. App. 96a-97a, 119a. Once it did so, the court summarily rejected Petitioners' argument that the HIF Act violated "the Contract Clause of the Minnesota Constitution, Minn. Const. art. I, § 11." Pet. App. 24a.[1] In rendering its decision, the Minnesota Supreme Court applied state law rules of contract construction including the rule of construction from *State v. Great Northern Railway*, 119 N.W. 202 (Minn. 1908), the federal analogue of which was explicated by this Court in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), to reject Petitioners' interpretation of the Agreement. *See* Pet. App. 21a (noting that language of Settlement Agreement did not meet the state law rule of *Great Northern Railway*). In short, the Minnesota Supreme Court addressed and resolved a state law question by applying state law, even though it also discussed an analogous federal decision. Because the Minnesota Supreme Court did not address or decide any federal question, this Court does not have jurisdiction.

Section 1257 constrains this Court's review of the final judgment of a state court. *See* 28 U.S.C. § 1257(a). It is axiomatic that this Court will not review a state court decision unless a federal question has been raised *and decided* by that court. *See*

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[1] Petitioners also challenged the HIF Act under Article I, § X, clause 1 of the United States Constitution. *See* Pet. App. 92a. As explained *infra*, however, the Minnesota Supreme Court specifically and plainly addressed only the Minnesota Constitution's prohibition against contract impairment. Petitioners raised no other federal challenges.

Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment."); *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds."). The reason for this rule is "so obvious that it has rarely been thought to warrant statement." *Herb*, 324 U.S. at 125. "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman*, 501 U.S. at 729; *see also Herb*, 324 U.S. at 126 (noting that this Court's jurisdiction is limited to correcting state court judgments that "incorrectly adjudge federal rights").

The longstanding restraint on this Court's jurisdiction over state court judgments bars granting this Petition. The Settlement Agreement is governed by, and was construed under, Minnesota law. *See* Pet. App. 119a. The "interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60, n.4 (1995) (*quoting Volt Info. Servs., Inc. v. Bd. of Tr. of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989)); *see also Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654 (1942) (noting that "meaning

and effect of contract" are "local questions" which this Court does not review).[2] Here, the Minnesota Supreme Court applied state law, first to construe the HIF Act, *see* Pet. App. 8a-9a; and then to construe the Settlement Agreement language. *See* Pet. App. 21a (noting commonality of language used in release provision); *id*. at 22a-23a (construing language in light of Minnesota's cigarette pricing scheme).[3]

The construction the Minnesota Supreme Court reached obviated the need to reach Petitioners' state or federal Contract Clause arguments. *See Fox Film Corp. v. Muller*, 296 U.S. 207 (1935). In *Fox Film*, the Minnesota Supreme Court construed contracts that admittedly violated federal antitrust laws to determine whether the illegal clause could be severed from those contracts. *Id*. at 208-09. After the court rejected severance, thus invalidating the contracts, the plaintiff petitioned this Court, asserting that the federal antitrust question was decided as part of the contract construction. *Id*. at 209. This Court disagreed:

> The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The nonfederal question in respect of the construction of the contracts and the federal question in respect of their validity under the Anti-Trust Act were clearly

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[2] While the decision in *Memphis Natural Gas* suggested that a state court's decision on state law could be reviewed if that law was used to evade federal law, 315 U.S. at 654, Petitioners do not allege, nor could they, that the Minnesota Supreme Court addressed the state constitutional claim only as a means to evade the federal constitutional claim.

[3] Petitioners thus have no basis for their blithe assertion that, "If the unmistakability doctrine had not been applied below, the [HIF Act] indisputably would have been found to impair the settlement agreement." Pet. at 15. In addition to plain meaning construction, the State and amicus provided the Court with several alternative state law grounds on which Petitioners' arguments to avoid the HIF could be rejected. *See* Resp. App. 24a-25a, 68a-85a.

> independent of one another. The case, in effect, was disposed of before the federal question said to be involved was reached. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.

Id. at 211 (citations omitted).

Here, the Minnesota court's "nonfederal" contract construction established that the terms of the Agreement were not implicated by the HIF Act. This construction allowed the court to summarily reject Petitioners' state constitutional challenge without analysis. *See* Pet. App. 24a-25a ("Because we construe the settlement agreement not to waive the legislature's authority to enact future legislative revenue measures to recover health care costs, the enactment of the [HIF] did not impair that agreement and therefore did not violate the [Minnesota] Contract Clause."). The court's construction likewise obviated any need to address Petitioners' federal Contract Clause argument. Consequently, the federal constitutional challenge asserted in the trial court — which was neither addressed nor resolved by the Minnesota Supreme Court — was "automatically . . . out of the case if otherwise it would be there" based on the nonfederal contract construction. *Id*.[4]

For this reason, Petitioners' assertion that the Minnesota Supreme Court reviewed a federal question simply because Petitioners asserted it is wrong. *See* Pet. at 8, n. 2 citing *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Delaware*, the state court began with the federal constitutional claim, "analyzed the various decisions interpreting the Federal constitution, concluded that the Fourth Amendment [was infringed], and summarily held

[4] The state and federal contracts clauses are interpreted similarly. *See* Pet. at 8, n.2. Thus, the Minnesota court's decision would not change *even if* the federal claim was treated similarly, i.e., summarily rejected. *See Coleman*, 501 U.S. at 729 (noting that independent federal ground "that could not affect the judgment" does not support jurisdiction).

that the State Constitution was therefore also infringed." *Id*. at 652-53. The lower court's decision thus "depended upon [its] view of the reach of the Fourth and Fourteenth Amendments." *Id*. at 653.

Review in this Court was therefore proper. Accepting jurisdiction in this case merely because Petitioners asserted a federal claim, in contrast, would disregard the limitations of Section 1257 and undermine the adequate and independent state grounds rule. Indeed, the Court has already rejected this unrestricted view of federal question jurisdiction. *See Enter. Irrigation Dist. v. Farmers' Mut. Canal Co.*, 243 U.S. 157, 165 (1917) (dismissing for "want of jurisdiction" even though federal constitutional challenges were part of case, where state law issues were addressed separately and this Court was "not at liberty to inquire whether the ruling is right or wrong").

Likewise, this Court has no need to determine the contract terms to which the federal Contract Clause might apply. This Court assumes jurisdiction to decide the existence and terms of a contract only when a state court addresses and resolves a federal Contract Clause claim. *See Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (noting that existence of contract is a federal question for purposes of contract impairment claim asserted under federal constitution); *Mun. Investors Ass'n v. City of Birmingham*, 316 U.S. 153, 157 (1942) (noting this Court's obligation "to determine for itself the basic assumptions upon which interpretations of the Federal Constitution rest"); *State of Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95, 98-99 (1938) (lower court admitted that constitutional claim was based on federal constitution, thus supporting Court's jurisdiction to determine the terms of the contract). Since the Minnesota court

summarily rejected only a state constitutional challenge, an adequate and independent state ground precludes this Court's jurisdiction.

The Minnesota Supreme Court's state law resolution is also adequate and independent notwithstanding that court's discussion of *United States v. Winstar Corp.*, 518 U.S. 839 (1996). The Minnesota Supreme Court relied on *Winstar* "as it would on the precedents of all other jurisdictions[.]" *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). It *decided* the contract construction issue, however, exclusively by reference to state doctrine: "We cannot say that the language of the settlement agreement effects such a waiver of the state's sovereign powers in language 'too clear to admit of doubt.'" Pet. App. 21a (*quoting Great N. Ry. Co*., 119 N.W. at 205)).[5] Thus, even if this Court were to conclude, as Petitioners urge, that *Winstar's* plurality opinions should be clarified, such an effort would be purely advisory as it would have no effect below. The Minnesota Supreme Court could reach the same decision by once again construing the contract under the state law unmistakability doctrine from *Great Northern Railway*.

Finally, there is an additional reason to decline review. The State argued below that because the Agreement resolved only common law and statutory claims the State had asserted in its proprietary capacity, the Agreement's boilerplate release-of-claims provision was simply a conventional promise not to sue, and could not reasonably be construed as a surrender of sovereign power. *See* Resp. App. 52a-58a. The state court

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[5] The absence of a statement disclaiming any federal basis for its decision, *see Long*, 463 U.S. at 1040, does not require this Court to assume jurisdiction. The federal claim was not mentioned in the decision below. In *Long*, in contrast, the state court "relied exclusively on its understanding" of federal law and "not a single state case was cited." *Id*. at 1043.

adopted this reasoning in part. *See* Pet. App. 19a ("we cannot help but note that the phrase 'liabilities of any nature whatsoever' (or similar language) is commonly used in general release forms in disputes having nothing to do with any sovereign power."). Although this construction of the Agreement would have been sufficient to resolve the case, the state court applied the Minnesota unmistakability doctrine in an abundance of caution, determining that *even if* the release provision were somehow ambiguous, it could not surrender sovereign power. *See* Pet. App. 21a. The concurring Justice, however, found no need to apply the doctrine:

> I read the settlement agreement and its release of "claims" to unambiguously cover no more than the claims the state brought or could have brought against [Petitioners] in the 1994 tobacco litigation or could bring in future litigation. Imposition of the Health Impact Fee does not create such a "claim." Therefore, I would hold that under the unambiguous language of the settlement agreement, imposition of the Health Impact Fee did not violate the settlement agreement.

Pet. App. 27a (footnote omitted) (Page, J., specially concurring). If this Court agreed with this reasoning, it would have no occasion to apply the unmistakability doctrine, federal or otherwise, and thus could not clarify federal law. *Cf. Winstar*, 518 U.S. at 880, n.24 (1996) (noting that doctrine may not be applicable where "normal rules of construction" may dispose of proposed construction).

Because the Petition presents no federal question, it should be dismissed.

II. THE MINNESOTA SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S CONTRACT CLAUSE JURISPRUDENCE.

Petitioners claim that by applying the unmistakability doctrine, the Minnesota Supreme Court deviated from this Court's Contract Clause jurisprudence. This is plainly

incorrect. The unmistakability doctrine developed as a part of this Court's Contract Clause jurisprudence, and in no way vitiates the protection federal law affords contracts. Although the state court applied Minnesota's version of the doctrine, that application is fully consistent with this Court's application of the federal doctrine.

A. The Federal Unmistakability Doctrine Is Part Of This Court's Contract Clause Jurisprudence.

The Contract Clause provides that, "No State shall … pass any … Law impairing the Obligation of Contracts." U.S. Const., art. I, § 10. The Clause limits state power "when its exercise effects substantial *modifications* of private contracts." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978) (emphasis added). As relevant here, a state may not enter a contract, then use its legislative power to substantially modify contractual obligations.

The federal unmistakability doctrine developed as a part of this Court's Contract Clause jurisprudence "to protect state regulatory powers." *United States v. Winstar Corp.*, 518 U.S. 839, 874 (1996) (plurality opinion). "Although [the Contract] Clause made it possible for state legislatures to bind their successors by entering into contracts, it soon became apparent that such contracts could become a threat to the sovereign responsibilities of state governments." *Id.* Thus, the unmistakability doctrine is a canon of construction that rejects "implied governmental obligations in public contracts," *id.* at 874, thereby limiting the extent to which the Contract Clause curtails state powers.

> Under this rule that all public grants are strictly construed, we have insisted that nothing can be taken against the State by presumption or inference, and that neither the right of taxation, nor any other power of sovereignty, will

> be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.

Id. at 874-75 (ellipsis in original) (internal quotation marks and citations omitted). Because the unmistakability doctrine construes contracts to protect state regulatory powers, its applicability "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power …." *Id.* at 879.

B. The Minnesota Supreme Court's Decision Is Correct And Is In Harmony With This Court's Contract Clause Jurisprudence.

As already noted, the Minnesota Supreme Court applied the unmistakability doctrine as a matter of state law rather than federal law. *See supra* at 6-12. But even if the state court had applied the federal doctrine, its application would be correct and in perfect harmony with this Court's Contract Clause jurisprudence.

From the start, Petitioners have alleged that the provision of the Settlement Agreement by which the State released all of its past, present and future "claims" (the "State's Release") prevents the Minnesota Legislature from imposing on Petitioners, and the Revenue Department from enforcing against them, the 75-cent per-pack HIF on Petitioners' products.[6] Attempting to avoid application of the unmistakability doctrine, Petitioners asserted—without authority—that the doctrine does not apply to contracts a

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[6] *See, e.g.*, Pet. App. 10a (Petitioners "argue that the imposition of the fee violates the settlement agreement"); *id.* at 12a (Petitioners assert the HIF "cannot be enforced against them, or, apparently, their products"); *id.* at 18a (Petitioners "argue that the consequence of the promise made by the state is that the exercise of sovereign power by the legislature is unenforceable as to them and their products"); *id.* ("the very relief [Petitioners] seek requires the state either to exempt [Petitioners] from the exercise of the state's sovereign powers to tax and to regulate, or to surrender those powers with respect to the cigarette industry altogether").

state enters in its proprietary capacity, such as the Settlement Agreement. The state court rejected this argument. *See* Pet. App. 16a, n.5. In line with this Court's cases, the state court properly held that application of the doctrine instead turns on the nature of the government's obligations "and the consequences of enforcing them."[7] *Id*. Accordingly, the state court concluded that "to construe the settlement agreement as [Petitioners] urge, that is, to waive the legislature's authority to enact revenue measures to recover tobacco-related health care costs, would be a surrender of the legislature's sovereign power." Pet. App. 14a. The court correctly determined that Petitioners' allegations implicated the doctrine. *See* Pet. App. 14a, 20a.

The state court correctly applied the doctrine. The court recognized that it must "examine the language of the [State's Release] to determine not just whether it supports a waiver of the legislature's power to enact future revenue measures expressly intended to

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[7] Petitioners' assertion that the unmistakability doctrine does not apply to contracts a state enters in its proprietary capacity is plainly incorrect, and is unsupported by any of the authorities Petitioners cite. *See* Pet. at 11-15 & nn. 4-5. First, this Court has applied the doctrine to proprietary contracts. *See infra* at 18-19 (discussing *Merrion v. Jicarilla Apache Tribe,* 453 U.S. 130 (1982)). Second, the two cases Petitioners discuss at length, *Murray v. Charleston,* 96 U.S. 432 (1877) and *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) show only that some Contract Clause cases involving proprietary contracts do not require application of the unmistakability doctrine (because the plaintiff does not allege that the disputed contract surrenders sovereign power, but only that legislative power was used to modify a contractual obligation). *See* 96 U.S. at 444-45; 431 U.S. at 23-24. These cases neither hold nor suggest that the doctrine does not apply to proprietary contracts. Finally, Petitioners' assertion is not supported by cases stating the general rule that government contracts are interpreted and construed like private contracts. *See* Pet. at 14. The unmistakability doctrine is an exception to the general rule, and applies whenever enforcement of a government obligation would impair a state's sovereign power. *See Winstar*, 518 U.S. at 879; *id*. at 920-21 (Scalia, J., concurring in the judgment).

address the costs of tobacco-related health care, but whether it does so in unmistakable terms." Pet. App. 20a. The court stated that in doing so, it was

> guided by the principles of construction stated in *Great Northern Railway* and *Winstar*. We are not to draw inferences from indefinite language or make presumptions from uncertain language. *Great N. Ry. Co.*, 106 Minn. at 322, 119 N.W. at 205; *Winstar*, 518 U.S. at 874, 116 S.Ct. 2432. Rather, the settlement agreement is to be strictly construed, and any waiver of sovereign power must be "in language and terms too clear to admit of doubt." *Great N. Ry. Co.*, 106 Minn. at 322, 119 N.W. at 205; *see also Winstar*, 518 U.S. at 874, 116 S.Ct. 2432.

Pet. App. 20a. These principles fully conform to *Winstar*.[8]

The state court applied the doctrine's rule of strict construction to the State Release and concluded that it did not surrender the state's sovereign police or taxing powers. *See* Pet. App. 21a. The court set forth its reasoning as follows:

> Application of the unmistakability doctrine compels the conclusion that the settlement agreement cannot be construed to waive the legislature's sovereign authority under the tax and police powers to enact revenue measures, even if earmarked for payment of tobacco-related health care costs. We cannot say that the language of the settlement agreement effects such a waiver of the state's sovereign powers in language "too clear to admit of doubt." *Great N. Ry. Co.*, 106 Minn. at 322, 119 N.W. at 205. Although the phrase "liabilities of any nature whatsoever" is broad, it is insufficiently specific to meet the requirements of the unmistakability doctrine. The language mentions neither the police nor the taxing power. Nor does the language expressly waive the state's right to impose future taxes or fees on [Petitioners] or their products, or expressly waive the state's right to further regulate the cigarette industry in the future.

Pet. App. 21a.[9] This reasoning is fully consistent with *Winstar*. *See* 518 U.S. at 878-79.

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[8] Moreover, the structure of the state court's citations confirms that the court was applying the state version of the unmistakability doctrine set forth in *Great Northern Railway*, although it also drew support by analogy from the federal version of the doctrine elaborated in *Winstar*.

Confronted with Petitioners' claim that the Settlement Agreement surrendered state sovereign powers, the state court strictly construed relevant contract provisions and determined that they worked no such surrender. The court accordingly concluded that the Agreement did not "preclude legislative enactment of revenue measures directed at recovering future tobacco-related health care costs generally or the Health Impact Fee in particular." Pet. App. 24a. The state court's construction of the Agreement obviated the need to reach or analyze Petitioners' state or federal contract clause arguments. *See* Pet. App. 19a, n.6 ("the unmistakability doctrine serves the dual purposes of limiting contractual incursions on a State's sovereign powers and of avoiding difficult constitutional questions about the extent of State authority to limit the subsequent exercise of legislative power. It serves both of those salutary purposes here ….") (internal quotation marks and citation omitted).[10]

In addition to being manifestly correct, the state court's decision is fully consistent with this Court's Contract Clause jurisprudence. Most importantly, the state court's decision here does not—as Petitioners wrongly assert—allow states to breach contracts that are found not to surrender sovereign powers. *See, e.g.*, Pet. at 10, 16 (so alleging).

(Footnote Continued From Previous Page)

[9] The full text of the State release quoted in this excerpt ("liabilities of any nature") is in Petitioners' appendix. *See* Pet. App. 10a; *see also supra* at 2.

[10] In addition to the Contract Clause challenges, the Minnesota Supreme Court was confronted with constitutional issues involving the separation of powers and the Minnesota Constitution's express prohibition against contracting away the taxing power. Resp. App. 66a-69a. The Governor, as amicus, also asserted that Petitioners' proposed constructions implicated state constitutional limits on the state attorney general's authority to contractually restrict the state's future exercise of sovereign powers. *See* Resp. App. XX.

A brief discussion focusing on two of this Court's cases is sufficient to illustrate the point. In the first case, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the Court considered whether long-term mineral leases between the Jicarilla Apache Tribe and non-Indian petroleum producers precluded the Tribe from later imposing a severance tax on petroleum produced by the lessees. *Id.* at 133. Twenty-one non-Indian petroleum producers ("lessees") entered into proprietary mineral leases with the Tribe granting them "'the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and natural gas deposits in or under' the leased land …." *Id.* at 135; *see also id.* at 145 (noting "the Tribe's role as commercial partner" in leases); *id.* at 146 (characterizing the leases as "the sovereign's commercial agreements"). The Tribe subsequently passed an ordinance "imposing a severance tax on oil and gas produced on tribal land." *Id.* at 135-36. The lessees "sought to enjoin enforcement of the tax by either the tribal authorities …." *Id.* at 136. The federal district court permanently enjoined enforcement of the tax, but the court of appeals reversed. *Id.* This Court affirmed.

The Court concluded that the absence of any reference to taxation in the leases did not impair the Tribe's taxing authority.[11] The Court explained that "[c]ontractual arrangements remain subject to subsequent legislation by the presiding sovereign," *id.* at 147 (citations omitted), and that "sovereign power, even when unexercised, is an

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[11] The Court first concluded that the Tribe's inherent authority to impose the severance tax was not affected by the Tribe's status as the lessor of mineral rights. "The mere fact that the government imposing the tax also enjoys rents and royalties as the lessor of the mineral lands does not undermine the government's authority to impose the tax." *Id.* at 138.

enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Id.* at 148. The Court emphasized that this subsisting sovereign authority is unaffected by proprietary agreements: "Even where the contract at issue requires payment of a royalty for a license or franchise issued by the governmental entity, the government's power to tax remains unless it 'has been specifically surrendered in terms which admit of no other reasonable interpretation.'" *Id.* at 148 (quoting *St. Louis v. United R. Co.*, 210 U.S. 266, 280 (1908)). Applying the unmistakability doctrine, the Court pointedly refused to infer waiver of the Tribe's taxing power from silence. "To presume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head …." *Id.* at 148.[12]

Merrion confirms that the Minnesota court's decision is consistent with this Court's application of the unmistakability doctrine. *See Winstar*, 518 U.S. at 876-77 (discussing this Court's cases applying the doctrine, including *Merrion*). Here, as in *Merrion*, a government entity entered into a proprietary agreement with private parties. Like the leases in *Merrion*, the Settlement Agreement in this case is silent about the state's taxing power. As did this Court in *Merrion*, the state court in this case applied the

[12] Petitioners seek this very inversion, for they suggest that a state must—even when entering proprietary agreements—*expressly reserve* the power to legislate. *See* Pet. at 10 (challenging state's right to enact legislation "that is not expressly and specifically barred by the contract"). As *Winstar* noted, however, the dispositive question for unmistakability purposes is not whether the contract *reserves* sovereign power; it is instead whether the contract unmistakably *waives* such power. *See* 518 U.S. at 877-78.

unmistakability doctrine and refused to infer a waiver of sovereign power from silence or ambiguity. In both cases, the unmistakability doctrine served its intended purposes of protecting government regulatory authority "and of avoiding difficult constitutional questions about the extent of state authority to limit the subsequent exercise of legislative power." *Winstar*, 518 U.S. at 875.[13]

Murray v. Charleston demonstrates the more general proposition that a state never has the power to breach its contracts, proprietary or otherwise. This Court held in *Murray* that the Contract Clause prohibited the City of Charleston from using legislative power to reduce the interest rate it had previously promised to pay to holders of municipal stock certificates. 96 U.S. 432, 444 (1877).

In *Murray*, the City of Charleston issued municipal stock certificates that provided for payment by the city of principal plus six percent interest. *Id.* at 439. The city later passed ordinances: (a) imposing a two-percent tax on real and personal property, and (b) ordering the city treasurer to pay four rather than six percent interest to stockholders, purportedly as a means of collecting the two-percent tax. *Id.* Plaintiff Murray brought an action under the Contract Clause complaining "that the city has not fully performed its contracts according to their terms, that it has paid only four per cent interest instead of six per cent, which it promised to pay …." *Id.* at 442. The city responded that it "possessed the power of taxation when the contracts were made, that by the contracts the city did not

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[13] Although the original purpose of the unmistakability doctrine was "avoidance" of Contract Clause issues, the Court has since applied the doctrine to avoid addressing limitations on government authority "independent of the Contract Clause." *See Winstar*, 518 U.S. at 875-76.

surrender this power, that, therefore, the contracts were subject to its possible exercise, and that the city ordinances were only an exertion of it." *Id.* at 444.

The Court framed the issue as whether the ordinances "did impair the obligation of the city's contract with the plaintiff." *Id.* at 443. The Court noted that "[t]he solution of this question depends upon a correct understanding of what that obligation was." *Id.* The Court found that the city had undertaken to pay plaintiff six percent interest, and that the contract "contained no reservation or restriction of the duty described." *Id.* The ordinances, however, purported to reduce the interest rate payable by the city from six to four percent. *Id.* Finding a "manifest" impairment of city's payment obligation, *id.*, the Court invalidated the ordinances under the Contract Clause. *Id.* at 448.

Importantly, the Court did not "question the existence of [the city's] power to levy taxes as claimed, nor the subordination of contracts to it …." *Id.* at 444. The issue, however, was not whether the city could levy the property tax, but was instead whether it could use legislative authority to alter its contractual obligation to pay stockholders six percent interest. The Court strongly affirmed the city's power to levy the property tax and collect it in the normal manner, holding that the city

> may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched.

Id. at 445. The city could not, however, use its taxing power to "convert its undertaking to pay a debt bearing six per cent interest into one bearing only four." *Id.* at 447. Under the Contract Clause, the city could not "by its own ordinances, under the guise of

taxation, relieve itself from performing to the letter all that it has expressly promised to its creditors." *Id.* at 448.[14]

The state court's decision in this case is consistent with *Murray*, and does not allow states to breach contracts, proprietary or otherwise. As in *Murray*, the state court began its Contract Clause analysis by determining the exact nature of the contractual obligation in question. *See* Pet. App. 9a. As in *Murray*, the state court recognized that contracts generally remain subject to a sovereign's taxing and police powers. *See* Pet. App. 14a-16a. And as in *Murray*, the court determined whether the state's obligation had been impaired by the subsequent exercise of legislative power. *See* Pet. App. 24a-25a. Although this Court invalidated the ordinances in *Murray*, whereas the state court upheld the HIF, this does not mean that the state court was unwilling to enforce the Contract Clause. It shows only that no contractual obligation undertaken by the state was impaired by imposition of the HIF.

Petitioners' assertion that this decision "conflicts with nearly 130 years of this Court's Contract Clause precedent," Pet. at 10, reflects a misunderstanding of both that precedent and the unmistakability doctrine's part therein. Although the states in both *Merrion* and *Murray* retained all of their sovereign powers, neither state was allowed to use those powers to breach contracts. Here, likewise, the State's retention of sovereign

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[14] Petitioners wrongly assert that the City of Charleston breached its contract "by levying a tax." *See* Pet. at 12. This is plainly incorrect. The *Murray* Court made clear that the city could levy and collect the tax without violating its contract, so long as the city honored its contractual obligation to pay stockholders six percent interest before attempting to collect the tax. *See* 96 U.S. at 445-46.

powers does not confer authority to breach the Agreement. In any event, Petitioners' claim rests firmly on the erroneous theory that the State of Minnesota *failed to retain* its sovereign powers, a theory expressly rejected by the unmistakability doctrine.

The Contract Clause prevents states from using legislative power to substantially modify contracts to which they are parties. The unmistakability doctrine does not in any way vitiate this protection. Instead, the doctrine is a rule of contract construction requiring that government obligations be strictly construed so as to limit the extent to which the Contract Clause curtails state regulatory powers. Government contracts—once properly construed—receive the full measure of Contract Clause protection. Petitioners' assertion that the state court's decision allows states to impair contracts is incorrect, and should be rejected.

III. THIS COURT SHOULD DECLINE REVIEW BECAUSE THE PRESENT CASE DOES NOT PROVIDE A VEHICLE FOR RESOLVING ANY CONFUSION THAT MAY EXIST AMONG THE LOWER COURTS CONCERNING APPLICATION OF THE UNMISTAKABILITY DOCTRINE AND THE MEANING OF *WINSTAR*.

The Court should decline review because the present case plainly implicates the unmistakability doctrine and therefore does not provide a vehicle for resolving any confusion that might exist among the lower courts concerning its proper application. As was shown above, this case is quite similar to *Merrion*. *See supra* at 18-19. In both cases, non-governmental contracting parties specifically alleged that a disputed contract prevented a sovereign from enacting or enforcing laws. *Merrion*, 455 U.S. at 136; Pet. App. 10a, 12a, 18a. There is simply no question that the doctrine applies under these circumstances. *See Winstar*, 518 U.S. at 880; *see also id.* at 878-79 (doctrine applies

"when the Government is subject either to a claim that its contract has surrendered a sovereign power … or to a claim that cannot be recognized without creating an exception from the exercise of such a power ….").[15]

The Court should decline review for additional reasons as well. First, Petitioners perceive confusion among the lower courts principally because Petitioners themselves misread the plurality opinion in *Winstar*. The plurality does not, as Petitioners assert, make application of the unmistakability doctrine turn on a "two-step inquiry" that begins with whether the disputed contract is "proprietary." *See* Pet. at 16-17 (positing two-step inquiry).

As an initial matter, the plurality specifically *held* that "application of the doctrine … turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power of the Government." *Winstar*, 518 U.S. at 879. The plurality noted that, "[s]ince the criterion looks to the effect of a contract's enforcement, the particular remedy sought is not dispositive …." *Id.* Application of the doctrine "will therefore differ according to the different kinds of obligations the Government may assume and the consequences of enforcing them." *Id.*. at 880. After setting forth examples in which the doctrine clearly would and would not apply, the

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[15] One lower court, although noting some uncertainty about how the doctrine might apply in particular circumstances, commented: "It is clear, however, that one of the basic principles underlying the doctrine is the concern that it would be unreasonable to presume, in the absence of an express contractual provision, that a sovereign intended a contractual waiver of a basic sovereign power." *Tamarind Resort Assocs. v. Gov't of the Virgin Islands*, 138 F.3d 107, 112 (3d Cir. 1998) (citing *Winstar*, 518 U.S. at 920-21 and *Merrion*, 455 U.S. at 148). The *Tamarind* court's citation to *Merrion* demonstrates that the lower courts have no doubt about the doctrine's application to paradigmatic situations like the one presented in this case.

plurality noted: "Between these extremes lies an enormous variety of contracts including those under which performance will require exercise (or not) of a power peculiar to the Government." *Id.* Rather than establishing the "two-step inquiry" perceived by Petitioners, the plurality articulated governing principles, then illustrated that application of those principles to "an enormous variety of contracts" would require a sensitive case-by-case adjudication. *Id.*

More importantly, Petitioners are simply incorrect in asserting that application of the doctrine turns on whether a contract is proprietary. *See, e.g.*, Pet. at 16. As was discussed above, this Court has itself applied the doctrine to a proprietary contract. *See, e.g.*, *Merrion*, 455 U.S. at 145-48. Moreover, as Petitioners themselves note, two Circuit Courts have applied the doctrine to proprietary contracts since the Court decided *Winstar*. *See* Pet. at 18 (citing *Tamarind Resort Assocs. v. Gov't of the Virgin Islands*, 138 F.3d 107, 109, 112 (3d Cir. 1998) and *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1579 (Fed. Cir. 1997), *cert. denied*, 524 U.S. 951 (1998)). The state court's application of the doctrine here is consistent with these authorities. The lower courts plainly understand that, under the proper circumstances, the doctrine applies to proprietary contracts. There is no confusion on this point; Petitioners are simply wrong.

Second, even if there is some confusion among the lower courts concerning how *Winstar* or the unmistakability doctrine should apply *to factual situations not presented here*, this case obviously provides no occasion to address such confusion. Petitioners cite a handful of cases in which lower courts indicate some uncertainty about how either *Winstar* or the unmistakability doctrine should apply to certain classes of contracts. *See*

Pet. at 18-19 & n.7; *see also Tamarind Resort Assocs.*, 138 F.3d at 112 ("It is somewhat unclear … as to the type of contract to which the unmistakability doctrine applies."). They cite academic authorities to the same effect. *See* Pet. at 19-20. Given the absence of a majority opinion in *Winstar* and the fact that the Court was somewhat fragmented, it is not surprising that some lower courts feel some uncertainty. This case, however, which involves a paradigm application of the unmistakability doctrine, furnishes no occasion to clarify how the doctrine should apply to non-paradigmatic facts.

An example may be useful. In *Winstar* a four-justice plurality[16] determined that the unmistakability doctrine does not apply where, as in *Winstar*, the disputed contract could be "reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of" government power. *Winstar*, 518 U.S. at 880. Three justices who concurred in the judgment disagreed with the latter restriction, and would have held the doctrine applicable even to so-called risk-shifting agreements. *See id.* at 919-20 (Scalia, J., concurring in the judgment).[17] The two dissenting justices would have held the doctrine applicable to all government contracts including risk-shifting agreements. *See id.* at 926-27 (Rehnquist, C.J., dissenting).[18]

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16 Justice Souter, joined by Justices Stevens, O'Connor and Breyer.

17 Joined by Justices Kennedy and Thomas.

18 Joined by Justice Ginsburg.

A principal point of disagreement in *Winstar*, then, was whether the unmistakability doctrine applies to risk-shifting agreements.[19] The concurring and dissenting justices would have held in the affirmative, and would thus have given the doctrine broader application than did the plurality. It is therefore to be expected that lower courts are somewhat uncertain about the doctrine's application to risk-shifting agreements. That issue is not presented here, however. The state court correctly determined that the Settlement Agreement in this case is not a risk-shifting agreement, and that Petitioners' proposed construction of the Agreement would directly limit state sovereign powers. *See* Pet. App. 10a, 12a, 18a. Under the circumstances, it appears that all nine *Winstar* justices would have applied the unmistakability doctrine to the present case. Plainly, this case does not provide a suitable vehicle for clarifying the law, even assuming such clarification is necessary.

CONCLUSION

For all the foregoing reasons, the Petition of Philip Morris USA, Inc. and all other Petitioners should be denied.

Dated December 7, 2006

Respectfully submitted,

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[19] The lower courts plainly perceive this disagreement. *See, e.g., Tamarind Resort Assocs.*, 138 F.3d at 112; *Yankee Atomic Elec. Co.,*112 F.3d at 1578-79; *Gen. Dynamics Corp. v. United States*, 47 Fed. Cl. 514, 535-36 (2000).

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