No. 07-562

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* R. J. REYNOLDS TOBACCO COMPANY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

CORPORATE DISCLOSURE STATEMENT

R. J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R. J. Reynolds Tobacco Company, a New Jersey corporation. The existing R. J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., a publicly held corporation. Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) holds more than 10% of the stock of Reynolds American Inc.

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Statutes and Rules

R. J. Reynolds Tobacco Company ("R. J. Reynolds") respectfully submits this brief *amicus curiae* pursuant to Supreme Court Rule 37.3 in support of petitioners.[1] *Amicus* urges the Court to grant certiorari in this case to clear up the lower courts' pervasive confusion regarding the scope of preemption under the Federal Cigarette Labeling and Advertising Act (the "Labeling Act" or "Act"). The First Circuit's decision exacerbates that longstanding confusion and, if left undisturbed, will impede the tobacco industry's efforts to conduct nationwide advertising campaigns and expose the industry to massive potential liability.

INTEREST OF *AMICUS CURIAE*

R. J. Reynolds manufactures and sells cigarettes and other tobacco products. R. J. Reynolds, which now includes the U.S. cigarette and tobacco business of the former Brown & Williamson Tobacco Corporation, is the second-largest tobacco company in the United States. Its brands account for approximately 33% of all U.S. cigarette sales.

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[1] Pursuant to Supreme Court Rule 37.6, R. J. Reynolds states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have been notified more than ten days before filing of R. J. Reynolds' intent to file this *amicus* brief. In addition, all parties have consented to its filing, and their consent letters are on file with the Clerk's Office.

R. J. Reynolds faces a large volume of tobacco-related litigation and is regularly subjected to the same types of claims at issue in this case. In fact, since 1998 R. J. Reynolds or its affiliates have been named as defendants in 15 putative class action suits asserting state-law causes of action that are virtually identical to the claims at issue in this petition. Billions of dollars have been at stake in *each* of these cases. For that reason, R. J. Reynolds has a strong interest in this Court resolving the uncertainty created by the First Circuit's decision regarding the preemption provision contained in the Labeling Act.

SUMMARY OF THE ARGUMENT

As the petition explains, the traditional reasons for granting certiorari are present here: The decision below implicates a clear split among the federal courts of appeals, as well as several lower federal and state courts, concerning an important and recurring question of federal law. *Amicus* wishes to highlight additional reasons why it is important for this Court to grant certiorari in this case.

This case poses a question that is critically important in a second wave of tobacco litigation that is currently threatening the tobacco industry: whether state-law challenges to statements regarding tar and nicotine yields in cigarette packaging and advertising are preempted by federal law. The court below misapplied this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and held that respondents' allegations escaped the preemptive reach of the Labeling Act because the substance of the claims at issue "is that Philip Morris has falsely represented certain of its brands as 'light' or having 'lower tar and nicotine.'"

Pet. App. 16a. Having so characterized respondents' claims, the First Circuit concluded that they were not preempted, because respondents had, according to the First Circuit, pleaded their claims so that they were not "based on smoking and health" but instead on a state law "duty not to deceive." *Id.* at 16a-17a. As the petition explains, the First Circuit's holding creates a direct conflict between the courts of appeals. *See* Pet. 10-14. Indeed, the First Circuit explicitly "disagree[d]" with *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), which held that the Labeling Act preempts substantively identical state-law fraud claims challenging the same statements on cigarette packaging and advertising, Pet. App. 35a; *see also* Pet. 10-14, and thus further exacerbated confusion in the lower courts on this important and recurring issue of federal law, *see* Pet. 18-20.

At a practical level, the First Circuit's holding effectively repeals the Labeling Act's preemption provision as applied to a new wave of "lights fraud" cases that plaintiffs have brought against the tobacco industry in courts throughout the country. In the First Circuit, plaintiffs challenging a tobacco company's advertising practices can now evade the Labeling Act's preemption provision by simply asserting that their fraud claims are based on the "duty not to deceive." Yet, under this Court's interpretation of the Labeling Act in *Cipollone*, such claims should be preempted, no matter how artfully they are pleaded, because they amount to a claim that the cigarette's effect on the plaintiffs' health was different from what the packaging allegedly suggested to the plaintiffs. Imposing liability based

on this theory would necessarily create state-law requirements or prohibitions that transgress Congress' comprehensive federal scheme for the national advertising and promotion of cigarettes.

A lawsuit alleging such a theory is grounded on what a company says about the cigarette on packaging and labeling—and what it says about the cigarette is inextricably intertwined with what the federal government requires or authorizes it to say in advertising and promotion. A requirement that a tobacco company take certain actions so as not to be in violation of state law is precisely the type of requirement barred by the Labeling Act because compliance with it would mean modifying a tobacco company's advertising, promotion, or labeling in some way and would create a patchwork of divergent state-law requirements for tobacco advertising and promotion. *See* 15 U.S.C. §§ 1333, 1334.

The First Circuit's holding has upset the uniformity that Congress legislated with the Labeling Act. With tobacco companies thus deprived of a preemption defense in the First Circuit for statements made in accordance with federal law, *amicus curiae* R. J. Reynolds and other tobacco companies will now be faced with defending claims in that circuit that should not be viable. Plaintiffs' lawyers throughout the country will also now be emboldened to file similarly styled complaints in the First Circuit and elsewhere. Such a result flies in the face of Congress' effort to create uniformity in this area and undermines the comprehensive regulatory regime that Congress has established to supervise tobacco advertising and promotion.

Without guidance from this Court, lower courts in the First Circuit and elsewhere will continue to reach inconsistent results in cases that regularly pose the specter of billions of dollars in damages awards in *each* case. The financial stakes that turn on the question presented by this petition are thus enormous. For this reason and because the decision below frustrates the uniform application of federal law that Congress has sought in this area, this Court should grant the petition to define the scope of the preemption provision under the Labeling Act and *Cipollone*.

ARGUMENT

THIS COURT'S REVIEW IS WARRANTED DUE TO THE CLEAR CIRCUIT SPLIT AND THE FINANCIAL STAKES IMPLICATED BY THE QUESTION PRESENTED

Review of the First Circuit's decision is essential. Without this Court's immediate intervention, the erroneous interpretation of the Labeling Act and *Cipollone* adopted by the First Circuit will undermine Congress' carefully crafted system of uniform regulation of cigarette packaging and advertising.

1. There can be no real debate that the question presented raises an issue of national importance. This Court has observed that preemption issues in tobacco litigation have "manifest importance." *Cipollone*, 505 U.S. at 509. Indeed, certain legal issues affecting the entire tobacco industry have been deemed so important to resolve that this Court has not hesitated to review them even in the absence of a split of authority. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 130 (2000) (considering

tobacco regulation by FDA even though there was no split of authority on the issue). This is one such issue. Permitting lawsuits such as this one to proceed will seriously undercut the uniform application of federal law by effectively repealing the Labeling Act's preemption provision as applied to these cases.

The First Circuit's decision should not be viewed as an isolated and limited holding. Rather, the First Circuit's decision and the direct and acknowledged split it has now created threaten to activate a flood of litigation in this area and put tobacco companies to the task of defending against state-law claims in courts throughout the country that, under the Labeling Act, Congress intended to be preempted by federal law. Congress included the express preemption provision in the Labeling Act to make clear which state laws can, and which cannot, be applied to tobacco companies in connection with advertising and promotion of cigarettes. *See Lorillard Tobacco v. Reilly*, 533 U.S. 525, 541 (2001). This Court should now "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and resolve the confusion created by the First Circuit's decision.

The Labeling Act expresses Congress' intent to maintain uniformity in the area of tobacco regulation, and maintaining such uniformity is an important reason why the Court should grant the petition. In the Labeling Act, Congress recognized that "diverse, nonuniform, and confusing cigarette labeling and advertising regulations" impeded commerce and the national economy. 15 U.S.C. § 1331; *Reilly*, 533 U.S. at 542-43. To avoid this confusion, Congress

prescribed the specific language that must appear on all cigarette packages and in cigarette advertisements. *See* 15 U.S.C. § 1333. Further, pursuant to the Labeling Act's preemption provision in 15 U.S.C. § 1334, Congress "unequivocally preclude[d] the requirement of any additional statements on cigarette packages beyond those provided in § 1333," and "preclude[d] States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes." *Reilly*, 533 U.S. at 542. Congress has thus taken the affirmative steps required to create a uniform regulatory regime governing the tobacco industry, and, in so doing, has made the Federal Trade Commission its regulatory watchperson. *See* 15 U.S.C. § 1336 ("[N]othing in this chapter (other than the requirements of [§ 1333]) shall be construed to limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes.").

The split created by the First Circuit's decision has upset the uniform application of the Labeling Act, and threatens to make plaintiffs' choice of forum, as opposed to Congress or the FTC, the final arbiter of tobacco regulation. Indeed, if the First Circuit's decision stands, tobacco manufacturers will be severely constrained in running any nationwide advertising and promotion program for lights cigarettes because there is now confusion and nonuniformity in the application of the Labeling Act. Yet, Congress' clear purpose in enacting the Labeling Act was to give companies and consumers clarity by

creating one, nationwide set of guidelines for cigarette advertising and promotion.

This issue should not be resolved through judicial roulette or by allowing the split, and the lack of uniformity that it fosters, to widen. This Court should therefore grant review to resolve the question presented and restore uniformity to lower courts' applications of the Labeling Act.

2. The lack of uniformity that the First Circuit's decision has engendered implicates numerous pending cases that should be preempted under Congress' plain language and this Court's decision in *Cipollone*. Since 1998, for example, there have been a total of 15 "lights fraud" cases filed under state law against *amicus curiae* R. J. Reynolds or its affiliates. These cases, most of which are putative class actions brought on behalf of *millions* of past and present lights smokers, raise claims in connection with light and low-tar cigarettes that are nearly identical to the claims at issue in this petition. Each case seeks, in the aggregate for all plaintiffs in the class, *billions* of dollars in damages. Ten of those cases are still pending at various stages in the lower courts against R. J. Reynolds or its affiliates, with more than 30 cases pending against all tobacco companies nationwide. *See, e.g.*, *Black v. Brown & Williamson Tobacco Corp.*, No. 002-08526 (Mo. Cir. Ct., filed Dec. 11, 2000); *Collora v. R. J. Reynolds Tobacco Co.*, No. 002-00732 (Mo. Cir. Ct., filed Mar. 17, 2000); *Dahl v. R. J. Reynolds Tobacco Co.*, No. 03-005582 (Minn. Dist. Ct., filed Apr. 3, 2003); *Howard v. Brown & Williamson Tobacco Corp.*, No. 00L000136 (Ill. Cir. Ct., filed Feb. 14, 2000); *Mills v. Martin & Bayley Inc.*, No. 04L001270 (Ill. Cir. Ct., filed Nov. 12, 2004);

Rios v. R. J. Reynolds Tobacco Co., No. 02-01391 (Fla. Cir. Ct., filed Feb. 1, 2002); *Rivera v. Brown & Williamson Tobacco Corp.*, No. 05002779 (Fla. Cir. Ct., filed Feb. 18, 2005); *Thompson v. R. J. Reynolds Tobacco Co.*, No. 05-002389 (Minn. Dist. Ct., filed Feb. 15, 2005); *see also* Pet. 24-25 & n.6.

Preemption is one of the dispositive issues in these cases. And because the claims asserted in them are, in substance, identical to the claims asserted against Philip Morris USA in this case, the importance of the question presented for *amicus curiae* and other tobacco companies cannot be overstated. With a preemption defense under the Labeling Act, these cases will be dismissed. Without it, they may proceed to trial and subject the companies named as defendants to the threat of massive judgments. R. J. Reynolds and other tobacco companies thus have a compelling interest in this Court resolving whether the Labeling Act's preemption provision is available in "lights fraud" cases raising state law claims that are, in substance, substantially similar to the claims at issue in this case.

This Court should also resolve this question now, because the confusion created by the First Circuit's decision will only continue to fester without this Court's intervention and will encourage future class actions in the First Circuit and elsewhere. Unless this confusion is resolved, the First Circuit's decision will not only cast a cloud of uncertainty over the existing "lights fraud" cases, but will encourage still more cases by plaintiffs who will flock to the First Circuit to escape a preemption defense that, in the Fifth and other circuits, is dispositive of the types of claims at issue in this case. The *in terrorem* effect of

the First Circuit's rule thus is not limited to this case, but will expand its tentacles to other, already-existing "lights fraud" litigation and, indeed, likely give rise to a whole new series of cases, unless this Court intervenes and settles the issue now. *See Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting the "*in terrorem* effect" of a "potentially enormous aggregate recovery for plaintiffs"); *see also Blair v. Equifax Check Servs., Inc.,* 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (class treatment "can put considerable pressure on the defendant" even when the "plaintiff's probability of success on the merits is slight"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Under the First Circuit's erroneous decision, R. J. Reynolds and other tobacco companies thus now face the prospect of receiving divergent treatment in courts in different parts of the country and the threat of potentially staggering judgments in cases that, under the Labeling Act, should be preempted. This Court should not countenance such a result because the whole purpose of the Labeling Act is to impose a uniform regulatory regime over the advertising and promotion of tobacco products.

To avoid the instability created by the First Circuit's decision and restore the uniform application of federal law that Congress intended in this important area, the Court should thus grant the petition and resolve the question concerning the scope of the preemption provision under the Labeling Act.

3. Finally, this case presents the Court with a particularly suitable vehicle to resolve this vitally important issue. This case arrives to the Court on

the district court's entry of a final judgment for Philip Morris USA, on the basis of the Labeling Act's preemption provision. A case where a court in the First Circuit or elsewhere denies a tobacco manufacturer's preemption defense, however, will of course be in an interlocutory posture. This case thus presents an opportunity for the Court to resolve the critical question of the scope of the preemption defense under the Labeling Act *before* the First Circuit's decision gives rise to any further confusion and subjects the tobacco industry to the very risks of nonuniformity and high-stakes litigation that Congress sought to avoid in the Labeling Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 28, 2007