Nos. 09-993, 09-1039

IN THE
Supreme Court of the United States

PLIVA, INC., TEVA PHARMACEUTICALS USA, INC., AND UDL LABORATORIES, INC.,
Petitioners in No. 09-993,

ACTAVIS ELIZABETH, LLC,
Petitioner in No. 09-1039,

v.

GLADYS MENSING,

Respondent in Nos. 09-993 & 09-1039.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Eighth Circuit

BRIEF OF THE GENERIC PHARMACEUTICAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether federal drug labeling laws preempt state-law tort claims that seek to hold manufacturers of generic drugs liable for retaining FDA-mandated labeling on their approved generic drug products.

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STATEMENT OF INTEREST AND SUMMARY OF THE ARGUMENT[1]

The Generic Pharmaceutical Association ("GPhA") is a non-profit, voluntary association comprised of more than 140 manufacturers and distributors in the generic pharmaceutical industry, which in turn accounts for nearly 70 percent of prescriptions dispensed in the United States each year. GPhA's members provide American consumers with safe and cost-effective medicines that are bioequivalent to, and have the same therapeutic benefit as, their brand-name counterparts. These products significantly improve public health while cutting annual healthcare costs by billions of dollars.

This brief *amicus curiae* marks only the third occasion in GPhA's history that the organization has chosen to address this Court at the petition stage. And for good reason: During the 25 years since the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act gave rise to the modern generic pharmaceutical industry, virtually no prior case has so squarely challenged the two central precepts of the Hatch-Waxman revolution—that generic drugs and their brand-name equivalents are

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[1] All counsel of record received timely notice of the intent to file the brief, all parties have consented to its filing, and letters evincing such consent have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief and that neither such counsel, nor any party, nor any person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

in all relevant respects *the same*, and that generic manufacturers thus should not be forced to assume the extraordinary burden of generating, compiling, and continuously revisiting the clinical data necessary to justify the FDA-approved labeling that federal law *compels* them to put on their products.

These key precepts manifest themselves throughout the Hatch-Waxman Amendments—in demanding that the active ingredient(s) in a proposed generic drug be "*the same as*" the one(s) in its brand-name equivalent, 21 U.S.C. §§ 355(j)(2)(A)(ii)(I), (II), (III) (emphasis added); in requiring that the proposed generic drug's route of administration, dosage form, and strength be "*the same as*" those of brand-name equivalent, *id.* § 355(j)(2)(A)(iii) (emphasis added); in commanding that the proposed generic drug be "bioequivalent" to its brand-name counterpart, such that it "can be expected to have *the same* therapeutic effect as the [brand-name] drug," *id.* § 355(j)(2)(A)(iv) (emphasis added); and, most pertinent here, in obligating generic drug manufacturers to demonstrate that "the labeling proposed for the [generic] drug is *the same as* the labeling approved for the [brand-name] drug." *Id.* § 355(j)(2)(A)(v) (emphasis added).

Despite these rigid and rigorously enforced requirements, however, the single greatest challenge facing generic drug manufacturers from the outset has been the mistaken belief that generic drugs are somehow inferior to their brand-name equivalents—and that generic manufacturers thus should be required to replicate or otherwise augment the brand manufacturer's prior and ongoing clinical work. To combat that misperception, both FDA and GPhA's

members spend millions of dollars each year educating the public about the fact that brand-name and generic drugs are indeed therapeutically equivalent, and seeking to reassure consumers that affordable generic drugs really are—as federal law compels them to be—*the same as* their pricier brand-name counterparts.

The Eighth Circuit's decision in this case takes direct aim at these core precepts of federal law, and in the process threatens to undo decades of progress in both shaping the public's perception of generic drugs and ensuring that generic drugs remain affordable and accessible. That is so because the Eighth Circuit's decision now allows plaintiffs to pursue state-law claims alleging that individual generic drug manufacturers unlawfully failed to warn consumers of drug-safety risks by declining to "initiate label changes *other than those made to mirror changes to the name brand label*," Pet. App. at 13a (emphasis added)—that is, by failing to propose new product labeling for a generic drug that demonstrably is *not* "the same as" the FDA-approved labeling on the generic product's brand-name equivalent.

It would be hard to overstate the radical nature of that holding. As a doctrinal matter, the lower court's decision effectively allows lay juries to punish generic manufacturers under *state law* for not attempting to do what *federal law* precludes them from doing. And as a practical matter, the upshot of the appellate court's decision is that plaintiffs now can pursue state-law claims that effectively would require each generic drug manufacturer to compile the voluminous clinical data necessary to craft and

then demand their own labeling from FDA—*or else stop selling their approved generic products to consumers*, as the Eighth Circuit flatly declared they should:

> The generic defendants were not compelled to market metoclopramide. If they realized their label was insufficient but did not believe they could even propose a label change, they could have simply stopped selling the product. Instead, they are alleged to have placed a drug with inadequate labeling on the market and profited from its sales. [T]hey may be held liable.

Pet. App. 17a.

That unprecedented holding—which directs generic manufacturers to either attempt what federal law forbids, or else stop selling their FDA-approved drug products in the United States—cannot be squared with the Hatch-Waxman Amendments' most fundamental goal: "'to get generic drugs into the hands of patients at reasonable prices—fast.'" *Andrx Pharms., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 809 (D.C. Cir. 2001) (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)). And, needless to say, GPhA's members have a powerful interest in restoring the national uniformity that federal control over generic drug labeling provides and in preserving the bedrock principle that affordable generic drugs are *the same as* their expensive brand-name equivalents and thus should be readily available to consumers. The Eighth Circuit's decision not only threatens to undermine the public's confidence in generic drugs; it

threatens the long-term viability of the generic pharmaceutical industry in this country. GPhA thus respectfully asks this Court to grant the writ, reverse the Eighth Circuit's judgment, and restore the integrity and uniformity of the federal generic drug-labeling regime.

STATUTORY AND REGULATORY BACKGROUND

In order to promote the development, production, and marketing of affordable generic medicines, the Hatch-Waxman Amendments established an expedited FDA review process for proposed generic drugs and created significant incentives for generic manufacturers to enter the market. *See generally* 21 U.S.C. § 355(j) (2007); *see also Purepac Pharm. Co. v. Thompson*, 354 F.3d 877, 879 (D.C. Cir. 2004); *Mead Johnson Pharm. Group v. Bowen*, 838 F.2d 1332, 1333 (D.C. Cir. 1988).

To that end, Hatch-Waxman allows FDA to approve proposed generic drug products without requiring their manufacturers to conduct the same extensive investigational studies and clinical trials that must be performed before most brand-name drugs can be approved. *Cf.* 21 U.S.C. § 355(b)(1)(A); 21 C.F.R. § 314.50(d). Instead, FDA may approve a proposed generic drug without such studies if the generic drug's manufacturer can prove that its product is both pharmaceutically and bio-equivalent to a brand-name drug FDA previously determined to be safe and effective, and thus can be expected to deliver the same therapeutic benefits as the previously approved brand-name drug product. 21 U.S.C. § 355(j)(2)(A).

Because the whole premise of Hatch-Waxman's streamlined review process for generic drugs is that such products are *the same as* their brand-name counterparts, the statute naturally seeks to ensure that the labeling on every generic drug product is *the same as* the labeling FDA approved for that product's brand-name equivalent. Each application for a proposed generic drug (or "ANDA") therefore must include "specimens of the labeling proposed to be used for [the generic] drug," *id.* § 355(j)(2)(A)(vi) (cross-referencing *id.* § 355(b)(1)(F)); proof that "the conditions of use prescribed, recommended, or suggested in the labeling proposed for the [generic] drug have been previously approved for a [brand-name] drug," *id.* § 355(j)(2)(A)(i); and, most important, proof "that the labeling proposed for the [generic] drug is *the same as* the labeling approved for the [brand-name] drug ... except for changes required ... because the [generic] drug and the [brand-name] drug are produced or distributed by different manufacturers." *Id.* § 355(j)(2)(A)(v) (emphasis added). To implement that mandate, FDA's regulations in turn require generic applicants to submit a "side-by-side comparison of the[ir] proposed labeling [and] the approved labeling for the [brand-name] drug with all differences annotated and explained." 21 C.F.R. § 314.94(a)(8)(iv).

Despite Hatch-Waxman's expedited review process for generic drugs, years sometimes pass between the date an ANDA first is submitted to FDA and the date FDA approves it. Special problems thus arise when changes are made to a brand-name drug's labeling after an ANDA applicant first seeks marketing approval for a generic version of that drug—including interim labeling changes that brand

manufacturers may effectuate without FDA pre-approval in extraordinary circumstances. *See* 21 C.F.R. § 314.70(c)(6)(iii). These submissions by brand manufacturers are known as "Changes Being Effectuated" or "CBE" submissions.

In such cases, FDA consistently has required generic applicants to replicate the latest *FDA-approved* version of the brand-name drug's label—and has flatly prohibited them from either replicating any *unapproved* labeling that the brand manufacturer implemented through the CBE process or otherwise seeking to add new warnings not contained in the brand-name product's approved labeling. *See, e.g.*, Pet. App. 106a-108a (Abbreviated New Drug Application Regulations—Final Rule, 57 Fed. Reg. 17950, 17961 (Apr. 28, 1992)); Pet. App. 149a-150a (Office of Generic Drugs, *Guidance For Industry: Revising ANDA Labeling Following Revision of the RLD Labeling* (May 2000)); GPhA App. 13a-15a (Letter from Douglas L. Sporn, Director, Office of Generic Drugs, Center for Drug Evaluation and Research, to All ANDA and AADA Applicants (Dec. 24, 1996)).

At the same time, FDA consistently has made clear that generic manufacturers, in marked contrast to their branded counterparts, are not entitled to depart from the brand manufacturer's approved labeling. *See, e.g.*, Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices—Final Rule, 73 Fed. Reg. 49,603, 49,603-04 (Sept. 22, 2008) (making clear that CBE submissions may be made only by sponsors of approved new drug applications ("NDAs"), biologics license applications ("BLAs"), and medical

device premarket approval applications ("PMAs"), but not generic ANDA sponsors); Pet. App. 104a, 106a-108a (57 Fed. Reg. at 17953, 17961).

Finally, federal law subjects generic companies to strict penalties for marketing drug products with labels that deviate from those FDA approved for use on the brand-name equivalent. The Hatch-Waxman Act itself prohibits FDA from approving an ANDA if "information submitted in the application is insufficient to show that the labeling proposed for the [generic] drug is the same as the labeling approved for the [brand-name] drug referred to in the application." 21 U.S.C. § 355(j)(4)(G). In turn, FDA's implementing regulations authorize the withdrawal of a generic drug's prior approval if its labeling "is no longer consistent with that for the [brand-name] drug referred to in the [ANDA]." 21 C.F.R. § 314.150(b)(10). And, of course, generic companies (like all other drug manufacturers) are subject to draconian penalties for marketing a "misbranded" drug product to consumers. 21 U.S.C. § 331 *id.* § 333; *id.* § 352.

ARGUMENT

Federal Drug Labeling Laws Preempt State-Law Tort Claims That Seek To Hold Manufacturers Of Generic Drugs Liable For Retaining FDA-Mandated Labeling On Their Approved Generic Drug Products.

The Eighth Circuit erred by holding that plaintiffs are free to pursue state-law tort claims that seek to hold generic drug manufacturers liable for retaining FDA-mandated labeling on their approved generic drug products. Federal law preempts state laws (including state-law causes of

action) that "make it 'impossible' for private parties to comply with both state and federal law," *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873, 881 (2000), or which otherwise "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The decision in this case fails both of those tests, by allowing plaintiffs to hold generic drug manufacturers liable for declining to initiate changes from the FDA-approved, brand-name labeling that federal law *compels* generic manufacturers to place on their products. Plaintiffs are free to seek prospective product-labeling changes by lodging their complaints directly with FDA, but federal law precludes them from seeking to impose liability on generic drug manufacturers for using the FDA-approved labeling that even the Eighth Circuit acknowledged those manufacturers are compelled by federal law to use. *See* Pet. App. 10a ("[G]eneric labels must be substantively identical to the name brand label even after they enter the market.").

The appellate court, however, sought to evade that commonsense conclusion by asserting that "the generic defendants could have at least *proposed* a label change," Pet. App. 11a (emphasis in original), "[b]ecause there is nothing in the FDCA or Hatch-Waxman Amendments that explicitly forbids them from proposing a label change." *Id.* 13a. Indeed, the court continued, FDA "expect[s] that generic manufacturers will initiate label changes *other than those made to mirror changes to the name brand label*." *Id.* (emphasis added).

There is no basis in law or logic for those remarkable assertions, which not only would allow generic manufacturers to be held liable for failing to attempt the impossible, but would fundamentally distort the entire statutory scheme governing generic drug approvals.

A. The Eighth Circuit's Decision Unlawfully Allows Generic Applicants To Be Held Liable For Failing To Engage In Futile Conduct.

As set forth above, the Hatch-Waxman Amendments expressly mandate that the labeling on each generic drug product must be "the same as" the labeling FDA previously "approved" for use on the product's brand-name equivalent. 21 U.S.C. § 355(j)(2). The Agency's duly promulgated regulations both reiterate that command and further require generic applicants to submit a side-by-side comparison of the brand-name and proposed generic labeling precisely so that FDA can ensure the proposed generic labels are, in all relevant respects, the same as their FDA-approved brand-name counterparts. 21 C.F.R. § 314.94(a)(8)(iv). And once a generic drug is approved, FDA's regulations authorize the revocation of marketing approval for that product if its labeling "is no longer consistent with that for the [brand-name] drug referred to in the [ANDA]." *Id.* § 314.150(b)(10).

Notably, when FDA first promulgated those regulations, it expressly rejected a proposal that would have allowed generic manufacturers "to deviate from the labeling for the [brand-name] drug to add contraindications, warnings, precautions, adverse reactions, and other safety-related

information" not contained in the previously approved brand-name label. Pet. App. 108a (57 Fed. Reg. at 17961). As the Agency explained at that time, such deviations not only would conflict with the plain language of the statute, which requires the generic "product's labeling [to] be *the same as* the [brand-name] drug product's labeling because the [brand-name] drug product is the basis for [generic drug's] approval," *id.* 109a (emphasis added), but would undermine the public's perception of generic drugs because only "[c]onsistent labeling will assure physicians, health professionals, and consumers that a generic drug is as safe and effective as its brand-name counterpart." *Id.*

Since that time, FDA consistently and repeatedly has warned generic applicants to conform their product labeling to the latest *FDA-approved* labeling for the brand-name equivalent—regardless of any interim changes that the brand-name manufacturer has adopted in response to new clinical or post-marketing developments. *See, e.g.*, GPhA App. 15a (warning that generic applicants should "NOT utilize the Physician's Desk Reference (PDR) as the source for the most recently approved labeling of the innovator's product," because "some of this labeling may have been ... implemented prior to FDA approval" and "*FDA must ... approve [such] labeling before it is acceptable for use as model labeling for an ANDA/AADA product*") (capitalization in original; emphasis added); *see also* Pet. App. 149-150a (explaining that "[t]he sponsor of an ANDA is ... responsible for ensuring that the labeling contained in its application is the same as the *currently approved* labeling of the [branded equivalent]," and instructing ANDA sponsors to "submit revised

labeling" to FDA when "labeling changes [are] needed because of *approved changes* to the labeling of the [branded equivalent]") (emphasis added).

Given the plain language of the statute and FDA regulations, and in light of FDA's longstanding practice of refusing even to consider allowing generic applicants to depart from the previously approved labeling for a given generic drug's brand-name equivalent, it thus would be futile for generic applicants to seek to depart from the labeling mandated by federal law.

The Eighth Circuit, however, was undeterred:

> The generic defendants were not compelled to market metoclopramide. If they realized their label was insufficient but did not believe they could even propose a label change, they could have simply stopped selling the product. Instead, they are alleged to have placed a drug with inadequate labeling on the market and profited from its sales. If Mensing's injuries resulted from their failure to take steps to warn their customers sufficiently of the risks from taking their drugs, they may be held liable.

Pet. App. 17a.

It is hard to understate the radical nature of that assertion, which essentially declares that generic drug manufacturers must either seek—hopelessly—to deviate from the brand manufacturer's FDA-approved labeling, or else stop selling their approved generic drug products until FDA changes the brand

product's labeling. Indeed, that holding self-consciously and unabashedly renders it *impossible* for a manufacturer who wishes to sell an FDA-approved generic drug to comply with both the federal generic-drug labeling requirements and the apparent duties of state tort law (*i.e.*, to *not* sell that FDA-approved generic drug with its current FDA-mandated labeling). *But see Geier*, 529 U.S. at 873, 881; *United States v. Locke*, 529 U.S. 89, 109 (2000) (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100-101 (1989)).

The Eighth Circuit, however, seemed to think that this Court's decision in the *Wyeth* case somehow compelled that result, repeatedly relying on *Wyeth*'s declaration that "manufacturers, not the FDA, bear primary responsibility for their drug labeling." Pet. App. 12a (quoting *Wyeth v. Levine*, 129 S. Ct. 1187, 1202 (2009)) (alterations omitted); *see also* Pet. App. 9a ("'[I]t has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate[.]'") (quoting *Wyeth*, 129 S. Ct. at 1197-98); *id.* at 19a ("On the contrary, 'failure-to-warn actions,' like Mensing's, 'lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times.'") (quoting *Wyeth*, 129 S. Ct. at 1202) (alterations omitted).

But that general principle—which *Wyeth* articulated in the course of addressing failure-to-warn claims lodged against the manufacturer of a *brand-name* drug—does not remotely apply in the

context of claims lodged against the manufacturer of a *generic* drug. To the contrary, federal law demonstrably does *not* charge generic drug manufacturers with "primary responsibility for their drug labeling," *Wyeth*, 129 S. Ct. at 1202, much less for "crafting an adequate label and ensuring that its warnings remain adequate." *Id.* at 1197-98. Instead, federal law (through the statute itself, FDA's duly promulgated regulations, and the Agency's repeated legal directives to applicants) charges generic manufacturers with the entirely different task of ensuring that their drug product labeling is "*the same as*" the latest FDA-approved labeling affixed to the generic product's brand-name equivalent—and for which that product's *brand manufacturer* bears responsibility. *See* 21 U.S.C. § 355(j)(2)(A)(v); 21 C.F.R. § 314.94(a)(8)(iv); 73 Fed. Reg. at 49,603-04; Pet. App. 104a, 106a-108a; 149a-150a; GPhA App. 13a-15a.

To the extent *Wyeth* bears on this case at all, then, what matters is its warning—echoed forcefully by Justice Breyer in his concurring opinion—that "we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law." *Wyeth*, 129 S. Ct. at 1203; *see also id.* at 1204 (Breyer, J., concurring) ("I write separately to emphasize the Court's statement that 'we have no occasion in this case to consider the pre-emptive effect of a specific agency regulation bearing the force of law.' *Ante*, at 1203. State tort law will sometimes help the [FDA] 'uncover unknown drug hazards and [encourage] drug manufacturers to disclose safety risks.' *Ante*, at 1202. *But it is also possible that state tort law will sometimes interfere with the FDA's desire to create a drug label*

containing a specific set of cautions and instructions.") (emphasis added); *id.* ("[FDA] may seek to embody those determinations in *lawful specific regulations describing, for example, when labeling requirements serve as a ceiling as well as a floor.*") (emphasis added).

This is that case. Compelled by the statute's plain language, and backed by specific regulations and directives, FDA repeatedly has ordered generic manufacturers to "create a drug label containing a specific set of cautions and instructions," *id.*—namely, *the same* specific set of cautions and instructions contained in the brand manufacturer's latest FDA-approved labeling, and from which the generic applicant cannot lawfully depart if they wish to continue selling their products in the United States. It is no answer, as the Eighth Circuit apparently thought, to belittle Justice Breyer's observations as a "one paragraph concurring opinion," Pet. App. at 17a: Justice Breyer was echoing what *the Court* said, and warning the lower courts to avoid precisely the trap the Eighth Circuit fell into here—an overreading of *Wyeth* that effectively would foreclose conflict preemption claims in precisely the circumstances presented by this case.

At bottom, the Eighth Circuit's decision turns federal preemption principles upside down, by effectively forcing generic drug manufacturers to either depart from the FDA-approved labeling that federal law requires them to use, or else exit the market entirely in order to comply with state law. That cannot be the law, and this should grant the writ and restore the integrity of the federal generic-drug labeling regime before the Eighth Circuit's

decision further damages the country's generic drug industry.

B. The Eighth Circuit's Decision Distorts The Entire Statutory Scheme, And In The Process Threatens To Undermine The Affordability Of Generic Drugs.

Even if the federal generic drug labeling laws and regulations did not squarely foreclose plaintiffs' effort to pin liability on generic manufacturers for using the FDA-approved labeling federal law compels them to use, the Eighth Circuit's decision impermissibly would undermine the entire Hatch-Waxman scheme.

As set forth above, the whole premise of the expedited review and approval process for generic drugs is that those drugs are *the same as* their brand-name equivalents, such that generic manufacturers need not—and should not—undertake the extraordinary burdens to which brand manufacturers are subject both before and after receiving FDA approval. Thus, unlike brand manufacturers, generic applicants are specifically exempted from conducting the extensive clinical trials brand manufacturers must conduct so long as they demonstrate that their products contain the same active ingredient(s) as the brand manufacturer's product and present it in a bioequivalent formulation, such that the generic product will release its active ingredient into patients' bodies at the same rate as the brand-name equivalent. 21 U.S.C. § 355(j)(2)(A)(iv); *cf. id.* § 355(b)(1) (requiring brand manufacturers to submit voluminous clinical data regarding a proposed brand-name drug's safety and efficacy).

This streamlined application and approval process is directly responsible for the significant growth in this country's generic drug industry over the past 25 years, as well as the corresponding decrease in average healthcare expenditures for prescription drugs. *See, e.g.*, Richard G. Frank, *The Ongoing Regulation of Generic Drugs*, 357 NEW ENG. J. MED. 1993-94 (2007) (noting that generic medicines now account for more than 60 percent of all prescriptions dispensed in the United States—up from 18.6 percent in 1984—but less than 20 percent of every dollar spent on prescription drugs). In those respects, the Hatch-Waxman Act has been remarkably successfully in fulfilling Congress's intent "'to make available more low cost generic drugs.'" *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1316 (D.C. Cir. 1988) (quoting H.R. Rep. No. 98-857 at 14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647).

The Eighth Circuit's decision, however, threatens to turn this framework upside down, by effectively requiring generic drug manufacturers to collect, compile, and process the universe of pre- and post-marketing data needed to make independent recommendations to FDA regarding the substantive content of prescription drug labels. But unlike brand manufacturers—which conduct the original clinical trials, perform significant post-marketing studies, and are required by law to carry out and submit detailed analyses of adverse patient reports to FDA, 21 C.F.R. § 314.80—generic manufacturers lack access to the underlying clinical data, are under no obligation to conduct post-marketing studies, and therefore by design lack the information necessary to

offer FDA substantive recommendations regarding the content of prescription drug labels.

That, of course, helps explain why the statute limits generic applicants' labeling responsibilities to ensuring that their labels are "the same as" the FDA-approved labels on their products' brand-name equivalents, rather than requiring generic applicants to propose and substantiate their own labeling that deviates from the FDA-approved labeling for the brand-name product. 21 U.S.C. § 355(j)(2)(A)(v).

The Eighth Circuit once again sought to downplay the remarkable implications of its holding, by suggesting that generic manufacturers could simply "reference[] studies published elsewhere," and asserting that FDA often requires manufacturers to change their labeling without the Agency first "conduct[ing] its own studies." Pet. App. 18a. But as petitioners well explain, FDA does far more than rely on a handful of published reference studies—and has no need to conduct its own clinical trials—when it orders labeling changes, because the Agency already "has in its possession all the original clinical data, all the world literature regarding [the drug product at issue], and [decades] of data from the adverse events reported to it from all sources since the listed drug was approved." PLIVA Pet. at 21.

Imposing those duties on generic manufacturers, by contrast, would require such companies to make extraordinary investments in order to acquire a base of knowledge that is not remotely contemplated by the statute. And, as petitioners once again explain, acquiring that knowledge base would be possible "only at a cost that would bring the generic drug price up to the [brand-name] drug's price." *Id.*

As a result, it is hard to conceive of a decision more at odds with the Hatch-Waxman scheme than this one. Time and again, the courts have explained that the whole point of Hatch-Waxman's streamlined review and approval process for generic drugs is to minimize the burdens on generic applicants and thereby "'get generic drugs into the hands of patients at reasonable prices—fast.'" *Andrx*, 256 F.3d at 809 (quoting *Barr Labs.*, 930 F.2d at 76); *see also Serono*, 158 F.3d at 1326 ("The purpose of the Hatch-Waxman Amendments was, after all, to increase competition [and] make available more low cost generic drugs.") (alteration in original); *Glaxo, Inc. v. Novopharm, Ltd.*, 110 F.3d 1562, 1568 (Fed. Cir. 1997) ("[T]he purposes of the legislation are 'to make available more low cost generic drugs,'" and "'to provide regulatory relief, increase competition, economy in government, and best of all, [allow] the American people [to] save money, and yet receive the best medicine that pharmaceutical science can provide.'") (quoting H.R. Rep. No. 98-857 at 14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647; Statement On Signing S. 1538 Into Law, 20 Weekly Comp. Pres. Doc. 1359, 1360 (Sept. 24, 1984)); *Bowen*, 838 F.2d at 1333 ("The purpose of this legislation was to increase competition in the drug industry by facilitating the approval of generic copies of drugs.").

By nonetheless embracing plaintiffs' claims against the generic defendants in this case, the Eighth Circuit's decision fundamentally interferes with that clear Congressional purpose and therefore stands as an impermissible obstacle to the core goals and objectives of the statutory scheme. The claims in this case thus are squarely preempted by federal

law, and the Eighth Circuit's contrary decision should be reversed. *See Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'") (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)); *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (noting that "[a]s early as *Gibbons v. Ogden*, Chief Justice Marshall stated the governing principle—that 'acts of the State Legislatures which *interfere with*, or are contrary to the laws of Congress, made in pursuance of the constitution,' are invalid under the Supremacy Clause") (quoting 22 U.S. (9 Wheat.) 1, 211 (1824)) (internal alteration and citation omitted; emphasis added).

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the Eighth Circuit's decision.

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