No. 06-1545

In the Supreme Court of the United States

R.J. REYNOLDS TOBACCO CO., ET AL.,

Petitioners,

v.

HOWARD A. ENGLE, ET AL.,

Respondents.

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

MOTION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

PLAC is a non-profit corporation with 127 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers of products such as automobiles, aircraft, electronics, chemicals, pesticides, pharmaceuticals, and medical devices. A list of PLAC's current corporate membership is included in an appendix to the accompanying brief.

PLAC's primary purpose is to file *amicus curiae* briefs in cases raising issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted hundreds of *amicus* briefs in the federal and state appellate courts, including in many of this Court's cases involving issues of federal preemption. See, *e.g.*, *Bates* v. *Dow Agrosciences, Inc.*, 544 U.S. 431 (2005); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002); *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001); *Buckman* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier* v. *American Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000); *United States* v. *Locke*, 529 U.S. 89 (2000); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996). Because many of PLAC's members manufacture products that are subject to preemptive federal requirements, they have a vital interest in the development of the law of preemption and the proper resolution of this case.

PLAC's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

The preemption issue raised by the petition is significant and recurring, has spawned confusion and conflicts in the lower courts, and clearly merits further review.[2] The Court should take this opportunity to clarify an important aspect of the fractured decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), that has caused difficulty in the lower courts: Whether claims that are labeled "fraud" or "negligence" by a plaintiff escape preemption even if they are predicated on liability theories, arguments, and evidence that are preempted under *Cipollone*. Further review would also serve to clarify preemption law outside of the area of tobacco litigation.

1. Under the Federal Cigarette Labeling and Advertising Act ("Cigarette Labeling Act"), 15 U.S.C. §§ 1331-1340, every package of cigarettes imported, distributed, or sold in the United States must bear a conspicuous warning. Between 1970 and 1984, that warning stated: "Caution: Cigarette Smoking Is Dangerous To Your Health." Since 1984, manufacturers have been required to use, on a rotating basis, the following four warnings specified by Congress:

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[1] Pursuant to S. Ct. Rule 37.6, PLAC states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] PLAC agrees with petitioners that the Florida Supreme Court's issue preclusion ruling also warrants this Court's review. To meet space limitations, this brief focuses solely on the preemption question.

> **SURGEON GENERAL'S WARNING:** Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.
>
> **SURGEON GENERAL'S WARNING:** Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.
>
> **SURGEON GENERAL'S WARNING:** Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.
>
> **SURGEON GENERAL'S WARNING:** Cigarette Smoke Contains Carbon Monoxide.

Id. § 1333(a)(1). These same rotating warnings have been required since 1984 in all cigarette advertising in the United States, except for outdoor billboards (where slightly modified warnings have been required). *Id.* § 1333(a)(2), (3).

In taking the unusual step of specifying product warnings, Congress sought to "establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," under which "the public may be adequately informed" about the adverse health effects of cigarette smoking. 15 U.S.C. § 1331(1). Because the federally mandated warnings on every package of cigarettes serve to "adequately inform[]" the public, Congress also decreed that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." *Id.* § 1334(a).

Congress did not stop there, however. The "comprehensive Federal program" established by the Cigarette Labeling Act had a second purpose: to "protect[]" commerce and the "national economy" from the burden imposed by "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to *any* relationship between smoking and health." 15 U.S.C. § 1331(2) (emphasis added). To carry out this second purpose, Congress included an express preemption clause, which was amended in 1969 to read (*id.* § 1334(b)):

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act].

2. a. In *Cipollone*, this Court considered, among other things, the effect of this preemption clause on a tort plaintiff's claims under state law for failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud. A portion of Justice Stevens's lead opinion (Section V) that was joined only by Chief Justice Rehnquist and Justices White and O'Connor discussed each of these claims in turn. See 505 U.S. 520-30. Justice Blackmun wrote a separate opinion concurring in part, concurring in the judgment, and dissenting in part, which was joined by Justices Kennedy and Souter. *Id.* at 531-44. Justice Scalia, joined by Justice Thomas, wrote an opinion concurring in the judgment in part and dissenting in part. *Id.* at 544-56. The three opinions combined to produce the following holdings of relevance here: "[T]he 1969 Act pre-empts [the] claims based on failure to warn and neutralization of federally mandated warnings to the extent those claims rely on omissions or inclusions in [manufacturers'] advertising or promotions" but does not preempt plaintiff's "claims based on express warranty, intentional fraud, or conspiracy." *Id.* at 530-31.

Of particular relevance for present purposes is the plurality opinion's analysis of the claims for failure to warn and fraudulent misrepresentation. As for the former, the plurality first looked beyond the "failure to warn" label attached to this claim and identified "two closely related theories" underlying it: "first, that [manufacturers] were negligent in the manner [that] they tested, researched, sold, promoted, and advertised their cigarettes; and second, that [they] failed to provide adequate warnings of the health consequences of cigarette smoking." 505 U.S. at 525. With an eye toward the evidentiary basis for each of these legal theories, the plurality next reasoned that "insofar as [the] claims *require a showing*" that the manufacturers' "post-1969 advertising or promotion should have included additional, or more clearly stated, warnings, those claims are

pre-empted." *Ibid.* (emphasis added). On the other hand, the statute does not preempt "claims that *rely solely on* [manufacturers'] testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25 (emphasis added).

Turning to the claims of fraudulent misrepresentation, the plurality again began by distinguishing two underlying legal theories. Insofar as the plaintiff was "alleg[ing] that [manufacturers], through their advertising, neutralized the effect of federally mandated warning labels," the claim was preempted. 505 U.S. at 527. "Such a claim," the plurality reasoned, "is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Ibid.* The plurality took note of the close, long-recognized "relationship between [1] prohibitions on advertising that downplay the dangers of smoking and [2] requirements for warnings in advertising." *Ibid.* And it explained that plaintiff's neutralization "theory of fraudulent misrepresentation is inextricably related to petitioner's first failure-to-warn theory," which "we have already concluded is largely preempted." *Id.* at 528.

On the other hand, the plurality concluded that plaintiff's second fraud theory – intentional fraud and misrepresentation both (1) by false representations of material fact and (2) by concealment of material facts – could escape preemption. 505 U.S. 528. The plurality gave two reasons. *First*, the preemption clause covers "only the imposition of state-law obligations 'with respect to the advertising or promotion' of cigarettes." *Ibid.* (quoting 15 U.S.C. § 1334(b)). Accordingly, plaintiff's "claims that respondents *concealed material facts* are * * * not preempted insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." *Ibid.* (emphasis added).

The plurality's *second* rationale rested on its "understanding of fraud *by intentional misstatement.*" 505 U.S. 529 (emphasis added). Plaintiff's claims "that *do* arise with respect to advertising and promotions (most notably claims based on

allegedly *false statements of material fact* made by such advertisements)," the plurality reasoned, "are not preempted" because they "are predicated not on a duty 'based on smoking and health' but rather on a more general obligation, the duty not to deceive." *Id.* at 528-29 (quoting 15 U.S.C. § 1334(b)) (emphasis added). This "understanding of fraud *by intentional misstatement* is appropriate for several reasons," the plurality reasoned. *Id.* at 529 (emphasis added). To begin with, "[i]n the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Ibid.* Beyond that, "[s]tate-law prohibitions on *false statements of material fact* do not create 'diverse, nonuniform, and confusing' standards" because "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Ibid.* (quoting 15 U.S.C. § 1331(2)) (emphasis added).

b. Although it garnered only four votes, the plurality's analysis of the preemptive effect of the Cigarette Labeling Act on the plaintiff's post-1969 claims for failure to warn and fraudulent misrepresentation represents the Court's holding because other Justices would have reached the same result on broader grounds. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Nevertheless, that analysis was criticized by a majority of the Court. See 505 U.S. at 543 (opinion of Blackmun, J.); *id.* at 556 (opinion of Scalia, J.). Justice Blackmun faulted the plurality for "its frequent shift in the level of generality at which it examines the individual claims." *Id.* at 543. In particular, he cited the plurality's conclusion that "fraudulent-misrepresentation claims (at least those involving false statements of material fact in advertising)" were exempt from preemption because they were predicated on a "general obligation" not to deceive rather than any duty "'based on smoking and health.'" *Ibid.* (quoting 15 U.S.C. § 1334(b)). That analysis, he explained, was inconsistent with the plurality's conclusion that federal law preempted the failure-to-warn claims not based solely on testing, which "could just as easily be described as based on a more general obligation to inform consumers of known risks." *Ibid.* "I can only speculate," Justice Blackmun wrote, "as to the difficulty

lower courts will encounter in attempting to implement today's decision." *Id.* at 543-44.

Justice Scalia agreed that the plurality's "analysis is suspect" because the plurality was "unwilling to apply it consistently." 505 U.S. at 552. "[I]f New Jersey's common-law duty to avoid false statements of material fact – as applied to the cigarette companies' behavior – is not 'based on smoking and health,'" he explained, "the same must be said of New Jersey's common-law duty to warn about a product's dangers." *Ibid.* (quoting 15 U.S.C. § 1334(b) (emphasis added)). In Justice Scalia's view, however, the "failure-to-warn and misrepresentation claims" are "both preempted." *Id.* at 554. Like Justice Blackmun, Justice Scalia predicted that the plurality's analysis would sow confusion in the lower courts. See *id.* at 556.

3. As petitioners demonstrate (Pet. 4, 8, 21-24 & n.9), the generalized jury findings and individual damage awards in this case rest on theories of liability, arguments, and evidence that are preempted under *Cipollone*. Specifically, respondents were permitted to make arguments and adduce evidence purporting to show that petitioners not only failed to provide adequate warnings about the health-related risks of smoking, but also engaged in advertising that "neutralized" the federally mandated warning labels. The Florida trial court overseeing this massive class action refused to give an instruction that would have cautioned the jury not to base liability on preempted theories such as warning neutralization. Pet. 8, 24 n.10. And while it did instruct the jury the liability could not be predicated *solely* on a failure to warn after 1969, the court also erroneously told the jury that federal law did *not* restrict the jury's authority to impose liability for claims "based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70; see Pet. 8-9. In subsequently denying petitioners' motion for judgment as a matter of law, the trial court held that federal law "certainly does not pre-empt any acts of fraud or conspiracy" occurring after 1969. Pet. App. 138a; see Pet. 9.

Beyond that, the Florida trial court made clear that it viewed the whole doctrine of federal preemption with hostility, vituperatively suggesting that this venerable principle, rooted in the Supremacy Clause of the U.S. Constitution, "doesn't apply to modern science and what's happening today" and "[b]oils my blood and boggles my mind." T.16621-22. Even more remarkably, the trial court suggested at one point that it would find a way to circumvent this Court's decision, offering that "the whole concept of *Cipollone* is terribly wrong" and makes "truth and justice impossible" – and declaring, "I have to figure out how to get around it." T.27878, T.16621-22; Pet. 29.

Rather than rectify this apparent defiance of federal law and this Court's decision in *Cipollone*, the Florida Supreme Court, and the Third District Court of Appeal on remand, gave short shrift to petitioners' preemption arguments by declining to address them despite repeated requests by petitioners for a ruling. Pet. 11 & n.6. The only comment offered by the Florida Supreme Court on this subject was its statement, made in passing in addressing the inflammatory arguments of respondents' trial counsel, that "[a]lthough compliance with the federal warnings preempted any claim based on failure to warn, it did not eliminate the other causes of action that the jury had to consider in Phase I." Pet. App. 38a. Thus, the Florida Supreme Court, like the trial court, treated the label attached to respondents' claims as being dispositive of the preemption issue under *Cipollone*. See also Pet. 24-25; Pet. App. 139a.

SUMMARY OF ARGUMENT

I. Further review is warranted to resolve multiple conflicts created or exacerbated by the decision of the Florida courts in this case. *First*, the Florida courts' treatment of the preemption issue is inconsistent in several ways with *Cipollone*'s delineation of the scope of preemption under the Cigarette Labeling Act, as amended in 1969. *Cipollone* held that claims based on "neutralization" of the federally mandated warnings, or failure to provide those warnings in the first place, are expressly preempted; yet the Florida trial court permitted evidence and

argument based on such impermissible "warning neutralization" and "failure-to-warn" theories of liability. *Cipollone* also held that "fraudulent misrepresentation" claims based on a theory of warning neutralization are preempted; yet the Florida courts apparently were of the view that *all* fraud claims were categorically exempt from preemption, even those based on warning neutralization – and even those based on omissions rather than affirmative misrepresentations.

Second, the Florida courts' decisions also conflict with this Court's *methodology* for analyzing preemption issues in *Cipollone*. The Court there looked beyond the labels attached to claims by plaintiffs to examine the underlying legal theories and evidence that supported those theories; the Florida courts, in contrast, treated pleading labels as utterly dispositive of the preemption issue. In addition to straying from *Cipollone*'s methodology, the Florida courts' approach runs afoul of a line of this Court's decisions holding that preemption cannot be evaded through artful pleading. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981). And by failing to give a jury instruction requested by petitioner that would have ensured that the verdict was not based on preempted arguments and evidence, the Florida courts ignored this Court's recent teachings in *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005).

Third, as petitioners persuasively demonstrate (Pet. 24-26), the decision below compounds a serious conflict in the lower courts over whether a plaintiff may defeat preemption under *Cipollone* by recharacterizing failure-to-warn or neutralization claims as claims for fraudulent concealment or suppression. That issue, which arises with substantial regularity in tobacco litigation, is ultimately traceable to certain confusing aspects of this Court's decision in *Cipollone* – aspects that only this Court can clarify.

II. Further review would also clarify the law of preemption outside of tobacco litigation. *Cipollone* is an important

precedent that has influenced the development of preemption law in many cases not involving the Cigarette Labeling Act. Notably, other express preemption clauses in the U.S. Code – of which there are many – contain words or phrases that are similar to the language of the Labeling Act, thus ensuring that *Cipollone*'s influence is broadly felt. Finally, given the variety of safeguards sought by petitioners at trial but squarely rejected by the trial court, this case provides an excellent vehicle for underscoring and further illuminating the critical importance of such safeguards – including (a) evidentiary rulings excluding evidence of preempted liability theories, (b) instructions limiting the jury's use of evidence that bears on both preempted and non-preempted theories, and (c) limitations on arguments made by trial counsel – in ensuring that a trial does not become an occasion for nullification of Congress's preemptive intent.

ARGUMENT

THE PREEMPTION ISSUE RAISED BY PETITIONERS WARRANTS THIS COURT'S REVIEW

I. The Florida Courts' Treatment Of The Preemption Issue Is Inconsistent With *Cipollone* And Other Decisions Of This Court And Deepens A Serious Conflict In The Lower Courts

Although petitioners raised and fully briefed their substantial preemption arguments below, the Florida Supreme Court and Court of Appeal never addressed them. Instead, the Florida Supreme Court offered only the passing observation, made in the context of discussing an issue unrelated to preemption, that "[a]lthough compliance with the federal warnings preempted any claim *based on failure to warn*, it did not eliminate *the other causes of action* that the jury had to consider in Phase I." Pet. App. 38a (emphasis added). In suggesting that the *pleading label* attached to respondents' claims was dispositive of the preemption question, the Florida Supreme Court was merely taking a page from the trial court, which denied petitioners' motion for judgment as a matter of law on the ground that federal law "certainly does not preempt" any "acts of fraud or

conspiracy" occurring after 1969. Pet. App. 138a. The trial court also informed the jury that federal law did not restrict its authority to impose liability for any claims that were "based on negligence, strict liability, express warranty, fraud, misrepresentation, or conspiracy." T.37569-70; see Pet. 8-9; see also Pet. App. 139a (holding that nature of the plaintiffs' "presentation" was significant in evaluating preemption).

The Florida courts' treatment of the preemption issue is inconsistent in multiple respects with *Cipollone*, with other decisions of this Court, and with the decisions of other federal and state appellate courts.

A. For starters, this Court in *Cipollone* did *not* say that the preemption analysis begins and ends with the pleading label selected by a plaintiff. On the contrary, as explained above (at pages 3-4, *supra*), although Justice Stevens's (and Justice Scalia's) opinions did consider each broad subject-matter category of tort claim in turn (see 505 U.S. at 520-30, 548-54), they plainly did not stop there. Instead, the Court looked beyond the pleading labels to identify the precise legal theories that were being advanced. See *In re Tobacco Cases II*, 2007 WL 2199006, at *8 (Cal. Aug. 2, 2007) (*Cipollone* "considered each common law theory * * * *as applied in the particular case*") (emphasis in original). Thus, in analyzing the failure-to-warn claims, the Court first carefully distinguished between "two closely related theories": (1) negligence "in the manner" that petitioners "tested, researched, sold, promoted and advertised their cigarettes"; and (2) failure "to provide adequate warnings of the health consequences of cigarette smoking." 505 U.S. at 524. Similarly, the Court's analysis of the fraudulent misrepresentation claims looked beyond the cause-of-action label and identified two distinct legal theories: (1) neutralization through advertising of the federally mandated warnings; and (2) intentional fraud and misrepresentation. *Id.* at 527. With respect to the latter, the Court went on to further distinguish – and to discuss separately – affirmative misrepresentations and fraudulent omissions or concealment. *Id.* at 528-29. Thus, the

Florida courts' sole reliance on the broad pleading labels chosen by plaintiff is incompatible with *Cipollone*.

Equally mistaken – and at odds with *Cipollone* – was the Florida trial court's conclusion that preemption was categorically unavailable because the plaintiffs had alleged "acts of fraud" (Pet. App. 138a) and were advancing, *inter alia*, claims "based on negligence, * * * fraud, [and] misrepresentation" (T.37569-70). *Cipollone* squarely held that a negligence claim based on the manner of promoting and advertising cigarettes (so that, for example, the cigarettes were unaccompanied by adequate warnings) *is* preempted by the Labeling Act. It also squarely held that a fraudulent misrepresentation claim based on a theory of neutralization is preempted. Thus, merely because a claim can be categorized under the broad pleading label of "negligence," "fraud," or "fraudulent misrepresentation" does not spare it from preemption under Section 1334(b). Under *Cipollone*, courts can – indeed, they must – look beyond the pleading labels chosen by plaintiffs.

Nor is this all. As petitioners point out (Pet. 28), the Florida courts appear to have misread *Cipollone* as sparing from preemption *all* fraudulent misrepresentation claims because fraud claims are not "based on smoking or health" (15 U.S.C. § 1334(b)) but rather on a more general "duty not to deceive." 505 U.S. at 528-29. This is doubly mistaken. First, as just explained, *Cipollone* expressly ruled that fraud claims based on affirmative misrepresentations *are* preempted to the extent they rely on a theory of warning neutralization.

Second, the Florida courts overlooked *Cipollone*'s careful distinction – and differential treatment of – non-neutralization claims of intentional fraud and misrepresentation that are based on (1) false affirmative representations of material fact, versus (2) concealment or omissions of material fact. 505 U.S. at 528-29. It was only the first of these two types of claims that *Cipollone* said was based on a generalized "duty not to deceive." Accord *id.* at 543 (Blackmun, J.) ("the plurality states that fraudulent-misrepresentation claims *(at least those involv-*

ing false statements of material fact) are 'predicated * * * on a * * * duty not to deceive'") (quoting 505 U.S. at 528-29) (emphasis added); *id.* at 552 (Scalia, J.) (discussing plurality's analysis of "New Jersey's common-law duty to avoid *false statements of material fact*") (emphasis added). In contrast, the Court held that *concealment* claims escaped preemption for a different reason: "insofar as those claims rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." *Id.* at 528. Had this Court thought that *all* claims that could be labeled "fraud" or "misrepresentation" escaped preemption because they were based on a general duty not to deceive, it would not have ruled that fraud claims based on warning neutralization are preempted. And, of course, there would have been no reason to discuss the concealment allegations separately (much less to carefully distinguish between concealment claims that impose disclosure obligations as to "advertising and promotion" versus alternative channels of communication).

B. The Florida courts' exclusive reliance on superficial pleading labels also ignores *Cipollone*'s willingness to look beyond those labels – and the underlying legal theories advanced by the plaintiff – to the evidence presented at trial. Thus, in discussing the failure-to-warn claims (including those based on negligence in the manner of promotion, advertising and testing and those based on the failure to provide adequate warnings), the Court in *Cipollone* reasoned that "insofar as [the] claims require *a showing* that respondents' post-1969 advertising or promotion should have included additional, or more clearly stated, warnings, those claims are pre-empted." 505 U.S. at 524. (emphasis added). On the other hand, the Court reasoned, the statute does not preempt "claims that *rely solely on* respondents' testing or research practices or other actions unrelated to advertising or promotion." *Id.* at 524-25 (emphasis added). In contrast, the Florida trial courts refused to give an instruction that would have cautioned the jury *not* to base liability on preempted theories such as warning neutralization.

Pet. 8, 24 n.10. That myopic focus on pleading labels is inconsistent with *Cipollone*.

To be sure, preemption is an affirmative defense of law and, as such, it is often resolved on purely legal grounds early in litigation (as on a motion to dismiss). Thus, the initial target of the preemption defense ordinarily is the allegations in the plaintiff's complaint. To prevent the preemption defense from being circumvented with the stroke of a pen, however, this Court has repeatedly stated that a plaintiff may *not* avoid preemption merely through artful pleading. See, *e.g.*, *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) ("[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would 'elevate form over substance and allow parties to evade' the pre-emptive scope of ERISA simply 'by relabeling their contract claims as claims for tortious breach of contract.'") (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 211 (1985)); *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the intent of Congress cannot be avoided by mere artful pleading."); see also *Kirksey* v. *R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1042 (7th Cir. 1999) (Posner, J.) (plaintiff may not "skirt th[e] pit" of preemption by artful pleading and, on motion to dismiss, courts should consider "the natural characterization of the claim"); cf. *Credit Suisse Securities (USA) LLC* v. *Billling*, 127 S. Ct. 2383, 2396 (2007) (rejecting approach that would "permit[] plaintiffs to dress what is essentially a securities complaint in antitrust clothing"). The Florida courts' approach to the preemption issue conflicts with these decisions.

Like *Cipollone*, this case arises in a different procedural posture: on appeal from a jury decision following trial (here, the generalized jury findings at the conclusion of Phase I and the individual awards at the conclusion of Phase II-A). In the trial setting, courts must take steps to ensure that arguments and evidence based on legal theories that are preempted are not allowed to become the basis for a judgment. This Court recently emphasized the need for such protective measures in *Bates* v.

Dow Agrosciences LLC, 544 U.S. 431 (2005), which involved a provision of Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v(b), that preempts certain state requirements that are "in addition to or different from" applicable federal requirements (language the Court interpreted as exempting state requirements that are equivalent to the federal requirements):

> In undertaking a pre-emption analysis at the pleadings stage of a case, a court should bear in mind the concept of equivalence. * * * If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent. If a defendant so requests, a court *should instruct the jury* on the relevant FIFRA misbranding standards, as well as on any regulations that add content to those standards. * * *

544 U.S. at 454 (emphasis altered).

Here, in contrast, the Florida trial court allowed the jury at the close of Phase I to make generalized findings, and at the close of Phase II-A to grant individual awards, that were predicated on theories of liability, arguments, and evidence that are clearly preempted under *Cipollone*. See Pet. 4, 8, 21-24 & n.9. For example, respondents were permitted to argue that liability should be imposed because petitioners' marketing activities "neutralized" or undermined the federally mandated warnings on cigarette packages. Pet. 22-23. Not only did the Florida trial court permit this evidence to be presented, but it refused to give an instruction that would have cautioned the jury *not* to base liability on preempted theories such as warning neutralization. Pet. 8, 24 n.10. The Florida trial court, in short, failed to do precisely what this Court in *Bates* said was required: take measures (including the giving of jury instructions) to ensure that preemption provisions are honored by the jury and not simply operative at the pleadings stage of litigation.

Such safeguards are of vital importance. Without them, there is nothing to prevent a plaintiff whose "warning neutralization" claim is stricken from the complaint on preemption

grounds at the motion-to-dismiss stage from smuggling that claim back into the case by urging the jury to find that defendants committed fraud or negligence by making affirmatively misleading statements aimed at neutralizing the federally mandated warnings. Indeed, unless there are adequate jury instructions preventing this outcome, a plaintiff could urge the jury to rely *exclusively* on such warning neutralization evidence in finding fraud. The potential in this circumstance for the preemption defense – and *Cipollone*'s core holdings – to be easily circumvented is obvious. That is precisely why this Court cautioned in *Bates* that jury instructions are important and "should" be given if requested by a defendant.

C. As petitioners persuasively show (Pet. 24-28), the decision below also exacerbates a conflict in the lower courts over whether a plaintiff may defeat preemption under *Cipollone* by recharacterizing failure-to-warn or neutralization claims as claims of fraudulent suppression or concealment. In marked contrast to the Florida courts in this case, the Fifth and Eleventh Circuits and the Alabama and Texas Supreme Courts have all rejected this tactic. See *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 393-94 (5th Cir. 2007) (citing additional cases so holding); *Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004); *American Tobacco Co.* v. *Grinnell*, 951 S.W.2d 420, 439-40 (Tex. 1997); *Cantly* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996) (fraudulent suppression claim generally alleging that manufacturers failed to inform smokers of the risks of smoking is "clearly" preempted under *Cipollone*).

These decisions are correct – and, unlike the decision below, faithful to this Court's analysis in *Cipollone*. As the Texas Supreme Court cogently explained, "fraudulent concealment claims are preempted because they * * * are premised on [the manufacturer's] failure to disclose information regarding the dangers of cigarettes." *Grinnell*, 951 S.W.2d at 439-40; see also *id.* at 440 (stating that claim that manufacturer violated Texas Deceptive Trade Practices Act by making "deceptive representations" is "properly characterized as a neutralization

claim because [the manufacturer] allegedly made deceptive statements in its advertising and promotional materials with the intent of diminishing the impact of the federal warnings"). There is no good reason – none – why a plaintiff should be able to present evidence of warning neutralization and obtain a verdict on the strength of that evidence merely by labeling her claim "fraudulent concealment." Nor is there any material difference – in fact or under *Cipollone* – between a failure-to-warn claim that faults the manufacturer for not including stronger or different warnings in the product advertising and a "fraudulent concealment" claim that rests on an identical evidentiary foundation. For that reason, other federal and state appellate courts of last resort have had no difficulty doing what the Florida courts refused to do here: look past the labels assigned to claims by plaintiffs to examine whether particular claims are preempted under *Cipollone*.

The Court should grant review of the preemption issue to resolve these conflicts in the lower courts, bring the Florida courts into line with this Court's decisions in *Cipollone*, *Davila Kalo Brick*, and *Bates*, and clarify this important area of federal law. As the petition demonstrates (see Pet. 26-27; Pet. App. 207a-214a), this issue arises with substantial regularity in tobacco litigation. It has continued to arise since the petition was filed. See *Clinton* v. *Brown & Williamson Holdings, Inc.*, 2007 WL 2181896, at *8-*12 (S.D.N.Y. July 24, 2007) (claims for fraud in marketing "light" cigarettes are preempted); *Espinosa* v. *Philip Morris, Inc.*, 2007 WL 1773198, at *3-*5 (N.D. Ill. June 18, 2007) (claims for fraud, fraudulent concealment, and negligence, among others, are preempted because gravamen of claims was that defendants failed to communicate certain information and warnings about the risks of smoking); see also *In re Tobacco Cases II*, 2007 WL 2199006, at *9 (Cal. Aug. 2, 2007) (unfair competition claim preempted because it "seeks to impose on * * * tobacco companies a duty not to advertise in a way that could encourage minors to smoke"). Although *Cipollone* was decided 15 years ago, this Court has never sought to clarify the plurality's discussion and analysis of

the fraud claims, which as petitioners demonstrate has been the source of confusion in the lower courts. Further review is needed because, in the end, only this Court can clarify these aspects of *Cipollone*. See *Nichols* v. *United States*, 511 U.S. 738, 746 (1994) (the "degree of confusion following a splintered decision" of this Court "is itself a reason for reexamining that decision") (citing cases).

II. Further Review Of The Preemption Issue Would Have Benefits Outside The Area Of Tobacco Litigation

As petitioners correctly point out, this Court's review of the preemption issue will serve judicial economy because it will avoid the colossal waste of judicial (and party) resources that will occur if the respondents, in a tsunami of individual lawsuits, invoke generalized findings of the Phase I trial that are based on preempted legal theories. If this Court does not grant review of the preemption issue, the Florida courts' errors will be propagated to hundreds if not thousands of individual lawsuits filed in the Florida courts. That prospect alone, which is far from hypothetical (see Pet. 18-19 & n.8), underscores the practical importance of the issue presented as well as its potentially far-reaching effects.

But even apart from the lawsuits that have been and will be filed by individual respondents, and the need for clarification of *Cipollone*'s meaning in other tobacco litigation across the country, further review is warranted because it will have broader salutary effects. *Cipollone* is an important preemption decision. By last count, it has been cited more than 1425 times by the lower state and federal courts. Its influence extends well beyond tobacco litigation and preemption under the Cigarette Labeling Act to other areas of preemption law. "Courts faced with the problem of interpreting and applying the preemption language found in FIFRA," for example, "have * * * looked to *Cipollone* for guidance in determining which causes of action against chemical companies are preempted and which are not." *Cantly* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 n.7 (Ala. 1996). *Cipollone*'s analysis has also been influential in cases

involving the preemption clause of the Medical Device Amendments (MDA), 21 U.S.C. § 360k(a).[3]

Although *Cipollone*'s influence in cases involving preemption under the MDA and FIFRA has diminished as a result of this Court having issued decisions on those statutes in the intervening years, see *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431 (2005); *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470 (1996), it must be remembered that there are a wide array of preemption provisions in the U.S. Code, many of which this Court has never addressed.[4] To the extent that these provisions include language similar to the Cigarette Labeling Act, *Cipollone* can be expected to continue to exert a powerful influence on the lower courts even outside of tobacco litigation. See, *e.g.*, *Behrens* v. *United Vaccines, Inc.*, 189 F. Supp. 2d 945, 963-66 (D. Minn. 2002) (citing cases in which courts relied on *Cipollone* in determining scope of preemption under the Viruses, Serums, Toxin, and Analogous Products Act. 21 U.S.C. §§ 151-159, and regulations issued by the Animal and Plant Health Inspection Service); *Palmer* v. *St. Joseph Healthcare P.S.O., Inc.*, 77 P.3d 560, 571-73 (N.M. Ct. App. 2003) (relying on *Cipollone* in determining preemption under Medicare Plus Choice program).

Perhaps for this reason, this Court has not hesitated in the past to grant review to dispel confusion and resolve disagree-

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[3] See, *e.g.*, *Michael* v. *Shiley*, 46 F.3d 1316, 1330-31 (3d Cir. 1995) (relying on *Cipollone* in holding fraud claim not preempted); *Steele* v. *Depuy Orthopaedics, Inc.*, 295 F. Supp. 2d 439, 455-56 (D.N.J. 2003) (relying on *Cipollone* in holding claim for express warranty not preempted and in analyzing fraudulent concealment claim); *Dutton* v. *Acromed Corp.*, 691 N.E.2d 738, 742 (Ohio App. 1997) (relying on *Cipollone* in holding fraud claim not preempted).

[4] See, *e.g.*, Agricultural Marketing Act, 7 U.S.C. § 1626h; Food Security Act, *id.* § 4817; Plant Protection Act, *id.* § 7756; Flammable Fabrics Act, 15 U.S.C. § 1203(a); Child Safety Protection Act, *id.* § 1278 note; Fair Packaging and Labeling Act, *id.* § 1461; Poison Prevention Packaging Act, *id.* § 1476(a); Nutritional Education and Labeling Act, 21 U.S.C. § 343-1.

ments over *Cipollone*'s meaning. For example, in *Freightliner Corp.* v. *Myrick*, 514 U.S. 280 (1995), which involved preemption under the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30103(b), this Court addressed confusion in the lower courts over *Cipollone*'s statement that "[w]hen Congress has considered the issue of pre-emption and has included * * * a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent * * *, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation." 505 U.S. at 517 (internal quotations and citations omitted). Some courts had interpreted that statement as announcing a rule that implied preemption arguments are *never* available under a statute that contains an express preemption provision, but in *Myrick* this Court disagreed. *Myrick*, 514 U.S. at 287-89 (rejecting interpretation as "without merit" and noting that, "[a]t best," the existence of an express preemption clause might "support[] an inference" in certain cases that no implied preemption was intended by Congress).

This case provides the Court with an excellent opportunity to address another aspect of *Cipollone* that has led to confusion in the lower courts: the proper treatment of fraudulent concealment claims. More broadly, further review would also permit the Court to underscore and perhaps extend a central teaching of *Bates* that appears to have been lost on the Florida courts: federal preemption of state law is not just an issue that courts must deal with at the pleading stage, but rather is an expression of Congress's paramount authority – and limits on state authority – that must be enforced at trial through the careful use of evidentiary rulings, cautionary and limiting jury instructions, and limits on the arguments of counsel.[5] In a case such as this,

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[5] The same feature of FIFRA's preemption clause that triggered this Court's admonition in *Bates* – the exemption from preemption of state requirements that are "different from, or in addition to" applicable federal requirements (7 U.S.C. § 136v(b)) – exists in a wide array of other federal preemption provisions. See, *e.g.*, 7 U.S.C. § 4817(b); 21

involving a decision of this Court carefully delineating the scope of preemption under an important federal statute, it is this Court's authority and holdings that must also be enforced through such appropriate safeguards. Unless these safeguards are vigorously deployed by trial judges, Congress's preemptive intent can be easily circumvented. Given the array of safeguards and protective measures sought by petitioners but rejected by the trial court, this case is an excellent vehicle for clarifying the trial court's obligations to prevent the circumvention of the preemption doctrine at trial.

This case provides a compelling illustration of these risks. As explained above, the Florida trial court permitted respondents to make arguments and adduce evidence purporting to show that petitioners not only failed to provide adequate warnings about the health-related risks of smoking, but also engaged in advertising and promotion that "neutralized" the federally mandated warning labels. It also refused to give an instruction that would have cautioned the jury not to base liability on preempted theories such as warning neutralization. Pet. 8, 24 n.10. In short, the trial court allowed respondents to get in through the back door of evidence and argument what this Court's decision in *Cipollone* makes clear cannot be pleaded at the front door of litigation. The fact that the Florida trial court that permitted this clear circumvention of the preemption doctrine and *Cipollone* also voiced outright hostility to the very idea of preemption, disagreement with this Court's decision in *Cipollone* ("the whole concept of *Cipollone* is terribly wrong" (T.27878)), and an intent to "figure out how to get around it" (T.16621-22) – and the Florida appellate courts did nothing to rectify the trial court's apparent defiance of federal law – is all the more reason why further review in this case is imperative.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

U.S.C. §§ 360k(a), 379r(a)(2), 379s, 467e, 678, 1052(b).

Respectfully submitted.

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