No. 17-___

IN THE

Supreme Court of the United States

MERCK SHARP & DOHME CORP.,
Petitioner,

v.

DORIS ALBRECHT, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

SHAY DVORETZKY
Counsel of Record
YAAKOV M. ROTH
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner

QUESTION PRESENTED

In *Wyeth v. Levine*, 555 U.S. 555 (2009), this Court held that the FDA's approval of a drug label does not, standing alone, insulate the manufacturer from failure-to-warn liability under state tort law. At the same time, the Court recognized that if "the FDA would not have approved" the label demanded by state law, then the manufacturer could invoke an "impossibility" preemption defense. *Id.* at 571.

In this case, it was "undisputed" that (i) "the FDA was aware of the possible link" between petitioner's drug and the risk at issue; (ii) petitioner "submitted a comprehensive safety update to the FDA reporting … numerous studies" finding "such an association"; (iii) petitioner "proposed warning language" about this risk, but the FDA "rejected" it; (iv) the FDA stated that the "conflicting nature of the literature d[id] not provide a clear path forward" and that it needed "more time" to consider "the issue of a precaution"; and (v) only later, after a report from a task force, did the FDA become "confident" that an association "potentially" existed. Pet.App.59a-60a.

The Third Circuit nonetheless held that a jury could find that petitioner had not shown by "clear and convincing evidence" that the FDA would have rejected a warning label of the type that respondents claim state law required. *See* Pet.App.37a, 56a-57a.

The question presented is: Is a state-law failure-to-warn claim preempted when the FDA rejected the drug manufacturer's proposal to warn about the risk after being provided with the relevant scientific data; or must such a case go to a jury for conjecture as to *why* the FDA rejected the proposed warning?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Merck Sharp & Dohme Corporation, a wholly owned subsidiary of the entity formerly known as Schering Plough Corporation, which has been renamed Merck & Co., Inc. No publicly held corporation owns 10% or more of the stock of Merck & Co., Inc.

Respondents—identified by name and Third Circuit docket number in Appendix G (Pet.App.203a-224a)—are more than 500 plaintiffs who brought state-law failure-to-warn claims against Merck, alleging that they were injured by Merck's drug Fosamax prior to September 14, 2010. The Third Circuit resolved their appeals in one consolidated opinion. Pet.App.1a n.*. Pursuant to this Court's Rule 12.4, Merck files this consolidated petition to challenge the Third Circuit's decision.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

Wyeth v. Levine, 555 U.S. 555 (2009), rejected an argument that the FDA's mere approval of a drug's label immunizes the manufacturer from any state tort liability for failure to warn. Rather, only if the FDA would have *rejected* a warning should the manufacturer be shielded from liability for failure to give it. In the latter scenario, it would truly be impossible to comply with both federal law (blocking the warning) and state law (mandating the warning). In *Levine*, however, there was no evidence that the FDA had paid more than "passing attention" to the risk at issue; no evidence that the drug manufacturer had provided the FDA with "evaluation or analysis" of the risk; no evidence that the manufacturer had "attempted to give the kind of warning" demanded by the plaintiff; and no evidence that the FDA had ever "made an affirmative decision" against allowing such a warning. *Id.* at 572-73.

In this case, by contrast, *each* of those factors is *undisputed*. Petitioner ("Merck") submitted data and analysis to the FDA suggesting that its Fosamax drug may be associated with certain bone fractures. Merck also proposed a warning addressing that risk. After back-and-forth, the FDA ultimately rejected the proposed addition, stating that it was not supported by the data. Pet.App.59a-61a. Despite all of this, the Third Circuit held that respondents' failure-to-warn claims were not legally preempted, because it believed that a *jury* could infer that the FDA's objection had been only to Merck's *wording*, and thus, as a "hypothetical" matter, that the agency might have approved the warning had it merely been phrased slightly differently. Pet.App.67a-68a.

Unfortunately, the decision below is not unique in its hostility to preemption. Despite *Levine*'s recognition that preemption would be appropriate if the FDA would have rejected the label demanded by the plaintiff, courts have erected a series of procedural and substantive hurdles to this defense, making it virtually impossible to establish, certainly as a matter of law. This case presents a particularly extreme illustration, with the court inventing a "clear and convincing evidence" standard exclusively for drug manufacturers, demanding "smoking gun" proof of *why* the FDA had rejected Merck's on-point warning, and leaving a lay jury to speculate about the intent of a federal regulatory authority.

This Court should grant certiorari to revive failure-to-warn branded drug preemption in the wake of the lower courts' interpretation of *Levine*. If a drug manufacturer candidly brings a risk to the FDA's attention and proposes an on-point warning, the FDA's rejection should suffice as a matter of law to preempt claims alleging failure to warn of that risk. By demanding more, courts have effectively eliminated impossibility preemption in this context: Even if manufacturers engage in good faith with the agency, propose a relevant warning, and follow the FDA's instructions, they remain on the hook based on a lay jury's psychoanalysis of *why* the agency had blocked compliance with state law. That untenable approach is of great importance, as proliferating tort suits stifle innovation, raise drug costs, undercut the FDA's role, and ultimately hurt public health. And this case is a perfect vehicle, because its undisputed facts would allow it to serve as an exemplar of when the preemption defense is legally established.

OPINIONS BELOW

The district court's opinion granting judgment to petitioner (Pet.App.113a-52a) appears at 2014 WL 1266994. The Third Circuit's decision vacating and remanding (Pet.App.1a-95a) was reported at 852 F.3d 268.

JURISDICTION

The Third Circuit entered judgment on March 22, 2017, and denied petitioner's timely motion for rehearing and rehearing en banc on April 24, 2017. *See* Pet.App.1a, 159a. On June 23, 2017, Justice Alito extended the time to file a certiorari petition until August 22, 2017. *See* No. 16A1264. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at Pet.App.177a-202a.

STATEMENT

This case is about whether a brand-name drug manufacturer may be held liable for failure to warn about a health risk associated with its drug—even when the manufacturer brought that specific risk to the FDA's attention and proposed adding a warning about it to its label, only to have the FDA reject that proposal. The court below held that Merck *could* be liable under those circumstances. Although the FDA had rejected Merck's proposed warning and doubted that the data supported it, the Third Circuit ruled that a *jury*—speculating about hypotheticals—could find that it was *possible* that the FDA *would have* approved a warning had Merck altered its wording slightly (something the FDA never suggested).

A. Regulatory Background

Congress and the FDA have crafted a regulatory regime in which name-brand drug manufacturers and the agency work hand-in-hand to appropriately warn consumers of the risks inherent in using many beneficial medications. While "the manufacturer bears responsibility for the content of its label at all times," *Levine*, 555 U.S. at 570-71, the FDA also plays a central role in label approvals and revisions.

The FDA may approve a new drug "only if it determines that the drug in question is safe for use under the conditions of use prescribed, recommended, or suggested in [its] proposed labeling." *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2471 (2013). After approval, the FDA continues to monitor the drug and its label. The manufacturer must investigate and report serious, unexpected adverse events to the FDA within 15 days of receiving information about them, *see* 21 C.F.R. § 314.80(c)(1)(i), and each year it must report all "significant new information … that might affect the safety, effectiveness, or labeling of the drug" to the agency, *id.* § 314.81(b)(2)(i).

Once a name-brand drug and its label have hit the market, there are only two ways in which that label may be revised by the manufacturer. *First*, the manufacturer may submit to the FDA a Prior Approval Supplement ("PAS"), asking for permission to change the label. *See generally id.* § 314.70(b). *Second*, through the Changes Being Effected ("CBE") regulations, a manufacturer may implement certain label changes subject to later FDA approval. *See id.* § 314.70(c)(6). Either way, the FDA's approval is required by federal law.

Because excessive warnings "could discourage appropriate use of a beneficial drug" and "decrease the usefulness and accessibility of important information by diluting or obscuring it," 73 Fed. Reg. 2848, 2851 (Jan. 16, 2008), any revision to a label must meet specified scientific criteria. To justify a change to the "Warnings & Precautions" portion of a label, there must be "reasonable evidence of a causal association" between the drug and the health risk. 21 C.F.R. § 201.57(c)(6)(i). And to justify a change to the "Adverse Reactions" section, there must be "some basis to believe there is a causal relationship." *Id.* § 201.57(c)(7). These standards apply equally to changes brought about through the CBE process and to changes requested in a PAS. *See* 73 Fed. Reg. 49603, 49604-05 (Aug. 22, 2008).

Under statutory amendments not in force at the time of *Levine*, the agency has its own obligations too: It may not sit on its hands if it comes to believe that an existing label does not sufficiently warn against possible risks. If the FDA "becomes aware of new safety information that [it] believes should be included in the labeling of the drug," it "shall promptly notify" the manufacturer, 21 U.S.C. § 355(o)(4)(A), who must "submit a supplement proposing changes to the approved labeling" or else "detail[] the reasons why such a change is not warranted," *id.* § 355(o)(4)(B). Just as importantly, the FDA may not let disagreement between it and the manufacturer about the need for (or proper content of) new warnings stand in the way of public health. If it "disagrees with the proposed changes in the supplement or with the statement setting forth the reasons why no labeling change is necessary, the

[agency] *shall initiate discussions to reach agreement* on whether the labeling for the drug should be modified to reflect the new safety information, and if so, the contents of such labeling changes." *Id.* § 355(o)(4)(C) (emphasis added). After those discussions, the agency "may issue an order directing [the manufacturer] to make such a labeling change as the [FDA] deems appropriate to address the new safety information." *Id.* § 355(o)(4)(E).

B. Fosamax and Its Label

1. Merck's drug Fosamax prevents and treats osteoporosis in postmenopausal women. Like the other bisphosphonates whose chemical properties it shares, Fosamax works by slowing the deleterious process that occurs in the bones of post-menopausal women, thereby helping patients retain bone mass, maintain bone strength, and avoid fractures. Pet.App.5a-6a. In one study, it reduced the risk of hip, spine, and wrist fractures by roughly 50%, and the risk of all symptomatic fractures—that is, ones that cause pain—by 26%. C.A.App.1103, 1699.

By interfering with this deleterious process, however, drugs like Fosamax could "theoretically increase" the risk of very rare "atypical femoral fracture[s]"—fractures in a very specific part of the femur (just below the hip joint ("subtrochanteric") or in the long part of the thigh bone ("diaphyseal")), that occur with only minimal trauma. Pet.App.12a; C.A.App.1118. In effect, it is alleged that the drug "may inhibit microdamage repair," C.A.App.1773-74, leading to small cracks in the bone (sometimes known as "stress fractures"), which could in turn progress into full-blown atypical femoral fractures. Pet.App.7a.

2. Merck and the FDA have long worked hand-in-hand to ensure that Fosamax's label reflects the best, current state of knowledge about the possible risk of atypical femoral fractures.

When Fosamax first hit the market in the mid-1990s, the FDA did not require any warning about this risk, even though Merck's scientists and others had discussed it with the agency. Pet.App.12a-13a. Since then, Merck has continually provided the FDA with the latest information about the potential connection. *E.g.*, C.A.App.1808, 1810-1929, 1938-68, 2576-31, 2696-2960 (materials submitted by Merck).

In March 2008, Merck submitted a safety update with "over 30 pages of information regarding atypical femur fractures and suppression of bone turnover," noting that "recent publications" "implicated a link between prolonged bisphosphonate therapy and atypical low-energy non-vertebral fractures." Pet.App.14a. By June 2008, the FDA told Merck and other manufacturers that it was "aware of reports regarding the occurrence of subtrochanteric hip fractures in patients using bisphosphonates" and was "concerned about this developing safety signal." *Id*. Merck then "promptly complied" with a request for any further information. *Id.*

While the FDA "was analyzing Merck's data," Merck submitted a PAS proposing to add language to the Warnings & Precautions and Adverse Reactions sections of Fosamax's label, addressing the fractures that the FDA considered a "developing safety signal." *Id.* Based on nine articles and an analysis of fractures in Fosamax users, Merck contended that although it was then "not possible" to establish that Fosamax "increases the risk" of these fractures, it

was "important to include an appropriate statement" on the label to "increase physicians' awareness of possible fractures … and allow early intervention," thereby "possibly preventing the progression to complete fracture." Pet.App.15a.

Accordingly, Merck proposed the following language for the Warnings & Precautions section:

> **Low-Energy Femoral Shaft Fracture**
>
> Low-energy fractures of the subtrochanteric and proximal femoral shaft have been reported in a small number of bisphosphonate-treated patients. Some were stress fractures (also known as insufficiency fractures) occurring in the absence of trauma. Some patients experienced prodromal pain in the affected area, often associated with imaging features of stress fracture, weeks to months before a complete fracture occurred. The number of reports of this condition is very low, and stress fractures with similar clinical features also have occurred in patients not treated with bisphosphonates. Patients with suspected stress fractures should be evaluated, including evaluation for known causes and risk factors (e.g., vitamin D deficiency, malabsorption, glucocorticoid use, previous stress fracture, lower extremity arthritis or fracture, extreme or increased exercise, diabetes mellitus, chronic alcohol abuse), and receive appropriate orthopedic care. Interruption of bisphosphonate therapy in patients with stress fractures should be considered, pending evaluation of the patient, based on individual benefit/risk assessment.

Pet.App.15a-16a. At the same time, Merck proposed adding "low-energy femoral shaft fracture" to the Adverse Reactions section of the label. Pet.App.16a.

3. Merck's submission kickstarted a back-and-forth with the FDA. In April 2009, an FDA official told Merck in a phone call that the FDA could "agree to add language in the Adverse Reactions section," but that Merck's "elevation of this issue to a precaution" was "prolonging review"; the FDA wanted to address the issue uniformly for "all bisphosphonates," but "the conflicting nature of the literature d[id] not provide a clear path forward." Pet.App.17a. Later that month, an FDA liaison sent Merck an email to the same effect: The "atypical fracture language" "could be approved" but "only" for the Adverse Reactions label, and Merck should "hold off" on changing the Warnings & Precautions label so that the agency and the industry could "decide on language" for a precaution, "*if it is warranted*." Pet.App.17a-18a (emphasis added).

In May 2009, the FDA sent Merck a formal response authored by the same doctor from the April call. Pet.App.18a. The FDA approved the changes to the Adverse Reactions section—with a slight tweak in terms (Pet.App.18a)—but rejected the rest:

> While the Division agrees that atypical and subtrochanteric fractures should be added to the **ADVERSE REACTIONS, Post-Marketing Experience** subsections of the [Fosamax] labels, your justification for the proposed **PRECAUTIONS** section language is inadequate. Identification of "stress fractures" may not be clearly related to the atypical subtrochanteric fractures that have been

> reported in the literature. Discussion of the risk factors for stress fractures is not warranted and is not adequately supported by the available literature and post-marketing adverse event reporting.

Pet.App.18a-19a.

4. Almost a year later, the FDA told the public that the science had "not shown a clear connection between bisphosphonate use and a risk of atypical subtrochanteric femur fractures." Pet.App.19a. None of the studies up to that date had concluded "even that Fosamax use was definitively associated with atypical fractures"; instead, they suggested only a "potential[]" increase in risk or that bisphosphonates "may be associated" with such fractures. Pet.App.13a. To resolve the issue, the FDA announced that it would work with an outside task force to gather more information. Pet.App.19a.

In September 2010, that task force reported that there appeared to be an "association between long-term bisphosphonate use and atypical fractures." Pet.App.20a. In October 2010, the FDA announced that while it was "'still not clear'" whether bisphosphonates *caused* these "'unusual femur fractures,'" they "'ha[d] been predominantly reported in patients taking bisphosphonates.'" Pet.App.21a. An agency official credited the task force's report for the agency's change in view, stating that the report made it "'confident' that atypical femur fractures are 'potentially more closely related to' long-term use of bisphosphonates" than the agency "'previously had evidence for.'" *Id.* (quoting C.A.App.1396). As a result, the agency declared that it would *now* be "considering label revisions." Pet.App.20a.

In October 2010, the FDA formally directed the manufacturers to revise the "Precautions" section of their labels. It admitted that it still was "not clear" whether bisphosphonates caused the fractures, as they "also occur" in those "who have not been treated with bisphosphonates." Pet.App.21a. Nonetheless, because the fractures might be related to long-term use of the drug, the FDA ordered revised labels. Pet.App.21a-22a. Those labels note that "[a]typical, low-energy, or low trauma fractures of the femoral shaft have been reported in bisphosphonate-treated patients," that patients with certain symptoms should be "evaluated to rule out a femur fracture," and that doctors should consider "[i]nterrupt[ing]" bisphosphonate use for such patients. Pet.App.22a.

C. This Litigation

1. After the FDA's action, many Fosamax users who had allegedly suffered atypical femur fractures sued Merck. Though the details varied, the plaintiffs generally alleged that Merck failed to warn about this risk. Pet.App.23a-24a. Some 1200 cases were sent to a multi-district litigation ("MDL") proceeding in the District of New Jersey. Pet.App.23a.

After holding a bellwether trial, the district court addressed the cross-cutting issue of preemption. It recognized that impossibility preemption "'is a demanding defense,'" Pet.App.168a (quoting *Levine*, 555 U.S. at 573), but held that there was "clear evidence that the FDA would not have approved a change to the Precautions section of the Fosamax label" before the September 2010 task force report. *Id*. The district court thus entered judgment for Merck on the claims of all plaintiffs who alleged injuries prior to that date. Pet.App.152a.

2. The Third Circuit vacated and remanded. It began by conceding that applying *Levine* is "not … straightforward." Pet.App.28a. Its standard—that preemption is warranted if there is "clear evidence that the FDA would not have approved a change" to the label, 555 U.S. at 571—"is cryptic and open-ended, and lower courts have struggled to make it readily administrable." Pet.App.28a. *Levine* thus left "an anomaly in our preemption jurisprudence: the number of cases applying the clear evidence standard continues to grow, yet the clear evidence standard remains undefined." Pet.App.35a.

Without seeking any guidance from the FDA, the Third Circuit addressed this anomaly by adopting two rules. *First*, it held that *Levine*'s reference to "clear evidence" imposes a heightened standard of proof: To prevail on a preemption defense, "[t]he manufacturer must prove that the FDA would have rejected a warning not simply by a preponderance of the evidence, as in most civil cases, but by 'clear evidence,'" which the court equated with the more familiar "clear and convincing evidence" test. Pet.App.36a, 37a. The defendant must prove it is "*highly probable*" that the FDA would have rejected the change. Pet.App.37a (emphasis added).

Second, the court held that the question whether the FDA would have rejected the proposed change is one for the jury, even when the historical facts are undisputed, because the question is "counterfactual." Pet.App.54a. A manufacturer thus cannot establish the preemption defense as a matter of law, pre-trial, absent a "'smoking gun' rejection letter from the FDA" that would leave a jury no choice but to find the state-law claim preempted. Pet.App.55a.

The Third Circuit found no smoking gun here. To be sure, it saw plenty of smoke. Prior to the task force report, the FDA had expressed doubt about the evidence tying bisphosphonate use to atypical femur fractures, including in rejecting Merck's proposed warning. Pet.App.59a-61a. Respondents thus had to show that the FDA spurned Merck's proposal because of unspecified semantic concerns with Merck's *wording*, not because it doubted the underlying data or need for a warning. Pet.App.61a-62a. That is highly dubious, because the FDA *is required to* "initiate discussions to reach agreement on whether the labeling for [a] drug should be modified" if it "becomes aware of new safety information." 21 U.S.C. § 355(o)(4)(A), (C). Indeed, the FDA had done just that when it tweaked Merck's proposed Adverse Reactions language.

Although the court did not "discount the force of this evidence," it concluded that a jury could still find it less than "highly probable" that the FDA would have rejected a differently phrased label change. Pet.App.62a, 63a. In its view, a juror could conclude that the FDA's rejection was indeed all about Merck's terminology (*viz.*, its use of the term "stress fractures"), with the agency refusing—in violation of its statutory duty—to offer alternate language. Pet.App.67a. Thus, "a reasonable jury applying a heightened standard of proof *could* conclude" that the FDA would have allowed the label change. *Id.*[1]

---

[1] The Third Circuit also held that the plaintiffs adequately pleaded a distinct failure-to-warn claim: that Merck should have altered the Adverse Reactions section of its label earlier than it did. Pet.App.70a. That ruling is not at issue here.

REASONS FOR GRANTING THE WRIT

In view of "[t]he importance of the pre-emption issue" to the pharmaceutical industry upon which so many rely, *Levine*, 555 U.S. at 563, this Court has granted review to correct courts' unduly narrow understandings of the doctrine, even absent any circuit conflict. *E.g.*, *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 610-11 (2011).

The Court should do the same here. The decision below illustrates the impossible position into which federal and state courts have forced brand-name drug manufacturers. Even if they cooperate with the FDA, share their safety data, and follow the agency's direction to "hold off" on adding label warnings, they *still* cannot escape costly, burdensome tort litigation complaining about those labels. Plaintiffs' lawyers, of course, can *always* dream up some "hypothetical" reason why the FDA might have rejected a proposed warning—and under the decision below, that suffices to reach a lay jury, which will be asked (case-by-case) to guess as to the reasons why the federal regulator blocked the manufacturer's state-law compliance.

This approach misunderstands *Levine*, conflicts with this Court's post-*Levine* precedents in *Mensing* and *Bartlett*, and threatens serious disruption to the cooperative relationship between the FDA and drug manufacturers. A jury's speculation about *why* the FDA blocked a manufacturer's effort to comply with state law cannot possibly defeat federal preemption. This petition is the ideal vehicle in which to lay down a legal marker for when a failure-to-warn claim *is* properly preempted in the branded drug context, and thus revive the preemption defense that courts since *Levine* have narrowed virtually out of existence.

I. THE LOWER COURTS HAVE MADE IT IMPOSSIBLE FOR BRAND-NAME DRUG MANUFACTURERS TO ESTABLISH PREEMPTION.

This Court warned in *Mensing* that preemption cannot be rendered "all but meaningless," 564 U.S. at 621, by forcing drug manufacturers to prove "counterfactual conduct of the FDA," *id.* at 623 (plurality op.). But the lower courts have defied that directive. In applying *Levine* to brand-name drugs, they have held the preemption defense out-of-reach by speculating as to counterfactuals, even when the record is clear that the FDA was aware of the risk and working with the manufacturer to address it. The decision below is the high-water mark of this trend, ruling that even though the FDA had rejected an on-point warning and cited inadequacies in the existing data, a jury could impose liability by "speculat[ing] about hypothetical scenarios" under a novel, heightened burden of proof. Pet.App.67a, 68a. All of this is quite wrong. No evidence of preemption could be more "clear" than the FDA's *actual rejection* of the warning required under state law.

A. States May Impose Liability for Failure To Warn Only If the FDA Would Have Allowed the Label Change.

This Court's leading decision on preemption for brand-name drug manufacturers is *Levine*, decided almost a decade ago. In that case, the majority held that the FDA's mere approval of a drug label did not, by itself, preempt state-law failure-to-warn liability. Rather, to show "impossibility" preemption, the drug manufacturer must show that it was *forbidden* by federal law from providing the additional warning—*i.e.*, that the FDA would have rejected it.

In *Levine*, the plaintiff successfully argued to the Vermont state courts that the label for Wyeth's drug Phenergan should have more strongly advised doctors to administer the drug indirectly through an IV-solution (the "IV-drip" method) rather than directly into the vein (the "IV-push" method). 555 U.S. at 560-63. On certiorari, this Court confronted the manufacturer's categorical contention that "the FDA's approvals [to Phenergan's labeling] provide[d] Wyeth with a complete defense" to the tort claims. *Id.* at 558. In Wyeth's view, "it would have been impossible for it to comply with the state-law duty to modify Phenergan's labeling without violating federal law," *id.* at 563, because it had no power to change its label without the FDA's permission.

The Court agreed in principle that, had federal law prevented Wyeth from updating its label, then Levine's failure-to-warn claim would have been preempted. *Id.* at 572. But the Court disagreed with that premise. The majority explained that, under the federal scheme, it is the manufacturer's duty to ensure that "its warnings remain adequate as long as the drug is on the market." *Id.* at 571. Through the CBE regulation, manufacturers may strengthen their existing warnings, even without the FDA's prior permission, provided they have good reason to do so. *See id.* at 569-71. Accordingly, the "mere fact that the FDA approved Phenergan's label" did not alone make compliance impossible, and so did not warrant preemption. *Id.* at 573; *see also id.* at 593 (Thomas, J., concurring in judgment) ("nothing in the … regulatory scheme necessarily insulates Wyeth from liability under state law simply because the FDA has approved a particular label").

"Of course," the majority went on to admit, "the FDA retains authority to reject labeling changes," even when made "pursuant to the CBE regulation," "just as it retains such authority in reviewing all supplemental applications." *Id.* at 571. And if the FDA would have *rejected* the relevant change, that would certainly trigger preemption. *See id.* "But absent clear evidence that the FDA would not have approved a change to Phenergan's label, we will not conclude that it was impossible for Wyeth to comply with both federal and state requirements." *Id.*

Wyeth "offered no such evidence." *Id.* at 572. *First*, Wyeth did "not argue that it supplied the FDA with an evaluation or analysis" about "the specific dangers posed by [IV-push]." *Id.* at 572-73. *Second*, the record showed that neither the FDA nor Wyeth "gave more than passing attention to the issue." *Id.* at 572. *Third*, Wyeth "d[id] not argue that it attempted to give the kind of warning required by the Vermont jury," or that it had been "prohibited from doing so by the FDA." *Id. Finally*, the Vermont Supreme Court "concluded that the FDA had not made an affirmative decision to preserve [IV-push]" or against "strengthening [Wyeth's] warning about IV-push." *Id.* Given this utter paucity of evidence, the majority could not "credit Wyeth's contention that the FDA would have prevented it from adding a stronger warning." *Id.*

The general rule that emerges from *Wyeth* is, in theory, administrable: If the FDA would have allowed a stronger warning, then states may impose liability for the manufacturer's failure to provide one. But if the FDA would have rejected such a change, the failure-to-warn claim is preempted. *See id.*

B. In the Absence of Further Guidance, Courts Have Gutted the Preemption Defense That *Levine* Recognized.

In practice, however, *Levine*'s line has proved elusive. This Court need not take Merck's word for it. As the court below put it, *Levine* did not "explain how courts should apply" its "cryptic," "open-ended" standard, and "lower courts have struggled to make it readily administrable." Pet.App.28a, 33a. Other courts have also observed that *Levine* did not "define clear evidence," *Reckis v. Johnson & Johnson*, 28 N.E.3d 445, 457 (Mass. 2015), or "clarify what constitutes" it, *Mason v. SmithKline Beecham Corp.*, 596 F.3d 387, 391 (7th Cir. 2010). *Levine* did not indicate "the level of proof required" to demonstrate preemption, *Dobbs v. Wyeth Pharm.*, 797 F. Supp. 2d 1264, 1270 (W.D. Okla. 2011), and so "lower courts are left to determine what satisfies this 'clear evidence' standard in each case," *Schilf v. Eli Lilly & Co.*, 2010 WL 3909909, at *4 (D.S.D. Sept. 30, 2010).

In short, while *Levine* was a good illustration of a case in which the manufacturer did *not* prove that the FDA would have rejected a labeling change, it gave the lower courts little help in determining when a drug manufacturer *has* proven that proposition. Without that guidance, and in the absence of an exemplar case from which to analogize, the state and lower federal courts have gradually shifted the line further and further in tort plaintiffs' favor, against preemption and expanding liability. Left to their devices, the courts have made proving impossibility preemption under *Levine* next to impossible. The Third Circuit's decision below epitomizes that shift, rendering the defense truly academic.

1. Procedurally, courts have interpreted the *Levine* majority's offhand, solitary reference to "clear evidence," 555 U.S. at 572, as imposing a uniquely high burden of proof, beyond the difficulty inherent in proving the impossibility of complying with both state and federal law.

The Seventh Circuit, for example, read *Levine* to limit preemption to cases in which the manufacturer "met the stringent standard of proving that there was *clear evidence* the FDA would have rejected the proposed change," *Mason*, 596 F.3d at 391, and held that the manufacturer had not made the "extensive showing required by *Levine*" because it did not "meet its burden of demonstrating by *clear evidence*" that the FDA would have rejected the proposed label, *id.* at 396 (emphasis added). Massachusetts' Supreme Judicial Court followed, setting out "*clear evidence*" as the required standard, *Reckis*, 28 N.E.3d at 457; referring to it *thirteen times*; and suggesting that it requires unusually strong proof of a virtually irrebuttable character, *see, e.g.*, *id.* at 460 n.29; *see also Dobbs v. Wyeth Pharm.*, 606 F.3d 1269, 1270 (10th Cir. 2010) (mem.) (remanding for application of *Levine*'s "new 'clear evidence' standard").

Substantively, these courts have effectively eliminated *Levine*'s preemption defense, requiring a manufacturer to prove that the FDA actually denied a request for a virtually identical label—*and* that it did so because it disagreed with the proposed label *as a matter of policy*, not for some other reason—to obtain judgment as a matter of law. Since the FDA does not always spell out its reasoning, this makes it all but impossible to avoid a trial in which the jury is left to speculate about the agency's thought process.

Reckis proves the point. There, the plaintiffs claimed that ibuprofen's label should have warned them—by name or by degree of dangerousness—about the risk of the "life-threatening disease" of toxic epidermal necrolysis ("TEN") and its more serious variant, Stevens-Johnson Syndrome ("SJS"). 28 N.E.3d at 454. However, a subsequent citizen's petition (which allows citizens to ask the FDA to strengthen a drug's label, *see* 21 C.F.R. § 10.25(a)) asked the FDA to warn that ibuprofen could cause "serious skin reactions" that "may progress to more serious and potentially life-threatening diseases, including … [SJS] and [TEN]." 28 N.E.3d at 453. In response, the FDA ordered the label revised to warn of "severe skin reactions," but not to mention the life-threatening nature of those reactions or to identify SJS or TEN by name, noting that consumers who purchase ibuprofen off the shelf are unlikely to recognize those names. *Id.* at 453.

Nonetheless, the Supreme Judicial Court held that the plaintiffs' claims were not preempted insofar as they sought a warning of life-threatening risks. *See id.* at 456-60. Even though the citizen petition had expressly requested such a warning to no avail, the court hypothesized that the agency's refusal "could well have been merely a byproduct of its rejection of these requested warnings" because they mentioned the conditions by name. *Id.* at 459. That is, perhaps the FDA *would have* approved a warning that noted the risk of life-threatening reactions but omitted their names. Because the agency "provided no reasoning" for rejecting the life-threatening aspect of the warnings, it would be "speculative" to rely on its rejection to find preclusion. *Id.*

Other decisions have been similarly dismissive. In *Mason*, for example, the Seventh Circuit found no preemption even though the FDA thrice rejected calls to add risk of suicide to the label of another antidepressant from the same chemical category, and even though the FDA publicly stated that there was no evidence of increased suicide risk in adults three months *after* the 23-year-old victim took the medicine. 596 F.3d at 394-95. And in *In re Prempro Products Liability Litigation*, the Eighth Circuit spent all of a sentence rejecting a claim that the FDA would have rejected stronger warnings. 586 F.3d 547, 563 (8th Cir. 2009); *see Mason*, 596 F.3d at 391 n.1 (noting that *Prempro* rejected preemption "rather summarily"); *see also, e.g.*, *Gurley v. Janssen Pharm., Inc.*, 113 A.3d 283, 291-92 (Pa. Super. Ct. 2015) (no preemption because the proposed but FDA-rejected warning of "possible birth defects" mentioned as an example a different congenital malformation than one at issue); *Hutto v. McNeil-PPC, Inc.*, 79 So. 3d 1199, 1210 (La. Ct. App. 2011) (no preemption because the manufacturer "did not attempt to have all the warnings" the plaintiffs requested "included on its Infants' Tylenol® label").

Indeed, even the few cases in which courts *have* found preemption illustrate the heightened barriers courts have erected around that defense. In *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1095 (10th Cir. 2017), the plaintiffs asserted that the victim's parents should have been warned about the risk of birth defects when taking the fertility drug Clomid *prior* to pregnancy, not just *during* pregnancy. The Tenth Circuit assumed that, to prevail, Aventis had to show that "'no reasonable juror could conclude that it

[was] anything less than highly probable that the FDA would have rejected' the proposed label" in order for the manufacturer to prevail at summary judgment. *Id.* at 1099 (quoting Pet.App.59a). Aventis met that standard, but only because a prior citizen petition asking the FDA to alter Clomid's label had "presented arguments [that were] *virtually identical* to the Cervenys' [arguments]," and the FDA denied it *and* stated expressly that "the scientific literature did not justify ordering changes to the labeling that warn … beyond those presently included." *Id.* at 1101. In other words, it is still possible to prevail on a preemption defense, but only if the FDA rejected a near-verbatim request *and* it expressly did so because it disagreed with that request as a matter of policy or science.

2. The decision below represents the high-water mark of lower courts' efforts to gut manufacturers' preemption defense, building on almost a decade of plaintiff-friendly caselaw misconstruing *Levine*.

Procedurally, the Third Circuit formalized the heightened evidentiary burden largely left implicit in cases like *Reckis*. The court squarely held that drug manufacturers "must prove that the FDA would have rejected a warning not simply by a preponderance of the evidence, as in most civil cases, but by 'clear evidence,'" a standard "synonymous" with the clear-and-convincing-evidence standard that the court called a "well-recognized intermediate standard of proof." Pet.App.35a-37a. The court defined "clear and convincing" evidence as evidence "'indicating that the thing to be proved is *highly probable* or *reasonably certain*.'" Pet.App.37a (emphases added) (quoting *Black's Law Dictionary* 674 (10th ed. 2009)).

The court further held that this standard must be applied by a jury, not by a judge. In its view, the *Levine* test requires a "counterfactual" analysis, "based on correspondence, agency statements, contemporaneous medical literature, the requirements of the CBE regulation, and whatever intuitions the factfinder may have about administrative inertia and agency decision-making processes." Pet.App.54a. The court admitted that this was a "complex" task, but concluded that "it does not require any special legal competence or training" and therefore "the question of whether the FDA would have approved a plaintiff's proposed warning is a question of fact for the jury." *Id.*

On that approach, a drug manufacturer is only entitled to judgment as a matter of law if *no* "*reasonable jury* could find it less than *highly probable* that the FDA would have rejected Plaintiffs' proposed warning." Pet.App.56a-57a (emphases added). As a practical matter, this leaves virtually no avenue for pre-trial relief, even if all the historical facts are undisputed. Absent a comprehensive, highly detailed rejection letter from the FDA, a plaintiff's lawyer could always chalk the agency's decision up to some idiosyncratic defect that the drug manufacturer could have remedied had it only tried harder or strung words together differently. And a jury, facing a sympathetic plaintiff, would not need much urging to reach such a finding, especially with the thumb that the "clear and convincing" standard places on the scales. This approach thus replaces the court, acting as gatekeeper and applying a rule of law, with a lay jury, invited to speculate case-by-case about why an expert federal agency did what it did.

The Third Circuit's heightened evidentiary standard—and its determination about the identity of the factfinder—bore fruit in its substantive result. The court acknowledged the myriad indications that the FDA would have rejected *any* additional warning about the connection between Fosamax and atypical femoral fractures before September 2010: Merck's submission of relevant data and proposed warning; the FDA's rejection and its statements asking Merck to "hold off" while it evaluated whether any warning was "warranted"; the agency's expressions of doubt about the strength of the data; and its convening of a task force, only *after* whose report the FDA ordered a label revision. Pet.App.59a-61a. All of these facts were "undisputed." *Id.*; *see supra* pp. 7-13.

The court also acknowledged the fundamentally bizarre claim at the heart of respondents' case. There was no dispute that the FDA had rejected Merck's attempt to strengthen its label. If it had done so because the agency did not believe that *any* warning was needed, then respondents' claims were plainly preempted. Their claims therefore hinged on the notion that the FDA had concluded that a stronger warning was needed regarding atypical femur fractures—in other words, that Merck had done the right thing by going to the FDA and seeking leave to amend its warning—but that the agency had inexplicably disregarded its statutory obligations and rejected Merck's supposedly deficient label outright based on a "language quibble" (Pet.App.61a), rather than work with Merck on a warning that would properly warn the public of the risk that all parties recognized (just as the agency had done for Merck's proposed Adverse Reactions label change).

Despite all of this, the court held that Merck could not satisfy the court's heightened burden of proof. It lacked the "smoking gun" needed to prevail as a matter of law because "a reasonable juror, looking at all the evidence and trying to reconstruct a hypothetical event, could conclude that it is less than highly probable that the FDA would have rejected the change," had it been "properly worded." Pet.App.56a, 62a-63a. In other words, even though the FDA *did* reject Merck's warning, the jury could conjecture about the FDA's reasoning and thereby conclude that the agency *would not have* rejected the warning had Merck improved its draftsmanship.

The upshot is this: Unless a plaintiff demands a warning nearly identical to one the FDA has already rejected—and rejected expressly on scientific rather than semantic or ambiguous grounds—state failure-to-warn claims are not preempted, no matter how hard a manufacturer tries to meet its obligations.

C. The Third Circuit's Decision Is Wrong.

On both procedure and substance, the decision below is flatly mistaken.

1. Take first its clear-and-convincing-evidence standard. In the past few years, this Court has twice reiterated that the preponderance of the evidence standard "is the standard generally applicable in civil actions, because it allows both parties to share the risk of error in roughly equal fashion." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1758 (2014); *see also id.* (entitlement to fees in patent cases need not be proven by clear and convincing evidence); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016) (misconduct for

purposes of enhanced patent damages need not be proven by clear and convincing evidence). In keeping with this strong default rule, this Court has applied a higher standard in civil litigation only where Congress has specified one, *see, e.g.*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 102-06 (2011), where courts have traditionally applied one, *see, e.g.*, *Radio Corp. of Am. v. Radio Eng'g Labs., Inc.*, 293 U.S. 1, 7-9 (1934), or where the Constitution demands one, *see, e.g.*, *Addington v. Texas*, 441 U.S. 418 (1979).

Whether the FDA would have rejected a label change for purposes of a preemption defense falls into none of these categories. Congress has not spoken to the issue; the Third Circuit identified no historical practice requiring heightened proof; and the Constitution does not demand any. While the parties "may be interested intensely in [this] civil dispute over money damages," it is not unique or important enough to trigger heightened standards of proof. *Santosky v. Kramer*, 455 U.S. 745, 755 (1982).

The Third Circuit did not address this wall of countervailing authority. Instead, it dissected the single sentence on this topic in *Levine*, concluding that in context "[t]he term 'clear evidence' [must] … specif[y] how *difficult* it will be for the manufacturer to convince the factfinder." Pet.App.35a. But "the language of a[Supreme Court] opinion is not always to be parsed as though we were dealing with the language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979). This Court would not upend the ordinary rules of civil litigation through a single sentence, especially in a case that did not present the issue because Wyeth offered "*no* such evidence." 555 U.S. at 572 (emphasis added). Rather, the Court was

simply restating the principle that preemption requires *actual* rather than *hypothetical* conflict. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000). As *Geier* thus instructed, "a court should not find preemption too readily in the absence of *clear evidence of a conflict*." *Id.* at 885 (emphasis added). *Levine* was just invoking that lesson, not creating a unique standard of proof from whole cloth.

The Third Circuit also reasoned that the Court has often used "clear evidence" to refer to a standard of proof. Pet.App.36a. However, those cases prove only that, when the Court *does* impose a heightened standard, it does so clearly and for good reason. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (requiring "particularly demanding" proof of selective prosecution "[b]ecause such claims invade a special province of the Executive"); *Oriel v. Russell*, 278 U.S. 358, 362-63 (1929) (calling for "clear and convincing evidence" for orders to turn over property in bankruptcy because "[t]he proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed"); *Microsoft*, 564 U.S. at 101 (adopting a heightened standard because Congress used the term "presumed valid," which had a "settled meaning in the common law" stretching back centuries). *Levine*'s stray use of "clear evidence," without any explanation of the compelling need for a departure from the ordinary rules, bears no resemblance to these cases.

Finally, the Third Circuit reasoned that its heightened standard flowed from the presumption against preemption. Pet.App.37a. This Court has explained, however, that it is "unusual" to "treat a presumption as alone establishing the governing

standard of proof"; presumptions generally establish who bears the burdens of production and persuasion. *Microsoft*, 564 U.S. at 103. Contrary to the Third Circuit's fears, this view still leaves preemption a "demanding defense," Pet.App.37a (quoting *Levine*, 555 U.S. at 573); manufacturers must, after all, show it was *impossible*, not merely difficult, to comply with both state and federal law.

2. The Third Circuit went further astray when it came to application of *Levine*'s substantive rule. There could hardly be clearer evidence that the FDA *would have* rejected a warning than the undisputed fact that the FDA *did* reject a warning. Yet even that is not sufficient for the court below, which would ask a *jury* to psychoanalyze *why* the agency did so, and reject preemption based on such conjecture.

In *Levine*, the majority pointed to a series of facts that precluded Wyeth from demonstrating that the FDA would have rejected a stronger warning: Wyeth had not "supplied the FDA" with data; neither Wyeth nor the FDA "gave more than passing attention to the issue"; Wyeth had not "attempted" to give a stronger warning; and the FDA had not made "an affirmative decision" to reject one. 555 U.S. at 572-73. Although *Levine* had no occasion to spell out which combinations of these facts would suffice, here *all of them* are *undisputed*. Pet.App.46a n.122. Merck raised the issue of atypical femoral fractures with the FDA, provided the agency with all available data, proposed a relevant warning, and was told to "hold off" because its justification was "inadequate." There is thus no factual dispute for a jury to resolve. If the factors *Levine* mentioned are relevant, then there *must* be preemption here, as a matter of law.

The court reasoned, however, that a jury could find that FDA rejected Merck's proposed warning because it objected to some of its particular *language* and not because it decided—as a policy matter—that a warning was inappropriate. Pet.App.64a-66a. Thus, a the FDA may have approved a *differently worded* warning compliant with state law. *Id.*

But this sort of conjecture by an inexpert lay jury cannot possibly defeat federal preemption. As this Court's post-*Levine* decisions make clear, preemption is not overcome by an attenuated chain of remote possibilities by which the defendant, hypothetically, could have reconciled conflicting state and federal duties. The generic drug manufacturers in *Mensing*, for example, could not independently revise their own labels, but could have lobbied the FDA to work with the name-brand manufacturer on a change. 564 U.S. at 616. Even if federal law *required* them to do so, the Court held that state failure-to-warn claims were preempted: It was "certainly possible that, had the [generic] [m]anufacturers asked the FDA for help, they might have eventually been able to strengthen their warning." *Id.* at 620. But such "conjecture[]" does not "suffice" to defeat preemption; otherwise, conflict preemption would be "all but meaningless." *Id.* at 621; *see also id.* at 623 (plurality op.) ("consider[ing] … the contingencies inherent in these cases" would be "speculati[ve]" and inappropriate). *Bartlett* recognized a similar point when it held that some possibilities of reconciling conflicting state and federal obligations—such as "simply leaving the market"—are too extreme or hypothetical to defeat the preemption defense. 133 S. Ct. at 2478.

The Third Circuit's reasoning cannot be squared with these cases. It is "certainly possible" that the FDA's rejection of a warning proposed by a brand-name manufacturer could have been based on some non-scientific objection to the warning's terminology. And so it is also "certainly possible" that the FDA might, hypothetically, have approved a warning that used different verbiage. But as *Mensing* teaches, "certainly possible" does not defeat preemption. 564 U.S. at 620. Playing this "what if" game—in this context, by nitpicking the manufacturer's proposed warning in an effort to imagine an alternative basis for its rejection by the FDA—simply takes the notion of impossibility too far, rendering preemption "all but meaningless." *Id.* at 621. And asking a lay jury to conjecture case-by-case about "counterfactual[s]" like these (Pet.App.63a) offends the Supremacy Clause. If it is undisputed that the manufacturer gave the FDA the relevant data and proposed changing its label, that should suffice—as a matter of law—to preempt state tort liability for failure to warn.

II. THIS IS AN IDEAL VEHICLE TO CLARIFY THE LEGAL SCOPE OF A CRITICAL DEFENSE IN AN IMPORTANT AREA OF LAW.

This Court should step in to correct the errors discussed above, because of the importance of the preemption defense to the pharmaceutical industry, and because the approach reflected by the decision below threatens the cooperative regulatory process between the FDA and drug manufacturers. And this is an ideal vehicle for doing so, because the facts here would allow this case to be an exemplar to the courts of when failure-to-warn claims *are* preempted—a counterexample to *Levine*, so to speak.

A. An Unduly Narrow Preemption Defense Threatens the Pharmaceutical Industry and the FDA's Regulatory Role.

When it comes to policing the boundary between state tort law and federal regulation of prescription drugs, this Court has recognized the overwhelming importance of getting it right. In its recent cases in this area, it has generally granted review because of the "importance of the pre-emption issue," *Levine*, 555 U.S. at 563—and sometimes based on the FDA's request—not because of disagreement amongst lower courts, *e.g.*, Pet. for a Writ of Cert. in *Mensing*, 2010 WL 638478, at *19-*25; Pet. for a Writ of Cert. in *Levine*, 2007 WL 776723, at *13-*15.

This is for good reason. Each year, tens of thousands of plaintiffs sue drug companies in tort; indeed, this MDL alone embraces over one thousand. But, extended too far, state tort law undermines the FDA's expert judgment by substituting regulation by one lay jury after another (and potentially in conflict with one another). *See Levine*, 555 U.S. at 626 (Alito, J., dissenting) (warning against allowing "juries in all 50 States … to contradict the FDA's expert determinations"). After all, "juries are ill equipped to perform the FDA's cost-benefit-balancing function," and only the expert agency "has the benefit of the long view." *Id.* Left unchecked, moreover, state tort law risks "whipsawing the medical community," *id.*, and thus jeopardizes access to safe and affordable medicines by "rais[ing] prices to the point where those who are sick are unable to obtain the drugs they need," *id.* at 582 (Breyer, J., concurring). Both the regulatory scheme and the public interest suffer when the scale is tilted too heavily toward plaintiffs.

The decision below tilts those scales in extreme fashion, and threatens those important interests. To start, the Third Circuit's approach inevitably will increase drug prices, because it puts manufacturers in an impossible spot: Even if they disclose every potential new risk to the FDA, and even if they seek to change their labels to account for those risks, they still face liability at the hands of a jury unless the FDA gives them definitive proof that it would have rejected every conceivable proposed change as a matter of policy. Most often, however, there is no such "smoking gun."

The Third Circuit's decision also undermines the FDA's regulatory authority. The court's clear-and-convincing-evidence standard means that even where it is more likely than not that the FDA *would have rejected* the plaintiff's demanded label change, the manufacturer cannot invoke preemption. By definition, then, the Third Circuit's test applies where the FDA would have made one policy decision, but a sympathetic jury evaluating an isolated case makes another, thus transferring regulatory power from the FDA to inexpert juries and their potentially conflicting findings. No one could think that this outcome embodies wise regulatory policy.

In addition, the decision below threatens to swamp the FDA and disrupt its relationship with the industry. If any hypothetical alternative, non-scientific basis for the agency's rejection of a proposed warning suffices to defeat preemption, then manufacturers will have no choice but to inundate the agency with alternative proposals, requests for clarification, and other attempts to smoke out its precise grounds. This Court has warned, however,

against liability rules that give regulated parties "an incentive to submit a deluge of information that the [FDA] neither wants nor needs," to the detriment of the agency and the public it protects. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001).

In short, the decision below will hurt not only the pharmaceutical industry, but the patients it serves and the agency that regulates its products (which has thus far not been asked to weigh in).

B. This Case Presents an Ideal Vehicle for Defining *Levine*'s Parameters.

As explained above, in the absence of guidance illustrating the kinds of facts that prove preemption under *Levine*, courts have construed the defense very narrowly, heaping up obstacles to manufacturers wishing to show that the FDA would have rejected the plaintiff's demanded label. *See supra* Part I.B.

This case presents an opportunity to turn the tide. The Third Circuit made clear that its decision turned on its interpretation of *Levine*'s statement about "clear evidence." It emphasized that the question before it was "not just whether a reasonable juror could find that the FDA would have approved [respondents'] proposed warning," but "whether a reasonable juror could find that it is *highly probable* that the FDA would have rejected the warning." Pet.App.58a (emphasis added). And it relied on that heightened standard to reverse the district court's judgment: Because a reasonable jury could "at least" conclude that it was not "highly probable" that the FDA would have "rejected [respondents'] proposed warning," summary judgment was inappropriate. Pet.App.63a; *see also, e.g.*, Pet.App.58a, 59a.

More importantly, this case would provide the Court with an excellent vehicle for putting another stake in the ground, across the field from *Levine*'s—this time to illustrate facts that *prove* preemption and to fashion an administrable rule of law that *protects* the Supremacy Clause. Merck presented compelling evidence on every front where Wyeth fell short. *See supra* p. 28. Indeed, the Third Circuit itself admitted that, even under its own heightened standard, this case was close. It did not "discount the force" of Merck's evidence about the FDA's actions, or doubt its "potential to sway a jury." Pet.App.62a. But because it demanded a "'smoking gun' rejection letter," and authorized the jury to speculate about the *basis* for the FDA's undisputed refusal to allow Merck to comply with state law, it refused summary judgment. Pet.App.55a, 67a.

If preemption does not exist as a matter of law here, it will rarely be found to exist anywhere. This Court should confirm that it does, and correct the ill-conceived course set by other courts post-*Levine*.

CONCLUSION

The petition should be granted.

AUGUST 22, 2017 Respectfully submitted,

SHAY DVORETZKY
Counsel of Record
YAAKOV M. ROTH
JEFFREY R. JOHNSON
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Counsel for Petitioner