No. 07-562

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,
v.
STEPHANIE GOOD, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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"Respondents do not dispute that the issue raised by this case"—the proper construction of the express preemption provision of the Federal Cigarette Labeling and Advertising Act—"is important." Opp. 31. And they acknowledge that, in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), the Fifth Circuit "found that claims similar to those asserted here were expressly preempted by [the Labeling Act], and the First Circuit disagreed with that conclusion in this case." Opp. 24.

Respondents nevertheless maintain that there is no need for this Court's review of this "important" question of federal law on which the First and Fifth Circuits concededly "disagreed," because (according to respondents) that disagreement had "nothing to do with the doctrine of federal preemption" but instead is attributable solely to "fundamentally different evidentiary records" before the two courts. Opp. 24. Respondents are wrong: The divergent preemption conclusions reached by the First and Fifth Circuits had absolutely nothing to do with purported factual differences between the two cases. Rather, the flatly inconsistent outcomes are attributable exclusively to differing legal understandings of the Labeling Act preemption framework articulated by a plurality of this Court in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992)—an issue that, as several Members of this Court predicted at the time, has generated widespread confusion among lower courts for more than a decade. *See id.* at 544 (opinion of Blackmun, J.); *id.* at 556 (opinion of Scalia, J.).

While it is undisputed that the Labeling Act preempts *some* state-law claims, neither a majority of

this Court in *Cipollone* nor those lower courts that have attempted to implement the *Cipollone* plurality's preemption framework have been able to agree on exactly *which* claims are preempted. This Court's review is necessary to provide an authoritative resolution to this sharply disputed issue of federal preemption law, which has a direct bearing on the outcome of hundreds of pending cases in both the "lights" and broader smoking-and-health contexts.

ARGUMENT

In *Brown*, the Fifth Circuit held that state-law consumer fraud claims challenging the use of tar and nicotine descriptors constitute "'implied misrepresentation'" neutralization claims preempted by the Labeling Act as construed by the plurality in *Cipollone*—rather than express misrepresentation claims, which, according to the Fifth Circuit, the Labeling Act does not preempt. 479 F.3d at 392, 395. The Fifth Circuit explained that, because "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the" testing methodology developed by the FTC, descriptors "cannot be inherently deceptive" and are, at most, impliedly misleading. *Id.* at 392.

In the decision below, the First Circuit explicitly rejected the Fifth Circuit's *legal* dichotomy between express and implied misrepresentations, reasoning that "[t]he 'express' or 'implied' nature of an allegedly fraudulent misrepresentation . . . does not determine whether it is preempted by the [Labeling Act] under the *Cipollone* approach." Pet. App. 26a. The First Circuit continued that "we do not see anything in *Cipollone*'s discussion of warning neutralization claims that equates them with 'implied misrepresentation' claims as *Brown* does." *Id.* at 32a; *see also id.*

at 32a n.18 ("reiterat[ing]" that "*Cipollone* does not differentiate between 'express' and 'implied' misrepresentations").

Contrary to respondents' contention, the details of the FTC regulatory history discussed at length in the opposition brief (at 4-14) have nothing to do with the express preemption question on which the First and Fifth Circuits reached diametrically opposite conclusions. That question is whether a state-law consumer fraud claim challenging the use of tar and nicotine descriptors constitutes a state-law "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes," and is therefore preempted by the Labeling Act. 15 U.S.C. § 1334(b). It is utterly irrelevant to the resolution of *that* question whether the FTC has approved the use of tar and nicotine descriptors, prohibited their use, or expressed no opinion on the matter. For that reason, respondents' suggestion that "the apparent division in the courts below resulted only from [their] differing assessments of FTC policy rather than a difference in the courts' views of the preemptive scope of the [Labeling Act]" (Opp. 30) is just plain wrong. Indeed, both *Brown* and the decision below were decided on summary judgment based on undisputed factual records, and respondents have not identified any factual issue that would preclude entry of summary judgment in petitioners' favor were this Court to agree with the Fifth Circuit's legal interpretation of the Labeling Act's preemption provision.

Confronted with state-law consumer fraud claims indistinguishable from those asserted by respondents, the Fifth Circuit in *Brown* explained that, although "claims based on 'fraud by intentional misstatement' are not pre-empted" because they are

based on nothing more than a duty not to deceive, rather than "based on smoking and health" (479 F.3d at 391), "the Labeling Act pre-empts . . . 'implied misrepresentation' claims, which arise from statements or imagery in marketing that misleadingly downplay the dangers of smoking." *Id.* at 392 (citing *Cipollone*, 505 U.S. at 527). The Fifth Circuit held that state-law claims challenging the use of tar and nicotine descriptors are "based on smoking and health"—and are therefore expressly preempted by the Labeling Act—because the statement that Marlboro Lights and Cambridge Lights are lower in tar and nicotine than "regular" cigarettes is indisputably accurate under at least one methodology for measuring tar and nicotine yields (the FTC Method). *Ibid.* Because such statements are not inherently false, the Fifth Circuit reasoned that, under the *Cipollone* plurality, the plaintiffs' fraud claims challenging those statements were not "based on a duty not to deceive." *Ibid.*

The First Circuit, in contrast, explicitly "disagree[d] . . . with *Brown*'s view that the [Labeling Act] preempts fraud theories arising out of 'light' and 'lower tar and nicotine' because those statements are not 'inherently deceptive or untrue.'" Pet. App. 35a (quoting *Brown*, 479 F.3d at 392). In rejecting *Brown*'s preemption analysis and holding that respondents' claims are not preempted by the Labeling Act, the First Circuit did not—as respondents contend—engage in "a careful examination of the evidentiary record" (Opp. 2) or adopt a "differing assessment[ ] of FTC policy." *Id.* at 30. Indeed, respondents do not—because they cannot—point to a single statement in the First Circuit's discussion of express preemption (Pet. App. 15a-37a) disagreeing with the *facts* recited by the Fifth Circuit. What the

First Circuit did disagree with, however, was the Fifth Circuit's *legal* conclusion that, because "'[t]he terms 'light' and 'Lowered Tar and Nicotine' cannot . . . be inherently deceptive or untrue,'" state-law fraud claims challenging such statements cannot, under the *Cipollone* plurality, be based on "the duty not to deceive." *Id.* at 34a (quoting *Brown*, 479 F.3d at 392) (alterations in original).

Respondents' contention that the conflicting decisions reached by the First and Fifth Circuits "did not stem from any differences regarding what the law requires" (Opp. 24) is flatly refuted by the decision below. In response to the Fifth Circuit's preemption analysis, the First Circuit stated:

> We think [the *Brown*] approach puts the cart before the horse. The assertion that Marlboro Lights and Cambridge Lights rate lower in tar and nicotine than their full-flavored cousins according to the Cambridge Filter Method may ultimately affect whether the plaintiffs can show that the challenged statements are false. We do not resolve the issue, however, because . . . we do not believe that the issue has any relevance in deciding the express preemption question. . . . [W]e do not see how the statements' falsity—or, for that matter, their materiality, or whether Philip Morris made them with the requisite scienter—bears on the preemption analysis. Such issues go to the merits of the fraud claim, not to the threshold question of preemption. We disagree, then, with *Brown*'s view that the [Labeling Act] preempts fraud theories arising out of "light" and "lower tar and nicotine" because those statements are not "inherently deceptive or untrue." 479 F.3d at 392.

Pet. App. 34a-35a (alterations, citations, and internal quotation marks omitted).

The First Circuit's express and acknowledged "disagree[ment]" with the Fifth Circuit is a direct result of the two courts' divergent interpretations of the preemption framework endorsed by a plurality of this Court in *Cipollone*—a matter that has been a source of confusion and frustration for lower courts for the past decade and that urgently requires clarification from this Court. *See*, *e.g.*, *Pearson* v. *Philip Morris Inc.*, 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 19) ("the *Cipollone* rubric [is] extremely difficult to apply"); *see also* Pet. 18.

Respondents are simply wrong when they attempt to downplay the lower courts' confusion about the scope of Labeling Act preemption by suggesting that, since *Cipollone*, "all courts, including the Fifth Circuit in *Brown*, have uniformly held that claims of fraudulent misrepresentation of fact are not preempted by the express preemption provision of [the Labeling Act]." Opp. 24. That assertion not only distorts *Brown*'s holding that fraudulent misrepresentation claims *are* preempted when they are based on statements that are not inherently false (479 F.3d at 392), but it also disregards other decisions recognizing that the Labeling Act does preempt some categories of fraudulent misrepresentation claims. *See*, *e.g.*, *Glassner* v. *R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 349 (6th Cir. 2000) ("claims of fraud based upon fraudulent misrepresentation . . . are preempted to the extent that they are predicated on a duty to issue additional or clearer warnings through advertising and promotion"); *see also* Pet. 18.

No more persuasive is respondents' contention that the First Circuit's approach is faithful to the

analysis of the *Cipollone* plurality because, according to respondents, the plurality's "analysis looks to the underlying or predicate state-law duty to determine whether it is generally applicable or whether it targets only the cigarette companies." Opp. 17 n.7. Respondents' proposed standard cannot account for the fact that *all* of the state-law claims asserted by the plaintiff in *Cipollone*—failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to misrepresent or conceal material facts—were based on "predicate state-law dut[ies]" that were "generally applicable" to all categories of defendants and did not "target[ ] only the cigarette companies." 505 U.S. at 509-10. The *Cipollone* plurality nevertheless concluded that several of these claims, including the plaintiff's fraudulent misrepresentation claim based on alleged "neutralization" of the federally mandated warning labels, were preempted. *Id.* at 527.

Nor does respondents' proposed preemption standard account for this Court's holding in *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), that the Labeling Act preempted state regulations restricting cigarette advertisements that were promulgated pursuant to the Massachusetts Unfair Trade Practices Act, which is also indisputably applicable to all categories of businesses, not only tobacco companies. *Id.* at 550-51; *cf. Morales* v. *TWA, Inc.*, 504 U.S. 374, 386 (1992) ("the notion that only state laws specifically addressed to the airline industry are preempted, whereas the ADA imposes no constraints on laws of general applicability" would "creat[e] an utterly irrational loophole").

Even if, *arguendo*, the analysis employed by the First Circuit were *correct*—which is what respondents' position ultimately boils down to—that would

not alleviate the need for this Court to review the *conflict* between the decision below and the Fifth Circuit's decision, which rested on a materially different understanding of the Labeling Act. Moreover, the decision below is *not* correct. Under a correct application of the preemption framework adopted by the *Cipollone* plurality, it is inherent "falsity" that distinguishes state-law fraudulent misrepresentation claims that are based on the "duty not to deceive" from state-law claims that are "based on smoking and health" because "state-law proscriptions on intentional fraud rely on a single, uniform standard: falsity"—and therefore need not be preempted to attain the Labeling Act's goal of national regulatory uniformity. 505 U.S. at 529. The First Circuit's conclusion that "the statements' falsity" does not "bear[ ] on the preemption analysis" (Pet. App. 35a)—and its holding that state-law fraud claims challenging tar and nicotine descriptors are not preempted even though such statements are concededly accurate under the FTC Method (Compl. ¶ 23)—is flatly inconsistent with the analysis of the *Cipollone* plurality.

Although respondents do not dispute the importance of this case to the "'low tar' litigation" that "ha[s] commenced across the country" (Opp. 28), they contend that the pending appeal in *United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *appeal docketed*, No. 06-5267 (D.C. Cir. Sept. 11, 2006), might alleviate the need for this Court's review. Respondents vastly overstate the implications of that case, a RICO action initiated by the federal government that does not even implicate the issue of federal preemption presented by this petition. Indeed, the district court's decision in *Philip Morris* was issued *before* the Fifth Circuit's decision in *Brown* and the First Circuit's decision in this case,

and did not resolve the question whether state-law claims challenging the use of tar and nicotine descriptors are preempted because descriptors are not inherently false. Regardless of the outcome of appellate proceedings in *Philip Morris*, other courts will continue to struggle with the preemption framework of the *Cipollone* plurality in cases arising under state law, both in the "lights" context and, more broadly, in the smoking-and-health setting.

There are currently more than 30 cases pending in state and federal courts across the country challenging tobacco companies' use of tar and nicotine descriptors. *See* Pet. 25 n.6. Still more implicate the Labeling Act's preemption provision outside the "lights" context. Those cases should be adjudicated under a uniform framework of federal preemption law. Parties in the Fifth Circuit should not be treated differently from parties in the First Circuit based on those courts' divergent understandings of federal preemption. Only this Court can bring certainty to this exceptionally important area of the law and—as Congress intended to do when enacting the Labeling Act—alleviate the pervasive "nonuniform[ity]" and "confusi[on]" regarding "cigarette labeling and advertising." 15 U.S.C. § 1331.*

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* Respondents also fail to suggest a tenable basis for this Court to decline review of the First Circuit's implied preemption analysis. Respondents, for example, conveniently ignore the FTC's 1967 policy statement, in which the agency explicitly stated that it "would not challenge statements or representations of or relating to tar and nicotine content of cigarettes" where those statements were substantiated by the FTC Method. C.A. App. 250 ¶ 162. That policy statement reflects the FTC's long-standing regulatory policy of providing consumers with standardized tar and nicotine information and encouraging the development of low-yield cigarettes. *See* Pet. 21-22.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[Footnote continued from previous page]

State-law consumer fraud claims challenging the use of tar and nicotine descriptors are "an obstacle to the accomplishment" of those regulatory objectives and are therefore impliedly preempted. *See Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (internal quotation marks omitted). Moreover, respondents are incorrect when they suggest that PMUSA's conduct was "inconsistent with the terms of the 1971 consent decree" because PMUSA did not disclose numerical tar and nicotine yields on cigarette packages. Opp. 27. The Labeling Act explicitly prohibits anyone other than Congress—including the FTC—from requiring such information on cigarette packages. 15 U.S.C. § 1334(a). Finally, respondents are unable to reconcile the First Circuit's holding that the FTC cannot preempt state law without "issu[ing] a formal rule" (Pet. App. 46a) with the Second Circuit's conclusion in *General Motors Corp.* v. *Abrams*, 897 F.2d 34 (2d Cir. 1990), that an FTC consent order "may preempt state legislation" (*id.* at 39). The conflict between the First Circuit's implied preemption analysis and the decisions of both this Court and other courts reinforces the compelling need for review. *See* Pet. 23.

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