Supreme Court, U.S.
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No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To ensure that interstate commerce is "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations," Congress has precluded the States from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes," and has authorized the Federal Trade Commission to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. §§ 1331, 1334, 1336. Based on studies suggesting that cigarettes with comparatively lower tar and nicotine yields may present fewer health risks, the FTC requires tobacco companies to disclose those yields as measured using an FTC-mandated test, and has authorized tobacco companies to advertise cigarettes using "descriptors," such as "light," as shorthand references to the numerical test results. Respondents in this case contend that such descriptors are misleading, in violation of a state deceptive trade practices statute.

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Lori A. Spellman and Allain L. Thibodeau were plaintiffs-appellants below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Altria Group, Inc., is the parent company of Philip Morris USA Inc. and that no other publicly held company owns 10% or more of its stock. Altria Group, Inc., has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc. (PMUSA) and Altria Group, Inc. (Altria) respectfully submit this petition for a writ of certiorari.[1]

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-62a) is not yet published but is electronically reported at 2007 WL 2460039. The opinion of the district court (App., *infra*, 63a-106a) is published at 436 F. Supp. 2d 132.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.*, provides in relevant part:

§ 1334. Preemption

. . . .

(b) State regulations

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

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[1] Altria is a holding company that is not subject to personal jurisdiction in Maine, where respondents filed this suit. *See* App., *infra*, 2a n.1, 65a n.4.

STATEMENT

Respondents, on behalf of a putative class of cigarette purchasers, allege that PMUSA violated a state-law prohibition on deceptive trade practices by using tar and nicotine "descriptors" in marketing cigarettes. PMUSA uses terms such as "light" to describe certain cigarette brands that have lower yields of tar and nicotine than other brands when measured using a standardized government test.

On summary judgment, the district court ruled that respondents' state-law challenges to PMUSA's use of tar and nicotine descriptors in its advertising are expressly preempted by the Federal Cigarette Labeling and Advertising Act (Labeling Act), which precludes the States from imposing requirements or prohibitions with respect to cigarette advertising that are "based on smoking and health." 15 U.S.C. § 1334(b). The court of appeals reversed, concluding that respondents' claims are neither expressly nor impliedly preempted. In so doing, the First Circuit explicitly "disagree[d]" with *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), which held that the Labeling Act preempts substantively identical state-law fraud claims challenging the same statements. App., *infra*, 35a.

A. Statutory and Regulatory Background

For decades, the Federal Trade Commission (FTC) has encouraged smokers to switch to cigarettes with lower tar and nicotine yields, based on studies showing that such cigarettes may present fewer health risks than cigarettes with comparatively higher yields. To accomplish this federal objective, the government has *required* tobacco companies to disclose tar and nicotine yields measured by a government-mandated methodology and has *author-*

ized them to use descriptors, such as "light" or "lower tar and nicotine," as shorthand references to those numerical test results. This FTC policy, which is based on smoking and health, is one component of the uniform federal scheme of cigarette advertising and promotion policed by the FTC pursuant to congressional directive.

1. In 1964, the Surgeon General issued a report that concluded that smoking causes lung cancer. Congress responded the following year by enacting the Labeling Act, which "establish[ed] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." 15 U.S.C. § 1331. The Labeling Act mandated that all cigarette packages carry a prominent warning label so that "the public may be adequately informed about any adverse health effects of cigarette smoking." *Ibid.* As amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, the Labeling Act's preemption provision precludes States from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes labeled in conformity with the statute's requirements. 15 U.S.C. § 1334(b). Congress enacted the preemption provision to ensure that "commerce and the national economy" were "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.* § 1331.

In *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), this Court held that certain state-law claims against tobacco companies are preempted by the amended version of the Labeling Act. A majority of the *Cipollone* Court agreed that common-law tort claims constitute "requirement[s] or prohibition[s]"

within the meaning of the statute. 505 U.S. at 521 (plurality opinion); *see also id.* at 548 (opinion of Scalia, J.). Although three Justices dissented from this conclusion (*id.* at 543 (opinion of Blackmun, J.)), it has since been reaffirmed by this Court. *See Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

The *Cipollone* plaintiff had "allege[d] two theories of fraudulent misrepresentation." 505 U.S. at 527 (plurality opinion). As described by the district court, one theory "allege[d] that respondents had willfully, 'through their advertising, attempted to neutralize the [federally mandated] warnin[g]' labels"; the other theory alleged "'false representation of a material fact.'" *Id.* at 510, 528 (alterations in original). The six Justices who agreed that the Labeling Act preempts common-law tort claims could not reach agreement as to *which* of those two fraud claims were preempted. *See Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 547 (2001) (acknowledging this "debate[ ]").

A four-Justice plurality endorsed a claim-by-claim preemption analysis that inquires "in each case . . . whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion.'" 505 U.S. at 523-24 (quoting 15 U.S.C. § 1334(b) (first alteration added)). The plurality concluded that the plaintiff's "warning neutralization" fraud claim was preempted because "[s]uch a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking," and thus is "based on smoking and health" within the meaning of the Labeling Act. *Id.* at 527. In contrast, the plurality

concluded that fraudulent misrepresentation "claims based on allegedly false statements of material fact made in advertisements" for cigarettes are not preempted because "[s]uch claims 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. According to the plurality, "state-law proscriptions on intentional fraud rely on a single, uniform standard: falsity." *Id.* at 529.

Justice Scalia, joined by Justice Thomas, concluded that the test for determining whether a claim was "based on smoking and health" was one of "proximate application," *i.e.*, whether the claim "impose[d] an obligation in this case because of the effect of smoking upon health." 505 U.S. at 554. Applying this broader standard, these Justices would have held both of the *Cipollone* plaintiff's fraud claims to be preempted. *Id.* at 544, 554.

2. "[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising," the Labeling Act "vested that authority in the" FTC. *Reilly*, 533 U.S. at 548; *see also* 15 U.S.C. § 1336 (expressly preserving the FTC's authority to police deceptive cigarette advertising). Section 5 of the Federal Trade Commission Act (FTCA) authorizes the FTC to prevent unfair or deceptive trade practices (15 U.S.C. § 45(a)(1)), and the FTC has repeatedly brought that regulatory authority to bear on the tobacco industry, particularly with regard to tobacco companies' advertising and promotional statements about the tar and nicotine yields of their cigarettes. In so doing, the FTC has attempted to encourage smokers to switch from cigarettes with high tar and nicotine yields to brands with comparatively lower yields by providing standardized tar and nicotine information about different brands.

The FTC requires tobacco companies to disclose cigarettes' tar and nicotine yields, as measured by a government-mandated test known as the "FTC Method," in their print advertising. C.A. App. 218-20, ¶¶ 98-101; *see also In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). The FTC has also authorized tobacco companies to use descriptors—such as "light" and "lowered tar and nicotine"—in advertising and promoting their cigarettes. *See* C.A. App. 250 ¶ 162 (FTC policy stating that it "would not challenge statements or representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized testing methods and procedures used by the" FTC). The descriptors provide a shorthand means of informing consumers that certain brands yield less tar and nicotine than other brands, as measured under the FTC Method.

B. Proceedings Below

PMUSA introduced Marlboro Lights in 1971 and Cambridge Lights in 1986, and marketed its Marlboro Lights as having "lowered tar and nicotine." The packaging of both brands has always borne the Labeling Act-mandated health warning labels, and their print advertising has always included a legend required by the FTC disclosing tar and nicotine yields under the FTC Method.

Respondents filed this putative class action under the Maine Unfair Trade Practices Act, which prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." Me. Rev. Stat. tit. 5, § 207. They allege that PMUSA deceived consumers by using the descriptors "light" and "lowered tar and nicotine" in its marketing of Marlboro Lights

and Cambridge Lights. App., *infra*, 4a. Respondents did not dispute that these brands have lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes as measured using the FTC Method. Compl. ¶ 23. They nevertheless alleged that the use of these descriptors is deceptive because smokers may compensate for the lower tar and nicotine yields by taking deeper puffs, holding the smoke in their lungs longer, or smoking more cigarettes, and therefore may not actually receive lower amounts of tar and nicotine than smokers of regular cigarettes. App., *infra*, 4a. Respondents alleged that PMUSA "intentionally marketed" Marlboro Lights and Cambridge Lights "in this manner with the intention of communicating to consumers that [these brands] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes." Compl. ¶¶ 15, 17.

The district court held that respondents' claims were expressly preempted by the Labeling Act and granted summary judgment to PMUSA. App., *infra*, 106a. Acknowledging that "[t]his precise question, express pre-emption of claims of deception regarding 'lights' cigarettes, has generated controversy across this country," the court analyzed respondents' allegations under the *Cipollone* plurality's claim-by-claim preemption framework. *Id.* at 89a. The court concluded that respondents had "made a valiant attempt to tailor their claims to fit within the *Cipollone* exception for violations of the duty not to deceive" but that, ultimately, they had "failed" because "the gist of [respondents'] cause of action runs to what [PMUSA] actually said about Lights and what [respondents] claim [it] should have said." *Id.* at 101a, 103a. "To respond to [respondents'] concerns," the court continued, PMUSA "would have to tell the pub-

lic that the FTC Method test, though accurate in the laboratory, was inaccurate in real life." *Id.* at 104a-05a. Such claims, the district court held, are expressly preempted by the Labeling Act. *Id.* at 106a.

The First Circuit reversed. The court of appeals held that respondents' allegations escaped the Labeling Act's preemptive reach because "the substance of [their] claim[s] is that [PMUSA] has falsely represented certain of its brands as 'light' or having 'lower tar and nicotine.'" App., *infra*, 16a. The First Circuit therefore concluded that respondents' allegations were not "based on smoking and health" within the meaning of the Labeling Act, but were instead based on the "duty not to deceive." In so holding, the First Circuit expressly "disagree[d]" with the Fifth Circuit's conclusion in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), "that the [Labeling Act] preempts fraud theories arising out of 'light' and 'lower tar and nicotine' because those statements"—which are substantiated by testing under the FTC Method—"are not 'inherently deceptive or untrue,'" and thus give rise to preempted claims "based on smoking and health." App., *infra*, 35a. In concluding that respondents' claims were not expressly preempted, the First Circuit directly "acknowledge[d] that the Fifth Circuit came to the opposite conclusion in *Brown*." *Id.* at 31a.

The First Circuit further rejected PMUSA's argument that respondents' state-law claims were impliedly preempted because they conflicted with the FTC's longstanding policy of encouraging consumers to switch to cigarettes with comparatively lower tar and nicotine yields by requiring tobacco companies to disseminate standardized tar and nicotine information. App., *infra*, 55a. The First Circuit based its conclusion on the absence of a formal FTC rule regu-

lating the use of tar and nicotine descriptors (*id.* at 46a), and on its inability to identify a "coherent federal policy on low-tar claims." *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The Court should grant review to resolve the profoundly important—and sharply disputed—question whether state-law challenges to tar and nicotine descriptors in cigarette advertising are preempted by federal law. A definitive answer to this question will significantly impact the outcome of dozens of pending lawsuits in which the plaintiffs are alleging billions of dollars in potential liability. Today, a defendant sued in the Fifth Circuit has a preemption defense unavailable to a defendant sued in the First Circuit; conversely, a plaintiff who resides in the Fifth Circuit has fewer avenues of potential redress than a plaintiff who resides in the First Circuit. These divergent results obliterate the Labeling Act's objective of establishing national uniformity in the regulation of cigarette advertising and promotion. 15 U.S.C. § 1331. This case, which arises from a factual record that, for purposes of summary judgment, is undisputed, and in which both express and implied preemption were argued to and decided by the court of appeals, presents the ideal vehicle for resolving the intractable conflict of authority that has developed on this significant question of federal law.

I. THE LOWER COURTS HAVE REACHED CONFLICTING DECISIONS ON WHETHER CLAIMS LIKE THESE ARE PREEMPTED BY FEDERAL LAW

In erroneously holding that the Labeling Act does not expressly preempt respondents' claims, the First Circuit explicitly rejected the Fifth Circuit's holding in *Brown* v. *Brown & Williamson Tobacco*

Corp., 479 F.3d 383 (5th Cir. 2007), that state-law consumer fraud claims challenging the use of tar and nicotine descriptors are preempted by the Labeling Act. That clear circuit split exacerbates an existing conflict of lower-court decisions on the preemptive effect of the Labeling Act. The First Circuit's conclusion also cannot be reconciled with the express preemption framework established by the plurality in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), or with the implied preemption analysis of cases such as *Geier* v. *American Honda Motor Co.*, 529 U.S. 861 (2000).

A. The Lower Courts Are Divided On The Scope Of Express Preemption

The First Circuit's erroneous holding that the Labeling Act does not preempt state-law fraud claims challenging the use of tar and nicotine descriptors in cigarette marketing creates a direct conflict with the Fifth Circuit's contrary conclusion in *Brown*, as the First Circuit itself acknowledged, and deepens an existing decisional split.

The state-law challenges to descriptors in *Brown* were substantively identical to those in this case. The plaintiffs in *Brown* alleged that "they were deceived by [PMUSA's] marketing into believing that smokers of light cigarettes consume lower tar and nicotine" than smokers of regular cigarettes. 479 F.3d at 386. Like the plaintiffs in *Brown*, respondents in this case allege that PMUSA "has falsely represented certain of its brands as 'light' or having 'lower tar and nicotine' although they deliver the same quantities of these ingredients to a smoker as do" regular cigarettes. App., *infra*, 16a.

Although the underlying claims were the same, the First and Fifth Circuits reached diametrically opposite results on preemption: The *Brown* court

correctly held that the claims fell within the Labeling Act's express preemption provision, while the court below erroneously held that the claims were not preempted. This conflict creates precisely the "diverse, nonuniform, and confusing" regulatory regime that Congress sought to eliminate in enacting the Labeling Act. 15 U.S.C. § 1331. Review is warranted to secure uniformity of decision and conformity with the congressional design.

1. The flatly inconsistent results reached by the First and Fifth Circuits reflect the lower courts' divergent understandings of the preemption framework established by the *Cipollone* plurality. Under that framework, state-law claims are expressly preempted by the Labeling Act if they "require a showing that [the defendant's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," or are "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." 505 U.S. at 524, 527. Such claims, the *Cipollone* plurality explained, seek to impose state-law advertising and promotional requirements "based on smoking and health" within the meaning of the Labeling Act.

The plaintiff in *Cipollone* had pleaded two separate theories of fraud. One alleged that the defendants had deliberately created "false impression[s]" that cigarettes are safe by using "statements" or imagery in marketing that misleadingly "downplay[ed] the dangers of smoking" and thus "minimize[d]" or otherwise "neutralized the effect of [the] federally mandated warning labels." 505 U.S. at 527-28 (plurality opinion). The plurality determined that the Labeling Act preempted this claim because it sought to impose state-law advertising and promotional re-

quirements "based on smoking and health." *Id.* at 528. In contrast, the plurality concluded that the plaintiff's other fraud claim—which was based on "'false representation of a material fact'"—was not preempted by the Labeling Act because it was based on the "duty not to deceive." *Ibid.*

The *Cipollone* plurality explained that it is inherent "falsity" that distinguishes state-law requirements based on the "duty not to deceive" from state-law requirements "based on smoking and health." 505 U.S. at 529. The plurality reasoned that this distinction between inherently false statements and statements that might create a false impression "is wholly consistent with the" Labeling Act's goal of establishing regulatory uniformity because, "[u]nlike state-law obligations concerning the warning necessary to render a product 'reasonably safe,' state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity." *Ibid.*[2]

The Fifth Circuit in *Brown* recognized and applied the *Cipollone* plurality's distinction between these two types of fraud claims. As the *Brown* court explained, "claims based on 'fraud by intentional

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[2] The distinction between inherently false statements and statements that are false only by implication is essentially the same distinction that the Court uses to determine the level of First Amendment protection afforded to commercial speech. *See Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). For example, "inherently misleading" advertising "may be prohibited entirely," while "potentially misleading information" warrants "not necessarily a prohibition but preferably a requirement of disclaimers or explanation." *In re R.M.J.*, 455 U.S. 191, 203 (1982). If this were a commercial speech case, tar and nicotine descriptors (as they are characterized by respondents) would clearly fall into the second category.

misstatement' are not pre-empted because Congress did not intend to 'insulate' manufacturers from state liability for affirmative lies." 479 F.3d at 391-92 (citation omitted). On the other hand, the court recognized that "the Labeling Act pre-empts . . . 'implied misrepresentation' claims, which arise from statements or imagery in marketing that misleadingly downplay the dangers of smoking, and thus minimize or otherwise neutralize the effect of the federal mandated safety warnings." *Id.* at 392 (citation omitted).

Applying this framework to claims like respondents', the Fifth Circuit recognized that "the use of FTC-approved descriptors cannot constitute fraud" because "[c]igarettes labeled as 'light' and 'low-tar' do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement"—the FTC Method. *Brown*, 479 F.3d at 392. The Fifth Circuit explained that, because PMUSA's use of descriptors was not inherently false, it could not support a misrepresentation claim based on the "duty not to deceive" under the framework established by the *Cipollone* plurality. *Ibid.*

The First Circuit, in contrast, flatly rejected the distinction drawn by the Fifth Circuit. "The 'express' or 'implied' nature of an allegedly fraudulent misrepresentation," the First Circuit reasoned, "does not determine whether it is preempted by the [Labeling Act] under the *Cipollone* approach." App., *infra*, 26a; *see also id.* at 35a ("we do not see how the statements' falsity . . . bears on the preemption analysis").

By eschewing the distinction between inherently false statements and potentially misleading statements that was applied by the *Cipollone* plurality and by the Fifth Circuit in *Brown*, the First Circuit

in this case adopted a preemption methodology that has no mooring in the Labeling Act or this Court's precedent. And as the divergent results in *Brown* and this case dramatically illustrate, the choice of preemption methodology will often, if not always, prove outcome-determinative. The sharp and express disagreement between the Fifth and the First Circuits regarding the mode of preemption analysis required under the Labeling Act, as construed by the *Cipollone* plurality, should be resolved by this Court.[3]

2. It is beyond dispute that the *Cipollone* plurality held that one fraud claim was preempted and another one was not. 505 U.S. at 527-29. The Fifth Circuit understood the distinction between the two to be that the preempted claim alleged false impressions while the non-preempted claim alleged inherent falsity. *Brown*, 479 F.3d at 391-92. The First

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[3] The First and Fifth Circuits also disagreed as to whether respondents' claims were in substance "failure to warn" claims, which the *Cipollone* plurality indicated were generally preempted. 505 U.S. at 524. The Fifth Circuit explained "that to impose state liability on the basis of [PMUSA's] use of the FTC mandated terms is necessarily to impose a state requirement or prohibition on cigarette advertising as it relates to the relationship between cigarettes and health" because "the gravamen of Plaintiffs' Light claim is that the warnings mandated by Congress are inadequate with respect to Light cigarettes" and should be accompanied by "an additional warning on the packages to the effect that Light cigarettes can be more hazardous than regular cigarettes due to smoker compensation." *Brown*, 479 F.3d at 393 (internal quotation marks omitted). The First Circuit explicitly rejected the Fifth Circuit's reasoning. App., *infra*, at 28a. According to the First Circuit, the "fact that these alleged misrepresentations were unaccompanied by additional statements in the nature of a warning" did "not transform the claimed fraud into failure to warn." *Ibid.*

Circuit expressly rejected that distinction. App., *infra*, 26a. While that conflict alone would warrant this Court's review, the patent error in the First Circuit's approach reinforces the appropriateness of granting review in *this* case.[4]

Respondents do not allege that PMUSA's tar and nicotine descriptors are inherently false and do not dispute that they provide an accurate shorthand means of conveying tar and nicotine testing results to consumers. Compl. ¶ 23. They instead contend that PMUSA is liable under state law because descriptors could be potentially misleading to smokers who are not aware that such representations are based on standardized machine testing and because PMUSA allegedly used tar and nicotine descriptors to allay smokers' health concerns. *Id.* ¶¶ 18, 25-27. According to respondents, PMUSA marketed Marlboro Lights and Cambridge Lights "with the intention of communicating to consumers that [these brands] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes." *Id.* ¶¶ 15, 17. These allegations are unambiguously "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking." *Cipollone*, 505 U.S. at 527 (plurality opinion).

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[4] It is PMUSA's position that the decision below erroneously applied the preemption framework articulated by the *Cipollone* plurality and should be reversed on that basis alone. But even assuming, *arguendo*, that the First Circuit correctly concluded that respondents' claims may proceed under that framework, then the Court should reconsider the *Cipollone* plurality's approach to Labeling Act preemption because it not only would conflict with the subsequent decision in *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 547 (2001), but would render the express preemption provision essentially meaningless.

The First Circuit nevertheless held that respondents' claims are not preempted because they are based on the "duty not to deceive" created by the Maine Unfair Trade Practices Act. While acknowledging that descriptors "could support a warning neutralization claim, *i.e.*, by suggesting that those brands of cigarettes do not pose the same grave threats to health announced in the accompanying warning label," the First Circuit contended that "those statements [could] also support a different theory of recovery, including one that falls outside the preemptive reach of [the Labeling Act]." App., *infra*, 32a-33a; *see also id.* at 33a ("the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted and some of them not").

The First Circuit offered no alternative metric for distinguishing preempted fraud claims from non-preempted fraud claims under the Labeling Act. Under the First Circuit's approach, then, a fraud claim would be preempted by the Labeling Act *only* when a plaintiff used the same "warning neutralization" label used by the plaintiff in *Cipollone* (which, needless to say, few if any plaintiffs will do). It is well-established, however, that it is the substance of the claim, not its label, that determines whether a claim is preempted. "[D]istinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them," this Court has warned, "would elevate form over substance and allow parties to evade the pre-emptive scope of [a statute] simply by relabeling their . . . claims." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004) (internal quotation marks omitted); *see also Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981)

("compliance with the intent of Congress cannot be avoided by mere artful pleading").

The error in the First Circuit's approach is manifest in its conclusion that—with the exception of a "warning neutralization" claim identical to the one pleaded in *Cipollone*—*no* claims brought under a state unfair trade practices statute will be preempted by the Labeling Act, because *all* such claims are based on a general "duty not to deceive." *See* App., *infra*, 20a-21a. That conclusion is directly at odds with *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), which held that the Labeling Act preempted state regulations restricting cigarette advertising promulgated pursuant to the Massachusetts Unfair Trade Practices Act. *Id.* at 550-51. *Reilly* makes clear that the Labeling Act preemption analysis turns on whether state law is employed to impose a requirement or prohibition "based on smoking and health," not on whether the underlying duty is so based. Otherwise, there could have been no preemption in *Reilly* (or, for that matter, in *Cipollone* itself). *See* 505 U.S. at 543 (opinion of Blackmun, J.).

Although the First Circuit thought that "the difference" between this case and *Reilly* "is that [the Massachusetts] regulations were themselves the 'prohibitions,' while the prohibition here is the ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act" (App., *infra*, 20a), that distinction is simply wrong. The identical general duty—a statutory directive not to engage in deceptive advertising—was at issue in both *Reilly* and in this case. Because "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572 n.17 (1996)), it is im-

material that the duty was enforced in *Reilly* by executive-branch regulation, whereas the enforcement in this case would be by judicial-branch judgment.

3. The conflict over the scope of Labeling Act preemption is not limited to the First and Fifth Circuits. To the contrary, the First Circuit placed itself at odds not only with *Brown* but also with several other decisions recognizing that fraud claims are preempted whenever they allege, in substance, that a tobacco company failed to provide additional health-related information to consumers or used marketing to create a false impression that undermined the health information contained in the warning label. *See 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"); *Am. Tobacco Co.* v. *Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997) (holding that a claim brought against a tobacco company under a provision of Texas law prohibiting deceptive misrepresentations was preempted because the tobacco company "allegedly made the deceptive statements . . . with the intent of diminishing the impact of the federal warnings"); *see also Spain* v. *Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1197 (11th Cir. 2004); *Cantley* v. *Lorillard Tobacco Co.*, 681 So. 2d 1057, 1061 (Ala. 1996).

Other courts have reached results more like the First Circuit's, which in turn conflict with the Fifth Circuit's holding in *Brown*. *See, e.g.*, *Whiteley* v. *Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 838 (Ct. App. 2004) (holding that allegations that a tobacco

company told the public "half truths" are "akin to intentional misrepresentations").[5]

This split among the lower state and federal courts reflects their inability to apply consistently the preemption framework developed by the *Cipollone* plurality, which several Members of this Court accurately predicted would foster significant "difficulty" for "lower courts . . . attempting to implement [the] decision." 505 U.S. at 543-44 (opinion of Blackmun, J.); *see also id.* at 556 (opinion of Scalia, J.) (predicting that the "questions raised by today's decision will fill the lawbooks for years to come"). Just recently, for example, an Oregon trial court rejected the First Circuit's holding in the decision below in favor of the Fifth Circuit's approach in *Brown*, while "confess[ing]" that it found "the *Cipollone* rubric extremely difficult to apply." *Pearson* v. *Philip Morris*

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[5] In addition to the appellate decisions cited in the text, the lower courts' confusion regarding the application of *Cipollone* in the "lights" context is further evidenced by the conflicting trial court decisions on the express preemption issue, some of which are now on appeal. *Compare Dahl* v. *R.J. Reynolds Tobacco Co.*, 2005 WL 1172019, at *12 (Minn. Dist. Ct. 2005) (holding that the Labeling Act expressly preempted state-law consumer fraud claims challenging the marketing of "light" cigarettes), *appeal docketed*, No. A05-1359 (Minn. Ct. App. July 11, 2005), *Newton* v. *R.J. Reynolds Tobacco Co.*, No. C 02-1415 (N.D. Cal. Mar. 17, 2003) (slip op. at 11-13) (same), *and Pearson* v. *Philip Morris Inc.*, 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 21) (same), *with Aspinall* v. *Philip Morris Cos., Inc.*, 2006 WL 2971490, at *11 (Mass. Super. Ct. 2006) (rejecting express preemption of such claims under the Labeling Act), *appeal docketed*, No. SJC-09981 (Mass. Mar. 9, 2007), *and Mulford* v. *Altria Group, Inc.*, _ F. Supp. 2d _, 2007 WL 1969734, at *19 (D.N.M. 2007) (holding that some such claims were preempted and others were not).

Inc., 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 19).

The conflict among the lower courts over the scope of express preemption—as exemplified by the flatly inconsistent holdings in *Brown* and this case—warrants this Court's review.

B. The Lower Courts Are Divided On The Scope Of Implied Preemption

State law is impliedly preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or a federal agency. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). The Court has repeatedly applied that principle to preempt state laws that interfere with agency regulation of an industry. *See, e.g.*, *Geier*, 529 U.S. at 866; *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 159 (1982).

The First Circuit's rejection of PMUSA's implied preemption defense rested on the conclusion that there is no "coherent federal policy on low-tar claims." App., *infra*, 54a. That conclusion is directly at odds with decisions recognizing that the FTC pursued a decades-long policy of requiring tobacco companies to provide standardized tar and nicotine information to consumers and encouraging tobacco companies to develop low-tar cigarettes. *See, e.g.*, *Watson* v. *Philip Morris Cos., Inc.*, 420 F.3d 852, 859, 860 (8th Cir. 2005) ("The FTC involved itself in the tobacco industry to an unprecedented extent," including by "compell[ing] the tobacco industry to advertise the tar and nicotine ratings as determined by the [FTC] Method"), *rev'd on other grounds*, 127 S. Ct. 2301 (2007). Indeed, the undisputed record establishes a coherent and consistent regulatory policy by the FTC.

The FTC has long supported the efforts of public-health officials to reduce the risks posed by smoking. *See* 29 Fed. Reg. 530, 532 (Jan. 22, 1964) ("it is the Federal Trade Commission's policy to encourage the development of less hazardous cigarettes"). Shortly after the Surgeon General's 1964 report on smoking and health, the U.S. Public Health Service issued a report concluding that the "preponderance of scientific evidence strongly suggests that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be the effect." C.A. App. 301 Ex. 172. In light of such reports, the FTC has pursued a regulatory policy designed to provide consumers with a standardized means of comparing different brands' tar and nicotine yields and to encourage the development of lower-yield cigarettes.

To that end, the FTC designated the FTC Method as the exclusive means of measuring tar and nicotine yields (C.A. App. 301 Ex. 97), and required the tobacco industry to disclose tar and nicotine yields, measured pursuant to the FTC Method, in all cigarette print advertisements. *Id.* at 218-20 ¶¶ 98-101; *see also In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). It also authorized tobacco companies to use tar and nicotine descriptors as a shorthand means of communicating tar and nicotine information to consumers, as long as those descriptors accurately reflect testing results under the FTC Method. C.A. App. 249-50 ¶¶ 161-63; *see also In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971) (a tobacco company may "advertis[e] that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms," so long as tar and nicotine yields, as measured by the FTC Method, are disclosed in print advertising).

The FTC has been well aware of the inherent limitations of the FTC Method since it first designated the test as the standardized methodology for measuring tar and nicotine yields, and has repeatedly reevaluated the propriety of this testing procedure. *See* 48 Fed. Reg. 15,953 (Apr. 13, 1983); 62 Fed. Reg. 48,158 (Sept. 12, 1997). In so doing, it has considered at length the FTC Method's inability to replicate the variability of human smoking behavior, which constitutes the basis for the plaintiffs' claims in this and similar lawsuits, and has acknowledged that "[n]o test can precisely duplicate conditions of actual human smoking." C.A. App. 301 Ex. 107. Notwithstanding these known limitations, the FTC has retained the testing method for four decades because "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." *Id.* at 301 Ex. 203, at 5.

Respondents' suit seeks to impose state-law liability on PMUSA for using FTC-authorized descriptors that reflect the results of tar and nicotine testing under the FTC Method. Thus, respondents are seeking to second-guess the FTC's determination that it is in the public interest to convey tar and nicotine information to the public using descriptors substantiated by the FTC Method. *See Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 378 (2000) (a state "statute conflicts with federal law" where it "penaliz[es] individuals and conduct that Congress has explicitly exempted or excluded from sanctions").

The First Circuit did not dispute that the FTC has historically regulated the tobacco industry's tar and nicotine claims through agreements, advisory opinions, consent decrees, and policy statements. The First Circuit held, however, that these regula-

tory activities cannot impliedly preempt state-law claims that impede the FTC's regulatory objectives because the FTC "has never issued a formal rule specifically defining which cigarette advertising practices violate the" FTCA. App., *infra*, 46a. In so holding, however, the First Circuit conceded that "[o]ther courts . . . have held that an agency can preempt state law through action short of formal rulemaking." *Id.*

Indeed, a number of courts have reached the opposite conclusion than that adopted by the First Circuit. In *General Motors Corp.* v. *Abrams*, 897 F.2d 34 (2d Cir. 1990), for example, the Second Circuit held that "a consent order reflecting a reasonable policy choice of a federal agency and issued pursuant to a congressional grant of authority may preempt state legislation." *Id.* at 39; *see also Feikema* v. *Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994) (holding that an Environmental Protection Agency consent order preempted state common-law claims regarding the same environmental conditions addressed in the order); *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 31 (Cal. 2004) (affording preemptive effect to an advisory letter of the Food and Drug Administration).

The First Circuit's holding that the FTC cannot preempt state law without promulgating a trade regulation rule—no matter the extent to which state requirements stand as an obstacle—squarely conflicts with the holdings of the Second and Fourth Circuits and the California Supreme Court, and deepens an existing conflict. *See also Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (labeling the Second Circuit's holding in *Abrams* that an FTC consent order can have preemptive effect "hard to understand");

State v. *Amoco Oil Co.*, 293 N.W.2d 487, 496 (Wis. 1980) (FTC industry guides do not have preemptive effect). These cases, and the decision below, are squarely at odds with this Court's recognition in *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), that even an agency's decision *not* to engage in regulation can have preemptive effect. *Id.* at 64.

Imposing state-law liability on PMUSA for conduct authorized—and encouraged—by the FTC would stand "as an obstacle to the accomplishment and execution of the important means-related federal objectives" embodied in the FTC's longstanding and comprehensive regulation of tar and nicotine claims (*Geier*, 529 U.S. at 881 (internal quotation marks omitted)), and replace the FTC's expert regulatory judgment with a patchwork of conflicting state-law advertising obligations with which PMUSA and other tobacco companies—which do business nationwide—would be required to comply. *See Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (holding that state-law fraud-on-the-FDA claims were impliedly preempted because "complying with the FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing" medical device manufacturers).

II. THE PREEMPTION ISSUE THAT HAS DIVIDED THE LOWER COURTS IS RECURRING AND EXCEPTIONALLY IMPORTANT

The preemption issue raised in this petition has profound practical and jurisprudential implications. There are currently more than 30 cases, most brought as class actions, pending in state and federal courts across the country in which the plaintiffs are pursuing similar state-law challenges to tobacco

companies' use of tar and nicotine descriptors in their marketing.[6] Together, the plaintiffs in these cases are alleging *billions* of dollars in liability. *See, e.g.*, *Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005) (overturning a $10.1 billion verdict in a "lights"

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[6] *See, e.g.*, *Mulford* v. *Altria Group, Inc.*, No. 05-659 MV/RHS (D.N.M. filed June 9, 2005); *Miner* v. *Philip Morris USA Inc.*, No. CV-2004-176 (Ark. Cir. Ct. filed Dec. 29, 2004); *Holmes* v. *Philip Morris USA Inc.*, No. 03C-08-167 (Del. Super. Ct. filed Aug. 18, 2003); *Rivera* v. *Brown & Williamson Tobacco Corp.*, No. 05002779 (Fla. Cir. Ct. filed Feb. 18, 2005); *Rios* v. *R.J. Reynolds Tobacco Co.*, No. 02-01391 (Fla. Cir. Ct. filed Feb. 1, 2002); *Hines* v. *Philip Morris Cos., Inc.*, No. CA 01-1882 AF (Fla. Cir. Ct. filed Feb. 21, 2001); *Kelly* v. *Martin & Bayley Inc.*, No. 05L000123 (Ill. Cir. Ct. filed Feb. 7, 2005); *Mills* v. *Martin & Bayley Inc.*, No. 04L001270 (Ill. Cir. Ct. filed Nov. 15, 2004); *Arnold* v. *Philip Morris USA Inc.*, No. 2003 L 000570 (Ill. Cir. Ct. filed May 2, 2003); *Howard* v. *Brown & Williamson Tobacco Corp.*, No. 00L000136 (Ill. Cir. Ct. filed Feb. 14, 2000); *Turner* v. *R.J. Reynolds Tobacco Co.*, No. 00-L-113 (Ill. Cir. Ct. filed Feb. 10, 2000); *Aspinall* v. *Philip Morris Cos., Inc.*, No. 98-6002 (Mass. Super. Ct. filed Nov. 24, 1998); *Thompson* v. *R.J. Reynolds Tobacco Co.*, MC 05-2389 (Minn. Dist. Ct. filed Feb. 15, 2005); *Curtis* v. *Philip Morris Cos., Inc.*, No. PI 01-18042 (Minn. Dist. Ct. filed Nov. 28, 2001); *Black* v. *Brown & Williamson Tobacco Corp.*, No. 002-08526-01 (Mo. Cir. Ct. filed Dec. 11, 2000); *Collora* v. *R.J. Reynolds Tobacco Co.*, No. 002-00732 (Mo. Cir. Ct. filed Mar. 17, 2000); *Craft* v. *Philip Morris Cos., Inc.*, No. ED 85142 (Mo. Cir. Ct. filed Feb. 29, 2000); *Peters* v. *Philip Morris USA, Inc.*, No. 02-C-398 (N.H. Super. Ct. filed Apr. 20, 2002); *Stern* v. *Philip Morris Cos., Inc.*, No. L-2584-03 (N.J. Super. Ct. filed Apr. 4, 2003); *Phillips* v. *Philip Morris Cos., Inc.*, No. 01-CIV-0413 (Ohio Ct. C.P. filed May 4, 2001); *Marrone* v. *Philip Morris USA Inc.*, No. 99 CIV 0954 (Ohio Ct. C.P. filed Nov. 8, 1999); *Pearson* v. *Philip Morris Inc.*, No. 0211-11819 (Or. Cir. Ct. filed Oct. 8, 2002); *McClure* v. *Philip Morris Cos., Inc.*, No. Civ. A. 99C148 (Tenn. Cir. Ct. filed Jan. 19, 1999); *Moore* v. *Philip Morris Cos., Inc.*, No. 01-C-125K (W. Va. Cir. Ct. filed Sept. 17, 2001).

class action). These staggering financial stakes provide a compelling reason for this Court to resolve the question of federal preemption presented in this petition. *See Fid. Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari) ("enormous potential liability, which turns on a question of federal statutory interpretation, is a strong factor in deciding whether to grant certiorari").

Moreover, PMUSA and the other major tobacco companies do business, and thus are subject to suit, throughout the United States. Plaintiffs and defendants alike in these actions, and the judges presiding over them, have a strong interest in securing this Court's review because a definitive resolution of the preemption question will enable litigants to proceed under a uniform and predictable legal framework, and will allow courts to apply a uniform rule of decision on an important federal issue in these dozens of similar cases. Indeed, respondents themselves have acknowledged that a decision from this Court on the preemption issue would benefit all parties to the litigation. *See* Tr. 9/21/07 pg. 6, ll. 16-17 ("We think all parties would benefit from hearing from the Supreme Court one way or the other").

Congress included the express preemption provision in the Labeling Act to make clear which state laws can, and which cannot, be applied to tobacco companies in connection with their advertising and promotion of cigarettes. *See Reilly*, 533 U.S. at 541. The Court's fractured decision in *Cipollone* has failed to produce the needed clarity. *See Nichols* v. *United States*, 511 U.S. 738, 746 (1994) ("confusion following a splintered decision [of this Court] is itself a reason for reexamining that decision"). Where, as here, Congress has enacted a specific statute to cover a

particular situation—the displacement of state laws as they pertain to cigarette advertising and promotion—it is simply intolerable that different rules apply depending on the geographical location in which the lawsuit is filed. Indeed, this Court regularly grants certiorari to resolve conflicts on the scope of express preemption. *See, e.g.*, *Riegel* v. *Medtronic, Inc.*, No. 06-179 (cert. granted June 25, 2007).

The scope of implied preemption in this context also warrants this Court's attention. It is beyond dispute that the FTC has for decades pursued a policy of requiring tobacco companies to provide consumers with standardized tar and nicotine information measured by the FTC Method. *Watson*, 420 F.3d at 860. The FTC itself has recognized the adverse legal and commercial implications of superimposing divergent state-law standards on these federal disclosure requirements. *See* C.A. App. 301 Ex. 42, at 8 ("if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that the disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict"). The claims in this case, if allowed to proceed, would require PMUSA and other tobacco companies to simultaneously comply with both the FTC's regulatory requirements *and* the divergent laws of 50 States. This is precisely the situation that the doctrine of federal preemption is designed to avoid.

The question presented by this petition—whether state-law challenges to tar and nicotine descriptors are preempted by federal law—will not resolve itself. It has already generated a division among the circuits, and that split in authority will only grow more pronounced with time. At some

point, this Court will have to resolve the conflict. It should do so sooner rather than later, so that litigants and courts do not continue to spend substantial resources grappling with an issue that, ultimately, must be decided by this Court. This case presents the ideal vehicle to settle the question of federal preemption, because the pertinent facts are undisputed and the preemption issue was both presented to and actually decided by the courts below. The Court should grant plenary review to answer this important and recurring question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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