No. 15-449

IN THE
# Supreme Court of the United States

JOHNSON & JOHNSON and MCNEIL-PPC, INC.,
*Petitioners,*
v.
LISA RECKIS and RICHARD RECKIS,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

What evidence is sufficient to establish "clear evidence" that FDA rules do not permit a drug manufacturer to make unilateral label changes—thereby requiring preemption of state tort claims that the manufacturer was obligated to add FDA-rejected language to its drug labeling?

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## INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared as *amicus curiae* in this Court in cases raising preemption issues, to support creation of a nationwide policy governing the labeling of products distributed on a nationwide basis, and to urge that that policy be established by experts in the field, not lay jurors. *See, e.g., Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of their intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

*Amici* are particularly concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation. Excessive or conflicting rules frustrate the operation of specific federal regulatory regimes and make it impossible for regulated businesses to operate in compliance with both federal and state laws.

At issue here is whether federal law preempts Respondents' cause of action. Respondents contend that Petitioners should have acted unilaterally (*i.e.*, without pre-approval from the Food and Drug Administration (FDA)) to change their over-the-counter (OTC) drug label, in order to explicitly warn consumers about the risk of developing a life-threatening disease from taking ibuprofen. The Court held in *Wyeth v. Levine*, 555 U.S. 555, 571 (2009), that state tort law may require brand-name drug manufacturers to make certain types of unilateral label changes in the absence of "clear evidence" that governing FDA requirements would not permit the change. *Amici* agree with Petitioner that review is warranted to provide guidance regarding one type of "clear evidence": evidence that FDA would have rejected the supplemental application that a drug manufacturer must submit to FDA at the same time that it makes the unilateral label change demanded by a tort plaintiff.

*Amici* write separately to focus on a second type of "clear evidence" cited by the Petition: evidence that FDA regulations do not permit the proposed unilateral label change because the change does not "reflect newly acquired information." 21 C.F.R. § 314.70(c)(6)(iii). As Petitioners note, nothing in the record indicates that

Respondents' proposed unilateral label change—the addition of an explicit warning to consumers that ibuprofen poses a risk of "life-threatening disease"—was based on any "newly acquired information." *Amici* urge the Court to grant review to resolve conflicting lower-court decisions regarding the relevance—to the preemption issue—of "clear evidence" that a tort plaintiff's proposed label change does not reflect newly acquired information.

## STATEMENT OF THE CASE

In 2003 when she was seven years old, Samantha Reckis developed toxic epidermal necrolysis (TEN), a rare but life-threatening skin disorder, after being administered multiple doses of Children's Motrin® by her parents. Her parents filed a products-liability lawsuit against the manufacturers of Motrin, Petitioners McNeil-PPC, Inc. and Johnson & Johnson, its parent company (collectively, "McNeil"). The suit alleged that Motrin was inadequately labeled because it failed to include specific warnings to consumers that a rash that develops after initial ingestion could be the start of: (1) TEN; and (2) a "life-threatening disease."[2]

Children's Motrin is McNeil's brand name for its version of OTC ibuprofen, a widely used and effective

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[2] In 2003, the label for the OTC version of Children's Motrin included instructions to stop use and seek medical help if an "allergic reaction" or "any new symptoms" appeared. Pet. App. 10a. Samantha's father testified that he would have ceased administering the drug once he noticed that she developed a rash following the second dose, if the label had included a reference to TEN and "life-threatening disease."

pain and fever medicine. FDA has approved ibuprofen as safe and effect for both adults and children, for both prescription use and OTC use. Each year, more than 100 million Americans take OTC ibuprofen, Pet. App. 154a; it is sold both generically and under a variety of brand names (including Advil, Motrin, and Nuprin).

Ibuprofen is classified as a nonsteroidal anti-inflammatory drug (NSAID). FDA has been aware for decades of reports that NSAID use is associated with two extremely rare but life-threatening skin disorders, TEN and its less severe cousin, Stevens-Johnson Syndrome (SJS). The FDA-approved prescription label for ibuprofen—both now and at the onset of Samantha's disease—notes the existence of that association and suggests that the relationship may be causal. Unlike the prescription label (which is directed to medical professionals), the label for OTC ibuprofen is directed to consumers and thus is far shorter and is written in language that, in FDA's view, is easily understandable by those lacking medical training.

In 1999, FDA issued new regulations governing the labeling of OTC medicines. 21 C.F.R. § 201.66. Acting pursuant to those regulations in 2000, FDA itself drafted the label required to be displayed by all OTC ibuprofen products, including Children's Motrin. The FDA-drafted label included warnings to stop use and seek immediate medical help if an allergic reaction occurs, but it made no mention of either SJS/TEN or of the possibility of "life-threatening disease."

In 2005, FDA released a comprehensive report on the risks and benefits of NSAIDs, including ibuprofen. Pet. App. 71a-110a. Although FDA's report

found that some FDA-approved NSAIDs posed a risk of adverse cardiovascular events, it concluded that short-term use of ibuprofen to treat acute pain posed no such risk. *Id.* at 103a. The report also noted that FDA had been aware for some time of the association between ibuprofen and SJS; it stated that the labeling for OTC ibuprofen (and other NSAIDs) should be amended to warn specifically about "the potential for skin reactions." *Id.* at 96a & n.6. Thereafter, FDA issued revised labeling templates for all OTC ibuprofen, which remain in effect today. FDA directed that OTC ibuprofen labels include three additional symptoms under its "Allergy Alert" subheading: "skin reddening," "rash," and "blisters." *Id.* at 162a. The new template says nothing about SJS/TEN or "life-threatening disease."[3]

Respondents and Massachusetts courts are not the first ones to demand that OTC ibuprofen labels include explicit warnings regarding ibuprofen's association with SJS/TEN and "life-threatening disease." In 2005, several individuals (including Respondents' eventual expert witness in this case), filed a Citizen Petition with FDA, Pet. App. 111a-146a, requesting FDA to:

> Amplify their prescription and OTC labeling to adequately warn prescribers, health care professionals and consumers of the increased risk of [SJS and TEN] associated with ibuprofen

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[3] In contrast, the new template for prescription ibuprofen labels includes strengthened "Warnings" that NSAIDs can cause serious and potentially fatal skin disorders, including SJS/TEN. *Id.* at 160a.

> *that has been established in the scientific literature since 1978* through the present.

*Id.* at 116a (emphasis added). The Citizen Petition proposed that the "Warnings" section of OTC ibuprofen labels should reference "serious and potentially life-threatening diseases, including . . . [SJS and TEN]" and that the "Stop Use" section should reference "life-threatening reactions including . . . [SJS and TEN]." 142a-143a.

FDA's 2006 formal response largely rejected the relief requested by the Citizen Petition. Pet. App. 146a-193a. FDA noted that it had already supplemented the "Allergy Alert" section of the ibuprofen labeling template to include "skin reddening," "rash," and "blisters" as additional possible symptoms of allergic reaction. *Id.* at 162a. FDA concluded that additional warnings to consumers were not appropriate:

> We do not believe that it is useful to include the specific terms *SJS, TEN, or erythema multiforme, Stevens-Johnson syndrome,* and *toxic epidermal necrolysis* in the OTC label because most consumers are unfamiliar with these terms. In addition, effective OTC labeling communicates warning information in a manner that consumers can quickly and easily identify and understand. Consequently, we believe a description of symptoms is more appropriate.

*Id.*

**The Litigation**. Throughout trial-court proceedings, McNeil asserted that Respondents' claims

were preempted by federal law. McNeil asserted that it was impossible for it to make the unilateral label changes demanded by Respondents without violating federal law. The court repeatedly rejected the preemption defense. Pet. App. 56a-70a. In particular, the judge stated that while he "appreciated" the Seventh Circuit's reasoning in rejecting an identical SJS/TEN claim regarding Motrin labeling, "I differ with their conclusion." *Id.* at 69a (citing *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861 (7th Cir. 2010)). The jury agreed with Respondents that McNeil's labeling was deficient and awarded compensatory damages of $63 million. With interest, the judgment now stands at $140 million.

The Massachusetts Supreme Judicial Court affirmed. It explicitly rejected McNeil's impossibility preemption defense. Pet. App. 15a-28a. Citing *Wyeth*, the court asserted that federal law permitted McNeil to unilaterally change its ibuprofen label to include Respondents' requested "life-threatening disease" warning (while simultaneously submitting a supplemental application to FDA, seeking permission for the change). *Id.* at 19a. Accordingly, the court concluded, it was not impossible for McNeil to comply with both state and federal law.

The court said that the state-law requirement that Respondents were seeking to impose was not preempted in the absence of "clear evidence" that FDA would not have approved a supplemental application seeking approval of the label change. *Ibid.* The court concluded that FDA's rejection of the 2005 Citizen Petition did not provide such evidence, for two reasons.

First, although FDA failed to adopt either of the major OTC ibuprofen label changes requested by the Citizen Petition (*i.e.*, explicit references to "life-threatening disease" and to SJS/TEN), the court noted that FDA's response to the Citizen Petition explained why FDA thought an explicit reference to SJS/TEN was a bad idea but did not explain its failure to require a reference to "life-threatening disease." *Id.* at 23a. The court stated:

> FDA's decision not to request that manufacturers add a warning about life-threatening diseases could well have been merely a byproduct of its rejection of [the Citizen Petition's] requested warnings on the basis that they mentioned Erythema Multiforme, SJS, and TEN by name. Whether the FDA also would consider including a mention of life-threatening diseases, by itself, to be inappropriate and off limits on the OTC label is anybody's guess.

Id. at 23a.

Second, the court concluded that there was not clear evidence that FDA would have rejected Respondent's proposed label warnings if the request had come from McNeil rather than from third parties. *Id.* at 24a-25a.

The court did not discuss whether the record included other "clear evidence" supporting McNeil's impossibility preemption claim—such as that FDA was well aware of the association between ibuprofen and SJS/TEN and thus that McNeil lacked the "newly acquired information" that FDA regulations demand

that it possess before undertaking a unilateral label change. Indeed, as the Petition makes abundantly clear, "there is no new data that might warrant revisiting [FDA's] prior determinations" regarding appropriate OTC ibuprofen labeling. Pet. at 5.

## SUMMARY OF ARGUMENT

This case presents issues of exceptional importance to the Nation's health care. A Massachusetts lay jury and appellate court have determined that OTC ibuprofen—a drug consumed by more than 100 million Americans each year—should bear labels containing more explicit health warnings than the labels drafted by FDA experts and currently in use by all ibuprofen manufacturers. Moreover, Massachusetts courts have determined that McNeil should pay $140 million for failing to adopt the Massachusetts-mandated labels—costs that consumers nationwide will presumably bear in the form of higher prices for ibuprofen and other OTC drugs. Furthermore, the judgment below will pressure manufacturers to seek inclusion of more detailed and fear-inducing information on OTC drug labeling, directly contrary to FDA's considered policy of avoiding difficult-to-understand language that may scare consumers away from beneficial treatments.

The courts below concluded that it was possible for McNeil to simultaneously comply with both Massachusetts labeling requirements and federal law and thus that the Supremacy Clause did not preempt Respondents' claims. U.S. Const., Art. VI, cl. 2. That decision conflicts with decisions from two federal appeals courts, which have held that state claims

arising under materially indistinguishable facts were inconsistent with federal law. Review is warranted to resolve the conflicts and to provide state and federal courts with badly needed guidance regarding what constitutes the "clear evidence" that *Wyeth* requires in order to sustain an impossibility preemption defense.

All agree that Respondents' claims are preempted unless federal law permitted McNeil to make the unilateral label change demanded by Massachusetts tort law. That is so because, without such permission, it would have been impossible for McNeil to comply with both federal and state law, and state law is impliedly preempted whenever it is impossible for a private party to comply with both state and federal requirements.

*Wyeth* held that FDA regulations do not permit unilateral label changes when there is "clear evidence" that FDA would not have given its after-the-fact blessing to the change. *Wyeth*, 555 U.S. at 571. The court below held as a matter of law that the "clear evidence" standard is *not* met, even when (as here) FDA has contemporaneously rejected a formal request to make the very label change sought by the tort plaintiff, so long as either: (1) FDA has not provided a comprehensive written explanation for its rejection (thereby making it "anybody's guess" if the agency really disapproved of the rejected change); or (2) the formal request for a label change has come from someone other than the drug manufacturer. Pet. App. 23a-26a. That decision directly conflicts with the Seventh Circuit's *Robinson* decision, which concluded that FDA's rejection of the 2005 Citizen Petition did,

indeed, provide "clear evidence" that FDA did not wish to scare and confuse consumers by adding dire health warnings to the OTC ibuprofen label. *Robinson*, 615 F.3d at 870, 873.

The Massachusetts decision also conflicts with the First Circuit's decision in *In re Celexa and Lexapro Marketing and Sales Practices Litig.*, 779 F.3d 34 (1st Cir. 2015), regarding the circumstances under which unilateral label changes are permissible under federal law. The Massachusetts court concluded that the only potential obstacle to a unilateral label change is "clear evidence" that FDA would have rejected the change and instead would have required the manufacturer to resume using the old label. Pet. App. 19a.

By way of contrast, in determining whether a drug manufacturer is permitted to make a unilateral label change, *Celexa* looked not only for clear evidence that FDA disapproved of the substance of the label change (and thus would likely have rejected the change) but also to the other provisions of the regulation governing unilateral label changes, 21 C.F.R. § 314.70(c)(6). 779 F.3d at 41-42. One of those provisions states that a manufacturer's authority to make unilateral label changes is limited to instances in which a proposed label change is based on "newly acquired information." 21 C.F.R. § 314.70(c)(6)(iii). The First Circuit—whose jurisdiction includes appeals from Massachusetts federal district courts—concluded that impossibility preemption required dismissal of the plaintiffs' tort suit because there was clear evidence that the proposed unilateral label change (required by the plaintiffs' theory of liability) was not based on

"newly acquired information" but rather on data and studies already available to FDA. 779 F.3d at 42-43. Review is warranted to resolve this conflict over whether the "newly acquired information" standard is relevant to the impossibility preemption analysis.

Review is also warranted because the decision below is inconsistent with *Wyeth* and the Court's subsequent preemption case law. For example, the Court held in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), that tort plaintiffs alleging deficient drug labeling can escape federal preemption only if the drug manufacturer can "*independently* do under federal law what state law requires of it." 131 S. Ct. at 2579 (emphasis added). It is not sufficient to demonstrate that FDA would have applauded the label change and would, if asked, have granted its blessing to the change. Rather, a unilateral label change is prohibited by federal law unless the change can be effected in full compliance with the governing FDA regulation, 21 C.F.R. § 314.70(c)(6). Given that McNeil had no newly acquired information to provide FDA in 2003 regarding the association between ibuprofen and SJS/TEN, the decision of the Massachusetts court that federal law did not preempt Respondents' tort claims cannot be squared with *Mensing*.

The Massachusetts court also based its rejection of a preemption defense on the fact that the formal label-change request was made by third parties, not the drug manufacturer. The court hypothesized that FDA might decide that a label-change request coming from a manufacturer is entitled to more weight than one coming from a third party, and thus it held that

rejection of the label change requested by the 2005 Citizen Petition did not mean that FDA would reject an identical request made by McNeil. Pet. App. 24a-25a. But the prerequisites established by 21 C.F.R. § 314.70(c)(6) for making unilateral label changes do not vary based on who suggests making the change or how much FDA trusts that entity. If a proposed labeling change does not "reflect newly acquired information," federal law prohibits the manufacturer from making the change unilaterally, regardless of how highly FDA may esteem the views of the manufacturer.

Review is also warranted because the decision below is inconsistent with the "clear evidence" test announced by *Wyeth*. The Massachusetts court defined "clear evidence" so narrowly that it is difficult to imagine *any* set of facts that could meet the court's definition. The court held that it was "anybody's guess" whether FDA would disapprove of adding the stand-alone phrase "life-threatening disease" to the OTC ibuprofen label, Pet. App. 23a, even though FDA contemporaneously rejected a Citizen Petition that requested addition of *that precise phrase*. The court held that "clear evidence" would entail a full written explanation by FDA of the reasons for its rejection. *Ibid.* But such an open-ended legal standard cannot be what *Wyeth* had in mind; it would grant courts free rein to decide for themselves when a rejection of a labeling change really counts as a rejection.

## REASONS FOR GRANTING THE PETITION

More than six years have elapsed since the Court issued its *Wyeth* decision, which established the basic

framework for determining whether federal law preempts a state-law failure-to-warn suit against brand-name drug manufacturers. In the ensuing years, lower courts attempting to apply that framework in the large number of product-liability lawsuits that raise preemption issues have adopted a variety of conflicting legal standards. For example, *Wyeth* cryptically discussed a "clear evidence" standard for reviewing impossibility preemption claims, and lower courts have struggled to apply that standard to a variety of factual circumstances. Moreover, lower courts have not agreed on whether *Mensing* and *Bartlett*—two of the Court's important post-*Wyeth* preemption decisions—are relevant outside the context of generic-drug labeling. The decision below made no mention of *Mensing* or *Bartlett*. Review of this case is warranted to resolve the conflicts among the lower courts and to provide them with badly needed guidance. Review is also warranted because the decision of the Massachusetts court so clearly conflicts with this Court's preemption case law.

In each of the Court's recent preemption decisions involving product-liability claims against drug manufacturers—*Wyeth*, *Mensing*, and *Bartlett*—its analysis focused heavily on FDA's Changes Being Effected (CBE) regulation, 21 C.F.R. § 314.70(c)(6). The CBE regulation is the sole means by which a drug manufacturer may change a product label without advance permission from FDA. To provide context for a subsequent discussion of preemption doctrine, we briefly outline the contours of the CBE regulation.

FDA marketing approval of a drug includes approval of the label that is to accompany the drug. Once the drug is approved, the manufacturer needs FDA pre-approval before making any major changes in the FDA-approved label. *Bartlett*, 133 S. Ct. at 2471 (citing 21 C.F.R. § 314.70(b)(2)(i)). Manufacturers of prescription *generic* drugs are "prohibited from making any unilateral changes to a drug's label." *Ibid.*

The CBE regulation creates a pathway by which manufacturers of other drugs can unilaterally make certain non-major changes to their product labels. It requires the manufacturer to file a supplemental application with FDA (seeking approval for the label change) at the same time that it begins using the new label. 21 C.F.R. § 314.70(c)(6). To qualify for use of this pathway, the label change must: (1) "reflect newly acquired information";[4] and (2) accomplish one of five objectives listed in the regulation. § 314.70(c)(6)(iii). These objectives include label changes that "add or strengthen a contraindication, warning, precaution, or adverse reaction," or that "add or strengthen an

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[4] FDA defines "newly acquired information" narrowly:

> Newly acquired information means data, analysis, or other information not previously submitted to the agency, which may include (but are not limited to) data derived from new clinical studies, reports of adverse events, or new analyses of previously submitted data (*e.g.*, meta-analyses) if the studies, events, or analyses reveal risks of a different type or greater severity or frequency than previously included in submissions to FDA.

21 C.F.R. § 314.3(b).

instruction about dosage or administration that is intended to increase the safe use of the drug product." § 314.70(c)(6)(iii)(A) & (C).

When FDA adopted the CBE regulation in 1982, it explained that use of CBEs would be relatively rare and was intended for the sole purpose of speeding up dissemination of "new" safety information:

> Although most changes in labeling would require the applicant to submit a supplement and obtain FDA approval before making the change, the following changes in labeling, which would make available important *new information about the safe use of a drug product*, could be made if the applicant submits a supplement when the change is made.

47 Fed. Reg. 46623, 46635 (Oct. 19, 1982) (emphasis added).

## I. Review Is Warranted Because the Decision Below Conflicts with the Court's Case Law Regarding Preemption of Failure-to-Warn Claims Against Drug Manufacturers

All agree that Respondents' claims are preempted unless federal law permitted McNeil to make the unilateral label change demanded by Massachusetts tort law. That is so because, without such permission, it would have been impossible for McNeil to comply with both federal and state law; and the Court has long held that state law is impliedly preempted when it is "impossible for a private party to

comply with both state and federal requirements." *English v. General Electric Co.*, 496 U.S. 72, 79 (1990). Review is warranted because the decision below conflicts with this Court's understanding of when federal law permits a drug manufacturer to make the requisite unilateral label change.

### A. The Court Below Improperly Rejected a Preemption Defense Despite the Absence of the Requisite "Newly Acquired Information"

*Wyeth* marked the first occasion on which the court considered drug-label changes in the context of a preemption claim. A drug manufacturer asserted that federal law preempted a Vermont-law tort claim that the manufacturer had provided inadequate safety warnings on its product; it asserted it could not simultaneously comply with both federal law and Vermont law because federal law prohibited it from adding the label warnings required by Vermont law.

The Court rejected the manufacturer's impossibility preemption claim. *Wyeth*, 555 U.S. at 568-73. It held that compliance with both Vermont and federal law was possible because the CBE regulation permitted the manufacturer to unilaterally make the requisite label change at the same time that it submitted a supplemental application to FDA for approval of the change. *Id.* at 568. The Court recognized that the CBE regulation states that a manufacturer may only unilaterally change its label "to reflect newly acquired information." *Ibid.* It concluded that the "newly acquired information" standard was

met because, in the years following FDA approval of the manufacturer's labeling, the medical evidence demonstrated that many more patients were experiencing the severe injuries suffered by the plaintiff than had originally been anticipated. *Id.* at 569-70; *id.* at 591 (Thomas, J., concurring in the judgment).

In contrast, nothing in the record of this case suggests that, at the onset of Samantha's unfortunate disease in 2003, McNeil possessed "newly acquired information" regarding the association between OTC ibuprofen and SJS/TEN.[5] In 2000, FDA itself drafted the label required to be displayed by all OTC ibuprofen products, and in 2003 "there [was] no new data that might warrant revisiting the Agency's prior determination." Pet. 5. Indeed, Respondents' own expert witness, in the 2005 Citizen Petition he submitted to FDA asking for increased warnings on OTC ibuprofen labels, stated explicitly that "the increased risk of [SJS and TEN] associated with ibuprofen . . . has been established in the scientific literature since 1978." Pet. App. 116a. It is fanciful to suggest that McNeil—just one of many ibuprofen manufacturers—knew more about the association

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[5] In the *amicus curiae* brief it submitted to the Court in *Mensing*, the United States adopted a narrow understanding of "newly acquired information," informing the Court that "genuinely new information" of the sort contemplated by the CBE regulation rarely arises in connection with drugs that have been marketed for many years. 131 U.S. at 2581 n.9 ("[T]he FDA informs us that '[a]s a practical matter, genuinely new information about drugs in long use (as generic drugs typically are) appears infrequently.' U.S. Brief 34-35.").

between NSAIDs and SJS/TEN than FDA, which had been studying the issue for years and (unlike McNeil) had access to adverse event reports submitted by *all* manufacturers. Given the *clear evidence* that McNeil possessed no "newly acquired information" in 2003, FDA regulations did not authorize it to make the unilateral label change demanded by Massachusetts law. Thus, *Wyeth* dictates that Respondents' tort claims were preempted because it was not possible for McNeil to comply both with Massachusetts law and federal law.

The decision below conflicts with *Wyeth* by failing even to acknowledge the availability of this "clear evidence" defense. Instead, the Massachusetts court interpreted *Wyeth* as having held that the only basis upon which a manufacturer could assert impossibility preemption was "clear evidence that the FDA would not have approved a change" in its product label. *Id.* at 19a. Review is warranted to resolve this conflict.

The Massachusetts court speculated that it was possible that FDA might have approved a request from McNeil itself (rather than from the Citizen Petition submitters) to strengthen label warnings, and added that it was "difficult to accept" the idea that FDA would *ever* punish a drug manufacturer for unilaterally "strengthening a warning pursuant to the CBE regulation." *Id.* at 25a. But whether FDA would have approved a request to change the label prospectively, and whether McNeil could have escaped FDA punishment for unilaterally changing the ibuprofen label in defiance of the "newly acquired information"

requirement, are not relevant issues.

Rather, the issue is whether federal regulations permitted McNeil to make a unilateral label change; because they did not, *Wyeth* requires a preemption finding. As *Mensing* explained, tort plaintiffs alleging deficient drug labeling can escape federal preemption only if the drug manufacturer can "*independently* do under federal law what state law requires of it." 131 S. Ct. at 2579 (emphasis added). McNeil could not "independently" make Respondents' proposed label change pursuant to the CBE regulation; rather, it could only do so with FDA's prior approval. The Court has never suggested that impossibility preemption is negated by the possibility that one who violates federal law might successfully persuade federal officials to overlook the violation.

Finally, it is no answer to argue that McNeil could have complied with both Massachusetts and federal law by ceasing all sales of OTC ibuprofen. *Bartlett* rejected that argument explicitly, stating:

> We reject this "stop-selling" rationale as incompatible with our pre-emption jurisprudence. Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether to avoid liability. Indeed, if the option of ceasing to act defeated a claim of impossibility, impossibility pre-emption would be "all but meaningless."

133 S. Ct. at 2477 (quoting *Mensing*, 131 S.Ct. at 2579).

### B. The Lower Court's Definition of What Constitutes "Clear Evidence" of FDA's Position Conflicts with *Wyeth*

After concluding that the drug manufacturer/defendant satisfied the prerequisites of the CBE regulation, *Wyeth* held that the manufacturer could still establish impossibility preemption if it could demonstrate that FDA would have rejected the supplemental authorization request that would have accompanied any unilateral label change. 555 U.S. at 571. But the Court concluded that the manufacturer there did not meet that "clear evidence" standard:

> 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. Wyeth has offered *no such evidence*. . . . The Vermont Supreme Court . . . concluded that the FDA had not made an affirmative decision to preserve the IV-push method or intended to prohibit Wyeth from strengthening its warning about IV-push administration.

*Id*. at 571-72 (emphasis added).

*Wyeth*'s discussion of the history of Phenergan labeling demonstrates that the Court understood its "clear evidence" standard as one that manufacturers could plausibly meet under an appropriate set of facts. In sharp contrast, the Massachusetts court set its "clear evidence" bar so high that drug manufacturers

could rarely, if ever, reach that bar. If, as the court below held, FDA's contemporaneous rejection of a Citizen Petition from reputable doctors requesting that a "life-threatening disease" warning be added to OTC ibuprofen labels is not "clear evidence" that FDA would have rejected an identical request from McNeil, it is difficult to imagine what evidence would ever qualify under the Massachusetts standard.

The Massachusetts court noted FDA's "limited resources to monitor the 11,000 drugs on the market," Pet. App. 25a n.30, and expressed "reluctan[ce] to infer" an FDA rejection of the "life-threatening disease" language in the absence of "a direct statement on the subject." *Id.* But FDA *did* make a direct statement on the subject; its lengthy response to the Citizen Petition rejected the request to add the "life-threatening disease" warning. Pet. App. 146a-193a. It explained, "[E]ffective OTC labeling communicates warning information in a manner that consumers can quickly and easily understand. Consequently, we believe *a description of symptoms is more appropriate*." *Id.* at 162a (emphasis added).

In sum, review is warranted because the "clear evidence" standard adopted by the lower court—for use in determining whether FDA would have rejected a supplemental authorization request to change a drug label—conflicts sharply with the standard adopted by *Wyeth*.

## II. Review Is Warranted Because the Decision Below Conflicts with Decisions from Two Federal Appeals Courts

As noted in the Petition, at 29-30 and 34, the decision below directly conflicts with the First Circuit's decision in *Celexa* and the Seventh Circuit's decision in *Robinson*. Review is also warranted to resolve those conflicts.

### A. The Decision Below Conflicts with a Decision from the First Circuit, Which Has Jurisdiction over Appeals from Federal District Courts in Massachusetts

*Celexa* was a challenge to the adequacy of a manufacturer's label on its brand-name prescription drug. Relying on *Mensing*, the First Circuit concluded that the claim was preempted because federal law prevented the manufacturer from making the unilateral label changes that the plaintiffs sought. *Celexa*, 779 F.3d at 35. The court explained that "[t]he CBE procedure is only available to make changes, among other things, that are based on 'newly acquired information.'" *Id.* at 41-42 (quoting 21 C.F.R. § 314.70(c)(6)(iii)). The court concluded that, in light of clear evidence that the manufacturer lacked "newly acquired information," the plaintiffs' tort claims were preempted. *Id.* at 41-43. The court explained:

> The line *Wyeth* and [*Mensing*] thus draw between changes that can be independently made using the CBE regulation and changes

> that require prior FDA approval also makes some pragmatic sense. CBE changes rest on the existence of "newly acquired information." *Wyeth*, 555 U.S. at 578-79. To the extent that the underlying policy issue is one of who decides whether and how a drug can be marketed, the line so drawn lets the FDA be the exclusive judge of safety and efficacy based on information available at the commencement of marketing, while allowing the states to reach contrary conclusions when new information not considered by FDA develops.

*Id.* at 41.

In sharp contrast, the Massachusetts court—when considering whether impossibility preemption barred Respondents' claims—took no account of whether their labeling request for a unilateral label change was based on "newly acquired information," as required by the CBE regulation. Instead, the court held that the only potential obstacle to a unilateral label change is "clear evidence" that FDA would have rejected the change and instead would have required the manufacturer to resume using the old label. Pet. App. 19a. Review is warranted to resolve the conflict between the federal appeals court that covers Massachusetts and the Supreme Judicial Court of Massachusetts.

### B. The Decision Below Conflicts with the Seventh Circuit's Understanding of What Constitutes "Direct Evidence" that FDA Would Not Grant After-the-Fact Approval to a Unilateral Label Change

The decision below also conflicts with the Seventh Circuit's *Robinson* decision. *Robinson* involved a tort claim involving the very same disease (TEN), the very same drug (Children's Motrin), and the very same time frame (a 2005 onset of the disease) as is at issue here. In sharp contrast to the Massachusetts court, the Seventh Circuit discerned "clear evidence" that FDA would not have approved a request from McNeil to add warnings to the drug label that focused on potentially catastrophic outcomes rather than symptoms of which the consumer should take note. The appeals court stated:

> The FDA decided not to require such a warning because it would confuse rather than inform, and a court cannot order a drug company to place on a label a warning if there is "clear evidence" that the FDA would not approve it. *Wyeth*, [555 U.S. at 571]. The "clear evidence" in this case is the agency's refusal to require a reference to SJS/TEN on the label of over-the-counter drugs containing ibuprofen, when it had been asked to do so in [the 2005 Citizen Petition] to which it was responding.

*Robinson*, 615 F.3d 861.[6] The court explicitly rejected the plaintiffs' claim that McNeil's label should not only have mentioned SJS/TEN by name but also "recited its horrific consequences," citing FDA's response to the Citizen Petition as evidence that "the agency decided not to require mention of SJS/TEN (or SJS/TEN plus its horrific symptoms), believing with reason that the addition would confuse rather than enlighten." *Id.* at 869-70. In sharp contrast, the Massachusetts court established a far narrower "clear evidence" standard, one that refused to read into the Citizen Petition response any rejection of "horrific consequences" language, such as the "life-threatening disease" language requested by Respondents. Review is warranted to resolve the conflict.

[6] *Robinson* did not directly address the issue of whether the plaintiffs' claims were preempted by federal law, preferring instead to affirm dismissal of their claims on other grounds. Its conflict with the decision below is nonetheless direct; the appeals court based its decision on a understanding of *Wyeth*'s "clear evidence" standard that differs sharply from the Massachusetts court's understanding.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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