No. 07-562

IN THE
Supreme Court of the United States

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

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

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.

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

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JURISDICTION

The judgment of the court of appeals was entered on August 31, 2007. The petition for a writ of certiorari was filed on October 26, 2007, and granted on January 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Cigarette Labeling and Advertising Act (Labeling Act), 15 U.S.C. § 1331 *et seq.*, the Federal Trade Commission Act (FTCA), 15 U.S.C. § 41 *et seq.*, and the Maine Unfair Trade Practices Act (MUTPA), Me. Rev. Stat. tit. 5, § 205-A *et seq.*, are reproduced in the appendix to this brief.

STATEMENT

Respondents, on behalf of a putative class of cigarette purchasers, allege that Philip Morris USA Inc. (PMUSA) violated a state-law prohibition on deceptive trade practices by using tar and nicotine "descriptors"—such as "light" and "lowered tar and nicotine"—"with the intention of communicating" in its print and package advertising that certain cigarette brands "were less harmful or safer than" other brands. J.A. 28a.

On summary judgment, the district court ruled that respondents' state-law claims are expressly pre-

empted by the Labeling Act, which precludes 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 because they do not seek to impose a state-law requirement or prohibition "based on smoking and health" and do not conflict with the federal government's regulatory policy governing tar and nicotine disclosures in cigarette advertising.

A. Statutory and Regulatory Background

For decades, the Federal Trade Commission (FTC) has pursued a regulatory policy designed to encourage consumers who do not quit smoking 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 FTC has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results. This FTC policy is one component of the uniform federal scheme of cigarette advertising and promotion established by Congress and policed by the FTC pursuant to the Labeling Act.[1]

1. In 1964, the Surgeon General issued a report that concluded that smoking causes lung cancer. The following year, Congress responded to the re-

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[1] A more detailed overview of this regulatory history can be found in the affidavit of former FTC Chairman James C. Miller III, which is reproduced at J.A. 43a-176a.

port—and to ensuing state efforts to regulate cigarette advertising—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 mandates 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.*; *see also id.* § 1333), and provides that no other health-related statements may be required on cigarette packages. *Id.* § 1334(a); *see also infra* note 7. As amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970), the Labeling Act also 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 included a preemption provision in the Labeling Act to ensure that "commerce and the national economy" were "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.* § 1331.

"[T]o the extent that Congress contemplated additional targeted regulation of cigarette advertising," the Labeling Act "vested that authority in the" FTC. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001); *see also* 15 U.S.C. § 1336 (expressly preserving the FTC's authority to police deceptive cigarette advertising). Section 5 of the FTCA authorizes the FTC to prevent unfair or deceptive trade practices. 15 U.S.C. § 45(a)(1). The FTC has repeatedly brought that regulatory authority to bear on the tobacco industry, particularly with respect to tobacco

companies' health-related advertising and promotional claims, including statements about cigarettes' tar and nicotine yields.

2. For more than seventy years, the FTC has closely regulated health-related claims in cigarette advertising. *See*, *e.g.*, *In re Julep Tobacco Co.*, 27 F.T.C. 1637, 1637-38 (1938) (ordering a tobacco company to cease representing that its cigarettes did not make the throat dry); *In re R.J. Reynolds Tobacco Co.*, 46 F.T.C. 706, 733 (1950) (ordering a tobacco company to stop representing that its cigarettes aided digestion and soothed nerves). The FTC began to focus particular attention on tobacco companies' tar and nicotine claims in the 1950s. At that time, various companies used different testing methods to substantiate their tar and nicotine claims, which made it impossible for consumers to draw meaningful interbrand comparisons. To eliminate consumer confusion, the FTC in 1959 directed the tobacco industry to cease making all tar and nicotine claims, upon pain of an enforcement action for engaging in deceptive trade practices. J.A. 401a.

The Surgeon General's 1964 report prompted the public-health community to begin an intensive inquiry into possible means of reducing the risks associated with smoking. The FTC strongly supported this effort. *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"). Two years later, 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." J.A. 647a. In transmitting the report to Congress, the Secretary of Health, Education, and Welfare sug-

gested that "requiring the identification of 'tar' and nicotine levels on packages and in advertising . . . would be an important step and would result in the progressive reduction of 'tar' and nicotine levels because of public demand." *Id.* at 664a. Public-health organizations made similar recommendations to the FTC. The American Cancer Society, for example, wrote to "express the conviction . . . that the Federal Trade Commission can render a major service to the health of the public by rescinding its restriction relative to the mention of the tar and nicotine content of cigarette smoke in cigarette advertising." *Id.* at 387a; *see also id.* at 386a ("The National Interagency Council on Smoking and Health hopes that [the FTC] will take the steps necessary to make it permissible for cigarette manufacturers to list tar and nicotine content on the labels of cigarette packages").

The FTC's response was immediate. "Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public," the FTC in 1966 lifted its prohibition on the advertising of tar and nicotine yields. J.A. 527a; *see also id.* at 478a. The FTC explained that its decision was designed to "prompt cigarette manufacturers to develop less hazardous cigarettes" and to "augment information available to the public on the tar and nicotine content of cigarettes." *Id.* at 527a. In an effort to facilitate consumers' interbrand comparisons of tar and nicotine yields, the FTC specified that only statements substantiated by testing under the "Cambridge Filter Method," a technique for measuring a cigarette's tar and nicotine yields that later became

known as the "FTC Method" (*id.* at 651a), would be permitted. *Id.* at 479a.[2]

Shortly after designating the FTC Method as the exclusive means for computing tar and nicotine yields disclosed in advertising, the FTC held public hearings concerning possible modifications to the test's procedures. 31 Fed. Reg. 14,278 (Nov. 4, 1966). During the hearings, Dr. Clyde Ogg, the Department of Agriculture employee who was the principal developer of the FTC Method, emphasized that "[s]ince smokers vary so greatly in their smoking habits, the [FTC] method will not tell a smoker how much tar and nicotine he will get from any given cigarette." J.A. 607a. Dr. Ogg explained that the FTC Method "will indicate, however, whether [a smoker] will get more from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." *Id.* at 607a-08a. PMUSA and other tobacco companies submitted written comments that similarly explained that the FTC Method did not approximate human smoking behavior. *See id.* at 666a ("The [FTC] Method does *not* measure the *volume* of smoke—or the [particulate matter] or nicotine in the volume of smoke—that any *human being* will draw from smoking any particular cigarette") (emphases in original). Comments from the tobacco industry also highlighted the possibility that smokers would compensate for lower

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[2] The FTC Method measures the tar and nicotine yields of a cigarette's smoke using a machine that takes a two-second puff on a cigarette every minute down to a specified butt length. J.A. 294a, 668a. The tar and nicotine emitted from the cigarette are collected and measured by the machine, and an average tar and nicotine rating is calculated based on a sample of 100 cigarettes. *Id.* at 294a.

tar and nicotine yields by smoking more cigarettes. *See id.* at 622a ("by lowering the nicotine content, the smoker may increase his consumption of cigarettes in search for nicotine satisfaction").

Despite its knowledge of the FTC Method's limitations and the possibility of smoker compensation, the FTC decided to retain the methodology as the exclusive means for measuring tar and nicotine yields. The FTC explained at the time that "[n]o test can precisely duplicate conditions of actual human smoking." J.A. 486a. "[T]he purpose of testing," the FTC continued, "is not to determine the amount of tar and nicotine inhaled by any human smoker, but rather to determine the amount of tar and nicotine generated when a cigarette is smoked by machine in accordance with the prescribed method" so as to produce "standardized" results "capable of being presented to the public in a manner that is readily understandable." *Id.* at 486a, 487a.

In 1967, the FTC opened its own laboratory to perform testing on the tar and nicotine yields of cigarettes. J.A. 294a. It adopted the FTC Method for its laboratory testing because, the FTC later explained, "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." C.A. App. 176 Ex. 203, at 5. The FTC periodically published the results of its tar and nicotine tests in the *Federal Register* and also included the results in annual reports to Congress. J.A. 265a, 549a.[3]

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[3] In 1987, the FTC closed its testing laboratory due to cost considerations, and the Tobacco Institute Testing Laboratory (TITL), which is funded by the major participants in the tobacco industry, assumed the testing function under FTC supervision. J.A. 93a. TITL continues to this day to conduct tar and nicotine

3. In the years immediately following the FTC's decision to lift the prohibition on the disclosure of tar and nicotine yields, relatively few tobacco companies voluntarily disclosed tar and nicotine yields in their advertising. As part of its effort to encourage consumers to rely on the FTC Method results in making their brand choices and to promote competition among tobacco companies to develop low-tar cigarettes (J.A. 566a), the FTC in 1970 proposed a Trade Regulation Rule that would have made it an unfair or deceptive practice under Section 5 of the FTCA for tobacco companies not to disclose tar and nicotine yields in their print advertising. *Id.* at 177a. This proposal had the strong support of the public-health community. C.A. App. 176 Ex. 38, at 1.

At the FTC's invitation, the leading tobacco companies, including PMUSA, also submitted a proposed agreement to the FTC that required disclosure of FTC-rated tar and nicotine yields in all print advertisements. J.A. 350a. The FTC sought an industry agreement from the major cigarette manufacturers because, in the words of then-Chairman Miles W. Kirkpatrick: "The Commission's objective is to insure that all cigarette advertising make[s] these tar and nicotine disclosures as soon as possible. . . . A trade regulation rule, if contested in the courts, might take a long time to become effective; a workable, voluntary plan by the industry could be put into effect immediately." *Id.* at 481a-82a.[4]

[Footnote continued from previous page]

testing using the FTC Method, and supplies the results to the FTC under compulsory process. 55 Fed. Reg. 42,768, 42,768 (Oct. 23, 1990).

[4] Indeed, "[u]ntil the 1970s," the FTC's authority to engage in formal rulemaking was in substantial "doubt," and the FTC

Despite the FTC's desire to secure the mandatory disclosure of tar and nicotine yields as quickly as possible, it rejected the tobacco industry's initial proposal as inadequate. J.A. 349a. The major tobacco companies thereafter submitted a revised version of the agreement that included modifications to meet the FTC's specific requirements. *Id.* at 899a. After subjecting the revised agreement to public comment, the FTC accepted the agreement and terminated its rulemaking proceedings, while reserving the right to reinstitute those proceedings in the event of industry noncompliance. *Id.* at 377a.

Since the disclosure agreement went into effect in 1970, the FTC has strictly policed its terms and ensured that the major tobacco companies' cigarette advertisements disclose tar and nicotine yields, as calculated using the FTC Method.[5] Indeed, the FTC has emphasized that the "public interest requires that all test results presented to the public be based

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therefore "proceeded almost exclusively through case-by-case enforcement actions" and "industry-specific guides." J. Howard Beales, III, *Brightening the Lines: The Use of Policy Statements at the Federal Trade Commission*, 72 Antitrust L.J. 1057, 1061 (2005).

[5] The agreement requires print advertising for cigarettes to bear the legend "_ mg. 'tar', _ mg. nicotine av. per cigarette, FTC Report (date)." J.A. 903a; *see also ibid.* (alternative legend applicable to new brands for which official FTC-rated tar and nicotine yields are unavailable). The FTC has not extended this requirement to cigarette packages because, under 15 U.S.C. § 1334(a), only Congress has the authority to require a "statement relating to smoking and health . . . on any cigarette package." *See also* J.A. 580a (FTC report to Congress stating that "[c]igarette manufacturers have never been required to disclose 'tar' and nicotine content on cigarette packages").

on a uniform method" because "[u]se of more than one testing method would . . . only serve to confuse or mislead the public." J.A. 487a. To that end, the FTC issued an advisory opinion that instructed a tobacco company that "it would be deceptive to advertise a tar figure" based on any method other than the FTC Method, even one that produces a tar yield "*higher* than the latest applicable FTC tar figure." *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978) (emphasis added). The FTC cautioned that "[i]f the headlined tar level [in an advertisement] differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated." *Id.*

Similarly, when another tobacco company began including testing results from an independent laboratory in its advertisements for a uniquely designed cigarette, the Barclay brand, that could not be accurately tested using the FTC Method, the FTC initiated an enforcement action against the company. *See FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985). The suit alleged that the defendant's use of results generated by a means other than the FTC Method was deceptive, and culminated in a holding that the advertisements violated Section 5 of the FTCA. *Id.* at 43.

The FTC has also repeatedly reevaluated the propriety of its low-tar policy, including by studying whether the FTC Method should be replaced by an alternative testing procedure or supplemented by additional disclosures. J.A. 122a. In so doing, it has considered at length the same methodological limitation that forms the basis for respondents' claims: the FTC Method's inability to replicate the variability of human smoking behavior and account for the tendency of some consumers to smoke "light" cigarettes

more intensely to compensate for lower nicotine yields. For example, in the early 1980s, the FTC undertook a multiyear review of its testing methodology and solicited public comments about whether the test should be modified due to compensatory smoking behavior to reflect more accurately smokers' actual tar and nicotine intake. 48 Fed. Reg. 15,953, 15,955 (Apr. 13, 1983). Similarly, in 1997, the FTC initiated a still-ongoing inquiry into whether the FTC Method should be modified or abandoned altogether. 62 Fed. Reg. 48,158, 48,158 (Sept. 12, 1997). To date, the FTC has elected to retain the FTC Method, despite its known methodological limitations and recent public-health studies calling into question the earlier epidemiological evidence associating lower FTC-rated tar and nicotine yields with reduced health risks. *See* Prepared Statement of the FTC Before the Comm. on Commerce, Sci., and Transp., U.S. Senate 6 (Nov. 13, 2007), *at* http://www.ftc.gov/os/testimony/P064508tobacco.pdf; J.A. 713a.

4. A number of tobacco companies, including PMUSA, use descriptors—such as "low tar," "lowered tar and nicotine," and "light"—in their marketing to reflect the results of testing under the FTC Method. The FTC has repeatedly endorsed the use of descriptors.

In 1967, just two months after beginning testing with the FTC Method, the FTC publicly announced its "enforcement policy" with respect to representations relating to tar and nicotine yields:

> As a general rule, the Commission will 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 con-

> ducted in accordance with the standardized testing methods and procedures used by the [FTC]. . . . [A] cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public, provided that the basis for comparison is fully and fairly stated.

J.A. 368a-69a. The FTC repeated this policy statement in its 1968 annual report to Congress. *Id.* at 528a.

Subsequently, through a series of consent agreements with individual tobacco companies, the FTC has reaffirmed that tar and nicotine descriptors may be used to encapsulate the results of testing under the FTC Method. In 1971, the FTC entered into a consent order with American Brands that permitted the company to state "in advertising 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 "the statement is accompanied by a clear and conspicuous disclosure" of tar and nicotine yields, as measured by the FTC Method. *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971). Similarly, in 1995, the FTC entered into a consent order with the American Tobacco Company prohibiting it from making comparative claims about smokers' actual intake of tar and nicotine, while expressly providing that the company could use descriptive terms such as "low," "lower," and "lowest," in conjunction with tar

and nicotine yields under the FTC Method. *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).[6]

Against this backdrop, PMUSA introduced Marlboro Lights in 1971 and Cambridge Lights in 1986, and marketed its Marlboro Lights as having "lowered tar and nicotine." Both brands have always had less than 15 milligrams of tar, as measured by the FTC Method; their packaging has always borne the Labeling Act-mandated health warning labels; and their print advertising has always included both the warning labels and the FTC-required legend disclosing tar and nicotine yields under the FTC Method.

B. Procedural Background

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. Pet. App. 4a. Respondents do not dispute that these brands have lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes as measured using the FTC Method. J.A. 30a. They nevertheless allege 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. Pet.

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[6] The FTC has defined the term "low tar" in its annual reports to Congress as denoting 15.0 milligrams or less of tar. *See* J.A. 587a n.8; *id.* at 604a n.11.

App. 4a. Respondents allege 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" (J.A. 28a, 29a), and "with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking." *Id.* at 29a. Respondents explicitly "disclaim any claim for damages for personal injuries" (*id.* at 26a) and instead seek restitution of the sums paid by members of the putative class to purchase Marlboro Lights and Cambridge Lights. Pet. App. 5a.

The district court held that respondents' claims were expressly preempted by the Labeling Act and granted summary judgment to PMUSA. Pet. App. 106a. The court analyzed respondents' allegations under the claim-by-claim preemption framework articulated by a plurality of this Court in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), which 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.'" *Id.* at 523-24 (quoting 15 U.S.C. § 1334(b) (first alteration added)). The court concluded that, although respondents had "made a valiant attempt to tailor their claims to fit within the *Cipollone* exception for violations of the duty not to deceive," 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." Pet. App. 101a, 103a. "To respond to [respon-

dents'] concerns," the court continued, PMUSA "would have to tell the public that the FTC Method test, though accurate in the laboratory, was inaccurate in real life." *Id.* at 104a-05a. Such claims, the court held, are "'intertwined with the concern about cigarette smoking and health'" and therefore expressly preempted by the Labeling Act. *Id.* at 106a (quoting *Reilly*, 533 U.S. at 548).

The First Circuit reversed. The court of appeals acknowledged that respondents' claims are "intertwined with" concerns about "smoking and health," but nevertheless concluded that those claims do not seek to impose requirements or prohibitions "based on smoking and health" because the relevant "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." Pet. App. 20a. According to the court of appeals, the Labeling Act does not preempt claims "premised on a state-law duty that is broader in scope" than the "concern about cigarette smoking and health," even where that general duty is applied in the specific smoking-and-health setting. *Id.* at 21a (internal quotation marks omitted). In so holding, the First Circuit explicitly "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.'" Pet. App. 35a.

The First Circuit also rejected PMUSA's argument that respondents' state-law claims are impliedly preempted because they conflict with the FTC's longstanding policy of requiring the dissemination of standardized tar and nicotine information to consumers and encouraging the development of low-tar cigarettes. Pet. App. 55a. The First Circuit held

that there could be no conflict preemption in the absence of a formal FTC rule regulating the use of tar and nicotine descriptors. *Id.* at 46a. The court further concluded that, even if a formal rule were not required, a preemption defense would still be unavailable to PMUSA because there was no "coherent federal policy on low-tar claims" (*id.* at 54a), and because the FTCA provides that the remedies available in an FTC enforcement action are "'in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.'" *Id.* at 47a (quoting 15 U.S.C. § 57b(e)).

SUMMARY OF ARGUMENT

Respondents' claims are expressly preempted by the Labeling Act because they seek to impose a state-law requirement or prohibition "based on smoking and health" with respect to the advertising or promotion of cigarettes, and impliedly preempted because they represent an obstacle to the FTC's low-tar policy.

I. The text, structure, and purpose of the Labeling Act—together with this Court's express preemption jurisprudence—establish that respondents' state-law challenge to the use of tar and nicotine descriptors in cigarette advertising is expressly preempted.

A.1. A state-law requirement or prohibition is "based on smoking and health" within the meaning of the Labeling Act when it is premised on the relationship between smoking and health. Respondents' claims allege that PMUSA violated Maine law by using tar and nicotine descriptors to "communicat[e] to consumers" that "light" cigarettes "were less harmful . . . than regular" cigarettes. J.A. 28a. If successful, this state-law challenge to allegedly deceptive health

messages in PMUSA's cigarette advertising would impose a state-law requirement or prohibition that is premised on the relationship between smoking and health.

2. The conclusion that respondents' claims are expressly preempted by the Labeling Act is confirmed by the structure of the statute, which establishes a "comprehensive Federal program" governing health-related statements in cigarette advertising and promotion (including packaging). 15 U.S.C. § 1331. As part of this comprehensive federal regulatory framework, the Labeling Act expressly *preempts* state authority to police health claims in cigarette advertising, while explicitly *preserving* the FTC's regulatory authority in this area. Had Congress intended to preserve state authority to regulate health-related claims in cigarette advertising, it would have included an analogous state-law savings clause.

3. Preemption of respondents' claims is also consistent with the Labeling Act's dual objectives of informing the public about the health effects of smoking and protecting the national economy from nonuniform cigarette advertising and labeling requirements. If respondents' state-law claims were allowed to proceed, the likely result would be a patchwork of conflicting state advertising requirements, some authorizing the use of tar and nicotine descriptors, and others imposing restrictions—or outright prohibitions—on their use. Such regulatory inconsistency would inevitably generate consumer confusion about tar and nicotine claims in cigarette advertisements and prevent cigarette manufacturers from operating national advertising campaigns.

B. Notwithstanding the language, structure, and purpose of the Labeling Act, the First Circuit held that respondents' claims are not preempted because they allege a violation of the MUTPA and, according to the court of appeals, therefore seek to impose a state-law requirement that is based on the duty not to deceive, rather than based on smoking and health. That analysis is inconsistent with this Court's holding in *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525 (2001), that the Labeling Act preempts the application of a general unfair trade practices statute in the specific smoking-and-health setting. *Id.* at 548. The fact that the requirements in *Reilly* were imposed by a state attorney general's promulgation of tobacco-specific regulations implementing a state unfair trade practices statute, while the requirements at issue here would be imposed by a jury's application of the MUTPA to a claim premised on smoking and health, is immaterial because judges and juries—no less than state executive officials—possess the authority to impose state-law requirements. Indeed, this Court has already held that federal law preempts a jury's application of a general state consumer fraud statute to a specific set of facts encompassed by the terms of an express preemption provision. *See Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995). This conclusion was recently reaffirmed in *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008), which reiterated that state-law claims are preempted where they seek to apply a generally applicable state-law obligation to specific factual allegations that fall within the scope of an express preemption clause. *Id.* at 1010.

C. The First Circuit's express preemption analysis is also inconsistent with the preemption framework articulated by a plurality of this Court in *Cipol-*

lone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992). In *Cipollone*, a four-Justice plurality concluded that the Labeling Act expressly preempts state-law fraud claims that challenge health-related advertising representations that are only potentially misleading, but does not preempt claims challenging inherently false statements because those claims are based on a state-law duty not to deceive. Respondents' claims are preempted under the *Cipollone* plurality's framework because respondents concede that tar and nicotine descriptors accurately convey the results of testing under the FTC Method (J.A. 30a), and allege only that descriptors could be potentially misleading to smokers who are unaware that the FTC Method may not reflect the amount of tar and nicotine that a smoker actually receives. The First Circuit misapplied the *Cipollone* plurality's preemption framework when it placed dispositive weight on the fact that respondents' claims do not carry the same "warning neutralization" label as the fraud claims that the *Cipollone* plurality found to be preempted.

If this Court were nevertheless to conclude that respondents' claims are not preempted under the framework endorsed by the *Cipollone* plurality, then it should reexamine that framework, which was criticized by a majority of the Court at the time it was articulated. This Court's more recent express preemption decisions in *Reilly*, *Riegel*, and *Wolens* unequivocally establish that respondents' claims are expressly preempted.

II. Respondents' claims are also impliedly preempted because they present an obstacle to the FTC's longstanding policy of encouraging consumers to rely on the standardized tar and nicotine information conveyed by the FTC Method and promoting

competition among tobacco companies in the development of low-tar cigarettes.

A. Based on scientific reports "strongly suggest[ing]" that cigarettes with lower FTC-rated tar and nicotine yields present fewer health risks (J.A. 647a), the FTC designated the FTC Method as the exclusive means of communicating tar and nicotine yields to consumers, required tobacco companies to disclose these yields in all cigarette advertisements, and authorized tobacco companies to use descriptors as a shorthand means of communicating the comparative FTC-rated tar and nicotine yields of different cigarette brands. Respondents contend that the use of descriptors to encapsulate the results of testing under the FTC Method is deceptive under Maine law. These claims present a direct challenge to the FTC's low-tar policy, and are therefore impliedly preempted.

B. The First Circuit's reasons for rejecting PMUSA's implied preemption defense are erroneous. The First Circuit's contention that the FTC lacks a "coherent" low-tar policy (Pet. App. 54a) disregards more than forty years of regulatory activity by the FTC designed to provide consumers with standardized tar and nicotine information using the FTC Method. Moreover, the court of appeals' conclusion that only a formal FTC rule can have preemptive effect is inconsistent with this Court's precedent (*see*, *e.g.*, *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64 (2002)), and would improperly restrict agencies' otherwise broad discretion to undertake regulation through either formal rulemaking or more efficient, informal regulatory procedures. Finally, the court of appeals' reliance on 15 U.S.C. § 57b(e) is misplaced because that provision simply makes clear that the

FTCA does not preempt the entire field of remedies for unfair and deceptive trade practices.

ARGUMENT

For more than 40 years, the federal government has extensively regulated the content of cigarette labeling and advertising pursuant to the Labeling Act's "comprehensive Federal program to deal with . . . any relationship between smoking and health." 15 U.S.C. § 1331. Congress has prescribed warnings that must appear on every cigarette package and advertisement, prohibited cigarette advertising on radio and television, precluded States from imposing any "requirement or prohibition based on smoking and health . . . with respect to . . . cigarettes," and expressly preserved the FTC's authority to regulate "unfair or deceptive acts or practices" in cigarette advertising. 15 U.S.C. §§ 1333, 1334(b), 1335, 1336.

During this same period of time, the FTC has invoked its authority under the Labeling Act and the FTCA to police health-related claims in cigarette advertising, require the dissemination of standardized tar and nicotine information to consumers, and encourage the development of less-hazardous cigarettes. In order to provide consumers with a useful shorthand means of comparing different brands' tar and nicotine yields, the FTC has also authorized cigarette manufacturers to use descriptors such as "light" or "lowered tar and nicotine" in their advertising, as long as those statements are substantiated by testing under the FTC Method.

Against this backdrop of extensive congressional and FTC oversight of health-related claims in cigarette advertising and promotion, respondents contend that Maine law prohibits the use of descriptors to communicate to consumers the relative FTC-rated

tar and nicotine yields of cigarette brands. Respondents' claims present a direct challenge to the "comprehensive Federal program" governing health claims in cigarette advertising, and are expressly and impliedly preempted by federal law.

I. RESPONDENTS' CLAIMS ARE EXPRESSLY PREEMPTED BY THE LABELING ACT

The Labeling Act provides that "[n]o 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 Act. 15 U.S.C. § 1334(b). Respondents do not dispute that their claims seek to impose a "requirement or prohibition" or that they pertain to the "advertising or promotion" of cigarettes that carried the Labeling Act-mandated warning labels on their packages. Pet. App. 82a n.14. They instead attempt to evade the Labeling Act's preemptive reach by contending that their claims—which allege that PMUSA is liable under state law for using descriptors "with the intention of communicating to consumers that" certain cigarettes "were less harmful or safer than" other cigarettes (J.A. 28a)—do not seek to impose requirements or prohibitions "based on smoking and health." Traditional principles of statutory construction establish that, if successful, respondents' claims would indeed impose state-law requirements or prohibitions "based on smoking and health" because they are premised on the relationship between smoking and health.

This Court's express preemption jurisprudence—including its prior interpretations of the Labeling Act—confirms this conclusion. This Court has repeatedly held that a general state-law obligation—

such as the duty not to engage in deceptive advertising—is preempted when it is applied to a specific set of facts encompassed by the terms of an express preemption provision. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 538 (2001); *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995). This principle was most recently reaffirmed in *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999 (2008), which held that a jury's application of a general common-law duty to a specific medical device constitutes a preempted state-law requirement "'with respect to'" that device. *Id.* at 1010 (quoting 21 U.S.C. § 360k(a)). Similarly, a general state-law duty not to engage in deceptive advertising constitutes a state-law requirement or prohibition "based on smoking and health" when its specific application is premised on the relationship between smoking and health—whether that application is effected by an executive official (as in *Reilly*) or by a court (as in this case).

A. The Text, Structure, And Purpose Of The Labeling Act Establish That Respondents' Claims Are Expressly Preempted

1. The starting point for the interpretation of any statute—including a preemption provision—is the statutory language. *See Reilly*, 533 U.S. at 545; *Riegel*, 128 S. Ct. at 1006. The plain language of the Labeling Act's preemption provision establishes that a state-law requirement or prohibition is "based on smoking and health" when it is "found[ed]" upon—or premised on—the relationship between smoking and health. *See Random House Unabridged Dictionary* 172 (2d ed. 1993). An examination of the allegations in respondents' complaint leaves no doubt that their claims seek to impose requirements or prohibitions that are "based on smoking and health."

Respondents allege that PMUSA used tar and nicotine descriptors to "communicat[e] to consumers" that "light" cigarettes "were less harmful or safer than regular" cigarettes. J.A. 28a. According to respondents, PMUSA "introduced Marlboro Lights and Cambridge Lights into the market with the intent to provide smokers who were concerned about their health with a product that could reduce their concerns about the negative health implications of smoking and thereby allow them to continue to smoke cigarettes." *Id.* at 29a. "[C]onsumers buying" these brands allegedly "understood that tar and nicotine were the 'bad' components in cigarettes and, therefore, lower levels of these components would reduce the negative health effects of the cigarette product." *Ibid.* These allegations are explicitly and unambiguously premised on the relationship between smoking and health. Indeed, the degree to which respondents' allegations are infused with health-related concerns is underscored by the fact that respondents use the words "health" and "cancer" more than half a dozen times in their complaint. *See Reilly*, 533 U.S. at 548 (a state-law requirement is "based on smoking and health" when it is "motivated by"—or "intertwined with"—"concerns about smoking and health").

As the complaint itself demonstrates, claims challenging the use of tar and nicotine descriptors are invariably premised on the relationship between smoking and health. Beginning in the mid-1960s, the public-health community repeatedly equated lower tar and nicotine yields with decreased health risks. *See* J.A. 647a (U.S. Public Health Service 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"); *see also id.* at 292a (National Cancer Institute committee report stating that "[b]rand names and brand classifications such as 'light' and 'ultra light' represent health claims") (internal quotation marks omitted). The FTC echoed this conclusion in its own public statements. *See id.* at 527a ("Based upon the proposition that lower yield cigarettes present a lessened hazard to the American public, the [Federal Trade] Commission has acted within the past year to . . . prompt cigarette manufacturers to develop less hazardous cigarettes").

Because consumers were repeatedly told by the public-health community and the federal government that cigarettes with lower FTC-rated tar and nicotine yields may have fewer health risks than regular cigarettes, a state-law claim challenging the use of descriptors to inform consumers about the comparative tar and nicotine yields of various cigarette brands is unquestionably premised on the relationship between smoking and health and, if successful, would impose state-law requirements or prohibitions "based on smoking and health." *See also* Br. of the United States as *Amicus Curiae* at 12-13, *Reilly* (No. 00-596) ("Congress amended Section 1334 to preempt state regulations that could interfere with [the] federal warning requirements. State law restrictions that either require or prohibit health messages in labeling or advertising meet that description.").

2. This conclusion is confirmed by the structure of the Labeling Act, which was designed to "establish 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 (emphases added).

The Labeling Act requires cigarette packages to carry federally prescribed warning labels regarding the health effects of smoking (15 U.S.C. § 1333) and provides that no other "statement relating to smoking and health . . . shall be required on any cigarette package." *Id.* § 1334(a).[7] The Labeling Act also requires cigarette advertisements to carry these health warning labels (*id.* § 1333) and prevents States from imposing their own "requirement[s] or prohibition[s] based on smoking and health" with respect to cigarette advertising and promotion. *Id.* § 1334(b). Taken together, these provisions establish a comprehensive federal regulatory framework governing health-related claims in the advertising and promotion of cigarettes that—through the Labeling Act's preemption provision—displaces state authority in this area. *See* 115 Cong. Rec. 38,732, 38,738 (Dec. 12, 1969) (statement of Sen. Magnuson, Chairman of the Senate Commerce Committee) (the Labeling Act, as amended, "preempts all State and local health-related regulation of cigarette advertising").

The comprehensive character of this federal regulatory framework is reinforced by the fact that

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[7] Between 1965 and 1970, the statutorily mandated warning read: "Caution: Cigarette Smoking May Be Hazardous To Your Health." Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282, § 4 (July 27, 1965). In 1970, Congress strengthened the warning to read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, § 4 (Apr. 1, 1970). Since 1985, manufacturers have been required to use, on a rotating basis, four warnings specified by Congress. 15 U.S.C. § 1333(a). The FTC is responsible for approving manufacturers' plans for the rotation of the four congressionally mandated warnings. *Id.* § 1333(c).

"Congress expanded the pre-emption provision [of the Labeling Act] with respect to the States . . . at the same time [that] it allowed the FTC"—which had been subject to the narrower preemption provision of the original 1965 enactment—"to regulate cigarette advertising." *Reilly*, 533 U.S. at 545-46. Congress expanded the FTC's regulatory role by amending "the pre-emption provision to prohibit only restrictions 'imposed under State law'" (*Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 515 (1992)) and through a savings clause that expressly authorizes the FTC to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. § 1336. The FTC savings clause underscores the absence of any Labeling Act provision preserving *state* authority to regulate health-related claims in cigarette advertising.

Indeed, at the time that Congress expanded the Labeling Act's preemption provision "with respect to the States" in the Public Health Cigarette Smoking Act of 1969, nearly every State had enacted a "Little FTC Act" that paralleled the federal agency's authority to police deceptive advertising practices, and the States were "prepar[ing] to take actions regulating cigarette advertisements." *Cipollone*, 505 U.S. at 515 & n.11. Congress's amendment of the Labeling Act to prohibit States from imposing "requirements based on smoking and health" in cigarette advertising expressly *preempted* the application of the States' Little FTC Acts to health-related claims in cigarette advertising, while expressly *preserving* the FTC's regulatory authority in this area. Had Congress intended the States to retain a role in policing health claims in cigarette advertising, it would have included an analogous state-law savings clause—as it has done in other tobacco regulatory frameworks.

See 15 U.S.C. § 4406(c) (expressly preserving state-law liability based on advertising for smokeless tobacco products).

The Labeling Act's FTC savings clause also demonstrates that Congress had no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health. Instead, it allocated responsibility for policing health-related claims in cigarette advertising and promotion to the FTC, which possesses a range of formal and informal regulatory tools that it has used to closely regulate tobacco companies' claims about smoking and health since the 1920s. *See* S. Rep. No. 91-566, at 13 (1969) ("The [Federal Trade] Commission remains free to proceed by complaint against any cigarette manufacturer who it believes is making unfounded health claims or false claims about the product's characteristics in advertising material").[8] Indeed, it is not unusual for Congress to promote national regulatory uniformity by providing a single federal agency with the authority

[8] *See*, *e.g.*, 13 F.T.C. 411, 412 (1929) (cigarette manufacturer agreed to cease and desist from representing its cigarettes as "harmless"); 17 F.T.C. 597, 597 (1933) (J.H. Guild Co. agreed to cease and desist from advertising cigarettes that "soothe[d] and relieve[d] Asthma"); 34 F.T.C. 1689, 1690 (1942) (Brown & Williamson Tobacco Corp. agreed to cease and desist from representing that its cigarettes "leave[ ] the nose and throat actually cleaner or clearer"); 46 F.T.C. 1230, 1230 (1950) (Leighton Tobacco Co. agreed to cease and desist from representing that its Phantom cigarettes "cause no irritation"); *see also supra* pgs. 4-13 (detailing the FTC's regulation of tar and nicotine claims in cigarette advertising since the 1950s); Prepared Statement of the FTC, *supra*, at 3 ("The Commission also has used its Section 5 authority to prosecute a variety of unfair and deceptive cigarette advertising practices—including claims about tar and nicotine ratings for cigarettes").

to oversee an industry's advertising practices and by simultaneously preempting the States' overlapping authority. *See Wolens*, 513 U.S. at 228 & n.4 (holding that the Airline Deregulation Act preempts state-law consumer fraud claims challenging airline advertising, while emphasizing that the Department of Transportation "retains authority to investigate unfair and deceptive practices and unfair methods of competition by airlines").

Although Congress has amended the Labeling Act on several occasions since 1969 (*see*, *e.g.*, Comprehensive Smoking Education Act of 1984, Pub. L. No. 98-474, 98 Stat. 2200), it has never altered the fundamental allocation of regulatory authority between the States and the FTC.[9]

3. Preemption of respondents' health-related claims is also consistent with the policies underlying the Labeling Act, which was enacted both to "inform the public adequately about the hazards of cigarette smoking, and to protect the national economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health." *Reilly*, 533 U.S. at 542-43; *see also* 15 U.S.C. § 1331.

Allowing respondents' suit to proceed would generate consumer confusion about tar and nicotine claims in cigarette advertisements and obliterate the national regulatory uniformity that the Labeling Act

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[9] Congress has also declined to enact legislation that would have prohibited the use of tar and nicotine descriptors and other advertising representations based on the results of testing under the FTC Method. *See*, *e.g.*, Truth in Cigarette Labeling Act of 2006, S. 3872, 109th Cong.

was designed to establish. If tar and nicotine descriptors could be used in one group of States to communicate cigarettes' comparative FTC-rated tar and nicotine yields, but could be utilized in other States only subject to certain restrictions, and were completely banned in a third group of States, then consumers and tobacco companies would be confronted with precisely the type of "confusing" and "nonuniform" cigarette advertising and warning regulations that the Labeling Act was designed to prevent. *Compare Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1, 6 (Ill. 2005) (holding that the use of descriptors does not violate Illinois's consumer fraud statute because the FTC has authorized such representations), *with* Pet. App. 61a (allowing virtually identical claims under Maine law to proceed). Under this patchwork regime, consumers would receive conflicting messages about the health effects of smoking, and tobacco companies would be effectively foreclosed from operating national advertising campaigns. For these reasons, the FTC itself has expressed opposition to proposals to repeal the Labeling Act's preemption provision due to the pernicious consequences that would result from superimposing divergent state-law standards on the federal framework governing statements about smoking and health in cigarette advertising. *See* J.A. 348a (FTC congressional submission explaining that, "if one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict").

The Labeling Act reflects Congress's judgment that health-related statements in cigarette advertising should be governed by a coherent federal regula-

tory framework that provides consumers with consistent and readily understandable information about the health effects of smoking and that provides tobacco companies with a uniform regulatory backdrop against which to operate national advertising campaigns. Preemption of state-law "cigarette advertising regulations motivated by concerns about smoking and health" (*Reilly*, 533 U.S. at 548)—such as respondents' claims that tar and nicotine descriptors are deceptive under Maine law—is essential to the preservation of that uniform federal regulatory framework. *Cf. Rowe* v. *N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 995 (2008) (holding a state law to be preempted where it had a "'significant' and adverse 'impact' in respect to the federal Act's ability to achieve its pre-emption-related objectives").

B. The First Circuit's Express Preemption Analysis Is Inconsistent With This Court's Precedent

Despite the clear import of the Labeling Act's language, structure, and purpose, the First Circuit rejected PMUSA's express preemption defense because it determined that the requirements that respondents' claims seek to impose are not "based on smoking and health" but are instead based on a general state-law duty not to deceive. The court of appeals' reasoning cannot be reconciled with this Court's interpretation of the Labeling Act in *Reilly*, or with the well-established principle—recently reaffirmed in *Riegel*—that federal law preempts a jury's application of a general state-law duty to a specific set of facts encompassed by the terms of an express preemption provision. Because respondents' claims apply the general obligations of the MUTPA to factual allegations premised on the relationship between smoking and health, those claims seek to im-

pose requirements or prohibitions "based on smoking and health" and are therefore expressly preempted.

1. While acknowledging that respondents' claims are "intertwined with the concern about cigarette smoking and health," the court of appeals held that the requirements that those claims seek to impose are not "based on smoking and health" because they are "premised on a state-law duty that is broader in scope" than the concern about smoking and health—the "ban on 'unfair or deceptive acts or practices in the conduct of any trade or commerce' under the Maine Unfair Trade Practices Act." Pet. App. 20a, 21a. According to the court of appeals, the Labeling Act does not preempt state-law claims challenging health-related statements in cigarette advertising where those claims are based on a "'general obligation'"—such as the obligation not to engage in deceptive advertising imposed by the MUTPA—that may also have application outside the specific context of smoking and health. *Id.* at 22a.

The First Circuit's conclusion that the Labeling Act does not preempt application of a generally applicable unfair trade practices statute in the specific smoking-and-health setting is directly at odds with this Court's holding in *Reilly* that the Labeling Act preempted state cigarette advertising regulations promulgated pursuant to the Massachusetts Unfair Trade Practices Act. 533 U.S. at 533. The Court concluded that these state regulations—which imposed restrictions on the location and content of outdoor and point-of-sale cigarette advertising in an effort to restrict youth exposure to such advertisements—were "intertwined with the concern about cigarette smoking and health" and therefore "based on smoking and health" within the meaning of the Labeling Act. *Id.* at 548. The fact that the regula-

tions in question were predicated on the general duty not to engage in deceptive advertising established by a state unfair trade practices statute did not give the Court reason to alter its conclusion that the application of that general duty in the specific smoking-and-health context created a state-law requirement "based on smoking and health."

2. Like the advertising regulations in *Reilly*, respondents' state-law claims seek to apply the general duty not to engage in deceptive advertising in the specific smoking-and-health setting and are therefore preempted by the Labeling Act. The First Circuit nevertheless suggested that *Reilly* was inapposite because the Massachusetts tobacco-specific "regulations were themselves the [state-law] '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." Pet. App. 20a.

The First Circuit's effort to distinguish *Reilly* is unavailing. Respondents' claims seek to impose health-related cigarette advertising requirements on the basis of a state unfair trade practices statute, which is precisely what the Massachusetts Attorney General did in *Reilly* when he promulgated health-related cigarette advertising requirements on the basis of the Massachusetts Unfair Trade Practices Act. The fact that the state-law requirements in *Reilly* were promulgated by an executive branch official, while the requirements in this case would ultimately be imposed by a judgment implementing a jury verdict, is immaterial because judges and juries—no less than officials of the executive and legislative branches—are state actors. *See Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 624 (1991) ("[A jury] is a quintessential governmental body, having no at-

tributes of a private actor. The jury exercises the power of the court and of the government that confers the court's jurisdiction."). 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)), a jury's invocation of the MUTPA to impose health-related restrictions on the use of tar and nicotine descriptors in cigarette advertising is legally indistinguishable from the Massachusetts Attorney General's invocation of his State's unfair trade practices statute to promulgate health-related cigarette advertising regulations.

Indeed, this Court has explicitly held that federal law preempts claims that seek to apply a general state consumer fraud statute to a specific set of facts encompassed by the terms of an express preemption provision. *See Wolens*, 513 U.S. at 228 (holding that the Airline Deregulation Act—which preempts state laws "relating to rates, routes, or services of any air carrier"—preempts state-law consumer fraud claims challenging airline advertising). In so doing, the Court rejected the argument—relied upon by the First Circuit in this case—that a jury's application of the general duty not to deceive to a specific set of facts can be distinguished from a state attorney general's reliance upon that general duty to promulgate industry-specific regulations. *See id.* at 236 (Stevens, J., dissenting) (disagreeing with the "majority's extension of the ADA's pre-emptive reach from [the] airline-specific advertising standards" at issue in *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374 (1992), "to a general background rule of private conduct"). Thus, no less than the Massachusetts advertising regulations in *Reilly*, a jury verdict finding that it is deceptive under Maine law to use descrip-

tors in cigarette advertising to communicate tar and nicotine yields would impose a state-law "requirement . . . based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. *See also Riegel*, 128 S. Ct. at 1007 (plaintiffs' common-law claims "'relate[ ] to the safety or effectiveness of [a medical] device'" because "[s]afety and effectiveness are the very subjects of the Riegels' common-law claims").

The First Circuit's reasoning would lead to untenable—and nonsensical—results. Like most state consumer fraud statutes, the MUTPA can be enforced either through the state attorney general's promulgation of a regulation defining the scope of the statutory prohibition on deceptive advertising or through a lawsuit initiated by the attorney general or a private citizen. Me. Rev. Stat. tit. 5, §§ 207, 209, 213. Under the First Circuit's reading of the Labeling Act, the Maine Attorney General's invocation of the MUTPA to issue a regulation that prohibited the use of tar and nicotine descriptors in cigarette advertising would be preempted by the Labeling Act but a jury verdict finding that PMUSA had violated the same statute through its use of tar and nicotine descriptors would escape preemption. It defies common sense, however, to suggest that Congress intended to afford state-law juries greater authority to regulate health-related claims in cigarette advertising than state executive and legislative officials by preempting one category of state regulation, but not the other. *See Riegel*, 128 S. Ct. at 1008 ("it is implausible that the [Medical Device Amendments were] meant to 'grant greater power (to set state standards "different from, or in addition to" federal standards) to a single state jury than to state officials acting

through state administrative or legislative lawmaking processes'").

As this Court has explained in rejecting similar arguments regarding the preemption provision of other federal statutes, an exception to the Labeling Act's preemptive reach for the application of the general duty not to deceive in the specific smoking-and-health setting would create an "utterly irrational loophole" because "there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute." *Morales*, 504 U.S. at 386 (Airline Deregulation Act); *see also Pilot Life Ins.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987) (ERISA preemption is not limited to state measures targeting ERISA plans but also includes general common-law tort and contract causes of action); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959) ("Nor has it mattered [in preemption cases under the National Labor Relations Act] whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations").

For all of these reasons, this Court in *Riegel* expressly rejected the argument that the preemptive reach of the Medical Device Amendments to the federal Food, Drug, and Cosmetic Act is restricted to statutory causes of action and common-law obligations that "apply *only* to the relevant [medical] device, or only to medical devices and not to all products and all actions in general." 128 S. Ct. at 1010 (emphasis in original). In holding that the statute preempts the application of a general common-law duty to a specific medical device, the Court emphasized that a "tort judgment . . . establishes that the

defendant has violated a state-law obligation" and "disrupts the federal scheme no less than state regulatory law to the same effect." *Id.* at 1008.

Similarly, the Labeling Act expressly prohibits state regulation of health-related claims in cigarette advertising, whether that regulation is accomplished through a cigarette-specific executive branch regulation or through a court judgment applying a generally applicable state-law duty to the smoking-and-health setting. Indeed, because there are no common-law duties specific to smoking and health, the Labeling Act would not preempt *any* common-law claims if it did not reach the application of a general state-law obligation to a specific health-related advertising representation—a result at odds with this Court's consistently reaffirmed conclusion that Congress intended the Labeling Act to preempt common-law claims. *See Cipollone*, 505 U.S. at 521 (plurality opinion); *id.* at 548 (opinion of Scalia, J.); *see also Riegel*, 128 S. Ct. at 1008 (reaffirming this conclusion); *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

C. Preemption Of Respondents' Claims Is Required Under The *Cipollone* Plurality's Interpretation Of The Labeling Act

The First Circuit's express preemption analysis also conflicts with the Labeling Act preemption framework endorsed by a plurality of the Court in *Cipollone*.

1. In *Cipollone*, this Court held that the Labeling Act expressly preempts certain categories of state-law fraud claims against tobacco companies. The plaintiff had "allege[d] two theories of fraudulent misrepresentation" against the tobacco company

defendants. 505 U.S. at 527 (plurality opinion). As described by the district court, one theory alleged "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). Although six Justices agreed that the Labeling Act preempts common-law tort claims, those Justices could not reach agreement as to *which* of the plaintiff's two fraud claims were preempted.

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.

The *Cipollone* plurality explained that it is inherent "falsity" that distinguishes state-law re-

quirements 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*.

The same cannot be said of claims challenging *potentially* misleading representations of fact. *See* W. Page Keeton et al., *Prosser & Keeton on Torts* § 105, at 728 (5th ed. 1984) (noting that some of the elements of the cause of action for deceit "have undergone modification or qualification in some jurisdictions"). Indeed, the potential for divergent state-law standards is heightened in cases—such as this one—where a plaintiff's claims are premised on a state consumer fraud statute. Such statutes vary widely from State to State, including in the extent to which they exempt conduct permitted by the federal government. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002). The proliferation of such conflicting state-law standards is precisely what Congress sought to prevent when enacting the Labeling Act to establish a uniform federal regulatory framework governing health-related representations in cigarette advertising.

Moreover, the distinction that the *Cipollone* plurality drew between inherently false statements and statements that are potentially misleading is hardly a novel one. It is essentially the same distinction that this Court had previously developed to deter-

mine 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 would clearly fall into the second category because it is undisputed that they accurately communicate the results of testing under the FTC Method. J.A. 30a.

2. Respondents' claims are preempted under the framework articulated by the *Cipollone* plurality. Respondents concede that descriptors are an accurate shorthand for conveying to consumers tar and nicotine testing results under the FTC Method. J.A. 30a. They nevertheless contend that PMUSA is liable under state law because descriptors could be potentially misleading to smokers who are not aware that these representations are based on standardized machine testing and thus may not reflect the amount of tar and nicotine that a smoker actually receives. *Id.* at 30a-31a. Respondents further allege that PMUSA used descriptors "with the intention of communicating to consumers that Marlboro Lights [and Cambridge Lights] were less harmful or safer than regular Marlboro [or Cambridge] cigarettes" (*id.* at 28a, 29a) and "to provide smokers who were concerned about their health with a product that could reduce their concerns." *Id.* at 29a. Like the warning-neutralization claim deemed to be preempted by the *Cipollone* plurality, respondents' allegations are therefore "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 527; *see also Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007) (holding that a state-law fraud claim challenging the use of descriptors was expressly preempted because the "terms 'light' and 'lowered tar and nicotine' cannot . . . be inherently deceptive or untrue").

According to the First Circuit, however, the preemption framework developed by the *Cipollone* plurality does not "differentiate between 'express' and 'implied' misrepresentations." Pet. App. 32a n.18. The court of appeals instead attempted to distinguish the preempted and nonpreempted categories of fraud claims recognized by the *Cipollone* plurality by looking to the label attached to respondents' claims. Because those claims allege a violation of the prohibition on deceptive advertising under the MUTPA—and do not carry the same "warning neutralization" label as the fraud claims that the *Cipollone* plurality found to be preempted—the court of appeals concluded that respondents' claims were based on the "duty not to deceive" and therefore were not preempted. *Id.* at 30a-31a.

In so holding, the court of appeals acknowledged 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." Pet. App. 32a. The court nevertheless suggested that "those statements [could] also support a different theory of recovery, including one that falls outside the preemptive reach of [the Labeling Act]." *Id.* at 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"). According to the First Circuit, respondents avoided the Labeling Act's preemptive reach by "not alleg[ing] that the statements 'light' and 'lower tar and nicotine' diluted the warnings on [PMUSA's] packaging or advertising" but instead "alleg[ing] that the statements deceived them into purchasing Marlboro Lights and Cambridge Lights." *Id.* at 30a-31a.

In addition to misconstruing the substance of respondents' claims (which repeatedly allege that descriptors were used to allay smokers' health concerns (J.A. 28a-29a)), the First Circuit's approach is flawed because it provides for preemption of a fraud claim *only* when a plaintiff uses the precise "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"). Because the *substance*—rather than the label—of respondents' claims is indistinguishable from the warning-neutralization claim in *Cipollone*, those claims are preempted.[10]

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[10] The plaintiff in *Cipollone* also advanced "two closely related theories" in support of a claim for "failure to warn." 505 U.S. at

3. If this Court were to conclude that respondents' claims are not expressly preempted under the framework articulated by the *Cipollone* plurality, then it should reexamine that framework.

As discussed at length above, respondents' claims seek to impose state-law requirements "based on smoking and health" within the meaning of the Labeling Act because they allege that PMUSA used tar and nicotine descriptors to communicate to smokers that "light" cigarettes had fewer health risks than regular cigarettes (J.A. 28a-29a) and because public-health organizations and the federal government repeatedly informed consumers that cigarettes with lower FTC-rated tar and nicotine yields had fewer health risks than higher-yield cigarettes. This conclusion is confirmed by the structure of the Labeling Act—which expressly preserves the FTC's authority to regulate health-related claims in advertising while

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[Footnote continued from previous page]

524 (plurality opinion). The plurality concluded that these claims were preempted "insofar as" they "require[d] a showing that [the manufacturers'] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings," but were not preempted insofar as they "rel[ied] solely on [the manufacturers'] testing or research practices or other actions unrelated to advertising or promotion." *Id*. at 524-25. Respondents' claims are substantively identical to the *Cipollone* plaintiff's preempted failure-to-warn claims because they "require[ ] a showing that [PMUSA's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings" about the methodological limitations of the FTC Method and the fact that the test is not capable of replicating the variations in actual human smoking behavior. *See Brown*, 479 F.3d at 393 ("the gravamen of Plaintiffs' Light claim is that the warnings mandated by Congress are inadequate with respect to Light cigarettes") (internal quotation marks omitted).

preempting the imposition of state-law advertising requirements "based on smoking and health"—and the Labeling Act's purpose of establishing a uniform federal regulatory program governing health claims in cigarette advertising.

If the framework endorsed by the *Cipollone* plurality could be applied in a way that would allow respondents' state-law claims to proceed, then the plurality's interpretation of the preemption provision would conflict with each of these interpretive guideposts. The plurality's analysis would also conflict with the subsequent conclusions of a majority of this Court in *Reilly*—that the Labeling Act preempts state-law cigarette advertising requirements that are based upon the application of a state unfair trade practices statute in the smoking-and-health setting (533 U.S. at 548)—and in *Riegel* and *Wolens*—that federal law preempts a court's application of a general state-law obligation to a specific set of facts encompassed by an express preemption provision. *See also Cipollone*, 505 U.S. at 554 (opinion of Scalia, J.) (preemption under the Labeling Act should be determined by "ask[ing] . . . whether, whatever the source of the duty, it imposes an obligation in this case because of the effect of smoking upon health").

The *Cipollone* plurality's preemption framework—which concededly lacks "theoretical elegance" (505 U.S. at 529 n.27 (plurality opinion))—was criticized by a *majority* of the Court at the time it was articulated. *See id.* at 543 (opinion of Blackmun, J.); *id.* at 552, 556 (opinion of Scalia, J.). If respondents' claims—which fall squarely within the plain language and purpose of the Labeling Act's preemption provision—are not preempted under that framework, then this Court should follow its subsequent holdings in *Reilly*, *Riegel*, and *Wolens*, and explicitly reject the

Cipollone plurality's restrictive reading of the Labeling Act's preemption provision.

* * *

In the Labeling Act, Congress established a uniform federal regulatory framework governing smoking-and-health claims with respect to cigarette advertising and promotion by explicitly *authorizing* the FTC to regulate such claims and expressly *preempting* state authority to do so. Respondents' suit falls squarely within the language and purpose of the Labeling Act's preemption provision because respondents are attempting to invoke Maine law to regulate PMUSA's alleged use of tar and nicotine descriptors to communicate to consumers that "light" cigarettes present fewer health risks than regular cigarettes. If these state-law claims—which present a direct challenge to health-related statements in cigarette advertising—are not preempted, then the Labeling Act's preemption provision would be largely nullified and the express preemption principles established in *Riegel*, *Reilly*, and *Wolens* would be effectively overruled.

II. RESPONDENTS' CLAIMS ARE IMPLIEDLY PREEMPTED

Respondents' claims are also impliedly preempted because, if allowed to proceed, they would present an obstacle to the FTC's longstanding policy of encouraging consumers to rely on the standardized tar and nicotine information conveyed by the FTC Method and promoting competition among tobacco companies in the development of low-tar cigarettes.

State law is impliedly preempted where it "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Con-

gress'" or a federal agency. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)). This Court has repeatedly applied these principles to preempt state laws that interfere with an agency's regulatory policies. *See*, *e.g.*, *Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000); *Fid. Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 159 (1982). Because respondents' state-law challenge to the use of FTC-authorized descriptors would substantially impede the FTC's low-tar policy, their claims are impliedly preempted.[11]

A. Respondents' Claims Present An Obstacle To The FTC's Low-Tar Policy

The FTC has long supported the efforts of public-health officials to reduce the risks posed by smoking. *See* 29 Fed. Reg. at 532. Since the publication of the first scientific reports in the early 1960s "strongly suggest[ing] that the lower the 'tar' and nicotine content of cigarette smoke, the less harmful would be

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[11] Although PMUSA's implied preemption defense relies primarily on the conflict between respondents' claims and the FTC's low-tar policy, respondents' state-law challenge to the use of tar and nicotine descriptors also conflicts with the policies underlying the Labeling Act, which was enacted to establish a "comprehensive Federal program to deal with" health-related statements in "cigarette labeling and advertising." 15 U.S.C. § 1331. The fact that the Labeling Act contains an express preemption provision does not bar the statute from also impliedly preempting state law. *See Freightliner*, 514 U.S. at 287 (the argument "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute . . . is without merit"); *see also Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 65 (2002) (same). *But see Cipollone*, 505 U.S. at 517.

the effect" (J.A. 647a), the FTC has pursued a regulatory policy designed to "lead those smokers who are unable to kick the habit to greater interest in obtaining a low tar and nicotine cigarette" and to encourage "competition among the cigarette companies to meet that interest." *Id.* at 566a.

Toward those ends, the FTC designated the FTC Method as the exclusive means of measuring tar and nicotine yields (J.A. 479a), and required tobacco companies to disclose tar and nicotine yields, measured under the FTC Method, in all print advertisements for cigarettes. *Id.* at 377a, 899a. Through a 1967 policy statement and a series of consent agreements with tobacco companies, the FTC also authorized the use of tar and nicotine descriptors in cigarette advertising as a shorthand means of communicating tar and nicotine information to consumers, as long as those descriptors were substantiated by testing under the FTC Method. *Id.* at 368a; *see also In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).

Since the inception of this policy, the FTC has been well aware of the FTC Method's inherent inability to replicate the variability of human smoking behavior 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). Notwithstanding these known limitations, the FTC has retained the testing method for four decades and has encouraged consumers to rely on its results because "the [testing] numbers provide legitimate comparative information to consumers attempting to lower their overall tar and nicotine consumption." C.A. App. 176 Ex. 203, at 5.

Respondents' claims represent an effort to second-guess the FTC's policy judgments by imposing state-law liability on PMUSA for using FTC-authorized descriptors to communicate to consumers the results of tar and nicotine testing under the FTC Method. Respondents' claims are barred by settled principles of implied conflict preemption because the imposition of state-law liability based on PMUSA's FTC-authorized conduct would "create[ ] an obstacle to the accomplishment and execution" of the FTC's low-tar policy. *De la Cuesta*, 458 U.S. at 156 (internal quotation marks omitted).

Respondents' claims allege that the descriptors authorized by the FTC—and, ultimately, the FTC Method itself—are deceptive and misleading under Maine law. The FTC, however, has made the determination that, despite its known limitations, the FTC Method provides a useful, standardized means of comparing different brands' tar and nicotine yields. The FTC has therefore declared the FTC Method to be the *only* methodology that tobacco companies may use to convey tar and nicotine information to the public, has designated the explanatory legend that must accompany the mandatory disclosure of FTC-rated tar and nicotine yields in cigarette advertising, and has repeatedly authorized the use of descriptors as a shorthand means of communicating testing results. Allowing respondents' claims to challenge PMUSA's FTC-authorized statements as deceptive under Maine law would frustrate—and, indeed, directly conflict with—the FTC's policy judgments.

B. The First Circuit's Reasons For Rejecting Implied Preemption Are Erroneous

The First Circuit gave three principal reasons for concluding that respondents' claims are not impliedly preempted: (1) the FTC lacks a coherent policy on tar and nicotine claims in cigarette advertising; (2) the FTC has never issued a formal rule with respect to the FTC Method and the use of descriptors; and (3) a provision of the FTCA, 15 U.S.C. § 57b(e), deprives the FTC's consent orders regarding the use of descriptors of any preemptive force. Each of these rationales is flawed.

1. The First Circuit premised its rejection of PMUSA's implied preemption defense on its inability to "discern a coherent federal policy on low-tar claims." Pet. App. 54a. Its evaluation of the FTC's regulatory activity in this area is erroneous.

The FTC has 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 supra* pgs. 4-13; J.A. 43a-176a. In furtherance of those objectives, the FTC has required tobacco companies to disclose tar and nicotine yields measured using the FTC Method in their advertisements and authorized them to use descriptors as a shorthand means of communicating testing results to consumers. The First Circuit discounted this longstanding FTC policy because it believed that the FTC "has not invariably allowed tar and nicotine claims that are supported by" the FTC Method. Pet. App. 52a. Specifically, the First Circuit pointed to two instances during the past 40 years when the FTC "has recognized that" tar and nicotine claims supported by

the results of the FTC Method "may nevertheless amount to unfair or deceptive acts or practices in certain circumstances." *Ibid.* Neither of these examples undermines the coherence or consistency of the FTC's low-tar policy.

In the first instance, the FTC determined that the FTC Method did not "measure accurately" the tar and nicotine yields of Barclay cigarettes because of the unique filter design of those cigarettes. 48 Fed. Reg. at 15,954. The FTC explained that the "Barclay filter . . . pose[d] a unique problem" because "[r]educed ventilation when smoking Barclay apparently occurs inevitably and cannot be avoided by informed consumers except by use of a cigarette holder." *Ibid.* The problem with the Barclay filter thus went beyond the FTC Method's inherent methodological inability to replicate the variability of individual smokers' behavior. The special filter used in Barclay cigarettes ensured that *no* smoker would actually receive the yields measured by the FTC Method (at least without using a holder). Rather than abandon the FTC Method, the agency responded to this "unique" situation by requiring the manufacturer to list an estimated range of numbers as the FTC-rated tar yield in Barclay advertisements. Contrary to the First Circuit's suggestion, this decision reinforces—rather than undercuts—the FTC's commitment to providing standardized tar and nicotine information to consumers measured using the FTC Method. Because the tar and nicotine yields of Barclay cigarettes could not be accurately compared to those of other cigarettes when expressed as a single, FTC-rated number, the FTC required that an estimated range of yields be listed in order to avoid consumer confusion and then brought an enforcement action against the manufacturer when it

began including tar and nicotine testing results from an independent laboratory in its advertisements. *See FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35 (D.C. Cir. 1985).

The First Circuit's second example is equally unavailing. The court of appeals suggested that the FTC's low-tar policy lacks regulatory coherence because the agency challenged a representation by American Tobacco that "'consumers will get less tar by smoking ten packs of any cigarette rated as having 1 mg. tar than by smoking a single pack of any other brand that is rated as having more than 10 mg. of tar.'" Pet. App. 51a n.26 (quoting *In re Am. Tobacco Co.*, 119 F.T.C. at 10). The FTC's objection was to the use of a "numerical multiple, fraction, or ratio" to suggest that—despite the FTC Method's methodological limitations—smokers would actually receive less tar from smoking ten packs of American Tobacco's cigarettes than from smoking one pack of the comparison brand. 119 F.T.C. at 10. In the same consent order, however, the FTC reaffirmed that representations that a brand is "low," "lower," or "lowest" in tar and nicotine are *not* misleading or deceptive if those representations are substantiated by the FTC Method and do not refer to smokers' actual tar and nicotine intake. *Ibid.* Like the Barclay case, then, the FTC's consent order with American Tobacco merely reinforces the agency's commitment to providing consumers with standardized tar and nicotine information measured using the FTC Method and its recognition of that methodology's inherent limitations.

2. In rejecting PMUSA's implied preemption defense, the First Circuit also emphasized the fact that the FTC "has never issued a formal rule specifically defining which cigarette advertising practices violate

the" FTCA. Pet. App. 46a. The court of appeals did not dispute that the FTC has regulated the tobacco industry's tar and nicotine claims through industry agreements, advisory opinions, policy statements, and consent decrees—including the 1967 policy statement and the 1971 and 1995 consent decrees authorizing the use of descriptors. *See* J.A. 368a; *In re Am. Brands*, 79 F.T.C. at 258; *In re Am. Tobacco Co.*, 119 F.T.C. at 11. It concluded, however, that none of these regulatory activities can impliedly preempt state-law claims that conflict with the FTC's regulatory objectives. Pet. App. 46a. This restrictive view of the FTC's power to preempt state law is flawed.

This Court has repeatedly held that agency activity other than formal rulemaking can have preemptive effect when it reflects a considered policy judgment by the agency. In *Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002), for example, the Court recognized that even an agency's decision *not* to engage in regulation can preempt state law. *Id.* at 64; *cf. Geier*, 529 U.S. at 885 (rejecting the argument that "a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking," is required before agency action can trigger implied preemption). Similarly, this Court's cases involving the "filed rate doctrine"—a species of preemption—typically accord preemptive effect to an agency's issuance of an order determining that a particular rate is just and reasonable, even though the agency has not memorialized that determination in a formal rule. *See*, *e.g.*, *Ark. La. Gas Co.* v. *Hall*, 453 U.S. 571, 578-79 (1981). And in an *amicus* brief recently filed at this Court's invitation in *Wyeth* v. *Levine*, No. 06-1249, the Solicitor General explained that the FDA's decision to approve a new drug application, including

the drug's proposed labeling, triggers implied preemption of conflicting state-law requirements. *See* U.S. Cert. Br. 11 ("a jury's imposition of liability based on a drug's FDA-approved labeling would interfere with FDA's expert judgment").[12]

The First Circuit's exceedingly narrow understanding of an agency's authority to preempt state law directly conflicts with this precedent. It also significantly restricts agencies' otherwise broad regulatory discretion to determine whether to proceed through formal rulemaking or through a more efficient, informal regulatory procedure. *See SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies") (internal quotation marks omitted; alteration in original). Those informal mechanisms—which carry with them many of the same procedural safeguards as formal rulemaking—are an essential component of the FTC's regulatory activity. *See*, *e.g.*, 16 C.F.R. § 2.34(c) (requiring a notice-and-comment period for FTC consent decrees). Indeed, former FTC Chairman Daniel Oliver explained in congressional testimony that the agency prefers to proceed by adjudication and other informal mechanisms because "rulemaking takes a very long time" and it is therefore "more efficient to

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[12] The lower courts have also repeatedly held that state law can be impliedly preempted by agency action other than formal rulemaking. *See*, *e.g.*, *Gen. Motors Corp.* v. *Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) ("a consent order reflecting a reasonable policy choice of [the FTC] and issued pursuant to a congressional grant of authority may preempt state legislation"); *Feikema* v. *Texaco, Inc.*, 16 F.3d 1408, 1416 (4th Cir. 1994); *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 5-6, 9-11, 14-15 (Cal. 2004).

bring a single case against the first offender in order to stop the practice before we go to rulemaking." J.A. 967a.

Even if this were not already a settled question, then, the First Circuit's conclusion would be flawed because it would compel agencies to engage in costly and time-consuming formal rulemaking to accomplish regulatory objectives that could be achieved more quickly and cost-effectively through adjudications, industry agreements, and other informal regulatory means.

3. The First Circuit's implied preemption analysis also relied on 15 U.S.C. § 57b(e), which is part of the FTCA provision authorizing the FTC to bring civil actions for violations of rules and cease-and-desist orders. Section 57b(e) states that "[r]emedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. § 57b(e). According to the First Circuit, this provision "raises an additional hurdle" to PMUSA's "implied preemption theory, at least insofar as that theory relies on the 1971 and 1995 consent orders," because the court could "think of no other purpose for this clause other than to allow further relief from unfair or deceptive acts or practices under state law even after the Commission has already challenged them through litigation under the FTC Act." Pet. App. 47a, 49a.

This reading of Section 57b(e) is flawed. The plain language of the provision indicates that it does nothing more than preserve the viability of state remedies where the FTC has made a determination that a defendant's conduct violates the FTCA. A parallel state-law action regarding that conduct would not conflict with federal law because state law would

merely provide an additional remedy for conduct that violated federal law. It hardly follows, however, that Section 57b(e) also preserves state unfair trade practices suits that are predicated on conduct that the FTC has mandated or authorized. Nothing in the language of Section 57b(e) suggests that the section was intended to create such a significant state-law impediment to the FTC's regulatory policies.

Indeed, this Court has made clear that the inclusion of a "savings" clause "does *not* bar the ordinary working of conflict pre-emption principles" or even impose a "'special burden'" on the proponent of conflict preemption. *Geier*, 529 U.S. at 869, 873 (emphasis in original). There is no more evidence in the text of Section 57b(e) than there was in the savings clause at issue in *Geier* that Congress meant to "save state-law . . . actions that conflict with" federal law. *Id.* at 869. As the Court in *Geier* made clear, although Congress has the power to preserve conflicting state law, such a scheme is extraordinary and hardly to be expected because it "would take from those who would enforce a federal law the very ability to achieve the law's congressionally mandated objectives" and could "permit[ ]" the federal law "to defeat its own objectives, or . . . to destroy itself." *Id.* at 872 (internal quotation marks omitted).[13]

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[13] Notably, Section 57b(e) does not read like a provision that saves state law from preemption. Congress knows how to draft such provisions and has done so in other statutes. *See*, *e.g.*, 6 U.S.C. § 1142(f) ("Nothing in this section preempts or diminishes any other safeguards against discrimination . . . provided by Federal or State law"); 15 U.S.C. § 4406(c) ("Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person").

At most, then, this narrow provision merely establishes that Congress did not intend to preempt the entire *field* of remedies for unfair and deceptive trade practices and that state-law remedies that are otherwise consistent with the federal regulatory framework are not preempted. *Cf. Am. Tel. & Tel. Co.* v. *Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (construing the savings clause in the Communications Act to "preserve[ ] only those rights that are not inconsistent with the statutory filed-tariff requirements"); *Pa. R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915).

* * *

As Congress recognized when enacting the Labeling Act, the relationship between smoking and health is a matter of exceptional importance to the Nation's public health. In order to ensure that the public receives consistent and comprehensible information about the health effects of smoking, Congress granted the FTC the authority to regulate health-related statements in cigarette advertising and expressly preempted the States' overlapping authority. For more than forty years, the FTC has carried out its regulatory mandate by policing deceptive health representations in cigarette advertising, requiring the dissemination of standardized tar and nicotine information to consumers, and encouraging the development of low-tar cigarettes. Respondents' state-law claims directly challenge health-related cigarette advertising representations regulated by the FTC, and are preempted both because they fall squarely within the language of the Labeling Act's express preemption provision and because they directly conflict with the FTC's longstanding tar and nicotine policy. A contrary conclusion would not only nullify

the Labeling Act's preemption provision and the FTC's policy judgments in this area, but would also obliterate the national regulatory uniformity necessary to ensure that consumers are able to make informed decisions about smoking-and-health issues.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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

§ 1331. Congressional declaration of policy and purpose

It is the policy of Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

* * *

§ 1333. Labeling: requirements; conspicuous statement

(a) Required warnings; packages; advertising; billboards

(1) It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(2) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised (other than through the use of outdoor billboards) within the United States any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health.

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

(3) It shall be unlawful for any manufacturer or importer of cigarettes to advertise or cause to be advertised within the United States through the use of

outdoor billboards any cigarette unless the advertising bears, in accordance with the requirements of this section, one of the following labels:

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, And Emphysema.

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Health Risks.

SURGEON GENERAL'S WARNING: Pregnant Women Who Smoke Risk Fetal Injury And Premature Birth.

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

* * *

(c) Rotation of label statement; plan; submission to Federal Trade Commission

(1) Except as provided in paragraph (2), the label statements specified in paragraphs (1), (2), and (3) of subsection (a) of this section shall be rotated by each manufacturer or importer of cigarettes quarterly in alternating sequence on packages of each brand of cigarettes manufactured by the manufacturer or importer and in the advertisements for each such brand of cigarettes in accordance with a plan submitted by the manufacturer or importer and approved by the Federal Trade Commission.

* * *

§ 1334. Preemption

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(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.

§ 1335. Unlawful advertisements on medium of electronic communication

After January 1, 1971, it shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission.

* * *

§ 1336. Authority of Federal Trade Commission; unfair or deceptive acts or practices

Nothing in this chapter (other than the requirements of section 1333 of this title) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

The Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, provides in relevant part:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except for [certain entities] . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

* * *

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

* * *

(b) Nature of relief available

The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers and other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, recission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule vio-

lation or the unfair and deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

* * *

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.

The Maine Unfair Trade Practices Act, Me. Rev. Stat. tit. 5, § 205-A *et seq.*, provides in relevant part:

§ 207. Unlawful acts and conduct

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful.

1. Intent. It is the intent of the Legislature that in construing this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to Section 45(a)(1) of the Federal Trade Commission Act (15 United States Code 45(a)(1)), as from time to time amended.

2. Rules and regulations. The Attorney General may make rules and regulations interpreting this section. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C.

45(a)(1) (The Federal Trade Commission Act) as from time to time amended. Evidence of a violation of a rule or regulation made by the Attorney General shall constitute prima facie evidence of an act or practice declared to be unlawful by this chapter in any action thereafter brought under this chapter.

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§ 213. Private remedies

1. Court action. Any person who purchases or leases goods, services or property, real or personal, primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 207 or by any rule or regulation issued under section 207, subsection 2 may bring an action either in the Superior Court or District Court for actual damages, restitution and for such other equitable relief, including an injunction, as the court determines to be necessary and proper. There is a right to trial by jury in any action brought in Superior Court under this section.

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