No. 07-562

IN THE
# Supreme Court of the United States

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

**On Writ of Certiorari**
**to the United States Court of Appeals**
**for the First Circuit**

## BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF 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.

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### INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry

[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court. Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber has filed *amicus* briefs in other preemption cases and is well situated to address the preemption issues raised in this case. Its members are engaged in commerce in each of the 50 States and are subject in varying degrees to a wide range of federal statutes and regulations. As a result, its members often confront the interplay between the duties imposed by federal law and the state-law standards applied in consumer fraud cases. The Chamber is, as a result, uniquely suited to offer a broader perspective on preemption and keenly interested in ensuring that the regulatory environment in which its members operate is rational and consistent.

## SUMMARY OF ARGUMENT

Product labeling and descriptions are critical both to consumers and our integrated national economy. Recognizing that, Congress has enacted a variety of statutes addressing such disclosures, including the Federal Cigarette Labeling and Advertising Act (the "Labeling Act"), 15 U.S.C. § 1331 *et seq.* Such statutes ensure uniform, nationwide standards. They promote efficiency, reduce barriers to interstate commerce, and prevent consumer confusion. But federal law cannot achieve those goals if federal labeling requirements and testing methods can be second-guessed by different juries under state tort law in different States.

A. The Labeling Act expressly preempts plaintiffs' claims. This lawsuit unequivocally seeks to impose a state-law requirement or prohibition "based on smoking and health" with respect to the advertising or promotion

of cigarettes. Plaintiffs would require Philip Morris USA Inc. ("PMUSA") either to include more information in addition to federally required tar and nicotine data, or to omit the lower-tar and lower-nicotine descriptors supported by federally mandated testing. Such requirements or prohibitions are plainly "based on" smoking and health.

B. The decision below erred in reducing the Labeling Act and this Court's cases, including *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), to mere pleading rules, depriving the statutory preemption language of any real effect. The fact that PMUSA could avoid suits and adverse jury verdicts only by providing additional disclosures—or abandoning descriptors that are both accurate under federal models and promoted by federal policies—confirms that, no matter how plaintiffs characterize their claims, they are preempted under any reasonable reading of the Labeling Act and *Cipollone*.

C. The decision below invites the very disuniformity and confusion that Congress sought to avoid. Congress has repeatedly recognized that, in today's integrated national economy, uniform standards promote efficiency, avoid waste, and reduce barriers to interstate commerce. Congress has also recognized that consumers would be harmed by the confusion that results if the same products are labeled differently in different States. The decision below cannot be reconciled with Congress' effort to avoid the injury to the national economy that would result from such nonuniform labeling.

II. Plaintiffs' claims are also impliedly preempted because they create obstacles to important federal goals.

A. The FTC has a longstanding policy of requiring cigarette companies to provide standardized tar and nicotine data to consumers. The fact that the FTC has not issued a formal rule is of no moment, as this Court has

repeatedly made clear that agency activity outside the formal rulemaking process can have preemptive effect where, as here, that activity reflects the agency's considered policy judgments.

B. Plaintiffs' lawsuit does not merely create an obstacle to federal goals. It also seeks to indict statements that accurately reflect a federal testing method imposed by a federal agency. Plaintiffs' theory is, in essence, that the FTC's method for measuring tar and nicotine does not accurately reflect real-world conditions because smokers may "compensate" for the reduced nicotine yields from "light" cigarettes by, for example, puffing more frequently or smoking more. They thus assail descriptors as fraud even though they accurately reflect the results of the FTC's testing method. The nationwide uniformity and consistency Congress sought to achieve cannot exist, however, where federal law mandates certain tests—and requires publication of the results to educate consumers—if state law can indict publication of the results as fraud.

C. Plaintiffs' theory of this case is an invitation for labeling and regulatory chaos. Congress has provided for uniform and mandatory labeling through myriad programs, including "Energy Star" certification, "Five Star" crash-test ratings, and food labeling regulation (*e.g.*, the "Reduced Fat" label). Plaintiffs' theory would allow suit against any manufacturer who uses one of those labels, even with 100 percent accuracy, based on the claim that the federal testing method does not reflect real-world circumstances. Litigants could claim that the federally regulated "Low-Fat" label on cookies is misleading because it does not account for the tendency of consumers to "compensate" for the reduced fat content by eating more cookies (some studies suggest they do). Plaintiffs who disagree with government tests could bring similar tort suits against manufacturers based

solely on manufacturers publishing the results of government safety or efficiency tests. To allow such lawsuits conflicts not merely with common sense, but also with the purpose of the federal statutes, which is to allow for labeling uniformity that promotes efficiency, increases comprehension, and enhances consumer awareness, without barraging consumers with a confusing array of contradictory and distracting state-specific data.

## ARGUMENT

Product labeling plays a critical role for consumers and producers alike in today's increasingly integrated, national economy. Properly designed product labels can rapidly and efficiently convey information critical to consumer purchasing decisions while, at the same time, allowing producers to identify the characteristics that set their products apart from those of competitors. Recognizing that, Congress and federal agencies have promulgated a variety of labeling regimes for goods as diverse as automobiles, appliances, food, and pharmaceuticals. Those programs ensure that commerce and the national economy are not impeded by diverse, nonuniform, and confusing requirements in different States. They carefully balance interests such as accuracy, completeness, and clarity. They prevent the imposition of multifarious requirements that might so barrage consumers with information that key facts become buried in a haystack of verbiage. As a result of those federal efforts, descriptions such as "low fat," "light," and "Energy Star" certified are now household terms with well-established and uniform meanings nationwide.

The decision below threatens the uniformity and efficacy of those regimes. Here, Congress expressly imposed a standard health warning for cigarette packaging and unequivocally displaced state efforts to impose additional requirements "relating to smoking and health"

in cigarette advertising and packaging. 15 U.S.C. § 1334(a), (b). At the same time, the federal agency with jurisdiction over cigarette packaging and advertising, the Federal Trade Commission ("FTC"), mandated a specific test for measuring the tar and nicotine delivery of cigarettes. There is no dispute that the descriptors used by petitioner Philip Morris USA Inc. ("PMUSA") in its labels and advertising in connection with Marlboro and Cambridge Lights cigarettes—words such as "light" and "lowered tar and nicotine"—were accurate according to that FTC-mandated test. Both Marlboro and Cambridge Lights in fact had lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes when tested under the FTC's method. J.A. 30a (Am. Compl. ¶ 23).

In the decision below, the First Circuit nonetheless held that plaintiffs can challenge those descriptors as misleading—and seek to impose potentially massive state tort liability—on the theory that the FTC's methodology did not reflect real-world conditions. In particular, plaintiffs assert that the FTC's method for measuring tar and nicotine delivery did not account for smokers' alleged tendency to "compensate" for lower tar and nicotine yields by inhaling more deeply, "taking more frequent" or "larger puffs," holding smoke in their lungs for longer periods, or simply "smoking more cigarettes." Pet. App. 4a; J.A. 30a-31a (Am. Compl. ¶ 27). Plaintiffs thus contend that otherwise accurate descriptors reflecting results under the mandatory federal testing method misled smokers by "reduc[ing]" their "concerns about the negative health implications of smoking and thereby allow[ing] them to continue to smoke cigarettes." J.A. 29a (Am. Compl. ¶ 18) (emphasis added). But allowing such a state-law tort claim to proceed cannot be reconciled with the express preemptive scope of the federal statute, which precludes States from imposing additional

requirements or prohibitions respecting "smoking and health" on cigarette labels and advertising.

More important, plaintiffs' theory represents a direct assault on the federal testing methodology and federally mandated disclosures. Plaintiffs' case rests on the claim that the descriptors such as "lowered tar and nicotine"—although accurately reflecting the results of FTC-mandated testing—were misleading because the FTC's tests ignore the fact that consumers might change their behavior to "compensate" for lower nicotine yields (*e.g.*, by smoking more cigarettes). But the same theory could be used to challenge virtually any national standard. Under uniform FDA standards, for example, cookies can be labeled "Reduced Fat" if they meet particular requirements. Plaintiffs' theory, however, would allow consumers to sue every cookie-maker using the "Reduced Fat" label—even in strict conformity with FDA standards—based on the theory that the FDA standard fails to account for "real-world" consumer behavior, such as the fact that consumers "compensate" for cookies' lower fat content by eating more of them. (As noted below, some studies indicate that consumers do just that.) Thus, anyone who advertises a product using the results of federally regulated tests—which cover everything from safety ratings, to automobile mileage estimates, to wine labeling—would confront rafts of lawsuits from those purporting to disagree with the federal methodology.

A greater threat to nationally uniform standards—and the ability of the federal government to ensure comprehensive and comprehensible labeling—is hard to imagine. Just as Congress and federal agencies impose consistent, uniform, and clear standards for descriptors (whether "low fat," "lowered tar," or for EPA mileage estimates), the tort law of 50 different States would be permitted to press in the opposite direction. In the end, manufacturers would have no choice but to balkanize their labels

with additional state-specific warnings, caveats, or counterstatements qualifying or contradicting federally approved labeling—or confront potentially massive liability merely because they used product labels that are accurate under testing methods imposed by federal law. That undermines the efficiency that comes from nationally uniform labeling. It reintroduces the confusion that can result when an increasingly mobile American public confronts different labels for the same product based on the happenstance of geography. And it replaces the federal judgment about the type and quantity of information to require—and how to avoid overloading consumers with so much information that the most helpful facts become lost—with the *ad hoc* decisions of different jurors in different courts under different state-law standards.

## I. Plaintiffs' Claims Are Expressly Preempted By Federal Statute

Congress enacted the Federal Cigarette Labeling and Advertising Act (the "Labeling Act") 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 (emphasis added). Seeking to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations," *ibid.*, Congress preempted certain state laws respecting the advertising or promotion of cigarettes.

Under the Labeling Act, Congress required cigarette manufacturers to place federally prescribed warning labels on cigarette packaging. 15 U.S.C. § 1333. It mandated that "[n]o statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package." 15 U.S.C. § 1334(a). And it expressly preempted state laws that purport to establish any "requirement or prohi-

bition based on smoking and health" with respect to the advertising or promotion of cigarettes that are labeled in conformity with the Labeling Act's requirements. 15 U.S.C. § 1334(b).

Congress also left undisturbed the FTC's regulatory authority over cigarette advertising and promotion. 15 U.S.C. § 1336; *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001). Exercising that authority, the FTC has required cigarette manufacturers to disclose the tar and nicotine yields of their cigarettes, as calculated under the "FTC Method." *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); see also *Watson* v. *Philip Morris Cos., Inc.*, 420 F.3d 852, 860 (8th Cir. 2005), rev'd on other grounds, 127 S. Ct. 2301 (2007); *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). Moreover, to ensure uniformity and avoid consumer confusion, the FTC has made its methodology exclusive. *In re Am. Brands, Inc.*, 79 F.T.C. at 257. Finally, to enhance consumer awareness and competition among manufacturers, the FTC has long allowed the use of descriptors such as "Light" and "Lowered" as shorthands for the yields of tar and nicotine as measured under the FTC's method. *Ibid.*; *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).

The Labeling Act thus creates a complete federal scheme for regulating the content of cigarette advertisements: mandatory federal labels, a prohibition of any additional warning labels required by state law, and FTC oversight to ensure that consumers receive useful information about relative tar and nicotine yields. The plain text of that Act and its purpose of ensuring uniform nationwide standards require preemption of plaintiffs' claims.

### A. Plaintiffs' Tort Claims Fall Squarely Within The Text Of The Labeling Act's Preemption Provision

As with other issues of statutory construction, express preemption analysis begins with statutory text. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). In construing the scope of federal preemption provisions, this Court accords them as much breadth as their text and structure mandate. Thus, where the language chosen by Congress otherwise provides for preemption, this Court will not impose fine-tuned distinctions that are unsupported by statutory text, much less "turn somersaults to create" them. *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008). That principle should apply with special force where, as here, such efforts would lead to untenable results, such as rendering the relevant provision ineffectual or essentially meaningless. See *Am. Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982).

The Labeling Act's express preemption provision states in relevant part:

> 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.

15 U.S.C. § 1334(b). *Amicus* will not repeat petitioners' exhaustive analysis of the Labeling Act's text, purpose, and structure. See Pet. Br. 22-45. For now, it is sufficient that the statutory language requires preemption of plaintiffs' claims because (1) they seek to impose a "requirement" or "prohibition" on cigarette labeling or promotion that is (2) "based on smoking and health" within the meaning of Section 1334(b).

1. There can be no serious question that plaintiffs' claims, if successful, would impose a "requirement" or

"prohibition" within the meaning of the Labeling Act's preemption provision. Plaintiffs allege that PMUSA "made material statements of fact that it knew to be false—'that Marlboro Lights and Cambridge Lights cigarettes are 'light' or have 'lower tar and nicotine'—to encourage smokers to purchase its products, and that smokers did so in reliance on those statements." Pet. App. 26a. In *Riegel*, this Court recently reaffirmed that the term "requirements" in express preemption provisions includes state common-law and statutory claims. 128 S. Ct. at 1008 ("Absent other indication, reference to a State's 'requirements' includes its common-law duties."). In this case, plaintiffs seek to impose liability for one of two alleged failures: Either plaintiffs want to *require* PMUSA to add warnings about the descriptors such as "light" and "lowered tar and nicotine" to identify the alleged shortcomings in the FTC's method for measuring tar and nicotine yield; or plaintiffs want to *prohibit* PMUSA from using those descriptors or otherwise disclosing tar and nicotine yields under the FTC's method. Plaintiffs' state-law claims thus plainly seek to impose "requirements" or "prohibitions" within the meaning of the preemption provision.

Plaintiffs' state-law claims likewise seek to impose a "prohibition" or "requirement" with respect to advertising or promotion that is "based on smoking and health." The descriptors, plaintiffs allege, are misleading because "the relative levels of [tar and nicotine] bear on a reasonable consumer's decision on which cigarette to purchase because consumers understand that reducing the quantities of tar and nicotine in cigarettes *reduces their adverse health effects*." Pet. App. 4a (emphasis added); see J.A. 28a-29a (Am. Compl. ¶¶ 15, 17) (urging that phrases like "lowered tar and nicotine" were used to imply that the cigarettes are "less harmful or safer than [their] regular" counterparts). And they claim that PM-

USA marketed Marlboro and Cambridge Lights "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* * * *." J.A. 29a (Am. Compl. ¶ 18) (emphasis added). The requirements plaintiffs would impose to avoid liability—either the inclusion of more qualifications about the descriptors (beyond disclosure of the federally mandated test results), or the omission of the lower-tar and lower-nicotine descriptors—are thus unquestionably "based on" smoking and health.

Indeed, the FTC's regulatory purpose in requiring disclosure of nicotine and tar yields (and in permitting short-hand descriptors for those yields) is based on concerns about smoking and health. The FTC has long required tobacco companies to disclose tar and nicotine amounts 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." J.A. 527a. The FTC thus promoted the disclosures challenged here precisely because the FTC believed they would inform consumers about the relative *health* effects of smoking different brands and encourage cigarette manufacturers to create lower-tar and lower-nicotine alternatives to their full-flavored cigarettes.

2. This Court's cases confirm that plaintiffs' claims are preempted. In *Cipollone*, the plurality opinion explained that the Labeling Act preempts common-law claims that would require additional disclosures regarding the health effects of smoking in cigarette advertising or promotion. In reaching that conclusion, the plurality "consider[ed] each category of damages actions in turn." 505 U.S. at 524. With respect to "failure to warn" claims, the plurality held that, "insofar as [those] claims * * * require a showing that respondents' * * * advertising or promotions should have included additional, or more

clearly stated, warnings, those claims are pre-empted." *Ibid.* The plurality then turned to the fraudulent misrepresentation claims, concluding that a claim alleging that "respondents, through their advertising, neutralized the effect of federally mandated warning labels" was likewise preempted:

> Such 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. Such a *prohibition*, however, is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials.

*Id.* at 27.

The *Cipollone* plurality opinion found, however, that claims alleging "intentional fraud and misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact'" were *not* preempted "insofar as [they] rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion." 505 U.S. at 528. The plurality concluded that claims based on "allegedly false statements of material fact made in advertisements * * * are not preempted by § 5(b)," because they were "predicated * * * on a more general obligation—the duty not to deceive," rather than on a "duty 'based on smoking and health.'" *Id.* at 528-29.

Importantly here, the *Cipollone* plurality recognized that claims "predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking" are preempted because "[s]uch a *prohibition* * * * is merely the converse of a state-law *requirement* that warnings be included in advertising and promotional materials." 505 U.S. at 527. That observation controls

this case. If plaintiffs' claims succeed, PMUSA faces either a prohibition on use of the terms "light" or "lowered tar and nicotine" to indicate the relative levels of nicotine and tar in their products, or a requirement to include additional information when using those terms, precisely because words like "light" and "lowered tar and nicotine" allegedly "minimize" the relative health effects of smoking a particular brand of cigarettes. Either mandate is clearly "based on smoking and health."

*Cipollone*, of course, addressed a claim that certain advertisements minimized the dangers of cigarette smoking *generally* and thus diluted federally mandated safety warnings. But that cannot meaningfully distinguish this case. The text of the Labeling Act provides no basis for distinguishing between statements relating to smoking and health that allegedly mislead by minimizing the *general* impact of smoking, and those that allegedly mislead about the *relative* health effects of smoking different brands of cigarettes. Plaintiffs seek to impose liability here on the theory that PMUSA's use of descriptive terms misleadingly "reduce[d]" smokers' "concerns about *the negative health implications of smoking* and thereby allow[ed] them to continue to smoke cigarettes." J.A. 29a (Am. Compl. ¶ 18) (emphasis added). Plaintiffs thus seek to impose a prohibition or requirement on cigarette labeling or promotion based on smoking and health.

This Court's decision in *Riegel* rejected analogous efforts to escape preemption by manipulating the generality of the legal challenge. In *Riegel*, the Medical Device Amendments of 1976 ("MDA") provided that "no State 'may establish or continue in effect *with respect to a device* * * * *any requirement*' relating to safety or effectiveness that is different from, or in addition to, federal requirements." 128 S. Ct. at 1010 (quoting 21 U.S.C. § 360k)). This Court refused to read a "specificity" limitation into the statute, holding that "[n]othing in

the statutory text suggests that the pre-empted state requirement must apply *only* to the relevant device, or only to medical devices and not to all products and all actions in general." *Ibid.* Conversely, one cannot read an extra-statutory generality requirement into the Labeling Act. By its terms, the Act prohibits state-law requirements "based on smoking and health." Nothing "in the statutory text suggests that the pre-empted state requirement must apply" only to the health effects of smoking cigarettes generally, as opposed to cigarettes of a particular brand or configuration.

### B. The Decision Below Misinterprets *Cipollone*

The decision below not only does violence to the plain text of the Labeling Act, but also misreads the plurality opinion in *Cipollone*. The court of appeals ruled that state-law claims are not preempted—no matter how intertwined with "smoking and health" they may be—so long as they are "premised on a state-law duty that is broader in scope," *i.e.*, a duty that imposes obligations beyond the context of cigarettes and health. Pet. App. 21a. That flawed reading of the *Cipollone* plurality would allow plaintiffs to plead around preemption in nearly every instance, thus rendering the Labeling Act's pre-emption provision virtually meaningless and abrogating Congress' effort to establish uniform national standards. The phrase "based on smoking and health" has almost no meaning if *any tort* with general applicability or a general standard—such as "falsity" or "negligence"—invariably escapes preemption. Indeed, under that standard, a state legislature could adopt a warning requirement applicable not just to cigarettes but also to smokeless (chewing) tobacco and then seek to avoid preemption on the theory that its new law rests on a broader state-law duty concerning tobacco that extends beyond "*smoking* and health."

Under the court of appeals' reading of the *Cipollone* plurality, the *only* claims Section 1334(b) would expressly preempt are those predicated on a need for "additional warnings" on cigarette packaging. Pet. App. 26a-31a. But no well-counseled plaintiff would make such an obviously defective claim. Instead, future litigants will (like plaintiffs here) simply style their pleadings as a challenge to allegedly misleading terms already used on labels, rather than as a demand that the defendant add new information to qualify those terms. Such claims, however, should be no less preempted under *Cipollone*. Simply put, they seek to impose a state-law "prohibition" on cigarette advertising and promotion—a ban on the use of certain terms—based on smoking and health.

If Section 1334(b) is to have any effective preemptive force, courts must look to the substance of the plaintiffs' claims. Plaintiffs here in substance seek to impose a new prohibition or requirement in cigarette labeling or promotion—abandonment or qualification of terms like "light" or "lowered tar and nicotine"—based on smoking and health. The court of appeals, however, refused to look to the substance of plaintiffs' claims because, in its view, that would improperly prejudge "plaintiff's chance of proving his claim." Pet. App. 33a-35a. But looking to substance does not "put[] the cart before the horse," Pet. App. 34a; it just puts substance ahead of form. Unless *Cipollone* is to be read as reducing express preemption into a pleading rule, at the very least a practical glance at substance is required.

Here, that practical glance makes the preemptive effect of the statute unmistakable. To avoid a lawsuit like plaintiffs', PMUSA must either provide additional information to qualify its descriptors—even though they accurately reflect the results of mandatory FTC testing—or PMUSA must abandon the descriptors altogether. No one disputes that the *Cipollone* plurality squarely fore-

closes the first option. As for the second, cigarette companies are *required* to disclose tar and nicotine yields calculated under the FTC's method, 36 Fed. Reg. 784 (Jan. 16, 1971), and are *required* to use FTC-method results, *In re Am. Brands*, 79 F.T.C. at 257; see also *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978). In allowing plaintiffs' claims to go forward without looking beyond plaintiffs' own styling of those claims, the decision below places manufacturers in a Catch-22: Comply with federal law and face a state tort lawsuit for fraudulent misrepresentation, or avoid using any descriptor that could potentially (if accurately) reflect the results of testing that they are required to disclose. As the district court observed:

> To respond to Plaintiffs' concerns, [PMUSA] would have to tell the public that the FTC method test, though accurate in the laboratory, was inaccurate in real life, and that light cigarette smokers * * * infused greater amounts of nicotine and tar than the designation 'Lights' and 'Lowered Tar and Nicotine' would imply. But, this information, if conveyed through a form of advertising would run head first into * * * the comprehensive federal scheme governing the advertising and promotion of cigarettes.

Pet. App. 104a (internal quotation marks omitted). Properly read, the *Cipollone* plurality opinion does not require, much less permit, such an absurd result.

The correctness of that conclusion is confirmed by considering how PMUSA might re-label its brands following an adverse jury verdict. For example, faced with a decision that "light" or "lowered tar" is misleading, PMUSA might choose to re-brand its Marlboro cigarettes as Marlboro 11 mgs., its Marlboro Lights as Marlboro 8 mgs., and its Ultra Lights as Marlboro 5 mgs. Like the "light" and "lowered tar" descriptors, those measurements would be literally true statements of the

results of the FTC's method. Yet, under the court of appeals' reasoning, even publishing the nicotine yield based on the FTC's method could support a state-law fraud claim because "falsity" is a generally applicable standard.

### C. Circumvention Of The Labeling Act's Preemption Provision Invites The Costly And Confusing Disuniformity Congress Sought to Avoid

Today, more than ever, this Nation has a truly integrated economy. At the time of the Framing, even prominent Americans like Abigail Adams of Massachusetts could sensibly think of Pennsylvania as "'that far country,' unimaginably distant." David McCullough, John Adams 20 (2001). Back then, travel was arduous and slow. Today, by contrast, it passes virtually unnoticed that tons of potato chips or cranberries regularly make the trip from Massachusetts to Pennsylvania—or beyond. Whenever an American buys a product today—whether a book or a vegetable—it very likely originated in another State. In 2006, $5 trillion in goods were shipped in the United States, and sales of goods over the Internet currently exceed $120 billion a year.[2] The American public is also increasingly mobile. In 2001, Americans made 936 million interstate trips.[3] And our communications are increasingly national in scope. Daily papers, periodicals, electronic media, as well as radio and

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[2] See U.S. Census Bureau, Shipped Goods in U.S. Manufacturing Reaches $5 Trillion in 2006 (avail. at http://www.census.gov/Press-Release/www/releases/archives/economic_surveys/010892.html) (shipping data); U.S. Census Bureau, Quarterly Retail E-Commerce Sales (avail. at http://www.census.gov/mrts/www/data/html/07Q4.html) (e-commerce statistics).

[3] Bureau of Transportation Statistics, Highlights of the 2001 National Household Travel Survey (avail. at http://www.bts.gov/publications/highlights_of_the_2001_national_household_travel_survey/pdf/entire.pdf.)

television can reach 100 million Americans simultaneously from coast to coast.[4]

Congress has repeatedly recognized the importance of such interstate commerce, and has at appropriate times imposed uniform labeling regulation to protect and promote it. Uniform, nationwide standards promote efficiency, avoid waste, and reduce hidden barriers to interstate commerce by allowing producers to use the same packaging, promotions, and labeling throughout the Nation. They prevent efforts to favor in-state producers through the imposition of quirky or unique labeling requirements. And, most critically, they prevent the consumer confusion that inevitably would result when our mobile populace is confronted with different names, different labels, and different disclosures for the same products simply because they are found in a different State.

The Labeling Act responded to precisely such concerns. The Act, Congress declared, was enacted to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations." 15 U.S.C. § 1331.

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[4] This year's Super Bowl and the accompanying national advertisements simultaneously reached as many as 100 million Americans—nearly one-third of our population. See The Nielsen Company, Neilsen's Recap of 2008 Super Bowl Advertising (avail. at http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/02-07-2008/0004751824&EDATE=http://biz.yahoo.com/prnews/080207/nyth105b.html?.v=1). The NBC Nightly News reaches an average of 9 million viewers, while the readership of USA Today, Newsweek, and Time Magazine averages about 3.9 million, 3.1 million, and 3.4 million per issue, respectively. USA Today Press Kit, Just the Facts, http://www.usatoday.com/media_kit/pressroom/pr_justfacts_usatoday.htm; Louis Hau, *Time's Lead Over Newsweek Narrows*, FORBES, Aug. 13, 2007, http://www.forbes.com/ 2007/08/13/magazines-audit-circ-biz-cx_ lh_0813mags.html.

As a result, while relatively few States may grow and process tobacco products, those products can be distributed nationally with identical packaging, labels, and warnings under national legislation enacted by Congress and the nationally binding determinations of the FTC. Congress has imposed similar national standards for a variety of products. 15 U.S.C. § 1232(g), 49 C.F.R. pt. 575 (crash test ratings for automobiles); 49 U.S.C. § 32908(b) (automobile fuel economy); 21 U.S.C. § 393(b) (prescription drug labeling and advertising); 21 U.S.C. § 343-1(a) (food nutritional labeling); 21 C.F.R. § 101.72 *et seq.* (health claims in food labeling); 27 U.S.C. § 205(e) (wine labels); 42 U.S.C. §§ 6293 & 6294 (testing and labeling for consumer product energy consumption).

The decision below cannot be reconciled with that effort to avoid the injury to "commerce and the national economy" that results from "nonuniform" and "confusing" labeling that varies from State to State. Indeed, plaintiffs do not merely challenge descriptors such as "lowered tar and nicotine" used on PMUSA's packages and promotions. They challenge the very name of the products—Marlboro and Cambridge Lights. If plaintiffs were to prevail, PMUSA might be able to sell the same cigarette in 49 States under the same names "Marlboro Lights" and "Cambridge Lights." But in Maine they would have to be known as "Marlboro and Cambridge Something-Elses." Or PMUSA could sell Marlboro Lights in Maine under the "Marlboro Lights Unless-You-Puff-More, Smoke-More, Or Otherwise-Compensate" brand name. The important interests of avoiding consumer confusion and ensuring national uniformity are ill-served by giving the exact same products different names based on the happenstance of location. That is no less true for cigarettes than for any other product that regularly travels in interstate commerce.

## II. Plaintiffs' State-Law Claims Are Preempted Because They Create Obstacles To Important Federal Goals

Plaintiffs' putative state-law causes of action are also impliedly preempted, because they directly challenge the propriety of a federally mandated methodology and disclosure. State-law claims are impliedly preempted when they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English* v. *Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)); see also *United States* v. *Locke*, 529 U.S. 89, 109-112 (2000); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 494-97 (1987). "Obstacle" preemption applies even though a statute, like the Labeling Act, contains an express preemption clause. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 288-289 (1995).

In *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 874-75 (2000), this Court affirmed that preemption does not "require a formal agency statement of pre-emptive intent as a prerequisite to concluding that a conflict exists"—*i.e.*, that preemption can (and often must) be inferred from comprehensive federal regulation itself. Finding preemption based on precisely such a comprehensive regulatory program in *Geier*, this Court held that inconsistent state duties were preempted. In that case, the Court explained, the federal standards for airbags and passive restraints had "deliberately provided the manufacturer with a range of choices among different passive restraint devices." *Id.* at 875. It therefore held that common-law claims seeking to "restrict that range of choices" were preempted "as an obstacle to the accomplishment and execution of * * * federal objectives." *Id.* at 881. The same thing is true here. Plaintiffs' claims "stand as an obstacle" to the "full purpose and objectives" of the comprehensive federal policy of providing

consumers with standardized information and encouraging tobacco companies to develop cigarettes lower in tar and nicotine.

### A. The FTC Has A Consistent, Longstanding Policy Of Requiring Tobacco Companies To Provide Standardized Information To Consumers

Both before and after enactment of the Labeling Act, the FTC extensively regulated (by consent decree and otherwise) disclosures related to cigarette advertising and promotion. Time and again, the FTC required tobacco companies to disclose tar and nicotine yields in their cigarette advertising; regulated the methodology for testing tar and nicotine yields; and precluded the use of alternative methodologies. J.A. 386a (1967 Pol'y Stmt.); *In re Am. Tobacco Co.*, 119 F.T.C. at 11; *In re Am. Brands, Inc.*, 79 F.T.C. at 257.

The FTC has required such disclosures to achieve its longstanding policy of providing consumers with standardized information about nicotine and tar yields to facilitate inter-brand comparison and encourage the industry to develop cigarettes lower in tar and nicotine. See, *e.g.*, *In re Am. Tobacco Co.*, 119 F.T.C. at 11 (cigarette company may continue to compare nicotine and tar levels between brands with descriptors such as "low," "lower," and "lowest"); *In re Am. Brands, Inc.*, 79 F.T.C. at 257. Consistent with that policy, the FTC has repeatedly allowed cigarette companies to use descriptors such as "light" and "lowered tar" based on the yields accurately and fully substantiated by the FTC's testing method. *In re Am. Tobacco Co.*, 119 F.T.C. at 11; *In re Am. Brands, Inc.*, 79 F.T.C. at 257.

That the FTC "has never issued a formal rule specifically defining which cigarette advertising practices violate the" FTCA, Pet. App. 46a, is of no moment. This

Court has repeatedly held that agency activity other than formal rulemaking can have preemptive effects when such activity reflects a considered policy judgment by the agency. For example, in *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 64 (2002), the Court recognized that even an agency's decision not to engage in regulation can pre-empt state law. See also *Geier*, 529 U.S. at 884 (finding that "a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking" is not required before agency action can trigger implied pre-emption). 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) (discussing FERC's issuance of such orders). Many courts of appeals have come to the same conclusion.[5]

### B. This Suit Represents A Frontal Assault On The FTC's Mandatory Methodology

1. Plaintiffs do not dispute that PMUSA's disclosures regarding tar and nicotine delivery were accurate under the testing method mandated for decades by the FTC. Nor do they dispute that the descriptors, such as "light," "lowered tar" or "lowered nicotine," are wholly accurate if measured by the mandatory FTC standard.

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[5] 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) (holding that an EPA consent order preempted state common-law claims regarding the environmental conditions addressed in the order); see also *Dowhal* v. *SmithKline Beecham Consumer Healthcare*, 88 P.3d 1, 5-6, 9-11, 14-15 (Cal. 2004) (holding an FDA advisory letter could have preemptive effect).

To the contrary, they agree that, when tested using the FTC's method, PMUSA's "light" and "lowered tar and nicotine" cigarettes in fact yielded lower quantities of tar and nicotine. J.A. 30a (Am. Cmplt. ¶¶ 23-25).

Instead, plaintiffs urge that those descriptions amount to fraud because the *FTC*'s mandatory testing method itself is flawed. That method, they claim, does not account for real-world human behavior, such as the tendency to "compensate" for lower tar or nicotine yields by smoking more cigarettes, inhaling more deeply, or puffing more often. J.A. 30a-31a (Am. Compl. ¶ 27). Plaintiffs thus seek not only the right to have a jury decide that the FTC's testing methodology is inaccurate. They also seek the right to ask a jury to indict as *fraud* public statements that fully and accurately represent the results of the FTC's methodology.

Surely there can be no greater "obstacle" to a federal policy or methodology than to impose fraud liability on companies that conduct federally mandated tests and accurately publicize the results those tests yield. This Court has held that state tort law is preempted to the extent it seeks to impose liability for perpetrating a fraud on a federal agency. *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 351-52 (2001). *A fortiori* state-law tort claims must similarly be preempted where they seek to impose liability for *accurately* reporting or characterizing the results of testing under a federal methodology.[6]

For that reason, courts have regularly rejected efforts to challenge, through state tort law, drug advertisements that accurately reflect the contents of federal drug labels. In *Prohias* v. *Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla.

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[6] In effect, the mandatory federal test establishes the results as preemptive "legislative facts" for certain purposes, *Friends of the Earth* v. *Reilly*, 966 F.2d 690, 693-94 (D.C. Cir. 1992), and those facts cannot be challenged as false under state law.

2007), for example, the district court recognized that FDA labeling requirements preempted claims regarding Lipitor's marketing. The court explained that, under the Food, Drug, and Cosmetic Act ("FDCA"), the FDA has broad authority to regulate prescription drug labeling and advertising, see 21 U.S.C. § 393(b), which the FDA has exercised through extensive regulations, 21 C.F.R. § 202.1 *et seq.* See *Prohias*, 490 F. Supp. 2d at 1234 n.6. The court held that, although the plaintiff had challenged the *advertisements* for Lipitor, the FDA's approval of the *labels* for Lipitor preempted the claims since the content of the advertisements and the approved labels were largely the same.

The Third Circuit came to the same conclusion in connection with a Delaware Consumer Fraud Act claim that challenged advertisements for the drug Nexium. *Pa. Employees Benefit Trust Fund* v. *Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007). The court explained that a particularly "strong[] case for preemption occurs when FDA-approved *labeling* is the basis for allegedly fraudulent representations made in prescription drug advertising." *Id.* at 251 (emphasis added). The "purpose of protecting prescription drug users in the FDCA would be frustrated," the Third Circuit explained, "if states were allowed to interpose consumer fraud laws that permitted plaintiffs to question the veracity of statements approved by the FDA" for product labels. *Ibid.* Yet that is precisely what the court of appeals has done here: It has allowed state tort law to be used to challenge the veracity of statements that accurately reflect the results of mandatory FTC testing. Federal and state law cannot coexist where the federal law mandates testing under a certain method—for the purpose of giving consumers access to uniform data—but state law indicts accurate descriptors for the test results as "fraud."

2. That is not to say that federal judgments about testing methodologies and disclosures are or should be beyond challenge. Those wishing to challenge federal regulations and methodologies can do so by participating in federal agency rulemakings, intervening in adjudications and, if adversely affected or aggrieved, seeking judicial review in federal court. Consumers and producers alike are best served through those processes, which allow regulators to weigh all relevant concerns in pursuit of the public interest. To allow jurors in different States to second-guess those determinations, without the necessary cost-benefit analysis, invites consumer confusion and labeling chaos. As this Court stated in *Riegel*:

> A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

128 S. Ct. at 1008. Similarly here, juries in tobacco labeling cases will not perform cost-benefit analyses for various testing methods or consider the value of clarity and uniformity. Instead, they would be asked to decide whether the FTC's method—and thus a descriptor based on it—is in some sense faulty.

To allow such a suit to proceed—to let jurors second-guess the FTC's uniform, nationwide methodology—is particularly pernicious given that the FTC was well aware of the potential limitations inherent in its tests. Indeed, before the FTC adopted that method and during its many investigations regarding its test methodology, it heard *exactly* the same testimony that a jury would hear

in this case: that smokers may compensate for lower tar and nicotine yields by smoking more cigarettes. Pet. Br. 7. The FTC explained, however, that "the purpose of testing 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 [a] machine" so as to "standardize" results across brands. J.A. 486a-488a. Implicit in the FTC's decision is that uniform bases for comparison are better than no information, or confusing or nonuniform information. The FTC weighed the effects of compensating behavior against the fact that some smokers *could* use the information to reduce their tar and nicotine intake and determined that its testing method, albeit imperfect, at least gave consumers standardized information with which to compare tar and nicotine yields. A jury asked only to assess the accuracy of the FTC's method would not perform this analysis and, as a result, the potential benefits of providing this information would be lost. As this Court recognized in *Geier*, "too many different safety-standard cooks" can result in "conflict, uncertainty, cost, and occasional risk to safety itself." 529 U.S. at 871. That is just as true when disclosing relative tar and nicotine yields as it is when dealing with passive restraints.

### C. Plaintiffs' Theory Would Undermine Federal Labeling Regulation In Myriad Contexts

Plaintiffs' theory does not merely undermine the FTC's authority. It also threatens the federal government's ability to establish clear, comprehensible, and uniform labeling requirements in a variety of contexts.

One need look no further than the pantry to see those efforts in operation. Acting pursuant to the Nutrition Labeling and Education Act ("NLEA"), the FDA has established standards for regulating food labeling and certain health-related claims. 21 U.S.C. § 343(r); 21

C.F.R. §§ 101.54-83. The NLEA expressly preempts States from creating labeling requirements, 21 U.S.C. § 343-1(a), including nutritional descriptors such as "Low Calorie," 21 C.F.R. § 101.60; "Low Fat," "Reduced Fat," 21 C.F.R. § 101.62(b); and "Light," 21 C.F.R. § 101.56. For example, under federal regulations, a food can bear the "Reduced Fat" label if it has 25 percent less fat than that generally found in the ordinary version of the product. 21 C.F.R. § 101.62(b). "Reduced Fat" Wheat Thins, for example, can have no more than 75 percent of the fat content of "regular" Wheat Thins. The FDA also regulates food health claims on labels that link the consumption of specific nutrients to health conditions (such as the claim that "diets low in sodium may reduce the risk of high blood pressure"). See, *e.g.*, 21 C.F.R. § 101.74 (sodium and high blood pressure); 21 C.F.R. § 101.73 (total fat consumption and cancer); 21 C.F.R. § 101.72 (calcium and osteoporosis).

Notwithstanding that comprehensive federal regime, plaintiffs' theory would allow consumers to bring state-law deception actions against producers for using those federally defined terms, even though fully accurate under the federal methodology. For example, consumers might sue the maker of "Reduced Fat" cookies on the theory that the label falsely implies that those cookies are healthier because of their lowered fat content. Compare J.A. 28a (Am. Compl. ¶ 15) ("Defendants intentionally marketed Marlboro Lights cigarettes in this manner with the intention of communicating to consumers that Marlboro Lights were less harmful or safer than regular Marlboro cigarettes."). The cookies, plaintiffs might argue, are in fact no healthier (and may be worse) because of the real-world effect of human compensation: The makers of low-fat or sugar-free cookies thus would face lawsuits because—just as smokers allegedly compensate for lowered tar and nicotine yields through "more

frequent puffs" or "smoking more cigarettes," J.A. 30a-31a (Am. Compl. ¶ 27)—consumers allegedly compensate for fat reduction and sugar reduction by eating more cookies. Indeed, research shows that, when given "low fat" and "sugar-free" foods as substitutes for higher-fat versions of the same item, consumers do eat more, just as smokers allegedly compensate by "smoking more cigarettes."[7] If endorsed by this Court, plaintiffs' theory thus would essentially allow a wholesale state-law assault on uniform federal labeling standards based on the premise that they do not fully reflect what plaintiffs claim are "real-world" conditions.

Other examples abound. In the automobile context, phrases like "Five Star" or "Four Star" have become useful shorthands that allow consumers to compare the relative crashworthiness of various vehicles under government-regulated tests. Congress intentionally promoted the development of such easy and informative labels, directing the NHTSA to promulgate a number of Federal Motor Vehicle Safety Standards, 49 U.S.C. § 30111(a), preempting States from creating their own standards, 49 U.S.C. § 30103(b), and giving the NHTSA the authority to carry out any testing necessary to create and enforce those standards, 49 U.S.C. § 30168. That testing includes crash-testing passenger vehicles and publishing the results. 49 C.F.R. § 571.208; see

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[7] See Brian Wansink & Pierre Chandon, *Can "Low Fat" Nutrition Labels Lead to Obesity?*, 43 J. Marketing Res. 605 (2006); Barbara J. Rolls & Debra L. Miller, *Is the Low-Fat Message Giving People a License to Eat More?*, 16 J. Am. College of Nutrition 535 (1997); Dianne Engell, *et al.*, *Effects of Information About Fat Content On Food Preferences in Pre-Adolescent Children*, 30 Appetite 269 (1998). That effect is compounded by the fact that foods with artificially reduced fat content are often higher in calories and sugar than their ordinary counterparts, and thus potentially more fattening in and of themselves. See Rolls & Miller, *supra*, at 535.

www.safercar.gov. Under the Automobile Information Disclosure Act ("AIDA"), 15 U.S.C. § 1232, automobile manufacturers now must include window stickers that display the results of NHTSA crash tests, including the rating—as indicated by a number of stars—the car received. 15 U.S.C. § 1232(g); see also 49 C.F.R. pt. 575. Manufacturers that receive favorable crash-test ratings often use those ratings in their advertisements, and consumers may use the data to decide whether a car meets their safety requirements.

Under plaintiffs' theory, however, consumers could bring fraud claims against automakers that accurately advertise their crash-test ratings. A plaintiff might argue, for instance, that advertising a "Five Star" rating is misleading because the government's test does not reflect all real-world conditions. (No test ever does.) Even the factor of "compensation" that features prominently in this case could be brought to bear: Some studies suggest that the human factor of "compensating" behavior—a tendency to drive more aggressively if the car is safer—may also operate in the crashworthiness context. See, *e.g.*, Steve Peterson, George Hoffer & Edward Millner, *Are Drivers of Air-Bag Equipped Cars More Aggressive? A Test of the Offsetting Behavior Hypothesis*, 38 J.L. & Econ. 251 (1995) (finding drivers of air-bag equipped cars tend to drive more aggressively); Anindya Sen, *An Empirical Test of the Offset Hypothesis*, 44 J.L. & Econ. 481 (2001) (offering support for the hypothesis that drivers take more risks when wearing seat belts). This case thus raises the prospect that all safety ratings—while literally true under federal standards and approved by a federal agency—could be the basis of a fraud action under state law because they allegedly do not account for all real-world conditions.

Programs ranging from appliance efficiency certifications to wine labeling likewise would be at risk.[8] Indeed, at least one automaker currently confronts a putative class action because its advertisements reported the car's fuel economy according to the EPA's methodology, *despite* a preemption provision that prohibits States from imposing non-identical laws on disclosure of fuel economy. *True* v. *Am. Honda Motor Co.*, 520 F. Supp. 2d 1175 (N.D. Cal. 2007). Like the decision below here, that cannot be reconciled with statutory text or common sense. Under federal law, the EPA must establish a methodology for testing fuel economy, and carmakers must post labels on their cars providing, among other things, "the fuel economy of the automobile." 49 U.S.C. § 32908(b). The EPA has promulgated exhaustive regulations governing the methodology for testing fuel economy. 40 C.F.R. §§ 600.002-08 *et seq*. And Congress expressly preempted States from imposing any law "*on disclosure of fuel economy* or fuel operating costs" unless it is "identical" to the federal standards. 42 U.S.C. § 32919 (emphasis added). Yet *True* allowed the claim to proceed because, in its view, Congress did not intend to "preempt states from regulating false or misleading advertising of a vehicle's fuel efficiency." 520 F. Supp. 2d

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[8] For example, the Energy Policy and Conservation Act ("EPCA") regulates the testing and labeling of consumer products in connection with energy consumption. See, *e.g.*, 42 U.S.C. §§ 6293 & 6294; 16 C.F.R. pt. 305; 42 U.S.C. § 6297(a)(1)(A & B). Under that statute, the EPA and the Department of Energy ("DoE") have created the "Energy Star" program, which allows manufacturers to label their products as "Energy Star" certified if they meet certain requirements. See, *e.g.*, 10 C.F.R. pt. 430; 16 C.F.R. § 305.11. The Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*, regulates wine labels and requires federal approval of each label. 27 U.S.C. § 205(e); see *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422 (Cal. 2004).

at 1181. But surely a claim that a particular statement is "false" under state law must be preempted when the statement is a 100 percent accurate recitation of the results of federally mandated testing under federally mandated standards. To hold otherwise would allow States, in effect, to indict a statement as "fraudulent" when it appears in an advertisement, even though federal law—in the interest of consumer education—requires the exact same statement to appear prominently on the vehicle's window.

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If federal laws regulating product labels are to succeed, they must be accorded appropriate respect. The federal government cannot promote the efficiency and cost savings that result from uniform labeling standards if adherence to the federal mandate—accurately reporting testing results under federal standards—can be indicted by juries as fraud. The federal government cannot ensure the proper mix of information is conveyed to consumers if jurors can invoke state-law standards to second-guess federal regulators about whether federal testing produces results that should be described or included on product labels, or otherwise require the addition of caveats or statements that contradict or undermine the federal standard. And if jurors in individual States can second-guess federal testing methods on an *ad hoc* basis, the federal government simply cannot prevent the confusion that inevitably results when an increasingly mobile American public confronts otherwise identical products bearing different brand names, different informational labels, and different disclosures based on the happenstance of geography.

## CONCLUSION

For the foregoing reasons, and those stated in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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