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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

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

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Where, as here, a "statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993). The Labeling Act's express preemption clause 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." 15 U.S.C. § 1334(b).

The complaint in this case alleges that PMUSA violated state law by "'intentionally market[ing]' light cigarettes as 'less harmful or safer' . . . 'than regular' cigarettes through the use of descriptors 'Lights' and 'Lowered Tar and Nicotine.'" Resp. Br. 20 (quoting J.A. 28a-29a). Respondents thus seek to impose state-law requirements or prohibitions based on smoking and health with respect to the advertising or promotion of cigarettes. Accordingly, the question presented in this case could be recast as: If the Labeling Act's express preemption provision does not preempt *this* claim, what does it do?

Respondents' principal argument is that the "Labeling Act preempts only targeted regulations that are aimed at and impose special burdens on cigarette companies." Resp. Br. 1. But nothing in the *text* of the Labeling Act supports respondents' proffered distinction between state laws that "target[ ]" cigarette companies and those that reach them even if aimed more broadly. It is therefore understandable, perhaps, that their 57-page brief devotes but a scant two paragraphs to the text of the clause at issue. *See* Resp. Br. 28-29. Moreover, this Court has squarely

rejected respondents' proposed distinction in construing the express preemption provisions of the Labeling Act and other federal statutes. *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 548 (2001); *see also Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1010 (2008); *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 228 (1995). And for good reason: The distinction urged by respondents would open an "utterly irrational loophole" in the preemptive reach of federal law. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992). These authorities destroy respondents' position—which is undoubtedly why they are compelled to misquote *Reilly*, mischaracterize *Morales*, and relegate *Riegel* and *Wolens* to a footnote. *See* Resp. Br. 19, 42-44 & n.13.

Respondents are unable to cite even a single decision of this Court that supports their position that the Labeling Act preempts only specifically targeted state laws, while preserving identical requirements or prohibitions imposed through the application of state laws of general applicability. Indeed, their only authority is the plurality decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), but the *Cipollone* plurality necessarily *rejected* respondents' proffered distinction when it concluded that the Labeling Act preempts failure-to-warn claims and warning-neutralization fraud claims based on generally applicable state-law duties. In any event, the *Cipollone* plurality's alternative preemption framework was criticized by a *majority* of the Court at the time and has never since been applied by this Court. Applying that framework here—especially in the distorted manner suggested by respondents—would require the Court not only to disavow its subsequent construction of the Labeling Act's preemption provision in *Reilly*, but also to construe that provision *differ-*

ently from the express preemption provisions of every other federal statute. In contrast, adherence to the plain text of the Labeling Act and the express preemption jurisprudence to which the full Court now subscribes (as exemplified most recently in *Riegel*) compels reversal of the decision below.

I. RESPONDENTS' CLAIMS ARE EXPRESSLY PREEMPTED

The Labeling Act was enacted "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). Because respondents' state-law claims fall squarely within the Labeling Act's plain language and run smack into the "Federal program" it established, their claims are expressly preempted.

A. Respondents' Claims Are Preempted Under Ordinary Principles Of Express Preemption

Respondents seek to eviscerate the Labeling Act's preemption provision by arguing that it "preempts only targeted regulations that are aimed at and impose special burdens on cigarette companies." Resp. Br. 1. This reading of the Labeling Act is impossible to reconcile with the statute's language, structure, or purpose.

1. The Labeling Act preempts state-law "requirement[s] or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion of" cigarettes. 15 U.S.C. § 1334(b). Respondents acknowledge that "the term 'requirement'" as used in the Labeling Act "encompasses state statutory *and* common-law duties." Resp. Br. 13 (emphasis added).

Respondents' concession that Congress intended to preempt "common-law duties" "based on smoking and health" is fatal to their express preemption argument. Resp. Br. 28-29. There are *no* common-law duties—in *any* State—that "are aimed at and impose special burdens on cigarette companies." *Id.* at 1. The common law is used to regulate health-related representations in cigarette advertising *only* when generally applicable state-law duties are applied by a judge or jury to factual allegations that are premised on the relationship between smoking and health. Respondents' concession that the Labeling Act preempts at least *some* common-law duties therefore establishes that the statute's preemptive reach extends beyond duties that specifically target cigarette companies. *See Riegel*, 128 S. Ct. at 1010 (refusing to limit the express preemption provision of the Medical Device Amendments to state-law duties that specifically target medical devices because there are "no common-law duties that relate solely to medical devices").

Moreover, *Reilly* forecloses respondents' reading of the Labeling Act. The cigarette advertising regulations held to be preempted in *Reilly* had been promulgated by the state attorney general "pursuant to his authority" under the generally applicable Massachusetts Unfair Trade Practices Act (533 U.S. at 533)—a point that respondents conspicuously omit from their discussion of *Reilly*. The fact that in this case a jury, rather than a state attorney general, would apply a materially identical state unfair trade practices statute to regulate smoking-and-health matters does not alter the preemption analysis. *Compare Morales*, 504 U.S. at 391 (Airline Deregulation Act preempts an attorney general's application of an unfair trade practices statute to regulate air-

line advertising), *with Wolens*, 513 U.S. at 228 (Airline Deregulation Act preempts a jury's application of an unfair trade practices statute to regulate airline advertising).

Nowhere in their discussion of *Reilly* do respondents (or their *amici*, including the state attorneys general) explain why a jury should be granted greater authority than a state attorney general to regulate cigarette advertising under an unfair trade practices statute. If the Maine attorney general were to rely on the Maine Unfair Trade Practices Act to issue a regulation prohibiting the use of descriptors in cigarette advertising, respondents would have to concede (given *Reilly*) that such a regulation would be preempted by the Labeling Act. Yet, respondents contend that if a Maine judge or jury were to rely on the same statute to issue a judgment against PMUSA based on its use of descriptors, such an application of state law would not be preempted. This Court has repeatedly declined to draw such an "implausible" and "perverse distinction" between executive and judicial power in the express preemption setting. *Riegel*, 128 S. Ct. at 1008; *see also Wolens*, 513 U.S. at 228.

Respondents contend that the Court in *Reilly* endorsed their untenable "distinction between state laws aimed at cigarette marketing and state laws of general applicability." Resp. Br. 19. *Reilly* did no such thing. Indeed, respondents' reading of *Reilly* is pieced together using selective (and misleading) excerpts of the opinion's language. Thus, while respondents assert that *Reilly* drew a "'critical distinction . . . between generally applicable . . . regulations . . . and regulations *targeting* cigarette advertising'" (*ibid.* (quoting *Reilly*, 533 U.S. at 549-50) (alterations and emphasis added by respondents)), the "critical

distinction" that the Court *actually* drew was between "generally applicable *zoning* regulations . . . and regulations targeting cigarette advertising." 533 U.S. at 549-50 (emphasis added). The Court explained that the preempted regulations targeting "youth exposure to cigarette advertising"—though enacted under a generally applicable statute—were "intertwined with the concern about cigarette smoking and health" and therefore "based on smoking and health." *Id.* at 548. In contrast, "generally applicable *zoning* restrictions" are based on "state interests in traffic safety and esthetics" and therefore not preempted. *Id.* at 551 (emphasis added). Needless to say, no zoning laws are at issue in this case.[1]

Respondents' reading of *Reilly* is also inconsistent with this Court's repeated conclusion in other cases that federal law preempts a generally applicable state-law duty when it is applied to facts encompassed by the terms of an express preemption provision. That conclusion was most recently reiterated in *Riegel*, where the Court held that the Medical Device Amendments to the Food, Drug, and Cosmetic

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[1] Equally unfounded is respondents' suggestion that *Reilly* endorsed the proposition that all "'[r]estrictions . . . that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption clause.'" Resp. Br. 19 (quoting 533 U.S. at 551-52). The language omitted by respondents makes clear that the Court was *actually* referring to "[r]estrictions *on the location and size of advertisements* that apply to cigarettes on equal terms with other products." *Reilly*, 533 U.S. at 551-52 (emphasis added). Such restrictions are not preempted when applied to cigarette advertising because their application is not "motivated by concerns about smoking and health." *Id.* at 550. Tellingly, the regulations held to be preempted in *Reilly* applied "on equal terms" to cigarettes *and* smokeless tobacco products. *Id.* at 534.

Act—which prohibit States from "establish[ing] . . . with respect to a [medical] device . . . any requirement . . . which relates to the safety or effectiveness of the device" (21 U.S.C. § 360k(a))—preempted a jury's application of generally applicable state common-law duties to an allegedly defective medical device. 128 S. Ct. at 1010. And this Court's holding in *Wolens* that state-law claims challenging airline advertising under the Illinois Consumer Fraud and Deceptive Business Practices Act were preempted by the Airline Deregulation Act—which precludes States from enacting laws that "relat[e] to [air carrier] rates, routes, or services" (49 U.S.C. App. § 1305(a)(1))—leaves no doubt that this principle applies with equal force to claims based on generally applicable fraud duties. 513 U.S. at 228; *see also id.* at 237 (Stevens, J., concurring in part and dissenting in part) ("The duty imposed by the Consumer Fraud Act is to refrain from committing fraud in commercial dealings—it is the 'duty not to deceive'").[2]

Respondents are correct that "Maine's general prohibition on fraud is not, by its terms, a 'requirement . . . based on smoking and health.'" Resp. Br. 29. It is equally the case, however, that the "general common-law duties" invoked by the *Riegel* plaintiff did not specifically "'relate[ ] to the safety or effectiveness of the [medical] device'" at issue (128 S. Ct.

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[2] The Solicitor General agreed that the state-law claims in *Riegel* and *Wolens* were expressly preempted. *See* Br. of the United States as *Amicus Curiae* at 6-7, *Riegel* (No. 06-179); Br. of the United States as *Amicus Curiae* at 12, *Wolens* (No. 93-1286). The Solicitor General does not suggest that a different express preemption analysis should apply here. On the contrary, the Solicitor General avoids taking any position on the express preemption question in this case.

at 1003 (quoting 21 U.S.C. § 360k(a)) and that the generally applicable fraud provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act invoked by the *Wolens* plaintiffs did not specifically "'relat[e] to [airline] rates, routes, or services.'" 513 U.S. at 223 (quoting 49 U.S.C. App. § 1305(a)(1)). As in *Riegel* and *Wolens*, respondents' claims are nevertheless preempted because they seek to enforce a generally applicable state-law duty against factual allegations encompassed by the terms of an express preemption provision. *See also Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 48 (1987) (holding that a generally applicable fraud in the inducement cause of action asserting improper processing of a claim for employee benefits was preempted because the claim "relate[d] to an[ ] employee benefit plan" within the meaning of ERISA's preemption provision).[3]

Rather than meaningfully address the holdings or analysis of *Riegel* and *Wolens*, respondents consign those cases to a footnote. Resp. Br. 43 n.13. They try to justify this blinkered approach by declar-

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[3] Contrary to respondents' suggestion (at 44), *Rowe* v. *New Hampshire Motor Transport Ass'n*, 128 S. Ct. 989 (2008), which was decided the same day as *Riegel*, is entirely consistent with this conclusion. The Court held in *Rowe* that the Federal Aviation Administration Authorization Act of 1994 (FAAAA)—which preempts state laws "related to a price, route, or service of any motor carrier" (49 U.S.C. § 14501(c)(1))—preempts state laws that have a "direct connection with motor carrier services." 128 S. Ct. at 996 (internal quotation marks omitted). *Rowe* did not involve the application of a generally applicable state law to motor carriers, and its holding is consistent with the conclusion that the FAAAA would preempt a jury's application of a generally applicable statute—such as a state unfair trade practices statute—to factual allegations that "relate[ ] to a price, route, or service of a[ ] motor carrier."

ing, conclusorily, that "[p]reemption decisions of this Court interpreting other statutes with different texts, histories, and purposes do not provide a reliable guide to interpreting the Labeling Act." *Id.* at 15; *see also id.* at 42 (arguing that *Morales* "does not bear on the proper interpretation of the Labeling Act"). There is nothing unique, however, about the text of the Labeling Act's preemption provision—except, perhaps, for its broad, unqualified language. *Cf. Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 446-47 (2005) (contrasting the restrictive language of FIFRA's preemption provision with the expansive language of the Labeling Act). Respondents' inability to square their theory of this case with the holdings in *Riegel* and *Wolens* is a tacit concession that the result they seek cannot be reconciled with the mainstream of this Court's express preemption jurisprudence.

In those rare cases where Congress wants to shield state laws of general applicability from any possibility of federal preemption, it does so explicitly. *See*, *e.g.*, 25 U.S.C. § 1723(a)(1) ("nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian . . . which is pursued under any law of general applicability that protects non-Indians as well as Indians"); 29 U.S.C. § 1144(b)(4). The Labeling Act's preemption provision contains no textual indication that Congress wanted to create a categorical exemption for every state law of general applicability. On the contrary, the Labeling Act's unequivocal proscription on state-law "requirement[s] or prohibition[s] based on smok-

ing and health" includes *all* state laws, whether classified as general or specific.[4]

2. The structure of the Labeling Act confirms that the statute preempts all state-law claims challenging health-related representations in cigarette advertising. "Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern." *Reilly*, 533 U.S. at 571. As part of this "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 expressly prohibited States from imposing their own advertising and promotional requirements "based on smoking and health" and explicitly preserved the "authority of the Federal Trade Commission with respect to unfair or decep-

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[4] *Bates* reinforces this conclusion. There, the Court held that FIFRA, 7 U.S.C. § 136v(b), preempts generally applicable "common-law rule[s]," including "fraud and negligent-failure-to-warn" claims, "that would impose a labeling requirement that diverges from those set out in FIFRA." *Bates*, 544 U.S. at 446, 452. Contrary to respondents' assertion (at 28-29), the Court's statement that "an event, such as a jury verdict, that merely motivates an optional decision is not a requirement" (544 U.S. at 445) offers no support for their effort to restrict the Labeling Act to laws that specifically target cigarette advertising. *Bates*'s conclusion that FIFRA preempts some generally applicable fraud and failure-to-warn claims conclusively forecloses respondents' reading of this language. The passage instead explains why FIFRA's preemption provision—which is limited to state-law "requirements for labeling or packaging"—does not reach express warranty and design defect claims, even though "a finding of liability on these claims [could] induce [the defendant] to alter [its] label." *Ibid.* (internal quotation marks omitted).

tive acts or practices in the advertising of cigarettes." *Id.* § 1336.

Respondents attempt to obscure the features of this "comprehensive Federal program" by contending that the "singular focus of each version of the [Labeling] Act was on the warning label on cigarette packages." Resp. Br. 41. But that argument ignores the statute's explicit—and much broader—prohibition on the imposition of state-law "advertising or promotion[al]" requirements. 15 U.S.C. § 1334(b). It is also flatly contradicted by this Court's own recognition that, when "enact[ing] the current pre-emption provision, Congress did *not* concern itself solely with health warnings for cigarettes." *Reilly*, 533 U.S. at 547 (emphasis added). "In the 1969 amendments," the Court continued, "Congress banned electronic media advertising of cigarettes" and, "to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC." *Id.* at 548.

Respondents are wrong to suggest that, at the time Congress amended the Labeling Act's preemption provision, the FTC lacked the regulatory tools to police health-related representations in cigarette advertising. Resp. Br. 34. In fact, the FTC had been closely regulating health claims in cigarette advertising since the 1920s (*see* Pet. Br. 28 n.8 (citing examples)), and it has continued to bring that regulatory authority to bear on the tobacco industry since the enactment of the Labeling Act.[5]

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[5] *See*, *e.g.*, *Santa Fe Natural Tobacco Co.*, 65 Fed. Reg. 26,211 (May 5, 2000); *In re Alternative Cigarettes, Inc.*, 65 Fed. Reg. 26,208 (May 5, 2000); *In re R.J. Reynolds Tobacco Co.*, 64 Fed. Reg. 13,205 (Mar. 17, 1999); *In re Am. Tobacco Co.*, 119 F.T.C. 3 (1995); *In re R.J. Reynolds Tobacco Co.*, 54 Fed. Reg. 41,342

It is no answer to say, as respondents and some of their *amici* do, that the FTC (like all government agencies) might elect—as a matter of enforcement discretion, because of resource constraints, or for other reasons—not to pursue such regulation. That is a necessary corollary to Congress's decision to vest exclusive enforcement authority at the federal level. *See Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 376-77 (2000). In any event, the federal government remains actively involved in all aspects of tobacco-control policy. In the short time since the Court granted certiorari in this case, for example, the FTC has proposed to rescind its longstanding guidance on the use of FTC Method results in cigarette advertising (Proposal to Rescind FTC Guidance Concerning the Current Cigarette Test Method, 73 Fed. Reg. 40,350 (July 14, 2008) [hereinafter FTC Proposal]), and the House of Representatives has passed a bill that, if enacted, would impose additional restrictions on tobacco advertising, including a ban on the descriptors "light" and "low tar." H.R. 1108, 110th Cong. (2008). Regardless of whether either of these proposals is adopted, they each demonstrate that the policymaking organs of the federal government remain actively involved in the "comprehensive Federal program" governing cigarette advertising. 15 U.S.C. § 1331. State-law "regulation-by-litigation," as exemplified by this lawsuit, is nei-

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[Footnote continued from previous page]

(Oct. 6, 1989). In addition to its administrative enforcement powers, the FTC also has the authority to file suit on behalf of consumers injured by a defendant's deceptive advertising practices and to recover relief that includes "the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b).

ther a necessary nor an appropriate adjunct to those federal efforts.

Respondents further contend that the Labeling Act should not be read to displace state-law regulation of health-related claims in cigarette advertising because the FTC "encourage[d]" States to enact Little FTC Acts that complement the federal agency's regulation of unfair trade practices. Resp. Br. 33, 34 (internal quotation marks omitted). But this sheds no light on the question whether the Labeling Act precludes actions brought under these state statutes. Far more probative is the fact that Congress—though undoubtedly aware of the States' consumer protection legislation when enacting the Labeling Act—expressly preserved the FTC's authority to regulate deceptive health representations in cigarette advertising without including a comparable savings clause for the States' authority under their Little FTC Acts, whether exercised by regulation or court decision.

3. Preemption of respondents' state-law claims also promotes the Labeling Act's dual objectives of "adequately inform[ing]" the public "about any adverse health effects of cigarette smoking" and preventing the proliferation of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U.S.C. § 1331. As evidenced by the dozens of cases filed across the country challenging the use of descriptors under state law (and the inconsistent results reached in those cases (*see* Pet. Br. 30)), allowing the States to regulate descriptors would generate conflicting standards regarding the circumstances in which tobacco companies can use such statements to communicate tar and nicotine information to consumers. These diver-

gent state-law regulatory requirements would inevitably foster consumer confusion and prevent tobacco companies from conducting advertising and promotional campaigns on a national basis.

Respondents suggest that "Congress's concern with uniformity" in the Labeling Act "was subordinate to its goal of ensuring that consumers receive 'adequate information' regarding smoking and health." Resp. Br. 38. But the Labeling Act's dual objectives are interrelated. To ensure that consumers receive a single, clear message about smoking and health, Congress mandated warning labels that must appear on every cigarette package, prohibited the States from requiring their own warning labels, expressly preempted state regulation of health representations in cigarette advertising, and explicitly preserved the authority of the FTC to regulate such health-related representations. Allowing respondents' claims to proceed would lead to precisely the disuniformity in health information and advertising regulation that Congress sought to prevent. 15 U.S.C. § 1331.

B. Respondents' Claims Are Also Preempted Under The Alternative Preemption Framework Articulated By The *Cipollone* Plurality

Unable to cite a single opinion of this Court that compels, or even supports, affirmance of the decision below, respondents rest their entire case on the alternative preemption framework articulated by the *Cipollone* plurality. That framework, however, will not bear the weight that respondents seek to place on it.

1. Respondents' claims are preempted under the framework developed by the *Cipollone* plurality be-

cause, in their complaint, respondents concede that the descriptors "light" and "lowered tar and nicotine" accurately convey the results of tar and nicotine testing under the FTC Method and thus are not inherently false. J.A. 30a; *see also* U.S. Br. 28-29 (descriptors are "'literally true' insofar as they state the tar yield to the smoking machine"). Respondents instead contend that descriptors are *potentially* misleading to consumers who do not know that these statements are based on a government-mandated testing methodology that is not capable of accounting for the variability in human smoking behavior. J.A. 29a. According to the *Cipollone* plurality, state-law challenges to such potentially misleading health representations are "based on smoking and health" and therefore preempted. 505 U.S. at 529.[6]

Respondents profess an inability to find anything in the *Cipollone* plurality's opinion that draws a dis-

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[6] Respondents' attempt (at 23) to recharacterize their claims as alleging that descriptors "were false, not potentially misleading," is unavailing because it is the substance of the allegations in a party's complaint—rather than the label attached to those allegations in the complaint or *post hoc* reformulations of those allegations in a brief—that determines whether a claim is preempted. *See Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 214 (2004). Respondents are therefore incorrect to contend (at 23) that it would be "premature" to consider whether descriptors are inherently false or, at most, potentially misleading. Their complaint concedes that descriptors accurately convey the results of testing under the FTC Method (J.A. 30a), and therefore establishes for purposes of the preemption inquiry that descriptors are not inherently false. *See Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392 (5th Cir. 2007) (holding on summary judgment that state-law claims challenging the use of descriptors are preempted under the *Cipollone* framework because the plaintiffs had acknowledged that descriptors accurately convey the results of FTC Method testing).

tinction between inherently false and potentially misleading statements. Resp. Br. 22. But this distinction is apparent from both the language of the opinion and the claims asserted by the *Cipollone* plaintiff. His preempted fraud claim based on a warning-neutralization theory alleged that the defendants had used statements and imagery in their advertisements to "neutralize[ ] the effect of federally mandated warning labels"—such as images of "contentment, glamour, romance, youth, [and] happiness." *Cipollone*, 505 U.S. at 527 (internal quotation marks omitted). His non-preempted fraudulent misrepresentation claim alleged that the defendants had made "intentional misstatement[s]" about the health effects of smoking in their advertisements. *Id.* at 529. Thus, while the statements and imagery underlying the warning-neutralization claim were not inherently false, they were nevertheless presented in a manner that potentially misled consumers by "minimiz[ing] the health hazards associated with smoking." *Id.* at 527. In contrast, the statements challenged by the plaintiff's fraudulent misrepresentation claim were allegedly characterized by outright "falsity" regarding the health risks of smoking. *Id.* at 529.

Respondents suggest that the *Cipollone* plurality concluded that the Labeling Act does "not preempt state-law claims alleging fraudulent misrepresentation regarding the health effects of cigarettes when such claims are not based on the warning on cigarette labels." Resp. Br. 17. Respondents make no attempt, however, to explain why the *Cipollone* plurality would have endorsed a preemption framework that preserves state-law fraud claims "unrelated to the warning labels on packages" (*id.* at 1) while preempting fraud claims that are "based on the warning

on cigarette labels." *Id.* at 17. Nothing in the language, structure, or purpose of the Labeling Act—which preempts *all* state-law advertising or promotional "requirement[s] . . . based on smoking and health"—supports this distinction.

Moreover, even under respondents' reading of the plurality opinion in *Cipollone*, their claims would be preempted because they *are* "related to [the] warning labels" on cigarette packages. Resp. Br. 22. Like the preempted fraud claim based on warning neutralization in *Cipollone*, which alleged that the defendants used "statements in advertising and promotional materials . . . to minimize the health hazards associated with smoking" (505 U.S. at 527 (plurality opinion)), respondents' claims allege that 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." J.A. 28a-29a. Because the substance of respondents' claims is that PMUSA failed to disclose information about the limitations of the FTC Method and used the descriptors "light" and "lowered tar and nicotine" to minimize consumers' concerns that smoking could result in the serious health consequences identified in the warning labels, those claims "relate[ ] to the warning labels" and are therefore preempted even under respondents' reading of the *Cipollone* plurality opinion.

2. If respondents' claims are not preempted under the preemption framework set forth by the *Cipollone* plurality, then this Court should reconsider that framework. An interpretation of the Labeling Act's express preemption provision that did not reach respondents' challenge to the use of tar and

nicotine descriptors would conflict with the statute's text, structure, and purpose, and with this Court's subsequent express preemption decisions in *Reilly*, *Riegel*, and *Wolens*.

Respondents are wrong to suggest that "there is nothing approaching judicial inconsistency or confusion that warrants a reexamination of *Cipollone*." Resp. Br. 27. As a majority of the Court predicted at the time (*Cipollone*, 505 U.S. at 543-44 (opinion of Blackmun, J.); *id.* at 555 (opinion of Scalia, J.)), the preemption framework articulated by the *Cipollone* plurality has fostered widespread and persistent confusion among lower courts attempting to distinguish between those fraud claims that the plurality deemed preempted and those fraud claims it concluded were not preempted. *See*, *e.g.*, *Pearson* v. *Philip Morris Inc.*, 2007 WL 2692026 (Or. Cir. Ct. 2007) (slip op. at 19) ("the *Cipollone* rubric [is] extremely difficult to apply"); *Wakeland* v. *Brown & Williamson Tobacco Corp.*, 996 F. Supp. 1213, 1221 n.13 (S.D. Ala. 1998) (recognizing "the difficulty the courts have encountered in applying *Cipollone*").

Contrary to respondents' argument (at 26), the disagreement among lower courts turns not "on diverging understandings of the FTC's actions with respect to light cigarettes" but on whether state-law claims challenging the use of tar and nicotine descriptors in cigarette advertising are "based on smoking and health" within the meaning ascribed to that language by the *Cipollone* plurality. *Compare Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 392, 395 (5th Cir. 2007) (holding that state-law consumer fraud claims challenging the use of descriptors constitute "'implied misrepresentation'" neutralization claims preempted under the *Cipollone* plurality's preemption framework), *with* Pet. App.

32a ("we do not see anything in *Cipollone*'s discussion of warning neutralization claims that equates them with 'implied misrepresentation' claims as *Brown* does"). Indeed, respondents presented the same artificially narrow characterization of the conflict between the First and Fifth Circuits as a basis for denying certiorari (Br. in Opp. 30), and the Court "necessarily considered and rejected that contention" when it granted review. *United States* v. *Williams*, 504 U.S. 36, 40 (1992).

In light of the lower courts' profound difficulty implementing the *Cipollone* plurality's preemption framework—and the tension between the plurality's analysis and the express preemption principles endorsed by a majority of this Court in *Reilly*, *Riegel*, and *Wolens*—there would be a compelling basis for reexamining that framework if the Court were to conclude that respondents' claims are not preempted under the plurality's analysis. And the framework articulated by the *Cipollone* plurality would not fare well on reexamination.

As respondents point out (at 17-18), the approach to Labeling Act preemption developed by the *Cipollone* plurality rested on four pillars. Each of them, however, is unsound.

In concluding that the Labeling Act does not preempt some categories of fraud claims, the *Cipollone* plurality first suggested that "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." 505 U.S. at 529. But the Labeling Act preempts *all* state-law "requirement[s] or prohibition[s] based on smoking and health"—whether based on fraud or any other state-law duty. There is no clear-statement requirement restricting the preemption of fraud-

based duties to statutes that explicitly mention "fraud." *See Wolens*, 513 U.S. at 228; *Bates*, 544 U.S. at 452-53; *Pilot Life*, 481 U.S. at 48.

Second, the *Cipollone* plurality reasoned that, by "explicitly reserv[ing] the FTC's authority" to police deceptive advertising, Congress "indicate[d] that" the preemption provision should "be construed narrowly, so as not to proscribe the regulation of deceptive advertising." 505 U.S. at 529. This "explicit[ ] reserv[ation]" of authority applies, however, only to *federal*—not state—authority to police deceptive advertising. Thus, while the Labeling Act was not intended to shield tobacco companies from the regulatory repercussions of engaging in deceptive advertising, it vested regulatory oversight in the FTC by explicitly preserving the agency's authority to regulate deceptive cigarette advertising and expressly preempting the States' overlapping authority.

Third, the *Cipollone* plurality observed that "[s]tate-law prohibitions on false statements of material fact do not create 'diverse, nonuniform, and confusing' standards." 505 U.S. at 529. But that is decidedly not the case, as evidenced by the conflicting results that courts have reached in determining whether the use of descriptors violates state unfair trade practices statutes. *See* Pet. Br. 30. It was to prevent the proliferation of precisely such conflicting state-law standards that Congress prohibited States from regulating health-related representations in cigarette advertising. 15 U.S.C. § 1331.

Fourth, and finally, the plurality suggested that the preemption of fraud claims "would conflict both with the background presumption against preemption" and with the Labeling Act's legislative history. *Cipollone*, 505 U.S. at 529 n.27. But the Labeling

Act's legislative history confirms that the statute was intended to "prohibit[ ] health-related regulation or prohibition of cigarette advertising by any State or local authority." S. Rep. No. 91-566, at 1 (1969). In any event, neither a so-called assumption against preemption nor snippets of legislative history can trump the Labeling Act's broad language prohibiting States from imposing *any* "requirement or prohibition based on smoking and health . . . with respect to" cigarette advertising. Indeed, the Court regularly construes the language of an unambiguous express preemption provision without resorting to either an assumption against preemption or legislative history. *See Riegel*, 128 S. Ct. 999; *Watters* v. *Wachovia Bank, N. A.*, 127 S. Ct. 1559 (2007).

Respondents' express preemption argument therefore fails at every turn. Under the ordinary express preemption principles applied in *Reilly*, *Riegel*, and *Wolens*, respondents' claims are expressly preempted because they seek to apply the general state-law duties established by the Maine Unfair Trade Practices Act to factual allegations that are unquestionably "based on smoking and health." Those claims are also preempted under the alternative preemption framework applied by the *Cipollone* plurality. If they are not, then there would be a compelling basis for this Court to reject that preemption framework in favor of the principles set forth in this Court's more recent express preemption jurisprudence.

II. RESPONDENTS' CLAIMS ARE IMPLIEDLY PREEMPTED

Respondents' claims are also impliedly preempted because they would "stand[ ] as an obstacle to the accomplishment and execution" of the FTC's

longstanding low-tar policy. *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995).

Respondents and the Solicitor General are wrong when they contend that the FTC has never authorized descriptors. The FTC concedes that it issued guidance to the tobacco industry in 1966 that a "factual statement of the tar and nicotine content . . . of the mainstream smoke from a cigarette would not be" deceptive if substantiated by FTC Method testing. J.A. 478a; *see also* FTC Proposal, 73 Fed. Reg. at 40,351. A year later, the FTC, in response to inquiries regarding the permissible range of "factual statements of . . . tar and nicotine content" (J.A. 366a), issued a policy statement informing the industry that a "cigarette testing relatively low, or among the lowest, in comparison with other brands may be so represented in advertising it to the public." *Id.* at 369a. In accordance with this explicit authorization, PMUSA introduced Marlboro Lights in 1971 and marketed them as having "lowered tar and nicotine" in comparison with regular Marlboros when measured using the FTC Method. In a series of consent decrees, the FTC subsequently reaffirmed that descriptors may be used to communicate FTC Method results to consumers. *In re Am. Brands, Inc.*, 79 F.T.C. 255, 257 (1971); *In re Am. Tobacco Co.*, 119 F.T.C. 3, 11 (1995).[7]

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[7] The fact that PMUSA did not disclose tar and nicotine yields on its cigarette packages does not detract from the preemptive force of those decrees. As this Court has recognized, the FTC lacks the authority to require the disclosure of tar and nicotine yields on cigarette packages. *See Reilly*, 533 U.S. at 542 ("In the preemption provision [of the Labeling Act], Congress unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in § 1333") (citing 15 U.S.C. § 1334(a)).

Apparently not content to let the regulatory record speak for itself, the FTC attempts in its recent *Federal Register* notice to reinterpret its guidance regarding "factual statement[s] of . . . tar and nicotine content" as applying only to numerical representations of FTC-rated tar and nicotine yields. FTC Proposal, 73 Fed. Reg. at 40,352 n.6. But no amount of *post hoc* rationalization by the FTC can alter the fact that descriptors—which have functioned as a shorthand reference to the results of testing under the FTC Method—unquestionably constitute "factual statements of tar and nicotine yields based on the [FTC Method]." *Id.* at 40,351. The FTC's policy statement defining the range of permissible "factual statements," the agency's annual reports to Congress defining the term "low tar" as 15.0 milligrams or less of tar (J.A. 587a n.8, 604 n.11), and the FTC's long-standing decision not to take enforcement action regarding descriptors used in conformity with the agency's guidance leave no doubt that descriptors were so understood by the agency for more than forty years.

The FTC's effort to rewrite this regulatory history may be attributable to the fact that the United States government is the plaintiff in a long-running RICO-fraud suit against the tobacco industry. *See United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *appeal docketed*, No. 06-5267 (D.C. Cir.). The FTC's comprehensive regulation of that industry for many years is obviously inconvenient for the government's litigating position in that case. In an apparent attempt to bolster the federal government's litigating position in that lawsuit, the FTC has prepared a revisionist history of its regulatory role. The Solicitor General's brief, likewise, appears to have been prepared with a keen eye

on preservation of the government's posture and position in the RICO action. The Court should view this litigation-driven strategy with more than the usual dose of skepticism. *Cf. Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 n.30 (1987).

Ultimately, respondents' claims constitute a direct attack on descriptors and the FTC Method. Because the FTC designated that methodology as the exclusive means of disseminating tar and nicotine information, compelled cigarette manufacturers to disclose those test results in all print advertising, and authorized the use of descriptors as a shorthand means of communicating the results to consumers, respondents' claims challenge the very foundation of the FTC's low-tar policy and are impliedly preempted by that policy. *Cf. Geier* v. *Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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