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 Petition for a 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 ("Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million companies and

[1] 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. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and respondents were notified of *amicus*'s intent to file this brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

professional organizations of every size, in every industry 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 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, not only uniquely suited to offer a broader perspective on preemption than the parties could provide by themselves, but also is keenly interested in ensuring that the regulatory environment in which its members operate is rational and consistent.

INTRODUCTION AND SUMMARY

Today, more than ever, U.S. businesses confront product liability lawsuits that—rather than challenge the design or quality of the product itself—seek damages based on the product's label, accompanying brochures, or advertising, often through a common-law "failure to warn" claim or a state deceptive trade practices statute. At the same time, Congress and federal regulatory agencies have recognized the critical role that product labeling plays for both consumers and the national economy. Balancing a variety of interests such as accuracy, completeness, and consistency—as well as the interest in not burying important information in a haystack of verbiage—Congress and federal agencies have promulgated labeling regimes applicable to goods as diverse as automobiles, appliances, food, and pharmaceuticals. For

example, the Environmental Protection Agency ("EPA") performs automobile fuel economy tests and requires disclosure of such information. The National Highway Traffic Safety Administration ("NHTSA") conducts and requires disclosure of crash test results. The EPA and the Department of Energy certify appliances and electronics as energy efficient. And the Food and Drug Administration ("FDA"), in addition to reviewing drug labeling and advertising, regulates when producers may label their foods "light," "low fat," or "low cholesterol," and when producers can make certain health claims regarding a food.

This case reflects the growing uncertainty and disuniformity on the scope of federal preemption when those regimes and state tort law intersect. A state-law claim or statute is expressly preempted when Congress or an agency declares, in text, that federal authority is exclusive or specifies that state law has been displaced. *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 62-63 (2002). Equally important, a state-law claim may also be impliedly preempted by Congress or a federal agency. That occurs where Congress or the agency regulates so comprehensively as to leave no room for the exercise of state authority (field preemption), or where the state law "conflict[s] with" or otherwise "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the statutory or regulatory regime (conflict preemption). *Id.* at 64-65 (internal quotation marks omitted).

As the petition and the decision below both make clear, the First Circuit's decision in this case creates a square circuit conflict on the extent to which federal law preempts the tobacco claims in this case. The Fifth Circuit, in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), held that federal law preempted claims indistinguishable from those at issue

here. By contrast, the First Circuit's decision here, in open disagreement with the Fifth Circuit, held that the same claims were not preempted. See Pet. 9-11; Pet. App. 34a. If allowed to stand, the First Circuit's approach would balkanize cigarette labeling, advertising, and promotion into a state-by-state endeavor. Plaintiffs here claim that petitioners' use of the words "light" and "low tar" in connection with Marlboro Lights and Cambridge Lights cigarettes was false and misleading. There is no dispute that, under the testing regime mandated by the FTC for decades, those cigarettes are in fact "light" and "low tar," since they deliver less tar and nicotine than their regular Marlboro and Cambridge counterparts. The First Circuit nonetheless allowed plaintiffs' lawsuit to proceed based on the theory that the labels are misleading under state law because the FTC's method does not reflect real-world conditions, such as the tendency of smokers to compensate for lower tar and nicotine delivery by puffing more deeply or holding the smoke in their lungs for longer periods. That ruling means that, in some States, Marlboro Lights and Cambridge Lights can be marketed as before. But in Maine, the same products would either have to be sold and marketed under an entirely different name—or bear wholly different disclosures and warnings—on the theory that the government-mandated mechanism for measuring tar and nicotine, while required for representing the tar and nicotine content on cigarette packages, is false and misleading when used (absent further elaboration) as the basis for labeling the cigarettes "light" or "low tar." In the context of cigarettes, it is difficult to imagine a more powerful blow to the interest of nationwide uniformity and consistency.

The significance of the First Circuit's decision, however, extends well beyond the context of cigarette labels and advertisements. It does not require much imagi-

nation (or legal research) to identify myriad areas of federal concern in which judicial endorsement of theories like those adopted here would lead to similar discontinuities. For example, while the EPA mandates the mechanism for rating fuel economy and requires the display of the resulting fuel economy estimate on each new car, some plaintiffs have challenged advertising that mentions those exact same EPA estimates on the theory that they are misleading. See pp. 12-13, *infra*. Lawsuits in other areas subject to federal regulation, such as drug advertising, abound. See pp. 13-14, *infra*. The results in those cases have been anything but uniform.

The square circuit conflict at this case's heart thus reflects a broader need for additional guidance from this Court. In the 15 years since this Court decided *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992)—holding that Congress had preempted certain state tort actions related to cigarette labeling—*Cipollone* has become one of the most cited and influential decisions on preemption of common-law tort claims, finding application in a variety of non-cigarette contexts. See *Bates* v. *Dow Agrosciences, LLC*, 544 U.S. 431, 441 (2005) (discussing the "groundswell" of federal court preemption decisions in the pesticide context alone). But *Cipollone* was a fractured decision; one can discern a majority vote for particular results, but no single rationale garnered the votes of a majority of the members of this Court. The lower federal courts have not uniformly interpreted the distinctions drawn by the plurality opinion. And the increasingly important doctrine of implied preemption has correspondingly become a hopeless muddle, with little to unify the many disparate labeling and disclosure decisions being generated by the lower federal courts. Only by granting the petition and resolving the question presented can this Court restore uniformity and coherence to this important area of federal law.

REASONS FOR GRANTING THE PETITION

Today's information economy has brought with it the rise of the "information tort." In ever-increasing numbers, plaintiffs' lawsuits challenge not the propriety of a product's design or quality, but the content of the labeling, advertising, or other information provided by the manufacturer. The result has been an "explosive increase in the number of * * * failure to warn cases" and claims based on deception. Douglas R. Richmond, *Human Factors Experts in Personal Injury Litigation*, 46 Ark. L. Rev. 333, 338 (1993). Indeed, given the dramatic shift, "one may speculate that, in the near term, mechanized accidents will cease to provide the focal point of tort. Even in the heartland of modern accident law—products liability—one already sees a relative increase in claims grounded on failure to warn and inform, as well as misrepresentation." John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L.J. 513, 582-83 (2003); see also Richard C. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers?*, 37 Wake Forest L. Rev. 97, 137 (2002) (similar); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 2 (2006) (similar).

Plaintiffs in this case assert precisely such a claim. Seeking damages under Maine's Unfair Trade Practices Act, plaintiffs challenge the marketing and labeling of Marlboro and Cambridge Lights. In particular, plaintiffs claim that petitioners' use of the word "light," and the words "lowered tar and nicotine," is deceptive. It is undisputed that both Marlboro and Cambridge Lights in fact have lower yields of tar and nicotine than regular Marlboro and Cambridge cigarettes when tested under the method the FTC has long mandated for purposes of cigarette advertising. Cmplt. ¶ 23. But plaintiffs claim

that advertising cigarettes as "light" or "low tar," even if consistent with federal test results, is deceptive because smokers may compensate for the lower yields of tar and nicotine by inhaling more deeply or by holding the smoke in their lungs longer—an effect that is not reflected in the FTC's mandated methodology or petitioners' advertising. Pet. App. 4a. Despite congressionally mandated warnings, plaintiffs assert that petitioners used the words "light" and "low tar" on labels and in advertisements "with the intention of communicating," Cmplt. ¶¶ 15, 17, that those cigarettes "were less harmful or safer than [their] regular" counterparts, *ibid.* And they make that claim notwithstanding a federal statute declaring 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" where the cigarette packaging conforms with federal requirements. 15 U.S.C. § 1334(b) (emphasis added).

In the decision below, the First Circuit held that plaintiffs' claims were neither expressly preempted by 15 U.S.C. § 1334(b), nor impliedly preempted by the FTC's standards. As the petition points out—and the First Circuit itself conceded—that creates a square conflict with the Fifth Circuit's decision in *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007). See Pet. 9-11; Pet. App. 34a (disagreeing with *Brown* and declaring that the Fifth Circuit's "approach puts the cart before the horse"). That square conflict and its potential impact on the innumerable tobacco cases now being litigated in state and federal court are themselves sufficient reason to grant the petition.

But the consequences of the decision below and the confusion it reflects extend well beyond the limited (but important) context of this particular case. As plaintiffs and their lawyers have gravitated toward labeling claims, Congress and federal agencies too have recognized the

importance of product labels. The statute at issue here is merely one of many statutes that preempt state-law regulation to ensure that "commerce and the national economy" are "not impeded by diverse, nonuniform, and confusing" requirements. 15 U.S.C. § 1331. Seeking to avoid the fragmentation of our national economy while balancing interests such as comprehensiveness, intelligibility, and consistency—as well as preventing consumers from being so inundated by disclosures that none gets read—Congress has enacted statutes addressing appliance energy efficiency labeling, 42 U.S.C. § 6297(a); motor vehicle fuel economy, 49 U.S.C. § 32919; crash test data, 49 U.S.C. § 30103(b); health claims and nutritional labels for food products, 21 U.S.C. § 343-1; and country of origin labeling for motor vehicles, 49 U.S.C. § 32304. Federal agencies likewise have enacted a raft of labeling requirements. As a result, litigation about the preemptive effect of those federal statutes and regulations has expanded dramatically—as has an increasingly fragmented and incoherent body of federal case law.

In the 15 years since this Court held that 15 U.S.C. § 1334(b) preempts certain state-law tort claims relating to cigarette labeling in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), *Cipollone* has become one of the most cited preemption decisions. But, as the circuit conflict in this case illustrates, that decision—a fractured ruling in which no single rationale was joined by a majority of the Court—has failed to provide the sort of guidance necessary to produce coherent and consistent preemption rulings. That has had a tremendous impact on *amicus*, its members, the business community, and potential claimants. Confronted by unpredictable preemption rulings and an increasing number of "information tort" suits under a multitude of state standards, businesses participating in the national economy may have to balkanize their labeling and promotions, with

different websites, labeling, and advertisements for as many as 50 different States. And consumers claiming injury now regularly confront protracted litigation over preemption before any court ever addresses the merits of their claims. This case thus presents the Court not merely with an opportunity to reconcile a square conflict in circuit precedent. It also provides the Court with the opportunity to provide badly needed guidance on an increasingly important issue more generally. For that reason too, the petition should be granted.

I. The Circuit Conflict On Preemption Reflects Widespread Disuniformity Under A Variety Of Regulatory Regimes.

A. While the statute and regulatory actions at issue in this case are now as many as four decades old, they are by no means unique. Responding to a 1964 Surgeon General report linking smoking with lung cancer, Congress enacted the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331 *et seq.*, 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. To apprise the public of the health risks associated with smoking, Congress mandated that all cigarette packages bear a prominent warning label. *Ibid.* And, 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 labeling and promotion of cigarettes that are labeled in conformity with federal requirements. The FCLAA thus states:

> 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) (emphasis added). Because the Act preempted only "State law," the FTC continued to regulate and police cigarette advertising and promotion. See *Cipollone*, 505 U.S. at 515. Among other things, the FTC required cigarette manufacturers to disclose the tar and nicotine yields of their cigarettes, as calculated under a methodology often referred to as the "FTC Method." *In re American Brands*, 79 F.T.C. 255, 257 (1971); see also *In re Lorillard*, 92 F.T.C. 1035, 1035 (1978).

As the petition explains in detail, the First Circuit's approach to that statutory and regulatory framework does not merely create a conflict in the circuits. It also parses Section 1334(b)'s text and the FTC's actions so finely as to deprive them of virtually any effect. Relying on the plurality opinion in *Cipollone*, the First Circuit appears to have 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. Pet. App. 21a.

That sort of reasoning effectively converts Section 1334(b) and this Court's *Cipollone* decision into a pleading rule: So long as the plaintiff invokes a sufficiently broad principle in the complaint (the duty to meet a reasonable standard of care, the duty not to deceive, *etc.*) when challenging the advertising, the claim is not preempted. Such a rule is not merely nonsensical. It also subjects the tobacco industry to a fragmented, state-by-state disclosure regime that cannot be reconciled with Congress's desire to establish uniformity. And such a rule makes it virtually impossible to distinguish preempted claims from non-preempted claims, except when a plaintiff is foolish enough to identify his challenge as a "warning neutralization" claim of the sort this Court held preempted in *Cipollone*. See Pet. 16-17.

B. While *amicus* agrees that the First Circuit's approach is fundamentally unsound—and that the Fifth Circuit's approach in *Brown* v. *Brown & Williamson Tobacco Corp.* is correct—the First Circuit's parsimonious construction of statutory text and *Cipollone* is part of a larger problem. Invoking a generalized presumption against preemption of local law articulated by the *Cipollone* plurality, 505 U.S. at 517, some federal courts have departed from the lodestar of all statutory construction—the rule that words and phrases are to be construed in accordance with their ordinary meaning. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990)). Correspondingly, they often have refused to find implied preemption even where, as here, the legal theory underlying the state-law claim in effect challenges the veracity of a federal methodology—deeming the results under that methodology, and representations that are accurate according to that methodology, not merely false but fraudulent. The result has been a body of inconsistent and often unsupportable decisions that wreak havoc with federal statutory and regulatory goals.

That confusion infects virtually every area of product labeling in which the federal government has intervened. For example, in 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), codified as amended at 42 U.S.C § 6291 *et seq.* and 49 U.S.C. § 32901 *et seq.*, to regulate the testing and labeling of a range of energy-consuming products. For automobiles, Congress authorized the EPA to establish a methodology for testing fuel economy, and mandated that automobile manufacturers post labels on their cars (known as "Monroney stickers") providing, among other things, "the fuel economy of the automobile." 49 U.S.C. § 32908(b). 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). And the EPA has promulgated exhaustive regulations governing the methodology for testing fuel economy. 40 C.F.R. §§ 600.002-08 *et seq.*

Properly read, those provisions and the accompanying regulations should preclude States from imposing inconsistent disclosure requirements. Nonetheless, invoking a presumption against preemption, at least one court has held that car buyers can sue a vehicle manufacturer under California's Unfair Competition and False Advertising statutes for including EPA fuel economy results (labeled as such) when advertising its hybrid automobile, holding that any preemption is limited to vehicle *stickers*. *True* v. *American Honda Motor Co.,* No. EDV 07-287-VAP, --- F. Supp. 2d ---, 2007 WL 3054569, at *3-*4 (C.D. Cal. June 27, 2007). The court stated that "[i]t would be an unreasonable assumption * * * that Congress intended to preempt states from regulating false or misleading advertising of a vehicle's fuel efficiency * * * ." *Id.* at *4. And the court rejected the claim that the complaint represents "a challenge to EPA testing guidelines" because, according to the court, the lawsuit merely challenged "the manner in which Defendant advertised the Honda Civic Hybrid in mediums other than the Monroney Sticker and [federally mandated] information booklet." *Ibid.*; see *Bronco Wine Co.* v. *Jolly*, 95 P.3d 422 (Cal. 2004) (holding that federal approval of wine labels does not preempt the State from requiring additional disclosures), cert. denied, 544 U.S. 922 (2005).

That decision is difficult to reconcile with text or common sense. Surely a state law governing fuel economy disclosures in advertising is a law "on disclosure" of fuel economy within the meaning of 42 U.S.C. § 32919. Likewise, it is impossible to reconcile the EPA's *mandate* that manufacturers use a particular measure of fuel economy when putting labels on their cars with a state-law *prohi-*

bition on using that same measure (accurately described as the EPA standard) in advertising. Such a rule allows state law, in effect, to indict as fraud in one medium the very statements the federal government requires manufacturers to make in another medium.

For that reason, many courts have taken precisely the opposite approach in other contexts. In *Prohias* v. *Pfizer, Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla. 2007), for example, the district court held that claims regarding the defendants' marketing of Lipitor were preempted by FDA labeling requirements. 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 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. *Id.* at 1233.

> [While] Lipitor was not approved to reduce the risk of heart attacks in all patients, *the alleged advertisements derive from, and largely comport with, the approved label*. For this reason, the plaintiffs[']efforts to hold Pfizer liable for the advertisements *conflicts with the FDA's jurisdiction over drug labeling, and specifically its approval of Lipitor to reduce the risk of heart disease in some patients*. Those claims are therefore preempted by federal law.

Id. at 1234 (emphasis added).

The Third Circuit came to the same conclusion in connection with a Delaware Consumer Fraud Act claim that challenged the advertisements used for Nexium. *Pennsylvania Employees Benefit Trust Fund* v. *Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007). Holding that the FDA's

regulations preempted those claims, the court explained that an "even stronger 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.* In *True*, the court nonetheless allowed precisely what *Zeneca* proscribed: It allowed state tort law to question "the veracity of" fuel economy statements in advertising even though the EPA and federal law mandated the inclusion of those exact same statements on vehicle labels.

C. That inconsistency is important here because it evidences the jurisprudential gulf that separated the First Circuit's preemption analysis below from the Fifth Circuit's analysis in *Brown* v. *Brown & Williamson Tobacco Corp.*, *supra*. Like the district court in *True*, the First Circuit in this case struggled to narrow the scope of preemption. It parsimoniously construed phrases like "requirement or prohibition based on." See Pet. App. 19a. It refused to attach much significance to the fact that the representations—"light" and "lowered tar"—were entirely accurate under the FTC-approved methodology. See Pet. App. 33a-34a (no dispute that, under the FTC method, the "light" or "lowered tar" cigarettes in fact did have lower tar and nicotine yields than their "full-flavored" counterparts). Thus, like *True*, the First Circuit's decision allows plaintiffs to challenge advertisements on a theory that effectively challenges the "veracity" of the method the government imposed. If the First Circuit's decision is allowed to stand, plaintiffs in this case will, in effect, need to prove at trial that the FTC's method (and thus the "low tar" and "light" descriptors

petitioners based on that method) misleads consumers by failing to account for human factors like smoker "compensation" (inhaling more deeply or holding the puff longer). Pet. App. 31a-32a.

By contrast, the Fifth Circuit's decision in *Brown* v. *Brown & Williamson Tobacco Corp.*, *supra*, and the drug advertising cases described at pp. 13-14, *supra*, take the opposite approach. Those cases recognize that, hair-splitting aside, any challenge to a disclosure that is truthful under a federally approved methodology necessarily implicates federal interests. Such disclosures cannot be deemed misleading unless the plaintiff seeks to impose an additional disclosure obligation—an obligation to qualify the disclosure by "tell[ing] the public that the [federal methodology], though accurate in the laboratory, [i]s inaccurate in real life." 479 F.3d at 393 (quotation marks omitted). Those cases further recognize that, once a federal agency approves a methodology or label, federal law will not allow the accuracy of the federal methodology to be placed on trial as deceptive under state law. *Id.* at 392. Allowing such a challenge would "directly undermine the entire purpose of the standardized federal labeling system." *Ibid.;* accord *Zeneca*, 499 F.3d at 251 (allowing suits under consumer fraud laws to challenge "the veracity of statements approved by the FDA" for product labels would "frustrate" the FDCA's "purpose"). The fact that the circuit conflict at issue here is symptomatic of a larger federal divide likewise weighs strongly in favor of granting the petition.

II. The Issues Raised Are Of Enormous And Increasing Importance.

Given the broad range of federal statutes that regulate labeling and the increasing number of lawsuits predicated not on product design or quality, but on the accompanying information, the issues raised in this case are of great and growing importance. Congress and federal

agencies have already enacted an increasing number of statutes requiring manufacturers to perform federally regulated tests on their products and to disclose the results of those tests to consumers. Congress has also expressly preempted state law in a variety of disclosure-related statutes. Each of those contexts raises the prospect of lawsuits, and conflicting results, similar to those at issue here.

A. A few examples illustrate the breadth of this issue. Addressing automobile crashworthiness, Congress has directed the NHTSA to promulgate a number of Federal Motor Vehicle Safety Standards ("FMVSS"), 49 U.S.C. § 30111(a), preempted States from creating their own standards, 49 U.S.C. § 30103(b), and given the NHTSA the authority to carry out any testing necessary to create and enforce those standards, 49 U.S.C. § 30168. That includes crash-testing passenger vehicles and publishing the results. 49 C.F.R. § 571.208; see www.safercar.gov (last accessed Nov. 20, 2007). 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—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 high 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.

That effort to educate consumers, however, could easily be derailed by a lawsuit parallel to the one the First Circuit upheld here. In this case, plaintiffs cannot credibly claim that cigarette labels such as "low tar" and "light" are literally false if evaluated under the FTC-approved methodology. To the contrary, under that methodology, the "light" and "lowered tar" cigarettes did yield less tar and nicotine than their regular counter-

parts. But plaintiffs claim that the use of those terms is nonetheless *misleading* because the FTC-approved test does not accurately reflect a human factor—that smokers may compensate by smoking more "light" or "lowered tar" cigarettes, inhaling more deeply, and holding a puff longer than with regular cigarettes. Pet. 7. And plaintiffs therefore claim that petitioners misled the public when they used short-hand terms such as "light" and "lowered tar" despite that shortcoming.

But a plaintiff could just as easily challenge a car manufacturer's advertisement of an automobile's five-star crash rating—even though it is true as a matter of federal law—under the same theory. For example, a plaintiff might argue that advertising a five-star rating is misleading because the government's test does not reflect all real-world conditions. (No test ever does.) And some studies suggest that the human factor of "compensating" behavior—a tendency to drive more aggressively if the car is safer—may also function 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 the safety ratings—while literally true and approved by a federal agency—could be the basis of a fraud action under state law because they allegedly do not account for real-world conditions.

The same theory likewise could be applied to evade the national uniformity goal underlying the National Labeling and Education Act ("NLEA"), which creates national standards for food labeling. 21 U.S.C. § 343-1(a).

When Congress enacted that statute, it explicitly preempted States from creating labeling requirements that are not identical to federal standards. 21 U.S.C. § 343(a)(1). Pursuant to the NLEA, the FDA has promulgated numerous regulations allowing food producers to use descriptors to identify "healthier" food products. Much like the FTC's regulatory activity regarding the use of "light" in connection with marketing cigarettes, the FDA allows foods that meet certain nutritional thresholds to use descriptors such as "Low Calorie," 21 C.F.R. § 101.60; "Reduced Fat," 21 C.F.R. 101.62(b); and "Light," 21 C.F.R. § 101.56. In addition, the FDA regulates food health claims on labels if they 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 (regulating claims concerning the relationship between sodium and high blood pressure); 21 C.F.R. § 101.73 (total fat consumption and cancer); 21 C.F.R. § 101.75 (saturated fat and cholesterol and heart disease); 21 C.F.R. § 101.72 (calcium and osteoporosis).

With respect to those terms too, enterprising plaintiffs can claim deception under state law because, once again, the labels—although accurate under a federal methodology—could be read to imply that the food is healthier despite a variety of putatively compensating factors that make them less healthy. Indeed, research shows that, when given "low fat" and "sugar-free" foods as substitutes for higher fat versions of the same item, consumers tend to compensate by eating *more*—just as smokers allegedly compensate by puffing more deeply or holding their breath longer. See Brian Wansink & Pierre Chandon, *Can "Low Fat" Nutrition Labels Lead to Obesity?*, 43 J. Marketing Res. 605 (2006); B. J. Rolls & D. 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 B. J. Rolls & D. L. Miller, *supra*, at 535.[2]

Other examples abound. The ECPA, in addition to regulating fuel efficiency ratings and disclosure, regulates the testing and labeling of consumer products in connection with energy consumption. See, *e.g.*, 42 U.S.C. §§ 6293 & 6294 (ECPA testing and labeling requirements for consumer product energy consumption); 16 C.F.R. pt. 305 (same); 42 U.S.C. § 6297(a)(1)(A & B) (ECPA preemption provision).[3] 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 energy efficiency testing requirements. See, *e.g.*, 10 C.F.R. pt. 430 (incorporating Energy Star guidelines) & 16 C.F.R. § 305.11 (FTC rule

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[2] See also *Pelman* v. *McDonald's Corp.*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (States may require restaurants exempt from federal labeling requirements to disclose nutritional information); *New York State Restaurant Ass'n* v. *New York City Bd. of Health*, 509 F. Supp. 2d 351, 357 (S.D.N.Y. 2007) (States may not impose additional requirements on restaurants that have voluntarily provided nutritional information in accordance with FDA regulations); *Reyes* v. *McDonald's Corp.*, No. 06-C-1604, 2006 WL 3253579, at *4 (N.D. Ill. Nov. 8, 2006) (NLEA preempted state-law deceptive practices claims based on voluntary disclosure of transfats in McDonald's french fries).

[3] Detailed guidelines for a number of products are available at: http://www.energystar.gov/index.cfm?c=product_specs.pt_product_specs (last accessed Nov. 20, 2007).

allowing manufacturers to use the Energy Star logo with DoE approval). 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.*, 95 P.3d at 422. Congress has regulated country of origin labeling for motor vehicles. 49 U.S.C. §32304. And, as noted above, p. 13, *supra*, the FDA extensively regulates the labeling of pharmaceuticals as well as related advertising. With respect to each of those regulatory regimes, state court actions challenging disclosures that are correct under federal methods could threaten the federal program by putting the veracity of any federal standard invoked in a promotion on trial, precisely as plaintiffs seek to do here.

B. The need to clarify the proper way to analyze the preemptive effect of these federal programs increases with each passing day. As the Nation's economy grows more integrated, the impetus for Congress and agencies to establish national standards that facilitate interstate commerce—and ensure that consumers can understand packaging anywhere in the United States—will only increase. At the same time, plaintiffs (and state legislatures) are increasingly attuned to labeling and advertising claims as well. Indeed, as explained above, the number of lawsuits predicated on state deception statutes and common-law failure-to-warn theories is growing exponentially. See p. 6, *supra*.

Given the direct, acknowledged, and undeniable circuit conflict, this case would warrant further review even if its impact were limited to tobacco cases. But its impact is not so limited. The confusion that has developed in the 15 years since *Cipollone* was decided infects many areas of the law, and the circuit conflict in this particular context merely reflects that greater uncertainty. In light of the number of federal labeling regimes that exist today, and the growing number of state-law challenges

predicated on advertising and disclosure, the importance of this issue will continue to grow, as will the uncertainty absent prompt review by this Court. Accordingly, the petition for a writ of certiorari should be granted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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