

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALTRIA GROUP, INC., ET AL. :

4 Petitioners :

5 v. : No. 07-562

6 STEPHANIE GOOD, ET AL. :

7 - - - - - x

8 Washington, D.C.

9 Monday, October 6, 2008

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:05 a.m.

14 APPEARANCES:

15 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of
16 the Petitioners.

17 DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of
18 the Respondents.

19 DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the
20 Solicitor General, Department of Justice, Washington,
21 D.C.; on behalf of the United States, as amicus
22 curiae, supporting the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this term in Altria Group v. Stephanie Good.

5 Mr. Olson.

6 ORAL ARGUMENT OF THEODORE B. OLSON

7 ON BEHALF OF PETITIONERS

8 MR. OLSON: Mr. Chief Justice, and may it
9 please the Court:

10 Respondents' state law claims track nearly
11 verbatim the Cigarette Labeling Act's pre-emption
12 provision. For example, the complaint challenges
13 promotions of light cigarettes as less harmful and safer
14 to smokers than regular cigarettes. But the statute,
15 Congress, explicitly preempted any requirement
16 respecting the promotion of cigarettes based upon
17 smoking and health. In short, the Respondents are
18 seeking in state court precisely what Congress
19 pre-empted. There is no space --

20 CHIEF JUSTICE ROBERTS: Mr. Olson, what if
21 the state law claim did not require any inquiry into the
22 relationship between smoking and health? Something
23 along the lines of saying our studies show that light
24 cigarettes are healthier for you, and in fact their
25 studies show the opposite. So all you, all the

1 plaintiff would have to show is that there was a
2 deception, a disconnect between the studies and the ad.
3 It wouldn't matter whether light cigarettes were
4 healthier or not healthier. Is that the type of action
5 that could be brought?

6 MR. OLSON: Well, I think the facts could
7 differ from case to case, Mr. Chief Justice. But the
8 inquiry is going to be generally, I think, simple: Is
9 there a requirement? Is it based upon smoking and
10 health, and does it appear in an advertising or
11 promotion of a cigarette. Now, I suppose there might be
12 conceivably circumstances where it's impossible to tell
13 that the requirement is not connected in some way with
14 smoking and health, but it's certainly clear here.

15 The complaint specifically talks in terms of
16 promoting cigarettes, purporting to be less harmful or
17 safer, despite serious health problems associated with
18 smoking. These appear at the beginning in paragraph 2
19 of the amended complaint which is at pages, beginning
20 Joint Appendix pages 26 through 28. I invite the
21 Court's attention to paragraph 2 of the amended
22 complaint and paragraphs 15 and 18 of the amended
23 complaint. In fact, the words "promotion,"
24 "cigarettes," "smoking," "safety," and "health," the
25 very words that appear in the Labeling Act statute,

1 appear, I counted at least 12 times in the amended
2 complaint.

3 JUSTICE GINSBURG: Is it a question of just
4 how you phrase it, Mr. Olson? Is there any scope --
5 does your argument leave any scope for attorney general,
6 state attorney general imposition of state law remedies
7 against a deceptive practice involving advertising
8 cigarettes. To give you concrete examples, suppose a
9 state attorney general said in every - suppose the
10 practice were in every carton of cigarettes the
11 cigarette manufacturer includes an insert that says: If
12 you want to ingest less nicotine, buy our cigarettes; if
13 you want to ingest less nicotine, buy our cigarettes.
14 And the state attorney general goes after that statement
15 in the carton as false and deceptive advertising. Would
16 there be any scope for that?

17 MR. OLSON: I think that there is. In
18 answer to the general question that you ask, Justice
19 Gins burg, there is plenty of room for an attorney
20 general to pursue deceptive advertising. Another
21 example -- and I'll come to the one you mentioned -- is
22 that someone might misrepresent the number of cigarettes
23 in a package or other things having to do with
24 cigarettes. That would not necessarily be related to
25 smoking and health. So there is not a pre-emption if

1 there is not a relationship between the prohibition and
2 smoking and health. The example you gave might require
3 some sort of inquiry as to what is motivating the
4 attorney general. The motivation is what you referred
5 to, your Court referred to in the Reilly case and I
6 would say --

7 JUSTICE SOUTER: Mr. Olson, doesn't your
8 answer in effect, in practical terms, exclude the
9 possibility of inserts like that? I mean, what else
10 would they be addressing except smoking and health?
11 That's the only subject on the table.

12 MR. OLSON: I think that's probably true in
13 most cases, Justice Souter, that the reason why there
14 might be regulations at the State level having to do
15 with cigarettes and advertising by and large is going to
16 have to do with smoking and health. The Court went
17 through the same inquiry in the Reilly case where it had
18 to do with billboards and --

19 JUSTICE GINSBURG: So your answer then to my
20 specific example would be the attorney general could not
21 go after such a statement, "If you want to ingest less
22 nicotine, buy our cigarettes"?

23 MR. OLSON: If -- if the courts were to
24 conclude that it had a relationship with smoking and
25 health, the answer is yes, Justice Ginsburg, but there

1 might be some case in which someone said, well, the
2 issue about nicotine and content of nicotine is being
3 regulated because it doesn't have anything to do with
4 smoking and health, but in the environment in which this
5 -- this statute was passed and this litigation was
6 pursued, there certainly isn't any question here. Now,
7 I think Justice Stevens, even in his dissenting opinion
8 in the Reilly case, focused on the content. He said and
9 the -- your dissenting opinion in that case said, as
10 opposed to location, that the Labeling Act was focusing
11 on the content of advertising.

12 JUSTICE KENNEDY: But suppose that a new
13 drug is found for the treatment of a condition, glaucoma
14 -- hypothetical -- and the evidence is stunningly clear
15 that smoking with this new drug causes a severe allergic
16 reaction. Does the cigarette manufacturer have any duty
17 to disclose this on the label or in promotions?

18 MR. OLSON: No, Justice Kennedy, to the --
19 the Federal Trade Commission, by the way, has full
20 authority to regulate deceptive --

21 JUSTICE KENNEDY: No, I -- they've just
22 found this out last week. Do they have any -- there can
23 be no -- I take it under your position there can be no
24 suit based on misleading or false promotion or labeling,
25 and there can be no suit even for the sale of an unsafe

1 item?

2 MR. OLSON: Well, there could be -- the
3 States may regulate the sale of items. The Labeling Act
4 provision only relates to promotion, marketing,
5 advertising, and that sort of thing. The State can
6 prohibit the sale of cigarettes. States and
7 municipalities have done that sort of thing. This
8 statute has three provisions in it: Is what the State
9 is attempting to do a requirement or prohibition.
10 There's no question that that's involved here. Does it
11 have to do with the advertising or promotion of
12 cigarettes? There's no question that this complaint is
13 aimed at the advertising and promotion of cigarettes.
14 And does the advertising or promotion have to do with
15 smoking and health?

16 JUSTICE BREYER: So, in your view, it says
17 in Cipollone that this -- that the four people said in
18 Cipollone that this statute does not pre-empt State law
19 where it's based on a prohibition of making a false
20 statement of material fact. For example, to make a
21 funny example, somebody could advertise smoking 42
22 cigarettes a day will grow back your hair.

23 (Laughter.)

24 JUSTICE BREYER: That's totally false, and
25 in your view, that would be pre-empted, if Congress

1 attempted to pre-empt a state law that says you cannot
2 make a completely false statement of material fact --

3 MR. OLSON: I don't --

4 JUSTICE BREYER: -- if it's based on -- has
5 something to do with smoking and health.

6 MR. OLSON: I don't mean to be whimsical,
7 but I think that, to the extent there's a representation
8 with respect to growing hair or something like that,
9 that may not -- it probably isn't -- have to do with
10 smoking and health.

11 JUSTICE BREYER: Well, I was trying to
12 produce an -- I mean, it will build strong bodies eight
13 ways.

14 (Laughter.)

15 MR. OLSON: Yes. And let me say with
16 respect to the Cipollone plurality opinion, which was
17 found to be baffling, confusing, litigation- generating,
18 easily abated by the labeling of the complaint, and
19 superseded by a number of subsequent decisions by this
20 Court, it should be set aside and restated. However,
21 the very case that the Cipollone decision in the
22 plurality did decide was pre-empted even under that
23 plurality opinion, and this is at page 527 of the
24 opinion, is an advertising that purported to neutralize,
25 minimize, down-play, negate, or disclaim the warning

1 label on the packages. This complaint is precisely that
2 claim. You could probably not have written a claim more
3 squarely --

4 JUSTICE BREYER: Excuse me. The reason I
5 think the plurality wrote this, I'm guessing, is that
6 when you read through this statute it seems as if what
7 Congress had in mind in the statute was not setting
8 aside State law, which is tradition, about not making
9 false statements, false and deceptive advertising law.
10 It was concerned with a different thing. They said, to
11 the cigarette companies: You have to put on the label
12 "Smoking is dangerous to your health." We don't want
13 States telling you to put other things like that on the
14 label, and we don't want States forbidding you to put a
15 picture of the Marlboro man or Lauren Bacall with her
16 cigarette. We don't want States to tell you that you
17 can't do that. That would be focused on the object of
18 the statute, which no one said had as its objective
19 setting aside traditional unfair and deceptive
20 advertising law. I think that's the argument.

21 MR. OLSON: That is the argument, and the
22 Respondents are making that argument. I submit that
23 that argument is squarely answered by the text of the
24 statute, which this Court has said again and again you
25 have to turn to. The text of the statute says no

1 requirement or prohibition; it doesn't say no
2 requirement or prohibition except one which is expressly
3 misleading. And the reason you mentioned, Justice
4 Breyer, what was the background for the statute or what
5 was Congress intending to do, well, fortunately on
6 section 1331 of the Labeling Act, which is on 1A of the
7 blue brief, Congress declares its policy and purpose
8 squarely, unequivocally, and in what this Court said in
9 Reilly was sweeping language: Any relationship between
10 smoking and health. And then Congress went on to point
11 out that with the labeling requirements, it intended for
12 consumers to receive certain information about the
13 smoking of cigarettes with specific labels, and then
14 went on to say, without hurting the commerce and the
15 national economy to be protected from confusing
16 cigarette labeling and advertising regulations that
17 might be "non-uniform, confusing, or diverse."

18 Now, Justice Stevens again in the Reilly
19 opinion when he was distinguishing in his concurring
20 opinion -- I can't recall whether it's a concurring or
21 dissenting opinion -- focused on the fact that different
22 requirements by different States might cause those very
23 diverse, confusing advertising. If one State says,
24 you've got to put something else in there about this;
25 one State says that so-called descriptors are

1 misleading, as was the case under this case, and another
2 State says, like Illinois said in another case, that
3 they are not misleading; that national advertising
4 becomes impossible. That's inconsistent and Congress
5 expressed what its policy was.

6 And, Justice Breyer, the Court went through
7 the same process in the Morales case and the Wolens case
8 in connection with airline and deregulation and whether
9 or not misleading advertising might be expressly
10 pre-empted. The Court went through the same sort of
11 process in the Riegel case with respect to medical
12 devices. The Court went through the same process in the
13 Rowe case, decided on the same day as Riegel in
14 connection with another context. And again, with
15 respect to the Reilly case, the Court --

16 JUSTICE STEVENS: Mr. Olson, you're relying
17 on 1334(b), I take it, specifically.

18 MR. OLSON: Yes, Justice Stevens. Not just
19 1334(b) but 1331, which it helps explain.

20 JUSTICE STEVENS: But the prohibition you're
21 talking about is in 13 -- in your express pre-emption
22 argument -- 1334(b). And I was just going to ask you,
23 is a State requirement prohibiting false statements
24 about smoking and health a requirement based on smoking
25 and health?

1 MR. OLSON: I think it is, unless I
2 misunderstood your question. If a State decides what
3 may be in the advertising or promotion --

4 JUSTICE STEVENS: The predicate for "based
5 on smoking" is the word "requirement." And a
6 requirement that you may not make any false statements,
7 would that be a requirement based on smoking and health?

8 MR. OLSON: Well, the statute contains the
9 words both "requirement" and "prohibition." And in your
10 plurality opinion in Cipollone on page 527, the same
11 page I mentioned before, you made the point that a
12 prohibition is merely the converse of a requirement.
13 And either a prohibition or a requirement with respect
14 to advertising if it relates to smoking and health is
15 pre-empted.

16 JUSTICE STEVENS: The question I'm asking,
17 though, is a requirement that you make no false
18 statements a requirement based on smoking and health?

19 MR. OLSON: Yes. And to the extent -- no,
20 we are not saying that the Massachusetts unfair-
21 practices statute is preempted in all respects. It's
22 only when the statute, like a common law tort provision
23 which the Court considered in Riegel, has application to
24 the context of smoking and health.

25 If the Court starts with the Morales case

1 through the Wolens case, through the Bates case, through
2 the Riegel case, through the Reilly case, it's the
3 application of the statute in the Reilly case. It was a
4 -- it was a statute of Massachusetts very much
5 identical, virtually identical, to the Maine statute
6 here. And in the -- in the Reilly case the attorney
7 general was attempting to apply the generalized,
8 unfair-practice statute to the advertising of smoking
9 and cigarettes near schools.

10 This is a similar statute, which is
11 attempted to be applied in the context of these labels
12 and the advertising of cigarettes. It's the application
13 of a generalized statute. This Court repeatedly said,
14 and specifically said in the Riegel case, there is
15 hardly any common law requirements which are
16 requirements, the Court has repeatedly held -- and the
17 Respondents don't dispute that; they specifically
18 acknowledge it -- when it's the application of a general
19 standard to the circumstances of the case. That's where
20 the pre-emption occurs.

21 Congress didn't want to pre-empt general
22 common law standards about fraud or misrepresentation or
23 anything like that except in the context of the
24 marketing --

25 JUSTICE BREYER: Well, why -- why would

1 Congress -- I mean the difficulty that the other side
2 raises here is just what Cipollone said. I can
3 understand totally why Congress would not want 50 States
4 telling cigarette companies what to say about health and
5 smoking or taking off pictures of the Marlboro ad. I
6 can understand that.

7 What I can't understand is why Congress
8 would want to get rid of, in this area, the traditional
9 rule that advertising has to tell the truth.

10 Now, what you said was you could end up with
11 different applications of that in different States. Of
12 course, every national advertiser faces that situation
13 at the moment. Everyone who advertises across the
14 nation could find deceptive -- anti-deception laws
15 differently administered in different States. Yet,
16 they'd survive. There is no evidence even that there is
17 a problem. So why would Congress want to get rid of
18 that particular statute?

19 MR. OLSON: Well, the Court -- and this
20 Court recently in Aetna v. Davila specifically said that
21 pre-emption can't be decided based upon the label that
22 the plaintiff puts in the complaint.

23 Now, as I think every member of this Court
24 would know, a creative plaintiff's lawyer can call a
25 claim misrepresentation, willful misrepresentation,

1 concealment, failure to warn, and so on and so forth.
2 It's just a matter of how they change the label on the
3 complaint.

4 Now, what Congress didn't want -- and I just
5 gave an example of a situation where Illinois decided
6 that the descriptors, which are an issue in this case
7 were not misleading; and it was not -- and they could
8 continue to be used.

9 What happened in this case in applying the
10 Maine statute is a court decided that they were
11 misleading and -- and couldn't be used.

12 JUSTICE STEVENS: But did the Illinois --
13 Illinois court reach the question whether the claim was
14 pre -- pre-empted? I think it firmly decided on the
15 merits there was no fraud, if I understand what you
16 said.

17 MR. OLSON: That's correct, and I'm not
18 saying --

19 JUSTICE STEVENS: So we must assume there
20 was no pre-emption, because it wouldn't have reached the
21 merits otherwise.

22 MR. OLSON: I -- I haven't got all of the
23 specifics of that case; but what I felt -- I just simply
24 meant -- but I think it's an example of what you said in
25 your concurring opinion in Reilly: That if you're going

1 to conduct a national advertising campaign, it can't be
2 governed by what a jury might decide in Des Moines
3 versus what a jury might decide in Birmingham, Alabama.
4 And --

5 JUSTICE STEVENS: When it's not --

6 JUSTICE GINSBURG: Is it the jury fracture?
7 You said the attorney general could not stop, my
8 example, "If you want to ingest less nicotine, buy our
9 lights." The attorney general could not proscribe that.
10 So nothing that you're saying turns on it being the jury
11 rather than the attorney general, does it?

12 MR. OLSON: Well, no, that's absolutely --
13 absolutely correct, Justice Ginsburg. In fact, the
14 panoply of this Court's decisions say that it doesn't
15 matter whether it's a statute -- a generalized statute
16 that's being applied or a common law standard that's
17 being applied, and it does not matter whether it's an
18 attorney general interpreting and enforcing general
19 provisions -- I give you Morales and the Wolens
20 situation -- or it's whether it's a common law tort
21 action being brought by a plaintiff to submit a case to
22 a jury a la Riegel.

23 JUSTICE GINSBURG: So your position is
24 essentially that Congress, as -- as far as the
25 advertising of low or light, Congress empowered one

1 decisionmaker only and that's the FTC, and if they don't
2 act then the cigarette companies can say anything they
3 want about low tar and low nicotine?

4 MR. OLSON: Well, there is also -- I -- I
5 think it doesn't -- it's not dispositive of the
6 pre-emption case, but there's also the master settlement
7 agreement that the tobacco companies entered into with
8 the States, which gives the States a lot of power to
9 enforce various different things.

10 But I think that the point here is that,
11 yes, Congress decided that it wanted one uniform source
12 of regulation of advertising of cigarettes with respect
13 to smoking and health. Now --

14 JUSTICE GINSBURG: Does the -- does the
15 consent decree say anything about advertising low,
16 light, those specifics?

17 MR. OLSON: The master settlement agreement?

18 JUSTICE GINSBURG: Yes.

19 MR. OLSON: I -- I don't -- I can't answer
20 that question. I don't know the answer to that
21 question, but what I -- I believe that it would allow
22 broad powers by the attorney generals. But I have --
23 hasten to say, as I did at the beginning, because some
24 parties entered into that master settlement agreement I
25 don't think changes the Federal -- the congressional

1 intent is very clear. It wanted the -- the statement --
2 Congress wanted the statements, certain statements, on
3 cigarette packages. It didn't want any confusion about
4 what the marketing or promotion of cigarettes would be.

5 I can't imagine, Justice Ginsburg, a clearer
6 statement. It says no requirement or prohibition in
7 section 1334(b). And in 1331 it says "comprehensive
8 Federal programs that deal with cigarette labeling and
9 advertising with respect to any relationship between
10 smoking and health."

11 JUSTICE SOUTER: But, Mr. Olson, isn't the
12 problem that Congress was equally clear, or has at least
13 been assumed to be equally clear, in a contrary line of
14 reasoning that holds against you? And that line of
15 reasoning is this: You agree -- everybody agrees --
16 that the FTC can represent -- it can regulate
17 advertising and -- and supposed deception on matters
18 that do affect -- relate to smoking and health.

19 It is pretty much hornbook law at this stage
20 of the game that the -- that the FTC's regulation of
21 deceptive advertising does not exclude State regulation
22 of deceptive advertising as a general proposition. In
23 fact, the FTC is very happy to have complementary State
24 regimes. That state of the law is just as clear. It is
25 at least as clear as you say the language is here.

1 Now, given the fact that the FTC can
2 regulate advertising of cigarettes in -- in the -- in
3 the respect that matters here, why don't we have to give
4 some recognition to this complementary regime of State
5 regulation, which, as a general proposition, survives
6 it?

7 MR. OLSON: Well, the point --

8 JUSTICE SOUTER: And all I'm saying is what
9 we have here is, you say, a clear preemption provision.
10 But we also have a clear regulatory regime which is at
11 odds with that preemption provision, and presumably
12 we've got to give some effect to that, too.

13 MR. OLSON: Well, the -- the statute deals
14 with this to a degree in section 1336 by saving certain
15 responsibilities. But I think the more powerful answer
16 is that the background principle, the Federal Trade
17 Commission Act and Federal and State Trade -- Fair
18 Practices Act, are a part of a national scheme just
19 exactly as you said. It's a background --

20 JUSTICE SOUTER: Well, it's part of a
21 national scheme, but in practical terms you can say that
22 on any subject matter that the FTC regulates. And,
23 nonetheless, the complementary State regimes of -- of
24 regulating deception survive.

25 So that the argument you are making here is

1 an argument that can be made, I suppose, on every
2 subject that the FTC touches.

3 MR. OLSON: Well, no. As a matter of fact,
4 I could not disagree more, Justice Souter. That's the
5 general background scheme. Then Congress specifically
6 addresses smoking and health in the advertising of
7 cigarettes. The same --

8 JUSTICE SCALIA: Your implied -- your
9 implied preemption argument would certainly fall prey to
10 that -- to that point.

11 MR. OLSON: Well, it -- we have -- I'd like
12 to spend no time on the implied preemption argument --

13 JUSTICE SCALIA: Good idea.

14 MR. OLSON: -- because I think -- I think
15 this is the -- the -- that Congress could not have been
16 more clear. And another answer to your question,
17 Justice Souter, is the Airline Deregulation Act.

18 You dealt -- you Court dealt with this in
19 the Morales case and the Wolens case. The -- you could
20 have said the same thing there: That there is a
21 background principle against unfair --

22 JUSTICE SOUTER: Perhaps we did not think of
23 it.

24

25 MR. OLSON: I don't -- I think that it's

1 clear that, looking at the briefs in that case, that
2 those very same arguments were made. The same argument
3 could have been made in the Riegel case with respect to
4 devices. The general principle that I'm making that I
5 think Congress understands, and this Court has clearly
6 understood, is that there is a background principle that
7 the Federal Government is not pre-empting deceptive
8 practice regulations except when Congress specifically
9 says so.

10 Now, one more point because I think the
11 white light will come on: the United States Government
12 did not address in this case the express pre-emption
13 argument. But a few years ago, in the Reilly case,
14 having to do with the very same statute, the Cigarette
15 Labeling Act, the United States Government said that the
16 labeling act pre-empted State laws concerning the
17 content of cigarette advertising, the content of
18 cigarette advertising. That's what the government said
19 then and the Acting Solicitor General during the
20 argument in that case, in response to a question by one
21 of your members of this Court, specifically said the --
22 the statute would pre-empt State laws about filters or
23 the safety of a particular cigarette. That was the
24 position of the United States Government a couple of
25 years ago and they have not changed.

1 Mr. Chief Justice, if I may reserve the
2 balance of my time.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 Mr. Olson.

5 Mr. Frederick.

6 ORAL ARGUMENT OF DAVID C. FREDERICK

7 ON BEHALF OF THE RESPONDENTS

8 MR. FREDERICK: Thank you, Mr. Chief Justice
9 and may it please the Court:

10 When Congress enacted the Labeling Act, the
11 1969 Labeling Act, it gave no intention whatsoever to
12 immunize cigarette makers for the false statements that
13 they made in violation of anti-deception in the
14 marketplace rules. They didn't empower the FTC with any
15 special rulemaking authority that applied industrywide,
16 and in fact the FTC's enforcement authority with respect
17 to individual companies was quite limited. The argument
18 that Philip --

19 JUSTICE ALITO: Mr. Frederick, suppose that
20 the FTC had adopted the rule that it considered in 1970
21 and required that the tar and nicotine figures that were
22 produced by the particular testing method that is at
23 issue here to be placed on all cigarette ads and
24 promotions; and then suppose that Maine issued a
25 regulation requiring that all ads and promotions in the

1 State of Maine state that the Federal figures are
2 misleading and should be disregarded. Would that
3 regulation be pre-empted?

4 MR. FREDERICK: That would be implied
5 conflict pre-emption, and we would acknowledge that
6 would be pre-empted. The difference here --

7 JUSTICE ALITO: What's the difference
8 between that situation and this situation?

9 MR. FREDERICK: The difference here is that
10 between a generally applicable rule that is specially
11 targeted at the cigarette industry and a generally
12 applicable rule against deception, upon which a fact
13 finder would not need to make any special inquiry about
14 smoking and health.

15 CHIEF JUSTICE ROBERTS: How is that
16 consistent with what the Court said in the Riegel case
17 where they said, and I'll quote: "We have held that a
18 provision pre-empting State requirements pre-empted
19 common law duties"? That's no suggestion that this is a
20 distinction between a focused common law duty, which
21 would be unusual anyway, and general common law duty.

22 MR. FREDERICK: Well, I have three
23 responses, Mr. Chief Justice. The first is that the
24 text in Riegel was different; the purposes behind what
25 Congress enacted in the medical device amendments were

1 different; and third, this Court twice, in both Reilly
2 and in Cipollone, has looked at this exact statute and
3 come to the opposite conclusion.

4 First with respect to the text of the
5 medical device amendments, there are several provisions
6 of that act that are quite a bit broader than what the
7 1969 Labeling Act --

8 CHIEF JUSTICE ROBERTS: You say Riegel
9 wasn't referring to the particular text of any statute.
10 It was making a general point. The Court said: We have
11 held that a provision pre-empting State requirements,
12 which is exactly what this one does, pre-empted common
13 law duties.

14 MR. FREDERICK: And the result, Mr. Chief
15 Justice, of virtually every one of this Court's
16 pre-emption cases has been to look at the particular
17 words of the statute to determine the scope of the
18 pre-emption. The Court did that in Bates. It did that
19 in Morales. It did --

20 CHIEF JUSTICE ROBERTS: So as a general
21 proposition -- I understand your position to be that
22 this particular statute doesn't pre-empt the common law
23 duties, but the distinction I thought you articulated in
24 response to Justice Alito's question was that general
25 common law duties are not pre-empted; specific tailored

1 ones are.

2 MR. FREDERICK: No.

3 CHIEF JUSTICE ROBERTS: You agree that a
4 general common law duty can be pre-empted by a
5 particular statute?

6 MR. FREDERICK: I do acknowledge that,
7 Mr. Chief Justice. But my point is that in the medical
8 device amendments what Congress was getting at were
9 things that were quite a bit broader and it had sweeping
10 language. It said not only to establish but also to
11 continue in effect, with respect to a device, which
12 relates to the safety or effectiveness of the device, or
13 "to any other matter included in a requirement
14 applicable to the device."

15 By contrast --

16 CHIEF JUSTICE ROBERTS: So you're -- so
17 you're saying that we should -- the difference in your
18 case is that the language here is narrower. It says "no
19 statement relating to smoking or health." I don't see
20 how that language is narrower.

21 MR. FREDERICK: No, I think you're quoting
22 1334(a) and the pre-emption provision at issue here, Mr.
23 Chief Justice, is 1334(b) which says --

24 CHIEF JUSTICE ROBERTS: Okay. So 1334(b)
25 says "no requirement or prohibition with respect to."

1 Isn't that just as broad?

2 MR. FREDERICK: Well, no, it isn't, because
3 the modifying term that's at issue in this case comes
4 between the two points that you quoted, and that's the
5 phrase "based on smoking and health." Our contention
6 here is that a generalized duty not to deceive is not a
7 requirement based on smoking and health. It's based on
8 a duty not to deceive.

9 CHIEF JUSTICE ROBERTS: How do you tell --
10 how do you tell whether it's deceptive or not if you
11 don't look at what the relationship is between smoking
12 and health? They have an advertisement that says light
13 cigarettes are better for you than regular cigarettes.
14 You have to know what the relationship is between
15 smoking and health to determine whether that's
16 deceptive.

17 MR. FREDERICK: No, you don't. You have to
18 look at two products and determine whether or not they
19 are achieving the same yield of tar and nicotine that --

20 CHIEF JUSTICE ROBERTS: That's the
21 relationship between smoking and health.

22 MR. FREDERICK: And the word "relate" does
23 not appear in 1334(b), and that is crucial because this
24 Court in *Safeco v. Burr* defined the phrase "based upon"
25 to mean but-for causation: But for smoking and health,

1 is there a requirement? The words "related to" have
2 been defined by this Court in numerous pre-emption
3 cases, including Morales, Wolens, ERISA cases, to be
4 among the most sweeping language that Congress can use
5 to denote a connection.

6 JUSTICE KENNEDY: Would you have -- would
7 have you been satisfied if your complaint said this
8 complaint does not seek any damages based on the link
9 between smoking and health?

10 MR. FREDERICK: Well, the damages here, Mr.
11 Justice Kennedy, are -- concern getting two products
12 that are not different. It's just like going to a car
13 dealer and saying, I want a Ford and they --

14 JUSTICE KENNEDY: Would you accept that
15 amendment to your complaint, that the plaintiff does not
16 seek any damages based on some link between smoking and
17 health?

18 MR. FREDERICK: I think we would accept
19 that, Justice Kennedy.

20 JUSTICE SOUTER: How can you accept that and
21 then expect to prove damages in the case? You can
22 accept it to this extent, it seems to me. You can
23 accept it in saying that what we are going to prove at
24 step number one is that it is false to indicate that
25 smoking light cigarettes will result in the ingestion of

1 less tar and nicotine; and we know why you're saying
2 that. But in order to prove damages in your case, you
3 would have to say: People get hurt because there is a
4 relationship between the ingestion of tar and nicotine
5 and their health; and the same cause -- the same causal
6 connection is therefore appropriate for -- for -- is
7 therefore necessary in order to prove that people were
8 hurt.

9 MR. FREDERICK: In fact in our case we are
10 not proving health-related damages.

11 JUSTICE SOUTER: No, but you're asking for
12 injunctive relief, I guess.

13 MR. FREDERICK: No, we are not asking for
14 injunctive relief. We are asking damages for the
15 difference in value between a product we thought we were
16 buying and a product we actually bought.

17 JUSTICE SOUTER: And the reason -- and the
18 reason the product is of different value is that in fact
19 it is dangerous to health, as opposed to -- or more
20 dangerous or equally dangerous to health as opposed to
21 less dangerous to health; so that at the causation stage
22 you've still got to prove the link between causation and
23 health.

24 MR. FREDERICK: I don't think so, Justice
25 Souter. I think all we have to prove is that the

1 products were different and that we relied materially on
2 a misrepresentation about what product to use.

3 JUSTICE SOUTER: Do you think you could
4 recover if the evidence showed simply that all your
5 clients had the health of Olympic athletes?

6 MR. FREDERICK: Yes.

7 JUSTICE SOUTER: You do?

8 MR. FREDERICK: Yes, I do, because our
9 damages here, Justice Souter --

10 JUSTICE SOUTER: What would the harm be,
11 sort of aesthetic?

12 MR. FREDERICK: If we bought a product
13 thinking that it would be a safer product and it was
14 not, and we would have quit smoking.

15 JUSTICE SOUTER: If they are healthy as
16 horses, you have no proof that it is not.

17 MR. FREDERICK: We're -- yes, we do, because
18 the product is different. If you buy a car thinking
19 it's a Ford and it's a Yugo but it still drives, you
20 still have a claim under the lemon laws for deceptive
21 advertising.

22 JUSTICE SCALIA: But what if Yugos and Fords
23 are worth the same amount of money?

24 MR. FREDERICK: That is an economic proof --

25 JUSTICE SCALIA: But that's the thing here.

1 Unless you show that for some -- for some reason -- were
2 light cigarettes sold as a premium? Did they charge
3 more for light cigarettes?

4 MR. FREDERICK: There is economic evidence,
5 Justice Scalia, of a difference in value, and of course
6 the pre-emption -- the issue here is not --

7 JUSTICE SCALIA: Answer my question. Did
8 they charge more for light cigarettes?

9 MR. FREDERICK: They did not charge more for
10 light cigarettes.

11 JUSTICE KENNEDY: So what are your damages?

12 JUSTICE SOUTER: Yes, what's the difference
13 in value?

14 MR. FREDERICK: Economists have projected
15 that if a person would have quit smoking and, therefore,
16 not purchased light cigarettes or would have paid a
17 different amount of money thinking it was getting a
18 safer cigarette, there is an economic value --

19 JUSTICE SOUTER: Why would the person have
20 decided to quit or not to quit? The person would have
21 made that decision based upon the health consequences.

22 MR. FREDERICK: Certainly. And the point
23 here about the advertising --

24 JUSTICE SOUTER: So -- you are proving a
25 point which depends upon the relationship between

1 smoking and health.

2 MR. FREDERICK: Justice Souter, I don't
3 think that the liability requirement here, the rule of
4 law that is being imposed under Bates -- what Bates said
5 was that you look at the elements of the claim to
6 determine whether or not the requirements are imposed by
7 State law. The requirement that we seek to impose here
8 is the duty not to deceive --

9 JUSTICE BREYER: Well, why couldn't you say
10 exactly the same thing about a State mode seeks to
11 protect consumers, and they have a -- they have a rule,
12 and the rule is not only the cigarette company do you
13 have to say cigarettes are dangerous to your health, you
14 have to put skull and crossbones? That's the state law.

15 And you say why? They say because we are
16 trying to protect consumers. And then you would be up
17 here saying, they are not trying -- the duty there is
18 not the duty to put the skull and crossbones. It's the
19 duty to protect consumers.

20 Now, that argument would get nowhere, as you
21 understand. And they are saying you're making just that
22 kind of argument here, except substitute the word
23 "deception".

24 MR. FREDERICK: We are not making the same
25 argument here for two reasons: One is that the main

1 statute is not specially targeted at cigarette smoking.
2 It's specially targeted at deception in the marketplace.
3 Under your hypothetical it would be specially targeted
4 at cigarette companies. Under Reilly that would be
5 preempted.

6 Secondly, skull and crossbones I think --

7 JUSTICE SCALIA: Excuse me before you go. I
8 don't understand that. It is not specially targeted at
9 cigarettes and at the harmful health effects of
10 cigarettes?

11 MR. FREDERICK: The statute we seek to
12 invoke is a --

13 JUSTICE SCALIA: It's a general statute but
14 in Riegel we -- we took a general statute and looked at
15 what its specific application in the case was.

16 MR. FREDERICK: Because the statute --

17 JUSTICE SCALIA: You can't get away with
18 just coming in and saying the general statute is an
19 anti-deception statute. Didn't we look at what the
20 application of it was in the case?

21 MR. FREDERICK: You looked at it because the
22 statute required you to look at it as applicable, and
23 the purposes behind that Act were to give the FDA
24 authority at the premarketing -- and purposes behind the
25 medical device amendment were completely different. The

1 FTC does not look at these marketing materials before
2 the cigarette companies do that.

3 JUSTICE BREYER: That's what I want you to
4 get you to talk about just for me for 30 seconds. I
5 can't deal with this conceptual thing. It was hard for
6 me to see it conceptually. I can't understand -- and
7 that may be enough to any other person here, but I can't
8 understand somebody saying yes, this language is very
9 absolute but it doesn't mean to cover everything that it
10 literally applies to. For example, it probably doesn't
11 cover a requirement about workers smoking who put up
12 billboards. And another thing you say it doesn't cover
13 is traditional anti-deception law. That would have to
14 do with the purpose of the statute not the text.

15 I'm not making your argument for you. I'm
16 giving you an introduction, and I want you to give 30
17 seconds dealing with the purposes that either says there
18 is something to that line or there isn't.

19 MR. FREDERICK: Prior to the enactment of
20 the 1969 Labeling Act, Congress confronted the spectra
21 of states imposing warning requirements. And the
22 tobacco companies went to Congress and said, we do not
23 want special burdens imposed on us. We don't want
24 special advantages, but please don't impose special
25 burdens on the cigarette industry.

1 And Congress said, we will wipe away the
2 prospect of state imposing warnings by having a
3 congressionally mandated warning on the cigarette packs
4 and in cigarette advertising. The Congress said nothing
5 about having anti-deception laws be displaced by States.

6 So that in, in the hair hypo that you gave,
7 I think Mr. Olson would have to acknowledge that the
8 cigarette companies were not asking at the time of the
9 '69 Labeling Act to be free of anti-deception laws.
10 They had been out for decades saying cigarette smoking
11 cures the common cold, it makes the throat feel better,
12 all sorts of health-related claims that were deceptive.
13 And Congress was not trying to wipe that away.

14 CHIEF JUSTICE ROBERTS: Mr. Frederick, did I
15 understand you earlier to say that your complaint did
16 not seek injunctive relief?

17 MR. FREDERICK: We are not here seeking
18 injunctive relief for this --

19 CHIEF JUSTICE ROBERTS: Page 42A of your
20 amended complaint says you ask the Court to grant such
21 injunctive relief as may be appropriate.

22 MR. FREDERICK: I misspoke, Mr. Chief
23 Justice, with apologies to the Court. Our claim here,
24 though, principally is for damages. And I would also
25 point out that any injunction that would have been

1 ordered here would be superseded by the United States
2 RICO case, where the District Court of the District of
3 Columbia has already issued an injunction for the use of
4 light cigarettes because Judge Kessler found in more
5 than 4,000 findings of fact that Philip Morris had
6 engaged in deception in the marketplace and findings of
7 fact, beginning 2023 and following --

8 JUSTICE GINSBURG: Mr. Frederick, are you
9 saying that the consent decree -- because we have
10 overtaken Judge Kessler's decision by consent decree,
11 right and it has terms? Does a -- does a consent decree
12 terms allow state attorney generals to say don't
13 advertise low?

14 MR. FREDERICK: The consent decree in the
15 master settlement agreement does not address itself to
16 specific issues with regard to light and low tar, to my
17 knowledge. The Kessler order does address the deception
18 by lights and low tar, and the reason is temporal.

19 When the master settlement agreement was
20 entered into in the late '90s, the tobacco companies had
21 not yet acknowledged publicly that they had been engaged
22 in deception with respect to studies regarding low tar
23 and light cigarette. That came to light in 2002, and as
24 a result of the discovery that occurred in the
25 government's case and in State cases, the studies that

1 the cigarette companies knew for decades that there was
2 no difference in the yield for low tar and light
3 cigarettes came to light.

4 And so, the master settlement agreement was
5 not -- it had certain provisions about the way
6 cigarettes could be marketed but -- but the Judge
7 Kessler opinion, in the government's RICO case, actually
8 makes findings of fact on this score. And the complaint
9 here essentially tracks the allegations in the
10 government's. All we seek to do is to provide a remedy
11 to consumers that have been defrauded by Philip Morris
12 over these many decades.

13 JUSTICE GINSBURG: Could a state attorney
14 general say under my authority to check against false
15 and deceptive advertising, no cigarette company can
16 advertise in this State low or light?

17 MR. FREDERICK: I think that would fall into
18 the Reilly line of being preempted, because it would be
19 specially targeted and there would be no room for a
20 cigarette maker to say truthfully our product actually
21 does yield lower and light. So, it could not be a
22 requirement based on deception. It would have to be a
23 requirement based on smoking and health under your
24 hypothetical.

25 JUSTICE ALITO: Weren't the claims that were

1 held to be preempted in Cipollone based on general
2 common law duties?

3 MR. FREDERICK: Yes, they were. Those --
4 the fraudulent neutralization of warning claim and the
5 failure to warn claim were common law claims, Justice
6 Alito, but the difference here is that in Cipollone the
7 plurality plus the three Justices who joined Justice
8 Blackmun's opinion and would have found no common law
9 claims preempted. Seven Justices found fraud claims
10 that are virtually identical to ours not to be preempted
11 because Congress lacked any intent to displace State
12 laws concerning deception.

13 JUSTICE KENNEDY: Mr. Frederick, if I take
14 away from your oral argument that it is your position
15 that this suit is not based on a link between smoking
16 and health, I'm going to have difficulty in accepting
17 your position in this entire case. Do you have a
18 secondary position that it is based on a link between
19 smoking and health but it is subject to a general duty,
20 that is, that supersedes or is quite in addition to
21 labeling?

22 MR. FREDERICK: The requirement is what I
23 would urge you to focus on, Justice Kennedy. And the
24 requirement that is being imposed here is not a
25 requirement that has to do specifically with smoking and

1 health.

2 There is a second argument, which is that
3 even under the application of that generalized duty, the
4 jury here or the trial court would not be asked to look
5 at the linkage between smoking and health. It could
6 simply say, have a scientist up there who says the yield
7 of a light cigarette is no different than the yield of a
8 regular cigarette.

9 JUSTICE STEVENS: Do I understand your basic
10 argument to be that this statute is a prohibition
11 against State warnings in either promotion or
12 advertising different from the Federal one?

13 MR. FREDERICK: That's correct. That was
14 the general purpose of the statute. There is language,
15 of course, that --

16 JUSTICE STEVENS: This specific quotation
17 deals only with the contents of the advertising that
18 might be described as warnings different from those in
19 the Federal scheme.

20 MR. FREDERICK: That's absolutely correct,
21 Justice Stevens. And here what we are talking about
22 with these light descriptors are comparisons between two
23 products that, in fact, are not different.

24 JUSTICE KENNEDY: Your answer to Justice
25 Ginsburg's question was that the state attorney general

1 could not impose a regulation that said you must say
2 that low tar cigarettes have as much nicotine as regular
3 cigarettes. If the attorney general couldn't do that,
4 why could the plaintiff do it in his lawsuit?

5 MR. FREDERICK: Well, the attorney general
6 could bring the same suit that we bring here, Justice
7 Kennedy. The difference is between a --

8 JUSTICE KENNEDY: No. The hypothetical was
9 the attorney general requires this as a regulation under
10 his authority.

11 MR. FREDERICK: And let me answer the
12 hypothetical this way: The attorney general can bring
13 the lawsuit under the State deceptive practices act but
14 cannot issue a generalized regulation targeted at the
15 cigarette industry that takes truth completely out of
16 the equation, because if another cigarette company comes
17 up and says, "We actually have a light cigarette that is
18 lower in tar," and we can prove it --

19 JUSTICE GINSBURG: Suppose he wins the
20 lawsuit -- he wins the lawsuit that it's false and
21 deceptive to say "low." Could he then have a regulation
22 that says cigarette companies don't advertise "low" or
23 "light"?

24 MR. FREDERICK: I think that's a much more
25 difficult hypo, but I think the answer is the same and

1 that would be no, because a regulation would be -- would
2 be specifically targeted at the industry and it would be
3 based on smoking and health, not deception.

4 In an injunctive situation, adjudicatory
5 facts can evolve. A company can come forward and say
6 the facts have changed, circumstances have changed,
7 please modify the injunction. That can't happen when a
8 generalized regulation is imposed that is specifically
9 targeted at facts regardless of their truth or veracity.

10 JUSTICE GINSBURG: Well, can you make that
11 concrete? What would change about the label "low" or
12 "light"?

13 MR. FREDERICK: If the -- if the company
14 came forward and said, "we redesigned our cigarette,"
15 and it in fact does yield less tar and nicotine under a
16 scientifically verifiable test, that would be -- that
17 would run afoul of the regulation, but it would not run
18 afoul of the general duty not to deceive.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Frederick.

21 MR. FREDERICK: Thank you.

22 CHIEF JUSTICE ROBERTS:
23 Mr. Hallward-Driemeier.

24 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

25 ON BEHALF OF THE RESPONDENTS

1 MR. HALLWARD-DRIEMEIER: Thank you,
2 Mr. Chief Justice, and may it please the Court:

3 CHIEF JUSTICE ROBERTS: It will not surprise
4 you that my first question is, why did the United States
5 not address the express pre-emption argument and,
6 second, what is the position of the United States on the
7 express pre-emption argument?

8 MR. HALLWARD-DRIEMEIER: Your Honor, the
9 United States did not participate on the question of the
10 scope of the express pre-emption provision in Cipollone,
11 and to a large extent the express pre-emption question
12 in this case is what was the meaning of the decision in
13 Cipollone. And so that is of less interest to the
14 United States than certainly the second question
15 presented, which has to do with the FTC's own authority
16 and its exercise of that authority.

17 CHIEF JUSTICE ROBERTS: All right. Well,
18 that's why you didn't address it. Now, what is the
19 position of the United States? It's a statute that is
20 directed to an area in which the Federal Government has
21 an extensive interest in regulation, and I would have
22 thought there'd be a position on that. It is logically
23 antecedent to the implied pre-emption. You would
24 consider whether there is express pre-emption before
25 implied pre-emption.

1 MR. HALLWARD-DRIEMEIER: Your Honor, the
2 United States has not taken a position on the bottom
3 line of the first question presented.

4 JUSTICE SCALIA: Petitioner says you have in
5 an earlier case.

6 MR. HALLWARD-DRIEMEIER: I don't believe
7 that the position that the United States stated in
8 Reilly is dispositive of the first question presented in
9 this case. But, again, that doesn't mean that the brief
10 that the United States has filed with respect to implied
11 pre-emption is not relevant.

12 CHIEF JUSTICE ROBERTS: Well, it's not
13 anymore. I understood -- I understood Mr. Olson to give
14 up on implied pre-emption in his opening argument.

15 MR. HALLWARD-DRIEMEIER: Well, I --

16 CHIEF JUSTICE ROBERTS: Implied pre-emption
17 is all that you address, right?

18 MR. HALLWARD-DRIEMEIER: But we --

19 CHIEF JUSTICE ROBERTS: So it should be
20 pretty easy for you to win on that.

21 (Laughter.)

22 MR. HALLWARD-DRIEMEIER: I would hope so.
23 Thank you.

24 But we also address a question that is
25 common to the two questions presented, and that is an

1 argument that the Petitioners make with respect to
2 implied pre-emption, but they also make it with respect
3 to express pre-emption, and that is -- and, Justice
4 Ginsburg --

5 JUSTICE ALITO: Does the FTC at this point
6 in 2008 have an opinion about whether the tar and
7 nicotine figures that are produced by this testing
8 method are meaningful or misleading?

9 MR. HALLWARD-DRIEMEIER: Well, as Your Honor
10 is aware, we submitted a -- a supplemental authority
11 letter that in July of this year the Commission issued a
12 request for comment on a proposal to rescind its
13 guidance with respect to the tar and nicotine test
14 results, precisely because of concern that they are
15 misleading due to the evidence that has developed about
16 the incidence of compensation. That was not believed at
17 the time that the Commission issued its guidance back in
18 1966 and '67 to present a significant problem. But it
19 is evident now. The scientific community indicates and
20 certainly the findings of fact in the RICO case are that
21 the -- that the tobacco companies have known since 1967
22 that in fact compensation is nearly complete, and for
23 that reason, the tar and nicotine yields via the
24 Cambridge test method are not indicative of the yield to
25 a true human smoker. And for that reason, it proposed

1 to withdraw.

2 JUSTICE ALITO: Would it be -- would it be
3 unfair to say that for quite sometime now, nearly 40
4 years, the FTC has passively approved the placement of
5 these tar and nicotine figures in advertisement?

6 MR. HALLWARD-DRIEMEIER: With respect to the
7 -- I want first to take issue with the question of
8 "approved," because I think that it -- it draws an
9 analogy to the FDA context, to Riegel and the like, and
10 that is not the nature of what the Federal Trade
11 Commission does. It doesn't stand --

12 JUSTICE ALITO: Well, you passed a rule to
13 require it, did you not?

14 MR. HALLWARD-DRIEMEIER: We proposed a rule
15 to require the disclosure of tar and nicotine --

16 JUSTICE ALITO: And you withdrew that after
17 the companies voluntarily agreed to place the
18 information on the ads --

19 MR. HALLWARD-DRIEMEIER: That's correct.

20 JUSTICE ALITO: -- and entered into consent
21 decrees with other companies requiring them to put
22 information in their ads.

23 MR. HALLWARD-DRIEMEIER: No. The consent
24 decrees did not require them to put the information in
25 their ads. It said that it would be deceptive to make

1 claims about the tar and nicotine content of the
2 cigarettes without expressing, in milligrams, what the
3 yield was per the Cambridge test method. But that's a
4 very different thing. It's a prohibition. They were
5 ordered to cease and desist making claims about tar and
6 nicotine content without giving the consumer the benefit
7 of the yield figures. But the Commission has never --
8 specifically at issue in this case are the descriptors
9 "light" or "lower in tar." In 1987, the Commission
10 issued a notice in which it said these terms are are not
11 defined by Federal law. They asked whether there should
12 be --

13 JUSTICE ALITO: Was there a different
14 between saying "light" and saying "lower in tar" in
15 accordance with the Cambridge testing method?

16 MR. HALLWARD-DRIEMEIER: Yes, Your Honor,
17 because the -- the "light," on its own, much more
18 conveys the impression to the consumer that this is the
19 yield to the consumer himself, the actual human smoker,
20 and in fact that was why the --

21 JUSTICE ALITO: The FTC's position seems to
22 me incomprehensible. If these figures are meaningless,
23 then you should have prohibited them -- are misleading,
24 you should have prohibited them a long time ago. And
25 you've created this whole problem by, I think, passively

1 approving the placement of these figures on the -- on --
2 in the advertisements. And if they are misleading, then
3 you have misled everybody who's bought those cigarette
4 for a long time.

5 MR. HALLWARD-DRIEMEIER: They -- whether
6 they are or are not misleading depends upon the
7 incidence of compensation. At the time the Commission
8 issued its guidance in 1966 and '67, the HEW report was
9 that compensation was not expected to be a problem. It
10 was not believed to be a problem. Beginning in 1983,
11 when in light of the Barclay's case in which it was
12 determined that a particular cigarette, the yield
13 according to the test method had nothing to do with
14 yield to an actual consumer, the FTC started to inquire
15 about this.

16 But the Petitioners, although they have
17 known since 1967 about the incidence of compensation,
18 failed to disclose that information to the Commission.
19 They have failed to -- they have refused to give them
20 the benefit of their insights, their own studies. The
21 Commission has asked --

22 JUSTICE SCALIA: The Commission -- when did
23 the Commission know of this stuff? I had a case when I
24 was on the Court of Appeals, so it had to be before 1984
25 involving so-called lip drape --

1 MR. HALLWARD-DRIEMEIER: You're right.

2 JUSTICE SCALIA: -- by which the smoker
3 covers up the little holes that bring in some fresh air.

4 MR. HALLWARD-DRIEMEIER: In 1978 --

5 JUSTICE SCALIA: It's been general knowledge
6 for a long time, and the FTC has done nothing about it.

7 MR. HALLWARD-DRIEMEIER: There has been a
8 question. In 1978, the Commission issued a notice
9 requesting comment about whether lip drape in fact
10 occluded the holes that dilute the concentration of the
11 air, and the tobacco companies did not respond to that,
12 even though they had their own studies showing that it
13 was a problem. So it is -- it is true that the
14 Commission has only now issued the notice proposing to
15 withdraw its earlier guidance; but the Petitioners
16 themselves should not be able to benefit from their own
17 misleading of the Commission.

18 But again, I think it's more fundamental
19 than that, is that their arguments rely upon a
20 misconception of what the Commission does. As Justice
21 Souter noted, it is Supreme Court law the Commission
22 does not supplant State law; it acts cooperatively with
23 State law. The Commission does not act as a gatekeeper
24 like FDA in approving things. It acts as a law
25 enforcement agency. It goes after fraud when it is

1 aware of it. But that is not to the exclusion of State
2 law enforcement agencies or other Federal law
3 enforcement agencies.

4 JUSTICE SCALIA: Can I ask a question? I
5 plan to go back and see what the Government said in
6 the -- in the case that Petitioner asserts you have
7 effectively supported his position on -- on express
8 pre-emption. I plan to go back and read it. Assuming I
9 agree with him rather than you, has the government's
10 position changed from what it was then? As far as you
11 know, is the government's position still the same, the
12 position that you delicately did not bring to our
13 attention?

14 JUSTICE GINSBURG: This is in the Reilly
15 case.

16 MR. HALLWARD-DRIEMEIER: The Reilly case.

17 JUSTICE SCALIA: Yes. In Reilly. I haven't
18 read the brief there, I must say. But suppose I agree
19 with Petitioner. Can I assume --

20 MR. HALLWARD-DRIEMEIER: Of course --

21 JUSTICE SCALIA: And do you assume that it's
22 --

23 MR. HALLWARD-DRIEMEIER: The position of the
24 United States as stated in the Reilly case was that the
25 express guarantee provision did not pre-empt a

1 regulation of the nature in that case. It was our
2 position that that, because it was --

3 JUSTICE SCALIA: No, I'm not asking about --
4 I'll figure that out on my own. Trust me. I can
5 probably figure that out. But once I have figured it
6 out, can I assume that that is still the government's
7 position --

8 MR. HALLWARD-DRIEMEIER: Well, I --

9 JUSTICE SCALIA: -- whatever it is?

10 MR. HALLWARD-DRIEMEIER: Well, I would think
11 that we would need to revisit the question in light of
12 this Court's holding in Reilly, in light of the
13 additional precedents that there have been over the last
14 decade or whatever it's been since that decision was
15 issued. So --

16 JUSTICE SCALIA: You have no idea which
17 direction that would lead?

18 MR. HALLWARD-DRIEMEIER: We have not taken a
19 position on the first -- on the bottom line of the first
20 question presented. Although as I say --

21 JUSTICE SCALIA: I'm going to hold you to
22 your last position, just -- just for fun.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Olson, you have four minutes remaining.

1 REBUTTAL ARGUMENT OF THEODORE B. OLSON

2 ON BEHALF OF PETITIONERS

3 MR. OLSON: Thank you, Mr. Chief Justice.

4 We haven't given up the implied pre-emption argument,
5 but I --

6 (Laughter.)

7 CHIEF JUSTICE ROBERTS: You just didn't want
8 to argue it.

9 MR. OLSON: I -- we feel that we explained
10 it very thoroughly in our briefs, and I thought knowing
11 that the time was limited I thought we should focus on
12 the strongest argument I think by any stretch of the
13 imagination, when Congress has spoken directly.

14 Now, first of all, with respect to what the
15 Solicitor General on behalf of the United States says,
16 and this is in response to the point that Justice Scalia
17 was just addressing -- page 1 of the Reilly brief, the
18 Attorney General is responsible for enforcing the
19 Labeling Act. So it is the government's responsibility,
20 according to them, to enforce the Labeling Act.

21 Then on pages 8 and 9 of their brief,
22 distinguishing between the location of the billboards in
23 that case and other things that would be pre-empted,
24 pages 8 and 9, the Government said the Labeling Act
25 preempts State laws concerning the content of cigarette

1 advertising with respect to smoking and health. And the
2 Acting Solicitor General on page 25 of the transcript of
3 the argument that day in this case was asked that
4 question, what is pre-empted? And she said it pre-empts
5 State law claims about filters or the safety of a
6 particular cigarette. That is this case.

7 JUSTICE BREYER: Isn't the point, it doesn't
8 pre-empt rules about location; it pre-empts rules about
9 content?

10 MR. OLSON: That was the government's point.

11 JUSTICE BREYER: That's the government's
12 position. Now, if that's their position, isn't it just
13 one additional step to say depending on what the history
14 of the statute is, that it pre-empts regulations about
15 content that don't have to do with lying about the
16 content?

17 MR. OLSON: It has to do according to what
18 Congress said about the content of the advertising and
19 the promotion of cigarettes; that's what this case is
20 about when it has to do with smoking and health.

21 Now, my opponent seems to run away, in
22 answer to your question, about what if we take out
23 smoking and health from their complaint? Well, they
24 can't take out smoking. That is everywhere in the
25 complaint. I asked the Court to sit down and compare

1 the labeling statute with the complaint. And the words
2 are indistinguishable, and they say over and over again
3 and on page 4A of -- then Mr. Frederick's saying well,
4 all they want is economic damages. They are really
5 not -- they are just concerned about they got one
6 cigarette and they wanted to get another cigarette.
7 Page 4A, this is the way the Court of Appeals understood
8 it. This is page 4A of the petition appendix: the
9 plaintiffs explain that the relative levels of these
10 substances bear on a reasonable consumer's decision on
11 which cigarette to purchase, because consumers
12 understand that reducing the quantities of tar and
13 nicotine in cigarettes reduces their adverse health
14 effects. That is what this case is all about.

15 Now, I will just conclude in this way. The
16 statute in the language of this Court in the Reilly
17 case, uses "sweeping language." The language is every
18 bit as sweeping as the language in the airline
19 deregulation act that uses the phrase relates to, I
20 submit.

21 So there is three requirements. Either --
22 the statute prohibits, any and it uses the phrase "any,"
23 you can't get more expansive than that; and it uses the
24 word "no" requirements or prohibition. The Court has
25 dealt with requirements and prohibition in Reilly,

1 Cipollone, Bates, Wolens, Riegel. The statute that we
2 are talking about here in this case is the same statute
3 essentially that it was dealing with in Reilly. It's
4 the State Unfair Practices Act. It was
5 Massachusetts/Maine; but I compared the statutes side by
6 side. They essentially the same.

7 Is the requirement based upon smoking and
8 health? Well, the complaint specifically says so. The
9 relief is based upon the relationship between smoking
10 and health and is it in promotion or advertising of
11 tobacco? Again, they've said that over and over again.
12 I submit that the statute could not be more clear. This
13 particular complaint seeks to impose a regulation --

14 JUSTICE STEVENS: Isn't it correct that your
15 argument requires us to reject the fraud analysis in
16 Cipollone?

17 MR. OLSON: Yes. I believe it does.
18 However, Justice Stevens, I believe when you talked
19 about in that -- the plurality opinion, you talked about
20 minimizing, reducing, negating the effect of the warning
21 labels. That's also this complaint. This as a
22 complaint is identical so what you were referring to on
23 page 527 of Cipollone.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Mr. Olson. The case is submitted.

1 (Whereupon, at 11:07 a.m., the case in the
2 above-entitled matter was submitted.)
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