IN THE SUPREME COURT OF THE UNITED STATES

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ALTRIA GROUP, INC., ET AL. :

Petitioners :

v. : No. 07-562

STEPHANIE GOOD, ET AL. :

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Washington, D.C.

Monday, October 6, 2008

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

APPEARANCES:

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

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

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

C O N T E N T S

P R O C E E D I N G S

(10:05 a.m.)

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

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

item?

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

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

(Laughter.)

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

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

MR. OLSON: I don't --

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

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

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

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the Court starts with the Morales case

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

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

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

JUSTICE BREYER: Well, why -- why would

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: When it's not --

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

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

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

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

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

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

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

MR. OLSON: The master settlement agreement?

JUSTICE GINSBURG: Yes.

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

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

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

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

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

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

MR. OLSON: Well, the point --

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

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

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

So that the argument you are making here is

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

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

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

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

JUSTICE SCALIA: Good idea.

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

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

JUSTICE SOUTER: Perhaps we did not think of it.

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Olson.

Mr. Frederick.

ORAL ARGUMENT OF DAVID C. FREDERICK

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ones are.

MR. FREDERICK: No.

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

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

By contrast --

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

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

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

Isn't that just as broad?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. FREDERICK: Yes.

JUSTICE SOUTER: You do?

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

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

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

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

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

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

MR. FREDERICK: That is an economic proof --

JUSTICE SCALIA: But that's the thing here.

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

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

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

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

JUSTICE KENNEDY: So what are your damages?

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

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

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

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

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

smoking and health.

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

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

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

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

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

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

Secondly, skull and crossbones I think --

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

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

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

MR. FREDERICK: Because the statute --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Weren't the claims that were

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

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

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

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

health.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Frederick.

MR. FREDERICK: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Hallward-Driemeier.

ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

MR. HALLWARD-DRIEMEIER: Well, I --

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

MR. HALLWARD-DRIEMEIER: But we --

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

(Laughter.)

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

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

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

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

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

to withdraw.

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

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

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

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

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

MR. HALLWARD-DRIEMEIER: That's correct.

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

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

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

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

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

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

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

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

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

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

MR. HALLWARD-DRIEMEIER: You're right.

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

MR. HALLWARD-DRIEMEIER: In 1978 --

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

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

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

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

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

JUSTICE GINSBURG: This is in the Reilly case.

MR. HALLWARD-DRIEMEIER: The Reilly case.

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

MR. HALLWARD-DRIEMEIER: Of course --

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

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

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

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

MR. HALLWARD-DRIEMEIER: Well, I --

JUSTICE SCALIA: -- whatever it is?

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

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

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

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

(Laughter.)

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Olson, you have four minutes remaining.

REBUTTAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF PETITIONERS

MR. OLSON: Thank you, Mr. Chief Justice. We haven't given up the implied pre-emption argument, but I --

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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