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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 THE 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 pre-empted 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

1 plaintiff would have to show is that there was a  
2 deception -- a disconnect between the studies and the  
3 ad. 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, fairly  
9 simple: Is there a requirement? Is it based upon  
10 smoking and health, and does it appear in an advertising  
11 or promotion of a cigarette? Now, I suppose there might  
12 be conceivably -- be circumstances where it's impossible  
13 to tell that the requirement is not connected in some  
14 way with smoking and health, but it's certainly clear  
15 here.

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

1 very words that appear in the Labeling Act statute,  
2 appear -- at least -- I counted at least 12 times in the  
3 amended complaint.

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

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

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

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

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

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

24 MR. OLSON: If -- if the courts were to  
25 conclude that it had a relationship with smoking and

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

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

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

23 JUSTICE KENNEDY: No, I -- they've just  
24 found this out last week. Do they have any -- there can  
25 be no -- I take it under your position there can be no

1 suit based on misleading or false promotion or labeling,  
2 and there can be no suit even for the sale of an unsafe  
3 item?

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

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

25 (Laughter.)

1 JUSTICE BREYER: Okay, that's totally false,  
2 and in your view, that would be pre-empted, that  
3 Congress attempted to pre-empt a state law that says you  
4 cannot make a completely false statement of material  
5 fact --

6 MR. OLSON: I don't --

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

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

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

17 (Laughter.)

18 MR. OLSON: Yes. And let me say with  
19 respect to the Cipollone plurality opinion, which was  
20 found to be baffling, confusing, litigation-generating,  
21 easily evaded by the labeling of the complaint, and  
22 superseded by a number of subsequent decisions by this  
23 Court, it should be set aside and restated. However,  
24 the very case that the Cipollone decision in the  
25 plurality did decide was pre-empted even under that

1 plurality opinion -- and this is at page 527 of the  
2 opinion -- is an advertising that purported to  
3 neutralize, minimize, down-play, negate, or disclaim the  
4 warning label on the packages. This complaint is  
5 precisely that claim. You could probably not have  
6 written a claim more squarely --

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

24 MR. OLSON: I think that is -- that is the  
25 argument, and the Respondents are making that argument.

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

21 Now, Justice Stevens again in the Reilly  
22 opinion when he was distinguishing in his concurring  
23 opinion -- I can't recall whether it's a concurring or  
24 dissenting opinion -- focused on the fact that different  
25 requirements by different States might cause those very

1 diverse, confusing advertising. If one State says,  
2 you've got to put something else in there about this;  
3 one State says the so-called descriptors are misleading,  
4 as was the case under this case, and another State says,  
5 like Illinois did in another case, that they are not  
6 misleading; that national advertising becomes  
7 impossible. That's inconsistent and Congress expressed  
8 what its policy was.

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

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

21           MR. OLSON: I am -- yes, Justice Stevens.  
22 Not just 1334(b) but 1331, which it helps explain.

23           JUSTICE STEVENS: Well, but the -- but the  
24 prohibition you're talking about is in 13 -- in your  
25 express pre-emption argument -- 1334(b). And I was just

1 going to ask you, is a State requirement prohibiting  
2 false statements about smoking and health a requirement  
3 based on smoking and health?

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

7 JUSTICE STEVENS: No, the -- the predicate  
8 for "based on smoking" is the word "requirement." And a  
9 requirement that you may not make any false statements,  
10 would that be a requirement based on smoking and health?

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

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

22 MR. OLSON: Yes. And to the extent -- now,  
23 we are not saying that the Massachusetts unfair-  
24 practices statute is pre-empted in all respects. It's  
25 only when the statute, like a common law tort provision

1 which the Court considered in Riegel, has application to  
2 the context of smoking and health.

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

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

24           Congress didn't want to pre-empt general  
25 common law standards about fraud or misrepresentation or

1 anything like that except in the context of the  
2 marketing of cigarettes.

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

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

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

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

1           Now, as I think every member of this Court  
2 would know, a creative plaintiff's lawyer can call a  
3 claim misrepresentation, willful misrepresentation,  
4 concealment, failure to warn, and so on and so forth.  
5 It's just a matter of how they change the label on the  
6 complaint.

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

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

15           JUSTICE STEVENS: But did the Illinois --  
16 Illinois court reach the question whether the claim was  
17 pre -- pre-empted? You apparently decided on the merits  
18 there was no fraud, if I understand what you said.

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

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

24           MR. OLSON: I -- I haven't got all of the  
25 specifics of that case, but what I felt -- I just simply

1 meant -- but I think it's an example of what you said in  
2 your concurring opinion in Reilly: That if you're going  
3 to conduct a national advertising campaign, it can't be  
4 governed by what a jury might decide in Des Moines  
5 versus what a jury might decide in Birmingham, Alabama.  
6 And --

7 JUSTICE STEVENS: When it's not --

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

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

25 JUSTICE GINSBURG: So your position is

1 essentially that Congress -- and as far as the  
2 advertising of low or light, Congress empowered one  
3 decisionmaker only and that's the FTC, and if they don't  
4 act, then the cigarette companies can say anything they  
5 want about low tar and low nicotine?

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

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

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

19 MR. OLSON: The master settlement agreement?

20 JUSTICE GINSBURG: Yes.

21 MR. OLSON: I -- I don't -- I can't answer  
22 that question. I don't know the answer to that  
23 question, but what I -- I believe that it would allow  
24 broad powers by the attorney generals. But I hasten to  
25 say, as I did at the beginning, because some parties

1 entered into that master settlement agreement I don't  
2 think changes the Federal -- congressional intent is  
3 very clear. It wanted the -- the statement -- Congress  
4 wanted the statements, certain statements, on cigarette  
5 packages. It didn't want any confusion about what the  
6 marketing or promotion of cigarettes would be.

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

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

21 It is pretty much hornbook law at this stage  
22 of the game that the -- that the FTC's regulation of  
23 deceptive advertising does not exclude State regulation  
24 of deceptive advertising as a general proposition. In  
25 fact, the FTC is very happy to have complementary State

1 regimes. That state of the law is just as clear. It is  
2 at least as clear as you say the language is here.

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

9 MR. OLSON: Well, the point --

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

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

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

1 regulating deception survive.

2           So that the argument you are making here is  
3 an argument that can be made, I suppose, on every  
4 subject that the FTC touches.

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

10           JUSTICE SCALIA: Your implied -- your  
11 implied pre-emption argument would certainly fall prey  
12 to that -- to that point.

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

15           JUSTICE SCALIA: Good idea.

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

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

24           JUSTICE SOUTER: Perhaps we did not think of  
25 it.

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

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

1 years ago and they have not changed.

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

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

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

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

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

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

1 Congress enacted in the medical device amendments were  
2 different; and third, this Court twice, in both Reilly  
3 and in Cipollone, has looked at this exact statute and  
4 come to the opposite conclusion.

5 First with respect to the text of the  
6 medical device amendments, there are several provisions  
7 of that act that are quite a bit broader than what the  
8 1969 Labeling Act --

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

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

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

1 common law duties are not pre-empted; specific tailored  
2 ones are.

3 MR. FREDERICK: No.

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

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

16 By contrast --

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

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

1 CHIEF JUSTICE ROBERTS: Okay. So 1334(b)  
2 says "no requirement or prohibition with respect to."  
3 Isn't that just as broad?

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

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

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

22 CHIEF JUSTICE ROBERTS: That's a  
23 relationship between smoking and health.

24 MR. FREDERICK: And the word "relate" does  
25 not appear in 1334(b), and that is crucial because this

1 Court in *Safeco v. Burr* defined the phrase "based upon"  
2 to mean but-for causation: But for smoking and health,  
3 is there a requirement? The words "related to" have  
4 been defined by this Court in numerous pre-emption  
5 cases, including *Morales*, *Wolens*, ERISA cases, to be  
6 among the most sweeping language that Congress can use  
7 to denote a connection.

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

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

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

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

22 JUSTICE SOUTER: How can you accept that and  
23 then expect to prove damages in the case? It -- you can  
24 accept it to this extent, it seems to me. You can  
25 accept it in saying that what we are going to prove at

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

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

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

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

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

1 MR. FREDERICK: No, I don't think so,  
2 Justice Souter. I think all we have to prove is that  
3 the products were different and that we relied  
4 materially on a misrepresentation about what product to  
5 use.

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

9 MR. FREDERICK: Yes.

10 JUSTICE SOUTER: You do?

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

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

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

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

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

25 JUSTICE SCALIA: But what if Yugos and Fords

1 are worth the same amount of money?

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

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

4 Unless you show that for some -- for some reason -- were  
5 light cigarettes sold at a premium? Did they charge  
6 more for light cigarettes?

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

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

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

14 JUSTICE SCALIA: Exactly. So what are your  
15 damages?

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

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

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

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

3           JUSTICE SOUTER: So ultimately you are  
4 proving a point which depends upon the relationship  
5 between smoking and health.

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

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

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

24                 Now, that argument would get nowhere, as you  
25 understand. And they are saying you're making just that

1 kind of argument here, except substitute the word  
2 "deception".

3 MR. FREDERICK: We are not making the same  
4 argument here for two reasons: One is that the main  
5 statute is not specially targeted at cigarette smoking.  
6 It's specially targeted at deception in the marketplace.  
7 Under your hypothetical it would be specially targeted  
8 at cigarette companies. Under Reilly that would be  
9 pre-empted.

10 Secondly, skull and crossbones I think --

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

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

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

20 MR. FREDERICK: Because the statute --

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

25 MR. FREDERICK: You looked at it because the

1 statute required you to look at it as applicable, and  
2 the purposes behind that Act were to give the FDA  
3 authority at the premarketing -- and purposes behind the  
4 medical device amendment were completely different. The  
5 FTC does not look at these marketing materials before  
6 the cigarette companies do that.

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

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

24 MR. FREDERICK: Prior to the enactment of  
25 the 1969 Labeling Act, Congress confronted the specter

1 of States imposing warning requirements. And the  
2 tobacco companies went to Congress and said, we do not  
3 want special burdens imposed on us. We don't want  
4 special advantages, but please don't impose special  
5 burdens on the cigarette industry.

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

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

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

22 MR. FREDERICK: We are not here seeking  
23 injunctive relief for this, and if I --

24 CHIEF JUSTICE ROBERTS: Page 42a of your  
25 amended complaint says you ask the court to grant such

1 injunctive relief as may be appropriate.

2 MR. FREDERICK: I misspoke, Mr. Chief  
3 Justice, with apologies to the Court. Our claim here,  
4 though, principally is for damages. And I would also  
5 point out that any injunction that would have been  
6 ordered here would be superseded by the United States  
7 RICO case, where the District Court of the District of  
8 Columbia has already issued an injunction for the use of  
9 light cigarettes because Judge Kessler found in more  
10 than 4,000 findings of fact that Philip Morris had  
11 engaged in deception in the marketplace and findings of  
12 fact, beginning at 2023 and following --

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

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

24 When the master settlement agreement was  
25 entered into in the late '90s, the tobacco companies had

1 not yet acknowledged publicly that they had been engaged  
2 in deception with respect to studies regarding low tar  
3 and light cigarettes. That came to light in 2002, and  
4 as a result of the discovery that occurred in the  
5 Government's case and in State cases, the studies that  
6 the cigarette companies knew for decades that there was  
7 no difference in the yield for low tar and light  
8 cigarettes came to light.

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

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

22           MR. FREDERICK: I think that would fall in  
23 the Reilly line of being pre-empted, because it would be  
24 specially targeted and there would be no room for a  
25 cigarette maker to say truthfully our product actually

1 does yield lower and light. So, it could not be a  
2 requirement based on deception. It would have to be a  
3 requirement based on smoking and health under your  
4 hypothetical.

5 JUSTICE ALITO: Weren't the claims that were  
6 held to be pre-empted in Cipollone based on general  
7 common law duties?

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

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

1 labeling?

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

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

14 JUSTICE STEVENS: Mr. Frederick, do I  
15 understand your basic argument to be that this statute  
16 is a prohibition against State warnings in either  
17 promotion or advertising different from the Federal  
18 warning?

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

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

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

5           JUSTICE KENNEDY: Your answer to Justice  
6 Ginsburg's question was that the state attorney general  
7 could not impose a regulation that said that, say, you  
8 must say that low tar cigarettes have as much nicotine  
9 as regular cigarettes. If the attorney general couldn't  
10 do that, why can the plaintiff do it in his lawsuit?

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

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

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

25           JUSTICE GINSBURG: Suppose he wins the

1 lawsuit -- he wins the lawsuit that it's false and  
2 deceptive to say "low." Could he then have a regulation  
3 that says cigarette companies don't advertise low or  
4 light?

5 MR. FREDERICK: I think that's a much more  
6 difficult hypo, but I think the answer is the same and  
7 that would be no, because a regulation would be -- would  
8 be specifically targeted at the industry and it would be  
9 based on smoking and health, not deception.

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Frederick.

2 MR. FREDERICK: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr.  
4 Hallward-Driemeier.

5 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

6 ON BEHALF OF THE RESPONDENTS

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

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

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

23 CHIEF JUSTICE ROBERTS: All right. Well,  
24 that's why you didn't address it. Now, what is the  
25 position of the United States? It's a statute that is

1 directed to an area in which the Federal Government has  
2 an extensive interest in regulation, and I would have  
3 thought there'd be a position on that. It is logically  
4 antecedent to the implied pre-emption. You would  
5 consider whether there is express pre-emption before  
6 implied pre-emption.

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

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

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

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

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

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

24 MR. HALLWARD-DRIEMEIER: But we -- we  
25 address this --

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

3 (Laughter.)

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

6 But we also address a question that is  
7 common to the two -- two questions presented, and that  
8 is an argument that the Petitioners make with respect to  
9 implied pre-emption, but they also make it with respect  
10 to express pre-emption, and that is -- and, Justice  
11 Ginsburg alluded to the question before --

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

16 MR. HALLWARD-DRIEMEIER: Well, as Your Honor  
17 is aware, we submitted a -- a supplemental authority  
18 letter that in July of this year the Commission issued a  
19 request for comment on a proposal to rescind its  
20 guidance with respect to the tar and nicotine test  
21 results, precisely because of concern that they are  
22 misleading due to the evidence that has developed about  
23 the incidence of compensation. That was not believed at  
24 the time that the Commission issued its guidance back in  
25 1966 and '67 to present a significant problem. But it

1 is evident now. The scientific community indicates and  
2 certainly the findings of fact in the RICO case are that  
3 the -- that the tobacco companies have known since 1967  
4 that in fact compensation is nearly complete, and for  
5 that reason, the tar and nicotine yield via the  
6 Cambridge test method are not indicative of the yield to  
7 a true human smoker. And for that reason, they've  
8 proposed to withdraw.

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

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

19 JUSTICE ALITO: Well, you proposed a rule to  
20 require it, did you not?

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

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

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

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

5 MR. HALLWARD-DRIEMEIER: No. The consent  
6 decrees did not require them to put the information in  
7 their ads. It said that it would be deceptive to make  
8 claims about the tar and nicotine content in the  
9 cigarettes without expressing, in milligrams, what the  
10 -- what the yield was per the Cambridge test method.  
11 But that's a very different thing. It's a prohibition.  
12 They were ordered to cease and desist making claims  
13 about tar and nicotine content without giving the  
14 consumer the benefit of the yield figures.

15 But the Commission has never -- specifically at  
16 issue in this case are the descriptors "light" or "lower  
17 in tar." In 1997, the Commission issued a notice in  
18 which it said these terms are not defined by Federal  
19 law. They asked whether there should be official  
20 guidance --

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

24 MR. HALLWARD-DRIEMEIER: Yes, Your Honor,  
25 because the -- the "light," on its own, much more

1 conveys the impression to the consumer that this is the  
2 yield to the consumer himself, the actual human smoker,  
3 and in fact that was why the --

4 JUSTICE ALITO: The FTC's position seems to  
5 me incomprehensible. If these figures are meaningless,  
6 then you should have prohibited them a long -- or  
7 misleading, you should have prohibited them a long time  
8 ago. And you've created this whole problem by, I think,  
9 tacitly approving the placement of these figures on the  
10 -- on the -- in the advertisements. And if they are  
11 misleading, then you have misled everybody who's bought  
12 those cigarettes for a long time.

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

24 But the Petitioners, although they have  
25 known since 1967 about the incidence of compensation,

1 failed to disclose that information to the Commission.  
2 They have failed to -- they have refused to give them  
3 the benefit of their insights, of their own studies.  
4 The Commission has asked --

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

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

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

12 MR. HALLWARD-DRIEMEIER: In 1978 --

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

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

1                   But again, I think it's more fundamental  
2 than that, is that their arguments rely upon a  
3 misconception of what the Commission does. As Justice  
4 Souter noted, it is hornbook law. The Commission does  
5 not supplant state law; it acts cooperatively with state  
6 law. The Commission does not act as a gatekeeper like  
7 FDA in approving things. It acts as a law enforcement  
8 agency. It goes after fraud when it is aware of it.  
9 But that is not to the exclusion of state law  
10 enforcement agencies or other Federal law enforcement  
11 agencies.

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

22                   JUSTICE GINSBURG: This is in the Reilly  
23 case.

24                   MR. HALLWARD-DRIEMEIER: In the Reilly case.

25                   JUSTICE SCALIA: Yes. In Reilly. I haven't

1 read the brief there, I must say. But suppose I agree  
2 with Petitioner. Can I assume --

3 MR. HALLWARD-DRIEMEIER: Of course --

4 JUSTICE SCALIA: And do you assume that it's  
5 still the --

6 MR. HALLWARD-DRIEMEIER: The position of the  
7 United States as stated in the Reilly case was that the  
8 express guarantee provision did not pre-empt a  
9 regulation of the nature in that case. It was our  
10 position that that, because it was --

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

16 MR. HALLWARD-DRIEMEIER: Well, I would think  
17 that --

18 JUSTICE SCALIA: -- whatever it is?

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

25 JUSTICE SCALIA: You have no idea which

1 direction that would lead?

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

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

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Olson, you have four minutes remaining.

10 REBUTTAL ARGUMENT OF THEODORE B. OLSON

11 ON BEHALF OF THE PETITIONERS

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

13 We haven't given up the implied pre-emption argument,  
14 but I --

15 (Laughter.)

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

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

23 Now, first of all, with respect to what the  
24 Solicitor General on behalf of the United States says --  
25 and this is in response to the point that Justice Scalia

1 was just addressing -- page 1 of the Reilly brief, the  
2 Attorney General is responsible for enforcing the  
3 Labeling Act. So it is the government's responsibility,  
4 according to them, to enforce the Labeling Act.

5 Then on pages 8 and 9 of their brief, in  
6 distinguishing between the location of the billboards in  
7 that case and other things that would be pre-empted,  
8 pages 8 and 9, the Government said the Labeling Act  
9 pre-empts state laws concerning the content of cigarette  
10 advertising with respect to smoking and health. And the  
11 Acting Solicitor General on page 25 of the transcript of  
12 the argument that day in this case was asked that  
13 question, what is pre-empted? And she said it pre-empts  
14 state law claims about filters or the safety of a  
15 particular cigarette. That is this case.

16 JUSTICE BREYER: So the point -- it doesn't  
17 pre-empt rules about location; it pre-empts rules about  
18 content?

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

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

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

5           Now, my opponent seems to run away, in  
6 answer to your question about what if we take out  
7 smoking and health from their complaint? Well, they  
8 can't take out smoking. That is everywhere in the  
9 complaint. I asked the Court to sit down and compare  
10 the labeling statute with the complaint. And the words  
11 are indistinguishable, and they say it over and over  
12 again and on page 4a of -- then Mr. Frederick's saying,  
13 well, all they want is economic damages. They are  
14 really not -- they are just concerned about they got one  
15 cigarette and they wanted to get another cigarette.  
16 Page 4a -- this is the way the Court of Appeals  
17 understood it. This is page 4a of the petition  
18 appendix: The plaintiffs explain that the relative  
19 levels of these substances bear on a reasonable  
20 consumer's decision on which cigarette to purchase,  
21 because consumers understand that reducing the  
22 quantities of tar and nicotine in cigarettes reduces  
23 their adverse health effects. That is what this case is  
24 all about.

25           Now, I will just conclude in this way. The

1 statute, in the language of this Court in the Reilly  
2 case, uses "sweeping language." The language is every  
3 bit as sweeping as the language in the airline  
4 deregulation act that uses the phrase "relates to," I  
5 submit.

6           So there is three requirements. Are there  
7 -- the statute prohibits any -- and it uses the phrase  
8 "any," you can't get more expansive than that; and it  
9 uses the word "no" requirements or prohibition. The  
10 Court has dealt with requirements and prohibition in  
11 Reilly, Cipollone, Bates, Wolens, Riegel. The statute  
12 that we are talking about here in this case is the same  
13 statute essentially that it was dealing with in Reilly.  
14 It's a State Unfair Practices Act. It was  
15 Massachusetts/Maine. But I compared the statutes side  
16 by side. They are essentially the same.

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

25           JUSTICE STEVENS: Isn't it correct that your

1 argument requires us to reject the fraud analysis in  
2 Cipollone?

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

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Olson.

12 The case is submitted.

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

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