

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-09981

LORI ASPINALL and THOMAS GEANACOPOULOS,
on Behalf of Themselves and
All Others Similarly Situated,

Plaintiffs-Appellees,

v.

PHILIP MORRIS COMPANIES, INC. and PHILIP MORRIS, INC.,

Defendants-Appellants.

**AMICUS CURIAE BRIEF OF PUBLIC CITIZEN, INC.,
CAMPAIGN FOR TOBACCO-FREE KIDS,
THE PUBLIC HEALTH ADVOCACY INSTITUTE,
THE AMERICAN LUNG ASSOCIATION,
THE AMERICAN LUNG ASSOCIATION OF MASSACHUSETTS,
AND THE AMERICAN CANCER SOCIETY**

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INTEREST OF AMICI CURIAE

This amicus curiae brief in support of the Aspinall plaintiffs-appellees is submitted by Public Citizen, Inc., the Campaign for Tobacco-Free Kids, the Public Health Advocacy Institute, the American Lung Association, the American Lung Association of Massachusetts, and the American Cancer Society. Amici share common interests in improving public health and in ensuring the public access to the court system for redress of health-related injuries. The interests of amici are described in the accompanying motion for leave to file this brief.

Amici file this brief to address Philip Morris's argument that federal law preempts the Aspinall plaintiffs' claims. That argument is unfounded for several reasons. First, the plain language of the Federal Cigarette Labeling and Advertising Act and its construction by the United States Supreme Court belie Philip Morris's express preemption argument. As that Court has made clear, there is no indication that Congress, when it addressed the question of tobacco

labeling in 1969, intended to eliminate the power of state and local governments to provide a remedy for deceptive statements on cigarette labels and in cigarette advertisements. Second, Philip Morris's implied conflict preemption argument lacks merit because the judgment in this case does not pose an obstacle to any federal policy or objective. Accordingly, this Court should reject Philip Morris's plea for an immunity from state-law consumer fraud remedies that Congress never conferred.

BACKGROUND

The first scientific studies linking cigarette smoking with lung cancer appeared in the early 1950s and led to the publication in 1962 of the Royal College of Physicians' report on "Smoking in Relation to Cancer of the Lung and Other Diseases" and in 1964 to the U.S. Surgeon General's report on smoking and health. As the public began to understand the link between smoking and disease, cigarette companies, seeking to stave off a massive loss in sales, scrambled to develop products that would ease consumers' fears about the health effects of smoking.

Developing products to ease fears, however, did not mean developing products to ease health risks. As Philip Morris candidly stated in an internal report: "The illusion of filtration is as important as the fact of filtration." National Cancer Institute, Smoking and Tobacco Control Monograph 13, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 206 (Oct. 2001) (citing 1966 Philip Morris report entitled *Market Potential of a Health Cigarette*) (available at <http://cancercontrol.cancer.gov/tcrb/monographs/13>) (hereinafter "NCI Monograph").

To reassure consumers, the companies introduced "low-tar" and "light" cigarettes. For health-conscious adults who wanted to quit smoking but were unable to do so because they were addicted, switching to cigarettes with lower tar and nicotine yields seemed an attractive alternative, allowing them to maintain their addiction while supposedly mitigating the health risk. Industry advertising promoted and reinforced this belief. As a result, over the past twenty-five years or so, most smokers in developed

countries began to use "light" and "low-tar" products as a substitute for what they perceived to be riskier products. See, e.g., L. Kozlowski, et al., "Smokers' Misperceptions of Light and Ultra-Light Cigarettes May Keep Them Smoking," 15 Am. J. of Preventive Med. 9-16 (July 1998); see generally NCI Monograph at Ch. 1, Ch. 6. In the United States, for example, approximately 84 percent of cigarettes currently sold are low-tar brands marketed with descriptions such as "light" and "ultra-light." FTC, *Cigarette Report for 2004 and 2005* at 21, Table 4A (2007) (available at www.ftc.gov/reports/tobacco/2007_cigarette2004-2005.pdf).

In fact, however, "light" and "lowered tar and nicotine" cigarettes are not actually any safer than regular cigarettes. As the National Cancer Institute has reported, although changes in cigarette design have reduced the amount of tar and nicotine measured by smoking machines, machine measurements do not accurately show how much tar and nicotine is actually received by the smoker. See NCI Monograph at 1, 4. Despite claims that the cigarettes delivered lowered

tar and nicotine, there is no meaningful difference in exposure from smoking low-tar brands as compared to regular brands, and therefore no difference in disease risk. *Id.* at 10. Although "many smokers switch to lower yield cigarettes out of concerns for their health believing these cigarettes to be less risky or to be a step towards quitting," *id.*, "current evidence does not support either claims of reduced harm or policy recommendations to switch to these products." *Id.*

Although the NCI Monograph is only six years old, the industry has been aware for decades that the smoking machines do not accurately measure the behavior of actual smokers. As a 1974 internal document from Philip Morris put it: "People do not smoke like the machine. People smoke cigarettes differently Generally people smoke in such a way that they get much more than predicted by machine." Philip Morris Tobacco Co., *Some Unexpected Observations on Tar and Nicotine and Smoker Behavior* (1974) (available at www.pmdocs.com, doc. #2047031987 at 2047031991). Nonetheless, companies such as Philip

Morris decided to use labels touting "light" and "lowered tar and nicotine" cigarettes, and fostered and then exploited widespread public misperception about both the true exposure to tar and nicotine, and the relative health risks of products. See also *id.* at 2047031992 (recommending use of machine test because "[i]t gives low numbers"); *NCI Monograph* at 32 (citing Philip Morris memo regarding study results showing that Marlboro smokers "did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery")

ARGUMENT

I. A PRESUMPTION AGAINST PREEMPTION APPLIES IN THIS CASE.

A. The Presumption Against Preemption

The federal preemption doctrine has its origin in the Supremacy Clause, Article VI, Clause 2 of the Constitution of the United States, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

shall be bound thereby, and any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Supremacy Clause provides the constitutional authority for the proposition that conflicts between federal and state law are resolved in favor of federal law. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Preemption is said to be "express" if a federal statute explicitly addresses the domain of state law that is preempted, and "implied" if the structure and purpose of federal law, but not its actual words, preempt state law. See *id.* at 516.

The Supremacy Clause is restricted by other principles implicit and explicit in the constitutional plan. In particular, the Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In light of this constitutional imperative of federalism, a party seeking preemption of state law bears a heavy burden. There is a strong presumption

against preemption that may be overcome only by "clear and manifest" congressional intent to the contrary. *Hillsborough County, Florida v. Automated Medical Labs., Inc.*, 471 U.S. 707, 715 (1985); see also *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605, 611 (1991); *U.S. Bank Nat'l Ass'n v. Clark*, 807 N.E. 2d 1109, 1113, 283 Ill.Dec. 268 (Ill. App. 2004).

Thus, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Put differently, "[p]reemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons--either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Moreover, the presumption against preemption is even stronger than usual where "Congress [has] legislated . . . in a field which the States have traditionally occupied, [involving] the historic police powers of the States." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In other words, the presumption is "that state and local regulation of health and safety matters can constitutionally coexist with federal regulation [because] the regulation of health and safety matters is primarily and historically a matter of local concern." *Hillsborough County*, 471 U.S. at 716, 719. This presumption applies where a defendant is seeking preemption of state tort remedies because, in that situation, preemption would displace the historic power of the states to protect the health and safety of their citizens. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-86 (1996).

Furthermore, in this case, where the allegedly preemptive federal regulatory scheme does not itself provide a damages remedy, preemption would leave injured individuals without any state or federal

remedy. In that situation, the Supreme Court has ascribed preemptive intent to Congress only in the most compelling circumstances. See *English v. General Electric Co.*, 496 U.S. 72, 87-90 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

B. Preemption And The Federal-State Balance

The presumption against preemption is not based on mere precedential idiosyncrasies. Rather, it arises directly from the "federal-state balance" that is fundamental to the constitutional plan. *Hillsborough County*, 471 U.S. 707; *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); see also P. Corboy & T. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Advoc. 435, 444-57 (1992) (detailed analysis placing the presumption against preemption in the context of the Tenth Amendment and federalism principles). Thus, the Supreme Court's Supremacy Clause jurisprudence is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which

Congress does not readily interfere." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

The presumption against preemption works in tandem with another aspect of the Supreme Court's federalism jurisprudence: the Eleventh Amendment. That Amendment provides that states, and state officers in certain circumstances, are immune from suit in federal court. See *Edelman v. Jordan*, 415 U.S. 651 (1974). Congress may override that judgment pursuant to its legislative powers under the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). However, the Supreme Court has insisted that Congress do so in unmistakably clear terms (referred to as the "plain-statement rule") and has enforced that edict very strictly. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-46 (1985). Because the same principles of federalism that support Eleventh Amendment jurisprudence also undergird Supremacy Clause jurisprudence, the plain-statement rule should be just as stringently enforced in the preemption context as in the Eleventh Amendment context. See *Gregory*, 501 U.S. at 460-67; *Wisconsin*

Public Intervenor v. Mortier, 501 U.S. 597, 607-09 (1991); accord *Cipollone*, 505 U.S. at 533 n.1 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting identity of Eleventh Amendment plain-statement rule and "clear and manifest" preemption standard).

A genuine plain-statement rule not only honors principles of federalism, but helps the legislative branch and the judicial branch maintain their appropriate roles by requiring Congress to say precisely what it means:

Congress gains little from writing ambiguous statutes. Particularly when it legislates in an area affected by state tort law, Congress has much to gain by making explicit its intent to preempt state law. Namely, clarity achieves certainty in statutory application and helps to avoid litigation over legislative meaning. Even more fundamentally, requiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice. Our system of federalism demands that interference with states' policy decisions to give their citizens tort remedies should be the product of judgment and careful balancing, rather than an unintended result of congressional inattention or imprecision.

Moreover, unlike judicial interpretations of constitutional principles that can be overturned only by the Supreme Court or constitutional amendment, Congress can overrule judicial preemption decisions. Thus, if Congress disagrees with a judicial refusal to find preemption, it can rewrite the statute to make preemption explicit. This may increase pressure on Congress to respond to the current "tort reform" campaign, as special interest groups may seek to ensure that express preemption clauses are incorporated into regulatory legislation. Nonetheless, the legislature is precisely where decisions regarding state versus federal policy should lie in the first instance.

Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. Rev. 559, 627 (1997); see also Jones, 430 U.S. at 525 (presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts") (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Accordingly, to the extent that it is ambiguous whether the Cigarette Labeling Act or FTC statements preempt the common-law claims at issue here, that ambiguity must be resolved in Plaintiffs' favor.

II. PLAINTIFFS' STATE-LAW CLAIMS ARE NOT EXPRESSLY PREEMPTED BY THE CIGARETTE LABELING ACT.

Section 5(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.* ("Cigarette Labeling Act") states: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b). According to Philip Morris (PM Br. at 34-35), although the Cigarette Labeling Act says nothing about "light" or "lowered tar and nicotine" labeling statements, Congress still intended the Act's preemption provision to bar Plaintiffs' state-law misrepresentation claims. The plain language of section 5(b) and the two U.S. Supreme Court cases construing it belie Philip Morris's argument.

To begin with, by its plain language, section 5(b) applies only to state-law requirements with respect to *advertising and promotion* of cigarettes. It does not preempt any state-law requirements with respect to *package labels*. Thus, the Court need look

no further to conclude that the Cigarette Labeling Act does not preempt Plaintiffs' deceptive practices claims with respect to use of the terms "light" and "lowered tar and nicotine" on cigarette package labels.¹

Moreover, the United States Supreme Court has already considered the preemptive effect of section 5(b) on state-law claims and held that misrepresentation claims indistinguishable from those at issue here are not preempted. In *Cipollone v. Liggett Group*, Justice Stevens' plurality opinion held that the Cigarette Labeling Act preempted the plaintiff's state-law duty-to-warn claims, *but not the fraud claims*. In arriving at this conclusion, the plurality construed section 5(b) by looking to the

¹The Cigarette Labeling Act addresses cigarette packages in section 5(a), which has a much narrower reach than section 5(b): "No statement relating to smoking and health, other than the statement required by section 4 of this Act shall be required on any cigarette package." 15 U.S.C. § 1334(a). This provision, unchanged since 1965, "merely prohibit[s] state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels" *Cipollone*, 505 U.S. at 518. Philip Morris has not argued that section 5(a) expressly preempts the Aspinall plaintiffs' claims. See PM Br. 34-35.

language of the preemption provision, the statute as a whole, and the purposes of the Cigarette Labeling Act. The opinion considered each of the common-law claims at issue and found preemption only where the claims would have "require[d] a showing that [the tobacco company's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." 505 U.S. at 524. Accordingly, fraud claims based not on advertising and promotion, "but rather on a more general obligation—the duty not to deceive" were not preempted. *Id.* at 528-29. Thus here, the Cigarette Labeling Act does not preempt Plaintiffs' claims, each of which is based on the general "duty not to deceive."

Nonetheless, Philip Morris contends (PM Br. at 39) that the Cigarette Labeling Act preempts Plaintiffs' claims because those claims are based on the theory that Philip Morris should have provided different warnings or that the company's use of the terms "light" and "lowered tar and nicotine" "neutralized" the federal-mandated warnings. As explained in the Aspinall appellees' brief, Philip

Morris is misconstruing the nature of the claims here. Plaintiffs have not challenged the federal warnings, have not alleged that the company's labels should have provided additional or different warnings, and have not complained that the company's affirmative statements neutralized or undercut the federal warnings. Put simply, the complaint in this case is unrelated to the warnings.² Rather, the complaint is that Philip Morris's description of products as "light" and "lowered tar and nicotine" was intended to deceive—and did deceive Plaintiffs and others—by causing them to believe that those products actually delivered less tar and nicotine and were therefore less harmful to smoke than other cigarettes. Plaintiffs do not allege that the company's misrepresentation caused them to believe that the

²Similar to Philip Morris, the Fifth Circuit in *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), misunderstood the nature of the claim alleged, a challenge under Louisiana's unfair and deceptive trade practices law to the use of "light" and "low tar" descriptors." Having incorrectly converted a challenge to the defendant's voluntary choice to label its tobacco products as "light" and "low tar" into a challenge to the warnings mandated by

products were safe or that the federal warnings were not applicable, only that "light" and "lowered tar and nicotine" cigarettes actually did deliver less tar and nicotine. Under *Cipollone*, such claims are not preempted.

Likewise, *Lorillard v. Reilly*, 533 U.S. 525 (2001), does not support Philip Morris's preemption theory. There, the United States Supreme Court considered a regulation issued pursuant to G.L. c.93A that was specifically intended to address youth smoking and directed solely at cigarette advertising and promotion. Although the Court held that section 5(b) preempted the Massachusetts law, it reiterated that generally applicable laws, not aimed specifically at tobacco products, are not preempted by section 5(b). *Id.* at 552 (advertising restrictions "that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption provision"). Consistent with *Cipollone's* holding with respect to state-law claims based on a "duty not to

the Cigarette Act, *id.* at 392-93, the court incorrectly found the plaintiffs' claims preempted.

deceive," *Lorillard* held such state laws were not "based on smoking and health," and thus were outside the scope of section 5(b) and not preempted. *Id.* Here, Plaintiffs' claims are based on G.L. c.93A's general proscription against unfair and deceptive practices, that is, a generally-applicable law "that applies to cigarettes on equal terms with other products." *Id.* Accordingly, they are not preempted.

III. PLAINTIFFS' STATE-LAW CLAIMS ARE NOT IMPLIEDLY PREEMPTED BY ANY FTC ACTION OR INACTION.

Philip Morris also argues that Plaintiffs' claims are impliedly preempted by the policies of the FTC. Again, Philip Morris's theory lacks merit for two independent reasons. First, the United States Supreme Court has repeatedly held as a general matter that state-law damages actions do not frustrate federal regulation and are, therefore, not impliedly preempted. Second, the judgment entered against Philip Morris in this case will not impair any FTC action.

A judgment for the appellees would require Philip Morris to pay damages; it would not require the

company to take any action inconsistent with federal requirements. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation."). The U.S. Supreme Court has already rejected the notion that federal regulation inherently conflicts with state damages actions. In *Cipollone*, for example, seven members of the Court held that the 1965 Act expressly preempted state regulatory law but did not preempt common-law actions for monetary damages. The Court explained: "[T]here is no general inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." 505 U.S. at 518 (plurality); *id.* at 533-34 (Blackmun, J., concurring). Earlier, in *Silkwood v. Kerr-McGee Corp.*, the Court acknowledged that the

Atomic Energy Act preempted state positive law directly "regulating the safety aspects of nuclear development." 464 U.S. 238, 250 (1984). Yet the Court held that the plaintiff's state-law damages action concerning an unsafe nuclear plant, including her claim for punitive damages, was not preempted. The Court found that it would be improper to interpret federal statutes to "remove all means of judicial recourse" for those seeking compensation for injuries without a clear statement to that effect. *Id.* at 251. Again, in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (unanimous opinion), the Court held that it is "perfectly rational" for Congress to preempt state positive law, but not "common-law claims, which—unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims." *Id.* at 64. Although these cases concerned state common law, as opposed to statutory law, G.L. c.93A codifies and enhances a damages action for fraud and deceit that previously existed only at common law. The reasoning of the U.S. Supreme Court cases thus wholly applies here.

Second, holding Philip Morris accountable for misrepresenting "light" cigarettes as delivering "lowered tar and nicotine" is not inconsistent with and does not frustrate the purpose of any FTC regulation, any formal FTC action, or any FTC policy. The FTC "has long encouraged use of overlapping state deceptive practices statutes." *United States v. Philip Morris*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003) (citing *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1381 (N.D. Tex. 1991)).

The FTC has never required any cigarette company to advertise its cigarettes as "light" or "lowered tar and nicotine." *Id.* at 81 (rejecting argument that tobacco companies were merely following FTC mandates and noting that companies' use of such terms "were certainly not mandated by the FTC"). Philip Morris's suggestion to the contrary (Br. at 59) relies on a consent order entered in a 1969 lawsuit brought by the FTC against American Brands, not Philip Morris. In that order, the FTC agreed not to pursue its lawsuit against American Brand's use of various slogans representing cigarettes to be "lower in tar," and

American Brands agreed not to use terms such as "low tar" without also stating in milligrams the tar and nicotine content in the cigarette's smoke. The order did not require any company to use the term "low tar," did not even address the term "light" in cigarette advertisements, and did not apply to Philip Morris. Accordingly, the 1969 consent decree between the FTC and American Brands does not foreclose Plaintiffs' claims here. See also *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985) ("Because the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette.").

Philip Morris is correct that in 1970 the FTC *proposed* a regulation to require cigarette companies to use the FTC method to calculate tar and nicotine yields stated in advertising. See 35 Fed. Reg. 12671 (1970). The proposal, however, neither addressed labeling nor use of the terms "light" or "lowered tar

and nicotine." *Id.* More importantly, as Philip Morris acknowledges (Br. at 46), the FTC abandoned the proposal that same year. Although Philip Morris attempts to equate its voluntary decision to adopt the FTC method for measuring yields with an affirmative federal policy, the FTC's decision *not* to regulate and not to displace state law is simply not a preemptive act.

The U.S. Supreme Court drove this point home in *Sprietsma*. There, the Court considered whether the Coast Guard's 1990 decision not to issue a regulation addressing propeller guards on motor boats, but instead to study the issue further, impliedly preempted a state-law damages action that alleged, among other things, that the manufacturer's motor boat was unreasonably dangerous because the motor was not protected by a propeller guard. Rejecting the manufacturer's preemption argument, the Court explained that "[i]t is quite wrong" to view a decision declining to impose a requirement as the "functional equivalent" of a prohibition against state regulation of the subject matter. Rather, a decision

not to take regulatory action leaves the applicable law "exactly the same" as it was before the agency's consideration of the matter. 537 U.S. at 65; accord *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995) (where agency had no standard either requiring or prohibiting antilock brakes, state common law as applied to antilock brakes not preempted); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501, 503 (1988) (absent explicit statement of intent, federal inaction has no preemptive effect).

Here, the FTC's decision not to issue a regulation mirrors the situation in *Sprietsma*. In both cases, the defendant-company premised its conflict preemption argument on agency action not taken, as opposed to the agency's imposition of a requirement or prohibition. Indeed, whereas in *Sprietsma* the agency had at least considered whether to impose a requirement and decided not to do so, here the FTC—in each instance recited in Philip Morris's brief—never even considered whether to impose requirements regarding the terms "light" or "lowered tar and nicotine." To be sure, the FTC took some

action with respect to the calculation of tar and nicotine yields; for example, it published the results that the companies obtained from smoking machines. Such action, however, cannot properly be deemed a requirement imposed on the industry. And the voluntary agreement among the companies pursuant to which tar and nicotine numbers are included in advertising is not enforceable by the agency—which is not even a party to the agreement. As in *Sprietsma*, the agency's decision to forgo federal regulation about the subject on which this suit is based does not give rise to an inference that state law on the subject is preempted.

In short, as Philip Morris acknowledges, the FTC has never established any requirements with respect to the use of the terms "light" or "lowered tar and nicotine" in cigarette labels or advertisements. See 62 F.R. 48158, 48163 (F.T.C. Sept. 12, 1997) ("There are no official definitions" for low tar descriptors and the FTC is "beginning the process" of determining whether there is "a need for official guidance with respect to the terms used in marketing lower rated

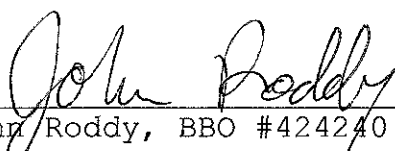
cigarettes."). Under the preemption jurisprudence of the United States Supreme Court, the agency's decision not to take action against cigarette companies that used such terms thus has no preemptive effect on state law, including Massachusetts's generally applicable unfair and deceptive trade practices law, G.L. c.93A.

CONCLUSION

For the foregoing reasons, the decision below holding that federal law does not preempt the claims alleged in this case should be affirmed.

Respectfully submitted,

July 18, 2007

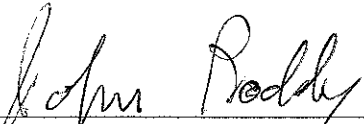

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure, undersigned counsel states that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.



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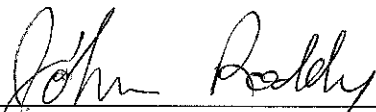
Dated: July 18, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2007, I caused two copies of the foregoing Amicus Curiae Brief of Public Citizen, Inc., et al., to be served by first-class mail on all parties required to be served, as follows:

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