

No. 26-235

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,
Petitioner,

v.

ARMAND FONTAINE, individually and as special
personal representative of the Estate of Barbara
Ellen Fontaine,
Respondent.

**On Petition for Writ of Certiorari to the
Massachusetts Supreme Judicial Court**

**BRIEF FOR *AMICUS CURIAE* R.J. REYNOLDS
TOBACCO COMPANY
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

R.J. Reynolds Tobacco Company manufactures and sells cigarettes and other tobacco products. Reynolds is the second-largest tobacco company in the United States. Its brands account for approximately one-third of all U.S. cigarette sales. It relies on the Federal Cigarette Labeling and Advertising Act in creating its packaging and advertising.

Reynolds faces a large volume of smoking-and-health-related litigation. Plaintiffs routinely name Reynolds and its affiliates as defendants in lawsuits presenting theories that are similar to those at issue in the Petition. Indeed, Reynolds was a co-defendant in the case giving rise to the Petition before the claims against it were dismissed. App. 5–6 & n.8. Reynolds therefore has a strong interest in this Court’s resolving the persistent uncertainty about the Labeling Act that the Massachusetts Supreme Judicial Court’s decision underscores.

¹ Notice of intent to file this amicus brief was provided to counsel for all parties more than 10 days before the filing deadline. *See* Sup. Ct. R. 37.2. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae and its counsel, made any monetary contribution toward its preparation or submission. *See* Sup. Ct. R. 37.6.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Labeling Act rests on Congress’s determination that certain warnings required on cigarette packaging and advertising are “both necessary and sufficient to achieve its purpose of informing the public of the health consequences of smoking.” *Altria Grp., Inc. v. Good*, 555 U.S. 70, 79 (2008). A State therefore “may not impede commerce in cigarettes by enforcing rules that are based on an assumption that the federal warnings are inadequate.” *Id.*

As the Petition demonstrates, the Massachusetts decision below cannot be squared with this precedent. That decision allows a jury to hold a defendant liable on the theory that the defendant should have given warnings about the health consequences of smoking that go beyond what federal law requires. Even though that theory of liability would be preempted if brought as a failure-to-warn claim, the decision below allows the plaintiff to evade preemption simply by repackaging the same theory as a different type of claim, such as fraud or conspiracy. App. 37–38; Pet. 15–20.

The Supreme Judicial Court (“SJC”) encouraged that evasion with its formalistic rule that the preemption analysis proceeds “by examining the nature of the claim asserted, not by looking to the evidence needed to prove the claim.” App. 38. That approach is wrong. It sidesteps what *should be* the question: whether the plaintiff’s claim, regardless of how it is labeled, imposes an obligation because of the effect of smoking upon health. *See* Pet. 15–20. If so, the Labeling Act preempts the claim because the

“predicate” “legal duty” underlying it would require the manufacturer to “includ[e] additional, or more clearly stated, warnings” about the health risks of smoking. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 523–24 (1992) (plurality op.).

The decision below is no outlier. Justice Thomas predicted “inevitable disagreement in the lower courts” and foresaw that “[i]t may even force us to yet again revisit the Court’s interpretation of the Labeling Act.” *Altria*, 555 U.S. at 111–12 (Thomas, J., dissenting). Justice Thomas was right. What happened in this case is just the latest example of how plaintiffs across the country have taken advantage of confusion stemming from this Court’s *Altria* decision to evade preemption under the Labeling Act.

Amicus’s trial records disclose a recurring pattern in smoking-and-health cases: Plaintiffs insist they are not bringing a preempted failure-to-warn claim, yet they offer evidence and argument attacking the federally mandated warnings as ineffective or inadequate, and they rely on the defendant’s failure to provide additional warnings to establish liability, allocate fault, or support punishment. Accepting that characterization, the trial court concludes that there is no preemption problem because the plaintiff has not pleaded a failure-to-warn claim, even though the plaintiff has effectively tried the same theory under a different name. Many of these cases have produced substantial judgments, to the tune of tens of millions of dollars. *E.g.*, *Manious v. R.J. Reynolds Tobacco*, No. 3CCV-22-0000072 (Haw. Cir. Ct. Dec. 31, 2024) (\$86 million); *see also* Pet. 34 (collecting examples).

That pattern reinforces the case for this Court to grant certiorari on both of the Petition’s questions

presented. Pet. i–ii. It shows that the decision below reflects a widespread misunderstanding of the Court’s *Cipollone-Altria* framework. That misunderstanding has allowed plaintiffs to regularly evade the preemption Congress mandated and has contributed to the very state-by-state patchwork of disparate warning requirements the Labeling Act is meant to foreclose. This Court should grant review and clarify that *Altria* and *Cipollone* do not permit this evasion. Alternatively, if these decisions by lower courts are faithful to *Altria*, then *Altria* should be overruled.

ARGUMENT

I. The decision below exemplifies a nationwide trend of courts allowing plaintiffs to evade Labeling Act preemption and attack the adequacy of the federal warnings.

A. Massachusetts allows plaintiffs to fault defendants for not including additional warnings: *Laramie* to *Fontaine*.

In *Laramie v. Philip Morris USA Inc.*, 173 N.E.3d 731, 748–49 (Mass. 2021), the SJC laid the groundwork for allowing plaintiffs to fault defendants for not including additional warnings. The plaintiff asserted a breach-of-warranty claim against Philip Morris (Petitioner here), alleging that the company was “manufacturing, selling, and distributing defectively designed cigarettes.” *Id.* at 738–39. The jury awarded \$11 million in compensatory damages and \$10 million in punitive damages. *Id.* at 738.

At trial, Philip Morris argued that Laramie understood the risks “in part due to the presence of the warning labels” mandated by federal law. *Id.* at 749. The plaintiff countered with excerpts from two Federal Trade Commission reports showing that consumers did not notice or read the warnings. *Id.* at 748. On appeal to the SJC, Philip Morris argued that this evidence was irrelevant because the warnings were adequate as a matter of law and federal law preempted claims that additional or clearer warnings were required. *Id.*

The SJC rejected Philip Morris’s argument because “[t]he plaintiff’s breach of warranty claim ... did not assert liability on the basis that Philip Morris should

have included additional, or more clearly stated, warnings.” *Id.* at 748. The court concluded that limiting instructions “informing the jury that the plaintiff was not claiming a failure to warn” had “mitigated” the risk that “the jury might have used this evidence improperly.” *Id.* at 749.

The SJC further held that Federal Trade Commission reports were relevant to consumer expectations (and that any hearsay error was harmless). The reports in question stated that fewer than three percent of adults read the federal warnings and that “few people ever notice or pay attention to” them. *Id.* at 748. The SJC affirmed the \$21 million judgment. *Id.* at 752.

In the decision below, the SJC applied *Laramie*’s rationale to claims of “fraud and conspiracy.” App. 38. The court reasoned that “no ... preempted claim was asserted in this case,” and that consequently, there was no problem with plaintiffs presenting to the jury the very same evidence and argument that would have been barred if offered in support of a preempted failure-to-warn claim. App. 37–38. The court therefore upheld a theory under which the jury held Philip Morris liable for removing a voluntary *additional* warning while retaining the federally mandated ones. That theory blesses a requirement of additional warnings and is thus a preempted failure-to-warn claim in substance, regardless of how the plaintiff chooses to label it. Pet. 16.

Accordingly, the rule developed in *Laramie* and extended in *Fontaine* gives future plaintiffs a roadmap for evading the Labeling Act’s express preemption provision and smuggling preempted

theories of liability into smoking-and-health trials, in Massachusetts and elsewhere.

B. Courts across the country have allowed similar end runs around the Labeling Act.

Massachusetts is far from alone. Plaintiffs across the country have devised a variety of similar end runs around Congress's prohibition of state-law requirements for additional warnings. In Amicus's experience, plaintiffs have argued that: (1) attacks on federal warnings are permissible to "rebut" defense theories or to go through a door the defense has opened by relying on those warnings; (2) the warnings have an "effect on the consumer" or are relevant to "consumer expectations"; (3) defendants engaged in "concealment by omission"; (4) attacks on the warnings are relevant to comparative fault; (5) defendants are liable because they had "notice" that the warnings were inadequate; and (6) defendants' advertising drowned out the warnings.

1. "Rebuttal" and "opening the door"

Courts permit plaintiffs to pursue otherwise preempted warning theories as "rebuttal" to a manufacturer's defense, on the ground that the defendant has "opened the door" to those theories. The asserted "opening" may be any of several defense arguments, including that the warnings show the smoker's knowledge, that the defendant has acted candidly, or that it has changed its ways. On that rationale, the plaintiff is permitted to fault the manufacturer for failing to supplement the warnings to cure their supposed shortcomings. But a theory that federal law will not permit in the plaintiff's

affirmative case does not become permissible merely because it is offered in response to a defense. Under *Altria*, the question is not whether a plaintiff’s challenge to the warnings’ sufficiency answers something the manufacturer has said. It is whether the challenge invites the jury to find liability, assign fault, or impose punishment because the defendant failed to provide additional warnings. *See Altria*, 555 U.S. at 81. Calling the challenge “rebuttal” does not change the fact that it creates a state-law requirement for the defendant with respect to labeling of its cigarettes.

The door-opening rationale also overlooks a basic distinction. A manufacturer that cites the warnings as evidence of what a particular smoker knew makes a factual claim, and whatever factual response is allowed remains subject to the limits just discussed. A manufacturer that invokes the warnings’ legal sufficiency makes no factual claim at all. Congress prescribed warnings that are both “necessary and sufficient” to inform the public of smoking’s health consequences. *Altria*, 555 U.S. at 79. Relying on that legal rule no more opens the door to an otherwise-preempted state-law warning requirement than quoting a governing jury instruction opens the door to evidence attacking the law the instruction states.

Examples of door-opening arguments include the following.

***Bessent-Dixon v. R.J. Reynolds Tobacco Co.*, No. 2015-CA-002554 (Fla. 13th Cir. Ct. Apr. 2, 2024):** In his opening, the plaintiff’s counsel promised the jury: “You will hear ... you will learn” that the “warnings” “never mentioned the words ‘nicotine’ or ‘addiction,’” and the companies “knew from their own

studies that the warnings ... were largely ineffective.” Tr. 489–90. When the defense objected on preemption grounds, the plaintiff’s counsel responded that “[e]very judge in this circuit ... ha[s] said that if the door is opened, if you are trying to say that they were adequately warned, you’ve opened the door ... you can’t be both a sword and a shield.” Tr. 492. The trial court overruled the objection. Tr. 493. The plaintiff’s counsel picked up where he left off: “More importantly, you are going to learn that the tobacco companies themselves knew that the warnings on cigarette packages were largely ineffective, undoubtedly good news for the industry.” Tr. 494. The jury awarded the plaintiff \$9 million in compensatory damages. A retrial on punitive damages resulted in an additional award of \$25 million, for a total of \$34 million.

***Johns v. R.J. Reynolds Tobacco Co.*, No. 17-CA-007972 (Fla. 13th Cir. Ct. June 15 and 18, 2026):** Over defense objections, the plaintiff sought to introduce a 1981 FTC staff report containing “polling information about the effectiveness of warnings.” Defense counsel told the court that “the jury is going to hear” about “failure to warn consumers regarding the adequacy of the warning label.” The plaintiff’s counsel responded that his argument was not “that they need to change their warnings,” but “simply in response to their point, hey, there is a warning on every packet [W]e’re entitled to say great, but the warnings were ineffective.” Tr. 1994, 2012–13. The plaintiff’s expert then presented the report’s conclusions about ineffectiveness and inadequate information; he said the report was “a document that would assist the jury in terms of explaining whether or not the warnings were effective.” Tr. 2053–56. In

closing, the plaintiff’s counsel drove the point home: “The warnings were ineffective, according to that FTC poll that we read you. And there’s a good question why those warnings weren’t made earlier.” Tr. 3057.

2. “Effect on the consumer” and consumer expectations

Some courts have allowed plaintiffs to attack the warnings on the theory that they inform “consumer expectations,” which undergird design-defect claims. *See, e.g., Laramie*, 173 N.E.3d at 748–49 (reasoning that “[e]vidence that consumers did not notice or read the mandated warnings thus was relevant, because it made more likely that consumers formed opinions about cigarettes through sources other than the warning labels”); *Evans v. Lorillard Tobacco Co.*, 990 N.E.2d 997, 1014 (Mass. 2013) (“[C]onsumer expectations are one of many factors that may be considered in determining whether a product’s design is defective.”). Evidence of what consumers expected is of course not categorically excluded. *See id.* But to the extent plaintiffs argue that the federally mandated labels were so deficient that they created expectations that manufacturers failed to satisfy, plaintiffs are effectively arguing that manufacturers had to supplement the labels to avoid liability.

In that way, plaintiffs can use a “non-preempted” design-defect claim to enforce the warning duty federal law forecloses. But *Altria* and *Cipollone* recognize that a claim on the other “side[] of the same coin” as a failure-to-warn claim is nevertheless preempted. *Altria*, 555 U.S. at 81 n.8. To be sure, this Court allowed juries to consider the efficacy of the warning labels in assessing “the materiality of ...

allegedly fraudulent statements.” *Id.* at 82–83. But that is a different kind of inquiry. It asks whether an affirmatively false statement mattered despite the warnings, not whether the warnings should have said more.

Examples of plaintiffs citing consumer expectations to challenge the warnings include the following.

***Irimi v. R.J. Reynolds Tobacco*, No. 08-026337(12) (Fla. 17th Cir. Ct. May 16, 2024):** The plaintiff proposed reading statements from the 1981 FTC report that “less than 3 percent of adults exposed to cigarette ads ever read the warning.” Tr. 1423. The defendant objected that “[t]he law says [y]ou can’t say the warnings were ... inadequate” and cautioned that “[w]hat this is saying is that the warnings are inadequate because people aren’t paying attention to them. The warning is adequate as a matter of law.” Tr. 1423. The plaintiff responded: “We can’t challenge and say they should have put some other language on the warning.” Tr. 1423–24. The trial court overruled the objection, explaining: “Right. It’s the effect of the warnings on the consumer.” Tr. 1424. The plaintiff’s expert then testified at length about the report. Reviewing a warning label on an advertisement, the expert read the report’s conclusion that “[t]he Surgeon General has no chance against this” advertisement, Tr. 1515, which is tantamount to the warnings-neutralization theory this Court prohibited in *Cipollone* (more on which below).

***Palmieri v. R.J. Reynolds Tobacco Co.*, No. 08-019615(03) (Fla. 17th Cir. Ct. Mar. 11, 2026):** The plaintiff’s expert historian testified that Congress and federal regulators “found also that these warnings are inadequate in expressing to smokers in impactful ways the depth and breadth of the harm.” Tr. 959. To no avail, the defendant objected: “No failure to warn claim. Preemption.” The plaintiff’s expert then testified that the 1985 warnings “do not contain any reference to addiction.” The defendant renewed its preemption objection and the court again overruled. *See also* Tr. 957 (testimony by the plaintiff’s expert that the 1970 warning “[d]idn’t really affect [consumer behavior] much at all”).

***Manious v. R.J. Reynolds Tobacco Co.*, No. 3CCV-22-0000072 (Haw. Cir. Ct. Dec. 10, 2024):** In closing, the plaintiff’s counsel discussed the “[c]onsumer expectation test” for defective design and emphasized: “Before 1985, there was no disease on the cigarettes.” Defense counsel objected “based on preemption principles to this portion of the argument and slide.” The trial court responded: “Overruled.” Tr. 3350–51; *see* Tr. 3354 (“Carbon monoxide is on the warning label, but not any of the other ones.”); Tr. 3357 (“There’s a reason why R.J. Reynolds doesn’t want to tell their customers every single disease caused by smoking.”). The jury awarded \$86 million. *Manious* (Haw. Cir. Ct. Dec. 31, 2024); Pet. 34.

3. Concealment by omission

Many courts allow attacks on the warnings under the heading of “fraudulent concealment.”² Plaintiffs

² Other courts have correctly held that federal law preempts fraudulent-concealment claims based on a failure to warn of the

argue that omitting additional health information about cigarettes is deceptive. But that theory is preempted because it asserts that an advertisement should have provided a fuller warning than Congress prescribed. *See Altria*, 555 U.S. at 81 n.8.

Examples of attacks on the labels under a fraudulent-concealment theory include the following.

***Deschamps v. R.J. Reynolds Tobacco Co.*, No. 2010-044753-CA-01 (Fla. 11th Cir. Ct. Mar. 25, 2025):** In closing, the plaintiff’s counsel told the jury that even an advertisement containing a warning could support liability under the concealment instruction: “all we have to show is that a statement omitted information that was important ... it’s highly addictive.” Tr. 3582. Defense counsel unsuccessfully objected on preemption grounds. *Id.* Again over defense objections, the plaintiff’s counsel said of a Winston advertisement bearing a federal warning label: “Well, that’s nice, but it still is[] an internal omission of the truth *because it didn’t say how dangerous it was.*” Tr. 3583 (emphasis added). The asserted fraud, in other words, was failing to provide a fuller warning than Congress required.

***Palmieri*, No. 08-019615(03) (Fla. 17th Cir. Ct. Mar. 12, 2026):** The plaintiff’s counsel elicited testimony that “between 1924 and 1992” (so including after the Labeling Act took effect) cigarette companies did not “specify in their ads how addictive their cigarettes were.” Tr. 1323–24. The trial court

dangers of cigarette smoking, reasoning that such claims “attempt[] to allege a duty beyond that imposed by the Labeling Act.” *See, e.g., Laschke v. Brown & Williamson Tobacco Corp.*, 766 So. 2d 1076, 1078 (Fla. 2d DCA 2000).

overruled the defense’s preemption objection, Tr. 1324, even though this fraud theory undoubtedly is based on a failure to include more information in the warning label.

4. Comparative fault

Some courts admit evidence attacking the federal warnings as relevant to comparative fault. But asking the jury to assign fault to the manufacturer for failing to supply additional warnings seeks to enforce a duty that federal law forecloses.

One recent example comes from New Mexico.

***Perez v. R.J. Reynolds Tobacco Co.*, No. D-101-CV-2019-02017 (N.M. 1st Jud. Dist. Ct. Oct. 21, 2025):** The plaintiff’s historian testified that attributing the 1970 warning to the Surgeon General gave manufacturers “plausible deniability.” Tr. 1964–65. When defense counsel objected that “this is a preempted area” under *Cipollone*, the plaintiff’s counsel responded: “I’m not saying [the warnings] were ineffective to impose liability. I’m saying that they were ineffective to avoid a finding of comparative fault.” Tr. 1966–67. The trial court overruled the objection, explaining that “[g]oing into the comparative fault issue it makes sense.” It cautioned, however, that it would sustain an objection to questions that “start getting into ... liability is attributable to them”—as if comparative fault were entirely separate from liability. Tr. 1968.

5. Notice and corporate state of mind

Some courts allow plaintiffs to argue that cigarette manufacturers had notice that the federal warnings were not adequate. Plaintiffs argue that a theory

based on the warnings' adequacy is not preempted because it goes to notice to the manufacturer, not a duty to warn. But notice to the manufacturer that the warnings are somehow inadequate would only be relevant if the manufacturer had some legal responsibility to act in response to that notice. If a plaintiff asks the jury to fault the manufacturer for failing to add warnings after learning that the federal ones were ineffective, the notice rationale just reintroduces the preempted duty, contrary to *Altria*.

One recent example suffices to illustrate the point.

***Fuller v. R.J. Reynolds Tobacco Co.*, No. 1672CV00154 (Mass. Sup. Ct. Sept. 10, 2021):** In a bench trial, the plaintiff asked her expert whether, in response to the 1981 FTC staff report, “R.J. Reynolds d[id] anything to try to make sure that the warning was noticed by its customers” or “took a position on whether the warning should be made more explicit.” Tr. 375. When defense counsel objected that this line of questioning was preempted, citing *Cipollone*, the plaintiff’s counsel responded that “I was eliciting whether the company, having been on notice of this, did something to change how it went about placing the warnings.” Tr. 375–76. The trial court responded: “That’s fair enough.” In short, the trial court allowed the plaintiff to condemn the defendant for not changing the warnings upon learning that they were inadequate.

6. Neutralization by advertising

The *Cipollone* plurality held that the Labeling Act preempts theories “based on ... neutralization of federally mandated warnings” by advertising. 505 U.S. at 530–31. A number of courts have since applied

that holding. *See Geiger v. Am. Tobacco Co.*, 674 N.Y.S.2d 775, 778 (App. Div. 1998) (dismissing post-1969 negligent misrepresentation and implied-warranty theories insofar as they rested on warning neutralization); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997) (holding a fraudulent-concealment claim preempted because its substance was that advertising diminished the federal warnings' impact); *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1202 (11th Cir. 2004) (affirming dismissal of a conspiracy-to-fraudulently-misrepresent claim insofar as it rested on the theory that the defendant's advertising neutralized the federal warnings); *see also Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 840 (W.D. Ky. 1999) (recognizing preemption of post-1969 neutralization and fraudulent-concealment theories).

Nevertheless, in Amicus's experience, trial courts continue to allow plaintiffs to present theories of warning neutralization. Examples include the following.

***Irimi*, No. 08-026337(12) (Fla. 17th Cir. Ct. May 16, 2024):** The plaintiff's expert witness contrasted consumers' recollection in internal company studies that "I saw a mountain, I saw a bikini, I saw a Jeep" with the failure to notice the warning "in comparison with all the other colorful imagery." Tr. 1512. Reading the 1981 FTC staff report's discussion of "a Christmas advertisement for Marlboro," he described "the romance of these ads," including images of a cowboy, snow, and a Christmas tree. Tr. 1514–15. "It's hard to imagine a more evocative American image," he continued, "[e]ven though the white-boxed cancer warning in the right-hand corner has stained the

snow yellow, the reflective pleasure of tobacco pervades the ad.” Tr. 1515. He then read the FTC report’s conclusion: “The Surgeon General has no chance against this.” Tr. 1515. In other words, the testimony portrayed the federal warnings as too weak to counter the advertising.

***Neff v. R.J. Reynolds Tobacco Co.*, No. 07-036745(08) (Fla. 17th Cir. Ct. June 13, 2023):** The plaintiff’s expert testified about the same FTC report and characterized it as “pointing out that the warning cannot compete with the vivid nature of the advertising.” Tr. 1349.

***Philip Morris USA Inc. v. McCall*, 234 So. 3d 4 (Fla. 4th DCA 2017):** The plaintiff was permitted to tell the jury that “with all the warnings it ... wasn’t enough to overcome all the advertisements about smoking being safer if you smoked filtered cigarettes.” 234 So. 3d at 17. The appellate court held the testimony went to “the materiality of the fraud,” not “the adequacy of the warnings.” *Id.*

The danger here is that testimony that advertising undermines the federal warnings becomes a basis for liability.

* * *

In sum, the line drawn in *Cipollone* and *Altria* must hold as a substantive matter, not just as a box on a pleadings checklist: “Does the complaint contain a failure-to-warn claim?” The examples above show plaintiffs presenting evidence that federally mandated warnings were ineffective, unread, or inadequate. Whether the theory is styled as “rebuttal,” “consumer expectations,” “fraudulent concealment,” “comparative fault,” or “notice,” the line

is crossed when juries are invited to impose liability or punishment based on the absence of warnings that Congress forbade states from requiring. Disputes over these theories and the instructions meant to cabin them underscore the need for further guidance. This Court should intervene to vindicate Congress's judgment that the federal warnings are "both necessary and sufficient" and to restore the uniform national standard the Labeling Act was designed to secure.

II. The pattern of end runs around the Labeling Act confirms both Questions Presented warrant review.

A. Question 1: *Fontaine* squarely presents a recurring issue.

Amicus's experience litigating smoking-and-health cases tried throughout the country shows that the decision below is symptomatic of a nationwide misunderstanding that only this Court can correct. The SJC's holding allows plaintiffs to invite, and juries to impose, liability based on a defendant's failure to provide additional warnings about smoking and health. The decision thus provides a roadmap for evading Labeling Act preemption. In doing so, it joins the many other lower courts that have read this Court's *Altria* decision as allowing plaintiffs to present liability theories premised on the federal warnings' supposed inadequacy. The Court should grant review to clarify that *Altria* does not permit these theories.

Amicus supports the position taken in the Petition: Under *Altria*, a claim whose gravamen is that the defendant should have given warnings beyond those

federal law requires is preempted whatever its label. Pet. 12–19. At a minimum, the Court should make clear that juries may not impose liability for post-1969 advertising or promotion on the ground that the federally prescribed warnings should have said more. That rule applies whether the asserted duty is to add or (as below) retain warnings that federal law does not require.

B. Question 2: If *Altria* permits these end runs, Amicus’s litigation experience supports reconsidering that decision.

As the above examples suggest, *Altria*’s rule is unworkable in practice. *Supra* Part I. Justice Thomas predicted “inevitable disagreement in the lower courts.” 555 U.S. at 111–12 (Thomas, J., dissenting). The cases discussed above illustrate recurring confusion over whether plaintiffs can evade preemption by repackaging the same warning-based theories as something other than a failure-to-warn claim.

The difficulty of drawing the right line can result in confusion even within a single trial. In *Perez*, the trial court said it would sustain objections to questioning that “start[s] getting into ... liability is attributable to [tobacco companies]” based on the warnings’ ineffectiveness while allowing testimony that the warnings were “the Surgeon General’s opinion” rather than “the cigarette companies ... saying it” and were “essentially invisible.” Tr. 1968–69, 2259.

If the Court concludes that *Altria* permits the sort of end runs described in this brief and in the Petition, then it should adopt the construction advocated by Justice Scalia in *Cipollone* and Justice Thomas in

Altria. Under that approach, preemption would turn on the obligation imposed in the particular case, not the general source of the duty invoked. *Cipollone*, 505 U.S. at 553–55 (Scalia, J., concurring in the judgment in part and dissenting in part); *Altria*, 555 U.S. at 93, 95–97 (Thomas, J., dissenting). Claims of all kinds, including design-defect, fraudulent-concealment and misrepresentation claims would be preempted when their application imposes requirements based on smoking and health with respect to cigarette advertising or promotion. The “neutralization” theory underscores the point. Justice Scalia questioned how different States would judge an advertisement featuring a “glamorous, youthful smoker,” explaining that a general fraud rule indicting that kind of ad could impose the very nonuniform advertising requirements Congress sought to prevent. 505 U.S. at 553 (Scalia, J., concurring in the judgment in part and dissenting in part). Amicus’s trial examples illustrate the practical importance of that concern.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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