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In This Section:

New Case: 07-1216  Philip Morris USA v. Williams

Synopsis and Questions Presented  p. 144

“Justices to See Philip Morris Case a Third Time”  p. 154
Linda Greenhouse

“Justices Uphold Cigarette Damages”  p. 155
Ashbel Green

“Justices Overturn Tobacco Award”  p. 157
Robert Barnes

“Oregon Supreme Court Backs $79.5 Million Tobacco Award”  p. 159
Ashbel Green

“High Court Sends back Tobacco Case Award”  p. 160
David Savage

“Jury Awards $81 Million to Oregon Smoker’s Family”  p. 162
Barry Meier

“A New Day on Punitive Damages Law”  p. 164
Lyle Denniston

New Case: 07-562  Altria Group v. Good

Synopsis and Questions Presented  p. 166

“Altria Gets U.S. High Court Hearing on ‘Lights’ Suit”  p. 177
Greg Stohr

“Light Cigarette Case not Preempted, First Circuit Says”  p. 179
Allison Torres Burtka

“Bid to Shift Tobacco Cases to U.S. Courts Denied”  p. 182
John Donnelly

New Case: 06-1249  Wyeth v. Levine

Synopsis and Questions Presented  p. 184
“Justices to Hear Cases on Products Liability”
Linda Greenhouse  

“Court Considers Protecting Drug Makers from Lawsuits”
Gardier Harris  

“Patients’ Ability to Sue at Risk”
Daniel Costello  

“The State of Medical Device Tort Litigation in the Wake of Riegel”
Eric J. Parker and Richard S. Cabelus  

“No Special Treatment”
Sol Weiss  

New Case: 07-512 Pacific Bell v. linkLine

Synopsis and Questions Presented
“High Court Agrees to Hear AT&T ISP Dispute”
EWeek.com  

“Ninth Circuit Case Alleging DSL ‘Price Squeeze’ Can Proceed”
Telecommunications Reports  

“Ninth Circuit Prequels and Sequels”
Neal R. Stoll and Shepard Goldfein  

ISPs File Antitrust Lawsuit Against SBC in California”
Telecommunications Reports  

“U.S. High Court Rules in Favor of Verizon”
James S. Granelli  

New Case: 07-1059 United States v. Eurodif

Synopsis and Questions Presented
“High Court to Hear Uranium Case”
Robert Barnes  

“ITC Rules in Favor of USEC Position on French Uranium Imports”
Business Wire  

“Sole U.S. Company that Enriches Uranium Is Struggling to Stay in Business”
Matthew L. Wald
New Case: 07-1239 Winter v. Natural Resources Defense Council

Synopsis and Questions Presented

“Justices Take Case on Navy Use of Sonar”
Linda Greenhouse

“Court Upholds Whale Protection in Navy Exercises”
Bob Egelko

“White House Went too Far in Sonar Case, Judge Rules”
Marc Kaufman

“Navy Wins Exemption from Bush to Continue Sonar Exercises in California”
Mark Kaufman

“Judge Imposes Stricter Rules on Navy to Protect Marine Life”
Carolyn Marshall

“Navy Given Choice: New Safeguards or No Sonar”
Kenneth Weiss

“Judge Curbs Navy Sonar”
Kenneth Weiss
Philip Morris USA v. Williams

07-1216


Plaintiff’s husband died from lung cancer after smoking cigarettes for over forty years. A jury awarded Plaintiff over $80 million in actual and punitive damages in her suit against Philip Morris for fraud and negligence. On appeal, Philip Morris argued that the trial court erred by refusing to give a proposed jury instruction. The Oregon Supreme Court upheld the jury’s verdict and damages award. On appeal to the U.S. Supreme Court, the Court held that the Oregon Supreme Court did not apply the correct constitutional standard and could have allowed the jury to consider factors that violated the Due Process clause of the Fourteenth Amendment. On remand, the Oregon Supreme Court upheld on procedural grounds its ruling that the trial court did not err in refusing to give the proposed jury instruction.

Question Presented: When this case was last before it, this Court reversed the decision of the Oregon Supreme Court and held that due process precludes a jury from imposing punitive damages to punish for alleged injuries to persons other than the plaintiff. Philip Morris USA v. Williams, 127 S. Ct. 1057, 1065 (2007). This Court then remanded the case to the Oregon Supreme Court with directions to “apply the [constitutional] standard we have set forth.” Id. On remand, however, the Oregon Supreme Court refused to follow this Court’s directive. Instead, the Oregon court “adhered to” the judgment that this Court had vacated because it found that Philip Morris had procedurally defaulted under state law and thereby forfeited its claim of federal constitutional error. App., infra, 22a.

The question presented: Whether, after this Court has adjudicated the merits of a party’s federal claim and remanded the case to state court with instructions to “apply” the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.


Supreme Court of Oregon

Decided January 31, 2008

[Excerpt: some footnotes and citations omitted.]

GILLETTE, J.

This matter is before us on remand from the United States Supreme Court. Previously, this court held (among other things) that certain federal constitutional limitations

144
constraining punitive damage awards did not require a trial court to instruct a jury that it was not to use an award of punitive damages to punish a defendant for harms to persons who were not parties to the litigation. *Williams v. Philip Morris Inc.*, 340 Ore. 35, 51-54 (2006). On certiorari, the United States Supreme Court vacated that opinion and remanded. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). The Court concluded that the Due Process Clause of the Fourteenth Amendment prohibits the state from using punitive damages to punish for harms to nonparties, and that states must prevent punitive damages from being misused in that way. 127 S. Ct. at 1065. On remand, we are called upon to reconsider and reassess our earlier holding, which arose in the context of the trial court’s refusal to give a particular proposed jury instruction that defendant had requested. Having reconsidered and reassessed the issue, we now conclude that the proposed jury instruction at issue here also was flawed for other reasons that we did not identify in our former opinion. We therefore reaffirm this court’s prior conclusion that the trial court did not err in refusing to give the instruction. We otherwise reaffirm our prior opinion in all respects.

Before we turn to the facts and procedural posture of this particular case, we first summarize the legal context in which it arose. The issues in this case revolve around federal constitutional limitations on punitive damage awards. Those constitutional limitations derive from the Due Process Clause of the Fourteenth Amendment. [T]he Supreme Court has held that states legitimately may use punitive damages to punish and to deter wrongdoing by defendants in tort cases. However, the Court also has held that the amount of punitive damages that a jury awards cannot be arbitrary; the jury’s discretion must be limited. Otherwise, defendants will not have adequate notice of potential sanctions, the punishments may be arbitrary, and large punitive damage awards may force one State’s policy choices onto other States. For those reasons, the United States Constitution requires both procedural and substantive limits on punitive damage awards.

We turn to the facts of this case. The plaintiff, Mayola Williams, is the widow of Jesse Williams, a smoker who died of lung cancer. Plaintiff, as personal representative of Jesse Williams’s estate, sued defendant Philip Morris Inc., asserting that Philip Morris’s fraud and negligence caused Jesse Williams’s death.

The parties do not dispute this court’s prior overview of the evidence offered at trial, which was presented in the light most favorable to plaintiff. *See Williams*, 340 Ore. at 38-43 (describing facts of case). Briefly, the evidence permitted the jury to conclude that Philip Morris and other tobacco companies had known of the carcinogenic dangers of smoking since at least the 1950s. Nevertheless, Philip Morris, operating in conjunction with the rest of the tobacco industry, carried out an extensive publicity campaign, from the 1950s into the 1990s, to convince the public that doubts remained about whether smoking actually was dangerous to one’s health. No legitimate controversy existed about whether smoking was harmful to health, although Philip Morris and the rest of the tobacco industry strove to persuade the public otherwise. Philip Morris and the rest of the tobacco industry also fostered the sham impression that they were themselves vigorously investigating the health effects of smoking when, in actuality, their research institution avoided doing research on that question.

The jury further could have concluded that this program of disinformation succeeded in
tricking Jesse Williams, who smoked from the early 1950s until he died in 1997. He was highly addicted to nicotine, eventually smoking three packs of cigarettes—primarily Philip Morris’s Marlboro brand—each day. Williams resisted his family’s efforts to convince him to quit smoking, because he believed media representations that the dangers of smoking were overstated or nonexistent. See id. at 39 (presented with article about dangers of smoking, Williams had found “published assertions that cigarette smoking was not dangerous”); id. at 42 (Williams rejected arguments to quit, because “he had learned from watching television that smoking did not cause lung cancer”). When Williams was diagnosed with lung cancer, however, he asserted that the “cigarette people” had betrayed him by “lying” to him. Williams was dead within six months after the cancer was discovered.

Near the end of trial, the parties offered proposed jury instructions. One instruction submitted by Philip Morris was its proposed jury instruction No. 34, dealing with punitive damages. Among other things, that instruction provided:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant’s punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

The trial court analyzed the proposed jury instructions line-by-line with the parties, during which time Philip Morris argued that the consider-but-don’t-punish part of proposed jury instruction No. 34 was needed to ensure that this plaintiff did not receive punitive damages that should be awarded (if they were to be awarded at all) to other plaintiffs. After the trial court had reviewed Philip Morris’s proposed jury instruction No. 34 together with plaintiff’s proposed jury instruction on punitive damages—the transcript of that part of the trial court’s analysis is 50 pages long—the trial court declined to give proposed jury instruction No. 34 as proffered.

The jury returned a verdict for plaintiff. The jury’s unadjusted award was $821,485.50 in compensatory damages and $79.5 million in punitive damages. The trial court, among other things, reduced the punitive damage award to $32 million. Williams, 340 Ore. at 44.

Plaintiff and Philip Morris both appealed. The Court of Appeals reversed on plaintiff’s appeal, concluding that the trial court should not have reduced the punitive damages award. Williams v. Philip Morris Inc., 182 Ore. App. 44, 72 (2002). The Court of Appeals affirmed on Philip Morris’s cross-appeal, concluding that the trial court did not err in refusing to give Philip Morris’s proposed jury instruction No. 34. This court denied review.

The United States Supreme Court then granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals for further consideration in light of the Supreme Court’s opinion in State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003). After an extended analysis on remand, the Court of Appeals again reached the same conclusions that it had reached in its earlier opinion. Williams v. Philip
Specifically, the court concluded that the $79.5 million punitive damage award did not violate due process. The court also rejected Philip Morris’s argument that the trial court erred in refusing to give proposed jury instruction No. 34.

This court then allowed defendant’s petition for review, and affirmed the decision of the Court of Appeals. Williams, 340 Ore. at 38. This court concluded, also after an extensive analysis, that the $79.5 million punitive damage award comported with federal due process. As pertinent to the present proceeding, this court also rejected Philip Morris’s argument that the trial court should have given proposed jury instruction No. 34. Philip Morris had argued that Campbell prohibited courts from “‘adjudicat[ing] the merits of other parties’ hypothetical claims against a defendant,’” because of the “‘possibility of multiple punitive damage awards for the same conduct[.]’” Id. at 52 (quoting Campbell, 538 U.S. at 423). This court concluded, however, that those quotations from Campbell were taken out of context. “The [full] quote referred only to dissimilar acts and dissimilar claims; the Court intended to prohibit a punitive damage award from becoming a referendum on a corporate defendant’s general behavior as a citizen.” Id. at 52. But, this court stated, “evidence of similar conduct against other parties may be relevant to a punitive damage award.” Id. at 53. Because proposed jury instruction No. 34 therefore incorrectly stated federal requirements of due process of law (at least as this court understood it), this court concluded that the trial court did not err in refusing to give the instruction.

Given this court’s holding that the instruction was erroneous with respect to federal due process law, however, this court did not need to address those alternative arguments. Now, in light of the remand from the United States Supreme Court, we must consider those alternative reasons for affirmance.”

On certiorari, the United States Supreme Court reached a different conclusion. Philip Morris USA, 127 S. Ct. at 1057 et seq. The terms of the Court’s decision are important to understanding the issues presented to this court. We therefore review that opinion in some detail.

After reviewing the procedural history of the case, the Court summarized the limits that due process imposes on punitive damages awards. Although the United States Constitution requires both procedural and substantive limits on punitive damage awards, in this case the Court only addressed the procedural limits. Id. at 1063. As the Court explained, “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation.” Id. The Court identified three reasons for that conclusion: First, a defendant cannot effectively defend against claims of injuries to nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation. Second, permitting a punitive damages award to punish for harm to nonparties “would add a near standardless dimension to the punitive damages equation,” with speculation about the nonparties magnifying the risk of arbitrary treatment. And, third, the Court found that no authority existed to permit using punitive damages to punish for harm to nonparties.

That said, the Court also went on to
acknowledge that harm to nonparties (to the extent that it exists) may play a role in the punitive damages calculus in the sense that it is relevant to showing the degree of reprehensibility of a defendant’s conduct. The Court distinguished, however, between legitimate use of evidence of such harm to establish reprehensibility and illegitimate use of that evidence to punish defendant for harm it caused to nonparties. As the Court explained:

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. . . . Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

Id. at 1064. The Court repeated the same point later in its opinion:

We have explained why we believe the Due Process Clause prohibits a State’s inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

127 S. Ct. at 1065.

All in all, the Court concluded, the risks of unfairness inherent in punitive damage awards mean that state courts must “provide assurance that juries are not asking the wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers.” Id. at 1064. The Court noted that that distinction raised practical difficulties for reviewing courts, difficulties that should be met by appropriate procedures:

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases.

Id. at 1065 (emphasis in original).

Having explained the general principles of law, the Court then applied those principles to this case. “The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the ‘reasonable relationship’ equation (which it would allow) and using it directly as a basis for punishment.” Id. at 1064. The Court reviewed this court’s opinion in Williams, 340 Ore. at 35 et seq.,
and concluded that that opinion permitted direct punishment for harm to others, without limiting the use of such harm to determine reprehensibility. For that reason, the Court vacated this court’s opinion and remanded for further proceedings. The Court specifically explained its conclusion, and the nature of the remand, as follows:

As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth. Because the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally “grossly excessive.”

Id. at 1065 (emphasis added).

Under the Supreme Court’s remand, then, it is our task to apply the constitutional standard set by the Supreme Court in our consideration of the sole issue raised by Philip Morris, viz., whether the trial court erred in refusing to give proposed jury instruction No. 34. As we shall explain, however, there is a preliminary, independent state law standard that we must consider, before we address the constitutional standard that the United States Supreme Court has articulated.

A state court decision like the decision of the trial judge in this case to refuse to give proposed jury instruction No. 34 may be affirmed, without reaching the federal question, if there is an independent and adequate state ground for doing so. See, e.g., Osborne v. Ohio, 495 U.S. 103, 123 (1990) (Ohio Supreme Court, applying state law, had held that defendant had waived due process challenge by failing to object to jury instructions at trial: “We have no difficulty agreeing with the State that [defendant’s] counsel’s failure to urge that the court instruct the jury on scienter constitutes an independent and adequate state-law ground preventing us from reaching [defendant’s] due process contention on that point.”). We believe that this is such a case, i.e., one resting on an independent and adequate state ground for affirming the trial judge’s ruling.

Under Oregon law, there are two different types of error respecting jury instructions: (1) error in the failure to give a proposed jury instruction, and (2) error in the jury instructions that actually were given. See Bennett v. Farmers Ins. Co., 332 Ore. 138, 152-53 (2001) (so indicating). As noted, Philip Morris failed to preserve for our review any claim that the jury instructions actually given were erroneous. See Williams, 340 Ore. at 54 (unpreserved in Court of Appeals). This case, therefore, involves only the failure to give a proposed jury instruction.

In Oregon, there are a well-understood standard governing claims of error respecting a trial judge’s refusal to give a proffered instruction: An appellate court will not reverse a trial court’s refusal to give a proposed jury instruction, unless the proposed instruction was “clear and correct in all respects, both in form and in substance, and . . . altogether free from error.” Beglau v. Albertus, 272 Ore. 170, 179, (1975); see also Hernandez v. Barbo Machinery Co., 327 Ore. 99, 106 (1998) (“there is no error [in refusing to give a proposed instruction] if the requested instruction is not correct in all respects”); Owings v. Rose, 262 Ore. 247, 258 (1972) (“The trial court is not obliged to give an incorrect instruction, or to give the correct
portions of one which includes errors."). The effect of that standard is to require that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give. That means that, in the case of the refusal to give an instruction—and we repeat that that is all that is at stake here—the party seeking a particular instruction must be correct respecting the rule of law stated in the instruction. In this case, the United States Supreme Court has opined that there is a risk that a jury will be confused about how to take into account harm that the defendant may have caused to others. A trial court must, "upon request," protect against that risk. But, as with any other request for an instruction, the question that we first must address is whether the rest of Philip Momis's requested instruction correctly stated Oregon law. It is not enough, for example, to offer a proposed instruction that is correct in part and erroneous in part, leaving the trial court to solve the problem for itself. We also note, in passing, that asking the court to give a multiple-page instruction—essentially placing all the party's eggs in one instructional basket—involves a significant danger that the proffered instruction will be erroneous in some aspects. We turn to an examination of proposed instruction No. 34 in light of the standard just discussed.

Proposed instruction No. 34 addressed a range of issues relating to punitive damages, and plaintiff contends that it was erroneous in a number of ways that are unrelated to the issues addressed by the United States Supreme Court. Among other things, plaintiff contends that proposed instruction No. 34 would have instructed the jury erroneously that (1) the Oregon statutory factors that the jury must find in order to justify a punitive damage award were discretionary, when they are mandatory; and (2) one factor to be considered in awarding punitive damages was Philip Morris's "motiv[ation]" to make "illicit profits." As we will explain, we agree with plaintiff on both points.

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... [B]efore we examine what proposed instruction No. 34 actually would have done, we examine what it appears that defendant intended the instruction to accomplish. Oregon law provides that, in product liability actions (such as the present case), punitive damages should be awarded (if at all) based on seven criteria. ORS 30.925(2), which sets out that requirement, provides:

Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) The degree of the defendant's awareness of that likelihood;

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's ...
Proposed jury instruction No. 34 restated most of the foregoing factors—often drastically. It provided:

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant’s conduct—that is, how far the defendant has departed from accepted societal norms of conduct. Factors that you may find to bear upon the degree of reprehensibility include:

(a) The likelihood at the time that serious harm would arise from the defendant’s misconduct, beyond the harms generally understood to inhere in cigarette smoking;

(b) The degree of the defendant’s awareness of that likelihood;

(c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;

(d) The duration of the misconduct and any concealment of it;

(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to cause defendant and others to refrain from similar misconduct in the future.

(4) Finally, you may also consider the defendant’s financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct.

We turn to plaintiff’s critique of that proposed instruction. Plaintiff first argues that proposed jury instruction No. 34 incorrectly indicates that the statutory factors are discretionary and nonexclusive—"[f]actors that you may find to bear . . . include" (emphasis added)—while ORS 30.925(2) actually makes those factors mandatory and exclusive—"shall be determined and awarded based upon the following criteria." (Emphasis added.) Philip Morris offers no argument against plaintiff’s proposed reading of the statute.

We agree with plaintiff that proposed jury instruction No. 34 is defective in the way that plaintiff argues. ORS 30.925(2) uses the word “shall,” which generally indicates that something is mandatory. See, e.g., Preble v. Dept. of Rev., 331 Ore. 320, 324, 14 P.3d 613 (2000). The legislature’s instruction that any punitive damage award “shall be determined and awarded based upon the following criteria” thus limited the scope of the jury’s authority to the list that followed. Altering that list in a jury instruction (as defendant proposed to do) would therefore fly in the face of the statute. Plaintiff might have a constitutional right to a further instruction of the kind suggested by the United States Supreme Court in Williams, but nothing in that right negated the trial court’s duty to follow ORS 30.925(2) in all other respects. To have given the instruction in the form proffered by defendant thus would have been error under Oregon law.

Plaintiff also maintains that proposed jury instruction No. 34 misstates one of the statutory factors in ORS 30.925(2). While the proposed jury instruction would have permitted the jury to consider “[t]he degree...
to which the defendant was motivated by a desire to obtain illicit profits from its misconduct," ORS 30.925(2)(c) actually directs the jury to consider "[t]he profitability of the defendant's misconduct." That is, proposed jury instruction No. 34 focuses on motive or intent, while the statute instead focuses on outcome. Again, to have given the instruction in the form proffered by defendant would have been error under Oregon law.

On remand, Philip Morris makes no argument that proposed jury instruction No. 34 accurately states the law in that respect. In the prior briefing in this case, however, Philip Morris had addressed that issue in part. As to the words "illicit profits," Philip Morris had contended that those words were necessary to "prevent[] the jury from relying on [Philip Morris's] 'profits'—without regard to whether they were derived from lawful or unlawful conduct—as an indirect way of punishing lawful cigarette sales." In support, Philip Morris cited Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 441-42 (2001), in which the Court stated that "it would be unrealistic to assume that all of [defendant's] sales of [a competing product] would have been attributable to its misconduct in using a photograph of [plaintiff's product] in its initial advertising materials." Id. at 442.

Again, we agree with plaintiff that Philip Morris's justification fails, and proposed jury instruction No. 34 misstated the law. While the statutory factor requires an examination of the profitability of the misconduct—an objective fact—proposed jury instruction No. 34 instead focuses on Philip Morris's subjective state of mind regarding profit—i.e., whether Philip Morris was "motivated by a desire" to profit from misconduct. And, while ORS 30.925(2)(c) directs the jury to consider all "profitability of the misconduct," the proposed jury instruction permits the jury to consider only "illicit profits from its misconduct" (emphasis added), thus implicitly directing the jury to try to subdivide the profits from misconduct into legal and illegal parts—a circular inquiry, at best.

We see no merit to Philip Morris's argument that the jury instruction needed to refer to "illicit profits" to keep the jury from considering lawful profits, because that simply misreads the statutory factor. ORS 30.925(2)(c) does not allow the jury to consider profitability generally—it instead limits the jury's inquiry to a consideration of "the profitability of the misconduct." (Emphasis added.) But, once the profitability of the misconduct is identified, it makes no difference whether it was otherwise licit (not against law) or illicit (against law). Either way, it was relevant to the jury's inquiry.

We think that it follows from the foregoing analysis that, even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly. Accordingly, the trial court did not err in refusing to give it. Our previous conclusion to that effect is reaffirmed. And, because our ruling respecting the trial judge's refusal to give proposed jury instruction No. 34 was correct, it follows that the remaining aspects of the judgment against defendant should be reaffirmed. That latter point is true, not only because reconsidering the remaining aspects of the judgment would lie outside the scope of the Supreme Court's remand, but also because defendant has not advanced any separate arguments for doing otherwise. We therefore reaffirm our previous decision in this case in all particulars.

The court's decision in Williams v. Philip Morris Inc., 340 Ore. 35 (2006), is adhered
to. The decision of the Court of Appeals is **AFFIRMED**. The judgment of the circuit court is reversed, and the case is **REMANDED** to the circuit court for further proceedings.
A staring contest between the United States Supreme Court and the Supreme Court of Oregon over a $79.5 million punitive damage award to a smoker’s widow has entered its fifth year, and so far neither side has blinked.

The justices have twice vacated the award against the cigarette maker Philip Morris, once in 2003 and again last year, and the Oregon court has twice reinstated it. On Monday, the justices announced that they would review the case for a third time.

The scope of their review will be deliberately narrow. Philip Morris, a unit of the Altria Group, appealed the latest Oregon Supreme Court decision on two grounds. One was that the ratio of punitive damages to compensatory damages, nearly 100 to one, was so great as to be constitutionally impermissible. The second was that the Oregon court’s invocation of a state procedural law in its latest ruling against Philip Morris came too late in the day to be sustained and represented little more than an effort to evade the instruction the justices gave last year to reconsider the damages award.

The justices denied review on the first question, which would have had broad application to all punitive damages cases. In earlier rulings, the Supreme Court has suggested that punitive damages should be no more than nine times the compensatory damages, and perhaps a good deal less than that, but there is evidently not a clear majority to convert the suggestion into a firm rule.

Instead, they will hear Philip Morris’s appeal only on the second question, which applies to this convoluted case, now in its ninth post-verdict year, and to no other. The justices, in other words, appeared less concerned with making law than with asserting their own authority over that of state courts on the issue of punitive damages.

In its February 2007 ruling in Philip Morris USA v. Williams, the court overturned the award on the ground that the jurors might have been allowed to calculate the amount based on harm to other, unnamed smokers in addition to Jesse D. Williams, the man whose widow, Mayola Williams, brought the lawsuit. The 5-to-4 majority ordered the Oregon Supreme Court to reconsider the award and make sure it was not calculated based on harm to “nonparties.”

The Oregon trial court that originally heard the case had rejected a proposed jury instruction from the cigarette maker that would have told the jurors “not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own.”

In its latest ruling reinstating the $79.5 million award, the Oregon Supreme Court said the trial court had been correct to reject the proposed instruction because it was flawed as a matter of state law by including too many unrelated issues.

Philip Morris’s appeal, also called Philip Morris v. Williams but with a new docket number, 07-1216, told the justices that the state court had never raised this objection in any of the previous proceedings. “The Oregon Supreme Court’s defiance of this court’s directive should not be countenanced,” the appeal said.
The widow of a Portland janitor won another round Thursday in her nine-year legal battle with the world’s largest cigarette maker.

The Oregon Supreme Court upheld a $79.5 million punitive damage award against Philip Morris for its role in the death of Jesse D. Williams, a longtime Marlboro smoker who died of lung cancer in 1997.

“Jesse wanted to fight back against the cigarette companies,” Mayola Williams said in a statement. “If he was here, he would be very proud today.”

The ruling was a surprise.

Last year, the U.S. Supreme Court overturned the verdict on the grounds that a faulty jury instruction deprived Philip Morris of its constitutional rights.

The nation’s highest court—and the final word on federal legal cases—sent the suit back to Oregon.

But it didn’t provide specific instructions about what to do.

And with several options, Oregon’s highest court decided that the verdict could stand because Philip Morris had effectively forfeited its right to appeal the jury instruction.

Company officials condemned the Oregon court.

“This is an inexplicable attempt by the Oregon Supreme Court to avoid the ruling of the nation's highest court,” William S. Ohlemeyer, the company’s vice president and associate general counsel said in a statement.

Ohlemeyer promised to appeal again to the U.S. Supreme Court, which likely will decide next fall whether to take the case again.

To add to the intrigue, Thursday’s ruling was the second time the Oregon Supreme Court has upheld the verdict after the U.S. Supreme Court overturned it.

In 2003, the U.S. Supreme Court ordered Oregon to reconsider whether the $79.5 million punitive damage award was excessive. The U.S. Supreme Court has said that most punitive damage awards should be no more than nine times the award of compensatory damages.

The $79.5 million punitive award is nearly 100 times the $821,485 in compensatory damages awarded in the case.

But the U.S. Supreme Court did not explicitly tell Oregon to overturn the verdict.

And Oregon didn’t.

In 2006, the Oregon Supreme Court noted the 9-1 ratio, but said the company’s longstanding policy of lying about the risks of smoking was so “reprehensible” that the larger award was justified.

Benjamin C. Zipursky, a professor at Fordham University School of Law in New York, said the Oregon Supreme Court
seemed unusually committed to the verdict given “what is in some sense the obvious direction of what the Supreme Court seems to feel about this case.”

But without a direct order to reduce the verdict, the Oregon Supreme Court has so far refused to do so.

“They’re calling their bluff,” Zipursky said.

Howard Bashman, a Pennsylvania attorney who runs the influential legal blog, How Appealing, said the ruling certainly had the appearance of a state court ignoring the orders of a superior court.

But Bashman said the decision was based on state law and was carefully written in a way that doesn’t seem to thumb its nose at the nation’s highest court.

“It’s not something that would cause offense to the U.S. Supreme Court,” he said.

With Philip Morris promising to appeal, the big question is whether the U.S. Supreme Court will take the case a third time and squarely answer the question of whether the $79.5 million award is excessively large.

Bashman doubts it, saying that because of some procedural issues, the case has “vehicle problems—it’s not a good vehicle for announcing a good rule on punitive damages.”

Zipursky also said he’s not sure the Supreme Court wants to take the case again because the justices don’t want to look as if they are riding to the rescue of a tobacco company that can easily afford to pay the verdict.

Why?

“Reputational concerns,” Zipursky said.
The Supreme Court yesterday overturned a nearly $80 million verdict intended to punish the Philip Morris tobacco company for endangering the lives of smokers, and the justices set limits on how jurors can decide to make big business pay for wrongdoing.

The court’s narrowly written 5 to 4 decision said that an Oregon court had improperly let jurors calculate the harm done to many in deciding damages paid to an individual.

The court ruled that the Constitution’s due-process clause forbids a state to use punitive damages to punish a company for injury it inflicts upon others who are “essentially, strangers to the litigation,” according to the majority opinion, written by Justice Stephen G. Breyer.

The case was seen at the beginning of the term as one of the most important business decisions that the court would make under new Chief Justice John G. Roberts Jr., and it was clearly a victory for Philip Morris and other big companies. It continues the reasoning in the court’s recent rulings that punitive damages—aimed at punishing a company and deterring more wrongdoing—must be proportionate to the wrong committed.

But in sending the case back to Oregon courts for further litigation, the justices sidestepped a decision that industry had most wanted: whether to set a solid limit on how much could be awarded for punitive damages, perhaps based on a specific ratio to the actual damages done to the individual who brought the suit.

Still, business advocates praised the decision.

“This is a really important case for the business community, and a big win,” said Robin Conrad, senior vice president of the National Chamber Litigation Center of the U.S. Chamber of Commerce. She said it would be valuable to insurance companies, automakers, pharmaceutical manufacturers and other firms that have been hit with huge punitive-damages awards in recent years.

But Robert S. Peck, the Washington lawyer who represented the Oregon smoker’s widow who brought the suit, said the decision “slays a dragon that didn’t exist.” Peck contended that the jury calculated its large award not on the number of other victims but on the company’s profitability, and he predicted that Oregon courts will “reaffirm” that they “did the right thing.”

How the jury decided the amount to award is unclear, and confusion at the Supreme Court oral arguments foreshadowed the justices’ ultimate decision. “Isn’t perhaps the better course to send this back to them . . .?” suggested Justice David H. Souter, who voted with the majority to do just that.

The case involved Jesse Williams, a Portland janitor who smoked at least two packs of Marlboros every day for 45 years and died of lung cancer in 1996. Philip Morris, now owned by Altria Group, had denied during that time that its cigarettes were addictive, and at trial, lawyers for his
estate told the jury to consider the damage done to other smokers in Oregon.

The attorney for his widow, Mayola Williams, told the jury to “think about how many other Jesse Williams in the last 40 years in the state of Oregon there have been.”

The jury awarded Mayola Williams $821,000 in compensation and then tacked on the $79.5 million punitive award. (Not all states allow punitive awards; in Oregon, 60 percent of the award goes to the state, Peck said.) The nearly 100 to 1 ratio of punitive damages to compensatory damages is far outside the “single-digit” ratio the Supreme Court suggested in previous cases, but a firm limit has never been set.

The majority opinion issued yesterday agreed with Williams that the jury could hear evidence of harm to others to show that a company’s conduct was reprehensible, which could increase the punitive-damages award.

But Breyer wrote that a “jury may go no further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.”

Dissenting justices said they wondered how a judge could properly instruct a jury to consider what Justice Ruth Bader Ginsburg called our “less than crystalline precedent.”

The majority “relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant’s conduct—which is permitted—from doing so in order to punish the defendant ‘directly’—which is forbidden,” Justice John Paul Stevens wrote. “This nuance eludes me.”

The court’s split in recent decisions limiting punitive damages is far different from the ideological differences that are apparent in many decisions on social issues. Breyer was joined by Roberts and Justices Samuel A. Alito Jr., Anthony M. Kennedy and David H. Souter.

Stevens, who in the past has supported limiting the amounts of punitive awards, joined Ginsburg and Justices Antonin Scalia and Clarence Thomas.

The case was sent back to the Oregon Supreme Court, which had upheld the large punitive award. Breyer wrote that the application of the court’s standard may “lead to the need for a new trial, or a change in the level of the punitive damages award.”

The case is Philip Morris USA v. Williams, case No. 05-1256.
The Oregon Supreme Court today affirmed a $79.5 million punitive damages award against tobacco giant Philip Morris.

The decision comes about three years after the United States Supreme Court ordered the Oregon courts to reconsider the verdict in what some interpreted as a strong suggestion to reduce it significantly.

But the Oregon Supreme Court said Philip Morris’ conduct justified such a large award.

“Philip Morris’ conduct here was extraordinarily reprehensible, by any measure of which we are aware,” Justice Michael Gillette wrote for the unanimous court. “It put a significant number of victims at profound risk for an extended period of time. The state of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.”

Gillette wrote that “Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group.”

The award stems from a lawsuit by the family of Jesse D. Williams, a former Portland janitor and longtime smoker who died of lung cancer in 1997.

During the 1999 trial, lawyers for the Williams family argued for a large punitive damages award because Philip Morris officials had known for more than half a century that smoking was deadly, had consistently downplayed the health risks and had manipulated the levels of nicotine to keep smokers addicted.

In addition to the $79.5 million punitive damages award, which at the time was the largest smoking-death verdict in the country, the jury awarded more than $800,000 in compensatory damages.

On appeal, Philip Morris lawyers argued that punitive damages were too high. They pointed out that the U.S. Supreme Court had said there must be a reasonable ratio between the compensatory and punitive damage awards.

The nearly 100-to-1 ratio in the Williams case was too big, Philip Morris lawyers argued.

The Oregon Court of Appeals upheld the award, and the Oregon Supreme Court refused to take it.

Philip Morris appealed to the U.S. Supreme Court, which in 2003 vacated the award and ordered the Oregon Court of Appeals to reconsider the case in light of a U.S. Supreme Court opinion on punitive damages out of Utah.

The Oregon Court of Appeals in 2004 upheld the award.
The Supreme Court tossed out a large punitive damage verdict against cigarette maker Philip Morris on Monday, telling lower court judges to reevaluate the size of the award.

The court set aside a $79.5-million award that was designed to punish the tobacco firm for the lung cancer death of an Oregon janitor. In another personal injury case, it set aside a $3-million verdict in which jurors sought to punish DaimlerChrysler for the death of a Kentucky man who was ejected from his Dodge Ram pickup in a crash.

The court’s one-line orders Monday followed a major ruling in April that sharply limited the power of juries to punish companies with huge punitive damage awards. The justices stressed that civil lawsuits are intended to compensate plaintiffs for their losses if they were injured and wronged by another. It is not a system for punishing unpopular industries and “unsavory businesses,” the court said.

Since the 1970s, an increasing number of lawsuits filed by injured individuals have resulted in multimillion-dollar verdicts against corporations. Typically, the jurors are asked to award actual damages to cover the victim’s losses and then award a second, larger amount to punish the company for its wrongdoing.

In its April decision in State Farm vs. Campbell, the high court warned judges that they must rein in punitive damage verdicts that greatly exceed the actual losses of the victims who brought the lawsuit.

In that case, a Utah jury had ruled against the auto insurer with $145 million in punitive damages for having refused to pay the full verdict against a man who caused an accident that killed another driver.

Ordinarily, after handing down such a ruling, the justices act on a series of pending appeals in related cases and send them back to lower courts to be reevaluated.

They did just that in May when they reversed two large verdicts against Ford Motor Co., including a $290-million punitive verdict in California. In that case, a Stanislaus County jury had awarded more than $6 million to a family that suffered injuries and a death when its Bronco rolled over, plus $290 million to punish Ford for what it said was gross wrongdoing in manufacturing a defective vehicle.

In Monday’s action involving Philip Morris and DaimlerChrysler, the high court did not rule out the possibility of punitive damages. Its order told lower courts that the amount of these damages should be in line with the actual losses of the victim.

Only in the rarest circumstance can the punitive verdict “exceed a single-digit ratio” compared with the actual damages, said Justice Anthony M. Kennedy. For example, if a jury awards $1 million to a plaintiff for actual losses, the punitive damages should not exceed $9 million, he said.

In the Oregon case, lawyers for Philip Morris had appealed, saying “the 97-1 ratio of punitive-to-compensatory damages in this
case cannot stand constitutional scrutiny.”

Jesse Williams started smoking during the 1950s and continued a three-pack-a-day habit for four decades. He died of lung cancer in 1997. His family sued Philip Morris and won $521,000 in compensatory damages. The jury tacked on $79.5 million in punitive damages. The verdict was upheld last year by the Oregon Supreme Court.

On Monday, the court granted an appeal by Philip Morris, vacated the lower court ruling and sent the case back to Oregon “for further consideration in light of State Farm vs. Campbell.”

The tobacco industry has several other large punitive damage awards on appeal, including four in California.

Last month, a state appeals court in San Francisco reduced the punitive damages awarded to a former smoker with lung cancer to $9 million from $25 million. But the court refused Philip Morris’ request to toss out the award entirely, saying $9 million was “permissible and appropriate” because Philip Morris had “touted to children what it knew to be a cumulatively toxic substance.”

Two other cases in California that resulted in punitive damages of $28 billion and $3 billion were later reduced to $28 million and $100 million, respectively.

Shares of Philip Morris parent Altria Group Inc. rose 34 cents Monday to $45.03. DaimlerChrysler gained 36 cents to $35.94. Both trade on the New York Stock Exchange.
A state jury in Portland, Ore., yesterday ordered the largest award in a smoking-related lawsuit, deciding that the Philip Morris Companies must pay $81 million to the family of a man who smoked Marlboro cigarettes for four decades before he died.

The verdict, coming just a month after a San Francisco jury awarded $51 million in another case brought by an individual smoker against Philip Morris, could indicate that the tobacco industry's legal fortunes may have shifted, analysts said. In recent years, the public has witnessed a constant drumbeat of documents damaging to cigarette makers, which industry analysts say may be a factor in the jury decisions.

For example, in both cases involving Philip Morris, the juries called for large punitive damages, which are meant to punish a company for its behavior. In yesterday's decision, the jury awarded $79.5 million in punitive damages and $1.6 million in compensatory damages to the family of Jesse Williams, who died in 1997, five months after lung cancer was diagnosed. In the San Francisco case, the jury awarded $50 million in punitive damages.

Yesterday Mr. Williams's wife, Mayola, said he had had a dying wish. "He wanted to make cigarette companies stop lying about the health problems of smokers," she told The Associated Press. "This jury agreed with his goals."

Philip Morris, which is appealing the California verdict, said yesterday that it would also appeal the Oregon verdict. Higher courts have thrown out the few previous victories by smokers in cigarette-related lawsuits, often on procedural grounds.

"No verdict has ever withstood an appeal, and we don't believe this will be a first one," said Gregory Little, the associate general counsel for Philip Morris, which is the country's biggest cigarette maker.

But tobacco industry analysts said yesterday's decision was a particular setback for cigarette makers because state product liability laws in Oregon are far tougher than those in California or Florida, the other states in which producers have suffered legal losses.

In Oregon, a smoker is barred from receiving an award if a jury determines that he or she bore more than 50 percent liability for the problem over which a suit was brought.

Cigarette company lawyers argued that Mr. Williams was aware of the health risk when he decided to continue smoking. The jury determined that Mr. Williams and Philip Morris equally shared liability.

William A. Gaylord, a lawyer for the Williams family, said they had acknowledged that Mr. Williams was partly responsible for his death.

"The problem has been that Philip Morris and other cigarette companies have never accepted an ounce of responsibility," Mr. Gaylord said. "They deny everything. They
essentially say to their very best customers that you get what’s coming to you for believing us.”

Gary Black, a tobacco industry analyst with Sanford C. Bernstein & Company in New York, said that added to the California decision, yesterday’s verdict suggested that the industry’s $206 billion settlement last year with 46 states had failed to put its legal troubles to rest.

Under that agreement, which resolved lawsuits brought by the states to recover health care expenses related to smoking, individual smokers and groups of them can still sue. Four states had earlier settled their claims in deals with the industry.

“I think the industry has got to get its head out of the sand and stop believing that the settlement got them closure,” Mr. Black said. “With all the documents and whistleblowers out there, juries are increasingly going to award damages.”

In trading after the verdict, Philip Morris stock fell $3.4375 a share to close at $37.75 a share.

In the California case last month, the jury ordered Philip Morris to pay $51.5 million to Patricia Henley, who said her lung cancer had been caused by more than 35 years of smoking. That verdict was the largest award of its kind until yesterday.

Cigarette industry officials have portrayed that case as an aberration, pointing to a number of recent legal victories. Earlier this month, a Federal jury in Akron, Ohio, ruled that tobacco companies did not have to repay the costs of treating smoking-related illnesses to dozens of union health and benefit plans in Ohio.

But analysts said the back-to-back losses by Philip Morris in individual cases suggested that cigarette makers were likely to see more defeats and escalating awards.

“It does seem to appear in the last two cases that the juries wanted to punish Philip Morris and the industry,” said Bonnie Zoller, an analyst with Credit Suisse First Boston Corporation in New York.

The Oregon lawsuit was brought by the wife and children of Mr. Williams, a former janitor in the Portland school system who was 67 when he died. It charged that Philip Morris knew cigarettes caused cancer and misrepresented that information.

In making its finding, the Oregon jury also had to conclude that the misrepresentations took place over the past decade because state law limits the time in which plaintiffs can seek damages.

There are more than 500 smoking-related lawsuits pending against Philip Morris. President Clinton also announced this year that he had directed the Justice Department to begin preparing a lawsuit against cigarette makers to recover Medicare and other Federal money spent treating illnesses related to smoking.

Mr. Black said a Federal lawsuit could be in the industry’s interest because it might provide a way to resolve individual cases as well.

“The industry has got to make a decision,” he said. “They have to recognize that the tide has turned and decide they have to get some type of settlement. Either that or they have to build in the anticipated price of litigation in the cost of cigarettes.”
Conspicuous in the Supreme Court’s lengthy and scholarly review Wednesday of the role punitive damages verdicts play in punishing serious wrongdoing, especially by big corporations, there is this crucially significant statement: “The real problem, it seems, is the stark unpredictability of punitive awards.” And, for that problem, the Court has found a simple, easy-to-use solution: a low numerical ratio between the damages awarded to compensate for actual loss or harm and the damages awarded on top of that to punish or to make an example of the wrongdoer. In the case before it Wednesday, the Court set the ratio at 1-to-1. That approach provides a rule-of-thumb that may well guide the Court as it looks, in the future, at a wide array of punitive verdicts.

It is necessary, in examining what the Court has done in Exxon Shipping Co. v. Baker (07-219), the celebrated case of the Exxon Valdez’s oil spill in Alaskan waters 19 years ago, to acknowledge that this is not a constitutional ruling, that it is only about the Court’s common-law powers, and that it arises only in the context of law governing maritime commerce. But to look at it only in those narrow terms is to miss the signal that the Court is giving—that is, it has grown highly skeptical that it can spell out, in words rather than numbers, workable guidelines that could bring some sense—some consistency—to punitive damages awards.

For years, the Court has had on display its prevailing view that punitive damage awards in the modern era have gotten out of control. It has undertaken, under the Constitution’s Due Process Clause, to lay down a number of verbal standards that supposedly could keep juries in check when they ponder punitive verdicts. But, try as it might, its efforts have not achieved that objective; year after year, corporations return again and again to the Court, arguing anew that juries and some lower courts don’t get it, that the problem of punitives is not getting solved.

In Justice David H. Souter’s long and detailed opinion in Exxon Shipping, the Court makes clear that it has not seen convincing evidence that juries are acting in runaway fashion, or that the actual dollar amounts of punitive awards are far too high. It homes in on the central problem it sees: “stark unpredictability,” which it perceives as an indication that maybe the process is not fair because of its inconsistency.

That comes in a part of the opinion where the Court was examining punitive damages in a much wider context than merely maritime law, or federal common law. Poring over the options it sees for dealing with the unpredictability phenomenon, it finds that “verbal formulations” of punitive damages limits have not worked to produce consistency. The Court says explicitly that it is “doubtful that anything but a quantified approach will work.” It expresses its concern over those trying to manage a system without numerical guidelines being “left at large, wandering in deserts of uncharted discretion.”

It then turns to alternatives for a verbal approach: a hard dollar ceiling on any punitive award, or “pegging punitive to
compensatory damages using a ratio or maximum multiple.” And, since it is operating in the Exxon Shipping case as a common-law court, unguided by constitutional or statutory mandates, it is free to choose which of those alternatives to apply in the maritime context. It chooses the ratio approach, and settles here on the 1-to-1. (It should be noted, as a matter of caution, that this particular 1-to-1 gauge is chosen in a case where corporate behavior was found to be more reckless than malicious, and where there was a sizable compensatory verdict; a somewhat higher ratio—but still a number—might be appropriate without those two factors in a future case.)

Justice Souter’s opinion goes on to reject the suggestion that the Court, in so choosing, is engaging too much in policy and too little in principle. The opinion comments: “Traditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem it created, simply by calling quantified standards legislative. . . . History certainly is no support for the notion that judges cannot use numbers.”

Since it is the Court that decides constitutional standards, perhaps the same sentiments as expressed by Justice Souter might apply in that context, too. If so, those making future Due Process claims against punitive awards might well suggest that there is merit to going to the numerical approach there, too. True, Justice Souter does say, at one point, that the Court was reaching for “more rigorous standards” in the maritime/common law arena than the Constitution would require, that may not mean that the Court, in time, would find that using the numbers is a better alternative than the verbal formulations the Court has laid down in judging the constitutionality of punitive verdicts.

What’s more, in a final footnote in the opinion, Justice Souter suggests, even in the Exxon Shipping context, “the constitutional outer limit may well be 1:1.”

It hardly will be a surprise if lawyers for corporations facing large punitive awards will find ways to cite Exxon Shipping as persuasive authority for adopting the numbers approach as a workable formula under the Constitution.
Plaintiffs are all smokers who allege that Defendant cigarette manufacturers committed fraud when they advertised cigarettes as "light" or "low in tar" without including actual tar and nicotine levels. Plaintiffs claim this action violated the Maine Unfair Trade Practices Act. Defendants claim that Plaintiffs' action is preempted by the Federal Cigarette Labeling and Advertisement Act. The First Circuit ruled that the Plaintiffs' state law action was not explicitly or implicitly preempted by federal law, overturning the District Court.

**Question Presented:** To ensure that interstate commerce is "not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations," Congress has precluded the States from imposing any "requirement or prohibition based on smoking and health... with respect to the advertising or promotion of any cigarettes," and has authorized the Federal Trade Commission to regulate "unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. §§ 1331, 1334, 1336. Based on studies suggesting that cigarettes with comparatively lower tar and nicotine yields may present fewer health risks, the FTC requires tobacco companies to disclose those yields as measured using an FTC-mandated test, and has authorized tobacco companies to advertise cigarettes using "descriptors," such as "light," as shorthand references to the numerical test results. Respondents in this case contend that such descriptors are misleading, in violation of a state deceptive trade practices statute.

The question presented is whether state-law challenges to FTC-authorized statements regarding tar and nicotine yields in cigarette advertising are expressly or impliedly preempted by federal law.

**Stephanie GOOD, Lori A. Spellman and Allain L. Thibodeau, individually and on behalf of others similarly situated, Plaintiffs-Appellants v. ALTRIA Group, Inc., and Philip Morris USA Inc., Defendants-Appellees**

United States Court of Appeals for the First Circuit

**Decided August 31, 2007**

[Excerpt: some footnotes and citations omitted.]

HOWARD, Circuit Judge

The plaintiffs appeal from the entry of summary judgment for the defendants, Philip Morris USA Inc. and its parent company (collectively, "Philip Morris"), on state-law claims based on the marketing of "Light" cigarettes. The district court ruled that these claims were preempted by the Federal Cigarette Labeling and Advertising
Act (the “FCLAA”), which provides that “[n]o 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) (1998). Because we find that the claims are not preempted, and because Philip Morris’s alternative arguments for affirmance are also unavailing, we vacate the decision of the district court and remand for further proceedings.

I.

The plaintiffs, who say they have smoked Marlboro Lights for at least fifteen years, claim that Philip Morris has employed unfair and deceptive practices in “designing, manufacturing, promoting, marketing and selling Marlboro Lights and Cambridge Lights purporting to be ‘light’ and having ‘Lowered Tar and Nicotine,’ all while [it] knew those cigarettes would not deliver less tar or nicotine to the consumer.” These brands have rings of ventilation holes in their filters, causing air to mix with the smoke as the smoker draws on the cigarette. As a result, “Lights” register lower levels of tar and nicotine than their so-called “full-flavor” counterparts under a test known as the “Cambridge Filter Method.” This test uses a machine to “smoke” a cigarette, collecting the resulting tar and nicotine in a filter for weighing.

The plaintiffs allege that a person smoking “light” cigarettes, however, engages in unconscious behaviors that essentially negate the ventilation effect, such as taking more frequent, voluminous, or longer puffs, covering the air holes with the lips or the fingers, or smoking additional cigarettes. Due to such “compensation,” which the plaintiffs attribute to the addictive nature of nicotine, they assert that a smoker consumes the same quantities of tar and nicotine from light cigarettes as from full-flavored ones. The plaintiffs explain that the relative levels of these substances bear on a reasonable consumer’s decision on which cigarette to purchase because consumers understand that reducing the quantities of tar and nicotine in cigarettes reduces their adverse health effects. Thus, the plaintiffs allege that Philip Morris has misrepresented material facts by describing its “Lights” as such or as having “lower tar and nicotine,” and that Philip Morris—which was aware of the “compensation” phenomenon before it began marketing its “Lights” brands—did so with the intent to deceive.

The plaintiffs claim that these misrepresentations amount to unfair or deceptive acts or practices in violation of the Maine Unfair Trade Practices Act. Me. Rev. Stat. Ann. tit. 5, § 207 (2002). This statute entitles any person who suffers a loss of money or property as a result of such acts or practices to sue for “actual damages, restitution and for . . . other equitable relief.” Id. § 213(1). The plaintiffs have expressly disclaimed any “damages for personal injuries,” but they do seek other relief, including the return of the sums they paid to purchase Marlboro Lights and Cambridge Lights, in addition to punitive damages and the attorneys’ fees as authorized by the Act. The plaintiffs also seek to certify a class of all purchasers of Marlboro Lights or Cambridge Lights in Maine through November 2002.

In response to the plaintiffs’ amended complaint, Philip Morris promptly moved for summary judgment. Philip Morris argued that the plaintiffs’ claims were (1) expressly preempted by the FCLAA, (2) implicitly preempted by “the efforts of Congress and the [Federal Trade Commission] for 40
years to implement a national, uniform policy of informing the public about the health risks of smoking," and (3) for similar reasons, not cognizable under the Maine Unfair Trade Practices Act, which does not apply to "[t]ransactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under the statutory authority of the . . . United States." Me. Rev. Stat. Ann. tit. 5, § 208(1) . . .

[Starting in 1959, the FTC required cigarette manufacturers to report the amount of tar and nicotine in their cigarettes based on the Cambridge Filter Method. The FTC also reported the test results to Congress through 1998, continuing even after the cigarette companies agreed to voluntarily report the test results in their advertising.]

Based on this regime, Philip Morris characterized the lawsuit as "a challenge to the FTC’s regulatory scheme," because "terms like ‘light’ and ‘lowered tar’ . . . convey precisely the same comparative information" as the tar and nicotine measurements derived from testing under the Cambridge Filter Method. The district court agreed, reasoning that

To respond to Plaintiffs’ claims, Philip Morris would have to tell the public that the FTC Method test, though accurate in the laboratory, was inaccurate in real life, and that light cigarette smokers . . . infused greater amounts of nicotine and tar than the designation ‘Lights’ and ‘Lowered Tar and Nicotine’ would imply. But, this information, if conveyed through a form of advertising, would run head first into . . . the comprehensive federal scheme governing the advertising and promotion of cigarettes.

436 F. Supp. 2d at 152. Finding the plaintiffs’ claims thus "grounded on Philip Morris’s ‘advertising or promotion of . . . cigarettes labeled in conformity with the provisions of federal law and regulation,’” the district court concluded that they were expressly preempted by the FCLAA. Id. at 153; (quoting 15 U.S.C. § 1334(b)). The court did not decide Philip Morris’s alternative arguments for summary judgment. This appeal followed.

II.

The plaintiffs challenge the ruling below as at odds with Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), where a plurality of the Supreme Court held that some—but not all—actions for damages under state law are expressly preempted by the FCLAA. In response, Philip Morris argues that the district court correctly found the plaintiffs’ claims preempted under Cipollone. Philip Morris simultaneously urges us to affirm the entry of summary judgment in its favor on the alternative grounds not reached below, namely, that the plaintiffs’ claims are implicitly preempted by federal law or that they complain of “actions otherwise permitted under laws” and therefore cannot serve as the basis for liability under the Maine Unfair Trade Practices Act. We review these arguments de novo. See Philip Morris Inc. v. Harshbarger, 122 F.3d 58, 62 (1st Cir. 1997).

A.

"A fundamental tenet of our federalist system is that constitutionally enacted federal law is supreme to state law. As a result, federal law sometimes preempts state law either expressly or by implication." N.H. Motor Transport Ass’n v. Rowe, 448 F.3d 66, 74 (1st Cir. 2006). Preemption questions ultimately turn on congressional intent, and
the primary indicator of that intent is the text of the congressional act claimed to have preemptive effect. But "[t]he text of the preemption provision must be viewed in context, with proper attention paid to the history, structure, and purpose of the legislative scheme in which it appears." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001).

I.

As noted at the outset, the FCLAA’s preemption clause states that “[n]o 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). Those provisions mandate that the packages of all cigarettes sold in the United States—and, in general, their advertisements—bear one of a rotating series of labels warning about the adverse health effects of smoking, *Id. §§ 1333(a), (c).* But no additional “statement relating to smoking and health... shall be required on any cigarette package.” *Id.* § 1334(a). The FCLAA also bans cigarette advertising “on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission,” *Id.* § 1335, and preserves the authority of the FTC over “unfair or deceptive acts or practices in the advertising of cigarettes.” *Id.* § 1336.

These provisions were added to the FCLAA through the Public Health Cigarette Smoking Act of 1969, enacted as the restrictions on cigarette advertising contained in the prior version of the FCLAA were set to expire. As the expiration date approached, both federal and state authorities prepared to resume their efforts to regulate cigarette advertising. *See Cipollone*, 505 U.S. at 514-15. Thus, Congress amended the FCLAA to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of warning notices and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

With these purposes in mind, the *Cipollone* Court considered whether the FCLAA’s preemption clause barred a state-law suit for damages brought by a smoker who had allegedly developed lung cancer from the defendants’ cigarettes. 505 U.S. at 509-10. The smoker asserted a number of common law causes of action, including strict liability, negligent failure to warn, breach of express warranty, fraudulent misrepresentation, and civil conspiracy. The court of appeals held that, while § 1334(b) did not expressly preempt common law claims, the FCLAA’s labeling requirement “revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and...
health.” *Id.* at 517. Accordingly, the court of appeals ruled that the plaintiff’s claims “challenging the adequacy of the warnings on labels or in advertising or the propriety of [the defendants’] advertising and promotional activities” were implicitly preempted.

A plurality of the Court disagreed with this analysis, holding that “the preemptive scope of the [FCLAA] is governed entirely by the express language in [§ 1334(b)],” *id.*, which did, in fact, reach some common law actions. *Id.* at 521-23. But because “[f]or purposes of [§ 1334(b)], the common law is not of a piece,” the plurality explained that it had to “look to each of [the smoker’s] common-law claims to determine whether it is in fact pre-empted.”

... [T]he plurality determined that the FCLAA preempted the claim, pleaded as a failure to warn, that the defendants’ “advertising and promotions should have included additional, or more clearly stated warnings,” because it relied on “a state-law ‘requirement or prohibition... with respect to... advertising or promotion.’” *Id.*

The plurality proceeded to consider the smoker’s two theories of fraudulent misrepresentation. The first, that the defendants, “through their advertising, neutralized the effect of federally mandated warning labels,” was preempted by the FCLAA. *Id.* at 527. As the plurality explained, this theory was “predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards of smoking,” which is itself “merely the converse of a state-law requirement that warnings be included in [such] materials.” *Id.* This fraudulent misrepresentation claim, then, was “inextricably related to” the failure-to-warn claim and therefore also premised on a “requirement or prohibition based on smoking and health” imposed by state law. *Id.* at 528.

But the plurality reached a different conclusion as to the smoker’s second fraudulent misrepresentation theory: “intentional fraud and false misrepresentation both by false misrepresentation of a material fact and by concealment of a material fact.” *Id.* First, the plurality held that the FCLAA does not preempt fraudulent concealment claims that “rely on a state-law duty to disclose such facts through channels of communication other than advertising or promotion,” *e.g.*, in the case of a state law requiring cigarette manufacturers “to disclose material facts about smoking and health to an administrative agency.” *Id.* Second, the plurality held that fraudulent-misrepresentation claims that do arise with respect to advertising and promotion (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by [§ 1334(b)]. Such claims are predicated not on a duty “based on smoking and health” but rather on a more general obligation—the duty not to deceive.

*Id.* at 528-29. The plurality saw this result as consistent with the text, structure, and purpose of the FCLAA. *Id.* at 529. First, the FCLAA “offered no sign that [Congress] wished to insulate manufacturers from longstanding rules governing fraud”—in fact, the Act “explicitly reserved the FTC’s authority to identify and punish deceptive advertising practices...” *Id.* Second, reading § 1334(b) to exclude fraud claims would not frustrate the FCLAA’s stated goal

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2.

The parties agree that whether the FCLAA expressly preempts the plaintiffs’ claims depends on how best to categorize them by analogy to the various causes of action considered in Cipollone. In doing so, as the district court recognized, we must look beyond the plaintiffs’ own classification of their claims and to their actual substance.

The plaintiffs seek relief under the Maine Unfair Trade Practices Act, which, in relevant part, outlaws “unfair or deceptive acts or practices in the conduct of any trade or commerce.” Me. Rev. Stat. Ann. tit. 5, § 207. Though this prohibition encompasses various kinds of behavior, including “a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances,” Maine v. Weinschenk, 2005 ME 28, 868 A.2d 200, 206 (Me. 2005), the substance of the plaintiffs’ claim is that Philip Morris has falsely represented certain of its brands as “light” or having “lower tar and nicotine” although they deliver the same quantities of these ingredients to a smoker as do “full-flavored” cigarettes. So, under the functional approach, we consider how this particular theory—as opposed to a more generalized claim under the Maine Unfair Trade Practices Act—resembles the various common-law causes of action considered in Cipollone. If, as the plaintiffs argue, they have indeed alleged fraudulent misrepresentation claims, the claims are not preempted because, as Cipollone explains, they are not premised on a state-law duty based on smoking and health. But if, as Philip Morris argues, the plaintiffs have in reality alleged failure-to-warn or warning neutralization claims, the claims are preempted.

... [T]he district court concluded the plaintiffs’ claims were expressly preempted by the FCLAA as construed by Cipollone.

We differ with the district court’s view of the fit between the plaintiffs’ theory and the Cipollone taxonomy and, more fundamentally, of Cipollone itself. To start, we do not read Cipollone to hold that the FCLAA preempts claims “grounded on [a defendant’s] ‘advertising or promotion of . . . cigarettes labeled in conformity with the provisions of federal law and regulation,” as the district court ultimately explained its conclusion. 436 F. Supp. 2d at 153. Cipollone reasoned that “each phrase” in; § 1334(b)—not just the phrase “with respect to the advertising or promotion of any cigarettes”—“limits the universe of common-law claims pre-empted by the statute.” 505 U.S. at 524. So “[t]he appropriate inquiry is not whether a claim challenges the ‘propriety’ of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising and promotion.” Id. at 525. A claim is not preempted, then, merely because it is “grounded on” the advertising or promotion of cigarettes with FCLAA-compliant labels.

Nor is a claim preempted merely because it arises out of the adverse health consequences of such cigarettes, as both the
reasoning and the result in Cipollone make clear. There, in fact, all of the plaintiff's claims were "based on smoking and health" in the sense that they "alleged that [she] developed lung cancer because she smoked cigarettes," 505 U.S. at 509, yet the Court held that the FCLAA preempted only some of them. And the fate of each claim depended on "whether the legal duty that is the predicate of the common-law damages action"—not the claim itself—met the criteria of § 1334(b). Id. at 524. Thus, for example, while the theory that the defendants in Cipollone "had expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences," id. at 509, was clearly based on smoking and health, it was not preempted because "it [did] not rest on a duty imposed under state law," but on the defendants' own "contractual commitment voluntarily undertaken," i.e., the warranty. Id. at 526. Accordingly, the FCLAA preempts only those claims based on a "requirement or prohibition based on smoking and health under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in accordance with" the FCLAA. 15 U.S.C. § 1334(b). It does not preempt claims because they are "based on smoking and health."

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Because the state-law "duty not to deceive" is one such "more general obligation," it falls within Cipollone's express holding that "claims based on allegedly false statements of material fact made in advertisements" survive FCLAA preemption. 505 U.S. at 528-29. In line with this holding, courts have routinely (though not uniformly) concluded that the FCLAA does not preempt fraudulent misrepresentation claims arising out of false statements made in advertising or promoting cigarettes. A number of these decisions, in fact, hold that the FCLAA does not preempt the very theory the plaintiffs advance here—that a cigarette manufacturer has perpetrated fraud by stating that its light brand offers lower tar and nicotine than its full-flavored one.

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... Unlike the district court, then, we do not see the plaintiffs' claims as arising out of what Philip Morris "should have said," but rather, what it did in fact say: that Marlboro Lights and Cambridge Lights have "lower tar and nicotine" than their full-flavored counterparts.

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... The district court's ruling was in error.

B.

Philip Morris also challenges the plaintiffs' claims as impliedly preempted by federal law. Even in the absence of express preemptive language—which the FCLAA contains, but which we have concluded does not reach the claims in this case—federal law can preempt state law by implication in two other ways. See, e.g., California v. ARC Am. Corp., 490 U.S. 93, 100 (1989). First, "Congress implicitly may indicate an intent to occupy an entire field to the exclusion of state law." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988). "Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ARC Am. Corp., 490 U.S. at 100-01; And,
whether through field or conflict preemption, "state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

Philip Morris does not argue that either Congress or the FTC has evinced an intent to occupy the entire field of cigarette advertising, or even the narrower field of low-tar cigarette advertising. Nor does Philip Morris protest that complying with both the state law the plaintiffs say has been violated and some contrary federal law would be impossible. Instead, Philip Morris maintains that the "[p]laintiffs' claims conflict with the FTC's 40-year history of regulation and control over the development, testing and marketing of low tar cigarettes, as well as the reporting of tar and nicotine measurements pursuant to the FTC Method and the use of descriptors substantiated by those measurements." Because Philip Morris has limited its implied preemption argument to the so-called "frustration-of-purpose" theory, see *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873-74 (2000); it cannot prevail unless "the rule of law for which [the plaintiffs] contend [stands] 'as an obstacle to the accomplishment and execution of the important means-related federal objectives' at stake." *Id.* at 881.

In identifying those objectives, Philip Morris argues that "Congress and the FTC have both sought uniform, national standards for cigarette advertising with respect to smoking and health. And State-law actions like this one would create a different standard of deceptiveness that would plainly conflict with these goals." At the outset, we reject the notion that the plaintiffs' claims would interfere with any congressional designs on cigarette advertising. It is true that, in the FCLAA, "Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health." *Reilly*, 533 U.S. at 548. By the same token, however, "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud," which are not so motivated. *Cipollone*, 505 U.S. at 529. As we have taken pains to elucidate, the plaintiffs' claims seek to enforce state-law prohibitions on fraud, not state-law prohibitions on cigarette advertising based on smoking and health. So their asserted rule of law—that the statements "light" and "lower tar and nicotine" constitute fraud—does not interfere with the goals of the FCLAA, which do not include establishing any national "standard of deceptiveness" for cigarette advertising.

* * *

Philip Morris . . . founds its implied preemption claim on the FTC's oversight of cigarette advertising under the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. . . . [W]e do not agree that the FTC's exercise of its authority in this area has preempted state-law damages actions, like this one, alleging that a cigarette manufacturer has engaged in such acts or practices through its use of the terms "light" and "lower tar and nicotine."

In brief, the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 45(a), and empowers the Commission both to define and enforce that prohibition in a number of ways relevant here. The Commission may prescribe either informal "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices," *id.* § 57a(a)(1)(A), or, pursuant to notice-and-comment procedures, *see id.* §§ 57a(b)-(e), formal rules which define those
acts and practices “with specificity,” id. § 57a(a)(1)(B). In addition, the Commission may issue cease-and-desist orders against those engaged in violations of the Act. Id. § 45(b). The FTC may enforce such orders—as well as its formal rules—by suing violators for either civil penalties, id. § 45(m), or “such relief as the court finds necessary to redress injuries to consumers” or other injured parties, id. §§ 57b(a), (b).

The FTC has regularly trained these powers on tar and nicotine claims in cigarette advertising; as the district court observed, “the tobacco industry is hardly unregulated in what it says to consumers about its products, including light cigarettes.” 436 F. Supp. 2d at 151. ... Under the established rules of conflict preemption we have recited, we must determine whether the FTC’s oversight of tar and nicotine claims manifests a federal policy intended to displace conflicting state law. . . .

[Recounting the history of FTC regulation of cigarette advertising, including a proposed rule requiring manufacturers to disclose tar and nicotine levels that was put on hold when the manufacturers voluntarily agreed to make the disclosures.]

Based principally on these exercises of authority over tar and nicotine claims, Philip Morris argues that the FTC has expressed a “policy of allowing their use so long as substantiated with the FTC Method numerical results and requiring publication of those results in all brand advertisements.” Because the plaintiffs’ claims “stand[] as an obstacle” to this policy, Philip Morris continues, they are implicitly preempted. Like the plaintiffs, we see a number of problems with this argument.

First, since its 1969 agreement with the tobacco companies, the FTC has never issued a formal rule specifically defining which cigarette advertising practices violate the Act and which do not. . . .

. . . [F]ormal rulemaking comes with a host of procedural protections under the Administrative Procedure Act (“APA”), such as notice of the proposed rule, an opportunity for interested parties to participate, a statement of the basis and purpose of any rule adopted, and its publication in the Federal Register. 5 U.S.C. § 533 (2007). Limiting the preemptive power of federal agencies to exercises of formal rulemaking authority, then, ensures that the states will have enjoyed these protections before suffering the displacement of their laws. This reasoning has particular force in the case of the FTC Act, which imposes procedural requirements on the Commission’s rulemaking powers that exceed those of the APA. 15 U.S.C. §§ 57a(c)-(e). Indeed, courts and commentators have understood these additional safeguards to reflect a congressional concern—well-documented in their legislative history—over the preemptive effect of FTC regulation on state consumer protection law.

Second, apart from the likely import of its rulemaking provisions, the FTC Act raises an additional hurdle to Philip Morris’s implied preemption theory. . . . The Act states that “[r]emedies provided in [15 U.S.C. § 57b] are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law.” 15 U.S.C. § 57b(e). And § 57b, as we have observed, empowers the Commission to sue for relief on behalf of consumers against those who violate its cease-and-desist orders against unfair or deceptive acts or practices. We do not think it a stretch, then, to say that when the FTC merely issues such an order, but never uses it as the basis for a subsequent lawsuit, the order does not supplant state-
law rights of action any more than the lawsuit would have. . . .

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Third, as the one court squarely holding that FTC consent orders can preempt state law has recognized, the mere entry of such an order dealing with a particular practice “is insufficient to preclude supplemental state regulation.” Gen. Motors Corp., 897 F.2d at 39. Thus, even if we were to agree that FTC action short of formal rulemaking—including consent orders—can implicitly preempt state law in some cases, we do not think that this is one of them, because the plaintiffs’ state-law claims do not pose a threat to any federal regulatory objectives apparent in the FTC’s approach to tar and nicotine claims in cigarette advertising.

Though Philip Morris argues that FTC policy permits a manufacturer to make such claims so long as they are consistent with the results of testing under the Cambridge Filter Method and those results are disclosed in the manufacturer’s advertising, the Commission has on occasion challenged statements about the tar or nicotine content of a particular brand even though they were supported by such testing. In 1982, for example, the FTC told a cigarette manufacturer that it could not rely on the Cambridge Filter Method to substantiate claims that one of its brands had only 1 milligram of tar, because the method did not accurately measure the tar and nicotine content of that brand due to its unusual filter design. The FTC has also challenged a manufacturer’s advertisements “that consumers will get less tar by smoking ten packs of [its] brand cigarettes than by smoking a single pack of the other brands of cigarettes depicted in the ads,” since the claim was based on “ratings obtained through smoking machine tests that do not reflect actual smoking, in part because the machines do not take into account such behavior as compensatory smoking.” In re Am. Tobacco Co., 119 F.T.C. at 4.

The FTC, then, has not invariably allowed tar and nicotine claims that are supported by the Cambridge Filter Method, but has recognized that such claims may nevertheless amount to unfair or deceptive acts or practices in certain circumstances. We acknowledge that the claim at issue here—that Marlboro and Cambridge Lights have “lower tar and nicotine” than their full-flavored versions—differs from those the FTC has challenged in the past, but our task is not to decide whether the FTC would view a particular kind of tar and nicotine claim as a violation of the FTC Act. Instead, we must determine whether the FTC’s oversight of such claims “convey[s] an authoritative message of a federal policy” jeopardized by the plaintiffs’ common-law damages action. Sprietsma, 537 U.S. at 67. Because the only policy we perceive is that certain tar and nicotine claims consistent with Cambridge Filter Method test results can still amount to unfair or deceptive acts or practices, we think not.

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. . . [I]t is not the fact of agency action on a particular subject alone—but the reasons for the action—that control its preemptive effect. And here, no clear rationale emerges from the history of the FTC’s treatment of tar and nicotine claims; indeed, the parties point to conflicting statements by the Commission itself on whether it even has an official position on the definitions of the terms “light” and “lower tar and nicotine.” Compare, e.g., 62 Fed. Reg. 48, 158, 48,163 (Sept. 12, 1997) (“There are no official definitions for these terms”) with, e.g., 1980 FTC Rep. to Congress 18 n. 11 (“The FTC
has not defined . . . any term related to tar level except for ‘low “tar”’, which the FTC defines as 15.0 mg or less ‘tar.”‘). Moreover, as in Spriettsma and in contrast to Geier, the Solicitor General recently filed a brief in the Supreme Court explaining that the FTC “has never promulgated definitions of terms such as ‘light’ and ‘low tar”‘ and that its previous statements purporting to define them “did not reflect an official regulatory position.” On this record, we cannot discern a coherent federal policy on low-tar claims, let alone one driven by the sort of “important means-related federal objectives” necessary to preempt conflicting state law. Geier, 529 U.S. at 881. The plaintiffs’ claims are not implicitly preempted.

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III.

In summary, we conclude that the plaintiffs’ claims that Philip Morris has made fraudulent misrepresentations in violation of the Maine Unfair Trade Practices Act by advertising and promoting Marlboro and Cambridge Lights as “light” and having “Lowered Tar and Nicotine” are not (1) expressly preempted by the FCLAA, (2) implicitly preempted, either by the FCLAA or by the FTC’s oversight of tar and nicotine claims in cigarette advertising, or (3) barred by the Act’s exemption for “transactions or actions otherwise permitted.” We do not, of course, reach any conclusion on the merits of the plaintiffs’ claims, the availability of summary judgment on other grounds, or the force of or any other defense potentially available to Philip Morris; and nothing in what we have said should be construed as expressing any views on those issues that are not before us. As always, “we leave the extent and nature of further proceedings in the hands of the district court.” Patterson v. Patterson, 306 F.3d 1156, 1162 (1st Cir. 2002).

We VACATE the judgment of the district court and REMAND for further proceedings.
The U.S. Supreme Court agreed to hear arguments from Altria Group Inc. in a case that may shield the tobacco industry from suits seeking billions of dollars over the marketing of “light” cigarettes.

The justices today said they will review a lower court decision that said Altria’s Philip Morris USA unit, the nation’s largest cigarette maker, must face Maine smokers’ claims that it fraudulently portrayed lights as safer than other cigarettes. Philip Morris contends that federal law bars the suit, which invokes a state consumer protection law, from going forward.

The clash may determine the fate of more than 30 similar lawsuits around the country against Philip Morris, Reynolds American Inc.’s R.J. Reynolds Tobacco Co. and other cigarette makers. An Illinois suit at one point threatened Philip Morris with a $10.1 billion award before it was overturned.

“These staggering stakes provide a compelling reason for this court to resolve the question,” Philip Morris argued in its petition seeking Supreme Court review.

The high court’s decision to hear the case suggests it will rule in favor of the tobacco industry, Morgan Stanley analyst David Adelman said in an investors’ note. That probably would mark “the death knell of the remaining lights class-action cases,” wrote Adelman, who rates Altria shares “overweight.”

Lower courts have disagreed about the propriety of the suits. In letting the Maine case go forward, the Boston-based 1st U.S. Circuit Court of Appeals criticized a different federal appeals court’s decision to block a Louisiana suit over light cigarettes.

Deception Alleged

The lawsuit seeks to recover the money smokers spent on Philip Morris’s Marlboro Lights and Cambridge Lights through November 2002, plus punitive damages.

The smokers, led by Stephanie Good, contend that Philip Morris intentionally deceived consumers by describing the cigarettes as being “light” and containing “lowered tar and nicotine.”

“For over 30 years, Philip Morris falsely reported on its cigarette packages that consumers would receive lower amounts of tar and nicotine from Marlboro Lights than from regular Marlboro cigarettes,” the group argued in a filing that urged the Supreme Court to reject the appeal.

The Supreme Court fight will focus on a pair of cigarette-labeling laws enacted in the 1960s. Those measures require each package of cigarettes to carry a specified warning label while barring additional state law requirements “based on smoking and health.”

In 1992, a splintered Supreme Court said that law barred some, though not all, smoker lawsuits against tobacco companies.

Cipollone Case

The smokers argue that the 1992 ruling, known as Cipollone v. Liggett Group,
permits suits that accuse tobacco companies of violating generally applicable laws, such as those that bar companies from deceiving consumers.

"Congress did not intend to give the tobacco companies a free pass to violate state laws that are promulgated pursuant to traditional state police powers and are binding on all other commercial actors," the consumers argued.

Philip Morris contends the *Cipollone* decision allows those types of suits only if they claim that cigarette makers lied about their products. The company says it didn't lie and simply used terms that had been endorsed by the Federal Trade Commission, the agency that oversees cigarette testing.

The smokers "do not allege that PMUSA's tar and nicotine descriptors are inherently false and do not dispute that they provide an accurate shorthand means of conveying tar and nicotine testing results to consumers," the cigarette maker argued.

**Two Hurdles**

R.J. Reynolds and the U.S. Chamber of Commerce joined Philip Morris in urging Supreme Court review. Philip Morris is based in Richmond, Virginia, while its parent company's headquarters are in New York. Altria fell $1.38, or 1.8 percent, to close at $75.42 in New York Stock Exchange composite trading.

The pre-emption question is one of two hurdles that have prevented some lights cases from going forward. Courts have derailed other suits by refusing to grant class-action status, a designation that lets smokers with relatively small claims sue together.

The high court case "is an absolute must-win issue for plaintiffs, but not for the industry," Adelman said in his investors' note.

A victory for Altria would mean the lights cases "are essentially wiped out," said Ed Sweda, an attorney at the Tobacco Products Liability Project at Northeastern University School of Law in Boston. He said that result would be a "tragedy depriving these aggrieved consumers from having their day in court."

The case is *Altria v. Good*, 07-562.
The First Circuit recently allowed a case brought by “lights” smokers against cigarette manufacturers to move forward, reversing a district court’s decision. The lower court had granted the defendants’ motion for summary judgment, ruling that the plaintiffs’ claims were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA). The plaintiffs sued Philip Morris USA, Inc., and its parent company, Altria Group, Inc., under the Maine Unfair Trade Practices Act (MUTPA). The manufacturers’ claims that light cigarettes were lower in tar and nicotine than regular, “full-flavor” cigarettes—when they actually delivered the same amount of tar and nicotine—constituted unfair and deceptive trade practices, the plaintiffs argued. They sought the return of sums they had paid to buy lights, as well as punitive damages and attorney fees.

The First Circuit held that the plaintiffs’ claims were neither expressly nor implicitly preempted by the FCLAA, nor implicitly preempted by Federal Trade Commission (FTC) oversight of cigarette advertising, nor barred by exemptions in the MUTPA. (Good v. Altria Group, Inc., 2007 WL 2460039 (1st Cir. Aug. 31, 2007)).

The decision revitalizes light cigarette litigation and “protects the legitimate claims of consumers deceived by a scam that goes back to the early 1970s,” said Edward Sweda, senior attorney with the Boston-based Tobacco Products Liability Project.

Light cigarettes yield lower nicotine and tar levels than full-flavor cigarettes in a machine test known as the Cambridge Filter Method, but actual smokers unconsciously compensate for the holes that lights have in their filters—by puffing harder, covering the holes, or smoking more—which exposes them to just as much tar and nicotine as smoking regular cigarettes would, the plaintiffs argued.

The district court concluded that the plaintiffs’ claims were expressly preempted by the FCLAA because they were grounded in the company’s advertising or promotion.

But the plaintiffs argued that that ruling conflicted with the U.S. Supreme Court’s decision in Cipollone v. Liggett Group, Inc., which held that the FCLAA expressly preempted only some actions under state law. (505 U.S. 504 (1992)). The First Circuit sided with the plaintiffs, holding that “the FCLAA preempts only those claims based on a requirement or prohibition based on smoking and health under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in accordance with the FCLAA. It does not preempt claims because they are ‘based on smoking and health.’”

Circuit Judge Jeffrey Howard wrote for the three-judge panel that the plaintiffs’ “asserted rule of law—that the statements ‘light’ and ‘lower tar and nicotine’ constitute fraud—does not interfere with the goals of the FCLAA.”

Sweda said the court was “very careful in adhering to precedent in Cipollone.”

The defendants argued the lawsuit challenged the FTC’s regulatory scheme,
and the district court agreed. But the First Circuit held, "[E]ven if we were to agree that FTC action short of formal rulemaking—including consent orders—can implicitly preempt state law in some cases, we do not think that this is one of them, because the plaintiffs’ state law claims do not pose a threat to any federal regulatory objectives apparent in the FTC’s approach to tar and nicotine claims in cigarette advertising."

The court said it disagreed "with those courts holding that the FTC has ‘authorized’ Philip Morris’s ‘light’ and ‘lower tar and nicotine’ claims so as to put them beyond the reach of state consumer protection statutes with exceptions similar to Maine’s."

Samuel Lanham of Bangor, Maine, who represents the plaintiffs, said it was significant that although the district court ruled only on express preemption, the First Circuit also addressed implied preemption.

Howard wrote, "As the Supreme Court has cautioned, to ‘infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state [balance] embodied in our Supremacy Clause jurisprudence.’"

William Ohlemeyer, Philip Morris’s vice president and associate general counsel, said in a statement that the company would seek Supreme Court review. "Attempts by plaintiffs’ lawyers to use state laws to regulate the marketing and sale of cigarettes are at odds with the nationwide regulations established by the Congress,” he said.

But Sweda noted that the cigarette manufacturers were trying to get “a special immunity that Congress never intended.”

Good creates a split in the circuits; the Fifth Circuit held last February that fraudulent-misrepresentation claims regarding light cigarettes were preempted by the FCLAA. (Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383 (5th Cir. 2007).)

The Good decision is likely to affect lights cases pending in other states, Sweda said, especially Aspinall v. Philip Morris Cos. (No. SJC-9981 (Mass.)), set for argument in November, and Dahl v. R.J. Reynolds Tobacco Co. (No. A05-1359 (Minn. App. argued Sept. 18, 2007)). Sweda noted that similar cases have been filed in more than 20 states.

In June, the Supreme Court considered another lights case. The plaintiffs argued that Philip Morris manipulated the design of its light cigarettes, using techniques to make them register lower levels of tar and nicotine on the Cambridge Filter Method than they actually delivered to consumers—and that these amounts of tar and nicotine were greater than the adjective “light,” as used in the company’s advertising, indicated. The plaintiffs argued that the company’s behavior was deceptive and misleading under Arkansas law.

Philip Morris removed the case from state court by invoking the Federal Officer Removal Statute, arguing that it was acting under a federal officer or agency—the FTC. The district court agreed, holding that the plaintiffs attacked the company’s use of the government’s cigarette-testing method, and the Eighth Circuit also found in the company’s favor.

A unanimous Supreme Court disagreed and reversed the Eighth Circuit’s decision. "A private firm’s compliance (or noncompliance) with federal laws, rules, and
regulations does not by itself fall within the scope of the statutory phrase ‘acting under’ a federal ‘official,’” the Court held. (Watson v. Philip Morris Cos., 127 S. Ct. 2301 (2007).)

A recent study found that more than 100 cigarette additives enhance or maintain nicotine delivery, mask smoke odor, mask illnesses, and could increase cigarettes’ addictiveness. (Michael David Rabinoff et al., Pharmacological and Chemical Effects of Cigarette Additives, Am. J. Pub. Health (July 31, 2007).) Lanham said more information on how manufacturers manipulate cigarette design “would make a strong case even stronger on the merits,” but “the challenge is getting to the merits.”

Lanham noted, “In Maine, we are thrilled for the opportunity to get to the real merits of the case.”
WASHINGTON—In a major blow to tobacco companies, the U.S. Supreme Court yesterday denied tobacco giant Philip Morris’s request to shift all smokers’ lawsuits to federal courts, which generally give greater leeway to corporations and smaller damage awards to those claiming harm from years of exposure to tobacco smoke.

The decision, in a case involving the alleged marketing deception of “light” cigarettes, is expected to affect liability lawsuits against tobacco companies filed in 20 states, including Massachusetts. Some state awards in recent years have been in the billions of dollars, although many of those judgments were later overturned on appeal.

The case stemmed from a class-action lawsuit in Arkansas brought by smokers Lisa Watson and Loretta Lawson. The suit alleges that Altria Group, the corporate owners of Philip Morris USA, violated state advertising laws by portraying Marlboro Light and Cambridge Light cigarette brands as low in tar and nicotine, though tests showed levels of both were dangerously high.

Attorneys for Philip Morris argued that, because the Federal Trade Commission is responsible for regulating the tobacco industry, federal courts should have jurisdiction over the case. The company also argued that because the U.S. government has allowed tobacco companies such as Philip Morris to assume responsibility for tests to determine tar and nicotine levels in cigarettes, the federal court should decide the case.

The U.S. Court of Appeals for the Eighth Circuit agreed, but the Supreme Court unanimously reversed that decision.

In the opinion, Justice Stephen G. Breyer wrote that the high court found no evidence that the federal government had delegated its legal authority allowing the tobacco companies to take over testing for tar and nicotine from the U.S. government.

Breyer pointed out that Philip Morris and other tobacco firms are highly regulated, citing the FTC’s rules on “advertising, specifications for testing, requirements about reporting results.”

“This is a big loss for the industry,” said Edward L. Sweda Jr., senior attorney for the antismoking Tobacco Products Liability Project at Northeastern University School of Law in Boston. “If the appeals court ruling had been upheld, it would have basically eliminated state courts as a venue for lawsuits against the tobacco companies.”

Sweda said other industries, such as pharmaceutical companies and automakers, could argue that lawsuits against them should move to federal court because of their relationship with federal regulators.

William Ohlemeyer, associate general counsel for Philip Morris, downplayed the Supreme Court’s decision as “narrow” and insisted it would not affect the case.
“We have compelling defenses to the Watson claim that have been advanced in state courts,” Ohlemeyer said in a statement.

Because the high court has allowed the case to proceed in state court, Sweda said, the ruling “now makes it easier for the plaintiff attorneys to bring these light-cigarette lawsuits against the companies.”

Several analysts said the ruling was largely expected, especially given the questions and comments from justices during oral arguments earlier this year.

Justice Ruth Bader Ginsburg, for instance, said Philip Morris was serving the consumer, not the U.S. government. “The company is doing it so they can stay in business and market a product, not serve the U.S. government,” she said.

Some of the pending cases in 20 states were sidetracked until the Supreme Court ruled in the Watson case.

In Massachusetts, a suit filed by Lori Aspinall and Thomas Geanacopoulos in 1998 is now before the state Superior Court. In 2004, the Massachusetts Supreme Judicial Court, in a 4-to-3 decision, allowed smokers to proceed with a class-action suit over the marketing of light cigarettes.

The lawsuits involving the marketing of light cigarettes are part of the latest trend of litigation against tobacco companies. Starting in the mid-1990s, aided by damaging internal tobacco company documents, smokers and states won many cases against the companies based on product liability claims.

Thomas Glynn, director of cancer science and trends at the American Cancer Society in Washington, said the high court’s verdict yesterday “certainly favors smokers and nonsmokers alike.”

“The main thing is it’s going to help the cases pending in state courts move forward, which was in some question before.”

Glynn said that the percentage of smokers in the United States has dropped by more than half over the past two generations, but the gains have leveled off in recent years. In the 1960s, 43 percent of American adults smoked. Today, that figure has dropped to 21 percent or 45 million Americans.

Now he is hopeful that several upcoming legal cases will cause smokers to rethink their risky habit. “Whenever litigation occurs, it focuses attention on the issue, which is vitally important,” Glynn said. “It does cause people to consider their tobacco use and revisits the whole idea, either for their health or the health of people around them.”
Wyeth v. Levine

06-1249


Levine received treatment for nausea by receiving injections of the drug Phenergan. The drug was mistakenly injected into an artery in her arm, which resulted in a section of her arm being amputated. Levine contended, and the lower courts agreed, that the warning label with the drug was inadequate under state common law. Wyeth’s warning label was in compliance with federal regulations when Levine received the injection. Wyeth contends that they were preempted by federal law and that by permitting this claim the courts are creating an obstacle to compliance with federal purposes.

Question Presented: Whether the prescription drug labeling judgments imposed on manufacturers by the Food and Drug Administration (“FDA”) pursuant to FDA’s comprehensive safety and efficacy authority under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq., preempt state law product liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use.
received two injections. The drug was first administered by intramuscular injection. Later the same day, when plaintiff’s nausea continued, she received a second dose by a direct intravenous injection into her arm, using a procedure known as “IV push.” The second injection resulted in an inadvertent injection of Phenergan into an artery. As a result, the artery was severely damaged, causing gangrene. After several weeks of deterioration, plaintiff’s hand and forearm were amputated.

Plaintiff brought a superior court action for negligence and failure-to-warn product liability, alleging that defendant’s inadequate warning of the known dangers of direct intravenous injection of Phenergan caused her injuries. During a five-day jury trial, both parties presented expert testimony regarding the adequacy of the warnings defendant placed on Phenergan’s label. Plaintiff’s experts testified that the label should not have allowed IV push as a means of administration, as it was safer to use other available options, such as intramuscular injection or administration through the tubing of a hanging IV bag. Defendant’s expert testified that allowing IV push with instructions cautioning against inadvertent arterial injection was sufficient. The court instructed the jurors that they could consider the FDA’s approval of the label in use at the time of plaintiff’s injury, but that the label’s compliance with FDA requirements did not establish the adequacy of the warning or prevent defendant from adding to or strengthening the warning on the label. At the conclusion of the trial, the jury found in favor of plaintiff on both the negligence and product-liability claims and awarded her $2.4 million in economic damages and $5 million in noneconomic damages. Pursuant to the parties’ stipulation, this award was reduced to a total of $6,774,000 to account for pre-judgment interest and plaintiff's recovery in a settlement of a separate action she had filed against the Health Center.

In a summary judgment motion prior to trial, as well as in its timely motion for judgment as a matter of law following trial, both of which the superior court denied, defendant argued that federal law preempted plaintiff’s claim. These arguments rested in part on defendant’s contention that it had submitted an adequate warning to the FDA, but that the FDA rejected the change because it did not favor strengthening the warning. Plaintiff contended that neither warning would have been adequate. The trial court stated, in its decision on defendant’s motion for judgment as a matter of law, that although the FDA had rejected a new warning, the agency’s “brief comment” failed to explain its reasoning or demonstrate that it “gave more than passing attention to the issue of whether to use an IV infusion to administer the drug. The proposed labeling change did not address the use of a free-flowing IV bag.” The court concluded that there was “no basis for federal preemption” and upheld the jury’s verdict.

Defendant claims the superior court erred by: (1) failing to dismiss plaintiff’s claim on the basis that the Food and Drug Administration’s approval of the Phenergan label preempted state common law claims that the label was inadequate; (2) failing to instruct the jury to reduce plaintiff’s damages by the amount of fault attributable to the Health Center; and (3) failing to instruct the jury to calculate the present value of plaintiff’s damages for future noneconomic losses. We reject these claims of error, and we affirm.

I. Federal Preemption

Defendant’s principal argument on appeal is that the court should have dismissed plaintiff’s claim because it was preempted.
by federal law. Defendant asserts that any state common law duty to provide a stronger warning about the dangers of administering Phenergan by IV push conflicts with the FDA’s approval of the drug’s label. As preemption is a question of law, we review the trial court’s decision de novo. We hold that the jury’s verdict against defendant did not conflict with the FDA’s labeling requirements for Phenergan because defendant could have warned against IV-push administration without prior FDA approval, and because federal labeling requirements create a floor, not a ceiling, for state regulation.

The United States Constitution provides that federal law is the supreme law of the land. U.S. Const. art. VI, cl. 2. The Supremacy Clause is the basis for the doctrine of preemption, according to which “state law that conflicts with federal law is ‘without effect.’” Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). In Cipollone, the Court described the relevant analysis for determining whether Congress intended a federal statute to preempt state law:

Congress’ intent may be explicitly stated in the statute’s language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.

Id. (quotations and citations omitted). Absent clear congressional intent to supersede state law, including state common law duties, there is a presumption against preemption. This presumption has “add[ed] force” when there has been a “long history of tort litigation” in the area of state common law at issue. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005).

Defendant concedes that Congress has not expressly preempted state tort actions through the Food, Drug and Cosmetics Act (FDCA), 21 U.S.C. §§ 301-399, and that Congress did not intend the FDCA to occupy the entire field of prescription drug regulation. Rather, it asserts that plaintiff’s action “actually conflicts with federal law.” Cipollone, 505 U.S. at 516. This requires defendant to show either that “it is impossible for a private party to comply with both state and federal requirements,” or that Vermont’s common law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).

Defendant presents two alternative bases for its assertion of conflict preemption: (1) in the specific context of the Phenergan label, the FDA was aware of the dangers of IV-push administration and specifically ordered defendant to use the warning it used, making it impossible for defendant to comply with both its state common-law duty and the requirements of federal law; and (2) by penalizing drug companies for using FDA-approved wording on drug labels, state tort claims like plaintiff’s present an obstacle to the purpose of the FDA’s labeling regulations. Before reaching these issues, we briefly examine the FDA’s role in regulating prescription drug labels and the general approach courts have taken to the preemptive effect of federal labeling requirements.

A. Regulatory Background

Prior to distributing a prescription drug such as Phenergan, the manufacturer must submit
a New Drug Application (NDA) for FDA approval. 21 U.S.C. § 355(a). The FDA must approve the application unless it fails to meet certain criteria, including whether test results and other information establish that the drug is "safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof," whether there is "substantial evidence that the drug will have the effect it purports or is represented to have under the conditions of use prescribed, recommended, or suggested in the proposed labeling thereof," and whether, "based on a fair evaluation of all material facts, such labeling is false or misleading in any particular." Id. § 355(d).

"FDA regulations mandate the general format and content of all sections of labels for all prescription drugs as well as the risk information each section must contain," and "[f]inal approval of the NDA is 'conditioned upon the applicant incorporating the specified labeling changes exactly as directed, and upon the applicant submitting to FDA a copy of the final printed label prior to marketing.'" McNellis v. Pfizer, Inc., 2005 WL 3752269, at *4 (D.N.J.). Once a drug and its label have been approved, any changes to the label ordinarily require submission and FDA approval of a "Supplemental NDA." Id.; 21 C.F.R. § 314.70(b)(2)(v)(A).

If the NDA process and the submission of changes for FDA approval were the exclusive means of creating and altering prescription drug labels, this might be a very different case. A key FDA regulation, however, allows a drug's manufacturer to alter the drug's label without prior FDA approval when necessary. The regulation provides in relevant part:

The agency may designate a category of changes for the purpose of providing that, in the case of a change in such category, the holder of an approved application may commence distribution of the drug product involved upon receipt by the agency of a supplement for the change. These changes include, but are not limited to:

... (iii) Changes in the labeling . . . to accomplish any of the following:

(A) To add or strengthen a contraindication, warning, precaution, or adverse reaction;

... (B) To add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product[.]

21 C.F.R. § 314.70(c).

Section 314.70(c) creates a specific procedure allowing drug manufacturers to change labels that are insufficient to protect consumers, despite their approval by the FDA. "The FDA's approved label . . . can therefore be said to set the minimum labeling requirement, and not necessarily the ultimate label where a manufacturer improves the label to promote greater safety." McNellis, 2005 WL 3752269, at *5. While specific federal labeling requirements and state common-law duties might otherwise leave drug manufacturers with conflicting obligations, § 314.70(c) allows manufacturers to avoid state failure-to-warn claims without violating federal law. Id. ("[I]t is apparent that prior FDA approval
need not be obtained, nor will a product be deemed mislabeled, if the manufacturer voluntarily or even unilaterally strengthens the approved warnings, precautions or potential adverse reactions upon the label pursuant to 21 C.F.R. § 314.70(c)(6)(iii)(A).’). There is thus no conflict between federal labeling requirements and state failure-to-warn claims. Section 314.70(c) allows, and arguably encourages, manufacturers to add and strengthen warnings that, despite FDA approval, are insufficient to protect consumers. State tort claims simply give these manufacturers a concrete incentive to take this action as quickly as possible.

B. Conflict Preemption in Other Jurisdictions

In light of the leeway created by § 314.70(c) for drug manufacturers to add warnings, courts have been nearly unanimous in holding that state failure-to-warn tort claims do not conflict with federal law. See, e.g., McNellis, 2005 U.S. Dist. LEXIS 37505, 2005 WL 3752269, at *7 (“[T]he FDCA and the FDA’s regulations do not conflict with New Jersey’s failure to warn law because those federal regulations merely set minimum standards with which manufacturers must comply.”). See also Cartwright v. Pfizer, Inc., 369 F. Supp. 2d 876, 882 (E.D. Tex. 2005) (“With little exception, courts that have considered this exact issue have concluded that state failure to warn claims are not preempted by the FDCA and its attendant regulations.”).

* * *

. . . Section 314.70(c) does not allow us to interpret FDA approval of a drug label as anything but a first step in the process of warning consumers. When further warnings become necessary, the manufacturer is at least partially responsible for taking additional action, and if it fails to do so, it cannot rely on the FDA’s continued approval of its labels as a shield against state tort liability. While a state common-law duty may encourage departure from a label that the FDA has approved in great detail, such a duty does not create a conflict with federal requirements because the FDA and the state share the purpose of encouraging pharmaceutical companies to alter their drug labels when they are inadequate to protect consumers. We agree with the significant majority of courts that state failure-to-warn claims are generally not preempted by federal labeling requirements.

We must now apply this reasoning to defendant’s two original contentions: (1) notwithstanding the fact that it is generally possible for manufacturers to comply with both federal and state law through the procedures created by § 314.70(c), the FDA’s specific actions with respect to Phenergan made it impossible for defendant to comply with both federal and state law; and (2) even if plaintiff’s claim and the cases cited above do not make it impossible for manufacturers to comply with both state and federal law, they present an obstacle to federal objectives.

C. Impossibility of Compliance

Defendant contends that in this case it was impossible to comply with both state and federal law because the FDA prohibited the use of a stronger warning with respect to IV-push administration of Phenergan. This claim is not supported by the evidence defendant presented to the trial court. The record lacks any evidence that the FDA was concerned that a stronger warning was not supported by the facts, that such a stronger warning would distract doctors from other provisions in the drug’s label, or that the
warning might lead to less effective administration of the drug. Instead, defendant essentially relies on two factual assertions: (1) the FDA approved the label that was in use in 2000; and (2) the FDA, in reviewing the label for use in a different version of Phenergan, expressed its opinion of the adequacy of the warning in the original label by stating, "Retain verbiage in current label."

With respect to defendant’s first assertion, our analysis above demonstrates that FDA approval of a particular label does not preempt a jury finding that the label provided insufficient warning, as defendant was free under § 314.70(c) to strengthen the warning without prior FDA approval. Defendant’s second assertion depends on the meaning of the instruction, “[r]etain verbiage in current label.” Tort liability for defendant’s failure to strengthen its warning could have created a direct conflict requiring federal preemption only if the FDA intended the instruction to prohibit any language strengthening the original warning. In other words, unless we interpret the FDA’s statement as evidence that it would have rejected any attempt by defendant to strengthen its label through § 314.70(c), we cannot conclude that it was impossible for defendant to comply with its state common-law duty without violating federal law.

Defendant argues that the instruction reflected the FDA’s opinion not only that a stronger warning was unnecessary, but also that it would have harmed patients by eliminating IV push as an option for administering Phenergan. The record does not support this interpretation.... The FDA could have rejected the new warning for any number of reasons, including clarity or technical accuracy, without implicitly prohibiting a stronger warning. Defendant’s unsupported hypothesis that the FDA saw the new warning as harmful seems among the least likely explanations, as the rejected proposal would not have eliminated IV push as an option for administering Phenergan.... There is no evidence that the FDA intended to prohibit defendant from strengthening the Phenergan label pursuant to § 314.70(c). Thus, we cannot conclude that it was impossible for defendant to comply with its obligations under both state and federal law.

D. Obstacle to Congressional Purposes and Objectives

Defendant next contends that state common-law liability for its use of an FDA-approved label presents an obstacle to federal objectives. We hold that plaintiff’s claim does not interfere with any objective that can legitimately be ascribed to Congress. We agree with the reasoning in the cases cited above, that federal labeling requirements pursuant to the FDCA create a floor, not a ceiling, for state regulation. Defendant presents a new FDA rule containing language disputing this reasoning, but this statement does not alter our conclusion that there is no conflict between federal objectives and Vermont common law.

1. The Purposes and Objectives of Congress

In the absence of a conflict that makes it impossible for a regulated entity to comply with both state and federal law, federal law will preempt state law only if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Freightliner, 514 U.S. at 287, 115 S.Ct. 1483 (quotations omitted). We must therefore examine what “the full purposes and objectives of Congress” were with respect to federal labeling requirements for prescription drugs. We agree with the
McNellis court that a system under which “federal regulations merely set minimum standards with which manufacturers must comply” is

fully consistent with Congress’ primary goal in enacting the FDCA, which is “to protect consumers from dangerous products,” United States v. Sullivan, 332 U.S. 689, 696, 68 S.Ct. 331, 92 L.Ed. 297 (1948), as well as Congress’ stated intent that the FDCA “‘must not weaken the existing laws,’ but on the contrary ‘it must strengthen and extend that law’s protection of the consumer.’” United States v. Dotterweich, 320 U.S. 277 [282, 88 L.Ed. 48] (1943).

2005 U.S. Dist. LEXIS 37505, 2005 WL 3752269, at *7; see also Witczak, 377 F. Supp. 2d at 731 (“Congress certainly did not intend to bar drug companies from protecting the public. In the 1962 amendments to the FDCA, Congress included a clause expressly limiting the preemptive effect of the statute: “Nothing in the amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law . . . unless there is a direct and positive conflict between such amendments and such provision of State law.” Drug Amendments of 1962 (Harris-Kefauver Act), Pub.L. No. 87-781, § 202, 76 Stat. 780, 793 (1962).

This amendment essentially removes from our consideration the question of whether common-law tort claims present an obstacle to the purposes and objectives of Congress. Congress intended that the FDCA would leave state law in place except where it created a “direct and positive conflict” between state and federal law. Drug Amendments § 202. This language “simply restates the principle that state law is superseded in cases of an actual conflict with federal law such that ‘compliance with both federal and state regulations is a physical impossibility.’” See S. Blasting Servs., Inc. v. Wilkes County, 288 F.3d 584, 591 (4th Cir.2002). In other words, under any circumstances where it is possible to comply with both state law and the FDCA, the state law in question is consistent with the purposes and objectives of Congress. Thus, our discussion above regarding defendant’s impossibility argument, supra, ¶¶ 21-23, provides a complete answer to the question of preemption.

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2. The FDA’s New Statement on Preemption

Defendant, after oral argument in this case, cited a new FDA regulation that contains a statement relating to the preemptive effect of the FDCA. The substance of the regulation changes certain aspects of labeling requirements for prescription drugs, but these changes are irrelevant to this appeal because the new rule did not take effect until June 2006. Food and Drug Administration, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, Supplementary Information, 71 Fed.Reg. 3922, 3922 (Jan. 24, 2006). The rule’s “Supplementary Information” section, however, contains a broad statement regarding the preemption of state common-law failure-to-warn claims. In this statement, the FDA asserts that recent cases rejecting preemption of these claims, including those cited above, pose an obstacle to the agency’s enforcement of the labeling requirements. Among the interpretations the agency claims are incorrect are: (1) those rejecting preemption on the basis of § 314.70(c); and (2) those stating that federal labeling requirements are
minimum standards and that “[s]tate law serves as an appropriate source of supplementary safety regulation for drugs by encouraging or requiring manufacturers to disseminate risk information beyond that required by FDA under the act.”

We are ordinarily required to defer to an agency’s interpretation of a statute it administers. Plaintiff, however, urges us not to defer to the FDA’s statement. . . . We need not decide this difficult question of administrative law, however, because we conclude that irrespective of the level of deference we might apply, the statement would not affect the outcome of this appeal.

Under Chevron, deference to an agency’s interpretation is appropriate only when a statute is “silent or ambiguous with respect to the specific issue” the agency has considered; otherwise, “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” 467 U.S. at 842-43, 104 S.Ct. 2778. Moreover, “[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” Id. “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” Id. When an agency’s interpretation is not the type of interpretation entitled to Chevron deference, we must still grant it some respect, but only “a respect proportional to its ‘power to persuade.’” Mead, 533 U.S. at 235, 121 S.Ct. 2164.

. . . Nothing in the FDA’s new statement alters our conclusion that it would be possible for defendant to comply with both its federal obligations and the obligations of state common law. The regulatory framework for prescription drug labeling allows drug manufacturers to add or strengthen a warning “to increase the safe use of the drug product” without prior FDA approval. Even if the new rule eliminated or altered this provision, the change in the regulation did not take effect until June 2006. Without such a change, it is possible for manufacturers to comply with both FDA regulations and duties imposed by state common law, and there is no “direct and positive conflict” between state and federal law.

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Here, we are not attempting to infer the effect of statutory language that only indirectly addresses the specific state law at issue. Instead, we are interpreting an unambiguous express preemption clause that specifically preserves the type of state law at issue. Under these circumstances, ordinary preemption principles must give way to Congress’s intent to preserve state laws that do not create a “direct and positive conflict” with federal law. Drug Amendments § 202. There is no such conflict here. Accordingly, the FDA’s statement is neither an authoritative interpretation of an ambiguous statutory provision entitled to deference, Chevron, 467 U.S. at 842-43, 104 S.Ct. 2778, nor a persuasive policy statement entitled to respect. Mead, 533 U.S. at 235, 121 S.Ct. 2164. Plaintiff’s claim does not impose conflicting obligations on defendant or present an obstacle to the objectives of Congress. We therefore agree with the trial court that the claim is not preempted by federal law.

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AFFIRMED.

REIBER, C.J., dissenting.

The overarching issue in this appeal is
whether plaintiff's common-law claim for failure to warn conflicts with the FDA's regulation of Phenergan, the drug responsible for plaintiff's injuries. I would conclude that the jury's verdict in this case conflicts with federal law for two reasons.

First, it would be impossible for defendant Wyeth to comply with the requirements of both state and federal law. Specifically, the FDA approved IV administration of Phenergan and required that IV administration be listed on the Phenergan label. By contrast, plaintiff's theory of the case required Wyeth either to remove this approved use from the Phenergan label, add a warning that would directly contradict the label's indication that IV administration was a safe and effective use, or, at a minimum, add a warning that only certain types of IV administration should be used. Thus, compliance with state law in this case would require Wyeth to eliminate uses of Phenergan approved by the FDA and required to be included in the Phenergan labeling.

Second, plaintiff's state-law claim conflicts with federal law in that it poses an obstacle to federal purposes and objectives. In short, by approving Phenergan for marketing and distribution, the FDA concluded that the drug—with its approved methods of administration and as labeled—was both safe and effective.

For both of these reasons I would conclude that the state-law cause of action is preempted. I respectfully dissent.

I. Impossibility of Compliance

As explained by the majority, because there is no clause in the FDCA expressly preempting state law, Wyeth must demonstrate that preemption is implied by showing either that federal law thoroughly occupies the regulatory field (a claim that Wyeth does not advance) or that there is an actual conflict between state and federal law. Actual conflict, in turn, can be demonstrated in one of two ways: by showing that it is impossible for the regulated party to comply with both state and federal law or that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).

The majority in essence concludes that it is not impossible for Wyeth to comply with both federal and state standards because Wyeth never sought FDA approval of a "stronger warning" of the type advocated by plaintiff. According to the majority, because the FDA was not presented with, and therefore did not explicitly reject, such strengthened language, there is no reason to presume that the FDA would disapprove. Therefore, the majority reasons, there is no actual conflict between state and federal law. It is inaccurate, however, to characterize the requirements imposed by the jury verdict in this case as merely requiring a "stronger warning." Rather, what plaintiff sought was an elimination of a use of Phenergan that had been approved by the FDA. Furthermore, the FDA's rejection of Wyeth's efforts to alter the language of the warning in 2000 supports Wyeth's claim that the FDA had an affirmative preference for the language of the original warning.

A.

The crux of plaintiff's claim was not based on the label warnings per se, but on the approved uses listed there. See, e.g., *ante*, ¶ 3 ("Plaintiff's experts testified that the label should not have allowed IV push as a means of administration. . . ."). A review of plaintiff's complaint and the evidence
presented at trial makes clear that the standard plaintiff sought to establish (i.e., the change to the label that would be required in light of the jury’s finding of liability) was to remove IV administration—or at least certain types—as an approved use. . . . In her appellate brief, plaintiff characterizes the evidence as revealing “that Wyeth was aware of research indicating that direct IV administration of Phenergan was unsafe.” (Emphasis added.) Plaintiff further refers to expert testimony “that the label should have restricted Phenergan to intramuscular injection as this method of administration presents no risk of inadvertent arterial injection; or, alternatively, that if IV administration is used, it must be by injecting the Phenergan into a hanging IV bag, not through a direct IV.” (Emphasis added.)

Here, the FDA clearly addressed the risks attending IV administration of the drug. The label approved IV administration generally, and specifically warned of the dangers of direct IV administration, including inadvertent arterial injection possibly resulting in amputation. In light of this, it cannot be argued that the FDA did not (1) assess the risk of IV administration, including direct IV administration and the associated risk of amputation due to inadvertent arterial injection; (2) conclude that the benefits of allowing IV administration with appropriate warnings outweighed the risk; and (3) reach a decision regarding precisely what warning language should be used. These assessments are, in fact, the very essence of the FDA’s approval and are in furtherance of the federal objective of advancing public health by balancing the risks and benefits of new drugs and facilitating their optimal use.

Further, the apparent purpose of § 314.70(c) is to allow manufacturers to address newly discovered risks. Even courts that conclude that § 314.70(c) provides manufacturers broad latitude to add warnings to labels acknowledge that such supplements are aimed at previously unknown and unanalyzed risks. Another section of the regulation makes clear that any changes to a label that exceed the scope of § 314.70(c) are considered “major changes” that require prior approval before the drug may be distributed. § 314.70(b), (b)(2)(v). In short, the regulation does not allow manufacturers to simply reassess and draw different conclusions regarding the same risks and benefits already balanced by the FDA. Here, the FDA had already evaluated the risk of inadvertent arterial injection from direct IV administration of Phenergan, and had mandated warning language for the label to reflect that risk assessment.

In addition, any change accomplished under § 314.70(c) is subject to ultimate FDA
review and approval. Thus, any additional or different warnings must ultimately be supported by scientific research that meets the FDA’s standards. Neither a manufacturer, a state court, nor a state legislature can permanently substitute its judgment of the risk-benefit analysis for that of the FDA.

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B.

Wyeth argues that even if § 314.70(c) theoretically allows a manufacturer to make unilateral changes to a drug label, in this case, the FDA actually rejected Wyeth’s attempts in 2000 to change the warning regarding intra-arterial injection and amputation. The trial court concluded that the FDA gave only “passing attention” to the risks of IV administration in 2000. The majority similarly concludes that the record does not indicate “that the FDA wished to preserve the use of IV push as a method of administering Phenergan.” Ante, ¶ 23. I cannot agree with this assessment of the record.

Both the original label and Wyeth’s proposed alternative were titled “INADVERTENT INTRA-ARTERIAL INJECTION.” On the original label, the first two sentences of the warning read:

Due to the close proximity of arteries and veins in the areas most commonly used for intravenous injection, extreme care should be exercised to avoid perivascular extravasation or inadvertent intra-arterial injection. Reports compatible with inadvertent intra-arterial injection of [Phenergan], usually in conjunction with other drugs intended for intravenous use, suggest that pain, severe chemical irritation, severe spasm of distal vessels, and resultant gangrene requiring amputation are likely under such circumstances.

On the proposed label, the first sentence of the warning read: “There are reports of necrosis leading to gangrene, requiring amputation, following injection of [Phenergan], usually in conjunction with other drugs; the intravenous route was intended in these cases, but arterial or partial arterial placement of the needle is now suspect.” While the proposed change to the warning language may not reflect what plaintiff would require in a warning, it cannot be disputed that Wyeth’s proposed alternative warning (1) placed greater emphasis on the risk of necrosis and amputation by referencing it in the first sentence, and (2) gave the FDA the opportunity to consider the specific, alternative warning advanced by Wyeth, as well as the adequacy of the warning in general. Despite this opportunity, the FDA mandated that Wyeth retain the language of the existing warning. The alleged extent of the FDA’s consideration of the issue is not relevant, in my view.

In 2000, the FDA confirmed its assessment that health care professionals should be permitted to choose IV administration in its various forms as a means of delivering the drug, where appropriate. Wyeth could not both list all forms of IV administration as an approved use, as required by the FDA, and exclude all or some forms of IV administration as unsafe, as required by the jury’s verdict in this case. It would be impossible to comply with both requirements.

II. Obstacle to Federal Purposes and Objectives

I would further conclude that Wyeth has demonstrated actual conflict preemption by
showing that plaintiff's state-law failure-to-warn claim poses an obstacle to federal purposes and objectives. The majority does not address this issue, concluding that Wyeth does not have the option of proving this form of actual conflict preemption. The majority reaches this conclusion by relying on the following clause in the 1962 amendments to the FDCA:

Nothing in the Amendments made by this Act to the Federal Food, Drug, and Cosmetic Act shall be construed as invalidating any provision of State law . . . unless there is a direct and positive conflict between such amendments and such provision of State law.


[T]he majority concludes that the provision "essentially removes from our consideration the question of whether common-law tort claims present an obstacle to the purposes and objectives of Congress," because the 1962 provision "simply restates the principle that state law is superseded in cases of actual conflict with federal law such that compliance with both federal and state regulations is a physical impossibility." Ante, ¶ 27. "In other words," the majority explains, "under any circumstances where it is possible to comply with both state law and the FDCA, the state law in question is consistent with the purposes and objectives of Congress." Id. Thus, the majority eliminates the possibility of proving actual conflict preemption independently through the "obstacle" prong of that standard.

But neither the passage in Southern Blasting on which the majority relies nor the United States Supreme Court decision cited as authority in that passage provide an explanation or even an affirmative statement that the phrase "direct and positive conflict" in the 1962 amendment eliminates the "obstacle" prong of the actual conflict preemption standard. Thus, the majority eliminates one of the two means by which Wyeth may show actual conflict based on a single, unclearly reasoned Fourth Circuit decision that is itself lacking in case law support. There is no basis for eliminating this prong of the actual conflict standard, and I disagree with the majority's conclusion to the contrary.

Assuming, then, that Wyeth may demonstrate actual conflict preemption by showing that state law is an obstacle to federal regulatory purposes and objectives, I believe the facts here support the conclusion that the state tort-law verdict in this case is preempted. The United States Supreme Court's decision in Geier v. American Honda Motor Co., 529 U.S. 861, 120 S.Ct. 914 (2000), is controlling when state law poses an obstacle to federal purposes and objectives. In that case, the Department of Transportation had issued a safety standard that required automobile manufacturers "to equip some but not all of their 1987 vehicles with passive restraints." Id. . . . The Supreme Court held that a lawsuit premising negligence on the failure to install an air bag conflicted with the objectives of the federal safety standard and was therefore preempted.

In reaching this conclusion, the Court noted that the plaintiff and the dissenting opinion—like the majority in the instant case—viewed the federal regulation as setting a minimum safety standard that states were free to supplement or strengthen. Id. However, by examining the comments accompanying the regulation, the Court concluded that a safety standard allowing a choice of passive restraint systems while not mandating any particular system was a
deliberate decision that reflected a balance of diverse policy concerns.

Application of the Supreme Court precedent in Geier dictates the same result in this case. As with the DOT in Geier, the FDA is primarily concerned with public safety. The conclusion of what is best for public safety is arrived at by considering various policy factors that are sometimes in tension with one another. . . . In the specific context of warnings on drug labels, the FDA considers not only what information to include, but also what to exclude. As the Eighth Circuit has noted in the medical device context, "[t]here are . . . a number of sound reasons why the FDA may prefer to limit warnings on product labels." See Brooks v. Howmedica, Inc., 273 F.3d 785, 796 (8th Cir.2001).

No drug is without risks. The FDA balances the risks of a drug against its benefits to maximize the availability of beneficial treatments. The FDA’s decision in approving a drug, its uses and labeling reflect consideration of these and other policy factors. While a state-court jury presumably shares the FDA’s concern that drugs on the market be reasonably safe, the jury does not assess reasonableness in the context of public health and the associated risk-benefit analysis. A jury does not engage in a measured and multi-faceted policy analysis. Rather, a jury views the safety of the drug through the lens of a single patient who has already been catastrophically injured. Such an approach is virtually guaranteed to provide different conclusions in different courts about what is “reasonably safe” than the balancing approach taken by the FDA. In fact, different conclusions were reached in this case.

The jury in this case was instructed that “[a] prescription drug is unreasonably dangerous due to inadequate warnings or instructions if reasonable instructions regarding foreseeable risks of harm are not provided to the physician and other medical professionals who are in a position to reduce the risks of harm.” Faced with plaintiff’s tragic injuries, the jury concluded that allowing Phenergan to be delivered through IV administration was “unreasonably dangerous.” The jury’s verdict conflicts squarely with the FDA’s assessment of precisely the same issue: whether Phenergan is safe and effective when delivered through IV administration. The claim is preempted.

For the above reasons, I dissent.
WASHINGTON—The Supreme Court’s already substantial investment in defining the boundary between federal regulation and state tort law grew even bigger on Friday. The justices added two new cases to their docket on drug and cigarette labeling requirements.

In each case, as in four others the court has already agreed to decide in the current term, the question is one of federal pre-emption. The cases offer variations of a common question: if a product meets federal standards, can the manufacturer be liable for damages under state law for injuries suffered by consumers? . . .

In the drug labeling case, the plaintiff was a guitar player who suffered the career-ending amputation of her right arm after being injected in a hospital with an anti-nausea drug made by Wyeth.

Gangrene and subsequent amputation was a risk from intravenous administration of the drug, Phenergan.

The plaintiff, Diana Levine, argues that the federally approved label did not give doctors a specific enough warning about the risks of the method used to give her the drug.

The state courts in Vermont allowed Ms. Levine to sue for damages under state law and upheld a jury verdict of more than $6 million. The manufacturer’s Supreme Court appeal, Wyeth v. Levine, No. 06-1249, argues that the lawsuit was pre-empted by the Food and Drug Administration’s approval of the label.

The Bush administration, which reversed a longstanding policy against pre-emption in drug cases, is supporting the appeal. In a brief filed this month in response to the Supreme Court’s request for its views, the administration said the agency’s approval of the Phenergan label “reflects F.D.A.’s expert judgment that the labeling strikes the appropriate balance.” The brief added: “Where, as here, F.D.A. was presented with information concerning the relevant risk, a jury’s imposition of liability based on a drug’s F.D.A.-approved labeling would interfere with F.D.A.’s expert judgment.”

Nonetheless, the court’s decision to grant Wyeth’s appeal at this point was surprising. The administration urged the justices to defer action until they decide, later this term, another medicine-related pre-emption case that was argued last month.

That case, Riegel v. Medtronic Inc., No. 06-179, presents a question under a separate statute, the Medical Device Amendments, which governs the F.D.A.’s premarket approval process for devices like the balloon catheter at issue in the case. There is considerable overlap between that process and the one for approving new drugs under the Food, Drug and Cosmetic Act, which is at issue in the new case. . . .
Less than a week after issuing a sweeping ruling that bars most lawsuits against medical device makers, the Supreme Court heard arguments Monday in the first of two cases that could determine whether drug makers receive similar protection.

Justice Stephen G. Breyer said the fundamental question in the cases was who should make the decisions that will determine whether a drug is “on balance, going to save people or, on balance, going to hurt people?”

“An expert agency on the one hand or 12 people pulled randomly for a jury role who see before them only the people whom the drug hurt and don’t see those who need the drug to cure them?” Justice Breyer asked.

Normally a member of the court’s liberal wing, Justice Breyer came down squarely on the industry’s side when he answered his own question, saying Congress left the role of policing the medicine market exclusively to the Food and Drug Administration.

“What worries me is, what happens if the jury is wrong?” he said.

If the justice’s view prevails, most lawsuits against drug makers, thousands of which have been filed in recent years and settled in some cases for billions of dollars, would be barred. But the Supreme Court is likely to wait until next year to answer Justice Breyer’s question completely.

That is because the question before the court Monday in *Warner-Lambert v. Kent* was in part restricted to the effects of a Michigan statute that bars personal injury suits against drug makers unless injured patients can show that the company deliberately withheld information from the F.D.A. that would have led the government to block the medicine from being sold.

The case was brought by 27 Michigan plaintiffs who claim they were injured as a result of taking a Warner-Lambert diabetes pill, Rezulin, which has since been withdrawn from the market. The plaintiffs claim the company withheld from the F.D.A. evidence of Rezulin’s dangers to the liver that would have led the agency to deny an approval.

But in a 2001 case involving the Buckman Company, the Supreme Court held that plaintiffs cannot sue based upon claims that a manufacturer defrauded the F.D.A.

Many of the arguments Monday concerned whether the court should strike down all of the Michigan statute or just the part allowing an exception for claims of fraud.

In October, the court will hear arguments in *Levine v. Wyeth*, a pharmaceutical case with no such state complications. In the *Levine* case, the court is being asked to decide whether F.D.A. approval bars personal injury lawsuits—the same question it decided in device makers’ favor last week.
Before the Bush administration, the F.D.A. argued that lawsuits provided patients with additional protection.

Now, the administration says the lawsuits largely conflict with the agency’s ability to do its job, and several of the justices seemed to agree.

Justice Samuel A. Alito Jr. asked the lawyer for the Michigan patients to explain why their lawsuit should go forward given that it might “very seriously interfere with what the F.D.A. is doing?”

Justice Anthony M. Kennedy asked whether the patients intended to argue whether Rezulin “should not have been on the market?”

Even Justice Ruth Bader Ginsburg, the lone dissenter in the case decided last week that gave medical device makers broad protection against lawsuits, asked whether certain claims in the suit against Warner-Lambert, now Pfizer, “are the kind of thing that the F.D.A. would want to police itself and not have state courts look into?”

Allison M. Zieve, the lawyer for the plaintiffs, pointed out that lawsuits against drug makers are still allowed in every state, pending the court’s decision next year.

Carter G. Phillips, who represented Pfizer, said the Buckman case and the Michigan statutes allowed lawsuits to be filed against drug makers in Michigan only if the F.D.A. itself concluded that a company had committed fraud. Such a determination by the F.D.A. is exceptionally rare.

The government argues that the F.D.A. competently oversees the drug and device markets, and should not be second-guessed by courts. But the Institute of Medicine, the Government Accountability Office and the F.D.A.’s own science board have all issued reports saying poor management and scientific inadequacies make the agency incapable of protecting the country against unsafe drugs, medical devices and food.
“Patients’ Ability to Sue at Risk”

Los Angeles Times
March 03, 2008
Daniel Costello

Years of high-profile court battles over drugs such as Vioxx and Celebrex, along with billion-dollar settlements and jury verdicts, could soon be a thing of the past.

The U.S. Supreme Court, in an 8-1 decision, ruled last month [in Riegel v. Medtronic Inc.] that patients injured by most medical devices can’t sue their manufacturers. And this fall, a similar case could extend the same legal protection to the much larger pharmaceutical industry—a frequent target of lawsuits.

In last month’s case, the high court backed a legal theory, supported by the Bush administration, that maintains that the Food and Drug Administration adequately regulates the drug and device industries and should not be second-guessed by courts.

Critics say such an argument would make more practical sense if the FDA were doing a better job.

The high-profile cases come as the federal agency faces growing challenges and some of its most withering criticism in years, some from within its own walls.

A trio of recent reports, including one by the FDA’s own advisory committee, has raised serious questions about the agency’s recent performance.

Last fall a yearlong study by the FDA’s advisory committee found “the agency is so underfunded and understaffed that it’s putting U.S. consumers at risk in terms of food and drug safety.”

In an unusual public departure from the view of the Bush administration, the current FDA commissioner, Andrew C. von Eschenbach, said in an interview last week that the agency needed a systemic overhaul that could take years.

In last month’s Supreme Court case, the widow of a New York man who died after a balloon catheter burst in his chest during surgery sued the manufacturer, Medtronic Inc., saying the catheter was defective.

Because federal law makes few provisions for suits against drug and device makers, injured patients have turned to state law and won substantial awards.

In 2004, the Bush administration reversed a long-standing federal policy, contending that if the FDA approves a medical product, that should protect manufacturers from damages under state law.

Supporters of that stance say it is overdue. Drug and medical-device manufacturers have contended for years that the legal environment around their products has grown too restrictive and is stymieing innovation.

“You have to balance the costs that so many lawsuits place on” the system, said Glenn Lamm, chief counsel for the Washington Legal Foundation. The foundation, a group that seeks restrictions on lawsuits, submitted an amicus brief on behalf of the device manufacturer in last month’s case.

Dane Titsworth of Bakersfield sees things
differently. After nearly a decade of worsening back pain, the former building manager had disks in his lower back replaced two years ago with new-generation artificial disks.

But after the surgery, he said, his pain was worse than before, immobilizing him to the point that he could no longer garden or play catch with his children. He has since left his job.

Titworth and several dozen patients with similar stories have sued the disk’s maker, DePuy Spine Inc., a Raynham, Mass.-based subsidiary of Johnson & Johnson.

“This sounds to me like just another way big business can line their pockets,” Titworth said. “I was a guinea pig for this company. I should be compensated for that.” He expects his case to be heard later this year.

In October, the court will hear arguments in another case, Levine vs. Wyeth, in which it might decide whether FDA approval bars personal-injury lawsuits involving drug companies.

The mere prospect that the high court could bar injury claims for FDA-approved pharmaceuticals helped precipitate the recent $4.85-billion settlement of Vioxx claims, according to lawyers involved in the negotiations.

Some legal experts and attorneys are concerned that without such lawsuits, regulators and the public may never hear of evidence that manufacturers knowingly marketed products they knew were unsafe.

In recent years, documents and e-mails uncovered in court cases have shown that some companies kept safety issues involving their products from the FDA.

“Without the tort system, what reasonable assurance do we have we will learn about the bad actors?” asked David Vladek, a law professor at Georgetown University. “A lot is lost without these lawsuits.”
In 1906, muckraker and investigative novelist Upton Sinclair revealed to the world the horrors of the Chicago meatpacking industry in his novel *The Jungle.*

His account of human and animal parts being ground into rotted and spoiled meat that was sold for public consumption led to consumer revulsion.

In order to quell public outrage and restore the U.S. meat market to economic viability, President Theodore Roosevelt spearheaded the passage of the 1906 Pure Food and Drug Act, the precursor to what is today the Food and Drug Administration.

In the decades following the FDA’s creation, the administration’s regulatory scope grew to include not only drugs and certain foods, but vaccines, medical products and medical devices as well.

For the past several decades, the FDA’s mission has been to regulate these industries, with a mandate to ensure that anything receiving FDA approval meets its promulgated minimum standards to safeguard the public health and welfare.

The recent decision by the U.S. Supreme Court in *Riegel v. Medtronic, Inc.*, has rather dramatically supplanted the FDA’s core mission with respect to medical devices and, in effect, given large corporate manufacturers of medical devices immunity from state and common law products-liability claims stemming from “defects” in the devices they produce.

### Riegel

In *Riegel*, the court held that so long as a new medical device receives pre-market approval from the Food and Drug Administration, the medical device manufacturer will be shielded from all state and/or common law claims for damages in the event the product is later found to be defective.

The court found that if the medical device was classified by the FDA as a Class III device, meaning the device is “purported or represented to be for supporting or sustaining human life,” and was screened by the FDA and received “pre-market approval,” all state or common law “requirements that are different from or in addition to” the FDA’s pre-market requirements would be preempted by the 1970 Medical Device Amendments to the Federal Food, Drug and Cosmetic Act.

Examples of Class III devices include replacement heart valves, cerebella stimulators and pacemakers, to name just a few.

The decision now makes regulatory compliance an affirmative defense for Class III medical devices that receive pre-market approval from the FDA, except in the rare circumstance where a device maker knowingly commits fraud on the FDA.

Therefore, any negligence or implied warranty suit brought by an injured plaintiff regarding such devices would be dismissed,
as it is no longer a valid claim. Prospective plaintiffs faced with such design defects would be required to prove that the device manufacturer failed to comply with FDA regulations, or that doctors or other medical personnel misused the device, placing an even greater strain on the medical profession.

180-Degree Change

This holding is an about-face for the court, which only 12 years ago, in a strikingly similar case, held that the Food, Drug and Cosmetic Act did not preempt state or common law defect design claims with respect to Type III medical devices.

So why the 180-degree change? The rightward shift in the composition of the court brought about by the Bush administration closely mirrored the shift that took place at the FDA.

Under the Bush administration, the FDA adopted a new approach with respect to its Class III medical device classification.

Historically, the FDA promulgated minimum standards that medical devices would be required to meet in order to be granted “FDA approval.” Of course, these benchmark standards varied depending on the degree of danger of the device, but they were nonetheless a minimum standard.

In recent years, however, the FDA has taken the approach that a Class III medical device that has met pre-market approval has thereby met an optimal standard as set forth by the FDA with respect to safety and efficacy.

Indeed, Justice Antonin Scalia, writing for the majority in Riegel, went to great pains to emphasize that a device that receives pre-market approval goes through a “rigorous process” and is screened and tested “an average of 1,200 hours.”

Therefore, the court held any state or common law claim for damages would be a requirement different from, or in addition to, the FDA optimal standard and thus preempted.

Gaping Loophole

On its face this does not seem too egregious until one discovers the gaping “loophole” that many medical device makers may now jump through to avoid the pre-market process.

This loophole with respect to Class III devices allows a device maker to qualify for preemption, and be immune from suit, without ever passing the FDA’s pre-market approval process. So long as (1) the device was in use prior to the 1976 Medical Device Amendments to the Food, Drug, and Cosmetic Act and is therefore “grandfathered-in”; or (2) the new device is found by the FDA to be “substantially equivalent” to another device that is exempt from pre-market approval, no pre-market approval of the device is required.

In fact, most new Class III medical devices find their way to the medical market by way of the second loophole and receive roughly 20 hours of screening, consisting mostly of FDA officials ensuring that the necessary paperwork is in order.

For example, a 1983 report by Congress revealed that of the approximately 1,100 Class III devices entering the market, nearly 1,000 never received pre-market screening because they were found to be “substantially equivalent” to previously approved devices.

Alarmed, Congress made further amendments to the Medical Device
Amendments in 1990, rendering it more difficult for the most dangerous devices to exploit this loophole.

Nevertheless, in 2005, more than 3,100 new Class III devices entered the market under the “substantially equivalent” exception, with only 32 devices required to undergo pre-market screening.

To make matters even worse, the “substantially equivalent” exception is premised on economic considerations and not those of safety. Buried in the majority’s opinion, Justice Scalia reveals the driving force behind the “substantially equivalent” exception as “seek[ing] to limit the competitive advantage grandfathered devices receive.”

Through Riegel, the Supreme Court has radically undermined the spirit and purpose of the Medical Device Amendments to the Food, Drug and Cosmetic Act based on the conclusion that the “rigorous” pre-market process employed by the FDA is the optimal standard that Class III devices seek to meet. Therefore, it should not be left to “juries [who] see only the cost of a dangerous design, and unconcerned with benefits to apply the tort law of fifty states.”

In reality, however, the Riegel decision widens the economic loophole, which is likely to be exploited with impunity by corporations more intent on conforming their devices to pre-existing designs so as to compete economically than being concerned with the safety and efficacy of their devices as the act was intended to promote.

And as the numbers clearly show, meeting the substantial equivalency exception seems to involve little heavy lifting.

The FAA

The underlying theme of the Riegel court is that tort law seeks not only to make an injured party whole, but also to regulate conduct by penalizing medical device manufacturers.

The court found that the “optimal” standard employed by the FDA for Class III devices cannot live in harmony with the negligence standard employed at common law.

However, if the court had broadened the scope of its inquiry, it may have been surprised to find that rigorous federal standards and tort law have peacefully coexisted for years.

To emphasize this point, one need look no further than the Federal Aviation Administration’s requirements for airplane design and product certification. The FAA’s product design approval process is a complex five-phase process in which the FAA and the manufacturer work jointly through each phase to analyze material and inspect and re-inspect mountains of data.

Even after a new design receives FAA certification, the design is still subject to post-certification inspection and tests to ensure maximum safety. In contrast with current state of FDA approvals, there exists no similar means of circumventing the FAA approval process.

Courts, however, have been reluctant to hold that the express preemption section of the Airline Deregulation Act of 1978 preempts state law claims for negligence and gross negligence causing personal injury. Indeed, relatives of 59 victims of last year’s TAM Airlines flight 3054 crash in Brazil recently brought wrongful-death actions in federal court in Florida, alleging, among other things, a faulty right thrust reverser.

Why the Supreme Court seeks to impose preemption in the complex realm of medical devices, but not in the equally sophisticated
area of airplane products and design, is perplexing if not totally inconsistent.

Hopefully, when the Supreme Court takes up FDA preemption again in the fall in

*Wyeth v. Levine*, its rationale will become clearer and the public will be provided with greater insight into the future of federal preemption as it relates to product safety.
Pre-emption threatens the vitality of state tort law and the historic co-existence of federal prescription drug safety standards and common law remedies for injuries arising from prescription drugs. The recent trend of pharmaceutical companies filing procedural motions seeking immunity from state law tort liability and prevailing raises serious questions about federalism. Why should this industry deserve special treatment?

Courts that grant dismissals do so by ignoring the force of the settled presumption against pre-emption that protects consumers. Furthermore, in the context of prescription drugs, Congress never intended to pre-empt state court litigation. There is a complete absence of any concrete law from Congress that might be frustrated by a state law tort suit.

Congressional intent is the “ultimate touchstone of preemption analysis,” Cipollone v. Liggett Group Inc. (1992). In ascertaining that intent, the U.S. Supreme Court’s pre-emption jurisprudence has repeatedly applied a presumption against pre-emption. See, e.g., Bates v. Dow Agrosciences LLC (2005). The Supreme Court has always held fast to the presumption, especially in implied (conflict) pre-emption cases. Geier v. Am. Honda Motor Co. (2000). The rationale for that practice is clear: The presumption against pre-emption—and in favor of the sovereign state—is at its strongest when Congress has not explicitly trumped that sovereignty. Should mere regulatory action remove all means of judicial recourse for consumers injured by unsafe drugs?

In 2006, the Food and Drug Administration (FDA), without public comment, in a preamble, announced its belief that a tort lawsuit for a failure-to-warn case is preempted when the warning urged by the lawsuit has not been required by the FDA. 71 Fed. Reg. 3922, 3936 (Jan. 24, 2006). This preamble follows earlier amicus briefs filed by the FDA arguing the same outcome.

FDA Should Get Little Deference

Some courts have given deference to the FDA’s view of pre-emption. However, under the high court cases Skidmore v. Swift & Co. (1944) and U.S. v. Mead Corp. (2001), the degree of deference should be reduced by the fact that the FDA’s earlier position was different. Under Mead, courts should afford a “relatively low level of deference” because the FDA’s position has been inconsistent; the FDA is not an expert on federalism concerns; and there is no evidence of any degree of formality in its position. Some courts that apply implied pre-emption discuss the tension between the FDA regulations and the potential for verdicts caused by unsafe drugs under common law. Both fora seek to balance safety and efficacy. If those results do conflict, Congress could, if it so chooses, step in and pass curative legislation.

Allowing multiple-source inquiries into the strength of warnings on drug labels can have important benefits. State courts provide a
check on agency power. Discovery in state tort suits provides a useful venue to raise questions about new and existing drugs. Immunity from litigation eliminates these potentially valuable information-gathering tools.

The scope and power of regulations against common law lawsuits was addressed by the high court in *Sprietsma v. Mercury Marine* (2002). The plaintiff argued that a motor boat was unreasonably dangerous without protective propeller guards. The Illinois Supreme Court found that the U.S. Coast Guard had explicitly considered and rejected the adoption of a regulation requiring propeller guards under the Federal Boat Safety Act (FBSA). The state court thus concluded that “the Coast Guard’s failure to promulgate a propeller guard requirement equates to a ruling that no such regulation is appropriate.” The Supreme Court reversed, holding that the plaintiff’s claims were neither expressly nor impliedly pre-empted by the FBSA. The court commented that it was “quite wrong” to view the Coast Guard’s rejection of the protective measure in question as “the functional equivalent of a regulation prohibiting all states from adopting such a regulation.” Rather, the recommendation by the Coast Guard “left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation.”

The FDA’s conduct, in post-marketing safety analysis, closely parallels the agency’s conduct underlying the regulatory inaction in *Sprietsma*. *Sprietsma* mandates that an agency’s intentional and careful consideration does not convey an “authoritative message of federal policy against” safety measures that trumps the positive effects from jury verdicts finding products unsafe without proper warnings. Conflict pre-emption infringes on the Seventh Amendment right to a trial by jury. It vests absolute power in an agency that at best is underfunded and that has close associations with drug companies that earn greater profits with fewer warnings.
Plaintiffs, Internet Service Providers, sued Defendants, regional telephone companies, for alleged violations of the Section 2 of the Sherman antitrust act. Plaintiffs claim Defendants engaged in a price squeeze by selling wholesale DSL access to the ISPs at a drastically higher price than Defendants provided retail DSL access to their direct customers, intending to squeeze Plaintiffs out of the DSL market. The Ninth Circuit upheld the lower court’s decision to deny Defendant’s motion to dismiss for failure to state a claim, holding that the Defendants’ retail pricing scheme could have created an anticompetitive price squeeze.

Question Presented: Whether a plaintiff states a claim under Section 2 of the Sherman Act by alleging that the defendant—a vertically integrated retail competitor with an alleged monopoly at the wholesale level but no antitrust duty to provide the wholesale input to competitors—engaged in a “price squeeze” by leaving insufficient margin between wholesale and retail prices to allow the plaintiff to compete.
data between the internet and consumers, these four lease those facilities variously from SBC California, Inc., Pacific Bell Internet Services, and SBC Advanced Solutions, Inc. (collectively “SBC Entities”).

As is true in many regions, because of the development of the telecommunications industry and the costs of building the necessary infrastructure, regional monopolies have developed that own and control the lines necessary for the delivery of telecommunication services. These regional telephone companies are known as incumbent local exchange carriers (“ILECs”). ILECs tend to own the local telephone network as well as the telephone lines—known as the “last-mile”—that connect each individual consumer to the network. Because any company seeking to connect with users at the end of these last mile connections must interconnect with the ILEC, the ILEC’s facilities are commonly referred to as “bottleneck” facilities.

At the time of the filing of linkLine’s amended complaint . . . [t]he SBC Entities were . . . organized so that they sold both wholesale DSL access (“DSL transport services”) to independent ISPs as well as retail DSL access (through PBIS and then SBC-ASI) to individual consumers. At the time the amended complaint was filed, the SBC Entities were both a supplier to the Plaintiffs at the wholesale level, and a competitor at the retail level.

Linkline filed its original complaint on July 24, 2003, alleging that the SBC Entities, acting as a single entity, have monopolized and attempted to monopolize the regional DSL market in violation of § 2 of the Sherman Act. In support of the § 2 claim, the complaint alleged that SBC Entities:

(a) created a price squeeze by charging ISP a high wholesale price in relation to the price at which defendants were providing retail services;

(b) intentionally adopted anticompetitive procedures and processes for handling customer ordering and installation to ISPs that are calculated to (i) cause ISP customer disruption and interruption in service, and (ii) create extraordinary and serious delays and a substantial backlog of orders, in the hope that the ISP customers will revert back to defendants;

(c) purposefully created and imposed procedures that impeded, and/or caused significant delays and costs for, end user customers of defendant switching to the services of independent ISPs, including plaintiffs;

(d) misled, harassed and exhibited hostility toward customers of ISPs, including plaintiffs;

(e) disparaged and created doubts about the efficacy and legality of ISPs, including plaintiffs; and

(f) purposefully failed to bill properly for DSL services.

In short, defendants adopted procedures carefully calculated to deny ISPs access to an essential facility and to preserve and maintain its monopoly control of DSL access to the Internet.

On July 6, 2004, the SBC Entities filed a motion for judgment on the pleadings. The district court read linkLine’s complaint as alleging three different categories of
anticompetitive conduct: refusal to deal, denial of access to an essential facility, and price squeezing. In an order dated October 20, 2004, the district court dismissed the first two as barred by the Supreme Court’s decision in *Trinko* [finding that “Defendants were obligated by law to offer their DSL transport facilities to the Plaintiffs under the 1934 Telecommunications Act (“1934 Act”) and the FCC rules implementing it.” This conclusion is not disputed on appeal.] With respect to the price squeezing claim, it ordered the Plaintiffs to file an amended complaint “limited to the price squeeze claim that details beyond the normal requirements of Rule 8 specific facts supporting Plaintiffs’ price-squeeze claim.” The first amended complaint described the allegation as follows:

(1) As set forth above defendants unlawfully manipulated their dual role as vertically integrated monopolists as both a wholesale-monopoly supplier and retail competitor of plaintiffs for DSL by engaging in an unlawful price squeeze by intentionally charging independent ISPs wholesale prices that were too high in relation to prices at which defendants were providing retail DSL services and necessary equipment to end-user customers—and for a period by charging wholesale DSL prices to competing ISPs (such as plaintiffs) that actually exceeded the prices at which defendants retail affiliate (PBI) was charging retail end-user customers for DSL services and necessary equipment—thereby making it impossible for independent ISP competitors such as plaintiffs to compete at the low retail prices set by defendants for combined DSL-Internet Service and necessary equipment provided to end-user customers.

(2) If plaintiffs charged retail DSL-Internet access customers the same retail price as defendants’ retail affiliate charged, plaintiffs could not cover the cost of providing DSL service, which costs necessarily includes the wholesale transport costs charged by defendants.

(3) By the same token, if defendants themselves charged their retail affiliates the same wholesale costs for DSL transport that they charged their wholesale ISP customers (such as plaintiffs), defendants could not cover their wholesale costs and make a profit from DSL service at their low retail prices for their bundled offering of DSL, Internet Service and necessary equipment (e.g., free modem and installation), that were in some cases, and for some period, even below the wholesale DSL transport cost. Given the price margin relationship between retail and wholesale prices, defendants are clearly attempting to compensate for deliberately sacrificing profits on the retail end of their operations (with offsetting margins on the wholesale side) in order to stifle, impede and exclude competition from independent ISPs such as plaintiffs that are both wholesale customers and retail rivals.

[The amended complaint also contained allegation (b)-(f) listed above.]

In response, the SBC Entities filed various motions challenging the price squeeze allegations and other portions of the
amended complaint.

The district court granted in part the relief requested, but denied the motion to dismiss for failure to state a claim. Acting on the request of the SBC Entities, the district court certified the order for interlocutory appeal.

We granted permission to appeal pursuant to 28 U.S.C. § 1292. We review the denial of a motion for judgment on the pleadings de novo. Doe v. United States, 419 F.3d 1058, 1061 (9th Cir. 2005).

II.

In antitrust terms, a price squeeze occurs “when a vertically integrated company sets its prices or rates at the first (or ‘upstream’) level so high that its customers cannot compete with it in the second-level (or ‘downstream’) market.” Von Kalinowski et al., 2 Antitrust Laws and Trade Regulation § 27.04[1], 27-40 (2d Ed. Matthew Bender 2007). For over six decades, federal courts have recognized price squeeze allegations as stating valid claims under the Sherman Act. [In a footnote, the court stated: “Section 2 states that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”] See United States v. Aluminum Co. of Am., 148 F.2d 416, 437-38 (2d Cir. 1945) (“ALCOA”) (holding price squeeze unlawful); see also Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 809-11 (3d Cir. 1984) (price squeeze is only an antitrust violation if plaintiffs can show that “the defendants deliberately produced the effect” to “destroy its competition”); Lansdale v. Philadelphia Electric Co., 692 F.2d 307, 309-10 (3d Cir. 1982); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1178-79 (8th Cir. 1982) (antitrust liability can still lie for price squeezes even when rates are regulated); City of Mishawaka v. Am. Elec. Power Co., 616 F.2d 976, 983-85 (7th Cir. 1980) (antitrust liability can lie for price squeezes in regulated industry upon a showing of specific anticompetitive intent).

We have joined our sister circuits in holding that claims of price squeezing under § 2 are viable against monopolists in regulated industries. City of Anaheim v. Southern California Edison Co., 955 F.2d 1373 (1992). In Anaheim, we held that even in a business where prices were regulated at both the wholesale and the retail level, it was possible for a price squeeze to occur. Id. at 1377 (“[I]t is possible for a utility to manipulate its filings and requests in a manner that causes a, at least temporary, squeeze which might be just as effective as one perpetrated by an unregulated actor.”).

In Trinko, however, the Supreme Court held that the failure by a monopolist to deal with a competitor on certain service terms when that monopolist was under no duty to deal with the plaintiff competitor absent statutory compulsion, did not state a claim under § 2 of the Sherman Act. This holding raised the question of whether a price squeeze is merely another term of the deal governed by the Supreme Court’s analysis in Trinko, or whether it is something else. The D.C. and Eleventh Circuits have offered conflicting answers to that question. Compare Covad Communications Co. v. Bellsouth Corp., 374 F.3d 1044, 1050 (11th Cir. 2004) (“Bellsouth”) (holding that price squeeze claims survive Trinko), with Covad Communs. Co. v. Bell Atl. Corp., 398 F.3d 666, 673 (D.C. Cir. 2005) (“Bell Atlantic”) (holding that they do not).

In Trinko, a customer of one of Verizon’s
rivals sued Verizon Communications, Inc., alleging that Verizon had engaged in anticompetitive practices by discriminatorily delaying orders placed by customers of Verizon’s competitors—orders Verizon was required to fill by the Telecommunications Act of 1996. 540 U.S. at 404. Trinko alleged that by rendering poor performance on orders placed through Verizon’s competitors, it would sour those customers’ relationships with their CLECs and drive them back to Verizon. Id. Trinko sued Verizon after both the Federal Communications Commission (“FCC”) and New York’s Public Services Commission (“NYPSC”) had already investigated the matter, resulting in a series of orders by the NYPSC and a consent decree with the FCC.

The Supreme Court held that “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court’s existing refusal-to-deal precedents.” Id. at 410. Trinko began from the premise that the Telecommunications Act of 1996 neither added to nor subtracted from the class of punishable conduct under traditional antitrust laws. Id. at 406 (quoting 47 U.S.C. § 152, note (“nothing in [the 1996 Act] shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws”)). Accordingly, the Court set out to determine whether Trinko’s allegations made out an actionable antitrust claim under the Court’s existing refusal-to-deal precedents, irrespective of Verizon’s statutory requirements under the 1996 Act.

The Court reiterated that “the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal,’” id. at 408 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)), but that “the right to refuse to deal with other firms does not mean that the right is unqualified,” id. (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, (1985). The Court then stated that it is “very cautious” when recognizing exceptions to the right of refusing to deal and that Aspen Skiing was “at or near the outer boundary of § 2 liability” for refusing to deal. Id. at 408-09. In Aspen Skiing, the Court saw strong evidence that the defendant’s sole purpose in refusing to deal was to attempt to monopolize, “not by competitive zeal but by anticompetitive malice.” Id. at 409. That evidence included that (1) the parties had “voluntarily engaged in a course of dealing” (proving that the defendant would have done so absent statutory compulsion); (2) the defendant refused even to sell highlands ski passes at retail rates; and (3) the services it was withholding were “otherwise marketed or available to the public.” Id. at 409-10. Having found no similar evidence in Trinko, the Court held that Verizon’s alleged insufficient service failed to state a valid antitrust claim since Verizon’s refusal to deal with its competitors at all could not even be seen as anticompetitive. Id. at 410.

The Court went on to reason that not only did Trinko’s allegations not make out a traditional antitrust claim, but that it would not be justified in extending antitrust liability to include Trinko’s case. In reaching this conclusion, it emphasized “the existence of a regulatory structure designed to deter and remedy anticompetitive harm,” and the dangers of judicial intervention. Id. at 412-14. The latter include the risk of “false condemnations” that might “chill the very conduct the antitrust laws are designed to protect.” Id. at 414 (quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). Importantly, the Court did not say that the existence of a
regulatory scheme was a per se bar to judicial enforcement of the antitrust laws, only that “the existence of a regulatory structure” is “[o]ne factor of particular importance.” *Id.* at 412 (emphasis added). *Trinko* never addressed price squeeze claims specifically. However, *Trinko* is of significant import. Indeed, we have already had occasion to apply *Trinko* to bar antitrust liability when the complaint centered on allegedly anticompetitive price terms, albeit not price squeezes. See *MetroNet Servs Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004).

Given this background, we must decide whether *Trinko* entitles the SBC Entities to judgment on the pleadings, which in turn requires us to decide whether *Anaheim* remains viable after *Trinko*.

Here, reconsideration of *Anaheim* is not required because the reasoning and theory of *Anaheim* is not “clearly irreconcilable with the reasoning or theory” of *Trinko*. First, as the Eleventh Circuit has underscored, *Trinko* did not involve a price squeezing theory. Indeed, *Trinko* took great care to explain that in this particular regulatory context, “claims that satisfy established antitrust standards” are preserved. 540 U.S. at 406. Because a price squeeze theory formed part of the fabric of traditional antitrust law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*. See *Bellsouth*, 374 F.3d at 1050 (“price squeezing claim survives [*Trinko*] because it is based on traditional antitrust doctrine”).

Second, *Anaheim* did not embrace an unlimited view of § 2 price squeeze liability in regulated industries. To the contrary, *Anaheim* rejected the idea that, in the case of regulated industries, “a mere showing that a price squeeze developed would suffice to cause antitrust liability.” 955 F.2d 1378. *Anaheim* recognized that “courts should tread carefully” in imposing antitrust standards on regulated industries, *id.* at 1378, and ultimately required a showing of specific intent on the part of the wholesale monopoly holder to “serve its monopolistic purposes at [retail competitors’] expense” in order for § 2 liability to attach. *Id.* Thus, *Anaheim* recognized the viability of the theory, but carefully circumscribed it.

*Trinko* did not, as the SBC Entities would argue, completely eliminate the viability of a § 2 price squeeze theory in regulated industries. Were that the case, *Trinko* would not have referred to the existence of a regulatory regime as only “one factor” to consider in determining whether antitrust liability might also lie. 540 U.S. at 412. Moreover, the existence of regulation does not always eliminate the danger of anti-competitive harm. See *Mishawaka*, 616 F.2d at 983-84 (noting that the presence of a regulatory structure offers price squeezers a “ready made illegal opportunity with a legitimate gloss”). The key, under *Trinko*, is the nature of the regulatory structure at issue. As Justice Scalia observed:

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, “[t]here is nothing built into the regulatory scheme which performs the antitrust function,” *Silver v. New York Stock Exchange*, 373 U.S. 341, 358
(1963), the benefits of antitrust are worth its sometimes considerable disadvantages.

Thus, consistent with *Trinko*, 540 U.S. at 412, *Anaheim* rejected the wholesale importation of antitrust theory as applicable to regulated industries. In the particular industry at hand, *Anaheim* recognized that, even in the regulatory scheme at issue, “it is possible for a utility to manipulate its filings and requests in a manner that causes a, at least temporary, squeeze which might be just as effective as one perpetrated by an unregulated actor.” 955 F.2d at 1377. Thus, *Anaheim* undertook a *Trinko*-type analysis in the context of the particular industry and factual setting. Significantly, after examining the particular pleadings, the *Anaheim* panel concluded that the price squeeze theory was not viable in that case. Of course, in any future application of *Anaheim*, we will have to ensure consistency with *Trinko*. However, a careful reading of *Anaheim* does not demonstrate that the holding is “clearly irreconcilable with the reasoning or theory” of *Trinko*.

When we apply *Anaheim* and *Trinko* to this case, the soundness of the district court’s conclusion in denying judgment on the pleadings is clear. Here, unlike the circumstances in *Anaheim* and *Trinko*, we are confronted with a partially regulated industry. At the wholesale level, there are a series of regulatory mechanisms and regulatory agencies charged with assuring fair play. These regulations grew out of the 1934 Act and have been considered in a series of FCC decisions known as the “Computer Inquiries.” In short, under FCC rules in place at the time of the filing of the complaint, the SBC Entities were subject to certain regulatory requirements if they wished to enter the enhanced services telecommunications market (i.e., offer DSL internet access).

If an ILEC wished to offer DSL internet access, it could choose one of two routes. It could form a separate subsidiary through which it would offer DSL internet access, but which had to obtain the infrastructure necessary to provision such services from the ILEC on the same terms as unaffiliated ISPs. See 47 C.F.R. § 64.702(c) (codifying the second “Computer Inquiry”). Alternatively, an ILEC could provide DSL internet access itself, but to do so it must file what is known as a “Comparably Efficient Interconnection” plan (“CEI”) with the FCC. See *In re Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Report and Order*, 14 FCC Rcd. 4289 (1999) [hereinafter “Computer III” order]. These plans indicated how ILECs planned on providing competing ISPs with equal access to all the elements necessary to provide their own DSL internet access services. Among the requirements for CEI plans, ILECs had to “provide competitors with interconnection facilities that minimize transport costs. This provision ensures that [ILECs] cannot require competitive ISPs to purchase unnecessarily expensive methods of interconnection with the [ILECs] network.” *Id.* The 1934 Act also required that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable . . . .” 47 U.S.C. § 201(b).

The 1934 Act charged the FCC with enforcing these regulations and, in some cases, parties can also bring complaints before state public utility commissions. Aggrieved parties can either file a complaint in federal district court or before the Commission. 47 U.S.C. § 207. The FCC may also initiate its own enforcement proceedings and craft remedies as it deems appropriate. 47 U.S.C. § 205. In practice, however, the FCC tends to rely on market players bringing complaints to its attention.
See Cannon, Guide to the Computer Inquires at 70.

All of this regulation, however, applies only to the wholesale prices the SBC Entities charged linkLine; there is no comparable regulatory attention paid to the retail DSL market. Any restrictions on pricing at the retail level derive primarily from the antitrust laws. It is unclear at this juncture the extent to which linkLine is basing its § 2 price squeezing theory on wholesale pricing, retail pricing, or both. However, since linkLine could prove facts, consistent with its complaint, that involve only unregulated behavior at the retail level, its action or lawsuit survives a motion for judgment on the pleadings. We do not preclude the district court, however, from re-examining the viability of this claim on summary judgment after the record is more fully developed and it is clear whether the complained of behavior took place at the regulated wholesale level, the unregulated retail level, or some combination of the two, and to what extent, if any, the responsible agencies have devoted attention to or had involvement in the complained of conduct. Based on the record before us at this time, we are able to conclude that the district court was correct to deny the SBC Entities' motion for judgment on the pleadings because linkLine's allegation that the pricing scheme created an anticompetitive price squeeze states a potentially valid claim under § 2 of the Sherman Act.

AFFIRMED.

Dissent

GOULD, Circuit Judge, dissenting:

I respectfully dissent, concluding that the amended complaint should have been dismissed for failure to state a claim, in light of dispositive Supreme Court precedent, notwithstanding the permissive standard by which we assess a complaint when confronted with a motion to dismiss on the pleadings.

As the court correctly notes, we assume the facts pleaded in linkLine's amended complaint to be true. As a general matter it is not correct to dismiss the complaint if any facts might be proved under which the complaint would be valid. However, the complaint only generally alleges a "price squeeze" and related exclusionary conduct. The complaint does not allege that the SBC Entities had any market power to set or influence the retail price for internet service. So it seems quite odd to say they could have violated the antitrust laws in part because of retail pricing; if SBC has no power to set its retail prices above the price at which it has sold its wholesale connection, it does not make sense to consider its pricing an illegal "price squeeze" under the antitrust laws. Given that SBC's DSL internet connections compete with connections by cable and by satellite, it is by no means clear that SBC has the market power to influence the retail market price.

Moreover, the complaint does not allege that the prices at which the SBC Entities sold retail "DSL" internet connections were below cost, under any measure of cost; yet to the extent the concern is with predation at the retail level, then it would seem that, in current antitrust theory, below-cost sales must be shown. The complaint does not allege that the SBC Entities, to the extent they had losses by selling below cost in the retail market, had any realistic prospect of recouping losses; yet again, this prospect of recoupment is an integral element of a predation analysis under current Supreme Court doctrine.

Because of the expense and burden of proceeding in the antitrust litigation, it
would be inefficient and unwise to permit the complaint to proceed on the general allegations of price squeeze, absent allegation of critical facts that in my view are needed for liability. To put the matter practically, it seems to me that the Supreme Court’s decision in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (‘Trinko’) in essence takes the issues of wholesale pricing out of the case, and thus transforms what is left of any claim of “price squeeze.” If so, and if plaintiffs in good faith cannot allege market power, below cost sales and probable potential for recoupment in the retail market, then the case should not proceed. Conversely, if plaintiffs are able to allege that the SBC Entities had market power in the retail market to set or influence the price, and that their retail sales of internet connection were predatory in the sense of being below cost with a real prospect of recoupment, then the case should proceed for factual development. After Trinko and Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, (1993) (“Brooke Group”), the case doesn’t get out of the antitrust law starting blocks if plaintiffs cannot make allegations showing that the retail prices charged by the SBC Entities were predatory in a sense forbidden by the antitrust laws.

The district court dismissed most of the allegations of the complaint, but let stand the “price squeeze” allegation. As the majority opinion notes, “At the time the amended complaint was filed, the SBC Entities were both a supplier to the Plaintiffs at the wholesale level, and a competitor at the retail level.” The majority opinion also correctly explains: “In antitrust terms, a price squeeze occurs ‘when a vertically integrated company sets its prices or rates at the first (or ‘upstream’) level so high that its customers cannot compete with it in the second-level (or ‘downstream’) market.’” Yet, the notion of a “price squeeze” is itself in a squeeze between two recent Supreme Court precedents.

Let us look first at the part of the “price squeeze” represented by SBC setting the upstream price at which it would sell use of its land lines to linkLine and the other ISPs here suing. The Supreme Court’s decision in Trinko, upholding the ability of a regulated monopolist to deal with a competitor on certain service terms, means that if SBC set its wholesale price, the upstream price, too high, that cannot be challenged under the antitrust laws by analogy to permissible refusals to deal. I substantially and substantively agree with the position taken by the D.C. Circuit in Covad Communications Co. v. Bell Atlantic Corp., wherein the court adopted the reasoning of a major treatise on antitrust law that “‘it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal.’” Covad Commun. Co. v. Bell Atl. Corp., 398 F.3d 666, 673 (D.C. Cir. 2005). I am in agreement with this reasoning so far as it goes: Trinko insulates from antitrust review the setting of the upstream price.

However, although the D.C. Circuit concluded from this that “price squeeze” allegations should be dismissed, in this respect I would disagree if the key allegations I have identified could be made, because part of the “price squeeze” allegation is based on the retail price set in the “downstream” market. Thus, here linkLine is complaining about its inability to buy use of wholesale service lines at the price set by SBC when it cannot compete with the retail price at which SBC itself sells DSL internet connections to consumers.

SBC’s setting of its sale price of the use of its land lines by ISPs in a wholesale transaction cannot be the basis of an
antitrust claim in light of *Trinko*. That, however, does not dispose of scrutiny of SBC’s conduct in the retail market, for it is the price at which SBC sells DSL service to its retail customers that squeezes linkLine’s ability to resell internet connections at a profit. Thus the “price squeeze” contention boils down to a claim of a predatory pricing on sales of internet connections by SBC in the retail market. If all that remains of the “price squeeze” claim is a challenge to the retail prices set by SBC on sale of DSL internet connection service, then it seems to me essentially a predatory pricing claim, and it can only be viable in the first instance if the SBC Entities have some real market power sufficient to set or influence prices in the retail market.

Moreover, even beyond the need for alleging and proving some degree of market power in the retail market, if that is the true locus of the antitrust complaint after *Trinko*, the retail side of a price squeeze cannot be considered to create an antitrust violation if the retail pricing does not satisfy the requirements of *Brooke Group*, which set unmistakable limits on what can be considered to be predatory within the meaning of the antitrust laws. In that case the Supreme Court held that a predatory pricing claim could proceed only if there were allegations (1) that the prices set were below an appropriate measure of the seller’s costs; and (2) that the seller had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of later recouping losses. *Id.* at 222-24. Here, plaintiffs in their “price squeeze” contentions in the amended complaint did not allege that the seller had the market power to set prices for internet connection in the retail market, that SBC’s retail price, contributing to the squeeze, was set below cost, and that losses could later be recouped.

Because we have not heretofore held that there must be a showing of market power in the retail market, nor held that the standards of *Brooke Group* must be applied in assessing predation in the retail side of a “price squeeze,” I do not think it would be correct to dismiss the complaint on the pleadings with prejudice. Instead, after dismissal, plaintiffs should have been free to amend their complaint if they could assert in good faith the allegations that are requisite here, after *Trinko*, for antitrust liability.

Thus I respectfully dissent, believing that the Supreme Court’s precedents in *Trinko* and *Brooke Group* have so hemmed in the potential for “price squeeze” liability that the specific allegations I have identified are necessary to state an antitrust claim in the context of the “price squeeze” alleged.
When the Federal Communications Commission classified DSL as an information service in 2005, it put telephone broadband providers in the same category as cable modem broadband providers. The decision relieved both telephone and cable companies from legal obligations to lease broadband lines to competitors.

More importantly, telephone companies would not face the same antitrust laws that required dial-up carriers to lease their lines at a discount to independent dial-up companies. Or did it?

The Supreme Court decided June 23 to hear a case pitting California broadband provider linkLine against AT&T. The company, which leases broadband lines and resells broadband access to consumers, claims AT&T’s wholesale broadband prices are so high, linkLine was unable to compete against AT&T’s retail prices.

In the legalese of the case, linkLine accused AT&T of a “price squeeze” in violation of the Sherman act. The case was originally filed against Pacific Bell, which was later acquired by SBC, which, in turn, acquired AT&T and began to operate under the AT&T name.

AT&T contended the FCC’s 2005 decision did not obligate it to lease any lines to linkLine and that the arrangement shielded AT&T from antitrust claims. After legal wrangling on the district court level, the Ninth Circuit Court of Appeals ruled the case could proceed. With the support of the Department of Justice, AT&T appealed the case to the Supreme Court.

“Defendants [AT&T] adopted procedures carefully calculated to deny ISPs access to an essential facility and to preserve and maintain its monopoly control of DSL access to the Internet,” the Ninth Circuit ruled.

In accepting the case to be heard this fall, the Supreme Court said it would consider whether a “vertically integrated retail competitor with an alleged monopoly at a wholesale level but no antitrust duty to provide the wholesale input” could engage in price squeezing by leaving “insufficient margin between wholesale and retail prices to allow the plaintiff to compete.”

According to the Ninth Circuit, a price squeeze occurs when a vertically integrated company sets its upstream prices or rates so high other companies are unable to compete.
The U.S. Court of Appeals for the Ninth Circuit (San Francisco) has affirmed the finding of a district court that refused to dismiss an antitrust lawsuit filed by a group of Internet service providers (ISPs) charging that subsidiaries of the former SBC Communications, Inc., had “created a price squeeze” for DSL (digital subscriber line) competitors that buy SBC’s wholesale services.

The complaint was filed more than four years ago by a group of ISPs—including Linkline Communications, Inc., In-Reach Internet LLC, Om Networks, and Nitelog, Inc.—that lease facilities for transporting data from SBC and its subsidiaries. SBC and its subsidiaries were both supplier to the plaintiff ISPs at the wholesale level, and competitor at the retail level.

The lawsuit accused SBC of charging the ISPs “a high wholesale price in relation to the price at which defendants were providing retail services.” The ISPs specifically alleged that SBC monopolized the regional DSL market in violation of section 2 of the Sherman Act.

SBC subsequently filed a motion for judgment on the pleadings, contending that the anticompetitive “price squeeze” allegations made under the Sherman Act were not valid claims. Among other things, SBC based its argument for dismissal on the U.S. Supreme Court’s decision in Verizon Communications Inc., vs. the Law Offices of Curtis V. Trinko and argued that its wholesale pricing can’t be the basis of an antitrust claim.

The federal district court in California denied SBC’s motion to dismiss for failure to state a claim and determined that the decision in the Trinko case does not bar a plaintiff from claiming a violation of the Sherman Antitrust Act by “virtue of an alleged price squeeze perpetrated by a competitor who also serves as the plaintiff’s supplier at the wholesale level, but has no duty to deal with the plaintiff absent statutory compulsion.”

The majority of the Ninth Circuit, according to a decision written by Judge Sydney Thomas, agreed with the finding of the lower court and affirmed the decision denying dismissal of the plaintiffs’ price squeeze claims against SBC. The court pointed to its 1992 decision in City of Anaheim vs. Southern California Edison Co. in which it determined that even in a business where prices are regulated at both the wholesale and retail level, it’s possible for price squeeze to occur.

Judge Thomas also pointed out that the “Trinko decision did not, as the SBC entities would argue, completely eliminate the viability of a section 2 price squeeze theory in regulated industries.” The existence of regulation does not always eliminate the danger of anticompetitive harm, Judge Thomas wrote in the decision.

“When we apply Anaheim and Trinko to this case, the soundness of the district court’s conclusion in denying judgment on the
pleadings is clear,” Judge Thomas said, pointing out that at the time the complaint was made SBC was subject to certain regulatory requirements related to the provision of retail DSL.

Ultimately, the Ninth Circuit concluded that the lower court was correct to deny SBC’s motion for judgment on the pleadings because the allegations made by the ISPs constitute a “potentially valid claim” under the Sherman Act. Judge Ronald Gould, however, dissented from the majority opinion and questioned the extent to which the ISPs allege that SBC and its subsidiaries had any market power to set or influence the retail price for Internet service. “It seems quite odd to say they could have violated the antitrust laws in part because of retail pricing if SBC has no power to set its retail prices above the price at which it has sold its wholesale connection?” Judge Gould wrote.
"Ninth Circuit Prequels and Sequels"

New York Law Journal
December 18, 2007
Neal R. Stoll and Shepard Goldfein

It must be more than a mere coincidence that the U.S. Court of Appeals for the Ninth Circuit’s jurisdiction includes California and its constituent city Hollywood, the locus of motion picture production. Once again, the Supreme Court is being asked to review a decision brought to us by the same Circuit Court that produced the short-run opinions in Dagher and Weyerhaeuser.

The ‘linkLine’ Case

The writ of certiorari, currently pending before the Court, arises from the Ninth Circuit’s decision in linkLine Communications, Inc. v. SBC California, Inc. that affirmed the District Court’s refusal to grant judgment on the pleadings for a defendant who allegedly priced its wholesale and retail provision of Internet connection services so as to monopolize DSL access to the Internet. The Supreme Court is being urged to consider whether or not a claim under §2 of the Sherman Act can be based on an alleged ‘price-squeeze’ theory where the defendant’s duty to deal with rivals only arises under statutory compulsion.

Specifically, the Ninth Circuit’s reasoning raises questions about the implications of the Supreme Court’s decision in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, i.e., antitrust oversight over vertically integrated competitors and the potential limitation of claims based on pricing to those alleging exclusionary conduct. Collaterally, the ‘price-squeeze’ claim also implicates the Court’s Weyerhaeuser decision and the Ninth Circuit’s recent holding in Cascade Health Solutions v. PeaceHealth.

SBC, the defendant in linkLine, was required to give access to its local telephone network to independent Internet service providers (ISPs), including linkLine, pursuant to statutory compulsion. SBC and linkLine both competed in the provision of DSL Internet services to consumers. linkLine alleged that SBC’s conduct amounted to a refusal to deal, denial of access to an essential facility, and was price-squeezing in violation of §2 of the Sherman Act.

Trinko, also in the context of telecommunications deregulation and compulsory access to networks, held that antitrust liability was inappropriate where there already exists a regulatory structure designed to prevent anticompetitive conduct. Therefore, the Supreme Court’s decision required the dismissal of the first two claims. However, a price-squeeze theory was not explicitly advanced in Trinko, and the majority of the Ninth Circuit panel held that Trinko did not preclude such a claim. Even though Trinko reiterated the general principle that the Sherman Act does not restrict the right to choose with whom to deal, Justice Antonin Scalia conceded, citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., that, ‘[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2.’ The Ninth Circuit was also careful to note that the Supreme Court did not state that the regulatory structure in existence created a per se bar to antitrust
liability, only that it was "[o]ne factor of particular importance."

The regulatory scheme in *linkLine* required the defendant to provide access to its network to independent ISPs with whom it competed in the downstream market. If it competed through a subsidiary, SBC was required to provide access on the same terms and conditions to independent ISPs as it did to its subsidiary. If it provided retail DSL services itself, SBC was required to provide network access in accordance with an FCC-approved plan that would ensure comparable parity in the ability to compete for the provision of retail DSL Internet services. The Ninth Circuit noted that the regulatory structure did not exercise control over retail prices for DSL Internet services. The Court of Appeals therefore concluded that there was room, consistent with *Trinko*, for antitrust regulation of the defendant's conduct, particularly as it related to retail pricing. Since it was unclear to what extent the plaintiff was basing its price-squeeze claim theory of wholesale pricing, retail pricing, or both, its claim should be allowed to proceed.

Judge Ronald Gould, dissenting, argued that *Trinko* precluded any claim based on SBC constructing a price-squeeze. The U.S. Court of Appeals for the District of Columbia Circuit had come to the same conclusion in *Covad Communications Co. v. Bell Atlantic Corp.* However, Judge Gould expressed the view that *Trinko* did not bar a claim based on predatory pricing. The Eleventh Circuit has already allowed such a claim to proceed in *Covad Communications Co. v. BellSouth Corp.* In light of the intervening judgment of *Trinko* and its implication that conduct meeting the standards of Brooke Group must be alleged, the dissent would have dismissed the plaintiff's pleading without prejudice, allowing the plaintiff to amend and re-file its claim should it have one based on predatory pricing.

**Price-Squeeze Theory**

The other context in which the price-squeeze theory has been advanced in a regulated-industry context has been with respect to the supply of electricity generated by vertically integrated utilities and distributed by independent local distributors. One such case is *Town of Concord, Massachusetts v. Boston Edison Company*. As noted in the U.S. Court of Appeals for the First Circuit's opinion in that case, delivered by then-Judge Stephen Breyer, the price-squeeze theory has a long and not insubstantial pedigree. In *United States v. Aluminum Co.*, Judge Learned Hand held that Alcoa acted unlawfully when it charged higher than a 'fair price' for aluminum ingot used to manufacture aluminum sheet because it also priced aluminum sheet so low as to deny its competitors an opportunity to make a "living profit." And since then, various courts of appeal and district courts have used similar language in describing claims allowed under the antitrust laws. In fact, the legitimacy of price-squeeze theories in a regulated-industry context has tended to be recognized in the electricity context, albeit in a limited fashion, although claims have rarely been allowed to succeed.

Notoriously absent from the *linkLine* decision are references to the Supreme Court's decision in *Weyerhaeuser* and the Ninth Circuit's recent decision in *PeaceHealth*. Both of these precedents are more on point than *Trinko* in the context of a price-squeeze claim:

A predatory buying claim resembles a price-squeeze claim in that, in both instances, the defendant allegedly inflated the input prices and left too small a differential between the
upstream input price and the downstream output price for rivals to survive.

Applying *Weyerhaeuser*, overpaying in the input market becomes suspect only when it leads to below-cost pricing in the output market. Moreover, *Weyerhaeuser* likely overrules Judge Hand’s holding in *United States v. Aluminum Co.* that relied on qualitative concepts such as “fairness” and “living profit.”

As we previously reported, the Ninth Circuit in *PeaceHealth* held that a cost-based test is an essential element of a monopolization claim premised on multiproduct or “bundled” discounting. Bundled discounting describes the practice of offering discounts that are conditioned upon the customer’s purchase of two or more products from the seller’s products or services. *PeaceHealth* applied a rule modeled on the Supreme Court’s landmark predatory pricing decision, *Brooke Group*. The Ninth Circuit’s approach unified the legal standard for Sherman Act §2 claims based on allegations of predatory pricing, predatory bidding, and bundled discounting practices.

Analysis

It is only a short distance from where the Supreme Court and the Ninth Circuit stand now to the dismissal of a plaintiff’s claim based on a defendant’s wholesale service cost forcing the plaintiff to operate at a loss. Unless the defendant is also operating at a loss with respect to its retail services it is hard to see why the antitrust laws should protect a clearly less efficient provider of the retail services.

The Ninth Circuit’s use of *Trinko* as a keystone to allow *linkLine* to attack the defendant’s retail pricing is a non sequitur. The Ninth Circuit, in denying the motion for judgment on the pleadings, stated that “*linkLine* could prove facts, consistent with its complaint, that only involve unregulated behavior at the retail level.” The fact that a plaintiff must prove its price-squeeze theory has a predatory effect in the retail market is dictated ultimately by *Brooke Group*, not *Trinko*.

Despite the deficiencies in the Ninth’s Circuit reasoning, one might feel some sympathy for the plaintiff in *linkLine*, especially when the end goal is to deliver cheaper and better Internet connection for consumers. It might be the case that the defendant is not as efficient a retail service provider as *linkLine*. But so long as the difference between the defendant’s wholesale price and its retail price is sufficient to cover the defendant’s costs to provide its retail services (i.e., it is not engaged in predatory pricing), there will always be room for a more efficient retail service provider to make a profit. In fact, in such a situation, the defendant would increase its profit by raising its wholesale price to capture the plaintiff’s efficiencies and exiting retail service provision altogether; all without any harm to consumers.

A monopolist has always had the right to be vertically integrated, even if it is less efficient than its competitors who it supplies in the downstream market. Once this is accepted, *Trinko* can be used to punctuate the conclusion, as some commentators have stated, that ‘it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal.’

At least it ultimately should be a Happy Holidays for wholesalers with market power!
"ISPs File Antitrust Lawsuit Against SBC in California"

Telecommunications Reports
July 24, 2003

A group of Internet service providers (ISPs) in California today filed an antitrust lawsuit charging that subsidiaries of SBC Communications, Inc., had "created a price squeeze" for DSL (digital subscriber line) competitors that buy SBC's wholesale services.

"SBC has used the classic 'price squeeze' to put independent ISPs out of the DSL market," said David Simpson, one of the attorneys of the plaintiffs. "With DSL, where SBC has a stranglehold on the 'last mile' critical for deployment of the broadband technology, SBC suddenly has nearly all of the market." The lawsuit accuses SBC of charging ISPs "a high wholesale price in relation to the price at which defendants were providing retail services." It also says SBC took a number of other actions to make it difficult for competing ISPs to do business. The plaintiffs allege that the extent of the damages they have incurred exceeds $40 million for each one.

An SBC spokesman said the lawsuit was "without merit and appears to be a rehash of issues that have already been resolved with the California Internet Service Providers Association." He added that SBC recently lowered its DSL transport pricing, which he said allows ISPs to better compete with cable modem providers.

Filing the lawsuit in U.S. District Court in Los Angeles against SBC California, Inc., Pacific Bell Internet Services, and SBC Advanced Solutions, Inc., were linkLine Communication, Inc., InReach Internet LLC, Om Networks, and Nitelog, Inc. The action alleges violations of the Sherman Antitrust Act and the California Unfair Business Practice statues. It seeks compensatory and punitive damages and an injunction on the defendants.
Local telephone companies may have to share their lines with competitors, but antitrust laws don’t force them to bend over backward to help rivals serve their customers, the U.S. Supreme Court ruled Tuesday.

The court rejected a customer’s complaint that Verizon Communications Inc. was furthering its monopoly in local service by failing to help AT&T Corp. deliver service on Verizon lines. The customer, a lawyer in New York, can’t sue under antitrust laws just because Verizon violated the federal Telecommunications Act of 1996, the court said.

That decision could lead lower courts to throw out most of the nearly three dozen antitrust lawsuits filed against Verizon, SBC Communications Inc. and other Baby Bells, said John Thorne, Verizon’s deputy general counsel. Verizon faces 13 such suits and SBC 15.

The high court justices ruled that the 1996 telecommunications law, intended to break up local phone monopolies and promote competition, didn’t give Verizon, SBC and other Bells immunity from conventional antitrust actions, as some Bell lawyers had argued.

New York-based Verizon is the nation’s largest local phone company. In California, it is second to SBC, serving many of the coastal communities in Southern California.

Both companies have argued vociferously that the rates they can charge competitors to rent their lines and equipment are too low.

Under the 1996 law, the Bells had to open their markets to competition and lease their equipment to rivals to get approval to offer long distance. In exchange for allowing rivals on their lines, the Bells were permitted to sell long-distance service.

James D. Ellis, general counsel for SBC, California’s dominant local carrier, said the decision freed the company from “frivolous lawsuits” and allowed it to focus more on new products.

Organizations representing consumers and competitors were disappointed.

“It will make the process of deciding to bring a case quite a bit more challenging,” said Michael McNeely, a lawyer for Consumers Union, which supported the customer who filed the complaint, Curtis V. Trinko. “It ups that ante on what you have to prove.”

Jonathan Askin of the Assn. for Local Telecommunications Services said the local loop to homes was an “essential facility,” and that without fair access to it, “the Bell cartel will always be able to wield monopoly control.”

“In our view, the decision is not surprising,” said James Kirkland, general counsel for DSL provider Covad Communications Group Inc., which filed a brief supporting Trinko.
Kirkland said the decision shouldn’t affect two antitrust suits that Covad has filed, alleging that Verizon and BellSouth Corp. illegally furthered their monopoly positions in digital subscriber line service. Those actions, he said, are based on conventional antitrust rules.

Trinko declined to comment on the decision, and his lawyer was unavailable.

Trinko’s law firm was an AT&T customer, receiving service on lines AT&T leased from Verizon. Trinko claimed that Verizon discriminated against AT&T customers by providing them worse service than it provided to its own customers.

He claimed this violated both the 1996 act and the Sherman Antitrust Act of 1890, which prohibits monopolies from aggressively defending their monopoly positions.

A federal district court ruled that Trinko had no grounds to sue because he wasn’t a direct customer of Verizon.

A U.S. 2nd Circuit Court of Appeals panel reinstated the Sherman Act claims. Verizon appealed to the Supreme Court.

Verizon’s alleged failure to provide AT&T adequate access to its lines may be a violation of the 1996 telecom law, Justice Antonin Scalia wrote for the majority Tuesday, but that doesn’t mean that Verizon broke antitrust laws.

Just as “the 1996 act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards,” Scalia wrote.

Having a monopoly isn’t unlawful “unless it is accompanied by an element of anticompetitive conduct.”

In this case, he said in the majority opinion, there was no evidence showing Verizon’s motivation was to further its monopoly position.

Trinko’s complaint led to investigations by the Federal Communications Commission and the New York Public Services Commission, the high court opinion noted. In the federal case, Verizon paid a $3-million fine. In the state case, it made a $10-million payment.
United States v. Eurodif S.A.

07-1059


The United States Enrichment Corporation (the only company in the United States that enriches uranium) filed a complaint with the Commerce Department against Eurodif S.A. for selling low enriched uranium at unfairly low prices, in violation of anti-dumping laws. In two previous decisions, the court found that contracts for the enrichment of uranium were contracts for services as opposed to contracts for the sale of goods, and therefore were not subject to anti-dumping laws. On remand from the Court of International Trade, Commerce redefined the scope of the anti-dumping laws to exclude such services. The appeal was dismissed by the Court of Appeals for the Federal Circuit as unripe.

Questions Presented: The antidumping law allows for duties to be imposed on “foreign merchandise ... sold in the United States at less than its fair value.” The Commerce Department construed that phrase as including transactions in which a U.S. customer furnishes cash and fungible raw material to a foreign producer and receives a substantially transformed finished product. The question presented in this case is whether the Federal Circuit erred in failing to accord Chevron deference to that construction, when a contrary one will prevent the Commerce Department from applying the antidumping law to imports causing or threatening material injury to a domestic industry.

Section 1673 of Title 19 of the United States Code provides that, when “a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value,” to the detriment of a domestic industry, the Department of Commerce (Commerce) shall impose antidumping duties on entries of the foreign merchandise.

The question presented is: Whether the court of appeals erred in rejecting Commerce’s conclusion that foreign merchandise is “sold in the United States” within the meaning of 19 U.S.C. 1673 when a purchaser in the United States obtains foreign merchandise by providing monetary payments and raw materials to a foreign entity that performs a major manufacturing process in which substantial value is added to the raw materials, thereby creating a new and different article of merchandise that is delivered to the U.S. purchaser.

EURODIF S.A., Compagnie Generale des Matieres Nucleaires, and Cogema, Inc., and Ad Hoc Utilities Group, Plaintiffs-Appellees

v.

UNITED STATES, USEC Inc., and United States Enrichment Corporation, Defendants-Appellants

United States Court of Appeals for the Federal Circuit

Decided September 21, 2007
ROBERTSON, District Judge.

In this dispute about the correct application of the antidumping statute, 19 U.S.C. § 1673, to enriched uranium feedstock, appellants United States, USEC Inc., and United States Enrichment Corp. (the latter two collectively referred to as “USEC”) appeal from a judgment of the United States Court of International Trade. Eurodif S.A. v. United States, 442 F. Supp. 2d 1367 (Ct. Int'l Trade 2006). In 2005, we issued two interlocutory opinions in the same case, Eurodif S.A. v. United States, 411 F.3d 1355 (Fed. Cir. 2005) (“Eurodif I”), and Eurodif S.A. v. United States, 423 F.3d 1275 (Fed. Cir. 2005) (“Eurodif II”). Because the issues appellants raise in the instant appeal concern only the application of those decisions to future entries of low enriched uranium, we dismiss the appeal as unripe.

I. BACKGROUND

In Eurodif I and Eurodif II, we found that separate work unit (“SWU”) contracts for the enrichment of uranium were contracts for services, rather than for the sale of goods, and that the low enriched uranium (“LEU”) produced under those contracts was therefore not subject to the antidumping statute. Eurodif I, 411 F.3d at 1364; Eurodif II, 423 F.3d at 1278. Following those decisions, the Court of International Trade issued a remand order, instructing the Department of Commerce (“Commerce”) to revise its final determination and order, and to “examine how its final determination and order on remand has eliminated all SWU transactions” in accordance with our decisions. Eurodif S.A. v. United States, 414 F. Supp. 2d 1263 (Ct. Int'l Trade 2006) (“Eurodif III”). Acting pursuant to that order, Commerce excluded LEU covered by SWU contracts from its recalculation of the duty margin, Final Results of Redetermination Pursuant to Court Remand, Eurodif S.A. v. United States (Mar. 3, 2006), but it did not modify the scope of the antidumping duty order to exclude future imports of LEU covered by SWU contracts.

Plaintiffs-Appellees Eurodif S.A., Cogema, and Cogema, Inc. (collectively referred to herein as “Eurodif”) supported Commerce’s action, as far as it went, but they also asked the Court of International Trade to require Commerce to amend the scope order so that it would expressly exclude LEU covered by SWU contracts. Defendant-Appellant USEC supported Commerce’s decision not to amend the scope order, but asserted that it was error for Commerce to exclude all LEU imported pursuant to SWU contracts from its recalculation without investigating the facts behind each contract to determine whether the transaction was a sale of services, as stated in the contract, or was in fact a sale of goods.

The Court of International Trade agreed with Eurodif. It found that our opinions in Eurodif I and Eurodif II took into account the factual circumstances operating behind the individual contracts in this case and therefore that Commerce was correct to exclude all LEU covered by those SWU contracts from its recalculation. Eurodif S.A. v. United States, 431 F. Supp. 2d 1351, 1354 (Ct. Int'l Trade 2006) (“Eurodif IV”). Furthermore, the Court of International Trade concluded that our previous opinions required Commerce to rewrite the scope of the antidumping duty order, and it remanded the case to Commerce once again with instructions to amend the order to exclude all LEU covered by SWU contracts from the “class or kind of merchandise” covered by
the order. *Id.* at 1355 (citing 19 U.S.C. § 1673e(a)(2)). On this second remand, Commerce redefined the scope of the antidumping order to exclude any entry of LEU that is accompanied by a certification claiming that the entry is made pursuant to a SWU contract. The Court of International Trade sustained, *Eurodif S.A. v. United States*, 442 F. Supp. 2d 1367 (Ct. Int’l Trade 2006) ("Eurodif V"), and this appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II. DISCUSSION

In *Eurodif I* and *Eurodif II*, we found that the SWU contracts at issue “in this case” were contracts for the sale of services that were not subject to the antidumping statute. *See Eurodif I*, 411 F.3d at 1362, 1364. We did not address how Commerce should determine whether future entries of LEU are made pursuant to SWU contracts. The contentions of the government and USEC on this appeal are directed to future entries. They argue that Commerce should be permitted to suspend liquidation of future LEU imports until it determines—transaction-by-transaction and by administrative review—whether the SWU contract exception applies. USEC additionally argues that the scope amendment and certification should be modified now to make it clear that future LEU imports will not be outside the scope of the antidumping law if the unenriched uranium is either (a) obtained from an affiliate of the enricher or (b) delivered to the enricher after entry.

Neither the procedural question presented here (scope review vs. administrative review) nor the substantive questions relating to affiliation of the enricher are ripe for decision. The doctrine of ripeness is designed “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). It is drawn “both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court’s own motion.” *Nat’l Park Hospitality Ass’n v. DOI*, 538 U.S. 803, 808 (2003) (citing *Reno v. Catholic Soc. Servs.*, 509 U.S. 43, 57 n.18, (1993).

**Administrative Review vs. Scope Determination**

The Court of International Trade found that an administrative review is not the “proper forum to address whether merchandise is within the scope of an order,” and that Commerce’s own regulations authorize a different mechanism for this purpose: a “scope determination.” *Eurodif IV*, 431 F. Supp. 2d at 1356. At the request of any interested party, Commerce may “initiate an inquiry” as to whether merchandise is within the scope of an antidumping duty order. *Id.* (citing 19 C.F.R. § 351.225(b)). If the Secretary determines that the product in question is included within the scope of the order, he may instruct Customs to suspend liquidation for each unliquidated entry, effective as of the date the scope inquiry was initiated. 19 C.F.R. § 351.225(l)(2). That determination is reviewable by the Court of International Trade. 28 U.S.C. § 1581(c).

Appellants argue that this scope determination process is inadequate, because, as a practical matter, an entry of
LEU under review will be liquidated before Commerce can complete its determination. They assert that determining whether a particular transaction is entitled to the SWU-contract exception requires a careful analysis of the contract itself and an opportunity to investigate the manner of its execution. The administrative review process would permit Commerce to suspend liquidation while such an assessment takes place, but the scope determination process permits Commerce to suspend liquidation only after the Secretary has issued a preliminary scope ruling. USEC notes that liquidation typically occurs ten months after entry, but Commerce’s previous assessments of LEU contracts have taken seventeen to eighteen months. As a result, appellants argue, the scope determination process will not be completed before the entry under review has been liquidated, mooting the review.

This dispute is about what may or may not happen with the next LEU case—a case about which we have no facts. Our decisions in Eurodif I and Eurodif II did not resolve the procedural problem that USEC and the government have presented here, but we decline to attempt a resolution on this record. We have held that SWU contracts are contracts for services and that the LEU in this case entered under SWU contracts. Whether the next contested shipment of LEU is covered by a valid SWU contract is a question that must await the next case. If Commerce is correct, and the next disputed LEU entry is liquidated before Commerce can complete its scope review, the dispute will not be rendered non-justiciable, as it would be “capable of repetition, yet evading review.” S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

**LEU Obtained from or Sold to Affiliates**

The more substantive questions USEC brings on this appeal also require a specific factual context for their resolution, and such a record is not before us. USEC wants it made clear that future LEU imports will not avoid antidumping penalties if the unenriched uranium was either (a) obtained from an affiliate of the enricher or (b) delivered to the enricher after the importation of the LEU. Although USEC does not challenge our finding that the contracts in this case were contracts for the sale of services, it seeks clarification as to whether our holding would apply to future entries with these characteristics. Until we have record evidence regarding such entries, however, USEC’s questions are non-justiciable. Elec. Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938) (“We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation.”).

**III. CONCLUSION**

For the aforementioned reasons, we dismiss.

DISMISSED.
The Supreme Court said yesterday that it would hear a dispute between USEC of Bethesda and a French supplier of low-enriched uranium in a case the federal government said has implications not only for the energy industry but also for efforts to dismantle some nuclear weapons.

Justices agreed to consider in their term that begins next fall whether anti-dumping duties can be imposed on Eurodif, which supplies utilities in the United States with low-enriched uranium, a critical component in the domestic production of nuclear power.

USEC, the only U.S. company that enriches uranium, complained to the Commerce Department that Eurodif's prices were unfairly low, and the agency decided in 2001 that anti-dumping duties should be levied. But the U.S. Court of International Trade disagreed, and in September the U.S. Court of Appeals for the Federal Circuit upheld that ruling.

USEC received powerful support from the federal government, which urged the Supreme Court to take the case.

The appeals court decision, Solicitor General Paul D. Clement said in a brief to the high court, "threatens to undermine U.S. foreign policy and national security interests in the remarkably sensitive context of nuclear fuel, nonproliferation, and ensuring domestic supplies for nuclear weaponry."

He said it would endanger the financial viability of USEC, the sole source of certain types of nuclear fuel used for military purposes.

A coalition of utilities joined Eurodif and its parent company, Areva, in urging the court not to review the case, which they said had been correctly decided by the lower courts. If Congress is concerned about the viability of USEC, they argued, there are other ways to take care of it.

"The antidumping statute is an instrument of trade policy with general application to all industries, and not a tool for the implementation of national security or energy policies," argued the Ad Hoc Utilities Group.

While the Commerce Department sided with USEC, the courts agreed with the utilities that, in at least some cases, importing the low-enriched uranium constituted a provision of a service by the French company, not a purchase of a product. Products are covered by the anti-dumping laws, while services are not.

The federal government asked the Supreme Court to uphold the Commerce Department's authority and expertise. And it warned that the decision, in a "truly unprecedented manner" for a trade case, has implications for national security.

The government said that a program under which Russia has agreed to convert weapons-grade, highly enriched uranium into the kind of uranium needed by U.S. utilities could be endangered. Dismantling
nuclear warheads, it said, is a more expensive process than simply enriching the uranium as the French company does. It is economically viable only because the United States has the ability to use anti-dumping laws to regulate the entry of low-enriched uranium from foreign sources.

The combined cases are *U.S. v. Eurodif* and *USEC v. Eurodif*. 
BETHELDA, Md.—The U.S. International Trade Commission (ITC) voted today in favor of USEC's position that terminating the antidumping duty order on imports of low enriched uranium (LEU) from France would materially injure the U.S. enrichment industry.

Today's ITC vote concludes the “sunset review” of the 2002 antidumping order against French uranium imports. A sunset review is a two-part administrative proceeding conducted every five years in which the ITC and the U.S. Department of Commerce (DOC) make separate determinations that are required for antidumping orders and certain other trade measures to remain in place. In May 2007, the DOC determined that dumping of French LEU is likely to continue or recur if the antidumping duty order were terminated.

This positive ruling from the ITC demonstrates that the dumping of foreign-produced uranium imports continues to be a significant threat to the U.S. enrichment industry, the economic well being of its workers and the communities in which they live. USEC is working vigorously to deploy new uranium enrichment technology at the American Centrifuge Plant in Piketon, Ohio, while maintaining our current enrichment operations in Paducah, Ky., and successfully implementing the Megatons to Megawatts nonproliferation program with Russia. Discipline on unfairly traded imports must be maintained until the success of all these initiatives is assured.

USEC will continue to support the efforts of the U.S. government to address the dumping of foreign-produced uranium imports. USEC also intends to seek U.S. Supreme Court review of the U.S. Court of Appeals for the Federal Circuit’s decision that enrichment transactions under SWU (separative work unit) contracts are sales of services, not goods, and thus outside the scope of U.S. antidumping law.

USEC Inc., a global energy company, is a leading supplier of enriched uranium fuel for commercial nuclear power plants.
WASHINGTON—Seventy years after the United States invented uranium enrichment, the sole American company in the business is struggling to survive, while nuclear power experts worry that its failure would leave the Russians dominant in the market for fuel processing.

The company, USEC, has liquidated some of its valuable uranium inventories to stay afloat, as its income has declined because of changing market conditions. But it had also maintained a high dividend, bought back stock and spent heavily on severance payments after frequent purges in the executive suite. The company spent more than $100 million on two new technologies for enrichment before abandoning them and embarking on a third.

"USEC has been a four-letter word in some circles," said its president, John K. Welch, who was hired in October 2005 to save the company. Though he has taken steps to strengthen the company, he said the problem now is to find a way to finance new technology and become competitive in the world market.

Enrichment means sorting two types of uranium to raise the proportion of uranium 235, a step essential for use in American nuclear reactors. The government is promoting nuclear as a step toward energy independence.

The United States invented the process and used it to build the bomb that destroyed Hiroshima in August 1945. Later, the United States offered enriched uranium to civil nuclear programs worldwide.

In the 1990s, the government privatized its antiquated enrichment plants. USEC closed one, in Piketon, Ohio, and still runs the other, in Paducah, Ky.

But the Paducah plant is a heavy user of costly electricity, which now amounts to more than 70 percent of USEC’s costs. Centrifuges, which are used by almost all other enrichment plants, use only 5 percent of the electricity used by the Paducah plant.

In February, USEC announced that the centrifuges it was developing would cost $2.3 billion, up from a previous estimate of $1.7 billion, and would take an extra year to deploy. The company has already spent about $400 million on the centrifuges and is looking for financing to complete the project, which it is trying to build in Piketon, Ohio.

"Most people expect that $2.3 billion is going to go up," said Paul R. Clegg, a stock analyst at Natexis Bleichroeder Inc.

The company has been involved in merger talks with several companies in the nuclear business, and the trade press has carried reports of other negotiations. But two people with knowledge of the talks said that they did not appear to be leading anywhere.

In addition to USEC’s Paducah plant and its planned centrifuge project, a European consortium is building a centrifuge plant in...
Hobbs, N.M., that it calls the National Enrichment Facility, and General Electric is trying to make an Australian enrichment technology called Silex commercially feasible.

Despite the challenges, and the fact that Mr. Welch eliminated the dividend, the stock price is strong. Market analysts say one reason is that the price of virgin uranium is so high that customers are demanding more enrichment work, thus driving up the price of the service that USEC provides. Some investors also see the company as a takeover target, or a likely beneficiary of government help.

USEC would like to acquire uranium from the Energy Department on favorable terms, to help provide funds for its centrifuge project. But the Energy Department appears to want a signal from Congress, and the company faces questions there about its previous performance, and about the wisdom of bailing out its stockholders.

The government still owns the Paducah plant, and could take it over and give it to a contractor to run. Or it could allow USEC to operate in bankruptcy, although that would probably eliminate the company's ability to build a more modern plant.

The assistant secretary of energy for nuclear energy, Dennis R. Spurgeon, was USEC's executive vice president and chief operating officer until he left in 2003, receiving a payment of more than $5 million, according to Securities and Exchange Commission filings. Mr. Spurgeon, through a spokesman, declined repeated requests for an interview.

According to people close to the company, Mr. Spurgeon had clashed with the chief executive, William H. Timbers, as had other top officials. Mr. Timbers left the company in December 2004, after disagreements with the board. In February 2006, USEC agreed to pay him $14.5 million, according to S.E.C. filings.

Some Democrats in Congress are demanding a full explanation of the departures of Mr. Timbers and others before they proceed with a discussion about how to help the company.

USEC has other problems as well. It also takes in enriched uranium from Russia, left over from Russia's nuclear weapons program, under a program called Megatons to Megawatts. USEC dilutes the material to reactor grade under an agreement in operation since the early 1990s.

Half of the enrichment that the company sells is done under the terms of that agreement, which were locked in years ago, and it provides a substantial profit to USEC. But the agreement ends in 2013, after which the Russian nuclear enterprise, Rosatom, wants to deal directly with the nuclear utilities. Those utilities would like to do the same.

Another potential problem for USEC is that a near-total ban on Russian imports beyond those allowed in the Megatons to Megawatts program may be coming to an end.

The ban dates from a trade case brought by American uranium companies against the Soviet Union. The companies won a ruling that the Soviets were dumping production in this country below cost. As a result, the United States threatened a tariff of more than 100 percent, and reached an agreement that limited the imports allowed under the Megatons to Megawatts program.

But last month, a similar ruling against a French producer was overturned by the
Court of Appeals for the Federal Circuit. The court ruled that enrichment was a service, not a product, and thus not subject to import quotas.

Russian and American officials said that the court decision put pressure on the American side to conclude a deal more favorable to the Russians.

Russia has vast inventories of enriched uranium and a huge ability to enrich more, according to trade experts. The prospect alarms some on Capitol Hill, who believe that the United States must maintain the ability to enrich uranium.

The prospect is that without USEC, the United States will rely on others not only for the uranium ore, but also for most of the work needed to convert it into fuel.

"We import two-thirds of our oil, but 90 percent of our uranium," said Jack Edlow, a Washington businessman who deals in uranium and who pointed out that the reliance was for both raw ore and for enrichment. "I can't say 'energy independence' with a straight face."
Winter v. Natural Resources Defense Council

(07-1239)


Plaintiffs filed the current lawsuit against Defendants concerning the U.S. Navy’s use of mid-frequency active sonar in Navy training exercises in southern California. Plaintiffs contend that Defendants failed to comply with the requirements of the National Environmental Policy Act by not filing an Environmental Impact Statement concerning the effect of the use of mid-frequency sonar on marine mammals in the area. The District Court found a likelihood that the Navy failed to comply with the National Environmental Policy Act (NEPA) and preliminarily enjoined the Navy’s use of mid-frequency active (MFA) sonar during training exercises that prepare Navy strike groups for worldwide deployment. The Chief of Naval Operations concluded that the injunction unacceptably risks the training of naval forces for deployment to high-threat areas overseas, and the President of the United States determined that the use of MFA sonar during these exercises is “essential to national security.” The Council on Environmental Quality (CEQ), applying a longstanding regulation, accordingly found “emergency circumstances” for complying with NEPA without completing an environmental impact statement. The Ninth Circuit nevertheless sustained the district court’s conclusion that no “emergency circumstances” were present and affirmed the preliminary injunction.

Question Presented: (1) Whether CEQ permissibly construed its own regulation in finding “emergency circumstances”; (2) Whether, in any event, the preliminary injunction, based on a preliminary finding that the Navy had not satisfied NEPA’s procedural requirements, is inconsistent with established equitable principles limiting discretionary injunctive relief.

NATURAL RESOURCES DEFENSE COUNCIL, Inc; The International Fund for Animal Welfare; Cetacean Society International; League for Coastal Protection; Ocean Futures Society; Jean-Michel Cousteau, Plaintiffs-Petitioners

v.

Donald C. WINTER, Secretary of the Navy; Carlos M. Gutierrez, Secretary of the Department of Commerce; National Marine Fisheries Services; William Hogarth, Assistant Administrator for Fisheries of the National Oceanographic and Atmospheric Administration; Conrad C. Lautenbacher, Jr., Administrator of the National Oceanographic and Atmospheric Administration, Defendants-Respondents.

United States Court of Appeals for the Ninth Circuit

Decided February 29, 2008

[Excerpt: Some footnotes and citations omitted.]

B. Fletcher, Circuit Judge:
Defendants Secretary of the Navy, Department of the Navy, Secretary of the Department of Commerce, National Marine Fisheries Service (NMFS), and two Administrators of the National Oceanographic and Atmospheric Administration (NOAA) appeal the district court’s January 3, 2008 order, as modified on January 10, 2008, granting a motion for a preliminary injunction and imposing certain conditions on the completion of the remaining eight of fourteen large training exercises scheduled to be conducted by the Navy’s Third Fleet in the waters off the coast of southern California between February 2007 and January 2009 (the “SOCAL exercises”). The motion was filed by plaintiffs Natural Resources Defense Council, Inc., International Fund for Animal Welfare, Cetacean Society International, League for Coastal Protection, Ocean Futures Society, and Jean-Michel Cousteau (collectively “NRDC” or “plaintiffs”), who are concerned that the Navy’s use of high-intensity, mid-frequency active sonar (“MFA sonar”) in the SOCAL exercises will cause serious harm to various species of marine mammal present in the southern California waters, and by extension, to plaintiffs themselves.

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I. Procedural History

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On January 3, 2008, [on remand from the Ninth Circuit] the district court . . . issued a new preliminary injunction that allowed the Navy to conduct the remaining SOCAL exercises provided that it employ certain measures intended to mitigate the impact of the Navy’s use of MFA sonar on the environment. On January 9, 2008, the Navy applied for a stay pending appeal and requested relief from the district court by January 14, 2008.

On January 10, 2008, in response to arguments raised in the Navy’s stay application, the district court modified the preliminary injunction by narrowing the mitigation measures contained in the January 3, 2008 order. The Navy filed a notice of appeal the following day. The district court denied the Navy’s stay application on January 14, 2008.

On the evening of January 15, 2008, the Navy filed an emergency motion with this court requesting vacatur of the preliminary injunction or, alternatively, a partial stay of the preliminary injunction pending a decision on its appeal by our court. The Navy’s motion was based in part on two developments that occurred on the same day that the motion was filed. First, the President of the United States, pursuant to 16 U.S.C. § 1456(c)(1)(B), exempted from the provisions of the CZMA the Navy’s use of MFA sonar during the SOCAL exercises, finding that such use of MFA sonar is “essential to national security” and in the “paramount interest of the United States.” Second, the CEQ, finding “emergency circumstances,” purported to approve “alternative arrangements” to accommodate those emergency circumstances, pursuant to 40 C.F.R. § 1506.11. It permitted the Navy to follow the prescribed arrangements to continue its exercises pending completion of the Navy’s EIS. The Navy subsequently adopted the alternative arrangements and determined that it would comply with them.

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On February 4, 2008, following briefing by the parties and oral argument, the district court denied the Navy’s application to vacate the preliminary injunction and lifted
the temporary partial stay. In its published order, the district court held in relevant part that CEQ's approval of "alternative arrangements" was invalid because there are no "emergency circumstances" within the meaning of 40 C.F.R. § 1506.11. Feb. 4, 2008 Dist. Ct. Order at 13-25, 527 F. Supp. 2d 1216. Thus, the district court left in place the original preliminary injunction. The Navy filed a notice of appeal two days later.

... We now affirm the district court’s order imposing the preliminary injunction.

II. Factual Background

A. The SOCAL Exercises and the Effect of MFA Sonar on Marine Mammals

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Active sonar involves a vessel or other sonar source emitting a loud noise underwater and then listening for whether the noise comes back to the source, indicating that the noise may have bounced off the hull of a previously undetected submarine. ... 

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The Navy acknowledges in its Environmental Assessment that MFA sonar may affect both the physiology and behavior of marine mammals. Exposure to "very high" acoustic energy levels may impair the functioning of marine mammals’ visual system, vestibular system and internal organs, and may cause injury to their lungs and intestines. However, the primary physiological effects of MFA sonar are on marine mammals’ auditory system: very high sound levels may rupture the eardrum or damage small bones in the middle ear, but even exposure to lower levels of sound may cause permanent or temporary hearing loss.

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The Navy also acknowledges that the use of MFA sonar may overtly disrupt the normal behavior of marine mammals even if it does not affect their physiology. While the Navy acknowledges that active sonar may cause behavioral responses such as attempting to avoid the site of sound exposure, swimming erratically, sluggish behavior, tail slapping, “jaw popping,” and aggressive behavior, those responses were observed in studies using trained animals held in captivity. NOAA concluded in 2006 that studies of marine mammals in the wild "strongly suggest" that the use of sonar at levels lower than those found to produce behavioral effects in the tests of captive animals can result in “profound” behavioral alterations, including changes in feeding, diving, and social behavior. In a February 9, 2007 Biological Opinion concerning the SOCAL exercises, the NMFS found that acoustic exposures can impair marine mammals’ foraging ability and their ability to detect predators or communicate. The NMFS cited studies finding that noise has caused whales to move away from their feeding and mating grounds and migration routes, and to change their calls.

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B. The Navy’s EA and the Predicted Harm to Marine Mammals in the Southern California Waters

[Discussion of the Navy’s Environmental Assessment and the estimated number of marine mammals hurt by the use of MFA sonar during the SOCAL exercises.]

In light of the harm that marine mammals are expected to suffer as a result of the SOCAL exercises, plaintiffs contend that they and their members living in southern California will be harmed. For example,
plaintiff Jean-Michel Cousteau alleges that as an environmental enthusiast and filmmaker his ability to enjoy and educate others about the marine environment in southern California will be impaired if the harmful effects of MFA sonar on marine mammals are not sufficiently mitigated. Other plaintiffs make similar allegations.

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C. Mitigation Measures Employed by the Navy and Those Imposed by the District Court

While the Navy adopted a number of mitigation measures intended to reduce the harm caused by the use of MFA sonar in the SOCAL exercises, the district court concluded that those measures were inadequate both to cure the Navy’s likely NEPA violation and to avoid the possibility of irreparable harm to NRDC. Accordingly, following our November 13, 2007 remand order, the district court established additional, narrowly-tailored mitigation measures which the Navy would have to employ during the remaining SOCAL exercises...

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After reviewing the parties’ briefs and taking a Navy-guided tour of the USS Milius, the district court imposed six mitigation measures in addition to those already required by National Defense Exemption II: (1) the Navy shall suspend use of MFA sonar when a marine mammal is detected within 2,200 yards from the sonar source, except where the marine mammal is a dolphin or a porpoise and it appears that the mammal is intentionally following the sonar-emitting naval vessel in order to play in or ride the vessel’s bow wave; (2) the Navy shall reduce the MFA sonar level by 6dB when significant surface ducting conditions are detected; (3) the Navy shall not use MFA sonar within 12 nautical miles from the California coastline; (4) the Navy shall monitor, including by aircraft, for the presence of marine mammals for 60 minutes before employing MFA sonar, shall utilize two dedicated, NOAA- and NMFS-trained lookouts at all times when MFA sonar is being used, shall employ passive acoustic monitoring to supplement visual detection of the presence of marine mammals, and shall use aircraft participating in the training exercises to monitor for marine mammals for the duration of the exercises when MFA sonar is being used; (5) Navy helicopters shall monitor for marine mammals for 10 minutes before employing active dipping sonar; and (6) the Navy shall refrain from using MFA sonar in the Catalina Basin between the Santa Catalina and San Clemente Islands because ingress and egress to the basin are restricted and the basin has a high density of marine mammals. See Jan. 10, 2008 Dist. Ct. Order at 1-5.

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The Navy takes issue only with the first two of the mitigation measures imposed by the district court, namely the 2,200 yard “shutdown zone” and the “power-down” requirement during significant surface ducting conditions. Specifically, the Navy argues that those two mitigation measures tip the balance of hardships in its favor and are contrary to the public interest.

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III. Standards of Review

Our review of a district court’s grant of a preliminary injunction is “very deferential.” Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv., 422 F.3d 782, 794 (9th Cir. 2005). We do not reverse the district court
unless it “relie[s] on an erroneous legal premise or abuse[s] its discretion.” Sports Form, Inc. v. United Press Int’l, Inc., 686 F.2d 750, 752 (9th Cir. 1982). A court abuses its discretion if it bases its decision on an erroneous legal standard or clearly erroneous findings of fact. Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1156 (9th Cir. 2006) (“Earth Island II”).

A district court may grant a preliminary injunction if one of two sets of criteria are met. “Under the ‘traditional’ criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). Alternatively, a court may grant the injunction if the plaintiff demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor.” Freecycle Network, Inc. v. Oey, 505 F.3d 898, 902 (9th Cir. 2007); see also Earth Island II, 442 F.3d at 1158.

IV. Discussion

A. Likelihood of Success on the Merits

1. Effect of CEQ’s Alternative Arrangements for NEPA Compliance

On January 15, 2008 CEQ purported to approve “alternative arrangements” for the Navy to continue its use of MFA sonar while complying with NEPA, reasoning that “emergency circumstances” prevented normal compliance. CEQ’s authority to grant such relief derives from 40 C.F.R. § 1506.11, which provides in full:

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

40 C.F.R. § 1506.11. CEQ’s letter of explanation to the Navy stated that the district court’s modified injunction “imposes training restrictions . . . that continue to create a significant and unreasonable risk that Strike Groups will not be able to train and be certified as fully mission capable.” CEQ Letter to Donald C. Winter at 3. CEQ also stated that “the inability to train effectively with MFA sonar puts the lives of thousands of Americans directly at risk. . . . Therefore, there are urgent national security reasons for providing alternative arrangements under the CEQ regulations.” Id. at 3-4.

The Navy then petitioned this court to vacate the district court’s preliminary injunction, arguing that CEQ’s approval of “alternative arrangements” deprived NRDC of the “likelihood of success on the merits” of its NEPA claims, thus eliminating the legal basis for the injunction. We remanded to the district court to allow it to consider in the first instance whether this legal development merited vacatur or a partial stay of the injunction.

On remand, the Navy maintained that the CEQ’s “emergency circumstances” determination relieved it of the requirement
to prepare an EIS prior to commencing the remaining SOCAL exercises. NRDC argued that CEQ’s action was beyond the scope of the regulation and otherwise invalid, and that the preliminary injunction should remain in place. The district court considered these arguments and concluded that its preliminary injunction was “not affected by [CEQ’s] approval of emergency alternative arrangements because there is no emergency.” Feb. 4, 2008 Dist. Ct. Order at 2, 527 F. Supp. 2d 1216. Accordingly, it held that “CEQ’s action is beyond the scope of the regulation and is invalid[,]” and that “[t]he Navy is not, therefore exempted from compliance” with NEPA and the preliminary injunction. Id. The district court found that CEQ’s interpretation of “emergency circumstances” to include a court order entered in the course of pending litigation was not authorized by 40 C.F.R. §1506.11, because it was contrary to both the plain meaning of “emergency circumstances” and the drafters’ original intent. It also found that CEQ’s action was contrary to the governing statute, NEPA.

The Navy makes two basic arguments as to why the district court erred by failing to vacate the preliminary injunction in light of CEQ’s approval of “alternative arrangements.” First, the Navy argues that the district court lacked subject matter jurisdiction to review CEQ’s approval of alternative arrangements because such approval constitutes a superseding agency action that removes as moot any basis for an injunction predicated on plaintiffs’ original claims concerning the Navy’s EA. Second, the Navy argues that, even if the district court could review CEQ’s action, the court erred by not deferring to CEQ’s and the Navy’s assessment that “emergency circumstances” exist within the meaning of 40 C.F.R. §1506.11.

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b. The District Court’s Assessment of Whether “Emergency Circumstances” Existed

(1) Deference

The district court concluded that CEQ’s interpretation of 40 C.F.R. §1506.11 is not entitled to deference. It reasoned that under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., the courts traditionally afford deference to (1) an agency’s reasonable interpretation of a statute it administers “if the statute is silent or ambiguous with respect to the specific issue. . .,” citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984), and (2) an agency’s interpretation of its own regulations unless “an alternative reading is compelled by the regulation’s plain language or by other indications of the [agency’s] intent at the time of the regulation’s promulgation,” citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512.

. . . Accordingly, the district court concluded that it did not owe deference to CEQ’s interpretation of §1506.11 under *Thomas Jefferson* and *Seminole Rock*. We review that conclusion to determine whether in so doing it relied on an erroneous legal premise or abused its discretion; we conclude that it did neither.

The district court followed established Supreme Court precedent in finding that an agency’s interpretation of its own regulation is not entitled to deference when it is inconsistent with the regulation itself, conflicts with agency intent at the time of promulgation, and reaches beyond “the limits imposed by the statute,” NEPA. See *Auer v. Robbins*, 519 U.S. 452, 461-63
(1997). Next, the district court, after concluding that the meaning of “emergency circumstances” was clear, applied the appropriate legal principles that an agency’s interpretation of its own regulation is entitled to deference “only when the language of the regulation is ambiguous.” See Christensen v. Harris County, 529 U.S. 576, 588 (2000). Accordingly, the district court did not abuse its discretion when it determined not to give deference to CEQ’s overly broad interpretation of “emergency circumstances.”

(2) Plain Meaning and Intent of CEQ Regulation

In finding that no emergency circumstances existed, the district court reasoned that the “Navy’s current ‘emergency’ is simply a creature of its own making, i.e., its failure to prepare adequate environmental documentation in a timely fashion, via the traditional EIS process or otherwise.” Feb. 4, 2008 Dist. Ct. Order at 17, 527 F. Supp. 2d 1216, 2008 U.S. Dist. LEXIS 8110 *33. In short, it was not a sudden unanticipated event. The district court supported its conclusion by noting that the CEQ letter does not specify an “emergency” other than the district court’s mitigation order itself, which, in CEQ’s view, creates a “significant and unreasonable risk” that strike groups will not be able to train and be certified as fully mission capable. Id. at 16-17.

* * *

There is ample support for the manner in which the district court exercised its discretion. The district court properly relied on dictionary definitions of “emergency” and “emergency circumstances” to support its conclusion that CEQ’s interpretation is not entitled to deference. See Watson v. United States, 128 S. Ct. 579, 583, 169 L. Ed. 2d 472 (2007) (noting that terms are construed consistently with their everyday meaning, including by reference to the dictionary absent statutory definition or definitive clue). As the district court observed, the Oxford English Online Dictionary defines “emergency” as “[t]he arising, sudden or unexpected occurrence (of a state of things, an event, etc.).” Oxford English Online Dictionary, available at http://dictionary.oed.com. Black’s Law Dictionary defines the term “emergency circumstances,” through a cross-reference to “exigent circumstances,” as “[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures, as when a neighbor breaks through a window of a burning house to save someone inside.” Blacks Law Dictionary 260, 562 (8th ed. 2004) (emphasis added). The district court did not abuse its discretion in concluding that the circumstances in the present case fall outside the scope of these definitions because its preliminary injunction was entirely predictable given the parties’ litigation history. Feb. 4, 2008 Dist. Ct. Order at 15, 527 F. Supp. 2d 1216, 2008 U.S. Dist. LEXIS 8110 *30.

The Navy urges that the risk to national security created by the preliminary injunction falls squarely within the legal definition of “emergency circumstances.” However, the Navy has been on notice of its possible legal obligations to prepare an EIS for the SOCAL exercises from the moment it first planned those exercises. In addition, NRDC filed its complaint almost a year ago, and on August 7, 2007, the district court held that the Navy was likely to lose on the merits of NRDC’s claims. We affirmed that ruling in November of 2007. Still, the Navy waited until January 10, 2008, to raise a cry of “emergency” and request the NEPA and CZMA waivers it relies on here, in order to continue its routine, planned training exercises. We find no abuse of discretion in
the district court’s determination that such a series of events gives rise to a predictable outcome, not an unforeseeable one demanding “unusual or immediate action.”

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(6) Conclusion

For the foregoing reasons, we hold that the district court did not abuse its discretion or rely on an erroneous legal premise in determining that CEQ’s broad interpretation of “emergency circumstances” was not authorized by 40 C.F.R. § 1506.11 because it was contrary to the plain meaning of the regulation and contrary to NEPA and, accordingly, that the Navy remains subject to the traditional requirements of NEPA.

2. NRDC’s NEPA Claim

We next address the district court’s conclusion that NRDC has shown probable success on the merits of its claim that the Navy violated NEPA by failing to prepare an EIS for the SOCAL exercises.

In our November 13, 2007 order we concluded that “Plaintiffs have shown a strong likelihood of success on the merits of their claims under [NEPA].” NRDC, 508 F.3d at 886. While that conclusion was based on our review of the record underlying the district court’s August 7, 2007 preliminary injunction order, the only subsequent developments are CEQ’s approval of “alternative arrangements” pursuant to 40 C.F.R. § 1506.11 and the Navy’s concession, by virtue of seeking such approval, that the SOCAL exercises will have a “significant environmental impact.” See 40 C.F.R. § 1506.11 (“Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements.”) (emphasis added). Although we elaborate on our reasons, our original conclusion remains unchanged.

a. Statutory Background

As discussed earlier, NEPA requires a federal agency such as the Navy to prepare a detailed EIS for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). However, if, as here, an agency’s regulations do not categorically require the preparation of an EIS, then the agency must first prepare an EA to determine whether the action will have a significant effect on the environment. Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001); see 40 C.F.R. § 1501.4. If the action will significantly affect the environment, an EIS must be prepared, while if the project will have only an insignificant effect, the agency issues a Finding of No Significant Impact (FONSI). Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 864 (9th Cir. 2005); see 40 C.F.R. §§ 1501.3, 1501.4.

“An EIS must be prepared ‘if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.’” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (quoting Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998)). Thus, a plaintiff need not show that significant effects on the environment will in fact occur; raising “substantial questions whether a project may have a significant effect” on the environment is enough. Id.; Idaho Sporting, 137 F.3d at 1150.
b. Substantial Questions about the Environmental Impact of the Exercises

The district court found that NRDC had raised substantial questions as to whether the SOCAL exercises would have a significant impact on the environment. Accordingly, the court concluded that NRDC had demonstrated probable success on the merits of its claim that the Navy's failure to prepare an EIS was arbitrary and capricious and in violation of NEPA and the APA. Id. at 7. The district court did not rely on an erroneous legal premise or abuse its discretion in so concluding.

Initially, we repeat our observation that the Navy, by seeking approval by CEQ of "alternative arrangements" pursuant to 40 C.F.R. § 1506.11, has effectively conceded that the SOCAL exercises will have a significant impact on the environment. See 40 C.F.R. § 1506.11. As the text of § 1506.11 indicates, the very purpose of the regulation is to provide for the possibility of alternative arrangements where emergency circumstances require the taking of an action "with significant environmental impact" without observing the requirements of NEPA. See id. The fact that the Navy sought relief under § 1506.11 is evidence that the Navy recognizes that the SOCAL exercises have a "significant environmental impact."

Moreover, the fact that "[t]he Navy is currently evaluating the environmental impact of MFA sonar training exercises through its development of the SOCAL Range Complex Environmental Impact Statement," Jan. 15, 2008 CEQ Letter at 2, confirms that, at the very least, the Navy acknowledges that substantial questions have been raised as to whether the SOCAL exercises will have a significant impact on the environment. . . .

c. The Navy's Mitigation Measures

The district court also concluded that NRDC had demonstrated probable success on the merits of its claim that the Navy's mitigation measures were inadequate to obviate the need for preparing an EIS. Again, we find no reliance on an erroneous legal premise and no abuse of discretion in the district court's conclusion.

The Navy correctly points out that "[a]n agency's decision to forego issuing an EIS may be justified in some circumstances by the adoption of [mitigation] measures" and that those measures, if significant, "need not completely compensate for adverse environmental impacts." Nat'1 Parks & Conservation Ass'n, 241 F.3d at 733-34. However, we have also held that a "perfunctory description" or "mere listing of mitigation measures, without supporting analytical data," is insufficient to support a finding of no significant impact. Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 473 (9th Cir. 2000). We find no reversible error in the district court's conclusion that the Navy's list of proposed mitigation measures was precisely such a perfunctory description devoid of supporting data.

The explanation contained in the EA as to why the mitigation measures are effective is contained in four short bullet points, stating that whales and dolphins spend extended periods of time on the surface, have relatively short dive periods, tend to move in large groups (pods), and frequently come to the surface and have a high level of activity there. Three of those bullet points in effect
state the same thing, namely that whales and dolphins spend little time under water. This explanation is inadequate for several reasons.

First, the Navy's explanation overlooks the fact that beaked whales spend much of their time under water, surface infrequently, and are generally difficult to detect. A study by NMFS scientists observed that "beaked whales are always difficult to see when they are on the surface, spend most of their time below the surface, and are found at low densities over large areas." Likewise, NRDC submitted a declaration by a biologist who opines that visual monitoring by ship-based lookouts would result in the detection of only 2% of beaked whales in the Southern California Operating Area, in part because of the speed at which Navy vessels travel. Declaration of Dr. Robin William Baird P 6.

Second, the Navy's explanation fails to address the effectiveness of the Navy's safety zones—the only measure that directly reduces exposure of marine mammals to MFA sonar. Specifically, the EA fails to explain why a safety zone of only 1,000 yards is adequate, why reducing the sonar level by 6dB and 10dB at the 1,000-yard and 500-yard marks, respectively, is adequate, and why it is effective to halt MFA sonar transmission altogether only at the 200-yard mark. The Navy's explanation also does not relate to the effectiveness of the measure requiring passive sonar to be used to detect sounds made by marine mammals.

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Notably, as to most of these measures the Navy does not contest that they would be effective. While the Navy claims that some of the measures would adversely affect its ability to achieve the objectives of the exercises, that does not render the measures the Navy has adopted adequate to avoid the need for preparing an EIS. Indeed, the Navy states in its "after action report" following the first three SOCAL exercises that in future exercises it intends to incorporate data collection necessary to address the question of how many marine mammals not observed by lookouts may have been exposed to dangerous sonar levels, and will integrate additional monitoring tools and techniques. While the Navy's intent is commendable, it implicitly acknowledges that its current mitigation and data collection efforts are less than adequate.

We conclude that the district court did not abuse its discretion in determining that the Navy's cursory explanation in the EA for why its mitigation measures are effective does not demonstrate that those measures "constitute an adequate buffer against the negative impacts" that may result from the SOCAL exercises. See Nat'l Parks & Conservation Ass'n, 241 F.3d at 734. Accordingly, we uphold the district court's conclusion that the Navy's reliance on its incomplete mitigation plan in deciding not to prepare an EIS was likely arbitrary and capricious and affirm its determination that NRDC has demonstrated probable success on the merits of its NEPA claims. Cf. Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1112 (9th Cir. 2000).
V. Conclusion

The district court concluded that plaintiffs have met the necessary burden of proof to demonstrate that preliminary injunctive relief is appropriate. It held that plaintiffs have shown a strong likelihood of success on the merits, as well as the possibility of irreparable injury if relief is not granted. It also held that plaintiffs have shown that the balance of hardships tips in their favor in light of the preliminary injunction’s narrowly tailored mitigation measures which provide that the Navy’s SOCAL exercises may proceed as planned if conducted under circumstances that provide satisfactory safeguards for the protection of the environment. Finally, it held that the public interest is advanced by a preliminary injunction that imposes adequate mitigation measures. In reaching these conclusions, the district court neither relied on erroneous legal premises nor abused its discretion. We therefore affirm the district court’s preliminary injunction.

AFFIRMED
WASHINGTON—The Supreme Court on Monday stepped into a long-running environmental dispute over the impact on whales and other marine mammals of Navy training exercises off Southern California.

The court, warned by the Bush administration that a set of conditions placed on the exercises by the federal appeals court in San Francisco “jeopardizes the Navy’s ability to train sailors and marines for wartime deployment during a time of ongoing hostilities,” agreed to hear the Navy’s appeal during its next term.

The training exercises, which are due to end next January, will continue in the meantime, because the appeals court issued a stay of its own order when it ruled in the case four months ago. That court, the United States Court of Appeals for the Ninth Circuit, ordered the Navy to suspend or minimize its use of sonar when marine mammals are in the vicinity.

The Navy acknowledges that the sonar can cause “behavioral disruptions” and short-term hearing loss in dolphins and whales, but denies that these effects are serious or lasting. But the Natural Resources Defense Council maintains that the high-intensity sonar causes “mass injury,” including hemorrhaging and stranding. The appeals court said the Navy’s own assessment “clearly indicates that at least some substantial harm will likely occur” without the measures designed to mitigate the sonar’s effects.

The justices themselves will not resolve the debate over the extent of the harm. Rather, as presented to the Supreme Court, the case is a dispute over the limits of executive branch authority and the extent to which the courts should defer to military judgments.

In January, as the case was proceeding in the appeals court, President Bush granted the Navy an exemption from one federal environmental law, the Coastal Zone Management Act. Simultaneously, the Council on Environmental Quality, an executive branch agency, declared that “emergency circumstances” warranted granting an exemption from the full effect of another statute, the National Environmental Policy Act.

These actions did not sway the appeals court, which said that “while we are mindful of the importance of protecting national security, courts have often held, in the face of assertions of potential harm to military readiness, that the armed forces must take precautionary measures to comply with the law.”

In the government’s appeal, Winter v. Natural Resources Defense Council, No. 07-1239, the administration describes training in the use of sonar to detect submarines as an “essential element” of the exercises, which it says are designed to “train the thousands of military personnel in a strike group to operate as an integrated unit in simultaneous air, surface and undersea warfare.”

The administration’s brief says that by imposing conditions on the use of sonar,
"the decision poses substantial harm to national security and improperly overrides the collective judgments of the political branches and the nation's top naval officers regarding the overriding public interest in a properly trained Navy."

Under the appeals court's order, the Navy must suspend the use of sonar or reduce it to specified levels when a marine mammal is seen at certain distances. The appeals courts said this requirement would not compromise the Navy's ability to conduct the exercises.
A federal appeals court has ruled that the Navy must protect endangered whales from the potentially lethal effects of underwater sonar during anti-submarine training off the Southern California coast, rejecting President Bush’s attempt to exempt the exercises from environmental laws.

In a Friday night ruling rushed into print ahead of the next scheduled exercise on Monday, the Ninth U.S. Circuit Court of Appeals in San Francisco upheld a federal judge’s decision that no emergency existed that would justify Bush’s intervention.

The Navy is engaged in “long-planned, routine training exercises” and has had ample time to take the steps that the law requires—conduct a thorough review of the environmental consequences and propose effective measures to minimize the harm to whales and other marine mammals, the three-judge panel said.

The court noted that the Navy has been conducting similar exercises for years, has agreed in the past to restrictions like the ones it is now challenging, and was sued by environmental groups in the current case nearly a year ago. The lower-court judge reviewed the evidence and found nothing to support the Navy’s claim that the protective measures would interfere with vital training or hamper national security, the court said.

Past rulings have established that “there is no ‘national defense exception’ “to the National Environmental Policy Act, the court said. That law requires government agencies to review projects that might harm the environment and propose reasonable protective measures.

Nonetheless, the panel allowed naval commanders to modify two of the restrictions if they arose during a “critical point in the exercise,” when certain levels of sonar are needed for effective training. The modifications reduce the protective zones within which vessels must reduce or shut down sonar when whales are detected.

Those changes are to remain in effect for 30 days, and will be extended if the Navy appeals the ruling to the Supreme Court, the appellate panel said.

The ruling sets a precedent for federal courts in California and eight other Western states. One of those states is Hawaii, where a federal judge on Friday ordered similar restrictions on Navy sonar exercises off the Hawaiian islands. The ruling by U.S. District Judge David Ezra includes requirements to reduce sonar when whales are detected within certain distances or when conditions make monitoring difficult.

The Navy has completed six of the 14 large-scale training exercises scheduled off Southern California between February 2007 and January 2009. It decided not to conduct a full environmental review before the operations, saying it had already agreed to post lookouts for whales and taken other adequate protective measures.

In an August 2007 ruling, U.S. District
Judge Florence-Marie Cooper of Los Angeles said the Navy's measures were "woefully ineffectual and inadequate" and would leave nearly 30 species of marine mammals at risk, including five species of endangered whales.

She said the Navy's own research shows that its use of mid-frequency sonar can damage the hearing of whales and dolphins, can interfere with their ability to find food and mate, and has been linked to the beaching of whales.

After Cooper reaffirmed her order requiring the Navy to observe restrictions on sonar use, including a ban within 12 miles of the coast, Bush declared the Navy exempt from the laws that were the basis of the ruling. The president's Jan. 15 order said the restrictions would interfere with training that was "essential to national security."

But the appeals court said that federal regulations in place since 1978 allow a president to override the environmental law only in an emergency, and that the administration had failed to demonstrate any "sudden unanticipated events" had occurred in this case.

Bush's actions were also constitutionally questionable, the court said, because he cited no evidence that Cooper had not already reviewed, but instead merely disagreed with her conclusions. Under the constitutional doctrine of separation of powers, "it was the job of the appellate court, and not the executive branch," to decide whether the judge erred, said Judge Betty Fletcher in the court ruling.

She said the court didn't have to decide the constitutional issue, however, because the president's order failed to meet the standard for an exemption under the environmental regulations.

The ruling shows that "neither the president nor the U.S. Navy is above the law," attorney Joel Reynolds of the Natural Resources Defense Council, lead plaintiff in the lawsuit, said Saturday.

Lt. Cmdr. Cindy Moore, a Navy spokeswoman, told the Associated Press the Navy is considering an appeal. The ruling places "significant restrictions on our ability to train realistically," although it is less restrictive than Cooper's earlier decision, she said.
The Bush administration overreached when it sought to limit the Navy’s obligations under national environmental laws related to sonar training exercises off California, a federal judge ruled yesterday.

In a sharply worded decision that will keep the Navy from continuing a series of 14 planned exercises, U.S. District Judge Florence-Marie Cooper wrote that the Navy and the administration had improperly declared that an emergency would be created if they had to accept court-mandated steps to minimize risk to whales and other sea mammals. Because no real emergency exists, she said, the White House cannot override her decisions and those of the U.S. Court of Appeals for the 9th Circuit.

Accepting the Navy’s arguments, she wrote, would produce “the absurd result of permitting agencies to avoid their [environmental] obligations by re-characterizing ordinary, planned activities as ‘emergencies’ in the interest of national security, economic stability or other long-term goals.”

White House spokesman Tony Fratto said, “We disagree with the judge’s decision. We believe the orders are legal and appropriate.”

A Navy spokeswoman, Lt. Cmdr. Cindy Moore, said the military was studying the decision.

Joel Reynolds, an official at the Natural Resources Defense Council, which obtained an earlier injunction against the Navy blocking the exercises, said in a statement that the court “has affirmed that we do not live under an imperial presidency.”

“The Navy doesn’t need to harm whales to train effectively with sonar,” said Reynolds, who directs the council’s Marine Mammal Protection Project. “By following the carefully crafted measures ordered by the court, the Navy can conduct its exercises without imperiling marine mammals.”

Early last month, President Bush signed a waiver exempting the Navy from provisions of the Coastal Zone Management Act after Cooper and the appeals court had concluded that the law required the Navy to do more to protect marine mammals during the sonar exercises. The loud blasts produced during sonar exercises have been shown to disorient some types of whales, leading in some circumstances to strandings and deaths.

At the same time Bush signed his order, the White House Council on Environmental Quality determined that the Navy did not need to follow the procedures of the National Environmental Policy Act when doing so would cause an emergency situation. The Navy has long argued that it urgently needs to train more sonar operators because of new threats from “quiet” diesel submarines that can approach ships or the U.S. coast without being detected by traditional passive sonar.

While Cooper’s ruling dealt primarily with the legality of the Navy’s “alternative arrangement” under NEPA, she also raised
the possibility that the administration’s actions were unconstitutional in general because they implied that White House agencies could routinely overrule federal court decisions. She did not, however, rule on those grounds.

“The Navy’s current ‘emergency’ is simply a creature of its own making, i.e., its failure to prepare adequate environmental documents in a timely fashion,” she wrote.

The ocean off Southern California, where the exercises were scheduled, is especially rich in sea life and is on the migration paths of five endangered species of whales, an important population of blue whales, and as many as seven individual species of beaked whales—small, deep-diving whales which have been shown to be particularly sensitive to sonar blasts.

The council and several other environmental groups have been fighting the Navy over sonar issues for more than a decade. The two sides have reached some agreements in the past, but the Navy in this case offered to enforce 29 “mitigation” measures to protect the whales, and nothing more.

The California Coastal Commission, a state agency, agreed with the environmental groups that the Navy’s offer would not sufficiently protect the whales. In her earlier decision, Cooper mandated additional steps advocated by the commission involving where the Navy could use sonar, what it had to do when a whale was spotted, how loud the sonar blasts could be, and how close to the coast its ships could come.

The Navy appealed, and then after losing the appeal, won White House support for overriding the court’s earlier decision.
The White House has exempted the Navy from two major environmental laws in an effort to free the service from a federal court’s decision limiting the Navy’s use of sonar in training exercises.

Environmentalists who had sued successfully to limit the Navy’s use of loud, mid-frequency sonar—which can be harmful to whales and other marine mammals—said yesterday that the exemptions were unprecedented and could lead to a larger legal battle over the extent to which the military has to obey environmental laws.

In a court filing Tuesday, government lawyers said President Bush had determined that allowing the use of mid-frequency sonar in ongoing exercises off Southern California was “essential to national security” and of “paramount interest to the United States.”

Based on that, the documents said, Bush issued the order exempting the Navy from provisions of the Coastal Zone Management Act, and the White House Council on Environmental Quality granted the Navy a waiver from the National Environmental Protection Act.

The government filings said the federal ruling limiting sonar use “profoundly interferes with the Navy’s global management of U.S. strategic forces, its ability to conduct warfare operations, and ultimately places the lives of American sailors and Marines at risk.”

The exemptions were immediately challenged by the environmental group that had sued the Navy and by the California Coastal Commission, a state agency that ruled last year that the Navy’s plans to protect marine mammals were too limited and deeply flawed.

“There is absolutely no justification for this,” commission member Sara Wan said in a statement. “Both the court and the Coastal Commission have said that the Navy can carry out its mission as well as protect the whales.”

Joel Reynolds, attorney for the Natural Resources Defense Council (NRDC), said the organization would “vigorously” contest the White House orders in court.

U.S. District Judge Marie Florence-Marie Cooper ruled this month in Los Angeles that the Navy’s plan to limit harm to whales—especially deep-diving beaked whales that have at times stranded and died after sonar exercises—were “grossly inadequate to protect marine mammals from debilitating levels of sonar exposure.” A federal appeals court had previously ruled that the Navy plan was inadequate and sent the case back to Cooper to set new guidelines for the exercise.

In her ruling, Cooper banned sonar use within 12 nautical miles of the coast and required numerous procedures to shut it off when marine mammals are spotted. After the ruling, the Navy indicated that the guidelines would render the exercise useless, but the judge disagreed.
The Navy had received a federal exemption from the Marine Mammal Protection Act for the exercises, which are scheduled to continue through January 2009, but the NRDC and other groups filed suit under other environmental laws. The Navy will still have to convince federal judges that the exemptions are legal. The NRDC said yesterday that waivers are not allowed under the National Environmental Protection Act.

The NRDC also said the situation does not constitute an emergency, because the Navy is allowed to continue sonar training under Cooper's ruling.

"The president's action is an attack on the rule of law," said Reynolds, director of the Marine Mammal Protection Project at the NRDC, which obtained the injunction against the Navy. "By exempting the Navy from basic safeguards under both federal and state law, the president is flouting the will of Congress, the decision of the California Coastal Commission and a ruling by the federal court."

Navy officials have argued that they must step up sonar training because a new generation of "quiet" submarines has made it increasingly difficult to detect underwater intruders. The Navy says that more than 40 nations now have relatively inexpensive diesel-powered submarines, which can be located only with sonar that emits the loud blasts of sound. The Navy trains sailors in sonar use on an underwater range off Southern California and wants to set up another range off the Carolinas.

Adm. Gary Roughead, the chief of naval operations, said in a statement yesterday that the White House waivers were essential and warranted, given that the Navy has 29 procedures to mitigate sonar's impact on whales.

"We cannot in good conscience send American men and women into potential trouble spots without adequate training to defend themselves," Roughead said. "The southern California operating area provides unique training opportunities that are vital to preparing our forces, and the planned exercises cannot be postponed without impacting national security."

Sen. Barbara Boxer (D-Calif.) sharply criticized the exemptions. "Once again the Bush Administration has taken a slap at our environmental heritage, overriding a court that was very mindful to protect marine wildlife, including endangered whales, while assuring that the Navy's activities can continue," she said in a statement. "Unfortunately, this Bush Administration action will send this case right back into court, where more taxpayer dollars will be wasted defending a misguided decision."

The NRDC said the waters off Southern California are especially rich in marine mammal life and are on migration paths of five species of endangered whales.
A federal judge has ordered the Navy to adopt stringent new safeguards intended to improve protection of whales and dolphins during its sonar training exercises off Southern California.

The ruling, issued Thursday by Judge Florence-Marie Cooper of the United States District Court for the Central District of California, orders the Navy to limit its use of medium-range sonar to an area beyond 12 nautical miles from shore. Closer to the shore, marine mammals have exhibited frenzied and disoriented behavior during the emissions of sonar blasts as part of the Navy’s practice missions.

Judge Cooper’s order also outlined safeguards, which include a monitoring session one hour before a military exercise to detect the presence of marine mammals, the use of trained aerial lookouts throughout exercises and a mandatory sonar shutdown when mammals are spotted within 2,200 yards of training maneuvers.

The ruling stems from a long-running legal battle between environmental groups, led by the Natural Resources Defense Council, and the Navy, which has argued that mid-frequency sonar is vital to the training of submarine seamen and other crews who now face a new generation of quiet submarines that cannot be detected by traditional passive sonar waves.

A spokesman at the Pentagon said Friday that the Navy was reviewing the judge’s ruling to determine its next move, which could include an appeal to the United States Court of Appeals for the Ninth Circuit.

“Despite the care the court took in crafting its order,” said the spokesman, Cmdr. Jeff Davis of the Navy, “we do not believe it struck the right balance between national security and environmental concerns.”

The Navy, Commander Davis said, remains especially concerned over the larger safety buffer zone now offered to protect marine mammals. Additionally, he said, Navy experts worry that some restrictions may make it difficult to adequately train submarine crews in certain underwater warfare techniques.

A senior lawyer with the Natural Resources Defense Council, Joel Reynolds, said the order established a precedent for court cases in other jurisdictions, although it applied only to a specific set of military exercises used in Southern California.

“Although the court’s order recognizes the Navy’s need to train with sonar for our national defense,” Mr. Reynolds said, “this is the most significant environmental mitigation that a federal court has ever ordered the U.S. Navy to adopt in its training with mid-frequency sonar.”
A federal appeals court Tuesday restored a ban on the U.S. Navy’s use of submarine-hunting sonar in upcoming training missions off Southern California until it adopts better safeguards for whales, dolphins and other marine mammals.

The order allows the Navy to continue its current exercises, but will force the Pentagon to devise ways to ensure that marine mammals are not harassed or injured by powerful sonic blasts during a series of training missions slated to begin in January.

Those precautions, such as reducing sonar power at night, when whales are not easily spotted, will have to be approved by the same federal court in Los Angeles that ordered the initial sonar ban in August.

Tuesday’s decision by a three-judge panel of the U.S. 9th Circuit Court of Appeals came in a case that had pitted the interests of unencumbered military training against environmental protection.

At issue is mid-frequency, active sonar, a technology developed to hunt for Soviet submarines in the deep ocean. The Navy has adopted the technique in coastal waters to train sailors for a potential threat posed by quiet, diesel-electric submarines operated by North Korea, Iran or other nations.

U.S. and NATO warships using mid-frequency sonar near land have, at times, left behind clusters of panicked and sometimes fatally injured whales and dolphins in the Pacific and Atlantic oceans and in the Mediterranean Sea.

U.S. District Judge Florence-Marie Cooper had issued a temporary injunction forbidding the Navy from training with sonar off Southern California until she could hear the merits of a case brought by the Natural Resources Defense Council and other groups.

The Navy appealed her decision and won a reprieve from the 9th Circuit Court. Tuesday’s ruling restored the original court decision, essentially forcing the world’s most powerful navy either to negotiate with environmental attorneys or unilaterally propose measures that will satisfy the district court.

In its five-page ruling, the three judges said that the environmental groups had shown a “strong likelihood” of winning their lawsuit and that the Navy had used many of the additional safeguards those groups have been pushing.

At the same time, the panel said Cooper did not explain why “a broad, absolute injunction . . . for two years was necessary to avoid irreparable harm to the environment.”

The panel ordered the judge to narrow the injunction to allow the Navy to increase its safeguards and proceed with training exercises that military officials say are needed to certify sailors as battle-ready.

Both the Navy and environmental attorneys claimed some measure of victory in the ruling.
"We are encouraged that the appeals court found the original injunction was too broad and ordered the district court to tailor mitigation conditions under which the Navy may conduct its training," Navy spokesman Capt. Scott Gureck said in a statement. He declined to reveal the Navy's next move, saying: "We are considering our options."

Attorney Richard Kendall, representing environmental groups, said his clients will offer to meet with the Navy immediately to fashion timely remedies that will not disrupt the Navy's training schedule.

“Our position has been the same all along: We are not opposed to training, but we are opposed to training without precautions that will prevent unnecessary harm to whales and other marine mammals,” Kendall said. “We’re pleased that the appeals court has upheld our position.”

The California Coastal Commission, which also sought additional safeguards that were rejected by the Navy, has joined the lawsuit. The commission has some say in Navy activities because of a federal law that empowers states to protect their coastal resources.

The Navy says it already uses 29 protective measures during the exercises, including placing personnel on ships to look for marine mammals and turning off sonar when dolphins or whales come within about 1,000 yards of sonar-emitting ships.

The Coastal Commission and other groups want to double the radius of that "safety zone" and require the Navy to reduce the intensity of sonar at night and during rough sea conditions, when whales and dolphins cannot be spotted.

The commission and environmentalists are pushing the Navy to avoid training in the gray whale migration route, typically within a dozen miles of the coast, and to avoid the Channel Islands, shallow banks and seamounts, where marine mammals tend to congregate.

“The Navy is faced with a brick wall,” said Joel Reynolds, an attorney with the Natural Resources Defense Council. “It has no alternative but to increase the level of protections for marine life.”

In a similar lawsuit brought by environmentalists, the Navy agreed last year to expand its buffer zone, and take other steps during multinational "Rim of the Pacific" exercises held off Hawaii in July 2006.

The Navy appeared to be eager to take the issue to the Supreme Court and establish a precedent that would prevent further legal action. But the decision Tuesday made it unlikely that the nation's highest court would take up the matter because the Navy has alternatives through the lower court.
"Judge Curbs Navy Sonar"

Los Angeles Times
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Kenneth Weiss

A federal judge in Los Angeles banned the U.S. Navy from using high-powered sonar in nearly a dozen upcoming training exercises off Southern California, ruling Monday that it could "cause irreparable harm to the environment."

U.S. District Judge Florence-Marie Cooper issued the preliminary injunction after rejecting the Navy's request to dismiss a lawsuit brought by the Natural Resources Defense Council.

The lawsuit, along with a similar one filed by the California Coastal Commission, argues for broader safeguards to protect marine mammals from powerful blasts of mid-frequency active sonar that have been linked elsewhere to panicked behavior and mass die-offs of whales.

The Navy, which plans to appeal the decision, said even a temporary ban would disrupt crucial training of sailors before they are sent overseas. The Navy uses the sonar to detect potentially hostile vessels, including quiet diesel submarines, which one captain called "the most lethal enemy known" on the high seas.

"It's akin to sending a hunter into the woods after one of the most lethal preys known, but sending him in partly deaf and blind," said Navy Capt. Neil May, assistant chief of staff for 3rd Fleet training and readiness.

Over the last decade, scientists have linked mid-frequency active sonar to a number of mass strandings or panicked behavior of whales after naval exercises in the waters off Greece, Hawaii, the Bahamas and elsewhere.

In a well-documented case near the Canary Islands in 2003, an international team of scientists found that at least 10 beaked whales probably succumbed to the bends after bolting to the surface in a panic.

The dead whales washed ashore after the Spanish navy led international military exercises involving warships from the United States and other members of the North Atlantic Treaty Organization. Pathologists found tissue in the whales' internal organs that appeared to have been damaged by compressed gas bubbles bursting inside them.

Navy lawyers argued in court that mid-frequency active sonar is crucial to national security and to keeping sailors safe from attacks by enemy submarines. Unlike passive listening devices that rely on detecting sounds, mid-frequency active sonar emits bursts of sound waves that can reveal even quiet submarines.

"Today, dozens of countries—including North Korea and Iran—have extremely quiet diesel-electric submarines, and more than 180 of them operate in the Pacific," said Vice Adm. Samuel Locklear, commander of the U.S. 3rd Fleet. "Active sonar is the best system we have to detect and track them."

To remove the temporary ban, the Navy will have to take the case to the U.S. 9th Circuit Court of Appeals. Navy lawyers plan to move quickly because the next training
mission is scheduled to begin in September.

Cooper said it was never easy to balance the interests of wildlife with those of national security. But in this case, she said, environmental lawyers have made a persuasive case that the potential harm to whales and other marine life outweighs any harm to the Navy while the court case proceeds.

The lawsuit, according to environmental lawyers, could be settled quickly if the Navy would agree to more sweeping precautions, such as shutting off or reducing the intensity of the sonar when visibility is too low for spotters stationed on deck to see whales that venture into harm’s way.

Joel Reynolds, a senior attorney with the Natural Resources Defense Council, said the judge’s ruling in no way restricts the Navy’s ability to use sonar against real threats or in battle. Instead, he said, the court decision zeroes in on training exercises planned long in advance in waters rich with endangered blue whales, various kinds of dolphins and migrating gray whales.

“Just as the Army has a responsibility not to train soldiers to shoot in the middle of a crowded city street, the Navy has a duty, when it’s learning how to hunt with sonar, not to choose a practice range next to a marine sanctuary.”

Cooper also ruled against the Navy last year in an earlier case, temporarily blocking the use of active sonar in multinational war games near Hawaii.

Ultimately, her decision forced the Navy to negotiate with environmentalists and establish a buffer zone and other precautionary measures before conducting its month-long Rim of the Pacific exercises involving 40 surface ships and six submarines from the U.S., Korea, Japan and Australia.

Other federal judges have also shut down or forced the Navy and various marine researchers to negotiate for stronger safeguards. The U.S. Navy has already conducted three of 14 planned training missions scheduled over the next two years in Southern California waters.

Naval attorneys said in court Monday that there was no evidence of strandings, injuries or even behavioral disturbances in marine mammals during those exercises. But the Navy’s own environmental assessment, Cooper noted, predicted that the exercises using powerful sonar will harass or disrupt the behavior of marine mammals 170,000 times and will cause hundreds of cases of permanent injury to deep-diving whales.

“The predicted permanent injury of 436 Cuvier’s beaked whales is especially significant in light of federal scientists’ estimate that there are as few as 1,211 such whales remaining off the entire U.S. West Coast,” Cooper wrote in a detailed, 19-page tentative ruling.

The judge also took issue with an array of measures to protect whales that the Navy has already put in place, including rules that prohibit using the sonar within 1,000 yards of marine mammals. Sound waves may not dissipate to sub-lethal levels for more than 5,000 yards, she noted.

Environmental lawyers have argued for a larger safety zone, as well as for a 12-mile buffer along the coastline. They want training missions to remain a respectful distance from the Channel Islands National Marine Sanctuary, and they want the Navy to use acoustic monitoring as well as
spotters in aircraft to watch for whales.

The California Coastal Commission, which filed a similar lawsuit, has also been negotiating with the Navy for extensive safeguards. Its hand was significantly strengthened Monday when Cooper ruled that the Navy had failed to comply with the federal Coastal Zone Management Act.

That's the law that gives the California Coastal Commission power to influence federal activities in waters off the state.