No. _____

IN THE
Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS INCORPORATED,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR A WRIT OF CERTIORARI

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October 2, 2006

QUESTION PRESENTED

Whether a negotiated Federal Trade Commission consent order operates, as a matter of federal law, as a safe harbor immunizing non-parties to the consent order from liability under otherwise applicable state law for conduct similar to that permitted under the order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

ADMINISTRATIVE DECISIONS

STATUTES AND REGULATIONS

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

Sharon Price and Michael Fruth, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

INTRODUCTION

This case presents an important and recurring issue of federal law concerning the legal effect of a federal consent order on non-parties to the order — an issue that has long divided the state supreme courts and the federal courts of appeals. In a 4-2 decision, the Supreme Court of Illinois overturned a $10 billion bench verdict against Philip Morris on the ground that Philip Morris's conduct was "authorized" by certain Federal Trade Commission ("FTC" or "Commission") consent orders to which Philip Morris was not a party. That supposed "authorization," the court held, immunized Philip Morris from liability under Illinois law for a massive and decades-long fraudulent scheme that enticed consumers into buying so-called "light" cigarettes on the false promise that they were lower in tar and nicotine. That legal conclusion is deeply flawed — contrary to Congress's intent as embodied in the Federal Trade Commission Act ("FTC Act"), decisions of this Court, the FTC's practice with respect to consent orders, and a landmark federal court judgment in a suit brought by the United States.[1]

The legal rule adopted by the Illinois Supreme Court — that FTC consent decrees "authorize" the acts of non-parties — is the subject of a deep and mature conflict, with the Eighth Circuit and Alaska Supreme Court agreeing with the Illinois Supreme Court's erroneous view that FTC consent orders establish legal precedent with respect to non-parties to those consent orders, and the D.C., Sev-

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[1] *See* Final Opinion at 3-4, *United States v. Philip Morris USA, Inc.*, Civ. A. No. 99-2496 (GK) (D.D.C. Aug. 17, 2006) (observing that Philip Morris has "marketed and sold" its "lethal product" — including light cigarettes — with "zeal," "deception," and "a single-minded focus on [its] financial success, and without regard for the human tragedy or social costs that success exacted").

enth, and Federal Circuits, and the supreme courts of Florida and Massachusetts, correctly holding that FTC consent orders have no legal effect outside the proceeding in which they are entered. Left uncorrected, the decision below will undermine the FTC's use of the consent settlement process, weakening federal enforcement efforts against unfair and deceptive consumer practices nationwide and dimming the prospects that consumers will be recompensed for injuries resulting from Philip Morris's pervasive frauds.

OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1a-150a) is reported at 848 N.E.2d 1. The opinion of the Illinois Circuit Court (Pet. App. 167a-216a) is unreported (available at 2003 WL 22597608).

JURISDICTION

The Illinois Supreme Court entered its judgment on December 15, 2005. A petition for rehearing was denied on May 5, 2006. *See* Pet. App. 217a (dissent from denial of rehearing reported at 848 N.E.2d 89-98 (Pet. App. 151a-166a)). On July 25 and August 28, 2006, Justice Stevens granted extensions of time within which to file a certiorari petition to and including September 5 and October 2, 2006, respectively. *See id.* at 261a-262a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Uniform Deceptive Trade Practices Act, and 15 U.S.C. § 45 and 28 U.S.C. § 1257, are set forth at Pet. App. 235a-260a.

STATEMENT OF THE CASE

A. The FTC and State Deceptive-Practices Statutes

The FTC was created in 1914 as an independent federal agency to ensure that companies compete fairly in the market. *See* Act of Sept. 26, 1914 ("FTC Act"), ch. 311, § 1, 38 Stat. 717, 717-18. Congress later extended the reach of the FTC Act to protect consumers by prohibiting

"unfair or deceptive acts or practices," and charged the FTC with enforcing that mandate as well. *See* Act of Mar. 21, 1938, ch. 49, § 3, 52 Stat. 111, 111. Today, the FTC enforces a passel of consumer-protection statutes in addition to the FTC Act. *See* 16 C.F.R. § 0.4 (listing statutes).

1. The FTC has considerable prosecutorial, adjudicatory, and rulemaking authority to carry out its statutory duties, both with respect to individual defendants and on an industry-wide basis. The FTC is generally "empowered and directed to prevent . . . unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). Like most federal agencies, it has broad discretion to issue industry-wide trade rules, *see id.* § 57a, and it has issued nearly 700 pages of such regulations. *See generally* 16 C.F.R. Pts. 0-901. Not a single page of those regulations concerns cigarettes. *See id.* Pt. 408 (intentionally left blank by the FTC).

When the FTC finds that a person is in violation of the Act, it "shall issue and serve upon such [party] a complaint stating its charges . . . and containing a notice of a hearing." 15 U.S.C. § 45(b). The defending party has a right to a hearing to "show cause why an order should not be entered . . . requiring such [party] to cease and desist from the violation of the law so charged in said complaint." *Id.* The FTC and the defending party may, however, settle a complaint prior to adjudication through a negotiated consent order. *See* 16 C.F.R. §§ 2.31-2.34. The FTC Act distinguishes between enforcement of cease-and-desist orders and negotiated consent orders. The Act provides that, if the FTC enters a cease-and-desist order, it may bring a civil action for a violation of that order against a party to the order, *see* 15 U.S.C. § 45(*l*), and even, under limited conditions, against a defendant that was not a party to the order, *see id.* § 45(m). But the FTC is barred from bringing such an enforcement action against a non-party based upon a purported violation of a "consent order." *Id.* § 45(m)(1)(B).

2. Notwithstanding its broad statutory authority to remedy deceptive practices, the FTC has long pursued a cooperative relationship with States in carrying out its consumer-protection mandate. Indeed, owing to "crucial and probably inherent limitations" of the FTC, it has "strongly endorsed and emphasized the need for complementary state law enforcement work." William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729 n.10 (1972). With the FTC's encouragement of state enforcement efforts, "[a]ll fifty states and the District of Columbia have enacted at least one statute . . . aimed at preventing consumer deception and abuse in the marketplace." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 41 (4th ed. 1997). Those state statutes "incorporat[e] the FTC Act concepts of deception and unfairness and . . . provid[e] significant state and private remedies," and thus are "particularly important" in redressing "marketplace misconduct and abuse of consumers" because the FTC Act provides for "only FTC enforcement and not state or private enforcement." *Id*. Two-thirds of state deceptive-practices statutes except conduct authorized by federal law.[2]

3. Illinois is no exception. Illinois has adopted two deceptive-practices statutes — the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), 815 ILCS 505/1 *et seq.*, and the Illinois Uniform Deceptive Trade Practices Act ("Deceptive Practices Act"), *id.* 510/1 *et seq*. Those statutes are modeled on the FTC Act and seek "to protect consumers, borrowers, and business persons against fraud, unfair methods of competition, and other unfair and deceptive business practices." *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960 (Ill. 2002). In keeping with the majority of States, each statute has an exception for conduct approved by a

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[2] *See* Pet. App. 234a (compendium of state statutes); Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 31 n.160 (2005) (collecting statutes).

federal regulatory agency. The Consumer Fraud Act exempts "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). Likewise, the Deceptive Practices Act does not apply to "conduct in compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency." *Id.* 510/4(1).

B. Proceedings in the Illinois Trial Court

Sharon Price and Michael Fruth brought this class action against Philip Morris under the Illinois deceptive-practices statutes. The gravamen of their claim was that Philip Morris had engaged "in a common course of deceptive and unlawful conduct" by, among other things, falsely or misleadingly representing its light cigarettes as delivering "lowered tar and nicotine in comparison to regular cigarettes," "intentionally manipulating" the design of its cigarettes to "maximize nicotine delivery," and "employing techniques . . . [to] reduce machine-measured levels of tar and nicotine . . . , while actually increasing the harmful biological effects" of the cigarettes. Second Am. Compl. ¶ 11 (filed Feb. 11, 2003).[3]

Philip Morris insisted, among other things, that its conduct was "authorized" by the FTC and therefore exempt from the state deceptive-practices statutes. Philip Morris argued that the FTC provided legal sanction for all cigarette makers to use the descriptors "light" and "low tar" by entering into consent orders with certain cigarette makers to settle FTC enforcement actions. Specifically, Philip Morris pointed to a consent order entered into in 1971 by the FTC and American Brands, Inc. That order settled a complaint charging that American Brands had advertised its cigarettes with a comparative claim of being

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[3] The trial court certified a class of all persons who purchased Philip Morris's Cambridge Lights and Marlboro Lights cigarettes in Illinois for personal consumption between the first date that Philip Morris put those cigarettes into the stream of commerce and February 8, 2001.

"lower in tar" although, according to the FTC's allegations, its cigarettes contained five times the amount of tar found in the lowest-yielding brand. *See* Pet. App. 218a-223a (*In re American Brands, Inc.*, 79 F.T.C. 255 (1971) ("1971 consent order")). Under the terms of the settlement, American Brands could advertise that its cigarettes had "'low,' 'lower,' or 'reduced'" tar if the advertisement was accompanied by a disclosure of "[t]he 'tar' and nicotine content in milligrams in the smoke produced by the advertised cigarette." *Id.* at 222a.

Philip Morris also relied on a 1995 consent order between the FTC and American Tobacco Company. That order settled a complaint charging that American Tobacco had made misleading representations, for example, that "10 packs of Carlton have less tar than 1 pack" of competitors' brands. *See id.* at 224a-233a (*In re American Tobacco Co.*, 119 F.T.C. 3 (1995) ("1995 consent order")). By the terms of the settlement, American Tobacco could not "represent[], through the presentation of the tar ratings of any of [its] brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand of cigarettes." *Id.* at 231a. Further, the order provided that "presentation of the tar and/or nicotine ratings of any of [American Tobacco's] brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that [American Tobacco's] brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed" to violate the ban on numerical comparisons. *Id.* at 232a.

After a seven-week bench trial, the state trial court held that Philip Morris had violated Illinois' deceptive-practices statutes. The court found that Philip Morris introduced light cigarettes "to provide smokers who were concerned about their health with a product that could reduce the cognitive dissonance associated with smoking and thereby allow them to continue to smoke cigarettes." *Id.* at 175a (¶ 31). But Philip Morris knew that its light cigarettes would not deliver less tar and nicotine than

regular cigarettes, *id.* at 182a (¶ 56), and, in fact, designed its cigarettes "in such a way as to reduce the machine-measured tar and nicotine delivery while at the same time allowing consumers to extract the same levels of tar and nicotine from these products as they would extract from [regular cigarettes]," *id.* (¶ 57).

The court rejected Philip Morris's argument that its conduct was specifically authorized by federal law, including the 1971 and 1995 consent orders, and therefore was exempt from the state deceptive-practices statutes. The court reasoned that "[n]o regulatory body has ever required (or even specifically approved) the use of [the light descriptors] by Philip Morris." *Id.* at 202a (¶ 124).

The trial court awarded the 1.14 million members of the class compensatory damages of $7.1005 billion and punitive damages of $3 billion. *See id.* at 206a, 209a (¶¶ 146, 157). The court ordered that any portion of the compensatory award unclaimed by the class be distributed to law schools, the American Cancer Society, domestic violence programs, and legal aid services. *See id.* at 214a-215a.

C. Proceedings in the Illinois Supreme Court

The Illinois Supreme Court ordered that Philip Morris's appeal bypass the normal appellate process and be heard directly by it. In an opinion that drew a special concurrence and two independent dissents, the court reversed the trial court's decision, holding that Philip Morris's conduct was not actionable under state law because federal law — namely, the 1971 and 1995 FTC consent orders — authorized Philip Morris to use the terms "light" and "low tar" to describe its cigarettes. *See* Pet. App. 1a-150a.

The court framed the issue of the case as follows: "If the use of these descriptive terms [*i.e.*, "light" and "low tar"] in the manner alleged has been specifically authorized by the FTC in the course of carrying out the duties assigned to it by Congress, this action cannot stand, even if the terms might be found deceptive by a trier of fact. Similarly, if these terms have been used by [Philip Mor-

ris] in compliance with the orders or rules of the FTC, an action under the Deceptive Practices Act is also barred." *Id.* at 49a (citation omitted). In the court's view, the dispositive issue was the federal-law question "whether the FTC has specifically authorized the use of these terms." *Id.* at 85a; *see also id.* at 70a ("The question for this court is whether the entry of [an FTC] consent order, expressly directing one industry member to behave in a certain way, is an implicit authorization for other industry members to conduct themselves in the same manner."); *id.* at 57a (defining authorization to mean "giv[ing] legal authority" or "formally approv[ing]").

The court observed that no principle of Illinois law required that federal authorization occur via "formal rulemaking," *id.* at 59a-60a, and that Illinois law did not address whether the FTC had meant to or could give any legal sanction to Philip Morris's conduct, *see id.* at 65a-67a. The court thus deemed it essential "to delve deeply into the functions and actions of [the FTC]." *Id.* at 67a. Looking to the "FTC's own published materials and cases from the United States Supreme Court and the federal courts," the court held that, although the 1971 and 1995 consent orders were entered into between the FTC and two specific cigarette companies, they "authorized other members of the tobacco industry to act in accordance with their terms." *Id.* at 67a-68a. The court based that conclusion specifically upon various "statements and actions" by the FTC, *id.* at 68a-70a, decisions of this Court pertaining to federal administrative law, *see id.* at 70a-72a, and decisions of other federal courts of appeals, *see id.* at 73a-79a. Using the same reasoning, the court disposed of plaintiffs' claims under the Deceptive Practices Act. *See id.* at 87a.

Justice Karmeier filed a special concurrence, joined by Justice Fitzgerald. Although joining the majority opinion, Justice Karmeier explained that he also would reverse the trial court on the ground that plaintiffs had failed to prove that they had suffered damages from "switching from

regulars to lights" and thus "pa[id] any more for cigarettes than they would have otherwise." *Id.* at 91a.

Justice Freeman, joined by Justice Kilbride, vigorously dissented. In his view, "the 1971 and 1995 FTC orders cannot be considered to have industrywide legal force." *Id.* at 119a. He explained that "'[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms.'" *Id.* (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971)). Thus, he reasoned, courts have "no authority to expand . . . a consent order's terms" to establish a general rule. *Id.* at 120a. He concluded with the admonition that the court's decision would "send a chill wind over consumer protection." *Id.* at 140a. Justice Kilbride, joined by Justice Freeman, dissented separately, reasoning that the 1971 and 1995 consent orders "[were] not, and did not purport to be, a rule or regulation permitting the entire cigarette industry to use these or any other descriptors." *Id.* at 146a. Instead, he explained, those consent orders were merely "compromise[s] of . . . disputed claim[s]." *Id.*

On May 5, 2006, the court, over the dissenting votes of Justices Freeman and Kilbride, refused to rehear the case. *See id.* at 151a-166a, 217a. Justice Freeman criticized the court for failing to seek the FTC's view on the legal effect of its consent orders, arguing that the court's decision created "the possibility of a multitude of interpretations by several states of the same FTC voluntary consent orders," which would undermine "uniform administration of FTC policy." *Id.* at 162a. Refusing to seek the views of the FTC given that Commission consent orders were "at the heart" of the majority opinion, he stated, would be "embarrassing" for the court. *Id.* at 165a-166a.

REASONS FOR GRANTING THE PETITION

THE ILLINOIS SUPREME COURT GRAVELY MISCONSTRUED FEDERAL LAW, DEEPENING CONFLICTS AMONG STATE SUPREME COURTS AND FEDERAL COURTS OF APPEALS ON THE LEGAL EFFECT OF FTC CONSENT ORDERS

A. A Mature Conflict Exists On The Legal Effect Of FTC Consent Orders

1. *The Eighth Circuit and the Alaska Supreme Court, like the court below, have held that FTC consent orders may authorize non-parties to engage in conduct permitted under the orders*

In *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005), *petition for cert. pending*, No. 05-1284 (filed Apr. 7, 2006), the Eighth Circuit reached the same conclusion as the Illinois Supreme Court in this case: that the 1971 consent order embodies the official policy of the FTC, applicable to non-parties. There, the plaintiffs sued Philip Morris in state court alleging, as in this case, that Philip Morris had engaged in deceptive practices by labeling as "light" and "lower in tar and nicotine" cigarettes that did not actually have less tar and nicotine than other cigarettes. Philip Morris removed the suit to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), claiming that it was "acting under" the FTC because the 1971 consent order authorized Philip Morris to use light descriptors for cigarettes that, like those so labeled by Philip Morris, registered low levels of tar and nicotine in machine testing. The Eighth Circuit concluded that removal was proper even though Philip Morris was not a party to the 1971 consent order, holding that the consent order announced official FTC policy, binding on non-parties, and, therefore, that the plaintiffs' claims "directly implicate[d] the enforcement and wisdom of the FTC's tobacco policies." 420 F.3d at 862.

The Alaska Supreme Court reached a similar conclusion about the legal purpose and effect of FTC consent orders

in *State v. O'Neill Investigations, Inc.*, 609 P.2d 520 (Alaska 1980). There, the Attorney General brought suit under the Alaska Unfair Trade Practices and Consumer Protection Act, Alaska Stat. §§ 45.50.471-45.50.561, which prohibits "unfair or deceptive" acts in connection with commerce, *id.* § 45.50.471. The Act provided that, in determining what constitutes an unfair or deceptive act, "'due consideration and great weight should be given the interpretations . . . of the [FTC] Act[] . . . made by the [FTC] and the federal courts." 609 P.2d at 523 (quoting Alaska Stat. § 45.50.545). The Alaska court held that the Attorney General properly relied on FTC consent decrees to establish that the defendant's acts were deceptive, rejecting the argument that FTC consent decrees do not constitute an official or binding interpretation of law. Citing this Court's decision in *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 (1959), the court squarely held that "adjudications which are resolved by consent decree constitute an administrative interpretation of the [FTC] Act which have clear precedential value." 609 P.2d at 529 & n.30.[4]

2. *In direct conflict with those decisions, the D.C., Seventh, and Federal Circuits, and the supreme courts of Florida and Massachusetts, have held that FTC consent orders do not constitute binding legal authority*

In *Trans Union Corp. v. FTC*, 245 F.3d 809, *on denial of reh'g*, 267 F.3d 1138 (D.C. Cir. 2001), the D.C. Circuit directly rejected the view, accepted below, that FTC consent orders implicitly authorize non-parties to engage in similar conduct. There, Trans Union challenged an FTC decision that lists of names and addresses of customers were "consumer reports" under the Fair Credit Reporting Act

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[4] The Maine Supreme Judicial Court has also decided, albeit implicitly, that FTC consent orders have precedential effect on non-parties. *See Searles v. Fleetwood Homes of Pennsylvania, Inc.*, 878 A.2d 509, 520 (Me. 2005) (relying, in part, upon an FTC consent order as setting forth a legal standard applicable to a non-party to the consent order).

and thus could not be sold to "target marketers" — *i.e.*, companies that use such lists to contact consumers with offers of products and services. The FTC had decided that, among other things, Trans Union could not disclose age information to target marketers. *See In re Trans Union Corp.*, Docket No. 9255, 2000 FTC LEXIS 23 (F.T.C. Feb. 10, 2000). In doing so, the FTC noted that, by the terms of a previous consent order, a competitor of Trans Union *was* "permit[ted] to use [such] age information," but held that the previous consent order was "not before [it] in this matter and it is without precedential effect to this opinion." *Id.* at *38 n.22.[5]

In rejecting Trans Union's challenge to the FTC, the D.C. Circuit held that it was not necessary to address any inconsistency between the FTC's current decision with respect to Trans Union and the previous consent order. The court expressly affirmed the FTC's holding that the consent order "[was] not before [the FTC] in this matter and it [was] without precedential effect on this opinion." 245 F.3d at 816-17 (internal quotation marks omitted).

In *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976), the Seventh Circuit similarly held that an FTC consent decree has no legal effect outside the proceeding in which it was entered. In that case, the FTC had ruled that Beatrice Foods' acquisition of another company violated section 7 of the Clayton Act, 15 U.S.C. § 18, because the acquisition resulted in an overly concentrated market. On appeal, Beatrice Foods noted that in an earlier case

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[5] That holding is in accord with an earlier FTC decision regarding Trans Union. There, an administrative law judge had gleaned a rule of general applicability from a consent order that guided his disposition of the Trans Union matter. *See In re Trans Union Corp.*, 118 F.T.C. 821, 832 (ALJ decision 1993, affirmed as modified by full Commission 1994). The FTC expressly rejected that view, explaining that "[o]f course . . . the Commission's consent agreement . . . [did not] govern the result in this case." *Id.* at 846. The FTC made clear that it need not resolve any conflict with the previous consent order because "[t]hat consent agreement is binding *only between* the Commission and [the party to the order]." *Id.* at 864 n.18 (emphasis added).

the FTC had entered into a consent decree that permitted an acquisition resulting in greater market concentration than that which resulted from Beatrice Foods' acquisition. Beatrice Foods argued that, because the FTC had permitted that prior acquisition, its acquisition must also be lawful. The Seventh Circuit rejected the argument, reasoning that "[t]he entering of a consent decree . . . is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto. Nor is a consent decree a controlling precedent for later Commission action." 540 F.2d at 312.[6]

Like the D.C. and Seventh Circuits, the Federal Circuit has held that consent orders have no legal effect outside the proceeding in which they are entered. In *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001), Intergraph brought suit against Intel, alleging that Intel violated the antitrust laws. The district court dismissed the claims under the law-of-the-case doctrine, because the Federal Circuit had held in an earlier appeal that Intergraph had not suffered an antitrust injury. *See id.* at 697. Affirming the district court, the Federal Circuit rejected Intergraph's argument that a consent order entered into between the FTC and Intel addressing the same conduct challenged by Intergraph warranted a departure from the law-of-the-case doctrine. Although acknowledging that the doctrine may not apply when "new . . . material evidence" is introduced or there is "an intervening change of controlling legal authority," the court sided with the Seventh Circuit's holding in *Beatrice Foods* to conclude that the consent order was not material, because "a consent

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[6] The Second Circuit has indicated that it also would follow that rule: "Unlike an agency regulation which has industry-wide effect, a consent order is binding only on the parties to the agreement." *General Motors Corp. v. Abrams*, 897 F.2d 34, 36 (2d Cir. 1990); *see also ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 222 n.23 (2d Cir. 1976) (consent orders, which provided that they "did not constitute an admission . . . that the law has been violated," could not be relied on in other proceedings) (internal quotation marks omitted).

order does not establish illegal conduct." *Id.* at 698 (citing *Beatrice Foods*, 540 F.2d at 312).

The Florida Supreme Court has likewise concluded that an FTC consent order has no authoritative weight against those who were not a party to it. In *Sakon v. Pepsico, Inc.*, 553 So. 2d 163 (Fla. 1989) (per curiam), a teenager who was injured while attempting a dangerous stunt portrayed in a Pepsi commercial brought suit against Pepsico, alleging that it had negligently failed to include in the commercial a warning that viewers should not attempt the stunt. In ruling that Pepsico did not have a duty to include such a warning, the Florida court rejected the argument that FTC consent orders arising from similar facts established that Pepsico had such a duty. The court explained that "[n]o legal standard of duty is set forth in a consent order, and there is no legal precedent arising from consent orders." *Id.* at 166.

The Massachusetts Supreme Judicial Court arrived at the same legal conclusion in *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243 (Mass. 1979). There, the court rejected the argument that conditions in a land deed were unenforceable because FTC consent decrees established that such conditions were *per se* violations of the antitrust laws. Relying exclusively on decisions of federal courts, the court correctly held that consent decrees "are not . . . authoritative interpretations of Federal law." *Id.* at 252.

This line of decisions, which properly holds that FTC consent orders have no legal effect on non-parties, cannot plausibly be reconciled with the contrary holdings of the Illinois Supreme Court below, the Eighth Circuit, and the Alaska Supreme Court. This Court's review is necessary to resolve this sharp split of authority and to establish the proper legal effect of an FTC consent order on those who were not a party to it.

B. The Illinois Supreme Court Erred In Interpreting Federal Law As Giving Any Authoritative Legal Effect To FTC Consent Orders

It is undisputed that the FTC has never issued a regulation or rule approving or regulating *any* cigarette company's use of the descriptors "low tar" or "lights." Nor has it adopted such a rule through an adjudicated decision. Nevertheless, the Illinois Supreme Court held that Philip Morris's use of light descriptors — even if fraudulent and deceptive — had been legally sanctioned by the FTC through the 1971 and 1995 consent orders that settled enforcement actions brought against *other* cigarette companies. That extraordinary conclusion rests on a fundamental mistake of federal law.

1. *Well-settled authority establishes that FTC consent orders have no legal effect on non-parties*

a. Congress has made clear that FTC consent orders have no legal effect vis-à-vis non-parties. Before 1994, the FTC Act provided that, "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (1988). In 1994, Congress amended that provision to codify, with respect to civil penalties, the FTC's longstanding practice of not according precedential effect to consent orders. The provision now states: "[i]f the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty . . . against any [party] which engages in such act or practice." 15 U.S.C. § 45(m)(1)(B) (emphasis added). Through that provision, Congress instructed that FTC consent orders are a unique category of

agency orders that should not be treated as establishing industry-wide standards.[7]

The legislative history of the 1994 amendment confirms that understanding. In explaining the reason for the amendment, the House Report states unequivocally that "a case settled by a consent agreement would not qualify as a precedent for a section [45(m)(1)(B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-138, at 14 (1993). The Report contrasted consent orders, which involve no factual or legal determinations, with cease-and-desist orders, which issue "after all factual and legal issues have been fully adjudicated." *Id.* In addition, the Report stated that it was "the FTC's current practice not to seek penalties based upon nonrespondent violations of outstanding consent agreements and this subsection codifies that practice." *Id.*

b. This Court has confirmed that an FTC consent order has no legal effect on those who were not parties to it. In *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961), du Pont challenged a district court's order requiring divestiture by pointing to FTC consent decrees not requiring divestiture entered in similar cases. This Court rejected the argument, reasoning that "the circumstances surrounding *such negotiated agreements* are *so different* that they cannot be persuasively cited in a litigation context." *Id.* at 330 n.12 (emphases added). The teaching of *du Pont* is straightforward: because FTC consent orders reflect a negotiated compromise, they are neither binding on nor available as a legal safe-harbor for non-parties.

Since *du Pont*, this Court has repeatedly reaffirmed the rule that consent orders have no legal effect on non-

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[7] *See* Patricia A. Davidson & Christopher N. Banthin, *Untangling the Web: Legal and Policy Tools to Restrict Online Cigar Advertisement*, 35 U.S.F. L. Rev. 1, 18 n.125 (2000) (Section 45(m)(1)(B) "allows the FTC to forbid certain conduct based on issuance of a final order as long as the party is aware of the order. This *rule-like procedure does not apply to consent decrees*.") (emphasis added, citation omitted).

parties. It has held, for example, that judicial consent decrees are creatures of contract, "'entered into by parties to a case after careful negotiation has produced agreement on their precise terms.'" *Carson v. American Brands, Inc.*, 450 U.S. 79, 86-87 (1981) (quoting *Armour*, 402 U.S. at 681). Accordingly, applying basic precepts of contract law, the Court has held that consent decrees "impose[] [no] obligations on a party that did not consent to the decree." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986). Likewise, the Court has held that a consent decree cannot prejudice the rights of strangers to the proceeding, even though they may have actual knowledge of the settlement or the underlying litigation. *See Martin v. Wilks*, 490 U.S. 755, 762-65 (1989).

This Court's decision in *United States v. Armour & Co.*, which involved a judicial consent decree entered into by the FTC and three meat packers, is particularly instructive. The issue there was whether a proposed acquisition by Greyhound Corporation of a controlling share of stock in Armour would violate the terms of the so-called Meat Packers Consent Decree of 1920, which prohibited Armour from participating in certain industries. The Court held that the consent decree did not bar the proposed transaction because its plain text prohibited Armour only from participating directly in certain industries, not from the acquisition of Armour by a company engaged in those industries. *See* 402 U.S. at 677-79.[8]

In so ruling, the Court rejected the claim that to allow the transaction would permit the very evils that had motivated the consent decree. *See id.* at 680-81. The Court explained that "[c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms." *Id.* at 681. "Naturally," the

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[8] The Court noted that "[t]he Government does not contend that Greyhound's acquisition of controlling interest in Armour subjects Greyhound to punishment for contempt since it was *not a party to the decree*." 402 U.S. at 676-77 (emphasis added).

Court reasoned, "the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681-82. It followed that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *Id.* at 682. *Armour* thus articulates a rule that consent decrees — and, hence, FTC consent orders — cannot, under federal law, have the purpose or effect of setting forth an industry-wide rule outside the decree's text.[9]

c. Consistent with *du Pont*, the FTC has consistently held that its "[c]onsent decrees provide no precedential value." *In re Rambus Inc.*, Docket No. 9302, 2004 FTC LEXIS 17, at *550 (ALJ decision, Feb. 23, 2004); *see also*, *e.g.*, *In re Telebrands Corp., et al.*, Docket No. 9313, 2004 FTC LEXIS 154, at *125 (ALJ decision, Sept. 15, 2004) (citing *du Pont* for proposition that "[t]he fact that the

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[9] This Court's decision in *Mandel Brothers* is not to the contrary. There, the Court noted that its view of the proper statutory construction of the Fur Products Labeling Act was also supported by a "contemporaneous construction" of the Act by the FTC in *In re Ed Hamilton Furs, Inc.*, 51 F.T.C. 186 (1954). 359 U.S. at 391 & n.6. Although styled a "Stipulation for Consent Order," the order ending that FTC proceeding was, in essence, a cease-and-desist order. The defendant in that proceeding stipulated to the record, withdrew its answer to the FTC's complaint, and, most importantly, "agree[d] that the order . . . shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon." 51 F.T.C. at 193-94. That language is conspicuously absent in the 1971 and 1995 consent orders. In any event, this Court severely limited *Mandel Brothers* in *du Pont*, where it held that consent orders "cannot be persuasively cited in a litigation context." 366 U.S. at 330 n.12. *Mandel Brothers* accordingly has no application in a case, such as this, where a consent order is nothing more than a negotiated settlement.

[FTC] has previously accepted consent orders with a performance bond . . . does not provide sufficient legal foundation to impose such a bond in this case"). The FTC has explained that consent orders are not "controlling case precedent," because "[s]uch orders are negotiated by the parties" and "they are not based on any finding of violation, a necessary predicate to an adjudicated order." *In re Chrysler Corp.*, 87 F.T.C. 719, 742 n.12 (ALJ decision 1975, adopted as modified by full Commission 1976); *see also In re Trans Union*, 118 F.T.C. at 864 n.18 (a "consent agreement [with one party] is binding only between the Commission and [that party]").[10]

The rule that FTC consent orders have no legal effect on non-parties reflects the realities of FTC enforcement actions. Consent orders, by their nature, reflect compromises between the parties, and therefore do not represent the FTC's full and considered views. *See Armour*, 402 U.S. at 681-82. The FTC "may settle for less stringent provisions . . . because of the public interest savings in time, money, and uncertainty which the settlement will provide." Stephanie W. Kanwit, *Federal Trade Commis-*

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[10] The FTC's position on the legal effect of its consent orders is longstanding. *See*, *e.g.*, *In re Beatrice Foods Co.*, 86 F.T.C. 1, 50 (ALJ decision 1973, adopted as supplemented and modified by full Commission 1975) ("In contrast to the procedures in a divestiture order, a consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record. The courts and the Commission have consistently held that a consent decree is not a binding judicial precedent because of these factors, as well as the fact that they are based entirely upon the bargaining of the parties.") (citations omitted); *In re Berger*, 56 F.T.C. 1000, 1003 n.3 (ALJ decision, adopted as modified by full Commission 1960) ("[t]he orders issued in each of these cases were based on consent agreements" and thus "they cannot be considered as legal precedents"); *In re Federal Employees' Distrib. Co.*, 56 F.T.C. 550, 574 (ALJ decision, adopted by full Commission 1959) (holding that case cited "resulted in a consent order under agreement of parties and is not a precedent in other cases *for any purpose*") (emphasis added).

sion § 12:4, at 12-9 (2004) (hereinafter "Kanwit-*FTC*") (internal quotation marks omitted); *see also Abrams*, 897 F.2d at 39 (FTC may settle to avoid "the expense, delay and risks of litigation"); *cf. Armour*, 402 U.S. at 681-82. A private party's agreement with a consent order likewise often depends on considerations such as the "uncertainty and expense" of litigation and a desire to "preserve the confidentiality" of the matter. Kanwit-*FTC* § 12.4, at 12-9.

The Illinois Supreme Court thus fundamentally misapprehended the purpose and effect of an FTC consent order. A consent order seeks to prohibit rather than to authorize conduct, and thus reveals little or nothing about the FTC's official view of the underlying conduct or the remedy imposed via a settlement. Nor does it imply that others in the same industry may freely engage, without fear of sanction, in conduct similar to that allowed under the order to the settling party. Indeed, "the principal purpose of a consent order is to *avoid* the fact finding and adjudicating process," *Ford Motor Co. v. FTC*, 547 F.2d 954, 956 (6th Cir. 1976) (emphasis added), thereby relieving the FTC of the need to formulate an industry-wide standard by allowing it to tailor a narrow and fact-specific remedy applicable to only the settling party.

d. The circumstances surrounding the 1971 and 1995 consent orders confirm that they did not have the legal purpose or effect of regulating non-parties. At the time of the 1971 order, the FTC "could only recover civil penalties from a respondent which violated a cease and desist order that had been previously issued *against it*." Kanwit-*FTC* § 10:7, at 10-32 (emphasis added). In 1975, the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act added section 45(m), which authorized the FTC to bring an action against any person that violated a cease-and-desist order. That change enabled the FTC to use cease-and-desist orders "to legislate prospectively and put businesses on notice of acts or practices that have been adjudged to be unfair and deceptive." *Id.* at 10-33. Thus, at the time of the 1971 consent order,

even if the FTC had issued a fully adjudicated *cease-and-desist* order against American Brands, that order could not have had legal effect on Philip Morris. It follows *a fortiori* that the 1971 *consent* order could not have "authorized" Philip Morris's acts.

Further demonstrating that the consent orders did not function as industry-wide rules are the FTC's proposed revisions in 1997 to cigarette testing methodology. In a notice inaugurating that rulemaking, the FTC sought comment on whether to define light cigarette descriptors and observed that there are no "official definitions" for descriptors such as "low tar" and "light." Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997); *see also id.* ("Is there a need for official guidance with respect to the terms used in marketing lower rated cigarettes?"). Such a request for public comment would have been completely unnecessary if the 1971 and 1995 consent orders served as industry-wide rules.

Even more telling is that the major cigarette companies, including Philip Morris, filed joint comments with the FTC in that proceeding stating plainly that "[t]he manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Comments of Philip Morris Inc., *et al.*, at 94, *On the Proposal Entitled FTC Cigarette Testing Methodology*, FTC File No. P944509 (filed Feb. 5, 1998); *see also* Philip Morris Petition for Rulemaking Concerning Tar and Nicotine Testing and Disclosure (FTC filed Sept. 18, 2002) (petitioning FTC to promulgate a rule authorizing use of light descriptors). Those comments — which do not even advert to the 1971 and 1995 consent orders — cannot be reconciled with Philip Morris's claim now that since 1971 the FTC has provided legal guidance with respect to Philip Morris's use of light descriptors.[11]

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[11] In a voluminous opinion resolving the nearly seven-year-long trial brought by the United States against leading cigarette makers, the United States District Court for the District of Columbia held, contrary

In addition, nothing in the text of the two consent orders themselves suggests that they were intended to have industry-wide application. The 1971 consent order made clear that American Brands' "signing of the agreement . . . is for settlement purposes only and does not constitute an admission . . . that the law has been violated." Pet. App. 221a. Moreover, the order was carefully limited only to "American Brands, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device." *Id.* at 222a. Similarly, the 1995 consent order stated that "the signing of said agreement is for settlement purposes only and does not constitute an admission . . . that the law has been violated." *Id.* at 230a. The 1995 order provided that it binds only American Tobacco Co. and "its successors and assigns." *Id.* at 231a. Those provisions would have been unnecessary — indeed, inappropriate — were the FTC aiming to announce an industry-wide rule. *Cf. In re Rambus*, 2004 FTC LEXIS 17, at *550 (a consent order did not have precedential value, in part, because it acknowledged that "the agreement is for settlement purposes only and does not constitute an admission of a law violation").

2. *The state supreme court's additional rationales for treating FTC consent orders as authorizing Philip Morris's conduct are erroneous*

The court below also misconstrued or misunderstood various other materials upon which it erroneously relied to conclude that the 1971 and 1995 consent orders "authorized" Philip Morris's conduct. *See* Pet. App. 67a-78a.

For example, the court relied on the FTC's 1964 statements that, in accord with this Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), it may use orders en-

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to Philip Morris's assertions here, that "the FTC does not impose, regulate, or require [the use of light descriptors]. How those terms are applied, and on which brands, is entirely up to the tobacco companies." Final Opinion at 1632 n.52, *United States v. Philip Morris USA* (internal quotation marks and alterations omitted).

tered in adjudicated cases to announce standards of "general application." Pet. App. 69a-70a. From this noncontroversial statement about an agency's ability to choose between adjudication and rulemaking when it declares principles of general application, the court inferred, in an unwarranted leap of logic, that "a consent order may serve as authorization for nonparties to the order to follow its directives." *Id.* at 70a. That conclusion both overstates the FTC's views and conflicts with the Commission's statement in 1971 — when the American Brands consent order was entered into — that a suit against a single violator resolved through a consent decree is not meant to bind "all firms engaged in [the] questionable practice." *Annual Report of the Federal Trade Commission*, H.R. Doc. No. 92-211, at 7 (1971).

The court likewise erred in relying on *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), in which this Court held that federal agencies may establish policy via either rulemaking or adjudication. *See id.* at 292-94. Nothing in that decision supports the state supreme court's view that an action settled by a consent order instead of by formal adjudication "establish[es] agency policy." Pet. App. 70a. In fact, *Bell Aerospace* suggests that agencies often choose adjudication to avoid formulating universal standards. *See* 416 U.S. at 294. Nor does *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973), support the court's judgment. There, the D.C. Circuit refused to imply a private right of action under the FTC Act, explaining that Congress gave the FTC enforcement authority because of its "expertise in dealing with commercial practices, its ability to act as a buffer in securing voluntary compliance through informal proceedings, and its sound discretion in determining when formal enforcement measures were necessary." *Id.* at 995-96. Nothing in that language (or the rest of the decision) speaks to the dispositive question here — whether FTC consent orders "authorize" the conduct of non-parties.

Finally, the court cited the FTC's occasional grouping of consent orders within the broad category of the agency's "regulatory activity" as a reason to imbue the 1971 and 1995 consent orders with legal force. *See* Pet. App. 72a. A decision by the FTC to list consent orders under a particular heading in a congressional report can hardly overcome the weight of congressional, Supreme Court, and FTC authority establishing that FTC consent orders can neither permit, nor prohibit, conduct by non-parties. A consent order is quite plainly a form of "regulatory activity" insofar as it affects the conduct of a particular party in a particular situation, but that says nothing about whether a consent order sanctions conduct by a non-party.

In short, none of the authorities cited by the court below supports its profoundly mistaken view that FTC consent orders regulate or authorize the activities of non-parties.

C. The Issues Of Federal Law Raised By This Case Are Important And Recurring

1. Litigation against Philip Morris is pending in state and federal courts nationwide in connection with decades of fraud and deception in its marketing of light cigarettes. In those cases, Philip Morris has insisted its conduct was authorized, if not directed, by the FTC.[12] To remove state-law actions to federal court, for example, Philip Morris has argued that the FTC consent orders constitute regulation sufficient to warrant federal officer removal under 28 U.S.C. § 1442(a)(1). *See*, *e.g.*, Philip Morris Brief at 47, *Kelly v. Martin & Bayley, Inc.*, No. 06-1756 (7th Cir. filed June 19, 2006) ("*American Brands* and *American Tobacco* had the purpose and effect of regulating all major manufacturers, not just the two companies involved."). Philip Morris has also maintained that FTC consent orders preempt state law. *See*, *e.g.*, Philip Morris Opening Brief at

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[12] *See*, *e.g.*, *Marrone v. Philip Morris USA, Inc.*, 850 N.E.2d 31, 41-42 (Ohio 2006) (noting that Philip Morris's arguments regarding supposed authority conferred upon it by the 1971 consent order could "doom" plaintiffs' claims under the Ohio deceptive-practices statute).

59-60, *Price v. Philip Morris Inc.*, No. 00-L-112 (Ill. filed Dec. 10, 2003). In resolving those issues, state supreme courts, as well as federal courts of appeals, will be called upon to determine whether, under federal law, FTC consent orders authorize conduct by non-parties.

Uniformity in the treatment of those orders is an essential component of justice. Correcting the state court's error now is especially important in view of the extraordinary disconnection between the holding that Philip Morris is wholly immunized from state liability because of *authorization from* federal law and the fact that the United States is currently suing Philip Morris for *violation of* federal law for the same conduct. Such manifest inconsistency mocks the credibility of state and federal judicial systems.

The significance of this litigation also can be measured by its enormous financial and legal stakes. The decision below overturned a substantial bench verdict, *cf. Commissioner v. Standard Life & Accident Ins. Co.*, 433 U.S. 148, 151 & n.5 (1977) (certiorari granted in part because "substantially more than $100 million is in dispute"), and other pending cases with billions of dollars in liability at stake will also turn on the legal significance of the FTC's actions, *see*, *e.g.*, Memorandum and Order at 154-63, *Schwab v. Philip Morris USA, Inc.*, No. 04-CV-1945 (JBW) (E.D.N.Y. Sept. 25, 2006) (certifying a class seeking $200 billion in damages from cigarette makers, including Philip Morris, but sending defendants' so-called "FTC defense" to the jury).

More importantly, the citizens of Illinois now have no effective recourse against Philip Morris for its fraud under Illinois deceptive-practices statutes. *Cf. Kansas v. Marsh*, 126 S. Ct. 2516, 2531 (2006) (Scalia, J., concurring) (certiorari is proper "[w]hen state legislation is thwarted . . . on the basis of a questionable application of [federal] laws"). The interest of Illinois citizens, and citizens of other States, in remedying decades of fraudulent behavior by Philip Morris is on par with the interest of the United

States in pursuing lengthy and costly litigation against Philip Morris for the very same acts. Given the numerous pending suits against Philip Morris that will benefit from this Court's guidance, resolution of this important federal question should not wait.

2. This decision also has broad implications outside the tobacco context. The FTC's "economic regulatory activities affect virtually every business in the country, from local furniture stores to 'Fortune 500' corporations." Kanwit-*FTC* § 1:1, at 1-1. In addition, "[t]he majority of matters initiated by the [FTC] are settled by negotiation through prescribed consent order procedures." *Id.* § 12:1, at 12-1. Given the large number of States with deceptive-practices statutes that exempt conduct authorized by federal law, the question whether an FTC consent order constitutes federal authorization for a non-party to engage in conduct shielded from state-law liability is of broad and recurring significance. *See* Schwartz & Silverman, 54 U. Kan. L. Rev. at 31 n.160 (state regulatory-authorization exemptions "may rise in importance, particularly in private consumer protection litigation involving highly regulated industries, following the Illinois Supreme Court's decision in *Price*").

3. The United States also has considerable interests in avoiding dismissals of deceptive-practices claims, whether brought by consumers or state Attorneys General, based on nothing more than a negotiated FTC consent order. The decision below puts the FTC in the untenable position of rendering toothless state-law deceptive-practices remedies that have long served as a crucial complement to federal enforcement whenever it elects to settle an enforcement action. Such a result directly contravenes congressional mandate and FTC policy encouraging effect state remedies. *See* Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-97 ("The [FTC] shall review its statutory responsibilities to identify those matters within its jurisdiction where Federal enforcement is particularly necessary or

desirable and those areas that might more effectively be enforced at the State or local level.").

Left uncorrected, the holding below will substantially undermine these objectives: an FTC settlement with one company will make state-law enforcement ineffective on an industry-wide basis, disrupting the regime of dual enforcement that Congress and the FTC have crafted to remedy deceptive consumer practices nationwide. Faced with that prospect, the FTC will need either to bring fewer enforcement actions or to dismiss cases that it would have otherwise settled via consent orders. As the FTC warned long ago, "a determination that consent orders are controlling precedents would severely limit the use of the consent settlement process." *In re Beatrice Foods*, 86 F.T.C. at 50.[13] That result will unnecessarily impair efforts to deter and remedy deceptive practices aimed at consumers.

D. This Case Is An Appropriate Vehicle To Resolve The Important Federal-Law Question Decided By The Illinois Supreme Court

Although the majority below reversed the trial court's determination that Philip Morris violated state law, the court's decision unmistakably turned on a determination of federal law. As in *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), this Court may exercise its jurisdiction to review the federal-law question presented.

Standard Oil involved a dispute arising out of section 10 of the California Motor Vehicle Fuel License Tax Act, which made a state vehicle tax inapplicable "to any motor vehicle fuel sold to the government of the United States or any department thereof." *Id.* at 482. The plaintiff had sold gas to the United States Army Post Exchange. The California Supreme Court ruled that the Army Post Ex-

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[13] *See also* Kanwit-*FTC* § 12:6, at 12-25 to 12-26 ("The courts and FTC have construed consent orders as contracts rather than as binding judicial precedent, reasoning that any other interpretation would hamper the consent settlement process.") (footnote omitted).

change was not "the government" and therefore that the plaintiff could be taxed. *Id.* at 483. This Court granted certiorari and rejected the argument that the issue presented was one of state law. It acknowledged that, "[i]f the [California] court's construction of Section 10 of the Act had been based purely on local law, this construction would have been conclusive." *Id.* "But," the Court explained, "in deciding that post exchanges were not 'the government of the United States or any department thereof', the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law." *Id.* Thus, the Court concluded, "[i]t was upon a determination of a federal question . . . that the Supreme Court of California rested its conclusion that . . . sales to post exchange were not exempted from the tax." *Id.* Accordingly, the Court upheld its jurisdiction and determined that the state court had erred in interpreting federal law. *See id.* at 483-85.

This case is on all fours with *Standard Oil*. In determining that the FTC had "specifically authorized" Philip Morris's conduct through consent orders, the court below rested its decision, not on an analysis of Illinois law, but rather on an exegesis of federal law. On the basis of that study, the court concluded — albeit erroneously — that the FTC's 1971 and 1995 consent orders authorized "nonparties to the order to follow its directives." Pet. App. 70a-72a. That determination is unmistakably one of federal law, because federal law defines the legal purpose and effect of a consent order entered into by a federal agency. This Court has repeatedly exercised its jurisdiction to resolve when an agency's action constitutes legal regulation, with all of the attendant legal effects. *See United States v. Mead Corp.*, 533 U.S. 218, 230 & n.12 (2001) (collecting cases); *cf.*, *e.g.*, *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (addressing whether opinion letter constitutes regulation warranting deference

under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

The federal-law element of the decision below is made clear by the court's exclusive reliance on federal authorities and FTC statements to resolve whether an FTC consent order constitutes legal authorization for non-parties. *See supra* p. 8. Indeed, the court acknowledged that the only way to determine the purpose and effect of consent orders was "to delve deeply into the functions and actions of a federal agency" and to "look to the affirmative acts or expressions . . . by the FTC." Pet. App. 67a.

The jurisdictional analysis here is not altered by the Illinois Supreme Court's statement that it "resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute." *Id.* at 87a. That statement is accurate only in the sense that the ultimate issue in the case was whether Philip Morris was subject to liability under the applicable state statute. If that were the appropriate jurisdictional standard, this Court could not have decided *Standard Oil*. What matters for jurisdictional purposes is that, in order to resolve the underlying state-law issue, the Illinois court was forced to decide a pivotal issue of federal law. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 816 (1986) ("[T]his Court retains power to review the decision of a federal issue in a state cause of action."); *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366-70 (2005). The court itself acknowledged repeatedly that the federal-law issue was in fact "dispositive." Pet. App. 64a. As the majority below explained, "[t]he question for this court is whether the entry of a consent order, expressly directing one industry member to behave in a certain way, is an implicit authorization for other industry members to conduct themselves in the same manner." *Id.* at 70a; *see also id.* at 85a ("the question [is] whether the FTC has specifically authorized the use of these terms [*i.e.*, 'light' and 'low tar']"). Likewise, the court's decisive holding amounted to an undis-

guised conclusion of federal law: "a consent order entered into by the FTC with one member of a regulated industry, which is published pursuant to statute, provides implied authority for other members of the regulated industry to engage in the same conduct." *Id.* at 86a.

Under *Standard Oil*, this Court has jurisdiction to correct the Illinois court's erroneous view of a significant concept of federal law. *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 565 (1985) (explaining that *Standard Oil* stands for the proposition that the Supreme Court may review a "question of state law [that] turns on a question of federal law").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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