No. 07-562

In The Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,

Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Federal Cigarette Labeling and Advertising Act ("FCLAA") expressly preempt state-law claims that a cigarette company violated the Maine Unfair Trade Practices Act by falsely representing its product to the public when: (a) the predicate state-law duty of such claims is the duty not to deceive; and (b) the Federal Trade Commission ("FTC") has not only refused to approve or authorize the alleged misrepresentations, but has prohibited their use in a consent decree with a third party?

2. Are such claims impliedly preempted even though: (a) no court has ever held such claims impliedly preempted; (b) this Court has held that there is no implied preemption under FCLAA; (c) the FTC has never exercised its rule making power to address the conduct at issue; and (d) the FTC prohibited the challenged conduct in a consent decree with a third party?

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INTRODUCTION

Respondents Stephanie Good, Lori A. Spellman and Allain L. Thibodeau ("Respondents") allege in this putative class action that Petitioners Altria Group, Inc. and Philip Morris USA, Inc. ("Philip Morris") violated Maine's Unfair Trade Practices Act by falsely stating on packages of Marlboro Lights and Cambridge Lights that such cigarettes delivered "LOWERED TAR AND NICOTINE" and were, therefore, "LIGHTS." The complaint alleges that Philip Morris knew that smokers would actually receive as much, or more, tar and nicotine from so-called "light" cigarettes as they would receive from regular, non-light cigarettes.

Respondents seek economic damages that they suffered as a result of Philip Morris' intentional fraud. They do not seek to recover for any health-related injuries caused by Philip Morris' products. Nor do Respondents claim that Philip Morris failed to warn them of the dangers of smoking cigarettes or that Philip Morris' statements on the packages of Marlboro Lights had the effect of neutralizing the warnings which are required by the Federal Cigarette Labeling and Advertising Act ("FCLAA"). *See* 15 U.S.C. § 1331 *et seq.* Rather, Respondents allege only that the statements "LOWERED TAR AND NICOTINE" and "LIGHTS" were false, and, accordingly, violated Maine's state-law prohibition on deceptive business practices. Me. Rev. Stat. Ann. tit. 5, § 207.

In granting Philip Morris' motion for summary judgment, the United States District Court for the District of Maine held that Respondents' claims are expressly preempted by FCLAA because they are more properly characterized as an attack on the adequacy of the federally mandated warnings than as claims for fraudulent misrepresentation. Its conclusion rested on its factual finding that the Federal Trade Commission ("FTC") had found the challenged representations to be truthful, and had authorized their use in advertising. Pet. at 63a. The First Circuit reversed. Based on a careful examination of the evidentiary record, it found – contrary to the District Court's conclusion – that the FTC had never found the "low tar" representations to be true or approved their use to advertise cigarettes. Accordingly, it held that Respondents had asserted fraudulent misrepresentation claims that are neither preempted nor foreclosed by any FTC conduct.

In its Petition to this Court, Philip Morris repeats the factual argument it made below, claiming that the FTC had authorized the use of the challenged representations and had determined that they were not deceptive. This factual argument is premised on a decision of the Fifth Circuit in which the cigarette manufacturers' characterization of the FTC's conduct was not disputed by the plaintiffs, and therefore was deemed true. However, as explained further below, the findings of the Fifth Circuit cannot be squared with the real facts when properly tested by a genuine adversarial proceeding.

In 2006, the United States District Court for the District of Columbia concluded – after a nine-month bench trial in a racketeering action brought by the federal government – that Philip Morris and other cigarette manufacturers had "falsely represented that Light and Low Tar Cigarettes Deliver less Nicotine and Tar" and enjoined the use of such representations. *United States v. Philip Morris, USA, Inc.*, 449 F.Supp.2d 1, 859, 938 (D.D.C. 2006) (injunction stayed pending appeal) ("*U.S. v. Philip Morris*"). The court's finding that Philip Morris had knowingly made false representations was largely based on Philip Morris' own internal memoranda. Moreover, the court heard testimony from the FTC itself that it had never "authorized" the use of any "low tar" or "light" descriptors.[1]

That case is currently on appeal to the D.C. Circuit. If it is affirmed, all cigarette manufacturers will be prohibited from using any "low tar" descriptors – thus, rendering the issues in this case of no future practical consequence – and issue preclusion may thereafter apply in private lawsuits that, like

[1] The FTC provided testimony in *U.S. v. Philip Morris* pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. C. Lee Peeler testified on behalf of the FTC that "[t]he FTC does not have a view on the use of ["low tar"] descriptors in – on cigarette packages or in cigarette advertising." *See Aspinall v. Philip Morris Cos. Inc.*, No. 98-6002, 2006 WL 2971490 at *5 (Mass.Super.Ct. Aug. 9, 2006) (appeal docketed in Supreme Judicial Court of Massachusetts, oral argument scheduled for January 10, 2008).

this one, challenge those statements as false. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331-332 (1979) (private plaintiffs may avail themselves of issue preclusion after government enforcement action results in final judgment).

STATEMENT OF THE CASE

A. At All Times, Philip Morris Knew That the Representations "LIGHTS" and "LOWERED TAR AND NICOTINE" Were False.

In 1967, the FTC adopted the Cambridge Filter testing method to measure the number of milligrams of tar and nicotine that cigarettes deliver when smoked in a standardized fashion by a machine. The FTC knew that the machine would not perfectly replicate the experience of a human smoker. However, the FTC did not know that because of the way humans smoke "low tar" cigarettes (a phenomenon known as "compensation"), the testing method would consistently yield meaningless low ratings for such cigarettes – rather than simply imperfect measurements resulting from variations in the smoking habits of individual smokers. *U.S. v. Philip Morris*, 449 F.Supp.2d at 501.

Unlike the FTC, Philip Morris was fully aware of the defects of the Cambridge Filter testing method. Nevertheless, 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, even though it knew that human smokers regularly used compensatory smoking techniques to ensure that they would satisfy their daily nicotine quotas. Thus, Philip Morris ensured that its customers would receive as much, if not more, tar and nicotine from smoking Marlboro Lights as they would from smoking regular cigarettes.

In a July 28, 1967 memorandum sent to Philip Morris' Director of Development, a Philip Morris Associate Scientist explained that "[s]mokers adjust puff intake in order to maintain TPM [total particulate matter] and/or nicotine constancy." *U.S. v. Philip Morris*, 449 F.Supp.2d at 462. One month later, Philip Morris' Vice President of Corporate Research and Development explained in greater detail:

> Two tests conducted at Product Opinion Laboratories demonstrate that in smoking a dilution filter cigaret [sic], the smoker adjusts his puff to receive about the same amount of "undiluted" smoke in each case. . . . In the smoking machine the puff volume is constant so that with dilution the quantity of "equivalent undiluted smoke" delivered to the Cambridge filter is reduced. Not so with the human smoker who appears to adjust to the diluted smoke by taking a larger puff so that he still gets about the same amount of equivalent undiluted smoke. . . . The smoker is, thus, apparently defeating the purpose of dilution to give him less "smoke" per puff. He is certainly not performing like

> the standard smoking machine; **and to this extent the smoking machine data appear to be erroneous and misleading**.

Id. (emphasis added).

Other studies conducted by Philip Morris in the late 1960's provided "further support to the postulate that smokers adjust puff intake in order to maintain constant smoke intake." *Id.* at 463. A Philip Morris Senior Scientist working on such studies reported to the Board of Philip Morris in the fall of 1969 that "[i]t would appear that smokers do modify their smoking habits in order to obtain a preferred [nicotine] intake level." *Id.* Two years later, in 1971, yet another Philip Morris special research report corroborated the earlier research findings that "the smoker does have daily intake quotas for tar and/or nicotine and that he titrates his smoke intake to meet these quotas." *Id.*

Moreover, by the 1970's, Philip Morris, unlike the FTC, had developed a method by which it could obtain measurements of tar and nicotine intake that reflected what a human smoker received with a "mean accuracy reading of 96%." *Id.* at 464. When using that Human Smoker Simulator method to study the difference between Marlboro Lights and regular Marlboros, the results were telling:

> Marlboro Lights cigarettes were not smoked like regular Marlboros. There were differences in the size and frequency of the puffs, with larger volumes taken on Marlboro Lights by both regular Marlboro Smokers

> and Marlboro Lights smokers. . . . The panelists smoked the cigarettes according to physical properties; i.e., the dilution and the lower RTD [resistance to draw] of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of Marlboro Lights proportionally. In effect, the Marlboro 85 smokers in this study **did not achieve any reductions in smoke intake smoking a cigarette (Marlboro Lights) normally considered lower in delivery**.

Id. at 465-466 (emphasis added). As that report itself indicated, these findings were consistent with other studies conducted by Philip Morris. *Id.* Another internal Philip Morris 1976 report discussing a study that compared Marlboro 100's (regulars) and Marlboro Lights using the Human Smoker Simulator was more explicit: "the tar and nicotine yields for these two brands were **basically identical**." *Id.* at 466 (emphasis added).

Philip Morris never disclosed to the FTC its internal research concerning compensatory smoking. On the contrary, as evidenced by a 1996 regulatory affairs strategic memorandum, Philip Morris' objective into at least the 1990's was to cast doubt on the evidence of compensatory smoking and its effect on the FTC testing results. It sought to preserve the illusion of a credible factual basis on which it could claim that its cigarettes deliver less tar and nicotine, even though it knew such representations were false.

Id. at 506 (listing objectives as "preserve our ability to . . . advertise low tar/light and ultra low tar/ultra light cigarettes as such; avoid changes in the FTC method for as long as possible; [and] minimize changes in the FTC method to the extent possible . . . ").

When the Cambridge Filter test was originally adopted, the cigarette manufacturers represented to the FTC (through the Tobacco Institute) that the test could be misleading because the results would be **too high**, not too low. *Id.* at 501 (FTC method "may be deceptive because a smoker may assume his cigarette is delivering the amount of 'tar' and nicotine reported by the FTC when in fact it will be delivering much less, the way he smokes."). As late as 1994, in a statement reminiscent of its sworn testimony before Congress denying that cigarettes were addictive earlier that same year,[2] Philip Morris made submissions to a National Cancer Institute conference on the FTC Cigarette Testing Methodology (convened at the request of the FTC) in which it denied the phenomenon of compensatory smoking: "While there is a fair amount of recent literature on compensation, few studies have been performed that provide reliable data to establish the occurrence of this suggested phenomenon. . . . [T]here can be no real dispute that,

[2] *See* 1994 WL 229351 (F.D.C.H. April 14, 1994) (House of Representatives Committee on Energy, Health, and the Environment).

to date, the scientific literature on compensation is limited and inconclusive." *Id.* at 505-506.

Philip Morris' strategy worked, and the FTC remained unaware of the true extent of compensatory smoking for many years. As noted in FTC testimony before Congress on November 13, 2007, the FTC was not fully aware of the limitations of the Cambridge Filter test with respect to compensatory smoking until the 1990's, and since that time, it has sought the advice of science-based government agencies to address these issues. *See* www.ftc.gov/os/testimony/P064508tobacco.pdf at 7-8 (limitations in the testing methodology "became a substantially greater concern by the 1990's as a result of . . . a better understanding of the nature and effects of compensatory smoking behavior.") ("FTC Prepared Statement").

B. The FTC Never Mandated or Authorized the Use of "Low Tar" Descriptors, or Provided Any Other Official Guidance Regarding the Advertising of So-Called "Light" Cigarettes.

Contrary to the petition's repeated assertions, *see, e.g.*, Pet. at 2-3, 21, 22, 24, and, notwithstanding Philip Morris' concerted efforts to distort the truth regarding compensatory smoking, the FTC never approved its use of "low tar" or "light" descriptors. In 1997, the FTC issued a request for public comment concerning two separate issues, Cigarette Testing Methodology (Section I), and Cigarette Descriptors

(Section II). 62 Fed. Reg. 48,158, 1997 WL 563104 (1997). Unlike its discussion of the agency's involvement with the testing methodology, the FTC was clear that as of 1997 it had "no official definitions" for the "low tar" descriptors used by the cigarette manufacturers to advertise cigarettes. *Id.* at 48,163. The FTC repeated this statement in its November 13, 2007 testimony to Congress. FTC Prepared Statement, *supra* at 6, n.16.

The FTC's 1997 request for public comment also stated that because the Ad Hoc Committee of the President's Cancer Panel had stated that such descriptors "should be regulated," the FTC was "beginning the process" of seeking comment on the issue, in order to determine whether "there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." *Id.* at 48,163. Thus, as of 1997, the FTC had not yet determined whether it should regulate the use of "low tar" descriptors, but instead was asking the public: "If yes, why? If no, why not?" *Id.*

In 1998, Philip Morris and several other manufacturers responded to the FTC's question. Contrary to their litigation position in this and other "low tar" cases, they acknowledged that there had been, to that date, no official guidance from the FTC on how these terms could be used in advertising cigarettes, and that:

> The manufacturers are not convinced that there is a need for official guidance with

> respect to the terms used in marketing lower rated cigarettes.

U.S. v. Philip Morris, 449 F.Supp.2d at 511-512.[3] Thus, while the FTC has endorsed the disclosure of the number of milligrams of tar and nicotine measured by the Cambridge Filter test, it has never provided any official guidance concerning whether or how "low tar" descriptors may be used in advertising.[4]

The closest the FTC has ever come to addressing the permissibility of using the terms in advertising cigarettes was in a 1971 consent decree resolving a 1969 enforcement action it had brought against American Brands. *See In re American Brands, Inc.*, 79 F.T.C. 255 (1971) (1971 WL 128779). In that case, the FTC had challenged as false and misleading in violation of the FTC Act American Brands' use of the representation "lower in 'tar'" in a television advertisement, among other representations. *Id.* (Complaint at ¶¶4, 7). In resolving the matter, the 1971

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[3] The FTC also asked whether there should be "a disclosure warning smokers about compensatory smoking behavior . . . in all ads." 62 Fed. Reg. at 48,162. Philip Morris and other manufacturers responded that they "were not convinced that compensatory smoking behavior is a sufficiently common or documented phenomenon that consumers should be alerted to its existence." *U.S. v. Philip Morris*, 449 F.Supp.2d at 504.

[4] The FTC provided testimony in the federal government's racketeering action against Philip Morris stating unequivocally that the FTC did not "have a view" on the use of such "descriptors . . . on cigarette packages or in cigarette advertising." *Aspinall*, 2006 WL 2971490 at *5.

consent decree explicitly prohibited the use of "the words 'low,' 'lower,' or 'reduced' or like qualifying terms, **unless the statement is accompanied by a clear and conspicuous disclosure of . . . [t]he tar and nicotine content in milligrams in the smoke produced by the advertised cigarette . . .** " *Id.* (Order at Section I) (emphasis added).

It is undisputed that Philip Morris has never included the "tar and nicotine content in milligrams" on its packages of so-called "light" cigarettes. *Aspinall*, 2006 WL 2971490 at *8 ("Defendant is not in compliance with the conditions established [in the 1971 consent decree] because the Defendant has admittedly never included the FTC method milligram yields of tar and nicotine on Marlboro Lights cigarette packages.").

Thus, the only FTC action specifically addressing "low tar" descriptors, a consent decree to which Philip Morris was not a party, actually **contradicts** Philip Morris' claim that the FTC authorized the use of these terms as Philip Morris has used them here. At the very least, that decree establishes that the FTC views numerical test results as fundamentally different from the "low tar" descriptors, which it only began to consider regulating in 1997. Indeed, the FTC testified in the *U.S. v. Philip Morris* case that its 1971 consent decree with American Brands **prohibited** the use of the descriptors in the absence of the numerical ratings. *See Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010 at *4 (E.D.Mich. Oct. 25, 2005) (quoting FTC 30(b)(6) witness in *U.S. v.*

Philip Morris: "this order doesn't affirmatively permit anything. What this order does is say what you can't do and it says you can't use any of these terms unless you provide a disclosure of the tar and nicotine content in the smoke produced by the advertised cigarette . . . "); *Watson v. Philip Morris Cos. Inc.*, 420 F.3d 852, 862 (8th Cir. 2005) (in 1971 consent order, "FTC explained its view of how the use of certain descriptors could constitute deceptive advertising – it would be deceptive to use descriptors like 'low,' 'lower,' 'reduced,' or other qualifying terms unless the tar and nicotine levels were also stated."), *rev'd on other grounds*, 127 S. Ct. 2301.

Philip Morris fully understood that it was not allowed to use the "low tar" descriptors without the numerical test results. In a 2002 petition to the FTC, well after the "low tar" litigation was in full swing, Philip Morris itself asked the FTC to promulgate a rule "expressly authorizing" use of the descriptors – a request that would have been unnecessary if authorization had already been granted, as Philip Morris now contends. *Aspinall*, 2006 WL 2971490 at *5. Thus, contrary to Philip Morris' repeated claims here (including in their statement of the "Question Presented" to this Court), the FTC has **not** authorized Philip Morris to use the "low tar" descriptors that appeared on Marlboro Lights packages without also setting forth the Cambridge Filter milligram yields of tar and nicotine on those packages. Marlboro Lights packages have never displayed these numerical yields. *Aspinall*, 2006 WL 2971490 at *8.

Nor has the FTC authorized manufacturers to make tar and nicotine representations that are simply consistent with Cambridge Filter test results. In fact, the FTC has taken enforcement action against manufacturers even when their representations **were** consistent with Cambridge Filter testing results. *First*, in 1985, the FTC successfully prosecuted Brown & Williamson for representing its Barclay cigarettes as delivering 1 mg of tar even though that is how the cigarette tested under the Cambridge Filter method. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985) (enjoining use of 1 mg rating unless further information provided to prevent consumer confusion). *Second*, in 1995, the FTC entered into a consent decree with American Tobacco that prohibited the company from making any representations about tar and nicotine in the form of percentages or ratios, *e.g.* one pack of Carltons has the tar content of 10 packs of another brand, even where such ratios were consistent with Cambridge Filter testing results. *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995) (1995 WL 17012576).

C. The Preemptive Scope of the Federal Cigarette Labeling and Advertising Act.

In *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992), a seven-Justice majority of this Court held that the preemptive scope of FCLAA was "governed entirely" by the preemption provision set forth in the

statute, 15 U.S.C. § 1334. 505 U.S. at 517. The Court reaffirmed this holding several years later:

> In *Cipollone* we did hold that the pre-emptive scope of the [FCLAA] was governed by the language in [the] act. That conclusion rested on a familiar canon of statutory construction and on the absence of any reason to infer any broader pre-emption.

Freightliner Corp. v. Myrick, 514 U.S. 280, 287-88 (1995). Thus, any FCLAA preemption defense depends "entirely" on whether the state-law claims are **expressly** preempted by the plain language of the statute. There can be no implied preemption under FCLAA.

In interpreting the scope of FCLAA's express preemption provision, Justice Stevens wrote on behalf of a four Justice plurality that the "central inquiry" when considering whether a state claim is preempted by FCLAA is whether "the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,' giving that clause a fair but narrow reading." *Cipollone*, 505 U.S. at 524.

Justice Stevens explained that a state-law duty compelling a manufacturer to include additional health warnings, or more clearly stated warnings than those required by FCLAA, would be "based on smoking and health" and would thus be a preempted

state-law "requirement." 505 U.S. at 524. Likewise, a state law forbidding a manufacturer from including images, graphic material, or statements that negate or disclaim the adequacy of the FCLAA warnings, so as to neutralize the warnings, would also be a pre-empted "prohibition." 505 U.S. at 527-528.[5] Because claims based on failure to warn or warning neutralization have predicate legal duties that target only the cigarette manufacturers, such claims are based on smoking and health and preempted. *Id.* at 524, 527-528.

However, the Court did **not** find that **all** state-law claims related to concerns about smoking and health would be preempted. The Court distinguished claims directed at the adequacy of the health warnings "necessary to render a product reasonably safe" from state-law claims that have predicate legal duties based on more general obligations that are applicable to all commercial actors, and do not challenge the federally mandated label warning. 505 U.S. at 529. Even though *Cipollone* was itself a personal-injury action arising out of the plaintiff's lung cancer, the *Cipollone* Court held that "fraudulent misrepresentation claims (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted" because the predicate legal duty of such claims is not " 'based on smoking

[5] Justices Scalia and Thomas joined in the judgment that such claims were preempted, albeit for different reasons, as they would have found all state-law claims expressly preempted.

and health' but rather on a more general obligation[,] the duty not to deceive." 505 U.S. 528-529.[6]

In reaching this decision, the Court looked to the "ultimate touchstone" of any preemption analysis, Congressional intent. 505 U.S. at 516. It held that in enacting FCLAA, Congress did not seek to immunize the cigarette manufacturers from "longstanding rules governing fraud" or "*similar police regulations*" applicable to all commercial actors, but rather only from claims based on legal duties that specifically targeted the tobacco industry due to concerns about smoking and health. 505 U.S. at 529, n.26 (emphasis in original).[7] In other words, Congress did not intend to give the tobacco companies a free pass to violate state laws that are promulgated pursuant to traditional

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[6] Justices Blackmun, Kennedy, and Souter concurred that such claims were not preempted because of the absence of any suggestion in the statute or legislative history that **any** state-law damages actions were preempted. They would have held that **all** state-law damage claims survive the express preemption defense.

[7] The critical consideration is not whether the claim itself implicates concerns about smoking and health, as Philip Morris argues. The preemption analysis looks to the underlying or predicate state-law duty to determine whether it is generally applicable or whether it targets only the cigarette companies. Were there any doubt that this was the holding in *Cipollone*, one need only examine Justice Scalia's dissent, in which he criticizes the plurality's reasoning. 505 U.S. at 532 (arguing for preemption of the state-law claim even though "New Jersey's tort-law 'duty not to deceive,' is a general one, applicable to all commercial actors and all kinds of commerce . . . ").

state police powers and are binding on all other commercial actors.

The Court subsequently affirmed this principle in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), where the Massachusetts Attorney General had promulgated regulations that targeted cigarette manufacturers by forbidding them (**and only them**) from placing advertisements in specified locations. The Court held that the state's advertising regulations were preempted by FCLAA because the predicate legal duty on which they were based targeted only the tobacco industry. *Cipollone*, 505 U.S. at 550 ("we hold only that the FCLAA pre-empts state regulations *targeting cigarette advertising*. States remain free to enact generally applicable zoning regulations . . . ") (emphasis added). All nine Justices concurred with the essential holding of *Cipollone* that an exercise of state police powers that imposes "generally applicable" restrictions would not be preempted because such restrictions would not be "based on smoking and health":

> Restrictions that apply to cigarettes *on equal terms with other products* appear to be outside the ambit of the pre-emption provision. Such restrictions are not "based on smoking and health."

Reilly, 533 U.S. at 551 (emphasis added).

After *Reilly*, there can be no dispute that the critical inquiry in an express preemption analysis is whether the predicate state-law duty underlying the

claim applies to all commercial actors equally, or whether it targets only the cigarette industry due to concerns about smoking and health. The Respondents' claims here are based on Maine's Unfair Trade Practices Act, which is a statute of general applicability, precluding all commercial actors in the state from making affirmative misrepresentations of fact.

D. The Federal Trade Commission's Preemptive Powers are Highly Circumscribed.

Unlike FCLAA, the Federal Trade Commission Act (15 U.S.C. § 45) includes a savings clause expressly preserving state-law remedies. 15 U.S.C. § 57b(e) ("Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."). There is no provision in the statute delineating the preemptive powers of the agency. Thus, any preemption defense based on FTC conduct must be predicated on an implied conflict with an FTC policy that carries the full force of federal law.

Every court that has analyzed the legislative history of the FTC Act has concluded that Congress did not intend an FTC policy to have the power to preempt state law unless that policy had been promulgated pursuant to the formal rule-making procedures set forth in the statute. Precisely because of the potential preemptive effect of FTC rules on state consumer protection law, Congress created heightened procedural safeguards in the FTC's rule-making

process that exceed what is required for other agencies under the Administrative Procedure Act ("APA"). *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 989-90, n.41 (D.C. Cir. 1985) (holding that FTC may "declare by rule" that certain state laws are preempted, but preemption occurs only with "validly enacted regulations") (internal quotations and citations omitted); *Katharine Gibbs Sch., Inc. v. FTC*, 612 F.2d 658, 667 (2nd Cir. 1979) (holding that preemption requires "valid enactments" pursuant to rulemaking authority); *Good*, Pet. at 47a; *U.S. v. Philip Morris, Inc.*, 263 F.Supp.2d 72, 78 (D.D.C. 2003) ("State prohibitions of unfair and deceptive trade practices are not preempted *unless* they conflict with an express FTC rule.") (emphasis in original); *Wisconsin v. Amoco Oil Co.*, 293 N.W.2d 487, 496 (Wis. 1980) (holding that interpretive guides, unlike substantive rules, "do not have the force and effect of law" and therefore do not "pose a preemption issue under the supremacy clause.").

All three courts of appeals that have addressed this question cited with approval the work of a noted scholar on this issue:

> While the Commission was not given the authority broadly to occupy the field of state unfair competition in consumer protection law, it was authorized to **declare by rule** preemption of state activities that conflict with federal regulations. **Since the rule making provisions are carefully surrounded by procedural protections,**

minimal injury is done to federal–state relations.

Am. Fin. Servs, 767 F.2d at 989-90, n.41 (citing Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 243 (1976)) (emphasis added); *Katharine Gibbs*, 612 F.2d at 667, n.7 (same); *Good*, Pet. at 47a (same); *see also Wabash Valley Power Ass'n v. Rural Electrification Administration*, 903 F.2d 445, 453-454 (7th Cir. 1990) (discussing importance of adhering to procedural safeguards under APA for agency substantive rules to have preemptive force of federal law for those agencies whose rule-making is governed by APA).

E. Proceedings Below

The District Court held that Respondents' fraudulent misrepresentation claims are expressly preempted by FCLAA. Pet. at 63a. The First Circuit reversed, applying the preemption principles discussed above in a straightforward manner. With respect to express preemption, it concluded that the complaint alleged that "Philip Morris made material statements of fact that it knew to be false . . . " Pet. at 26a-27a. It found that Respondents' fraudulent misrepresentation claims were predicated on the general state-law duty not to engage in deceptive business practices by misrepresenting the nature of the product advertised. *Id.* at 31a. As this Court had done with respect to the New Jersey fraudulent misrepresentation claim at issue in *Cipollone*, the

First Circuit held that Respondents' claims are not preempted. *Id.*

In reaching this conclusion, the First Circuit rejected Philip Morris' argument that the claims should be re-characterized as warning neutralization claims. Pet. at 30a-31a ("plaintiffs here . . . do not allege that the statements 'light' and 'lower tar and nicotine' diluted the warnings on Philip Morris's packaging or advertising so as to make its cigarettes unreasonably dangerous or otherwise defective."). The First Circuit correctly distinguished between claims challenging the use of fraudulent statements and those that attacked the adequacy of the warnings on the packages.

In addition, like every other court to consider the issue, the First Circuit also held that there could be no implied preemption here. *First*, there is no implied preemption defense available under FCLAA. Pet. at 39a-42a. *Second*, regardless of the level of FTC action required to have preemptive force, there is no clear FTC policy that conflicts with the Respondents' claims. Pet. at 46a-55a.

The First Circuit found that the FTC's actions with respect to tar and nicotine representations did not evidence authorization of either the use of the descriptors themselves, or the use of any other representation that was simply consistent with the cigarettes' numerical testing results. Pet. at 51a-52a. On the contrary, two FTC enforcement actions challenged similar representations as false and misleading even

though they were consistent with the results of the Cambridge Filter test.[8] Moreover, the court noted that Philip Morris had not complied with the terms of the 1971 consent decree with American Brands that prohibited the company from describing its cigarettes as "low tar" without also stating the numerical testing results. Pet. at 57a. In light of the lack of evidence of any coherent FTC policy in conflict with the Respondents' claims, the court properly declined to find any conflict with any federal policy.

CONSIDERATIONS CONCERNING WHETHER *CERTIORARI* SHOULD BE GRANTED

I. The Apparent Disagreement Between the First and the Fifth Circuits Arises From Differing Evidentiary Records, Not From Different Views of the Law.

Citing *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), Philip Morris argues that there is a division in the courts of appeals

[8] *See* Pet. at 51a-52a (noting situations where the FTC "challenged statements about the tar or nicotine content of a particular brand even though they were supported by such testing") (citing *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37-39 (D.C. Cir. 1985) (cannot represent cigarette as having 1mg of tar even though consistent with testing results); and, *In re Am. Tobacco Co.*, 119 F.T.C. at 4 (cannot represent Carltons as having 10% of the tar of another brand (or expressing any tar or nicotine content in the form of percentages or ratios) even if consistent with numerical testing results)).

over how to interpret this Court's rulings in *Cipollone* and *Reilly*. To be sure, *Brown* found that claims similar to those asserted here were expressly preempted by FCLAA, and the First Circuit disagreed with that conclusion in this case. However, the reason these courts reached opposite conclusions did not stem from any differences regarding what the law requires. Ever since this Court's holding in *Cipollone*, all courts, including the Fifth Circuit in *Brown*, have uniformly held that claims of fraudulent misrepresentation of fact are not preempted by the express preemption provision of FCLAA. *See Brown*, 479 F.3d at 391-392 ("claims based on 'fraud by intentional misstatement' are not preempted because Congress did not intend to 'insulate' manufacturers from state liability for affirmative lies . . . ").

What then caused the disparate conclusions of the First and Fifth Circuits? The answer has nothing to do with the doctrine of federal preemption, let alone with differing views regarding that doctrine. Rather, the two courts were presented with fundamentally different evidentiary records concerning the position of the FTC with respect to whether the "low tar" descriptors were deceptive, and whether the FTC had specifically authorized, or even mandated, their use. For present purposes, the two most important sentences in the Fifth Circuit's decision in *Brown* are contained in the very first footnote, neither of which is mentioned in the petition or in any supporting *amicus* brief:

> The Manufacturers presented a regulatory history in support of their motion for summary judgment. Plaintiffs did not dispute any of the facts relating to the regulatory history, and thus they are deemed admitted.

Brown, 479 F.3d at 387, n.1. In other words, the plaintiffs in *Brown* erroneously conceded – contrary to the actual facts – that the FTC had authorized, and indeed mandated, the use of "low tar" descriptors, and had approved their use in advertising as true statements if they were substantiated by the testing results. *Id.* at 388, 391-392, 393 (referring to the terms as "FTC-approved" and "mandated").

Believing that a challenge to the truth of the manufacturers' representations had been foreclosed by purported FTC authorization, the Fifth Circuit was left with the only alternative characterization available: that the plaintiffs' claims alleged that the representations had diminished or "neutralized" the power of the Surgeon General's warnings concerning the health effects of smoking. Under *Cipollone*, such warning neutralization claims are preempted, and the *Brown* court ruled accordingly.

The First Circuit summarized the approach of the *Brown* court as follows:

> In rejecting plaintiffs' characterization of their claim as sounding in fraud, *Brown* concluded that "[t]he terms 'light' and 'Lowered Tar and Nicotine' cannot . . . be inherently deceptive or untrue," . . . This reality, in

> *Brown's* eyes, foreclosed any fraudulent misrepresentation claim, leaving plaintiffs to argue that the challenged statements served to neutralize the warnings – a theory preempted by *Cipollone's* construction of the FCLAA.

Pet. at 33a-34a. Thus, the Fifth Circuit's conclusion that the "low tar" descriptors were "inherently" true, and that the plaintiffs' claims must therefore be viewed as a disguised attack on federally mandated warnings, was based on an evidentiary record that was the fictional construct of the tobacco companies. That record – unlike the one before the Court in this case – simply had not been properly tested by the adversary process.

Indeed, that is the federal government's position. In *U.S. v. Philip Morris*, the government explained that the FTC had not authorized the use of these terms, and that the *Brown* court's contrary conclusion was "because the [*Brown*] plaintiffs explicitly accepted the view that the FTC had authorized the descriptors." U.S. Brief filed November 19, 2007 at 161-162 (D.C. Cir. No. 06-5267) (quoting manufacturers' brief that the *Brown* plaintiffs' there had made this "remarkable concession.").

Having had the benefit of a genuine adversarial proceeding, the First Circuit reached precisely the same conclusion as has the federal government, explaining that decisions like *Brown* "overlook the subtleties in the [Federal Trade] Commission's approach to tar and nicotine claims . . . " Pet. at 56a; *see*

also Dahl v. R.J. Reynolds Co., No. A05-1539, ___ N.W.2d ___, 2007 WL 4234141 at *11 (Dec. 4, 2007) (explicitly rejecting *Brown* and following the decision of the First Circuit here).

The cigarette companies' unchallenged construction of the evidentiary record in *Brown* had two critical results. *First*, the court was deprived of the evidence discussed in *U.S. v. Philip Morris*, *supra*, that demonstrates that the "low tar" descriptors are, in fact, false, and that Philip Morris had known them to be false for over three decades. *Second*, contrary to the Fifth Circuit's conclusion that defendants' representations were "FTC-approved" or "mandated," the FTC has always distinguished between the numerical testing results expressed in milligrams, and generalized "low tar" representations, which it specifically addressed only in the 1971 consent decree with American Brands. In that decree, it concluded that the terms were false and misleading, and **prohibited** their use unless accompanied by the numerical tar and nicotine ratings expressed in milligrams. Given that Philip Morris admittedly never accompanied its "low tar" representations with the numerical testing results, its conduct was inconsistent with the terms of the 1971 consent decree, which is the only instance in which the FTC has specifically addressed the issue. *Aspinall*, 2006 WL 2971490 at *8.

Philip Morris' own statements to the FTC in 1998 acknowledged that there was no FTC regulation of these terms, and it lobbied against the creation of any such official guidance. Not surprisingly, in 2002, after

"low tar" litigation had commenced across the country, Philip Morris decided to ask the FTC to promulgate a rule "expressly authorizing" such "low tar" descriptors, but to date, the FTC has not done so. *Aspinall*, 2006 WL 2971490 at *5.

The *Brown* court was not presented with these facts before determining that the descriptors were "inherently" true and sanctioned by the FTC. *Brown*, 479 F.3d at 392. Had it been aware of this evidence, its conclusion that the "low tar" descriptors "cannot . . . be inherently deceptive or untrue" would have been untenable. *Id*. Because the *Brown* plaintiffs did not contest the defendants' assertion that use of the descriptors had been approved by the FTC as truthful, the Fifth Circuit assumed that the plaintiffs would be unable to prove the sort of false representation claim that would survive preemption under *Cipollone*. Based on this faulty assumption, it recharacterized the plaintiffs' claims as warning neutralization claims.

However, that is not the case here.[9] Respondents

[9] Philip Morris' argument that the claims should be re-characterized as warning neutralization claims ignores the allegations in the complaint and the evidence demonstrating that the representations are false. To accept Philip Morris' argument would convert every claim challenging a false statement that related in any way to health, such as a claim that "Marlboro Lights Do Not Cause Cancer," into a warning neutralization claim. Many courts have refused to re-characterize similar fraud claims. *See Mulford v. Altria Group, Inc.*, 506 F.Supp.2d 733, 752 (D.N.M. 2007) (claim that the "terms 'lights' and 'lowered tar and nicotine' are false and misrepresent the facts" is not a warning neutralization claim, and court "is not free to convert the claim into something that it is not."); *Aspinall*, 2006 WL 2971490 at *10 (refusing to characterize fraud claim as one of warning neutralization); *Price v. Philip Morris, Inc.,* No. 00-L-112, 2003 WL 22597608 at *19 (Ill. Cir.Ct. Mar. 21, 2003) (affirmative misrepresentations of "light" and "lowered tar and nicotine" are "neither based upon a failure of Philip Morris to provide adequate warnings nor based upon a neutralization claim."), *rev'd on other grounds*, 848 N.E.2d 1, 33, but affirming trial court's rejection of Philip Morris' "attempt to cast plaintiffs' claim as one of failure to make additional disclosures beyond the warning required by federal law . . . [and concluding] Plaintiffs' claim is not based on failure to warn or on neutralization of the required warnings."); *Johnson v. Brown & Williamson*, 122 F.Supp.2d 194, 203 (D.Mass. 2000) ("Nowhere, however, does the complaint allege fraudulent dilution of the federally-mandated cigarette warning labels . . . [The] fraud claim can thus be characterized as an allegation that [defendant] made intentional misrepresentations and false statements of material fact in its advertising and promotional material. Construed as such, his fraud claim is not preempted."); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F.Supp.2d 167, 174-176 (D. Conn. 2000) (rejecting defendant's argument that when "look[ing] beyond the descriptive label" of plaintiff's claims, intentional fraud claims were in reality failure to warn or warning neutralization claims). These courts recognized that to hold otherwise would vitiate the

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vigorously contested Philip Morris' contention that the company's use of the descriptors had been authorized. Thus, in this case, the allegations in the complaint that Philip Morris made express misrepresentations of material fact, which are supported by ample evidence, are precisely the types of claims that survive an express preemption defense under *Cipollone*.

In considering whether to grant *certiorari* on the express preemption question, the Court should understand that the apparent division in the courts below resulted only from these differing assessments of FTC policy rather than a difference in the courts' views of the preemptive scope of the FCLAA. Indeed, **all** courts, including the Fifth Circuit, 479 F.3d at 391-392, agree that false misrepresentation claims are not preempted, expressly or by implication, by any statute or FTC conduct. The case law is uniform on this point: all courts have described the *Cipollone* rubric consistently; it is the application of the undisputed legal standard to the varying evidentiary records in the "low tar" cigarette cases that has led to divergent outcomes. *See* Rule 10(c) of this Court ("A petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

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holding in *Cipollone* that misrepresentation claims, including the claim challenging representations related to the plaintiff's lung cancer in *Cipollone*, are not preempted.

Accordingly, a plaintiff who files a "low tar" case within the Fifth Circuit can defeat a preemption defense just as easily as a plaintiff within the First Circuit: by presenting an evidentiary record that demonstrates that the descriptors were not deemed true by the FTC, and were never authorized or mandated by that agency.

Respondents do not dispute that the issue raised by this case is important. However, Respondents do not believe that decisions like *Brown* are likely to occur in the future. With the decision of the First Circuit in this case and the racketeering judgment in *U.S. v. Philip Morris*, it is unlikely that future courts will conclude that the "low tar" descriptors are true, inherently or otherwise, or that they had been approved by the FTC. Even since Philip Morris' petition was filed in this Court, one appellate court has already reversed a trial court that found the claims were preempted, relying primarily on the decision of the First Circuit here. *Dahl*, 2007 WL 4234141 at *7.[10]

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[10] Other than *Brown*, Respondents know of only four trial courts that have ruled such claims are expressly preempted. *See In re Tobacco Cases II*, No. JCCP 4042, 2004 WL 2445337 (Cal.Super.Ct. Aug. 4, 2004); *Newton v. R.J. Reynolds Tobacco Co.*, No. 02-1415 (N.D.Cal. Mar. 13, 2003) (unpublished slip op.); *Pearson v. Philip Morris, Inc.*, No. 0211-11819, 2007 WL 2692026 (Or.Cir.Ct. Sept. 5, 2007) (appeal docketed); *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F.Supp.2d 639 (S.D.N.Y. 2007) (motion pending for interlocutory appeal). In the California cases, the "low tar" misrepresentation claims were

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Moreover, if the *U.S. v. Philip Morris* judgment is affirmed on appeal, all manufacturers, not just Philip Morris, will be enjoined from using the "low tar" descriptors at issue in these cases. Such a final judgment, should it be entered, would also provide a basis for issue preclusion with respect to the falsity of the representations, a claim which even Philip Morris concedes is not preempted. *Parklane*, 439 U.S. 322, 331-332.

II. There is No Conflict on the Implied Preemption Question.

Philip Morris is incorrect when it argues that lower courts are in conflict regarding whether claims

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apparently neither the primary claims asserted, nor were they appealed. *Id.*; *see In re Tobacco Cases II*, 20 Cal.Rptr.3d 693, 699 n.5. However, preemption rulings on other claims in one of the cases were appealed to the California Supreme Court, which recently issued a decision supporting Respondents' position here. *In re Tobacco Cases II*, 41 Cal.App.4th 1257, 1271-1272 (2007) (fraudulent misrepresentation claims are not preempted because based on duty to deceive).

The other two cases will likely be addressed by the relevant appellate courts soon. Although *Pearson* was decided after the First Circuit's decision in this case, the court distinguished the claim from the one here because the plaintiffs there purportedly alleged that additional statements should have been included on the packages. 2007 WL 2692026 (page 20 of slip op.; no page references available for Westlaw version). And, in *Clinton,* the court relied heavily on the *Brown* decision, which, as shown above, was based on a fictional evidentiary record. 498 F.Supp.2d at 652. *Brown* may well be the only appellate court that will ever find express preemption of these claims.

such as those alleged here are impliedly preempted. The only courts that found such claims preempted have done so under an **express** preemption analysis. *See supra*, n.10. None of the 24 cases cited by Philip Morris (Pet. at 25) held that the plaintiffs' claims were impliedly preempted under either FCLAA or the FTC Act. The jurisprudence could not be more uniform.

The agreement among the lower courts on this issue with respect to FCLAA is not surprising. In *Cipollone*, seven Justices of this Court held that there was no implied preemption defense available under FCLAA because the preemptive scope of the statute was defined "entirely" by its express preemption provision. *Cipollone*, 505 U.S. at 517. That holding was affirmed just three years later in *Freightliner*, 514 U.S. at 287-288. Given the clarity with which this Court has spoken, the lower courts, including the district court below, *see* Pet. at 83a-84a, have been unanimous in rejecting implied preemption defenses under FCLAA.

With implied preemption under FCLAA foreclosed, Philip Morris suggests that there is a split in the lower courts regarding the preemptive power of the FTC acting pursuant to the FTC Act. However, no court has ever held that the FTC's actions with respect to "low tar" descriptors are sufficient to impliedly preempt state-law claims similar to those asserted here. Thus, there is no division between the Courts of Appeals, or even the trial courts, on this issue.

The First Circuit did observe that there are some differences among the courts with respect to the powers of administrative agencies **other than the FTC** to preempt state law. However, those differences arise out of the specific terms of the varying statutes that govern those agencies' activities. If there is any doctrine of preemption that is unassailable, it is that the "ultimate touchstone" of the preemption inquiry is the intent of Congress in enacting the statute. *Cipollone*, 505 U.S. at 516. Accordingly, what Congress intended in vesting one agency with regulatory powers is not relevant to a preemption inquiry concerning a different administrative agency acting under a different federal statute.

With respect to the Federal Trade Commission Act, the parties agree that a formally promulgated rule may preempt inconsistent state law. However, they also agree that the FTC has never promulgated a rule that conflicts with Respondents' claims.

Philip Morris has identified only one potential division in the courts regarding the FTC's preemptive powers – whether a consent decree with the FTC will preempt any state-law obligations applicable to the parties to that decree. Pet. at 23.[11] However, that

[11] One court has held that a consent decree with the FTC can preempt state regulations in conflict with the decree, at least with respect to how those regulations apply to an actual party to the consent decree. *Gen. Motors Corp. v. Abrams*, 897 F.2d 34 (2nd Cir. 1990). The *Abrams* court did not engage in a meaningful analysis of the legislative history of the FTC Act. *Id.*

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purported division in the courts, even if it were found to exist, does not apply here, because neither of the two consent decrees cited by Philip Morris provides any support for its position. Indeed, Philip Morris was not a party to either decree, and that alone would be enough to find that the Respondents' claims are not impliedly preempted.

Moreover, due to the absence of any conflict with Respondents' claims, the First Circuit correctly held that those two decrees do not support an implied preemption defense here, and there is no divergent authority on that question. The 1971 decree explicitly **prohibited** American Brands from using "low tar" descriptors unless accompanied by "a clear and conspicuous disclosure of the tar and nicotine ratings" of the cigarettes. 79 F.T.C. 255 (1971) (1971 WL 128779) (Order at Section I). Philip Morris has already conceded that it failed to make this accompanying disclosure when using these descriptors on cigarette packages. Pet. at 57a; *Aspinall*, 2006 WL 2971490 at *8.

The 1995 decree **prohibited** tar and nicotine representations in the form of ratios or percentages when comparing different types of cigarettes, even though such representations were fully consistent

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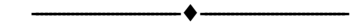
at 39 (analyzing intent of FTC, not Congress, in determining whether FTC consent order could preempt state law). Absent Congressional intent to empower the FTC to preempt state law by means of a consent decree, it would not matter whether the agency itself sought to preempt such law.

with Cambridge Filter test results. Pet. at 51a (citing 119 F.T.C. at 4). Thus, the 1995 decree did **not authorize** the use of any such statement simply because it may be consistent with numerical testing results. Accordingly, neither decree cited by Philip Morris conflicts with Respondents' claims and, therefore, the decrees cannot form the basis for an implied preemption defense to such claims. No court has held to the contrary.

In light of this uniform jurisprudence, there is no reason why the Court should grant *certiorari* on the implied preemption defense question. However, should the Court be inclined to address the question, Respondents respectfully request that it seek the views of the Solicitor General before doing so. The Solicitor General has in the past provided guidance to this Court on the scope of FTC regulation of tar and nicotine claims, and its views on the actions taken by the FTC could provide a useful perspective on whether the issue merits review by this Court at this time. *See, e.g.*, Brief for United States as Amicus Curiae, 127 S. Ct. 2301 (2007) (No. 05-1284) 2006 WL 3694382 at *4 (FTC has no official "regulatory position" on "low tar" descriptors).



CONCLUSION

The apparent division between the First and Fifth Circuits relates only to the express preemption

issue, and derives from the differences in the respective evidentiary records, rather than any disagreement on the law (on which the circuits are uniform). No court has held that claims similar to those of Respondents are impliedly preempted by virtue of any FTC regulation or order. In sum, there is no conflict among the lower courts that warrants review of the First Circuit's decision.

Respectfully submitted,

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