

No. 07-562

IN THE
Supreme Court of the United States

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

v.

STEPHANIE GOOD, LORI A. SPELLMAN,
AND ALLAIN L. THIBODEAU,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit**

**BRIEF OF ALLAN M. BRANDT, ROBERT N.
PROCTOR, DAVID M. BURNS, JOHNATHAN
M. SAMET, AND DAVID ROSNER AS *AMICI
CURIAE* SUPPORTING RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

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Robert N. Proctor is Professor of History of Science at Stanford University. He was elected a Fellow of the American Academy of Arts and Sciences in 2002. His research addresses the history of biomedical science and policy in twentieth century Europe and America. He is the author of more than a dozen articles, numerous chapters in books, thirty book reviews, several encyclopedia entries, and four books, including, *Cancer Wars: How Politics Shapes What We Know and Don't Know About Cancer* (1995). Professor Proctor testified as an expert witness in *United States v. Philip Morris USA, Inc.*

¹ Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amici curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

Dr. David M. Burns is Professor Emeritus in the Department of Family and Preventive Medicine at the University of California, San Diego, School of Medicine. Dr. Burns's primary expertise is the origin, prevention, and treatment of pulmonary diseases. He was an author, editor or reviewer of every Surgeon General's Report on smoking since 1975, and has written 144 book chapters and peer-reviewed articles, including more than 100 on tobacco.

Dr. Jonathan M. Samet is Professor and Chairman of the Department of Epidemiology of the Johns Hopkins Bloomberg School of Public Health, where he also co-directs the Institute for Global Tobacco Control and the Risk Sciences and Public Policy Institute. He was elected to the Institute of Medicine of the National Academy of Sciences in 1997, and received the Surgeon General's Medallion in both 1990 and 2006 for his work as Senior Scientific Editor for Surgeon General's Reports on smoking. He has edited books on the epidemiology of lung cancer, and published dozens of peer-reviewed articles on the effects of inhaled pollutants, including cigarette smoke, in the general environment and in the workplace. Dr. Samet testified as an expert witness in *United States v. Philip Morris USA, Inc.*

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Fellow, and the recipient of a Robert Wood Johnson Investigator Award. He is author or co-author of numerous books and articles including, with Gerald Markowitz, *Deceit and Denial: The Deadly Politics of Industrial Pollution* (2002).

Amici have a strong interest in the accuracy of the historical information that this Court considers in deciding the legal issues in this case.

SUMMARY OF ARGUMENT

Petitioner Philip Morris asks the Court to reverse the Court of Appeals for the First Circuit and to find that state-law challenges that involve Philip Morris's statements regarding tar and nicotine yields in cigarette marketing are either expressly or impliedly preempted by federal law. In support of its preemption arguments, Philip Morris advances an inaccurate history of the cigarette industry's advertising and marketing practices that fails to account for its frequent dissemination of false health claims and its manipulation of the applicable laws to deter regulation and accountability for its deceptive practices.

What Philip Morris calls regulatory compliance that should receive preemptive treatment is actually the *voluntary* marketing of Marlboro Lights and Cambridge Light cigarettes as either "light" or "lowered in tar and nicotine" without FTC control or approval. In fact, Philip Morris alone chose the "light" descriptor for its products based upon "Cambridge Filter Method" ("Cambridge Method") test results despite knowing that these results were misleading both to the FTC and consumers. Philip

Morris's use of the descriptors "light" and "low tar" in a fraudulent and misleading way was part of a lengthy, concerted campaign to deny smoking's harms while simultaneously marketing filtered and so-called "light" cigarettes as less harmful than full-flavored cigarettes, and as an alternative to quitting smoking. In light of these facts and this Court's precedent, the First Circuit correctly held that Respondent Good's claims under the Maine Unfair Trade Practices Act, Me. Rev. Stat. Ann. tit. 5, § 205-A, *et seq.*, which prohibits "deceptive acts or practices in the conduct of any trade or commerce," are not expressly preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1331, *et seq.*, or impliedly preempted.

The history of the development and marketing of cigarettes with the "light" or "lowered in tar or nicotine" descriptors and of the FTC's attention to the issue establishes that the FTC does not regulate – or authorize – the use of any of the descriptors at issue in this case. As the First Circuit correctly held, the FTC lacks a "coherent federal policy" on the use of such descriptors. (Pet. App. 54a.)

The FTC's lack of regulation in this area and the FTC's lack of authority to enforce any particular standard for the use of descriptors, as evidenced by Philip Morris's 2002 petition urging the FTC to undertake such regulation, indicate that there has been no federal direction, and thus that Respondents' claims cannot be impliedly preempted. Even if the FTC had undertaken such regulation, the use of state consumer protection laws to further the FTC's mandate poses no conflict with federal law.

Accordingly, this Court should affirm the First Circuit's decision.

ARGUMENT

The Court of Appeals for the First Circuit correctly held that Respondents' claims that Philip Morris "falsely represented certain of its brands as 'light' or having 'lower tar and nicotine,'" Pet. App. 16a, are fraud claims that are not expressly preempted by the FCLAA, especially as construed by this court in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992). Further, the First Circuit correctly held that Respondents' claims are not impliedly preempted because the FTC has never formally defined the terms "light" or "low tar," or authorized their use.

I. The History of "Light" Cigarettes and the FTC's Regulatory Response to Their Marketing and Advertising Reveals That the FTC Lacks a Coherent Federal Policy That Could Impliedly Preempt Respondents' Claims.

The task of applying law to a set of facts cannot proceed in a vacuum. This Court repeatedly has stated that the "historical and factual context in which . . . cases arise is critical." *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2801 (2007). At issue here is the behavior of an industry that consistently has made various health-related claims for its products that subsequently were proven false. To avoid any consequences for those misrepresentations, it has

manipulated the facts and the law to profitable advantage.

While the cigarette industry's manipulative and deceptive conduct may not set it apart from any self-advocating industry as a general matter, the degree and depth of its mendacity are unrivaled in the annals of American commercial history. This history informs this Court's inquiry and should not be overlooked in deciding the Questions Presented.

This case centers on the simple fact that the FTC has neither compelled nor authorized Philip Morris to market its cigarettes as "light" or "lowered in tar or nicotine." Philip Morris voluntarily markets its cigarettes as "light," because doing so has proven highly profitable. The history both of the development and marketing of cigarettes, including filtered cigarettes and those labeled as "light," "low tar," or "lowered in tar and nicotine," and of the FTC's quiescent response to such marketing practices, reveals that Philip Morris, indeed the entire cigarette industry, "acted on its own" in using these descriptors.

Moreover, this history reveals that the cigarette industry, including Philip Morris, has used FTC inaction as a shield: the industry has insisted that, absent a rule or regulation governing these practices, it be allowed to rely on Cambridge Method data to justify advertising its cigarettes with these descriptors, despite having superior knowledge (not available to the FTC or the public health community) about cigarette design and the phenomenon of compensation indicating the health claims "light" and "low tar" are misleading. In fact, only recently,

after defrauded consumers, such as Respondents, began to allege claims under state deceptive trade practices statutes, enacted specifically to compliment the FTC's regulatory authority, has Philip Morris petitioned (though unsuccessfully) the FTC for a rulemaking to immunize their deceptive advertising through federal preemption. In view of this history, Respondents' claims are not impliedly preempted.

A. The rise of tobacco advertising and early FTC attempts to regulate it

Since the early twentieth century, the cigarette industry, including Philip Morris, has been one of – if not – the most aggressive advertisers of its products, setting “unprecedented ratios of promotion costs in relation to sales.” Allan M. Brandt, *The Cigarette Century* 32 (2007) (citing Neil H. Borden, *The Effect of Advertising on the Demand for Tobacco Products—Cigarettes*, *The Economic Effects of Advertising*, 207-49 (1944)). In the years just prior to World War I, cigarette advertising accounted for \$13 million dollars in advertising expenditures by tobacco companies. *Id.* at 54. By 1928, the annual advertising budget of American Tobacco on the Lucky Strikes brand alone was \$7,000,000. *Id.* at 75. As President Calvin Coolidge explained “[m]ass demand has been created almost entirely through advertising,” *id.*, and through advertising the cigarette industry was able to transform what had been only decades before a commercially insignificant and reviled offering into a popular, accepted, and highly-consumed product. By the late 1940s, Americans smoked more than 350 *billion* cigarettes each year, *id.* at 97, up from 2.5 billion in the early twentieth century. Robert N. Proctor,

Tobacco and the Global Lung Cancer Epidemic, 1
Nature Reviews Cancer 82-86 (2001).

Philip Morris introduced the Marlboro cigarette in 1927 as a premium brand for women. Brandt at 95. In 1933, it introduced its eponymous Philip Morris cigarette, which gained quick popularity due to Philip Morris's advertising claims that the additive diethylene glycol caused the cigarette to be less "irritating" than competitors'.² *Id.* In fact, in 1937 Philip Morris advertised:

Men and Women with irritation of the nose and throat due to smoking were instructed to change to Philip Morris Cigarettes. Then day after day, each doctor kept a record of each case. The final results, published in authoritative medical journals, proved conclusively that when smokers changed to Philip Morris, every case of irritation cleared completely or definitely improved.

Id. at 104 (citing ad in *Saturday Evening Post*, Oct. 16, 1937)³ Philip Morris even advertised heavily in medical journals and provided free cigarettes to physicians hoping to make "Philip Morris the

² Diethylene glycol is highly toxic and can be fatal if ingested. It is commonly used in antifreeze and was a main ingredient in elixir of sulfanilamide, from which more than 100 people died, leading Congress to enact the Food Drug and Cosmetics Act of 1938. Institute of Medicine, *The Future of Drug Safety: Promoting and Protecting the Health of the Public* 22, 152 (Alina Baci, et al. eds. 2007).

³ For more recent advertisements, see http://cancercontrol.cancer.gov/tcrb/monographs/13/m13_7.pdf.

cigarette of the American medical profession.” *Id.* at 95. In 1947, Philip Morris had a display at the American Medical Association convention giving away free cigarettes, insisting that Philip Morris was the “healthiest cigarette” and “explain[ing] the advantages of diethylene glycol as a hygroscopic agent.” *Id.* at 105.⁴

Even as Philip Morris advertised these claims, it was becoming increasingly evident to tobacco manufacturers, including Philip Morris, and to the scientific community that cigarette smoking *caused* disease. In 1946, researchers found that the incidence of lung cancer had tripled over the previous three decades. *Id.* at 106 (citing *Cigaret Smoking Causes Lung Cancer*, NEA J. 35, no. 2 (1946)). Scientists also had identified the constituents of burning tobacco, or tars, as carcinogenic polycyclic aromatic hydrocarbons. *Id.* at 118; Robert N. Proctor, *Angel H. Roffo: The Forgotten Father of Experimental Tobacco Carcinogenesis*, 84 Bulletin of the WHO 494-95 (June 2006). And over the following decade the *New England Journal of Medicine*, among others, published research that “yielded evidence of an association between cigarette

⁴ In March 1943, the FTC filed a Complaint against P. Lorillard Co. alleging “unfair methods of competition in commerce and unfair and deceptive acts and practises [sic] in commerce in violation” of the FTC Act for conduct similar to Philip Morris’s: Lorillard claimed in ads that the cigarettes were “‘easy on the throat,’ provided a ‘bonus on throat ease,’ . . . provided ‘definite defense against throat irritation’”. In *Matter of P. Lorillard Co.*, 46 F.T.C. 735 (No. 4922) (1950) (citing Compl. Mar. 2, 1943); see also Richard Kluger, *Ashes to Ashes* 130 (1997) (stating that the FTC filed complaints in 1942 against four top cigarette makers for “continually offering health reassurances that skirted intolerably close to express warranties of harmlessness”).

smoking and lung cancer so strong as to be considered *proof . . .*” Brandt at 156 (emphasis added).

Prominent magazines and newspapers reported this research and its authors’ conclusions that experiments had “proved” “beyond any doubt” that smoking *caused* cancer, alongside the statistics that rates of lung cancer in the United States had quadrupled for men and doubled for women since 1933. *Id.* at 161. The widespread public dissemination of this research led to what the tobacco industry called a “health scare,” as consumers became increasingly aware of the health risks associated with smoking. National Cancer Institute, *Monograph 13: Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, at 199 (2001) (“Monograph 13”), available at <http://cancercontrol.cancer.gov/tcrb/monographs/13/>.

Notwithstanding these facts, the tobacco industry, including Philip Morris, publicly refused to acknowledge that smoking caused disease. Instead, the industry collectively decided to respond to the scientific research and related health claims by waging a public relations campaign aimed at producing and sustaining scientific skepticism, resisting regulation of its products, and defending itself from legal liability. It also vigorously sought to maintain controversy around the scientific findings that causally linked smoking to cancer and other diseases. See Robert N. Proctor, *Cancer Wars: How Politics Shapes What We Know and Don’t Know About Cancer* 101-32 (1995) (“Cancer Wars”); Brandt at 159-60. The tobacco industry also decided to

appeal to increasingly health-conscious consumers, by developing filtered cigarettes, and later marketing cigarettes as “light” and “lowered in tar.” See National Cancer Institute, Monograph 13, at 199. And the tobacco industry used Congress and the FTC as a shield, first by resisting regulation, and then, when Congressional regulation appeared inevitable, by actively shaping the legislative action to their advantage.

These industry efforts were deliberate and coordinated. For example, after December 1953, the tobacco companies presented a “unified front on smoking and health” requiring “strategic and explicit collusion.” Brandt at 169. The companies established the Tobacco Industry Research Committee (“TIRC”) – Parker McComas of Philip Morris served as one of its early acting chairs – and in early January 1954 issued “A Frank Statement to Cigarette Smokers.” *Id.* at 170, 173. The statement was “a triumph of modern PR” – it was duplicitous but effective. *Id.* It read:

We accept an interest in people’s health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health.

Id. (citing Tobacco Industry Research Committee, *A Frank Statement to Cigarette Smokers* (Jan. 4, 1954), available at <http://legacy.library.ucsf.edu/tid/qxp91e00>). It was

signed by top executives from the major U.S. tobacco companies, except Liggett & Meyers, and was published as an advertisement in 448 newspapers. *Id.* at 171; *Cancer Wars* at 105.

Notwithstanding the rhetoric of the Frank Statement, the tobacco companies' unified advertising strategy dodged advertising regulation, presenting claims about the beneficial health effects of specific cigarette brands, minimizing health concerns, and reassuring consumers with images and advertisements of healthy, attractive smokers. *Brandt* at 243. For example, one company urged smokers to take their "own personal 30-day test" to prove the brand's mildness, and juxtaposed in the ad a "Doctors Report" and a "Smokers Report." *Id.* at 162. Arthur Godfrey's television appearances also epitomized this campaign: During his weekly show Godfrey announced, "I smoke two or three packs of these things every day. I feel pretty good. I don't know, I never did believe they did any harm, and now, we've got proof."⁵ *Id.* at 162.

Even as the industry funded a massive public relations campaign undermining the relationship between smoking and disease, and issued press releases explaining that "[c]hemical tests have not found any substance in tobacco smoke known to cause human cancer . . . ," *id.* at 202, industry scientists privately confirmed and added to "the evidence showing the connection between lung cancer and cigarette smoking." *Id.* at 199. *See also* Proctor Expert Report, *Schwab v. Philip Morris USA*, CV 04-1945 (E.D.N.Y. Dec. 18, 2005)

⁵ "Godfrey died of emphysema in 1983." *Brandt* at 163

Companies, however, were unwilling to develop cigarettes that actually were safer, because to do so would have admitted that smoking cigarettes was harmful.

Yet, cigarette manufacturers began to alter their products in response to public concern, by initially adding filters and later adding the descriptors “light” and “lowered in tar.” *Id.* at 244. So was born the *illusory* quest to develop and market a “safer” cigarette. It was illusory because industry executives realized that filters were “a critical new marketing tool,” and industry scientists realized that filters *did not* create a safer cigarette. *Id.*

After an R.J. Reynolds’ chemist determined that varying the pH in a filter changed the filter’s color when smoked, he recommended that filters’ pH be altered so that filters darkened upon smoking: “While the use of such color change material would probably have . . . no effect on the actual efficiency of the filter tip material, the *advertising* and *sales advantages* are obvious.” *Id.* at 245 (citation omitted) (emphasis added). Consumers assumed the color change meant that the filter was working and consumption of filtered cigarettes accordingly increased. By 1954, filtered cigarettes composed approximately ten percent of the U.S. cigarette market. *Id.* at 244.

In 1955, the FTC issued voluntary guidelines advising tobacco companies not to make unsubstantiated representations about the tar and nicotine levels of their cigarettes. *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985); *see also* Brandt at 244. The FTC had become

alarmed that tobacco companies' advertising claims were inaccurate and misleading. *Brown & Williamson*, 778 F.2d at 37. Despite the 1955 FTC advisory, and 1960 FTC rules to eliminate unsubstantiated health claims, tobacco companies continued to aggressively market their cigarettes as having less tar than competitors' and thus as impliedly healthier. The FTC's limited ability to regulate tobacco advertising became increasingly obvious.

The combination of the TIRC and the industry's concerted media campaign successfully created a cigarette "controversy" by 1960. *Cancer Wars* at 105-10; *Brandt* at 184. The industry actively and aggressively identified and supported skeptics and by doing so "managed to sustain the widespread perception of an active . . . scientific controversy into the 1960s despite overwhelming evidence and scientific consensus that smoking cause serious disease." *Brandt* at 184. And the industry managed to increase sales: the total number of cigarettes sold rose from 369 billion annually in 1954, to 488 billion in 1961. *Id.* at 203.

In 1964 the Surgeon General released its landmark report, establishing cigarette smoking as a cause of lung cancer, at least in males. The FTC responded that "given the surgeon general's findings, tobacco companies would be engaging in 'an unfair or deceptive act' . . . if they did not disclose on both packages and in ads: 'Caution: cigarette smoking is dangerous to health and may cause death from cancer and other diseases.'" *Brandt* at 250 (citing Richard A. Wegman, *Cigarettes and Health: A Legal*

Analysis, 51 Cornell L.Q. 678 (1966)). The FTC mandated such warnings as of January 1, 1965.

The report galvanized the tobacco industry, including Philip Morris. The industry insisted “that there is no proof that tobacco causes disease; disparage[d] and attack[ed] all studies indicating such a relationship,” *id.* at 230, all the while recognizing that its continued profitability rested on marketing cigarettes that assuaged health concerns but continued to deliver sufficient amounts of nicotine. Monograph 13 at 206. And, despite declines in cigarette sales immediately following the report’s release, the industry reported record sales in 1965 and its highest profits in its history. Brandt at 237.

Industry executives also responded politically by appointing a single spokesman, Thomas Austern, to respond to the FTC – and to attempt to derail FTC regulation by seeking congressional oversight. Brandt at 253. Congress essentially enacted the bill presented to it by the tobacco industry in response to the Surgeon General’s Report and proposed FTC action, the FCLAA at issue here. *Id.* at 256. In the act, the warning label proposed by the FTC that was to take effect in January 1965 was diluted: “Caution: Cigarette Smoking *May Be* Hazardous to Your Health.”⁶ *Id.* (emphasis added). The FTC fought the change in language but recognized that “the present

⁶ The FCLAA and its ambiguous warning label succeeded in accomplishing the tobacco industry’s goal of neutralizing or minimizing state tort claims. Because every smoker would be warned that “smoking may be hazardous to your health,” the FCLAA gave the industry ammunition for its argument that smokers *knowingly* assumed the risks associated with and inherent in smoking. Brandt at 254.

cautionary statement on cigarette packages . . . cannot compete with the forces that promote cigarette smoking.” *Id.* (citation omitted). The FCLAA also prohibited the FTC from requiring health warnings in cigarette advertisements for four years.⁷ *Id.* at 257.

The FCLAA did not eliminate the FTC’s regulatory role entirely – the FTC was to monitor the effectiveness of labeling and the ongoing impact of advertising and promotion. *Id.* at 266. In 1966, the FTC issued a policy statement indicating that a factual statement of the tar and nicotine content based upon the Cambridge Method would not be treated as deceptive as long as there were no express or implied representations in advertisements that the represented level of tar or nicotine reduced or eliminated health hazards. Cigarette Advertising Guides, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955).⁸

The FTC believed that the Cambridge Method “provide[d] smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands.” 62

⁷ The 1969 act extended the bar on FTC labeling requirements for ads until at least July 1, 1972. Brandt at 272.

⁸ Such policy statements are not formally promulgated as a substantive rule with a public comment period. Therefore, they lack the force and effect of law, and merely advise how an agency likely will exercise a discretionary power. They are neither rules nor regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31, 315-16 (1979); *see also Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 809 (2003) (stating that policy statements inform the public of an agency’s views but do not create legal rights or obligations).

Fed. Reg. 48,158 (1997). The Cambridge Method is a machine measurement of cigarette tar and nicotine yields that does not attempt to replicate the amount of tar and nicotine actually inhaled by human smokers, which itself varies based upon an individual's personal smoking behavior. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d. 1, 435-36 (D.D.C. 2006). The Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Brown & Williamson*, 778 F.2d at 37.

Although the Cambridge Method was originally designed by a government scientist, the cigarette industry embraced the Method, refined testing procedures, and lobbied the FTC to use their "smoking machine." Statement of FTC Commissioner Paul Rand Dixon (May 15, 1967) *available at* http://www.nmcourt.fed.us/DCDOCS/files/05cv659/Volume_I/114.pdf (stating, "[W]e have received [the cigarette companies'] complete cooperation in establishing this laboratory. Our smoking machine . . . has been developed and perfected by the tobacco scientists since the Commission announced its intentions."). Philip Morris and the cigarette industry told the FTC that the Cambridge Method could have *some* useful value in comparing the tar and nicotine yields of cigarettes, even if this data did not reflect actual smoker tar and nicotine intake; yet, it did not disclose to the FTC that its own internal tests, based on superior testing methods and reflecting a sophisticated understanding of cigarette design and the

phenomenon of compensation, indicated that the data had no value in predicting human exposure.

By 1966, cigarette sales were at an historic high and in June 1967, the FTC found “virtually no evidence that the warning statement on cigarette packages has had any significant impact.” Brandt at 257 (citation omitted).

In 1970, the FTC initiated formal rulemaking proceedings to require tobacco manufacturers to disclose the tar and nicotine yields as determined by the Cambridge Method test. 35 Fed. Reg. 12,671 (1970). However, the FTC never completed the rulemaking process. Instead, five major tobacco companies, including Philip Morris, as well as three minor producers, entered into a private, voluntary agreement to disclose Cambridge Method test data in cigarette advertisements. The companies entered into this voluntary agreement to avoid FTC regulation of their cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. at 435. This private agreement prompted the FTC to end its formal rulemaking proceedings. 62 Fed. Reg. at 48,158. Notably, the FTC was not a party to the agreement and, as a result, it never established the agreement’s terms as a “Trade Regulation Rule” pursuant to 15 U.S.C. § 57a. Thus, the FTC lacked the authority to enforce the voluntary agreement. See *Brown & Williamson*, 778 F.2d at 37.

B. Sales of “light” cigarettes flourished in an increasingly unregulated era

In 1971, Philip Morris introduced Marlboro Lights cigarettes nationwide as “light,” while

including the phrase “lowered in tar and nicotine” on all of its packaging. See Proctor Schwab Report.

Nevertheless, as early as the 1970s, Philip Morris internally recognized, based upon its sophisticated understanding of cigarette design and smoker compensation, that “low tar” or “light” cigarettes offered no discernable health benefit and that these “light” cigarettes were potentially more hazardous than regular cigarettes. *Philip Morris USA*, 449 F. Supp. 2d. at 222-24 (“By 1978, Philip Morris had substantial evidence that ‘filter dilution [which Philip Morris used to reduce tar and nicotine yields when testing by the Cambridge Method] was somehow acting to increase’ the biological ‘activity’ of the whole smoke condensate (“WSC”) collected from its cigarettes.”). While Philip Morris kept this information secret, it continued selling Marlboro Lights as “light” and “lowered in tar and nicotine” and publicly defended the Cambridge Method as a useful means of measuring tar and nicotine yields in “light” cigarettes.

Dr. William Farone, who was the Director of Applied Research at Philip Morris from 1977 to 1984, has testified that:

[I]n the case of Marlboro Lights, the Philip Morris test data that I have reviewed on that level of dilution for equivalent blends indicated that the product design for their Light cigarettes was more mutagenic than the full flavor Marlboro, Marlboro Reds, and therefore predictive of more potential *cancer* risk. These studies were repeated multiple

times over the past 20 years and continue to be repeated to this day. The Philip Morris data, as was used by Philip Morris, was a strong warning that their product design change between a Marlboro Red and a Marlboro Light – increased ventilation – resulted in a potentially more dangerous product.

Id. at 456-57. Dr. Farone further testified that Philip Morris has not “changed the design of [Marlboro] ‘Lights’ cigarettes in response to its studies and knowledge concerning mutagenicity.” *Id.* at 457.

Philip Morris was aware, as early as 1975, that, due to compensation, smokers got as much tar and nicotine from Marlboro Lights as from regular Marlboros:

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. . . . [T]he Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.

Id. at 465-66.

Nevertheless, Philip Morris continued to market Marlboro Lights as “light” and “lowered in tar and nicotine.” James Morgan, former CEO of Philip Morris, testified that “Philip Morris made a calculated decision to use the phrase ‘lower tar and nicotine’ even though its own marketing research indicated that consumers interpreted that phrase as meaning that the cigarettes not only contained comparatively less tar and nicotine, but also that they were a healthier option.” *Id.* at 513-14.

During this period, the FTC took no regulatory action regarding “light” cigarette advertising; nor did it take any regulatory action based on the Cambridge Method.

In the early 1980s, Philip Morris and R.J. Reynolds discovered that Brown & Williamson was taking market share by marketing its Barclay cigarettes as the industry leader in “light” smoking, yielding a mere 1 mg of tar using the Cambridge Method. Philip Morris and R.J. Reynolds protested to the FTC that the cigarettes’ unique design fooled the smoking machine. The FTC addressed the issue and sought an injunction in federal district court to stop Brown & Williamson. *Brown & Williamson*, 778 F.2d at 37. The injunction sought also would have forced Brown & Williamson to modify the standard Cambridge Method testing procedure to one that the FTC devised solely for Barclay cigarettes. Although the D.C. Circuit concluded that Brown & Williamson’s claims about the amount of tar and nicotine were deceptive and had to cease, it found, in an opinion by Judge Bork, that the FTC could not dictate how cigarettes are tested. *Id.* at 42. The court explained that to grant the requested

injunction would “enshrine the current FTC system [Cambridge method] as the sole legitimate testing method, even though it was not passed pursuant to section 18 of the FTC Act, 15 U.S.C. § 57a (1982), and subjected to the possibility of judicial review.” *Id.* at 45. Absent the use of such procedures, the court held that the FTC lacks the authority to require any particular tar and nicotine rating system. *Id.* The D.C. Circuit invited the FTC to “address the problem by promulgating a Trade Regulation Rule under section 18 of the Act.” *Id.* To date, the FTC has not done so.

Rather than promulgate a trade regulation rule “enshrining” the Cambridge Method, the FTC ceased conducting its own testing of “light” cigarettes in 1987, closing its laboratory. 62 Fed. Reg. at 48,158. The Tobacco Institute Testing Lab, an organization funded by major tobacco companies, then assumed the role of conducting the Cambridge Method tests, annually submitting the data to the FTC to discharge the agency’s obligation to report the numbers to Congress. *Id.* at 48,158 n.5.

Public health authorities believed that a cigarette yielding less tar in the Cambridge Method tests would be likely to produce less cancer as well. Monograph 13 at 2. For example, in 1981, the Surgeon General recommended that smokers who could not quit could face less risk of illness by smoking “light” cigarettes. U.S. Department of Health and Human Services, *The Health Consequences of Smoking: The Changing Cigarette, A Report of the Surgeon General* (1981), available at http://profiles.nlm.nih.gov/NN/B/B/S/N/_/nnbbsn.pdf.

Philip Morris, on the other hand, had special knowledge of the Cambridge Method's limitations, in part because it had developed an alternative testing machine, the human smoke simulator, that could test for actual smoker nicotine and tar yields. A Philip Morris document dated September 17, 1975, from Goodman to Leo F. Meyer, the Philip Morris Director of Research, reflects the depth of Philip Morris's knowledge. As Dr. David M. Burns, an author of the 1981 Surgeon General's Report, has explained the document:

“very clearly demonstrates that, in contrast to what we believed six years later when we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We [in the public health community] believed they were . . . [T]his study was done on a machine that mimicked actual smoking behaviors, that actually matched the behavior of the individual when the machine smoked the cigarette. In 1981, one of the recommendations that we made . . . was that this type of machine should be developed so that we could develop a better understanding of the relationship between delivery of tar and nicotine of these cigarettes when they were actually smoked.”

Philip Morris USA, 449 F. Supp. 2d, at 466. Dr. Burns further testified, “Had that information been available to us, we would not have then offered the

recommendation to the population of the United States that it would be a good idea to shift to these products.” *Id.* at 445.

Philip Morris also internally recognized that the Cambridge Method data from its line of “light” cigarettes, which were designed with dilution filters, were false and misleading. A Philip Morris document dated August 11, 1967, from Helmut Wakeham, Vice President of Corporate Research and Development, to Paul D. Smith, Vice President and General Counsel, recognized that human smokers increased their smoke intake when switching from non-filter to filter cigarettes:

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.

It has probably always been so for diluted smoke cigarettes, whether dilution is obtained by porous paper or holes in the filter.

Id. at 462. Philip Morris's own scientist, Dr. Jerry Whidby, testified that:

Product Opinion Laboratories was a facility established by Philip Morris to evaluate smokers' reaction to the cigarette brands Philip Morris was selling, as well as to Philip Morris's prototype cigarettes," and that he was not "aware of any instance, at any time between when Dr. Wakeham wrote this document in 1967 and when [Dr. Whidby] left the company in 1998, in which Philip Morris informed the American public directly of Wakeham's conclusions that the FTC tar and nicotine yields are apparently 'erroneous and misleading,'" and "dilution filter cigarettes generated lower FTC yields than non-dilution cigarettes, but delivered about the same amount of smoke to smokers.

Id. (citing Dr. Jerry Whidby Dep.).

Dr. Farone has testified to the extraordinary significance of Mr. Wakeham's statements in this document:

It shows that Philip Morris understood the puff compensation phenomenon. . . . this document [also] shows that Philip

Morris knew in 1967 that human smokers compensated by increasing their smoke intake when switching from non-filter to filter cigarettes, and in doing so, smokers received the same amount of tar and nicotine from their filter cigarettes as from non-filter cigarettes. It also shows Wakeham's understanding that the FTC tar and nicotine yields for low tar cigarettes are erroneous and misleading.

Id. at 463.

Thus, when Philip Morris first designed Marlboro Lights and crafted a marketing strategy that would downplay the health risks of smoking "light" cigarettes in comparison to full-flavored cigarettes, it was fully aware that its marketing strategy was "erroneous" and "misleading." The public health authorities, in contrast, lagged behind in their scientific understanding of cigarette design and compensation. Any attempts by them to raise awareness of the health effects of smoking were fiercely contested by Philip Morris and other industry members, who continued to insist that more research was needed before any definitive pronouncements could be made about whether cigarettes were addictive or caused disease. That Philip Morris in the 1970s and 1980s had a sophisticated and specialized understanding of just how addictive and harmful its "light" cigarettes were makes their use of these descriptors all the more fraudulent.

C. The FTC declined to adopt regulations governing “light” cigarettes even as the United States prosecuted Philip Morris for deceptive marketing practices related to “light” cigarettes

In 1997, the FTC solicited public comment on whether it should regulate descriptors such as “light” or “low tar.” 62 Fed. Reg. at 48,163. The FTC stated in its request that “[t]here are *no* official definitions” for terms such as “low tar,” “light,” or “ultra light,” but explained that “they appear to be used *by the industry* to reflect ranges of FTC tar ratings.” *Id.* (emphasis added).

The FTC sought public comment on the use of these descriptors at a time when public health authorities and researchers were developing an increasingly sophisticated understanding of smoker compensation and cigarette design – an understanding that the cigarette industry, including Philip Morris, had long possessed. These advancements in public knowledge became possible largely because numerous internal industry documents, including memoranda on the science of cigarette design and on advertising practices, were made publicly available through litigation brought against the tobacco companies. *See* Monograph 13 at i-ii.

The National Cancer Institute’s Monograph 13, which summarizes these documents, concludes that “[w]idespread adoption of lower yield cigarettes in the United States has not prevented the sustained increase in lung cancer among older smokers.” Monograph 13 at 10. The report found that:

[m]easurements of tar and nicotine yields using the FTC method do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette. The measurements also do not offer meaningful information on the relative amounts of tar and nicotine exposure likely to be received from smoking different brands of cigarettes.

Id.

Although the FTC did not take any regulatory action following its request for public comment, the United States in 1999 brought suit in federal district court under the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968, against Philip Morris and tobacco-related entities, several of whom were signatories to the 1971 voluntary agreement. With respect to Philip Morris, the United States alleged, in part, that it had engaged in a decades-long unlawful conspiracy to deceive the American public about the health benefits derived from smoking low tar, “light” cigarettes. *Philip Morris USA*, 449 F. Supp. 2d. at 26.

Philip Morris in this case argues that as early as 1967 both the FTC and the cigarette industry were aware of the Cambridge Method test’s limitations, namely, that the test neither reflected actual tar and nicotine intake in human beings, nor accounted for the phenomenon of compensation. (Br. 6-7). But as amicus curiae Dr. David M. Burns testified in *United States v. Philip Morris USA*, this is false. Philip

Morris and other cigarette manufacturers had superior knowledge about “the deceptive nature of low tar cigarettes and the influence of compensatory behavior on exposure of smokers who uses these cigarettes” that they “failed to disclose to public health authorities.” 99-cv-02496 (D.D.C) (Dr. Burns Direct Exam. 48:2-5), *available at* http://www.usdoj.gov/civil/cases/tobacco2/01_Burns_Testimony.pdf.

Based on his review of internal documents of the tobacco company defendants, Dr. Burns concluded:

[T]he cigarette companies were aware of nicotine compensation and design changes that could be employed to facilitate compensation by smokers. . . . [T]he companies were aware that the FTC-machine measured yield was misleading to consumers and that the FTC yield it provided little to no information on how much tar and nicotine, whether in absolute or relative terms, were likely to be ingested into the smoker’s body.

Id. at 48:12-17.

Philip Morris itself had superior knowledge that it failed to disclose to the public or public health authorities. Dr. Burns testified that Philip Morris was “aware[] of the deception of smokers by the use of machine measured tar values and use of the term ‘light’. . .” *Id.* at 52:9-10. Philip Morris’s own internal documents “very clearly demonstrate[] that, in contrast to what we believed six years later when

we wrote the 1981 Surgeon General's Report, smokers who smoked brands of cigarettes on the market in 1975 were not getting different yields when they smoked those products. We believed that they were." *Id.* at 52:21-53:1-3. But the Surgeon General and the public health community at that time "did not have access to this information or comparable information." *Id.* at 53:5.

Amicus curiae Dr. Allan Brandt testified that in the course of suppressing this superior knowledge, Philip Morris and members of the cigarette industry sought to create a "controversy" over the health effects of smoking:

It is my opinion that filtered cigarettes, and their advertising and promotion, constituted a critical aspect of industry strategy in the wake of categorical scientific evidence demonstrating the harms of smoking. As I have suggested, the central part of this strategy was to utilize science to argue that there was "no proof," that there was a controversy about the scientific findings. At the same time, a consistent counterpart to this strategy was to imply that the product had been successfully modified to remove any hazards. . . . Both the effort to sustain a controversy and the reassurance of filtered cigarettes were important in an ongoing effort to shape public knowledge about smoking and its harms in the interest of the industry, and to maintain and expand the sales of cigarettes.

United States v. Philip Morris, 99-cv-02496 (D.D.C.) (Dr. Brandt Direct Exam. 138:22-23 to 139:1-5, 7-9), available at <http://www.usdoj.gov/civil/cases/tobacco2/20040920%20Allan%20M.%20Brandt,%20Ph.D.,%20Written%20Direct.pdf>. According to Dr. Brandt, public relations strategists for the industry had, in December 1953, developed a marketing and advertising strategy rooted in deception.

As the memoranda from 1953 make clear, [the industry] well understood that the health risks associated with smoking by that time had created a new environment that had dramatically changed the market for selling cigarettes. Unless consumers came to doubt the evidence, or came to believe that the product had been modified, the traditional rationale for the product would be severely damaged. The industry utilized considerable resources in the aggressive implementation of this strategy. They repeatedly denied and distorted the massive scientific evidence through a sophisticated public relations program. At the same time, they implied that modifications in their product protected consumers from these very harms.

Id. at 139:17-23 to 140:1-2.

In August 2006, following more than two years of discovery and a trial at which countless scientists, government officials, and tobacco industry members testified, the federal district court held that Philip

Morris had falsely marketed and continues to falsely market “light” cigarettes through its use of the descriptor “light” in violation of RICO. The court enjoined Philip Morris from using descriptors such as “light” in cigarette advertising. *Philip Morris USA*, 449 F. Supp. 2d. at 398. It found:

[T]he only way to restrain Defendants from their longstanding and continuing fraudulent efforts to deceive smokers, potential smokers, and the American public about “light” and “low tar” cigarettes is to prohibit them from using any descriptor which conveys a health message. . . . By using descriptors such as “lights” and “low tar,” Defendants knowingly convey the false impression that cigarettes with those labels are less harmful than other cigarettes. Consumers’ false belief is so pervasive and longstanding, and has been exploited and promoted by Defendants for so long, that preventing and restraining Defendants’ future fraud requires a ban on any future use of descriptors which convey a health message.⁹

Id., 449 F. Supp. 2d at 924-25.

Notably, in 2002, during the Government’s RICO suit, Philip Morris petitioned the FTC to promulgate a trade rule that would require tobacco companies:

⁹ The U.S. Court of Appeals for the District of Columbia has stayed that injunction pending appeal.

(1) to disclose the average tar and nicotine yields of cigarette brands; (2) to define and regulate the use of descriptors such as “light” and “ultra light;” and (3) to mandate the use of disclaimers with respect to the average tar yield and the health effects of low-yield cigarettes. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). The FTC never acted on that petition.

To this day, Philip Morris and other cigarette companies continue to market their cigarettes as “light” and “low tar” without any FTC authorization or requirement that they do so. For undertaking these voluntary marketing efforts, these cigarette companies can be fairly characterized as a “rogue” industry: “[W]hen an industry knows it is producing a dangerous and deadly product but denies these harms for decades, all the while vigorously promoting the product, it is well outside the boundaries of American corporate practice.” Brandt at 502.

II. The History and the FTC’s Conduct Demonstrate That Respondents’ Claims Are Not Impliedly Preempted

No FTC rule or regulation governs Philip Morris’s use of “light” or other such descriptors in advertising. The FTC does not authorize or regulate Philip Morris’s “light” cigarette marketing practices: Respondents’ claims thus are not impliedly preempted. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 67 (2002) (holding that the coast guard’s decision not to regulate propeller guards has no implied preemptive effect).

The 1971 voluntary agreement among select tobacco industry members does not equal an FTC regulation carrying the force and effect of law. The FTC, which was not a party to that agreement, has no authority to enforce the agreement. *Brown & Williamson*, 778 F.2d at 37. As the court in *Brown & Williamson* explained, because the “FTC had not adopted [the Cambridge Method] of testing pursuant to a Trade Regulation Rule . . . one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette.” *Id.* at 44.

It is also inconsequential that the FTC once conducted testing pursuant to the Cambridge Method. Absent a rulemaking, the FTC lacks the authority to require any particular tar and nicotine rating system. *See id.*

The FTC reports to Congress, which on occasion have used the term “low tar” to refer to cigarettes measuring 15 milligrams or less in tar under the Cambridge Method test, are not legally binding.¹⁰ *See United States v. Anderson*, 82 F.3d 436 (D.C. Cir. 1996) (holding that a statement by the United States Sentencing Commission included in a special report to Congress was at most a policy statement). Only after following its applicable procedures may a federal agency affect the rights of individuals through regulation. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

¹⁰ This purported “low tar” definition was *never* used in the context of any enforcement proceeding, formal rule, guide or policy statement that indicated the FTC’s view on the legality of the use of the representation in advertising.

Furthermore, FTC reports that have employed the term “low tar” or related descriptors have not purported to define these terms. The FTC has repeatedly assured Congress that it has never formally defined “‘ultra-low tar,’ or any term related to ‘tar’ level.” FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1979*, 11 n.8 (undated). As recently as 1997, in its request for comments on whether it should define “light” cigarette descriptors, the FTC reiterated that “[t]here are no official definitions for these terms,” and that these terms merely reflect industry usage. 62 Fed. Reg. at 48,163.

Finally, nothing more clearly evidences that the FTC has never defined the term “light” than the fact that Philip Morris in 2002 petitioned the FTC to do just that. See Petition for Rulemaking Preliminary Statement at 32-35. As discussed above, the FTC never acted on that petition.

The 1971 consent order between the FTC and American Brands also does not evidence FTC control over the cigarette marketing practices of any other tobacco company, including Philip Morris. See *In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971).

This Court has held consistently that consent orders or decrees are contracts that only bind the parties thereto, and that “any command of a consent decree or order must be found within its four corners, and not by reference to any purposes of the parties or of the underlying statutes.” *United States v. ITT Cont’l Baking Co.*, 420 U.S. 223, 233 (1975) (internal quotation marks omitted); see also *California v. Am. Stores Co.*, 495 U.S. 271 (1990) (deciding merits of

California's suit alleging that merger violated Clayton Act, which suit had been filed a day after the FTC had approved the proposed merger following American Stores Co.'s agreement to the terms of a consent order with the FTC); *Am. Stores Co. v. Comm'r of I.R.S.*, 114 T.C. 458 (2000).

Further, since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed as contracts, without reference to the legislation the Government sought to enforce but never proved applicable through litigation. *ITT Cont'l Baking Co.*, 420 U.S. at 236-37; see *United States v. Atl. Ref. Co.*, 360 U.S. 19, 23 (1959) (rejecting the Government's argument that its interpretation of a consent order would better serve "the basic purpose of the [act]" and explaining that, "[t]his may be true. But it does not warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues.").

Most importantly, because consent orders are contracts between the parties, they cannot bind non-parties. *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *superseded by statute on other grounds in* The Civil Rights Act of 1991 (explaining that this "rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'"); see also *Am. Stores*, 495 U.S. at 271. It is undisputed that Philip Morris was not a party to this 1971 consent order. Therefore, this 1971 consent order can have no legal effect regarding whether Philip Morris is compelled or authorized to use the descriptors "light" and "lowered in tar and nicotine" in advertisements or on packaging.

None of these FTC actions impliedly preempt suits under Maine's deceptive trade practices statute, which is designed to further the FTC's own policies. In fact, the FTC, beginning in the 1960s, assisted states like Maine in drafting deceptive trade practices statutes, known as "little FTC Acts," to compliment the agency's regulatory authority, recognizing that the agency has limited resources to prosecute deceptive advertising claims. Victor E. Schwartz et al., *"That's Unfair!" Says Who—the Government or the Litigant?: Consumer Protection Claims Involving Regulated Conduct*, 47 Washburn L.J. 93, 99 (2007) ("When the FTC urged states to adopt their own 'little-FTC Acts,' they did so as a way of combining resources to target unfair and deceptive practices at both the local and national levels. The federal and state laws are meant to complement each other.") (citations omitted); *see also* Jack E. Karns, *State Regulation of Deceptive Trade Practices Under "Little FTC Acts": Should Federal Standards Control?*, 94 Dick. L. Rev. 373, 374 (1990). These little FTC Acts extend to state attorneys general and private litigants the authority to prosecute deceptive marketing practices that would violate the FTC Act. This enforcement authority is co-extensive and complimentary, and thus there is no "disruption" of the FTC's own regulatory authority.¹¹ Schwartz, 47 Washburn L.J. at 99 (recognizing that the "adoption of [little FTC Acts] are not intended to create a new policy-making function that could be at odds with federal consumer protection efforts.");

¹¹ As in most states, Maine's consumer protection statute requires that it be construed in conformity with the FTC and federal courts' construction of "the Federal Trade Commission Act." 5 Me. Rev. Stat. Ann. § 207(1).

compare Riegel v. Medtronic, Inc., 128 S.Ct. 999, 1008 (2008) (indicating there is no conflict and thus no preemption when state-based lawsuits help enforce federal agency responsibilities).

Respondents are furthering the underlying purposes of the FTC Act by prosecuting Philip Morris's deceptive advertising and marketing practices. Should the FTC conclude that Philip Morris's use of these descriptors is not deceptive, it could enact a trade regulation rule to that effect. But it has not, and in the absence of a rule or regulation, Respondents' claims are not impliedly preempted by FTC inaction.

CONCLUSION

Philip Morris voluntarily markets Cambridge Light cigarettes and Marlboro Lights as "light" or "lowered in tar and nicotine" without FTC control or direction. Thus, Respondents' claims are not impliedly preempted. For these reasons, and because Respondents' claims are not expressly preempted under the FCLAA, as discussed in Respondents' brief, this Court should affirm the First Circuit's decision.

Respectfully submitted,

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