No. 07-562

# In The Supreme Court of the United States

ALTRIA GROUP, INC., *et al.*,

*Petitioners,*

v.

STEPHANIE GOOD, *et al.*,

*Respondents.*

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

**BRIEF OF MAINE, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING AS *AMICI CURIAE* SUPPORTING RESPONDENTS**

G. STEVEN ROWE
Attorney General for the State of Maine
PAUL STERN
Deputy Attorney General
(*Counsel of Record*)
LINDA CONTI
Chief, Consumer Protection Division
JENNIFER WILLIS
CAROLYN SILSBY
Assistant Attorneys General
Six State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8568
Fax: (207) 287-3145
*Counsel for Amici Curiae*
(Additional Counsel Listed On Inside Cover)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130

TALIS J. COLBERG
Attorney General of Alaska
P. O. Box 110300
Juneau, AK 99811

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, AZ 85007

DUSTIN MCDANIEL
Attorney General
State of Arkansas
323 Center Street,
Suite 200
Little Rock, AR 72201

EDMUND G. BROWN JR.
Attorney General
State of California
1300 I Street, Suite 125
P. O. Box 944255
Sacramento, CA 94244-2550

JOHN W. SUTHERS
Attorney General
State of Colorado
1525 Sherman Street,
7th Floor
Denver, CO 80203

RICHARD BLUMENTHAL
Attorney General
State of Connecticut
55 Elm Street
P. O. Box 120
Hartford, CT 06105

JOSEPH R. BIDEN, III
Attorney General
State of Delaware
820 N. French Street
Wilmington, DE 19801

PETER J. NICKLES
Interim Attorney General
for the District of Columbia
One Judiciary Square
441 4th Street, N.W.,
Suite 600 South
Washington, DC 20001

BILL MCCOLLUM
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

THURBERT E. BAKER
Attorney General of Georgia
132 Judicial Building
40 Capitol Square SW
Atlanta, GA 30334

MARK J. BENNETT
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Idaho Attorney General
P. O. Box 83720
Boise, ID 83720-0010

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

STEVE CARTER
Attorney General of the
State of Indiana
Indiana Government
Center South, Fifth Floor
Indianapolis, IN 46204

THOMAS J. MILLER
Attorney General
of the State of Iowa
Hoover State Office Building
Des Moines, IA 50319

STEPHEN N. SIX
Attorney General
for the State of Kansas
120 SW 10th Avenue,
2nd Floor
Topeka, KS 66612-1597

JACK CONWAY
Attorney General
Commonwealth of Kentucky
700 Capitol Avenue,
Suite 118
Frankfort, KY 40601

ATTORNEY GENERAL JAMES
D. "BUDDY" CALDWELL
Louisiana Attorney
General's Office
1885 North Third Street
P. O. Box 94005
Baton Rouge, LA 70802

DOUGLAS F. GANSLER
Attorney General
of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MARTHA COAKLEY
Attorney General
Commonwealth of
Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Boulevard
St. Paul, MN 55155-1609

JIM HOOD
Attorney General
of Mississippi
P. O. Box 220
Jackson, MS 39205-0220

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
P. O. Box 201401
Helena, MT 46920-1401

JON BRUNING
Attorney General
of Nebraska
2115 State Capitol
Lincoln, NE 68509

CATHERINE CORTEZ MASTO
Attorney General of Nevada
100 North Carson Street
Carson City, NV 89701

KELLY A. AYOTTE
Attorney General
of New Hampshire
33 Capitol Street
Concord, NH 03301

ANNE MILGRAM
Attorney General
State of New Jersey
The Hughes Justice Complex
P. O. Box 080
25 Market Street
Trenton, NJ 08625

GARY K. KING
Attorney General
State of New Mexico
P. O. Drawer 1508
Santa Fe, NM 87504

ANDREW M. CUOMO
Attorney General
of New York
120 Broadway, 25th Floor
New York, NY 10271

WAYNE STENEHJEM
Attorney General
of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505-0040

NANCY H. ROGERS
Attorney General of Ohio
30 East Broad Street,
17th Floor
Columbus, OH 43215

W.A. DREW EDMONDSON
Attorney General
of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK
73105-4894

HARDY MYERS
Attorney General
State of Oregon
1162 Court Street, N.E.
Salem, OR 97301

TOM CORBETT
Attorney General
Commonwealth of
Pennsylvania
Strawberry Square,
16th Floor
Harrisburg, PA 17120

PATRICK C. LYNCH
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

HENRY D. MCMASTER
Attorney General
South Carolina Office
of the Attorney General
Rembert C. Dennis Building
P. O. Box 11549
Columbia, SC 29211-1549

LAWRENCE E. LONG
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501-3215

ROBERT E. COOPER, JR.
Attorney General of Tennessee
P. O. Box 20207
Nashville, TN 37202-0207

GREG ABBOTT
Attorney General of Texas
P. O. Box 12548
Austin, TX 78711-2548

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol
Suite 230
P. O. Box 142320
Salt Lake City, UT
84114-2320

WILLIAM H. SORRELL
Attorney General
Office of the
Attorney General
109 State Street
Montpelier, VT 05609-1001

ROBERT M. MCKENNA
Attorney General
of Washington
1125 Washington Street
P. O. Box 40100
Olympia, WA 98504-0100

DARRELL V. MCGRAW, JR.
West Virginia
Attorney General
Office of the
Attorney General
State Capitol, Room 26-E
Charleston, WV 25305

J.B. VAN HOLLEN
Attorney General
Wisconsin Department
of Justice
17 West Main Street
P. O. Box 7857
Madison, WI 53707-7857

BRUCE A. SALZBURG
Attorney General
for the State of Wyoming
123 Capitol Avenue
Cheyenne, WY 82002

## QUESTIONS PRESENTED

1. Whether the Federal Cigarette Labeling and Advertising Act expressly preempts state-law claims that a cigarette company violated the Maine Unfair Trade Practices Act by falsely representing its "light" cigarettes to the public when the predicate state-law duty of such claims is the duty not to deceive.

2. Whether such claims are impliedly preempted where the FTC has never exercised its rule-making power to address the conduct at issue nor defined the terms at issue in this dispute.

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## INTEREST OF *AMICI CURIAE*

The State *amici curiae*, through their Attorneys General, respectfully submit this brief in support of Respondents. The States have a vital interest in preserving their power to regulate businesses to protect consumers from unfair and deceptive practices, a traditional area of state concern. And the States have a specific interest in being able to prevent fraudulent or misleading cigarette advertising by tobacco companies. While this case involves a private suit challenging the use of certain descriptors regarding tar and nicotine, Petitioners' arguments would expand preemption under the Federal Cigarette Labeling and Advertising Act (the FCLAA), 15 U.S.C. §§ 1331 *et seq.*, well beyond the private realm. They would foreclose actions by the Attorneys General and other state law enforcement agencies against tobacco companies under state laws prohibiting deceptive or misleading advertising – not only those related to "light" cigarettes. The result urged by Petitioners, therefore, would be a serious blow to state law enforcement.

This case also affects the longstanding program of federal-state cooperation in combating deceptive practices, established under the Federal Trade Commission Act (the FTC Act), 15 U.S.C. §§ 41 *et seq.*, and the complementary state unfair trade practices and consumer protection statutes. The Court in *Cipollone v. Liggett*, 505 U.S. 504 (1992), recognized the continuing important role of state law enforcement in preventing deceptive conduct under the FCLAA. The

States and their citizens have relied upon that ruling, and thus have an interest in ensuring that the FCLAA's preemption provision is not construed more broadly than Congress intended.

Finally, it is common for a deceptive business's conduct to be pursued in parallel under federal law by the FTC and under state law by State Attorneys General. It would be a novel and disruptive precedent, having implications going beyond efforts to address tobacco company practices, for the actions of the FTC here to be found to impliedly preempt state consumer protection statutes. Reversal of the court of appeals' decision would dramatically alter the federal-state cooperative endeavor in a manner not intended by Congress or the FTC, and would do serious harm to the joint efforts under the FTC Act and state statutes that protect consumers.

## SUMMARY OF ARGUMENT

This case presents the questions whether the FCLAA or the actions of the FTC preempt state-law deception claims arising out of Petitioners' practices with respect to "low tar and nicotine" and "light" cigarettes. Neither the FCLAA nor the actions of the FTC license Petitioners to deceive consumers in violation of state law. Immunizing Petitioners from the consequences of the alleged wrongful conduct is not a result that should be presumed without clear language and intent, neither of which is present here.

1. In *Cipollone v. Liggett*, 505 U.S. 504 (1992), the Court held that the FCLAA does not preempt claims resting upon false representation of a material fact or concealment of a material fact by tobacco companies where such claims are founded upon a general duty under state law not to deceive. The suit at issue here brings precisely such claims. It seeks economic, not personal injury, damages, under Maine's general prohibition against any "material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." Me. Rev. Stat. Ann. tit. 5, § 207 (Supp. 2007). Because the lawsuit before the Court is predicated upon a general statutory prohibition against deception (that the manufacturers made false statements and concealed information regarding "light" cigarettes), under *Cipollone* it is not pre-empted.

To find otherwise would disrupt and do serious harm to the sovereigns' complementary efforts to protect consumers, which would have adverse implications beyond the "light" cigarettes dispute before the Court here. State law suits pursuant to state unfair practices and consumer protection statutes combating deceptive practices are a critical complement to the administrative and prosecutorial efforts of the FTC. In fact, recognizing that it cannot combat consumer fraud on its own, FTC regulations direct the agency "to assist and cooperate" with state consumer protection efforts. One common outgrowth of that cooperation is that the FTC and the States often

target the same wrongdoers, which sometimes results in separate settlements that provide different forms of relief. There is no exception in this complementary regulatory scheme for fraud or deception by cigarette manufacturers. Indeed, the FTC acknowledges the States' vital part in prohibiting deception by tobacco companies.

2. Petitioners' arguments that the FTC has somehow impliedly preempted the state-law claims are patently incorrect. Nothing in the text, structure, or regulatory history of the FTC Act or in the actions of the FTC relating to "light" cigarettes supports implied preemption. Petitioners are not claiming that the FTC Act itself imposes requirements on tobacco companies that conflict with state law. Nor could they, given that the FTC Act lacks an express preemption provision and instead contains a broad saving clause protecting state remedies and causes of action. In addition, Congress imposed heightened requirements for FTC rulemaking, and the FTC's procedural rules require that it explain the impact of any of its rules on state law. And petitioners do not assert that the FTC has promulgated specific rules that preempt state-law actions with respect to "low tar" and "light" cigarettes. Rather, Petitioners' implied preemption claim is based on their assertion that the FTC has blessed tobacco companies' "light" cigarette advertisements through a history of less formal actions, such as consent decrees reached with individual companies. But neither the consent decrees nor the other actions relied upon by Petitioners mandated or

approved Petitioners' "light" and "low tar" advertisements. Moreover, in none of those actions did the FTC ever suggest that State consumer protection laws present an obstacle to, or are preempted by, some sort of FTC policy. Indeed, the FTC has eschewed any suggestion that its actions have resolved the issue of tobacco companies' deceptive practices regarding "low tar" cigarettes.

## ARGUMENT

### I. UNDER *CIPOLLONE*, STATE-LAW CLAIMS BASED ON DECEPTION ARE NOT EXPRESSLY PREEMPTED BY THE FCLAA.

In *Cipollone*, this Court addressed the preemptive scope of the FCLAA and held that the statute does not displace state-law claims predicated upon a generally applicable law dealing with deceptive practices. 505 U.S. at 527-31. Petitioners nonetheless argue that the FCLAA preempts state-law claims that tobacco companies deceived the public by falsely representing "low tar" cigarettes. Pet. Br. 22-45. By extension, Petitioners maintain that the FCLAA preempts, across the board, state-law claims based on deceptive statements of tobacco companies. Such a retrenchment of *Cipollone's* holding would dramatically impair the States' ability and responsibility to protect their citizens from deceptive marketing practices. As this subject is fully explored by Respondents and other *amici*, the States will limit their submission to the following points.

### A. The FCLAA Does Not Preempt Generally Applicable State Laws Prohibiting Deceptive Marketing.

In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 551 (2001), this Court reaffirmed *Cipollone's* holding that the FCLAA does not preempt a state-law claim against a tobacco company that is predicated on a generally applicable deceptive-practices law. The Court in *Lorillard* explained that "[r]estrictions . . . that apply to cigarettes on equal terms with other products appear to be outside the ambit of the preemption provision." *Id.* at 551-52. The two decisions teach us that while state rules specifically targeting the tobacco industry are preempted if they concern smoking and health, as was the case in *Lorillard*, non-targeted requirements that apply not only to cigarette makers but to all sellers of products, such as state prohibitions on unfair or deceptive practices, are not. In addition, the decisions distinguish between an affirmative obligation that might be imposed under state law concerning smoking and health (that would be preempted), and a general prohibition (that would not). In other words, a state-law claim or regulation predicated on an affirmative duty applied only against a cigarette maker is much more likely to run afoul of the FCLAA than a general prohibition on falsity in representations about the product.

In this case, Respondents allege that Petitioners "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,'" and that Petitioners "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." Resp. Br. in Opp. 4. Because, as the court of appeals explained (Pet. App. 15a-37a), the predicate of Respondents' claims is a classic violation of the Maine Act's general prohibition against deceitful practices – *i.e.*, Petitioners lied to consumers – there is no preemption under *Cipollone* and *Lorillard*. The claims rest upon a general prohibition that all sellers of goods not deceive consumers.

### B. Finding FCLAA Preemption Here Would Significantly Impair the States' Efforts to Combat Deceptive Marketing of Tobacco Products.

If Petitioners' arguments that the Court abandon *Cipollone's* limitations on preemption were successful, there would be a dramatic, adverse impact on the continuing and successful efforts under state consumer protection laws to prohibit deceptive practices by tobacco companies. Petitioners' arguments would extend FCLAA preemption (1) to all claims of any deceptive or misleading conduct of tobacco companies, whether relating to "light" or other types of cigarettes, and (2) to claims made by state law enforcement, including the Attorneys General. This would have serious adverse consequences for the States as well as consumers.

Following *Cipollone*, many States brought individual lawsuits against the largest cigarette companies in the United States predicated upon, *inter alia*, violations of state consumer protection statutes. *See* Master Settlement Agreement (hereinafter MSA) (Nov. 1998), at 1, *available at* <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/> (visited June 15, 2008) ("the Settling States that have commenced litigation have sought to obtain equitable relief and damages under state laws, including consumer protection and/or antitrust law"). In these lawsuits, the States alleged that the cigarette companies conspired for decades to deceive the American public about the health risks related to smoking and the addictiveness of nicotine. Rather than litigate the cases to their conclusion, the four major domestic tobacco companies and the Attorneys General of 46 states and six territories signed the MSA in November 1998. *Id.*; *see Lorillard*, 533 U.S. at 533. The MSA provides for annual payments from the tobacco companies to the States, and also provides some restrictions on advertising practices. MSA § III. Under Petitioners' theories, however, the MSA may never have come about because a core component of the States' consumer protection claims – deceptive practices relating to tobacco marketing – would have been preempted.

Prospectively, rolling back *Cipollone* or reading that case as narrowly as Petitioners advocate would seriously limit state efforts in dealing with ongoing and future deceptive practices by tobacco companies. The MSA does not resolve or deal with all potential

deceitful conduct of all tobacco manufacturers. Most obviously, it is only enforceable against manufacturers who have signed onto it, and not against the ever-growing number of Non-Participating Manufacturers or the thousands of distributors, retailers, and Internet sellers who market cigarettes. Nor, unlike consumer laws in many States, is the MSA enforceable by other state law enforcement agencies, such as district attorneys, county counsel, and city attorneys. *See, e.g.*, Cal. Bus. & Prof. Code §§ 17204, 17206 (Deering 2007) (violations of California's deceptive practices statute enforceable by Attorney General, district attorneys, county counsel, and city attorneys). With the Internet and other forms of media becoming available, the future creativity of tobacco companies cannot be underestimated. Petitioners' arguments would foreclose States from combating present and future tobacco company deceptive practices.

### C. The FTC Cannot Fill the Void If the States Are Foreclosed From Addressing Deceptive Marketing by Tobacco Companies.

Excluding States from regulating deceptive marketing by tobacco companies would have significant practical consequences – notwithstanding the FTC's continued ability to regulate that conduct itself. Combating the myriad means by which consumers are deceived is a monumental undertaking, beyond the capabilities of the federal government, the States, or private citizens alone. The FTC therefore

has as one of its expressly stated missions "to assist and cooperate with . . . state . . . agencies . . . in consumer protection enforcement and regulatory matters." 16 C.F.R. § 0.17 (2008).

In particular, recognizing that "problems in the marketplace go beyond the enforcement capabilities of the federal government," the FTC "has encouraged state deceptive practices laws." *Kellogg Co. v. Mattox*, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991) (citing Dee Pridgen, *Consumer Protection and the Law* § 3.02[1] (1986)). All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted consumer protection or unfair trade practices acts that, like the FTC Act, have broad applicability to most consumer transactions, and are aimed at preventing deception in advertising and promotion of products and services. Jonathan Sheldon & Carolyn L. Carter, *Unfair and Deceptive Acts and Practices* (6th ed. 2004), Appendix A (compilation of state consumer protection statutes). Enacted in 1969, the Maine Unfair Trade Practices Act is typical of these statutes. Under section 207, "deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." Me. Rev. Stat. Ann. tit. 5 § 207 (Supp. 2007). The Supreme Judicial Court of Maine has defined "deceptive act" to mean "a material representation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." *State v. Weinschenk*, 868 A.2d 200, 205 (2005). "In enacting the UTPA in 1969, the Legislature intended 'to bring into Maine law the federal

interpretations of unfair methods of competition and unfair or deceptive acts or practices,' as set forth in the Federal Trade Commission Act." *Id.* at 205 (quoting *Bartner v. Carter*, 405 A.2d 194, 199-201 (1979)). Under section 209, the Attorney General may bring an action to restrain by injunction the use of any deceptive act or practice and to seek damages and restitution on behalf of any person who has suffered an ascertainable loss as a result of such an act or practice. Me. Rev. Stat. Ann. tit. 5 § 209 (2002). The right of a private citizen to sue under the Act was established in 1973 with the addition of section 213, subsections (1) and (2). Me. Pub. L. 1973, ch. 251, as amended by Me. Pub. L. 1973, ch. 788, § 13.

These statutes are "particularly important" because the FTC Act provides only for FTC enforcement, and not for state or private enforcement. Sheldon and Carter, *supra*, § 1.1, at p. 1; *see Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973) (an individual consumer may not bring a private action under the FTC Act); *Bartner*, 405 A.2d at 200 (same). "[B]y providing significant state and private remedies, [State statutes] allow for the widespread redress of marketplace misconduct and abuse of consumers." Sheldon and Carter, *supra*, § 1.1, at 1. These laws "are broad and flexible, so that they can apply to creative, new forms of abusive business schemes in almost all types of consumer transactions." *Id.*

The suggestion, therefore, that the States' interest in this matter is "modest," Brief of the National Association of Manufacturers as Amicus Curiae, at 4,

ignores the vital role that the state unfair trade practices statutes play in combating the sophisticated and numerous deceptive efforts of businesses. The common and cooperative effort of the FTC and the States in fighting deceptive practices is shown by their practice in entering into settlement agreements and consent decrees.[1] It is common for the FTC and the States to enter into settlement agreements and consent decrees with the same target for the same conduct.[2] It is also not unusual, moreover, for the FTC

[1] The States settle claims in one of two ways. If the States file complaints in court and a settlement is reached, then a consent decree is filed. The consent decree might be sought on the date of filing if settlement was reached beforehand, or it may be sought sometime after the case was initiated at the time when the matter settles. Most States also have statutory authority to enter into settlement agreements called Assurances of Discontinuance or Assurances of Compliance ("AVC's") without filing an action in court. *See, e.g.,* Me. Rev. Stat. Ann. tit. 5 § 210 (2002). Some states enter into AVC's despite the lack of statutory references to this form of settlement. AVC's are often negotiated and entered into between a business and a large number of state Attorneys General; hence they are often referred to as multi-state settlements. Some multi-state settlements may be in the form of consent decrees in lieu of AVC's.

[2] *See, e.g., United States v. Choice Point, Inc.*, No. 1:06-cv-198 (N.D. Ga. Feb. 15, 2006), and *In re Choice Point, Inc., Assurance of Discontinuance,* May 2007 (on file Kennebec County Superior Court, Me.) (failure to adequately protect confidential information and misleading consumers about its privacy policies); *FTC v. Alyon Technologies, Inc.*, No. 1:03-cv-1297 (N.D. Ga. Dec. 6, 2004), and *Maine v. Alyon Technologies, Inc*., No. CV-03-324 (Ken. Cty. Sup. Ct. Jan. 22, 2005) (settling claims for unauthorized billing).

and State settlements to provide different sorts of relief.[3]

Indeed, the FTC has explicitly recognized and relied upon the role of state consumer protection laws in combating deception by tobacco companies. As explained by the FTC before Congress:

> In another example of a Commission action involving unfair and deceptive cigarette advertising practices, in 1997, the Commission issued a complaint against R.J. Reynolds

[3] For example, both the FTC and 44 States in a multi-state agreement separately settled claims against America Online regarding its free trial offers, with the State settlement requiring additional injunctive relief. *In re America Online, Inc.,* 125 F.T.C. 403 (1998); *In re America Online, Inc., Assurance of Discontinuance,* May 1998 (on file Kennebec County Superior Court, Me.). And in *In re National Research Center for College and University Admissions, Inc.,* 135 F.T.C. 13 (2003), the FTC consent order bars the company from using previously collected student information for non-educational related marketing and bars the company from using data collected from students in the future for non-educational related marketing unless certain disclosures are made. By comparison, not long after, 42 States entered into a multi-state AVC with this same company based on the same set of facts, which went beyond the FTC consent order in several ways: (1) it bars the use of survey data from students who opted out or whose parents opted them out as minors, (2) it includes provisions relating to direct notice of use for non-educational-related marketing purposes should NRCCUA decide to again begin using survey data for that purpose, and (3) it requires NRCCUA to disclose why it uses the information and which sorts of entities receive the data. *In re National Research Center for College and University Admissions, Assurance of Discontinuance,* January 2005 (on file Kennebec County Superior Court, Me.).

> Tobacco Co. alleging that the company's Joe Camel advertising campaign caused or was likely to cause many young people to begin or continue to smoke, thereby exposing them to significant health risks. *R.J. Reynolds Tobacco Co.*, 127 F.T.C. 49 (1999). The Commission's complaint was issued on May 28, 1997. On January 26, 1999, the Commission dismissed the complaint without prejudice because the relief sought had been achieved through, *inter alia*, the master settlement between the major tobacco companies and the attorneys general for 46 states.

*Accuracy of the FTC Tar and Nicotine Rating System: Hearing Before the Senate Comm. on Commerce, Science and Transportation*, 110th Cong. (Nov. 13, 2007) (Prepared Statement of the Federal Trade Comm.) ("FTC 2007 Prepared Statement") at 4 n.10, *available at* <http://www.ftc.gov/os/testimony/P064508tobacco.pdf> (visited June 15, 2008).

Because the FTC Act and the state unfair trade practices acts have a "common purpose" in preventing deceptive practices, the presumption against preemption has "special force" here. *Pharmaceutical Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 666 (2003) (quoting *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973)). The Court has already applied these principles to state-law claims relating to tobacco. *Cipollone*, 505 U.S. at 518 ("we must construe these provisions in light of the presumption against the pre-emption of state police

power regulations. This presumption reinforces the appropriateness of a narrow reading of" the FCLAA).

Petitioners' arguments would also effectively immunize Petitioners and other tobacco companies from paying for the damages caused by their unlawful deceptions. This Court has recognized that "common-law claims . . . – unlike most administrative and legislative regulations – necessarily perform an important remedial role in compensating . . . victims." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). For this reason, Congress should not lightly be viewed as "remov[ing] all means of judicial recourse for those injured by illegal conduct." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). Yet Petitioners' arguments lead precisely to that result: they would effectively immunize Petitioners and other tobacco companies from paying for the damages caused by their unlawful deceptions. However successful the federal government may be in a suit against the major tobacco companies, such as one for violating the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), appeals pending, Nos. 06-5267 *et al.* (D.C. Cir.), it will not compensate the victims of those deceptions. Petitioners' express preemption claim should be rejected.

## II. STATE-LAW CLAIMS AGAINST TOBACCO COMPANIES BASED ON DECEPTIVE ADVERTISEMENTS OF "LIGHT" CIGARETTES ARE NOT IMPLIEDLY PREEMPTED BY PAST FTC ACTIONS.

*Cipollone* held, and *Lorillard* confirmed, that the FCLAA's express preemption provision forecloses implied preemption with respect to tobacco advertising. *Lorillard*, 533 U.S. at 541 ("our task is to identify the domain expressly pre-empted, because 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters'") (citations omitted); *Cipollone*, 505 U.S. at 517 ("we need only identify the domain expressly pre-empted by each of those sections") (plurality); *id.* at 531, 533 (Blackmun, J., concurring in part). The *stare decisis* effect of those holdings defeats Petitioners' implied preemption argument. Petitioners' implied preemption argument also fails on its own terms.

Petitioners are not claiming that the FTC Act itself imposes requirements on tobacco companies with which state law conflicts. Nor do Petitioners claim that the FTC has promulgated specific rules with respect to the marketing of "light" cigarettes that preempt state law. Rather, Petitioners assert implied preemption based on other actions the FTC has taken over the years that purportedly mandate or authorize the very conduct alleged to violate state law. Pet. Br. 46-56. The court of appeals properly rejected this argument because the FTC Act expressly saves

state-law actions; the FTC imposes procedural requirements, not implemented here, before it seeks to preempt state laws; and the FTC does not have a cohesive policy on the subject of marketing "light" cigarettes.

### A. The FTC Act and the FTC's Preemption Policies Are Consistent with the Cooperative Relationship Between the FTC and the States.

1. The cooperative relationship between the States and the FTC, discussed in section I.C, *supra*, is reflected in the FTC Act, which has no express preemption provision and instead has a clause broadly preserving state remedies and rights of action. The saving clause could not be more clear or expansive:

> 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.

Pub. L. No. 93-637, § 206(a), 88 Stat. 2183, 2201 codified at 15 U.S.C. § 57b(e). When this provision was enacted in 1975, Maine and other states had unfair trade practices statutes that included private causes of action. *See, e.g.*, Me. Pub. L. 1973, ch. 251, as amended by Me. Pub. L. 1973, ch. 788, § 13. Nothing in the saving clause evinces any intent by Congress to preempt the States' enforcement of their unfair trade practices laws or state-law claims such

as those at issue here; indeed, the plain meaning of the provision leads to exactly the opposite conclusion.

The legislative history leading up to the 1975 amendments, contained in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183, demonstrates that preemption of state consumer laws was not to be done lightly. Paul R. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225, 236-40 (1976) (setting forth history). Congress certainly recognized the critical role of the States in combating deceptive practices. When discussing the meaning of "in or affecting commerce" for purposes of FTC regulation, the House Committee explained that the FTC "should not intrude" on the States' domain, nor "preempt state and local agencies from carrying out consumer protection or other activities within their jurisdiction which are also within the expanded jurisdiction of the" FTC. H.R. Rep. No. 93-1107, at 45 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7726; Verkuil, *supra* at 239-40.

2. FTC practice has been consistent with the FTC Act's anti-preemption leaning. Since the enactment of the saving clause, the FTC has carefully and expressly dealt with the issue of preemption in order to afford States and others the opportunity to comment and provide input. The FTC requires that preemption be addressed in the "Statement of Basis and Purpose" when it promulgates a rule. 16 C.F.R. § 1.14(a)(1)(iv) ("If the Commission determines to promulgate a rule, it shall adopt a Statement of Basis

and Purpose to accompany the rule which shall include: . . . . (iv) A statement as to the effect of the rule on state and local laws. . . .”). FTC rulemaking also mandates procedural safeguards beyond those normally found in the Administrative Procedures Act. *Compare* 15 U.S.C. § 57a, *with* 5 U.S.C. §§ 551 *et seq.*; *see* Verkuil, *supra* at 243 (rulemaking procedures “serve[ ] to implement the felt concern of the 1975 Congress with keeping the preemption function of the FTC under strict control.”) Additionally, if a rule were promulgated preempting state law, the state and its citizens could seek judicial review. 15 U.S.C. § 57a(e)(1)(A); *see American Financial Services Ass'n v. FTC,* 767 F.2d 957, 961 (D.C. Cir. 1985) (seeking review of FTC rules); Verkuil, *supra* at 243 (“ensure[s] that the courts look closely at [the preemptive rule's] basis and rationale.”) This critical safeguard is unavailable for consent decrees, agreements between tobacco companies, or the other actions upon which Petitioners rely. Pet. Br. 2-13.

In light of the FTC Act saving clause and the FTC's procedural requirements, courts have been extraordinarily careful to protect state prerogatives when the FTC has attempted to preempt by formal rule. In *American Financial Services*, 767 F.2d at 990-91, for example, the court of appeals upheld an FTC rule against a preemption challenge in large part because the FTC “considered and modified the Rule to be as consistent with state laws as possible, explicitly expressed its intent not to occupy the field, and included a provision which allows states providing

equal or greater protections to obtain an exemption." In *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658, 662, 667 (2nd Cir. 1979), the court struck down an FTC rule that had an explicit preemption provision because it lacked precision and the FTC failed to comply with the procedural requirements of section 57a. Not surprisingly, therefore, no court has found an action of the FTC, other than formal rulemaking, to preempt state law. *See, e.g., United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 78 (D.D.C. 2003) ("State prohibitions of unfair or deceptive trade practices are not preempted unless they conflict with an express FTC rule."); *see also Wabash Valley Power Ass'n v. Rural Electrification Admin.*, 903 F.2d 445, 453-54 (7th Cir. 1990) (explaining the importance of rulemaking safeguards for agency substantive rules to have the preemptive force of federal law).

3. Petitioners' implied preemption theory completely disregards this longstanding practice of protecting state laws from preemption unless the FTC explicitly and carefully does so by rule, and therefore would disrupt the complementary federal-state relationship in dealing with deceptive practices. The procedural protections of rulemaking – including the opportunity for judicial review of final rules – allow States, and those who wish to avail themselves of state laws, to provide insight into the effect of federal preemption on the joint and cooperative goals of state and federal law and to preserve state-law claims as appropriate. Under Petitioners' preemption

argument, no such protections would be available to States or their consumers.

In fact, not only did the FTC not engage in rulemaking to preempt state laws pertaining to deceptive marketing of tobacco products, it did not engage in rulemaking prescribing how "low tar" and "light" cigarettes are to be advertised. Had the FTC wanted to preempt the state laws at issue, it had a process in place for attempting to do so. Its failure to avail itself of that process speaks volumes about the FTC's intent – or lack thereof – to preempt those laws.

### B. The FTC's Actions Relating to "Light" Cigarettes Do Not Impliedly Preempt State-Law Claims for Deception.

At the core of Petitioners' implied preemption theory is the notion that the FTC has resolved the underlying issue and has a cohesive and all-encompassing policy mandating how cigarette companies are to describe "light" cigarettes. Pet. App. 49; *see also* Brief of Former Commissioners as Amici Curiae. According to Petitioners, the FTC adopted that policy through a patchwork of FTC consent decrees and other actions such as an early role in testing cigarettes' tar and nicotine content, playing some sort of role in the 1970 voluntary agreement reached among the tobacco manufacturers, and not prohibiting tobacco companies from featuring the test results in their ads. The picture that Petitioners attempt to paint is a misleading one. The FTC did not

mandate or authorize Petitioners' representations of their "light" cigarettes to the public; Petitioners therefore did not act pursuant to a definitive federal policy.

1. The federal government's RICO lawsuit against the tobacco companies is the most obvious evidence that the federal government, including the FTC, has not adopted a policy mandating or authorizing the "light" cigarette advertisements challenged by the state-law action here. According to the United States, tobacco companies have engaged "in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, 'light' cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction." *Philip Morris*, 449 F. Supp. 2d at 26-27. These claims are manifestly inconsistent with the proposition that the FTC itself mandated or authorized the deceptive practices with respect to "light" cigarettes. And in that suit, the federal government has never suggested that other actions based on these deceptive practices are foreclosed. Of course, it is only the private state-law claims that can compensate victims for their losses from Petitioners' deceptive practices, and there is nothing indicating that the federal government believes that such claims are an obstacle to any federal scheme.

In addition, the United States has confirmed that it has not set forth a clear policy addressing the

subject upon which Petitioners rely so heavily: the definitions of the terms "light" and "lower tar and nicotine." The Solicitor General explained to the Court that the FTC "has never promulgated official regulatory definitions of terms such as 'light' or 'low tar,'" and that its previous statements "did not reflect an official FTC regulatory position." Brief for United States as Amicus Curiae, *Watson v. Philip Morris Cos.*, 127 S. Ct. 2301 (2007), at 4-5; *see also* 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997) ("There are no official definitions for these terms"). And just last year, the FTC informed Congress that while cigarette companies "have adopted descriptors, such as 'light' and 'low,' to characterize cigarettes that have tar ratings of 15 mg. or less," "[t]hese terms are not defined by the FTC or any other government agency." FTC 2007 Prepared Statement, at 6 & n.16. The FTC went on to explain that "the Commission has been concerned for some time that the [FTC testing] method may be misleading to individual consumers who rely on the ratings it produces as indicators of the amount of tar and nicotine they actually will get from their cigarettes. In fact, the current ratings tend to be relatively poor predictors of tar and nicotine exposure." *Id.* at 7. It would be an astonishing conclusion that a federal scheme supporting preemption is based upon a method that not only is not mandated by the FTC, but is one that the FTC itself understands may be misleading.

2. Petitioners' contention that several FTC consent decrees with tobacco companies related to

the marketing of "light" cigarettes impliedly preempt state laws pertaining to such marketing is foreign to the practice and traditions of the FTC. As discussed above, the FTC and States work cooperatively in fighting deceptive practices, and it is not uncommon for the FTC and the States to enter into parallel consent decrees with the same target for the same conduct. It would seem, therefore, that if the FTC intended that a particular consent decree or set of decrees was to have the extraordinary, and as of yet unprecedented, effect of preempting state law for an entire industry, it would say so. Nowhere in the history presented by Petitioners is there any hint of such intent by the FTC. It is certainly not found in the FTC consent decrees themselves, *In re American Tobacco Co.*, 119 F.T.C. 3 (1995); *In re American Brands, Inc.*, 79 F.T.C. 255, 257 (1971); *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). Indeed, the consent decrees do not discuss any effect on state law, and do not express any notion of exclusivity.

The lower court case Petitioners rely upon to argue that FTC consent decrees may preempt state law regarding unfair trade practices does not support their argument. In *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990), the court of appeals found no preemption of New York's Lemon Law as a result of an FTC consent order with General Motors prescribing a dispute resolution process for automobiles.

Most notably for purposes of this matter, the court made clear that, "[u]nlike an agency regulation which has industry-wide effect, a consent order is binding only on the parties to the agreement." *Id.* at 36. Thus, even under this case, the consent decrees upon which Petitioners rely so heavily do not preempt state action against other tobacco companies, such as Petitioner Philip Morris. And although the court opined that a consent order could theoretically preempt state law actions against the party to the consent decree, it expressly noted that "[t]he mere fact that the instant Order has been entered . . . is insufficient to preclude supplemental state regulation. As with any preemption analysis, the lodestar of our inquiry is the 'intent' of the FTC in entering into the Consent Order." *Id.* at 39. The court went on to apply a rigorous test in an effort to harmonize the FTC order and the state law, taking into consideration the presumption against preemption and the FTC's statements, if any, regarding preemption and the role of the States.

Nor did the FTC express the intent to preempt state law in any of its other actions, such as its role in the 1970 agreement between the tobacco companies. *See* Pet. Br. 2-13, 46-55. None of those actions on their face purported to preempt state law, discussed their effect on state law, or expressed any notion of exclusivity which would prompt a State or citizen to be concerned about preemption. Petitioners' argument therefore undermines the protections normally afforded by the FTC when dealing with the issue of

preemption, and – contrary to FTC practice – leaves the States entirely in the dark as to when the FTC intends to preempt state law. Petitioner's theory forces States and their citizens to guess regarding preemption every time the FTC signs a consent decree, files a lawsuit, or, indeed, does nothing at all. Preemption does not rest upon thin threads of the sort Petitioners spin.

3. Petitioners' reliance on *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000), for the proposition that preemption may be implied even in the face of a saving clause is misplaced. Pet. Br. 55-56. This Court has emphasized the "need for analysis of an individual statute's pre-emptive effects." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995).[4] Several factors distinguish the present case from *Geier*. First, the Court in *Geier* focused on safety standards promulgated by the Department of Transportation under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* (1988). Here, by contrast, no federal regulations support Petitioners' preemption claim. In other words, rulemaking protections were available in *Geier*, while none were available regarding the actions upon which Petitioners rely.

[4] The laundry list of cases found at Brief of the National Association of Manufacturers as Amicus Curiae, at 19-20, dealing with other statutes is therefore irrelevant.

Second, the underlying statute at issue in *Geier* had an express preemption provision. The Court found that the express preemption provision and the saving clause, "read together, reflect a neutral policy, not a specially favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles." *Id.* at 870-71. By contrast, because Congress chose not to include a preemption provision in the FTC Act, the balance here is strongly in favor of "saving" and against preemption. And in the context of deceptive practices by tobacco companies, the Court in *Cipollone* has already struck that balance under the FCLAA preemption provision, by finding certain state-law actions preempted and others not. Nothing in the FTC Act or the FTC's actions changes that.

Finally, the FTC Act saving clause is more expansive than the one before the Court in *Geier*, which read: "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e), formerly codified at 15 U.S.C. § 1397(k). Section 57b(e), by contrast, states that the remedies provided to the FTC by Congress "are in addition to, and not in lieu of, any other remedy or right of action provided by State . . . law." Section 57b(e) reinforces this Court's decisions in *Cipollone* and *Lorillard*. Nothing in the saving clause evinces any intent by

Congress to preempt state-law claims against deceptive practices such as those at issue here.

* * *

The common purpose of the FTC Act and State unfair trade practices and consumer protection acts, such as Maine's, is to protect consumers from deceptive practices. The FTC has been most sensitive to this relationship, as have the courts. Finding preemption here would run counter to how the FTC and the States have worked cooperatively together, and would do serious harm to that relationship and to the protections afforded consumers through their efforts. The particular claims of deception here fall squarely within those permitted under *Cipollone*, and the FTC has not established a cohesive policy impliedly preempting the States with respect to deceitful conduct by tobacco companies regarding "low tar" and "light" cigarettes. For these reasons, the Court should find that the state-law claims before it are not preempted.

## CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

G. STEVEN ROWE
Attorney General of the
State of Maine

PAUL STERN
Deputy Attorney General
(*Counsel of Record*)

LINDA CONTI
Chief, Consumer Protection
Division

JENNIFER WILLIS
CAROLYN SILSBY
Assistant Attorneys General

Six State House Station
Augusta, ME 04333-0006
(207) 626-8568
(207) 287-3145 (fax)

*Counsel for Amici Curiae*