No. 07-562

IN THE

Supreme Court of the United States

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

v.

STEPHANIE GOOD, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* MARYLAND CONSUMER RIGHTS COALITION AND LEGAL RESOURCE CENTER FOR TOBACCO REGULATION, LITIGATION & ADVOCACY IN SUPPORT OF RESPONDENTS

KATHLEEN HOKE DACHILLE *
JACQUELINE M. MCNAMARA
LEGAL RESOURCE CENTER FOR
TOBACCO REGULATION,
LITIGATION & ADVOCACY
500 W. Baltimore Street
Baltimore, MD 21201
(410) 706-1294

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 07-562

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

v.

STEPHANIE GOOD, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* MARYLAND CONSUMER RIGHTS COALITION AND LEGAL RESOURCE CENTER FOR TOBACCO REGULATION, LITIGATION & ADVOCACY IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI CURIAE* [1]

Amicus the Maryland Consumer Rights Coalition is a non-profit organization of consumer advocates

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Blanket letters from the parties consenting to the filing of any and all *amicus curiae* briefs in this case have been filed with the Clerk's office.

focused on consumer rights and fairness and safety in the marketplace. The Coalition seeks to advance and protect the interests of consumers in the State of Maryland through research, education, and advocacy. The Coalition monitors legal proceedings across the country and engages with national partners on issues of concern to Maryland consumers. The Coalition seeks to insure that state consumer protection laws are fully enforceable and are not inappropriately limited by overbroad interpretation and application of preemption provisions in federal law.

Amicus the Legal Resource Center for Tobacco Regulation, Litigation & Advocacy has significant interests in and expertise on legal, policy, and public health issues surrounding tobacco control in the State of Maryland and throughout the United States. In addition to monitoring tobacco-related legal proceedings across the country, the Center, on its own and with the Tobacco Control Legal Consortium, prepares legal briefs as *amicus curiae* in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. Center staff authored and submitted *amicus curiae* briefs to the U.S. Supreme Court in *Rowe v. New Hampshire Motor Transport Association* at both the *certiorari* and merits phases. As a legal resource for cigarette consumers in Maryland, the Center seeks with this brief to insure that injured smokers are not precluded from bringing legitimate consumer fraud claims under State law.

SUMMARY OF ARGUMENT

Respondent Stephanie Good has stated a legitimate cause of action for deceptive acts or practices under the Maine Unfair Trade Practices Act ("MUTPA") against Petitioners Philip Morris USA

Inc. and its parent company, Altria Group, Inc. (collectively "PMUSA"). Good alleges that through its advertising and promotion of Marlboro Lights as a product presenting less risk of harm than regular Marlboro cigarettes, PMUSA deceived Good and other Maine consumers into purchasing a product that did not deliver as promised. Hence, Good seeks compensation for the lost benefit of the bargain.

A plurality of this Court made clear in *Cipollone v. Liggett Group, Inc.* that a claim of fraud or misrepresentation premised on a cigarette manufacturer's duty not to deceive consumers is not preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"). *Cipollone* held that while some state law claims alleging deception in the advertising and promotion of cigarettes are preempted by the FCLAA, some claims are not preempted. The critical factor in determining whether a claim is preempted is the predicate duty upon which a claim is based. Causes of action that allege warning neutralization or constitute failure to warn are preempted; those that are based on the cigarette manufacturer's duty not to deceive are not preempted. Based on the MUTPA's imposition of a general duty to not deceive on all commercial actors in Maine, Good's claims are not preempted by the FCLAA.

To construe the FCLAA or *Cipollone* in any other manner would result in immunity for cigarette manufacturers to deceive consumers on matters that concern smoking and health. Given the explicit documentation of PMUSA's deception in the advertising and promotion of its light and low tar and nicotine cigarettes, allowing Good to pursue her consumer fraud claims will result in an equitable and legally sound outcome.

ARGUMENT

Stephanie Good stands as a fine example of thousands of light cigarette smokers in Maine and millions across the country. Good chose to smoke Marlboro Lights because she was led to believe that the product presented lower risk of health hazards than smoking regular Marlboro cigarettes. Good and the other lights smokers in Maine and across the United States were intentionally duped by PMUSA on this issue. In response, Good simply seeks to recover for the lost benefit of the bargain—the typical recovery in consumer fraud cases. She invokes Maine's consumer fraud statute, the standard cause of action for a deceived consumer, to recover the cost of purchasing a product that was in a condition different from that promised. This traditional state consumer fraud claim is no different from the type of state law tort claim held permissible against cigarette manufacturers under this Court's interpretation and application of the FCLAA in *Cipollone v. Liggett Group*.

I. Petitioner PMUSA Intentionally and Fraudulently Marketed Marlboro Lights as a Lower Health Risk Alternative to Regular Cigarette Brands Like Marlboros in Violation of the Maine Unfair Trade Practices Act

Smokers of Marlboro Lights cigarettes, the most popular brand of cigarettes on the market,[2] have long been

[2] Marlboro Lights brand is a cigarette product of Petitioner Philip Morris USA (PMUSA), a subsidiary of Petitioner Altria Group, Inc. *See* http://www.philipmorrisusa.com/en/cms/Company/Financial_Information/default.aspx?src=top_nav (last visited April 8, 2008) (stating that Marlboro brand cigarettes have a U.S. market share of 41%, and that this market share is larger

unaware that they are inhaling the same amount of cancer-causing toxins and nicotine as if they were smoking regular Marlboro brand cigarettes. National Cancer Institute (NCI), *Risks associated with smoking cigarettes with low machine-measured yields of tar and nicotine*, Smoking and Tobacco Control Monograph 13 (NIH Publication No. 02-5074) (2001) [hereinafter "NCI Monograph 13"]. Tragically, since the 1960s, smokers have unwittingly switched from regular to "light" cigarettes under the pretense of decreased health risk and with the false hope of assistance in quitting their deadly habit. Saul Shiffman et al., *Smokers' beliefs about "Light" and "Ultra Light" cigarettes*, Tobacco Control 10 (Suppl. 1), i17-i23 (2001); K. Michael Cummings et al., *What do Marlboro Lights smokers know about low-tar cigarettes?*, Nicotine & Tobacco Research 1, 4 (2004) (". . . Marlboro Lights [smokers]. . . are for the most part . . . misinformed about the health risk of using low-tar and filtered cigarettes."); *see also* Neil D. Weinstein, *Chapter 6: Public Understanding of Risk and Reasons for Smoking Low-Yield Products*, NCI Monograph 13, *supra*. The reduced risk anticipated by lights smokers has not come to fruition, however, as lung cancer, cardiovascular disease, and smoking-related mortality rates have not decreased for these smokers. MJ Thun and DM Burns, *Health impact of "reduced yield" cigarettes: a critical assessment of the epide-*

---

than the combined share of the next ten tobacco companies). Generally light cigarettes are the product of choice of the supermajority of smokers. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 933 (D.D.C. 2006), *clarified*, 477 F. Supp. 2d 191 (2007), *appeals pending*, Nos. 06-5267 *et al.* (D.C. Cir.) (findings of fact stating that "[o]f the almost 47 million Americans who smoke cigarettes . . . more than 81% smoke "light" or "ultra light" cigarettes").

miological evidence, Tobacco Control 10 (Suppl. I), i4–i11 (2001). The findings in the NCI Monograph clearly demonstrate that people who switch to low-tar or light cigarettes from regular cigarettes are likely to inhale the same amount of cancer-causing toxins and that these smokers remain at high risk for developing smoking-related cancers and other diseases. *Id*.

What is most insidious and reprehensible, however, is the fact that cigarette manufacturers like PMUSA have, in fact, created and preyed on this false hope. PMUSA, which is in the best position to provide the true measure of its cigarettes' tar and nicotine delivery to consumers, falsely marketed light and lower tar and nicotine cigarettes as a lower health risk alternative to smoking regular brand cigarettes. Blinded by its overarching economic goals of "keep[ing] smokers smoking; stopp[ing] smokers from quitting; encourag[ing] people, especially young people, to start smoking; and increas[ing] corporate profits," *United States v. Philip Morris USA, Inc*., 449 F. Supp. 2d 1, 431 (D.D.C. 2006), *clarified*, 477 F. Supp. 2d 191 (2007), *appeals pending*, Nos. 06-5267 *et al*. (D.C. Cir.), PMUSA seized an opportunity to develop and market an ostensibly reduced risk product to induce smokers who otherwise would quit to continue smoking, thereby endangering their health. In so doing, PMUSA has deceived—and continues to deceive—all smokers of its Marlboro Lights cigarettes, and thereby has violated—and continues to violate—Maine's consumer fraud statute.

One of those deceived Maine consumers, Good, relied on PMUSA to provide accurate information about the Marlboro Lights cigarettes she smoked since 1992. At the very least, Good reasonably expected PMUSA not to deceive her about the cigarettes' true tar and

nicotine yields when smoked by a human—versus a machine. When PMUSA failed her, Good turned to Maine's Unfair Trade Practices Act ("MUTPA") for appropriate recourse. *See* Me. Rev. Stat. Ann. tit. 5, §207.

The authority to protect their citizens from unfair and deceptive trade practices that might result in the loss of money or property stems from the states' traditional police powers. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) ("neither logic nor precedent invites any distinction between state regulations designed to keep unhealthful or unsafe commodities off the grocer's shelves, and those designed to prevent the deception of consumers"); *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992) (consumer protection is one area "over which the states have traditionally exercised their police powers"). It is within the plenary police power that most states have adopted unfair trade practices acts. *See* Richard A. Leiter, Deceptive Trade Practices, Business Organizations; Consumer Protection, 50 State Statutory Survey 2007 (noting that most states have adopted the Uniform Deceptive Trade Practice Act or a similar law).

Making illegal "[u]nfair or deceptive acts or practices in the conduct of *any* trade or commerce," Me. Rev. Stat. Ann. tit. 5, §207 (emphasis added), the MUTPA was created as Maine's version of the Federal Trade Commission (FTC) Act. *Bartner v. Carter*, 405 A.2d 194, 199-201 (Me. 1979). The states' unfair trade practices statutes, like the MUTPA, provide a remedy to citizens who have been wronged by corporate conduct in the marketplace, as Good alleges in her Complaint. The term "deceptive act or practice" is not defined in the MUTPA, but has been inter-

preted by Maine courts to mean "a material misrepresentation, omission, act or practice that is likely to mislead consumers acting reasonably under the circumstances." *State v. Weinschenk*, 868 A.2d 200, 206 (Me. 2005) (citing *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 164-65 (1984)). "A material representation . . . 'involves information that is important to consumers and, hence, [is] likely to affect their choice of, or conduct regarding, a product.'" *Weinschenk*, 868 A.2d at 206 (quoting *In re Cliffdale Associates, Inc.*, 103 F.T.C. at 165). On a proper pleading as in the Good Complaint, the fact-finder determines whether an act or practice is deceptive in violation of the MUTPA. *Weinschenk*, 868 A.2d at 204, 206 (citing *Binette v. Dyer Library Association*, 688 A.2d 898, 906 (Me. 1996)). "To justify a finding of unfairness, the act or practice: (1) must cause, or be likely to cause, substantial injury to consumers; (2) that is not reasonably avoided by consumers; and (3) that is not outweighed by any countervailing benefits to consumers or competition." *Weinschenk*, 868 A.2d at 206 (citations omitted). The "defendant's good faith or lack of intent to deceive" cannot save an act or practice from being found deceptive under the MUTPA. *Id.* (citation omitted).

PMUSA's actions with regard to Marlboro Lights cigarettes clearly amount to material representations and deceptive acts under Maine consumer protection law. Good alleges that PMUSA "has misrepresented material facts by describing its 'Lights' as such or as having 'lower tar and nicotine,' and that [PMUSA] . . . did so with the intent to deceive." *Good v. Altria Group, Inc.*, 501 F.3d 29, 31 (1st Cir. 2007). Good alleges that, before it started marketing Marlboro and Cambridge Lights, PMUSA knew that through "compensation," smokers of its light cigarettes products

ingested the same amount of tar and nicotine as they did from smoking regular Marlboros. *Id.* Good would not have purchased and smoked Marlboro Lights but for PMUSA's deceptive marketing practices, which directly affected her choice to switch from traditional Marlboros. Good alleges that "the relative levels of [tar and nicotine] bear on a reasonable consumer's decision on which cigarette to purchase because consumers understand that reducing the quantities of tar and nicotine in cigarettes reduces their adverse health effects." *Id.*

As the U.S. District Court for the District of Columbia found in *United States v. Philip Morris*, 449 F. Supp. 2d at 431, PMUSA has long known that its light and low tar and nicotine cigarettes deliver the same amount of tar and nicotine as its regular brand counterparts due to smokers' practice of inhaling deeper and longer and smoking more light cigarettes. Further, PMUSA has been aware for some time that the Cambridge Filter Method,[3] which PMUSA uses as the basis for this representation, is also fatally flawed. *Id.* at 436. Despite this knowledge, the company continued to mislead consumers and deny the existence of smoker compensation behavior.

PMUSA claims that the terms light and low tar describe the strength of taste and flavor in its products. *United States v. Philip Morris,* 449 F. Supp. 2d at 512; *see also* http://www.philipmorrisusa.com-/en/cms/Products/Cigarettes/Tar_Nicotine/default.aspx?src=top_nav (last visited June 11, 2008) (stating that "PM USA frequently describes cigarette brands

[3] The Cambridge Filter Method is also commonly referred to as the "FTC Method."

using these descriptors that facilitate a smoker's ability to distinguish among our products"); *but compare United States v. Philip Morris*, 449 F. Supp. 2d at 478 (former PMUSA CEO James Morgan admitting that PMUSA never meant for Marlboro Lights moniker to refer to product taste as opposed to "lower tar and nicotine"; stating "light" means nothing "in terms of taste"). Flavor is unlikely what most smokers had in mind when they decided to try Marlboro Lights, and flavor is most assuredly not the reason smokers chose to continue smoking these products. Market research definitively shows that smokers do not smoke light and low tar cigarettes based on any taste preference over regular, full-flavor cigarettes; on the contrary, PMUSA and other light cigarette manufacturers "are well aware from their own research that a majority of smokers believe that low-tar cigarettes are healthier, are willing to buy them for precisely that reason, and are willing to sacrifice taste for what they believe to be less harmful cigarettes." *United States v. Philip Morris,* 449 F. Supp. 2d at 912 (emphasis added).

Thus, PMUSA has not only known but has, in fact, *intended* that the descriptors would be understood to mean that smokers had a choice of a lower health risk cigarette that could also help them quit. *United States v. Philip Morris*, 449 F. Supp. 2d at 430-31. The company actively bolsters this misconception in its marketing. *Id.* MUTPA §207 protects Maine's citizens from exactly this type of fraudulent misrepresentation and ensures that companies like PMUSA who defraud consumers like Stephanie Good pay for such unlawful actions. *See State v. Weinschenk*, 868 A.2d 200, 206 (material representations in designer/builder's advertisements of homes to buyers who otherwise would not have purchased the homes—

which were defective due to poor construction—constituted deceptive acts that violated the MUTPA).

PMUSA's practice of deceiving consumers into believing that Marlboro Lights were "healthier" to smoke than Marlboro Reds created substantial injury by luring smokers into the false belief that they had made a better choice for their health—likely prompting some to switch rather than quit smoking altogether. Consumers could not have known that they were getting at least the same, if not greater, amounts of tar and nicotine from Marlboro Lights cigarettes as regular, full-flavored cigarette brands; the phenomenon of smoker compensation being beyond the ken of the ordinary consumer. And it is inconceivable that this purposeful deception was to the benefit of consumers or to competition in the marketplace; hence, nothing outweighs PMUSA's scheme to defraud Good and millions of American consumers. Stephanie Good should be permitted to pursue this properly pled consumer fraud claim.

II. Respondent Stephanie Good's Claim that PMUSA Violated the Maine Unfair Trade Practices Act is Not Expressly Preempted by the Federal Cigarette Labeling and Advertising Act

Understanding the nature of Good's claim is essential to answering the preemption question presented to this Court. Good does not claim personal health-related injury or seek damages based on the negative health consequences of her smoking Marlboro Lights cigarettes; instead Good asks for proper recourse for PMUSA's fraudulent behavior in deceptively marketing and selling those cigarettes. *Good v. Altria Group*, 501 F.3d at 30-31. As is her right under the MUTPA,

Good asks for reimbursement of the money she paid for a product she was deceived into believing presented a lower health risk than her usual brand, but which turned out to be otherwise.[4] This is precisely the type of claim that remains viable against a cigarette manufacturer. As the First Circuit properly concluded, PMUSA's argument that Good's claim is preempted is simply wrong.

In enacting the Federal Cigarette Labeling and Advertising Act ("FCLAA"),[5] Congress intended "to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Congressional Declaration of Policy and Intent, 15 U.S.C. §1331(1), *as amended by* the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (Apr. 1, 1970). To foster this uniform program, Congress included a provision that preempted

---

[4] Good also seeks punitive damages and attorney's fees under MUTPA §213. *See Good v. Altria Group,* 501 F.3d at 31.

[5] Pub. L. No. 89-92, 79 Stat. 282 (July 27, 1965).

any state law affecting cigarette advertising: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. §1334(b).

By claiming that its deceptive advertising of lights and use of low tar and nicotine descriptors are protected from liability under §5(b) of the FCLAA, PMUSA expects to be treated differently from any other manufacturer conducting business in Maine. PMUSA essentially asks for a "free pass" to defraud those Maine citizens who unwittingly purchased and smoked Marlboro Lights cigarettes thinking they received a benefit vis-à-vis regular Marlboros. Congress in no way intended such a result.

A. This Court's 1992 Plurality Opinion in *Cipollone v. Liggett Group* Provides a Viable Exception for Good's State-Law Claim of Fraudulent Misrepresentation under the MUTPA.

A plurality of this Court recognized in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), that some state-law claims are not subject to FCLAA preemption. That decision created a framework regarding FCLAA preemption of state tort law claims that has survived for sixteen years and is applicable to the state deceptive and unfair practices statute at issue here. Indeed, Good's consumer fraud claim falls neatly within the plurality's description of viable causes of action.

Rose Cipollone smoked cigarettes for 42 years before her diagnosis of lung cancer and ultimate demise from that smoking-caused disease. Alleging that she

had been deceived into believing that smoking was not hazardous to her health, Cipollone sued cigarette manufacturers for damages resulting from her lung cancer; her family continued the case after her demise. Cipollone claimed, *inter alia*, that manufacturers fraudulently misrepresented health hazards to consumers and conspired to deprive the public of medical and scientific information about smoking, all in violation of New Jersey law. *Id.* at 504. Defendant cigarette manufacturers asserted that Cipollone's claims were preempted by the FCLAA. In *Cipollone*, this Court interpreted FCLAA preemption to mean that federally mandated warnings do not always bar smokers from suing manufacturers under state personal-injury laws. *Id.* at 528-29.

The *Cipollone* Court clarified two important steps in any FCLAA preemption analysis. First, for each claim, an evaluation should be made "whether the legal duty that is the predicate of the common-law damages action constitutes a requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion." *Id.* at 523-24.

Second, the preemption determination depends on the specific allegations that form the basis of the claim; a superficial review of the type of claim—intentional or unintentional tort or liability for an act or for an omission—is not sufficient to answer the FCLAA preemption question. State-law claims are neither uniformly preempted nor uniformly allowed by the FCLAA. *Id.* at 528-29. Ultimately, this Court found it necessary to look beyond the category attached to plaintiff's common-law claims and, instead, to evaluate each claim to determine whether it was in fact preempted by the 1969 Act. *Id.* at 523.

Fraudulent misrepresentation "claims based on allegedly false statements of material fact made in advertisements" for cigarettes are not preempted, because "such claims are predicated not on a duty 'based on smoking and health', but rather on a more general obligation – the duty not to deceive." *Id.* at 528-29. Only claims alleging that cigarette manufacturers' omissions or statements in advertising or promotion that constitute the "failure to warn" or the "neutralization" of federally mandated warning labels are preempted. *Id.* at 530.

To support its categorical framework, the *Cipollone* plurality pointed to Congressional intent. With the FCLAA, Congressional intent is that the phrase "based on smoking and health" be construed narrowly, so as not to proscribe the regulation of deceptive advertising.[6] As stated in the Senate Report, the FCLAA's "'preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health*. It would in no way affect the power of any State . . . with respect to . . . *police regulations*.'" *Cipollone,* 505 U.S. at 529 n. 26 (citing S. Rep. 96-566, at 12 (1969) (emphasis supplied by Court)). *See also Cipollone*, 505 U.S.at 518 (the Court must construe the FCLAA's preemption provision in view of the presumption against preempting state police power regulations).

---

[6] Notably, the FCLAA explicitly reserves the authority of the Federal Trade Commission ("FTC") to identify and punish cigarette companies' deceptive advertising practices. 15 U.S.C. §1336. The FTC's failure to act pursuant to such authority should not foreclose Good from pursuing her rights as a deceived consumer under the MUTPA.

Congress did not intend to insulate tobacco companies from longstanding state laws governing fraud, promulgated pursuant to traditional state police powers, which are binding on all commercial actors. *Id.* at 528-29. The single, uniform standard of "falsity" distinguishes state-law requirements based on the general "duty not to deceive" from state-law requirements or prohibitions based on "smoking and health." *Id.* at 529.

This Court emphasized that its reading of "based on smoking and health" was not at cross purposes with Congress' intent to avoid the imposition of diverse labeling and advertising standards by the states. "State-law prohibitions on false statements of material fact" or "state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. . . . [T]he phrase 'based on smoking and health' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements"—even if those statements pertain to smoking and health.[7] *Id.* (holding FCLAA does not preempt

[7] Petitioners' arguments notwithstanding, this Court's holding in *Lorillard v. Reilly*, 533 U.S. 525 (2001), is completely inapposite to the case at hand. *See* Pet. Br. at 18, 32-37. *Reilly* involved the direct control of cigarette and tobacco advertising through regulations promulgated by the Massachusetts Attorney General under Mass. Gen. Laws ch. 93A, a consumer protection statute similar to the MUTPA. *See Good v. Altria Group*, 501 F.3d at 38. This Court held that the Massachusetts regulations, controlling the size and placement of cigarette ads, fell within §5(b)'s preemption of any "requirement or prohibition based on smoking and health . . . imposed under state law with respect to the advertising or promotion of any cigarettes," because the regulations were "motivated by" and "intertwined with the concern about cigarette smoking and health." *Reilly*, 533 U.S. at 548.

claims based on allegedly fraudulent statements made in tobacco companies' advertisements).

B. The First Circuit Court of Appeals Correctly Applied the *Cipollone* Framework to Determine that the FCLAA does not Expressly Preempt Good's Claim

The First Circuit held that Good's allegations that PMUSA "made material statements of fact that it knew to be false . . . to encourage smokers to purchase its products, and that smokers did so in reliance on those statements . . . state a claim for fraudulent misrepresentation" under the MUTPA. *Good v. Altria Group*, 501 F.3d at 42 (citing Restatement (Second) of Torts § 525 (1977)). The court thus correctly applied the *Cipollone* framework to conclude that Good's claim was not expressly preempted by the FCLAA. *Good v. Altria Group*, 501 F.3d at 58. Specifically, the court found that Good's fraudulent misrepresentation claim was based on a general "duty

---

As the First Circuit in *Good v. Altria Group* correctly explained:

> [Respondents'] claims are indeed "intertwined with" the concern about cigarette smoking and health," just as surely as the regulations in *Reilly* were; the difference, however, is that those regulations were themselves the "prohibitions," while the prohibition here is the ban on "unfair or deceptive acts or practices in the conduct of any trade or commerce" under the [MUTPA]. And *Cipollone*, as we have noted, treats a state-law "duty not to deceive" as broader than a "duty 'based on smoking and health' and therefore beyond the reach of FCLAA preemption.

501 F.3d at 39 (citations omitted).

not to deceive" and not a requirement or prohibition based on smoking and health. *Id.* at 45-46.

In Stephanie Good's case, as in Rose Cipollone's, the predicate legal duty at issue is the manufacturer's duty not to deceive; more specifically, to refrain from making fraudulent misrepresentations about its products. This duty is pressed upon *every* manufacturer conducting trade or commerce in the State of Maine. *See* Me. Rev. Stat. Ann. tit. 5, §207. By analogy, if the claim at issue was that a purportedly "lower fat" candy bar was not, in fact, lower in fat than its regular counterpart, the duty not to deceive could be invoked to impose liability on the candy manufacturer for the misrepresentation.[8]

---

[8] In its *amicus* brief, the U.S. Chamber of Commerce likens Good's labeling claim to that of a consumer who buys cookies labeled "Reduced Fat" to curb calorie intake, consumes large quantities of the cookies—thus eliminating any health benefits—and then sues the cookie manufacturer because the label does "not fully reflect what plaintiffs claim are 'real-world' [eating] conditions." Br. *Amicus Curiae* Chamber of Commerce of the United States of America in Support of Petitioners, *available at* http://www.abanet.org/publiced/preview/briefs/pdfs-/07-08/07-562_PetitionerAmCuCoC.pdf. This analogy is not only inapposite, it is absurd. First, cookies are not deadly or addictive like cigarettes. Moreover, unlike tobacco products, cookies are regulated by the U.S. Food and Drug Administration; as such, packages are required to contain nutrition labels by which consumers can compare information such as sugar, fat, and calorie content based on a given serving size. Consumers therefore have sufficient information available to enable them to make a *conscious choice* to eat more than the recommended serving size. In stark contrast, cigarette manufacturers are not required to disclose product ingredients; the only labeling requirements are the warnings mandated by the FCLAA. PMUSA voluntarily added information about tar and nicotine yields and used terms like light and low tar to deceive consumers into believing that switching to light cigarettes offers a health benefit, knowing

Although the manufacturer's claim of lower fat content may be designed to entice health-conscious consumers, much like the light descriptor for cigarettes, the falsity of the descriptor and the consumer deception that occurs create liability pursuant to the longstanding duty not to deceive. The *Cipollone* framework requires that, in the context of the MUTPA's prohibition on deceptive acts, cigarette manufacturers like PMUSA be treated the same as that candy manufacturer.

Importantly, the First Circuit made clear that the same alleged conduct by a cigarette manufacturer can give rise to a number of claims, some of them preempted, some of them not; consequently the same conduct can result in a claim that can be categorized as either a "warning neutralization" claim (preempted) or a fraudulent misrepresentation claim (not preempted)—or both. *Good v. Altria Group*, 501 F.3d at 44-45. Thus, even if this Court were to find that Good's claim about the descriptors constitutes a warning neutralization claim, by suggesting that the brand descriptors ameliorate the impact of the re-

---

that the Cambridge Filter Method was inaccurate for measuring human consumption and that smoker compensation behavior would result in virtually no change in tar and nicotine yield in an individual consumer. And smokers do not knowingly "overconsume" light cigarettes. A smoker does not consciously take deeper, longer, or more frequent puffs or smoke a greater number of cigarettes; it is due to the addictive nature of nicotine that the smoker *unconsciously and without choice* compensates for any lowered nicotine by engaging in these behaviors, which lead to the inhalation of greater amounts of tar, thus negating any ostensible health benefits. Offering a reduced fat cookie with accurate nutritional information is not at all similar to offering a deadly and addictive product using deceptive terms in a misleading advertising and promotional scheme.

quired health warnings, it does not follow that those statements could not simultaneously support a non-preempted fraudulent misrepresentation theory of recovery, such as Good's claim that PMUSA deceived her into buying Marlboro Lights cigarettes.

Furthermore, the First Circuit stressed that Good's claim was not based on what PMUSA "should have said," which would render it a failure-to-warn claim, but what PMUSA "did in fact say: that Marlboro Lights . . . have 'lower tar and nicotine' than their full-flavor counterparts," *Id*. at 42, which is false.

C. Other Courts Have Properly Applied *Cipollone* to Exempt State-Law Claims from FCLAA Preemption

That Good's claim is precisely the type of claim found viable in *Cipollone* is supported by the clear majority of courts from around the country. Because a contrary conclusion would mean a reversal of *Cipollone* and a free pass to deceive for cigarette manufacturers—as long as the deception relates to smoking and health—these courts must be right.

Courts that have followed *Cipollone* examined closely the predicate duty on which the plaintiffs' claims against a cigarette manufacturer are based. Those courts have consistently found that claims based on the duty not to deceive, like Good's claims here, are not preempted by the FCLAA even if the misrepresentations or fraud relate to smoking and health. For example, the Second Circuit Court of Appeals found that a health insurer's claims that PMUSA distorted public knowledge of the health dangers associated with smoking, resulting in increased costs of treating insured smokers, were claims of misrepresentation, the predicate duty of which is the duty

not to deceive. As such, the insurer's claims were not preempted by the FCLAA. *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA Inc.*, 344 F.3d 211 (2d Cir. 2003). Similarly, the Sixth Circuit Court of Appeals, although clearly frustrated with the plaintiff's inarticulately drafted Complaint, parsed through the claims and found that the fraud claims against cigarette manufacturers that were premised on a general duty not to deceive were not preempted by the FCLAA. *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 348 (6th Cir. 2000).

These courts have not ignored *Cipollone*'s determination that some claims are preempted by the FCLAA; rather, the courts have demonstrated a keen understanding of the distinct claims allowed and disallowed by this Court. In *Blue Cross Blue Shield*, the Second Circuit made clear that the jury instructions insured that "liability was predicated on [the cigarette manufacturers'] affirmative misrepresentations rather than on their alleged failures to disclose." 344 F.3d at 222. And in *Glassner*, the Sixth Circuit explained that common-law fraud claims were preempted by the FCLAA to the extent that the claims were predicated on a duty to issue additional or clearer warnings through advertising. 223 F.3d at 348. These decisions fall perfectly within the rubric created in *Cipollone*.

Other state and federal courts have similarly interpreted and applied *Cipollone* to preserve some, but not all, fraud claims even when the fraudulent misrepresentations relate to smoking and health.[9] Per-

[9] *See, e.g., Gerrity v. R.J. Reynolds Tobacco Co.*, 399 F. Supp. 2d 87 (D. Conn. 2005) (common law tort actions based on state laws not motivated by health concerns, but rather by public policy to protect consumers from fraud were not preempted);

haps the best example here is *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 199 (Minn. Ct. App. 2007) in which the Minnesota Court of Appeals found that manufacturers of light cigarettes knowingly and intentionally engaged in fraud and misrepresentation in advertisements for the purpose of inducing consumers to purchase the low tar and nicotine cigarettes. As with the Second and Sixth Circuits, the Minnesota court distinguished between preempted and non-preempted claims, allowing fraud claims based on the duty not to deceive and disallowing claims that "suggest that [cigarette manufacturers] had a duty to warn consumers about the dangers of smoking light cigarettes." *Id.* at 199. The *Dahl* court examined both the First Circuit's decision in *Good* and a disparate Fifth Circuit Court of Appeals' decision in *Brown v. Brown & Williamson Tobacco Corp*., 479

Izzarelli v. R.J. Reynolds Tobacco Co., 117 F. Supp. 2d 167 (D. Conn. 2000) (false representation claims based on duty not to deceive, not health and smoking, thus not preempted); *In re Simon II Litigation*, 211 F.R.D. 86 (E.D. N.Y. 2002) (fraud claims not preempted since involved state's traditional police powers, not advertising); *Tompkins v. R.J. Reynolds Tobacco Co*., 92 F. Supp. 2d 70 (N.D.N.Y.2000) (claim alleging that false statements misled smoker was not preempted); *Hill v. R.J. Reynolds Tobacco Co*., 44 F. Supp. 2d 837 (W.D. Ky. 1999) (non-failure-to-warn strict liability claims and fraud claims based on non-disclosure were not preempted); *Hollar v. Philip Morris Inc*., 43 F. Supp. 2d 794 (N.D. Ohio 1998) (claims not preempted since based on a state law duty not to make false statements of material fact or to conceal such facts); *Scott v. American Tobacco Co., Inc*., 949 So. 2d 1266 (La. Ct. App. 4th Cir. 2007) (claims not preempted because tobacco companies intentionally engaged in actions designed to distort the public knowledge concerning smoking and health); *Tomasino v. American Tobacco Co*., 23 A.D.3d 546, 807 N.Y.S.2d 603 (2d Dep't 2005) (state-law causes for fraudulent concealment of facts regarding dangers of using tobacco products were not preempted).

F.3d 383 (5th Cir. 2007), concluding that the First Circuit's rationale was more persuasive and that the Fifth Circuit misapplied the *Cipollone* framework. *Dahl*, 742 N.W.2d at 194-95.

D. The Fifth Circuit Got it Wrong in *Brown v. Brown & Williamson Tobacco Corp.* by Considering the Merits of the Plaintiff's Claim Rather than the FCLAA Preemption Question

By deciding that the plaintiff's claims were without merit, rather than evaluating whether those claims were preempted, the Fifth Circuit in *Brown v. Brown & Williamson Tobacco Corp*. erred by placing the cart of merit before the horse of preemption. *See Good v. Altria Group*, 501 F.3d at 45; *Dahl*, 742 N.W.2d at 194-95. As such, the *Brown* decision stands as one court's finding, based solely on the pleadings, that one cigarette manufacturer—Brown & Williamson—did not deceive consumers in the marketing of its light cigarettes. The *Brown* decision is not at all helpful to resolution of the preemption question at issue here.

Although the Fifth Circuit began by correctly stating that "after *Cipollone*, cigarette manufacturers, under certain circumstances, may be held liable for fraud under state law for affirmative misrepresentation of material fact," *Brown*, 479 F.3d at 391, the court then failed to apply the *Cipollone* rubric. Instead, the court considered the merits of the fraud allegation, finding that because "cigarettes labeled as light or low-tar do deliver less tar and nicotine as measured" by the Cambridge Filter Method, the terms light and lowered tar and nicotine cannot be "inherently deceptive or untrue." *Id.* at 392. The court held that Brown failed to allege fraud or misrepresenta-

tion; therefore, Brown failed to allege claims that fit in the non-preempted category. *Id.* at 395. The Fifth Circuit's rationale is incorrect because it confuses an assessment of the merits of a fraudulent misrepresentation case with the determination of whether the claim is preempted under the FCLAA. *See Dahl*, 742 N.W.2d at 194-95.

This Court should be careful to determine only whether Good's claim is preempted by the FCLAA; consideration of the viability of Good's fraud claim is not appropriate here. As the First Circuit correctly stated, "the assertion that Marlboro Lights and Cambridge Lights rate lower in tar and nicotine than their full-flavored cousins according to the Cambridge Filter Method may ultimately affect whether the plaintiffs can show that the challenged statements are false;" however, the effect of the descriptors' claimed accuracy does not have any relevance in deciding the express preemption question under the FCLAA. *Good v. Altria Group*, 501 F.3d at 44-46; *see also Cipollone*, 505 U.S. at 524 ("We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume, *arguendo*, that they are."); *accord Dahl*, 742 N.W.2d at 194 (holding that "appellants may ultimately prove unsuccessful in their claims, but this does not influence our preemption analysis").

Because the First Circuit got it right, this Court should affirm the First Circuit's rationale and application of the *Cipollone* exception to FCLAA preemption for state-law claims grounded on the duty not to deceive, refuse to cut off the longstanding and crucial avenue of protection for citizens afforded by state consumer protection statutes, and give Good the

opportunity she deserves to have her MUTPA claim considered on the merits.

III. Considering the Outrageous Historical Conduct Revealed in Internal Tobacco Industry Documents, *Cipollone's* Fraudulent Misrepresentation Exception Should Be Kept Alive and Read Broadly

Petitioners seek to remedy their inability to escape the consequences of their egregious conduct toward Good and others by asking this Court to overturn the decision in *Cipollone* simply because the decision stands in Petitioners' way. Pet. Br. at 43 ("If this Court were to conclude that respondents' claims are not expressly preempted under the framework articulated by the *Cipollone* plurality, then [this Court] should reexamine that framework."). If there has ever been an appropriate context in which to reinforce the plurality's decision in *Cipollone*, the light and low tar and nicotine descriptor context is the one.

Fraudulent misrepresentation in the tobacco industry context has been given new meaning since the signing of the Master Settlement Agreement ("MSA") in 1998 by PMUSA and three other cigarette manufacturers.[10] At the time of the *Cipollone* opinion in 1992—six years before the MSA—a plurality of this Court understood that there may be valid state-law claims of fraud or misrepresentation specifically against the tobacco industry. This Court's decision

[10] Originally signed by PMUSA, R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company, the MSA was later signed by over forty additional cigarette manufacturers. Master Settlement Agreement (Nov. 23, 1998), *available at* http://www.naag.org-/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605-_cigmsa.pdf.

was prescient, given the industry's outrageous historical conduct revealed in internal industry documents made public as a result of the MSA. *See, e.g.,* www.tobaccodocumentsonline.org for an extensive online compilation of these documents.

The internal documents reveal a persistent and pernicious approach by cigarette manufacturers to addict smokers and avoid liability for the consequences. Specifically, PMUSA actively reassured health-conscious smokers that light cigarettes were a less risky alternative to regular brands, knowingly used defective filters, and manipulated public opinion and policy by questioning research findings implicating smoking as a cause of cancer. K.M. Cummings & R. W. Pollay, *Exposing Mr Butts' tricks of the trade*, Tobacco Control 11 (Suppl I), i1–i4 (2002).

In 1992, a plurality of this Court determined that the fraudulent misrepresentation exception to FCLAA preemption was important for the protection of consumers, without knowing the true breadth of the tobacco industry's deceit. Not only has PMUSA defrauded its customers in the past but today—sixteen years after *Cipollone*—the company continues to sell and market the same Marlboro Lights cigarettes despite lingering consumer misperceptions about risk reduction. Keeping *Cipollone's* fraudulent misrepresentation exception alive and reading it broadly is imperative; otherwise cigarette manufacturers will be granted special protection from state police powers and allowed to deceive consumers on issues concerning smoking and health without penalty.

A broad interpretation is also consistent with recent domestic and international determinations in the judicial, legislative, and policy arenas that descriptors such as light and low tar and nicotine—

and similar offshoots—are fraudulent and should be banned. In 2006, the U.S. District Court for the District of Columbia permanently enjoined PMUSA from using the descriptors "low tar," "light," "ultra light," "mild," "natural," and like phrases on its cigarette packaging and in its advertising. *United States v. Philip Morris USA,* 449 F. Supp. 2d 1. That order has been stayed pending PMUSA's appeal.

Moreover, Congress is considering legislation that would empower the U.S. Food and Drug Administration to regulate tobacco products and to ban the use of descriptors such as "light" or "low tar." *See* Family Smoking Prevention and Tobacco Control Act, H.R. 1108, S. 625, 110th Cong. §911 (b) (2) (A) (ii) (2007).[11] Finally, the World Health Organization's Framework Convention on Tobacco Control (FCTC), an international public health treaty, requires parties to prohibit the use of deceptive descriptors in cigarette packaging and labeling by 2010, listing low tar, light, ultra light and mild as examples of such descriptors. *See id.*, Art. 11, Packaging and labeling of tobacco products, 56th World Health Assembly, 21 May 2003 (adopted unanimously). One hundred and fifty-six countries, many for whom tobacco growing is an essential component of the economy, have ratified the treaty. *See* http://www.who.int/tobacco/framework/countrylist/en/index.html (last visited June 11,

[11] The Senate version has 55 co-sponsors and was approved by the Health, Education, Labor and Pensions Committee on August 1, 2007. The House companion bill has 219 co-sponsors—a majority of the House—and was approved by the House Energy and Commerce Committee on April 2, 2008, by a bipartisan vote of 38-12. *See* Alex Wayne, "Bill to Force FDA Tobacco Regulation Moves Through Energy and Commerce," *CQ Today-Regulatory Policy,* Apr. 2, 2008, *available at* http://public.cq.com/docs/cqt/news110-000002696077.html (last visited June 11, 2008).

2008) (listing countries that have signed and subsequently ratified, accepted, approved, and/or confirmed the FCTC). Under then-Secretary of the Department of Health and Human Services, Tommy Thompson, the United States signed the FCTC in 2004; the treaty has not been presented to Congress for ratification.

A federal judge, dozens of members of Congress, and more than a hundred countries recognize the devastating impact that the false consumer choice of light and low tar and nicotine cigarettes has had on public health. That such action is necessary to prevent continuing deception by cigarette manufacturers highlights the necessity for a sustained and broad reading of the fraudulent misrepresentation exception to FCLAA preemption provided under this Court's decision in *Cipollone*.

CONCLUSION

For the foregoing reasons, this Court should affirm the First Circuit's decision, find that Good's claim of fraudulent misrepresentation under the MUTPA is not expressly preempted by the FCLAA, and allow Maine to continue to protect its citizens from unfair or deceptive acts or practices by manufacturers like PMUSA.

Respectfully submitted,

KATHLEEN HOKE DACHILLE *
JACQUELINE M. MCNAMARA
LEGAL RESOURCE CENTER FOR
TOBACCO REGULATION,
LITIGATION & ADVOCACY
500 W. Baltimore Street
Baltimore, MD 21201
(410) 706-1294

* Counsel of Record

Counsel for Amici Curiae