No. 06-465

IN THE

Supreme Court of the United States

SHARON A. PRICE, *et al.*,

Petitioners,

v.

PHILIP MORRIS INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE AMERICAN LEGACY FOUNDATION, ACTION ON SMOKING AND HEALTH, CAMPAIGN FOR TOBACCO-FREE KIDS, CITIZENS' COMMISSION TO PROTECT THE TRUTH, CONSUMER FEDERATION OF AMERICAN, LUNG CANCER ALLIANCE, NATIONAL AFRICAN AMERICAN TOBACCO PREVENTION NETWORK, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, PUBLIC CITIZEN, TOBACCO CONTROL LEGAL CONSORTIUM, TOBACCO CONTROL RESOURCE CENTER, AND U.S. PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

As organizations dedicated to reducing the toll of death and disease associated with tobacco use and to protecting the public against deceptive trade practices, *amici curiae* have a substantial interest in the proper construction of the legal effect of federal agency consent orders on the scope and reach of state consumer protection laws. These state laws serve as critical safeguards against deceptive practices, including those that encourage young people to start smoking and discourage smokers of all ages from quitting. If, as the Illinois Supreme Court held below, a federal agency's decision not to prohibit certain practices in a negotiated consent order can broadly immunize those practices from state regulation, the missions of *amici* will be rendered far more difficult.[1]

The American Legacy Foundation was established in March 1999 as a result of the Master Settlement Agreement between the attorneys general of 46 states and 5 U.S. territories and the tobacco industry. It is dedicated to building a world where young people reject tobacco and anyone can quit. The Foundation develops national programs that address the health effects of tobacco use through grants, technical assistance, youth activism, strategic partnerships, research, counter-marketing and grassroots marketing campaigns, and outreach to populations disproportionately affected by the toll of tobacco. The Foundation's programs include a major national tobacco youth prevention and education effort known as the truth® campaign. Research published in the March issue of the American Journal of Public

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[1] Petitioners have filed with the Court a letter consenting to the filing of all *amicus* briefs, and respondent has consented to the filing of this brief in a letter filed concurrently herewith. No counsel for any party had any role in authoring this brief. Counsel for *amici curiae* previously advised petitioners in connection with an earlier stage of this case, but have not represented petitioners in connection with the preparation or filing of their petition for a writ of certiorari. No one other than *amici curiae* provided any monetary contribution to the preparation or submission of this brief.

Health shows that in 2002, there were 300,000 fewer youth smokers because of truth®. The American Legacy Foundation also promotes a range of programs designed to help adults quit smoking, including quitlines and public awareness and education campaigns.

Action on Smoking and Health (ASH) is a non-profit tax-exempt legal action antismoking organization based in the United States that has been solely devoted to the many problems of smoking for over 36 years. Its principal activity is to serve as a legal action arm of the nonsmoking community, bringing or joining in legal actions concerning smoking, and ensuring that the voice of the nonsmoker is heard. It also serves as an advocate of the nonsmokers' rights movement.

The Campaign for Tobacco-Free Kids works to raise awareness that cigarette smoking is a public health hazard by advocating public policies to limit the marketing and sales of tobacco to children and altering the environment in which tobacco use and policy decisions are made. Tobacco-Free Kids has more than 100 member organizations, including health, civic, corporate, youth, and religious groups dedicated to reducing children's use of tobacco products.

The Citizens' Commission to Protect the Truth was created in 2002 to end youth smoking by supporting the American Legacy Foundation's life-saving truth® campaign. The members of the Commission include all the living former U.S. Secretaries of Health, Education and Welfare; U.S. Secretaries of Health and Human Services; U.S. Surgeons General; and Directors of the Centers for Disease Control and Prevention, from every Administration, Republican and Democrat, since Lyndon Johnson. These public health officials have united—for the first time in this nation's history—because of their shared belief that keeping our children and teenagers free from tobacco is the single most important way to prevent death and disease in this country.

The Consumer Federation of America (CFA) is a nonprofit association organized in 1967 to advance the interests of consumers through advocacy, research, and education.

CFA's current membership is comprised of 300 national, state and local consumer groups throughout the country. These organizations represent more than 50 million consumers. Among other issues, CFA advocates for the rights of those harmed in the marketplace by fraud, negligence, predation, deception, and other illegal or injurious acts. CFA supports the longstanding federalist approach to enforcement—providing for strong federal consumer protections while preserving the flexibility for individual states to continue to protect their citizens. Consumers are best protected when federal and state protections complement one another to provide the broadest possible safety net for vulnerable consumers.

The Lung Cancer Alliance is the only national organization providing patient support and advocacy exclusively to those living with or at risk for lung cancer. Its mission is to reverse decades of stigma and neglect by empowering stakeholders, elevating awareness and changing public health policy.

The National African American Tobacco Prevention Network is a national non-profit organization dedicated to facilitating the development and implementation of comprehensive and community competent tobacco control programs to benefit communities and people of African descent.

The National Association of Consumer Advocates (NACA) is a non-profit group of attorneys and advocates committed to promoting consumer justice and curbing abusive business practices that bias the marketplace to the detriment of consumers. Its membership is comprised of more than 1,000 law professors, public sector lawyers, private lawyers, legal services lawyers, and other consumer advocates across the country. NACA has established itself as one of the most effective advocates for the interests of consumers in this country. Its advocacy takes many forms, including the publication of guidelines for the appropriate use of the class action device in the consumer context.

Public Citizen is a consumer advocacy organization founded in 1971. On behalf of approximately 100,000 mem-

bers nationwide, it appears before Congress, administrative agencies, and the courts on a wide range of issues and works for the enactment and effective enforcement of laws protecting consumers, workers, and the general public. Over the past 35 years, it is has worked to improve public health laws and regulations and to ensure access to the courts for redress of injuries caused by unsafe and defective products, including, in particular, tobacco products.

The Tobacco Control Legal Consortium (TCLC) is a national network of legal centers providing technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC grew out of collaboration among specialized legal resource centers serving six states, and is supported by national advocacy organizations, voluntary health organizations and others.

The Tobacco Control Resource Center, founded in 1979, is a division of the Public Health Advocacy Institute devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

U.S. Public Interest Research Group (PIRG) serves as the federation of non-profit, non-partisan, state PIRGs, which conduct public interest advocacy projects on behalf of their nearly one million members around the country. The PIRGs have a longstanding interest in both reducing the incidence of tobacco use and in preserving strong state remedies against deceptive consumer practices. They have supported smokefree indoor air laws to reduce exposure to second-hand smoke and tobacco tax increases to reduce the incidence of smoking. They have conducted research into tobacco company marketing to youth, including through movie placements. They have supported efforts to enact and preserve strong state consumer laws and enforcement against fraud and deceptive practices.

INTRODUCTION AND SUMMARY OF ARGUMENT

In reversing the trial court's decision holding Philip Morris accountable for decades of deceptive trade practices, the Illinois Supreme Court relied on an illusory federal "authorization" in the form of two Federal Trade Commission (FTC) consent orders to which Philip Morris was not even a party. These consent orders, entered in 1971 and 1995, settled FTC enforcement proceedings brought against certain other tobacco companies for representing that their cigarettes were lower in tar than other brands. Given the narrow focus of these proceedings, these negotiated settlement orders required only that the individual respondents disclose the basis for their representations by revealing their cigarettes' tar and nicotine content. Pet. App. 218a-223a (*In the Matter of American Brands*, FTC Docket No. 8799 (1971)); *id.* at 224a-233a (*In the Matter of the American Tobacco Company*, FTC Docket No. C-3547 (1995)). The Illinois Supreme Court, applying a statutory exemption to consumer fraud liability that exists in similar form in two-thirds of the United States, 815 Ill. Comp. Stat. 505/10b(1),[2] concluded that these two FTC consent orders entered against individual companies had authorized *all* U.S. tobacco companies to use the terms "'low,' 'lower,' 'reduced,' or like qualifying terms, such as 'light,'" provided that they otherwise complied with the FTC consent orders. Pet. App. 79a-80a. This federal "authorization," the court held, broadly immunized such representations from state regulation—no matter how false, how fraudulent, or how damaging to public health. *Id.* at 87a-88a.

The Illinois Supreme Court's decision misconstrued federal law in at least two critical respects. *First*, contrary to the court's holding, FTC consent orders do not *authorize* any person or entity—including the party to the order—to engage in any particular course of conduct as a matter of fed-

[2] *See* Pet. App. 234a (compiling state statutes with similar exemptions for conduct authorized by regulatory entities).

eral law. The FTC is a law enforcement agency, not a licensing agency; its primary function is to prosecute unfair and deceptive trade practices, not to authorize any particular practice in the first instance. Moreover, even if the FTC's determination that a particular practice is not prohibited by federal law could in fact "authorize" a party to engage in non-prohibited conduct—which it could not—consent orders certainly would not suffice. Consent orders reflect the FTC's determination to prohibit certain conduct, but they do not represent the agency's considered and comprehensive judgment as to what federal consumer protection law does *not* prohibit. As to conduct *not* prohibited, consent orders at most reflect an exercise of the FTC's discretion not to prosecute under the circumstances of the case and in light of constraints on the agency's resources and priorities at the time. *Second*, and in any event, FTC orders neither bind nor authorize non-parties in any respect. The Illinois Supreme Court erred in treating the 1971 and 1995 consent orders as an industry-wide authorization to engage in deceptive marketing practices.

The Illinois Supreme Court's fundamental misunderstanding of federal law will have grave consequences for both state and federal efforts to regulate deceptive and harmful trade practices. If, as the court held, federal agencies can be deemed as a matter of federal law to *authorize* an entire industry to engage in deceptive practices whenever they negotiate consent orders that do not *prohibit* a single company from engaging in those practices, state laws—vital safeguards in the battle against harmful and deceptive trade practices—will be displaced and rendered ineffective. Moreover, federal agencies will no longer be able to rely on consent orders as one of their most important enforcement tools if an order's limited scope can be read to constitute an industry-wide "authorization." And regulated entities—such as tobacco companies—could deliberately game the federal enforcement process in an effort to extract an industry-wide safe harbor for future deceptive practices. Under the regime the Illinois Supreme Court has invented, deceptive and

harmful practices like those at issue here—practices found to have contributed to the deaths of millions of Americans—would simply get a pass.

The Court should grant review.

BACKGROUND

Tobacco use is the leading cause of preventable death and a major cause of disease in the United States.[3] Tobacco is a highly addictive product[4] that harms almost every organ in the body, causing heart attacks, strokes, emphysema, and almost one-third of all cancer deaths.[5] Twelve hundred Americans die every day from smoking.[6] More than 8 million suffer from smoking-related illnesses.[7] Secondhand smoke is also deadly, killing approximately 50,000 Americans every year.[8] And as tobacco consumers die or quit, tobacco companies have found a steady supply of teenagers to replace them.[9] For all of these reasons, as this Court has observed, "tobacco use, particularly among children and ado-

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[3] U.S Dep't of Health & Human Servs., *The Health Consequences of Smoking: A Report of the Surgeon General* 3 (2004) ("2004 Surgeon General's Report").

[4] *See generally* Michael C. Fiore et al., *Clinical Practice Guideline: Treating Tobacco Use and Dependence* (2000).

[5] 2004 Surgeon General's Report, *supra* n.3, at 25-30; J. Michael McGinnis & William H. Foege, *Actual Causes of Death in the United States*, 270 J. Am. Med. Ass'n 2207-2212 (1993).

[6] 2004 Surgeon General's Report, *supra* n.3, at 9; *Annual Smoking-Attributable Mortality, Years of Potential Life Lost and Economic Costs—United States, 1997-2001*, 54 Morbidity & Mortality Weekly Report 625-628 (2005).

[7] *Cigarette Smoking Attributable Morbidity—United States*, 52 Morbidity & Mortality Weekly Report 842-844 (2000).

[8] Stanton A. Glantz & William W. Parmley, *Passive Smoking and Heart Disease*, 273 J. Am. Med. Ass'n 1047-1053 (1995).

[9] Eighty percent of all smokers start before the age of 18 and 90% before the age of 20. Paul W. Mowery et al., *Legacy First Look Report: Pathways to Established Smoking: Results from the 1999 National Youth Tobacco Survey* 7 (2000).

lescents, poses perhaps the single most significant threat to public health in the United States." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

Advertising and marketing—and in particular, *deceptive* advertising and marketing—have long been the linchpin of tobacco manufacturers' commercial success. Tobacco companies' new customers are, as the companies are well aware, overwhelmingly young people under the age of 20.[10] Advertising has been the key to the companies' strategy for targeting this strategically important market. Tobacco companies spend more than $15 billion per year on marketing their products to this and other key target audiences.[11] This onslaught of commercial advertising and promotional activities reflects tobacco companies' understanding that cigarette advertising is among the most important factors that influence young people to begin smoking, and thereby increase the companies' profits.[12]

As this case demonstrates, the tobacco companies' deceptive marketing has also played a crucial role in deterring smokers of all ages from ceasing use of a product that, when used as directed, kills one out of two of its long-term consumers.[13] The trial court found that Philip Morris responded to growing concerns regarding the health effects of smoking by waging a decades-long "disinformation campaign" in which it "knowingly and falsely disputed scientific conclusions that established a connection between smoking and diseases" in an attempt to "create doubt about the negative health implications of smoking without actually denying these allegations." Pet. App. 174a.

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[10] *See* Mowery et al., *supra* n.9, at 7.

[11] Federal Trade Commission Cigarette Report for 2003, at 1 (2005), *available at* http://www.ftc.gov/reports/cigarette05/050809cigrpt.pdf.

[12] U.S. Dep't of Health & Human Servs., *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (1994), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1994/index.htm.

[13] 2004 Surgeon General's Report, *supra* n.3, at 873.

Cigarettes marketed as "lights" or "low tar" were—and continue to be—a significant and pernicious part of Philip Morris' deceptive marketing program. "Light" and "low tar" cigarettes were designed and promoted to appeal to smokers worried about their health, *see* Pet. App. 174a,[14] yet Philip Morris has long known that there is no scientific support for the proposition that these cigarettes offer any health benefits as compared to so-called full-flavor cigarettes, *see id.* at 182a.[15] Philip Morris and others nevertheless expended considerable resources advertising and promoting these products, directing their marketing efforts toward "health conscious consumer[s]" who would "rely upon the implicit representation of safety." *Id.* at 178a.[16] This strategy was effective: By the mid-1990s, light and low tar cigarettes amounted to about 70% of cigarette sales. *United States* v. *Philip Morris USA Inc.*, No. 99-2496, 2006 WL 2381449, at *31 (D.D.C. Aug. 17, 2006). Approximately 50% of all smokers of "lower tar" cigarettes chose them because they perceived them "to be a 'healthier' cigarette and a potential step toward quitting." *United States* v. *Philip Morris*, 2006 WL 2380650, at *148 (citations omitted). But these smokers were deceived on both counts. "Light" or "low tar"

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[14] National Cancer Inst., U.S. Dep't of Health & Human Servs., Smoking & Tobacco Control Monograph No. 13, *Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine* 233 (2001) ("NCI Monograph No. 13"); *see also United States v. Philip Morris USA Inc.*, No. 99-2496, 2006 WL 2380650, at *148-*150 (D.D.C. Aug. 17, 2006).

[15] *See also* NCI Monograph No. 13, *supra* n.14, at 9, 10; *United States* v. *Philip Morris*, 2006 WL 2381449, at *84 ("It is clear, based on their internal research documents, reports, memoranda, and letters, that Defendants have known for decades that there is no clear health benefit from smoking low tar/low nicotine cigarettes as opposed to conventional full-flavor cigarettes.").

[16] *United States* v. *Philip Morris*, 2006 WL 2381449, at *30 ("The FTC's report [on marketing expenditures by the tobacco companies] for 1997 revealed that for every single year from 1967 to 1992, [the tobacco companies'] advertising and promotional spending for low tar cigarettes exceeded their domestic market share.").

cigarettes offer no health benefits as compared to regular cigarettes, and research shows that they may inhibit smokers from quitting and encourage non-smokers to begin.[17]

Far from remaining on the sidelines, the federal government has taken an active role in addressing these fraudulent and deceptive practices. In 1999, the U.S. Department of Justice filed suit against Philip Morris and other major tobacco companies under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. The United States contended, among other things, that the companies' representations regarding "light" and "low tar" cigarettes were false and misleading. After a lengthy trial, the U.S. District Court for the District of Columbia agreed. It concluded that, "over the course of more than 50 years, [the major tobacco companies] lied, misrepresented, and deceived the American public . . . about the devastating health effects of smoking and environmental tobacco smoke." *United States* v. *Philip Morris*, 2006 WL 2380650, at *140. In particular, and much like the Illinois trial court in this case, the D.C. district court found that the companies "distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting." *Id.*

[17] NCI Monograph No. 13, *supra* n.14, at 10; *see also United States* v. *Philip Morris*, 2006 WL 2381449, at *84 ("Defendants also knew that many smokers were concerned and anxious about the health effects of smoking, that a significant percentage of those smokers were willing to trade flavor for reassurance that their brands carried lower health risks, and that many smokers who were concerned and anxious about the health risks from smoking would rely on the health claims made for low tar cigarettes as a reason, or excuse, for not quitting smoking.").

ARGUMENT

I. THE ILLINOIS SUPREME COURT ERRED IN CONCLUDING THAT FTC CONSENT ORDERS CONSTITUTE FEDERAL AUTHORIZATION TO ENGAGE IN DECEPTIVE ADVERTISING

The Illinois Supreme Court's decision rested on its conclusion that two FTC consent orders "provide[] express authority for the party that was the target of the enforcement action to engage in the conduct described in the consent order," and "implied authority for other members of the [same] regulated industry to engage in the same conduct." Pet. App. 86a. Both assertions are wrong: FTC consent orders provide no authority, express or implied, to engage in any particular course of conduct as a matter of federal law.

A. The FTC's Decision Not To Forbid Certain Conduct In A Consent Order Does Not Constitute Authorization To Engage In That Conduct

Under its organic statute, the FTC has the power to regulate matters relating to consumer protection in two ways: by issuing prophylactic rules and general statements of policy, and by prosecuting offenses. 15 U.S.C. §§ 45, 57a. The FTC consent orders at issue represent an exercise of the latter type of regulatory power.

The FTC's prosecutorial authority, like prosecutorial authority generally, is broadly discretionary. *See Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *accord Pendleton* v. *Trans Union Sys. Corp.*, 430 F. Supp. 95, 97-98 (E.D. Pa. 1977). The FTC has the discretionary authority to decide whether it will investigate particular alleged violations and whether it will institute proceedings against alleged violators. *See Pendleton*, 430 F. Supp. at 97-98. It has the discretionary authority to decide whether to proceed against a single firm in the industry or to proceed against all firms at once. *See Moog*, 355 U.S. at 413. And it has the discretionary authority to terminate enforcement proceedings by entering into consent orders "after careful negotiation has produced agreement on [the parties'] precise terms," and thus

save itself "the time, expense, and inevitable risk of litigation." *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

Much like plea agreements in criminal prosecutions, these negotiated settlements do not embody the FTC's considered judgment as to what the law requires—or, crucially, as to what the law authorizes. To begin with, consent orders generally address the specific conduct at issue in the enforcement proceedings, not any possible abuse the respondent may previously have committed or may subsequently commit. Although the FTC is certainly entitled to fashion relief that goes beyond merely "prohibiting the illegal practice in the precise form existing in the past," *FTC* v. *Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959) (internal quotation marks and citation omitted), as a practical matter, consent orders do not often address other conduct of which the agency was aware, and certainly do not address facts or circumstances unknown to the agency at the time. In both the 1971 and the 1995 consent orders, for example, the FTC focused specifically on misrepresentations concerning the relative tar levels in specific brands of cigarettes, and accordingly crafted a settlement agreement that required the respondents in those proceedings to disclose the data relating to their claims. As Justice Freeman noted in dissent below, in neither proceeding did the FTC address the use of the term "lights" to describe cigarettes known by the companies to be just as unhealthy as regular cigarettes. Pet. App. 116a-117a. The 1971 and 1995 consent orders did not—and indeed, did not purport to—set forth comprehensive guidance concerning the boundaries of permissible cigarette marketing, nor did they pass on the lawfulness of false and misleading representations that "light" cigarettes are safer than any other cigarettes—one of the primary issues in this case.

Moreover, like any prosecutorial agency, the FTC need not, and often lacks the resources to, enforce federal law to its limits whenever it enters into a settlement order. As this Court has recognized, even as to those claims that it does

address, an FTC consent order "normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *Armour*, 402 U.S. at 681. The FTC, in particular, chooses not to pursue some violations of law in order to secure more limited remedies without expenditure of further resources. A consent order thus cannot be said to embody the FTC's policy "purposes"; rather, it "embodies as much of [the parties'] opposing purposes as the respective parties have the bargaining power and skill to achieve." *Id.* at 681-682.

For these reasons, an FTC consent order does not authorize—expressly or impliedly—any specific course of conduct as a matter of federal law, by any party. At most, such an order expresses the FTC's determination that certain conduct does not warrant prosecution under the circumstances of the proceeding and in the light of the agency's resources and priorities at that time. The Illinois Supreme Court misapplied federal law in concluding otherwise.

B. An FTC Consent Order Neither Binds Nor Immunizes Non-Parties

The Illinois Supreme Court misconstrued federal law in a second critical respect: Whatever force and effect the 1971 and 1995 consent orders may have with respect to American Brands and American Tobacco, respectively, the orders can have no such effect with respect to Philip Morris. As a matter of federal law, FTC consent orders neither bind nor immunize third parties.

As petitioners have explained, *see* Pet. 15-24, before 1975 the FTC Act permitted the FTC to recover civil penalties only from respondents that violated the terms of cease-and-desist orders issued against them. 1 Stephanie W. Kanwit, *Federal Trade Commission* § 10:7, at 10-32 (1996 & Supp. 2004). In 1975, Congress amended the Act to permit the FTC to bring an action against any party that violated a cease-and-desist order. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No.

93-637, § 205(a), 888 Stat. 2183, 2200-2201 (1975) (codified at 15 U.S.C. § 45(m) (1988)) ("If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice[.]"). But as a matter of practice, the FTC refrained from bringing § 45(m)(1)(B) enforcement proceedings against nonparties to consent orders, as opposed to fully adjudicated cease-and-desist orders. *See* H.R. Rep. No. 103-138, at 13 (1993). In 1994, Congress codified FTC practice by specifically exempting consent orders from the class of cease-and-desist orders enforceable against nonparties. Pub. L. No. 103-312, § 4 (Sept. 10, 1993) (codified as amended at 15 U.S.C. § 45(m)(1)(B)) ("If the Commission determines . . . that any act or practice is unfair or deceptive, and issues a final cease and desist order, *other than a consent order*, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice[.]") (emphasis added). The House Report explained that, under this amendment, "a case settled by a consent agreement would not qualify as precedent for a section [45(m)(1) (B)] proceeding because the legal and factual issues in question would not have been subject to challenge in an adjudicatory proceeding." H.R. Rep. No. 103-183, at 13-14. Thus, no third party—including Philip Morris—is bound by the restrictions in the consent orders at issue here.

Just as entities cannot be bound by the consent orders to which they were not party, neither can they take shelter in such orders. This Court has itself concluded that a litigant cannot "persuasively cite[]" consent orders to which it is not a party. *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 330 n.12 (1961). The courts of appeals have agreed. For example, in *Trans Union Corp.* v. *FTC*, 245 F.3d 809 (D.C. Cir. 2001), a party under investigation for de-

ceptive trade practices claimed that the FTC impermissibly ordered it to cease activity expressly allowed a competitor under a prior consent order. The D.C. Circuit rejected this claim, agreeing with the FTC that the prior consent order was "'without precedential effect on this opinion.'" *Id.* at 816-817 (D.C. Cir. 2001) (quoting *In re Trans Union Corp.*, No. 0255, slip op. at 16 n.22 (FTC Feb. 10, 2000)). The Seventh Circuit has reached a similar conclusion: "The entering of a consent decree . . . is not a decision on the merits and therefore does not adjudicate the legality of any action by a party thereto. Nor is a consent decree a controlling precedent for later Commission action." *Beatrice Foods Co.* v. *FTC*, 540 F.2d 303, 312 (7th Cir. 1976).

In sum, the FTC consent orders at issue in this case neither expressly nor impliedly authorized Philip Morris—or, for that matter, any other tobacco firm—to engage in deceptive practices. Two consent orders terminating enforcement proceedings involving different parties, at different times, on different factual records, and concerning different aspects of light cigarette marketing practices, do not constitute a federal authorization for Philip Morris' longstanding and tragically successful efforts to deceive the American public.

II. IF LEFT UNCORRECTED, THE ILLINOIS SUPREME COURT'S DECISION WILL DRAMATICALLY HINDER STATE AND FEDERAL EFFORTS TO REGULATE DECEPTIVE TRADE PRACTICES

The Illinois Supreme Court's erroneous determination that federal law authorizes the deceptive advertising at issue is a matter of great importance to efforts to prevent deceptive trade practices nationwide.[18] Because the Illinois

[18] Given the prevalence of state-law exemptions from consumer-fraud liability for conduct authorized by regulatory agencies, *see supra* n.2 and accompanying text, the potential reach of the decision below is readily apparent. Indeed, the Illinois Supreme Court's reasoning has already been adopted by state courts outside Illinois. *See Aspinall* v. *Philip Morris Cos.*, No. Civ. A. 98-6002, 2006 WL 2971490, at *6 & n.13 (Mass. Super. Ct. Aug. 9, 2006) (noting that, "[d]espite slight differences in the language

Supreme Court's decision turned on a misinterpretation of federal law, this Court can and should review its decision, to prevent the needless erosion of state *and* federal power to protect consumer welfare. *See Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483-485 (1942); *cf. Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366-2370 (2005).

A. The Illinois Supreme Court's Misreading Of Federal Law Eviscerates Critical State-Law Safeguards Against Deceptive Trade Practices

State consumer protection laws play a vital role in protecting American consumers, and complement the FTC's regulatory efforts in critical respects. Indeed, the FTC strongly supported the passage of such laws; it encouraged the establishment of coordinate consumer protection responsibility at "'the lowest practicable level of government'" to supplement its own enforcement efforts. Sheila B. Scheuerman, *The Consumer Fraud Class Action*, 43 Harv. J. on Legis. 1, 15 (2006) (citation omitted); *see also* William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 Tul. L. Rev. 724, 729-730 & n.14 (1972). Congress, too, has recognized the importance of federal-state cooperation in the field of consumer protection: In 1994, Congress specifically directed the FTC to identify "those areas that might more effectively be enforced at the State or local level," and to report to Congress with recommendations for "achieving

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of the exemption clauses in the Massachusetts and Illinois statutes, the analysis in *Price* is apropos"). Respondent cites *Aspinall* for the proposition that other courts can and do reject the Illinois Supreme Court's interpretation of federal law in this case. *See* Br. in Opp. 17 n.14. Although *Aspinall* parted company with the Illinois Supreme Court with respect to the narrow issue of whether Philip Morris' product packaging complied with the 1971 consent order, it broadly endorsed the Illinois Supreme Court's view that the 1971 and 1995 consent orders authorized Philip Morris' use of "low tar" and similar descriptors under certain circumstances. *See* 2006 WL 2971490, at *8. *Aspinall* thus confirms that the Illinois Supreme Court's decision is of national significance.

greater cooperation between the Commission and the States." Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 13, 108 Stat. 1691, 1696-1697.

State statutes such as Illinois' consumer protection laws are, in some respects, even more powerful tools for consumer protection than their federal counterparts. *See* Lovett, *supra*, at 730. Like similar consumer protection laws in other states, Illinois law provides for both private enforcement and investigation and enforcement by the state attorney general. 815 Ill. Comp. Stat. 505/3, 505/7, 505/10a. These state-law remedies, along with FTC enforcement, "allow for widespread redress of marketplace misconduct and abuse of consumers." National Consumer Law Center, *Unfair and Deceptive Acts and Practices* 1 (6th ed. 2004).

The Illinois Supreme Court's reading of federal law dramatically constrains the states' role in this federal-state partnership. It wrongly denies state attorneys general and private victims the power to halt and remedy deceptive practices, and threatens thereby to eviscerate a crucial set of protections against consumer fraud. And it creates a perverse opportunity for respondents to exploit the FTC consent-order negotiation process to gain immunity for deceptive trade practices of which the FTC simply may not be aware.

The Illinois Supreme Court's misunderstanding of this critical federal-law issue is thus a matter of nationwide significance: for victims of the tobacco companies' deception in Illinois and elsewhere, for state attorneys general seeking to discharge the duties of their office, and for all concerned with the welfare of American consumers.

B. The Decision Impedes Federal Regulatory Efforts

Not only does the Illinois Supreme Court's decision threaten dramatically to hamper state efforts to curb deceptive advertising, but it also threatens substantial interference with the FTC's own regulatory efforts. Like many other federal agencies, the FTC resolves the majority of its enforcement proceedings by entry of consent orders. 1

Kanwit, *supra*, § 12:1, at 12-1. The Illinois Supreme Court's decision affects this work in at least two ways.

First, the FTC entered into many of its existing consent orders on the presumption that these contractual arrangements would bind only the respondent before it, leaving it free to address the conduct of other parties on a case-by-case basis, and in a manner tailored to "the individual circumstances presented." *Weight Watchers* v. *FTC*, No. C93-534R, 1995 WL 548776, at *3 (W.D. Wash. Aug. 16, 1995). The Illinois Supreme Court's decision vitiates that presumption and leaves many existing consent orders open to similar misuses, both by the respondents thereto and by third parties. It thus adds another item to the FTC's regulatory agenda: whether to commence further proceedings with respect to the subjects of past consent orders, lest those orders be treated as authorizing unlawful and deceptive trade practices under state law.

Second, the Illinois Supreme Court's decision will affect the FTC's calculus in future enforcement proceedings. Federal law equips the FTC to choose, as its resources and strategy dictate, whether to address unlawful and deceptive practices through rulemaking, adjudicated orders, or negotiated consent orders. *See supra* I.A. But without the ability to tailor consent orders specifically to the parties involved, *every* consent order negotiation would become more like a rulemaking. This would vastly increase the FTC's workload: Every proceeding would require extensive fact-finding and legal development, and would invite participation by all other members of the same regulated industry. Given the FTC's limited resources, the inevitable result of such a rule would be a decline in the Commission's ability to pursue violators of the consumer protection laws.

Finally, even as to the party before it, the FTC will be disinclined to settle matters short of full achievement of all possible remediation, for fear that an underinclusive compromise will unwittingly immunize the respondent from making restitution to victims under state law. The FTC will have to guard against being manipulated to insulate unlaw-

ful conduct from state liability, a dynamic that could potentially change the basic assumptions of consent-order negotiation.

In the wake of this Court's decision in *Brown & Williamson*, 529 U.S. 120, the FTC has become the primary federal agency with the power to oversee tobacco marketing practices. The Illinois Supreme Court's decision diminishes the FTC's ability to address the kinds of harmful and deceptive marketing practices that have been the long been mainstay of the tobacco industry's success, as well as similar practices in other industries. To tie the FTC's hands in this manner is to blunt one of the principal weapons in the fight against the national tobacco epidemic.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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