No. 07-562

In the Supreme Court of the United States

ALTRIA GROUP, INC., ET AL., PETITIONERS

v.

STEPHANIE GOOD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

MICHAEL F. HERTZ
Deputy Assistant Attorney General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

MARK B. STERN
ALISA B. KLEIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

The Federal Trade Commission has authority to prevent "unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. 45(a)(2), and the Federal Trade Commission Act expressly provides that its remedies "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law," 15 U.S.C. 57b(e). The United States will address the following question:

Whether guidance statements and consent orders issued by the Federal Trade Commission impliedly preempt a state-law tort claim based on a cigarette manufacturer's allegedly fraudulent use of the descriptors "Light" and "Lowered Tar and Nicotine" to characterize its cigarettes when the manufacturer allegedly knew that the cigarettes, as smoked by a human smoker, would deliver as much tar and nicotine as so-called "full flavor" cigarettes.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 07-562

ALTRIA GROUP, INC., ET AL., PETITIONERS

v.

STEPHANIE GOOD, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

Petitioner contends, *inter alia*, that respondents' claims are impliedly preempted because they would frustrate the policies of the Federal Trade Commission (FTC) concerning the disclosure of cigarette tar and nicotine yields. That argument is grounded on petitioner's assertions that the FTC "has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results." Br. 2. The United States has a substantial interest in the proper understanding of the scope and effect of the FTC's actions. That is particularly true where, as here,

a party claims that the FTC's actions have the effect of displacing state law.[1]

STATEMENT

A. Statutory Background

1. The Federal Trade Commission Act (FTC Act), 15 U.S.C. 41, *et seq.*, empowers the FTC, as relevant here, to prevent the use of "unfair or deceptive acts or practices," 15 U.S.C. 45(a)(2). The Commission's jurisdiction is not limited to any particular segment of the economy, but instead extends, with limited exceptions, to all unfair or deceptive practices "in or affecting commerce," *ibid.*

The FTC Act authorizes the Commission to adopt two different types of rules: "interpretive rules and general statements of policy," 15 U.S.C. 57a(a)(1)(A), and "rules which define with specificity acts or practices which are unfair or deceptive acts or practices," 15 U.S.C. 57a(a)(1)(B). As to the latter category only, called "trade regulation rules," 16 C.F.R. 1.7, the FTC Act imposes detailed procedural requirements. See 15 U.S.C. 57a(b) and (c), 57b-3(a)(1). Violation of a trade regulation rule "constitute[s] an unfair or deceptive act or practice in violation of section 45(a)(1)," 15 U.S.C. 57a(d)(3), and can be enforced through a civil action, 15 U.S.C. 45(m)(1)(A) (civil penalties for knowing rule violations); 15 U.S.C. 57b(a)(1), (b) (action to redress injury to consumers). Interpretive rules, which do not undergo the same procedural process, are not enforceable in their own right. *Ibid.*; *FTC Operating Manual* (June 25, 2007) ch. 8.3.2. <http://www.ftc.gov/foia/adminstaffmanuals.shtm> (industry guide "does *not* have the force

[1] Petitioner Altria Group, Inc., is the parent of petitioner Philip Morris USA Inc. References to "petitioner" are to Philip Morris.

or effect of law and is not legally binding on the Commission or on the public in an enforcement action").

2. Federal and state laws prohibiting unfair or deceptive practices operate in a complementary fashion. See 16 C.F.R. 0.17. The FTC Act has no express preemption provision, and, in the mid-1960s, the FTC encouraged States to adopt similar legislation. Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 16-17 (2006) (Scheuerman). In 1970, the Commission, together with the Committee on Suggested State Legislation of the Council of State Governments, issued a model Unfair Trade Practices and Consumer Protection Law. *Ibid.* Within three years, 43 States had adopted some version of the FTC-proposed legislation. *Id.* at 17-18. The FTC works closely with its state counterparts in enforcing their complementary prohibitions on unfair or deceptive practices. When the FTC closes its own investigation without taking enforcement action, it may refer the matter to state or local officials "for such action as may be warranted under state or local law." *FTC Operating Manual*, ch. 14.2.3.9.

The FTC Act does not create a private right of action for injured consumers. *Holloway* v. *Bristol-Myers, Corp.*, 485 F.2d 986 (D.C. Cir. 1973). The model legislation prepared by the FTC did, however, include a private state-law cause of action for damages. Scheuerman, *supra*, at 17. And when, in 1975, Congress authorized the FTC to seek remedies for consumer injuries pursuant to 15 U.S.C. 57b, it specified that those remedies are "in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law," 15 U.S.C. 57b(e).

The Maine Unfair Trade Practices Act (MUTPA), Me. Rev. Stat. Ann. tit. 5, § 205-A *et seq.* (West 2002), declares, in words substantially identical to Section 45(a)(1), that "unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful," *id.* § 207 (West Supp. 2007). MUTPA provides that construction of the provision is to "be guided by the interpretations" given to the FTC Act by the FTC and federal courts. *Id.* § 207(1) (West Supp. 2007). MUTPA provides a private right of action for consumers injured by unfair or deceptive acts or practices. *Id.* § 213(1) (West 2002).

B. Regulatory Background

1. The Cambridge Filter Method

In the 1950s, the FTC became concerned that tobacco companies' advertising claims were misleading consumers. See *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). In 1955, the Commission published Cigarette Advertising Guides that advised manufacturers of the Commission's view that it would be unfair or deceptive to make representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence. See *Cigarette Advertising Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (2004). In 1966, following the Surgeon General's report on the cancer-causing properties of tar, J.A. 650a, the FTC sent letters to cigarette manufacturers stating that, "[o]n the basis of the facts now available," the Commission had determined that "a factual statement of the tar and nicotine content (expressed in milligrams)" would not be in violation of the 1955 Guides or the FTC Act. 6 Trade Reg. Rep. (CCH) ¶ 39,012.70. The Commission made clear, however, that

the new guidance applied only if (1) "no collateral representation[s] (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) are made, expressly or by implication, as to reduction or elimination of health hazards," and (2) the statement was supported by "tests conducted in accordance with the Cambridge Filter Method." *Ibid.* The Cambridge Method uses a smoking machine that takes a 35 milliliter puff of two seconds' duration every 60 seconds until the cigarette is smoked to a specified butt length. J.A. 485a. The tar and nicotine collected by the machine are then weighed and measured. *Ibid.* On August 1, 1967, the FTC announced in a press release that it would begin its own testing program utilizing the Cambridge Method. *Ibid.*

In October 1967, the FTC responded to an inquiry by the National Association of Broadcasters (NAB) with a letter explaining "the Commission's current enforcement policy in regard to statements of, and representations relating to tar and nicotine content of cigarettes." J.A. 368a. The letter stated that, "*[a]s a general rule*, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by tests conducted in accordance with the standardized" Cambridge Method. *Ibid.* (emphasis added). The FTC emphasized, however, that there was "no reliable evidence that the health hazards of cigarette smoking are thereby eliminated or avoided," and "[h]ence, no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer.'" J.A. 369a. The Commission further advised that any inter-brand comparisons of tar

and nicotine content must be "factual, fair, and not misleading." *Ibid.*

In 1970, the Commission proposed a trade regulation rule that would require manufacturers to disclose tar and nicotine yields as determined by the Cambridge Method. 35 Fed. Reg. 12,671 (1970). In response, petitioner and other leading cigarette manufacturers submitted a "voluntary program" in which they agreed "to disclose 'tar' and nicotine content in cigarette advertising." J.A. 899a-900a. That private agreement prompted the FTC to suspend indefinitely the rulemaking proceedings, 36 Fed. Reg. 784 (1971), which were never reinstituted.

2. Deceptive use of Cambridge Method results that do not correspond to relative yields to human smokers

When the FTC issued its guidance in 1966 indicating that it would not regard as deceptive factual statements of tar and nicotine content determined according to the Cambridge Method, it did so, it later explained, on the understanding that such disclosures would "provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62 Fed. Reg. 48,158 (1997). The FTC recognized that "[n]o two human smokers smoke in the same way"; that "[s]ome take long puffs (or draws); some take short puffs," and that such "variation affects the tar and nicotine quantity in the smoke generated." J.A. 487a (8/1/1967 press release). Indeed, the FTC noted, smoking behavior "varies with the same individual under different circumstances even within the same day," such as whether the smoker is talking, listening, reading a book, or watching television. *Ibid.*

Despite that variation, the FTC believed standardized test results could provide useful information to the consumer because it would indicate "whether he will get more [tar] from one than from another cigarette if there is a significant difference between the two and if he smokes the two in the same manner." J.A. 607a-608a (statement to FTC of Clyde L. Ogg, developer of Cambridge Method). Although the FTC understood that any benefit of shifting to a cigarette with a lower Cambridge Method rating could be "negated if this shift were accompanied by an increase in the number of cigarettes consumed, or in the length of each cigarette used," an ad-hoc group of scientists convened by the Surgeon General advised that "[t]here is evidence that, by-and-large, this does not occur; that the shift to low 'tar' and nicotine cigarettes tends to be accompanied by the same level of consumption or an even lower level rather than by an increased consumption." J.A. 648a (enclosure to 1/10/1967 letter from HEW Secretary John Gardner to Senator Warren G. Magnuson).

In the ensuing years, the Commission made clear its view that advertising claims based on Cambridge Method results can be deceptive when those results do not reflect the relative tar yields of cigarette brands to actual human smokers. In the 1980s, the Commission determined, 48 Fed. Reg. 15,953, 15,954 (1983), and the District of Columbia Circuit affirmed, that advertising the Cambridge Method results for Barclay cigarettes was, "although literally true, inherently deceptive," *Brown & Williamson*, 778 F.2d at 41. Because human smokers compressed the cigarette's ventilation channels but the smoking machine did not, the Barclay "yield[ed] substantially more tar than other" equally rated cigarettes "when smoked by humans." *Id.* at 38; see *id.* at

42. In 1995, the Commission likewise found that American Tobacco's "represent[ation], directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands" was deceptive, despite the fact that it was an accurate ratio of Cambridge Method results, because, "[i]n truth and in fact, consumers will not necessarily get less tar" due to "such behavior as compensatory smoking." *In re American Tobacco Co.*, 119 F.T.C. 3, 4 (1995).

3. The FTC's efforts to understand, and petitioner's efforts to conceal, smoker compensation

a. The Barclay inquiry raised a larger concern that had been noted but believed to be unsupported by the evidence when the FTC first considered the Cambridge Method: to what extent do smokers engage in "compensatory smoking behavior, including hole blocking," and "does behaviorally reduced air dilution affect the relative rankings of various brands"? 48 Fed. Reg. at 15,955. The Commission requested comments on those questions, *ibid.*, but petitioner failed to disclose its own studies demonstrating compensatory behavior, and instead sought to cast doubt on whether it occurred.

Whereas the FTC initially believed that, in most instances, the Cambridge Method results provided a meaningful basis for smokers to compare the amount of tar and nicotine they would receive from one brand versus another, see p. 7, *supra*, petitioner's undisclosed internal research showed otherwise. Although the FTC was unable to simulate "actual human smoking," J.A. 486a, petitioner had developed by 1974 a "Smoker Simulator" that allowed the company to "duplicate[] exactly the smoking behavior of a given individual with a given

cigaret[te]," J.A. 915a. A 1975 report for petitioner, based on the Smoker Simulator, confirmed that smoke intake did not, in fact, vary between "light" and "full flavor" cigarettes. J.A. 701a-704a. "[T]he dilution and the lower [resistance to draw] of Marlboro Lights caused the smokers to take larger puffs on that cigarette than on Marlboro 85's," such that, "[i]n effect, the Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery." J.A. 704a.

The 1975 study confirmed what petitioner's Vice President of Corporate Research and Development reported as early as August 1967: "[T]he smoking machine data appear to be erroneous and misleading" because, unlike the machine, a "human smoker * * * appears to adjust to the diluted smoke" of a ventilated cigarette "by taking a larger puff so that he still gets about the same amount of equivalent undiluted smoke," thereby "defeating the purpose of dilution." See *United States* v. *Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 462 (D.D.C. 2006) (quoting 8/11/1967 memorandum).[2]

Although petitioner's 1975 research showed that smoking a cigarette "normally considered lower in delivery" did "not achieve any reduction in smoke intake," J.A. 704a, petitioner did not share that information with the FTC in response to its 1983 request for comments. Rather, petitioner urged that compensatory smoking behavior was not relevant. See J.A. 660a (C. Lee Peeler,

---

[2] A 1972 internal memorandum of R.J. Reynolds similarly noted that a "low tar" cigarette "offers zero advantage to the smoker" who "will subconsciously adjust his puff volume and frequency, and smoking frequency, so as to obtain and maintain his per hour and per day requirement for nicotine." *Philip Morris*, 449 F. Supp. 2d at 467.

National Cancer Inst., Monograph 7, *Historical Overview*) (*Historical Overview*). Petitioner further asserted, in connection with the Barclay investigation, that its own cigarettes were not subject to vent blockage, *Brown & Williamson*, 778 F.2d at 37, even though its internal research showed that such blockage did occur, see *Philip Morris*, 449 F. Supp. 2d at 462 (quoting 7/28/1967 memorandum stating that "some of [the ventilation holes] are likely to be occluded under normal smoking conditions, whereas no occlusion is likely to occur when the cigarettes are machine smoked for analysis").[3]

b. Decades after petitioner's own studies, as independent research into compensation behavior increased, health groups and others began to question whether Cambridge Method results mislead consumers about the relative risks of smoking cigarettes with various tar and nicotine ratings. J.A. 335a. Accordingly, in 1994, the FTC asked the National Cancer Institute (NCI) to convene a conference to consider the cigarette testing methodology and possible modifications or alternatives. 62 Fed. Reg. at 48,159. In 1997, after receiving the NCI's report, the FTC solicited public comment on the prevalence of vent blocking and compensation and on possible changes to the Cambridge Method. See *id.* at 48,159-48,162.

In response, Philip Morris and three other major tobacco companies submitted joint comments in 1998.

---

[3] Petitioner similarly failed to inform the Commission of its evidence demonstrating vent blocking by smokers' lips in response to a 1977 inquiry whether "a new insertion depth would be more consistent with the manner in which smokers insert cigarettes in actual use." 43 Fed. Reg. 11,857 (1978) (indicating that no responses were received to the inquiry).

See *Comments of Philip Morris Inc., et al., On the Proposal Entitled FTC Cigarette Testing Methodology* (Joint Comments), FTC File No. P944509 (filed Feb. 5, 1998) <http://www.ftc.gov/foia/frequentrequests/TobaccoCoComments.pdf>. The Joint Comments opposed any change to the Cambridge Method and attacked the literature on compensation, without disclosing that petitioner's own research had long since confirmed the phenomenon. The Joint Comments described "compensatory smoking" as a "hypothesized" phenomenon as to which the "evidence * * * is highly equivocal," and asserted that "current knowledge about [compensatory] behaviors is too sparse to be usable for modeling purposes," Joint Comments 43-44. They argued that compensation was not a "sufficiently common or documented phenomenon that consumers should be alerted to its existence." *Id.* at 89.[4]

4. FTC proceedings regarding descriptors

The FTC also sought comments in 1997 on the use of cigarette "descriptors" such as "'low tar,' 'light,' 'medium,' 'extra light,' 'ultra light,' 'ultra low,' and 'ultima.'" 62 Fed. Reg. at 48,163. The Commission observed that "[t]here are no official definitions" of those terms and sought comments on whether "there [is] a need for official guidance with respect to the terms" as well as whether "the descriptors convey implied health claims." *Ibid.* In response, petitioner stated that it was "not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes." Joint Comments 94.

---

[4] These contentions echoed comments petitioner submitted to the NCI in 1994 and to FDA in 1996. See, *e.g.*, *Philip Morris*, 449 F. Supp. 2d at 502, 504.

In 2002, petitioner filed a petition requesting the Commission "to promulgate rules governing * * * the use of descriptors, such as 'light' and 'ultra light[.]'" J.A. 1044a. The petition urged the Commission to require tobacco companies to disclose the "average tar and nicotine yields of cigarette brands"; define and "regulate the use of descriptors such as 'light' and 'ultra light'"; and mandate "the use of disclaimers with respect to the average tar yield and the health effects of 'low yield' cigarettes." J.A. 1043a-1044a, 1082a-1085a. That petition remains pending.

C. Proceedings Below

1. Respondents purchased Marlboro Lights and Cambridge Lights in Maine. J.A. 26a (First Amended Compl. ¶ 3). They allege that petitioner used the descriptor "Lights" on the packages of both brands, and the phrase "Lowered Tar and Nicotine" on the Marlboro Lights packages, in order to communicate to consumers that "light" brands were "less harmful or safer" than regular brands. J.A. 28a-29a (¶¶ 14-17). Respondents allege that petitioner knew, however, that consumers would receive the same delivery of tar and nicotine from "light" brands as from regular brands, see J.A. 30a-31a (¶¶ 25-29), and that the representations were thus false and misleading in violation of MUTPA. See J.A. 37a, 38a (¶¶ 53, 54(a)).

The district court entered summary judgment for petitioner, holding that respondents' claims were expressly preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331 *et seq.* (Labeling Act). Pet. App. 63a-106a.

2. The First Circuit vacated and remanded for further proceedings. Pet. App. 2a-62a. The panel rejected

petitioner's express preemption defense as inconsistent with *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 528-529 (1992) (plurality). See Pet. App. 10a-37a. The court also rejected petitioner's implied preemption argument, explaining that "Lights" and "Lowered Tar and Nicotine" representations were not affirmatively authorized by the FTC. The court observed that the FTC has never promulgated a trade regulation rule addressing this issue. Pet. App. 46a. And, assuming *arguendo* that FTC actions short of formal rulemaking could be preemptive, the court determined that there would be no such preemption here. *Id.* at 50a-51a.

The court rejected petitioner's attempt to divine from various FTC actions a "policy" to permit manufacturers to claim that brands are "Lights" or have "Lowered Tar and Nicotine" as long as the brands measure less than 15 milligrams of tar under the Cambridge Method, regardless of their relative yield to actual smokers. Pet. App. 51a, 54a. The court observed that the FTC had cautioned against "collateral representations (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the public) . . . , expressly or by implication, as to reduction or elimination of health hazards." *Id.* at 6a (quoting 3/25/1966 FTC Press Release). In addition, the court noted that the Commission has on occasion challenged representations about tar or nicotine content as deceptive even though they were supported by Cambridge Method testing. *Id.* at 51a (discussing *Brown & Williamson* and *In re American Tobacco Co.*). Accordingly, the court concluded that the FTC "has not invariably allowed tar and nicotine claims that are supported by the Cambridge Filter Method, but has recognized that such claims may nevertheless amount to unfair or decep-

tive acts or practices in certain circumstances." *Id.* at 52a.

SUMMARY OF ARGUMENT

Petitioner's implied preemption argument should be rejected because it is based on a mischaracterization of the scope and effect of the FTC's actions concerning cigarette advertising.

1. The premise of petitioner's implied preemption claim is that a state-law tort claim based upon petitioner's allegedly deceptive use of descriptors such as "light" or "lowered tar and nicotine" would frustrate the purposes of the FTC's regulatory policies. The FTC disagrees; the Commission does not view respondents' lawsuit as undermining the FTC's policies in any way.

In the 1960s and 1970s, the FTC encouraged the adoption of complementary state enforcement mechanisms, including private rights of action for damages, which the FTC Act does not provide. The Commission's regulatory actions generally set a floor below which private conduct cannot sink, rather than a ceiling that precludes States from adopting more demanding standards.

With respect to cigarettes, in particular, none of the actions on which petitioner's preemption argument relies preempts state lawsuits such as this. In the FTC Act, Congress specifically provided that, while trade regulation rules constitute enforceable federal law, interpretive rules and general statements of policy instead assist industries in understanding how the Commission interprets the prohibitions in the FTC Act itself. Petitioner does not contend that the FTC Act directly preempts respondents' claims, and there is no applicable trade regulation rule. Thus, the Commission's industry guidance and similar statements interpreting the Act do

not have preemptive effect. Petitioner's reliance on two consent orders is also misplaced. Because petitioner was not a party to those agreements, they do not create enforceable legal rights or obligations with respect to it.

2. Petitioner contends (Br. 2) that the FTC "has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as shorthand references to those numerical test results." Neither assertion is correct.

Although the FTC indicated, in industry guidance, that it would not regard factual statements of a cigarette's tar and nicotine yields according to the Cambridge Method as *per se* violations of the FTC Act, the Commission did not *require* such disclosures. Nor has the Commission affirmatively *authorized* the use of descriptors such as "light" and "lowered tar and nicotine"—terms that, as petitioner recognizes, lack any official definition. Although two consent decrees to which petitioner was not a party provide that use of such descriptors by themselves would not violate specific provisions of those orders, the Commission never gave affirmative endorsement to such descriptors, much less to their deceptive use as alleged in respondents' complaint. To the contrary, the Commission's enforcement actions demonstrate that the fraudulent use of descriptors, with the intent to create the false impression that the cigarettes would yield less tar to human smokers than full-flavor cigarettes, violates the FTC Act's prohibition against unfair or deceptive acts or practices.

Nor, contrary to petitioner's argument, does the Labeling Act grant the FTC exclusive authority with respect to cigarette advertising. The source of the FTC's authority regarding unfair or deceptive cigarette adver-

tising is the same as its authority over all other advertising—the FTC Act. Indeed, the Labeling Act states explicitly that it does not "expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes." 15 U.S.C. 1336.

3. Petitioner failed for decades to disclose to the FTC its internal research indicating that, due to compensatory behaviors, smokers receive as much tar from cigarettes with lower Cambridge Method ratings than so-called "full-flavor" cigarettes. After hiding its own research for years, despite the Commission's requests for information in light of growing concerns about compensation, petitioner now claims that the FTC has known about compensation for years and affirmatively decided that it does not warrant any change in the Cambridge Method. In fact, the absence of definitive action on that question to date reflects only the Commission's ongoing consideration of the issue. Its inaction (particularly insofar as it is based on petitioner's own failure to provide information to the FTC) does not constitute even a definitive interpretation of the federal Act, much less one that would bar application of state law.

ARGUMENT

RESPONDENTS' CLAIMS ARE NOT IMPLIEDLY PREEMPTED BY THE FEDERAL TRADE COMMISSION'S ACTIONS CONCERNING CIGARETTE ADVERTISING

A. Respondents' Claims Do Not Conflict With Any Policy Of The Commission, Much Less One Having The Preemptive Force Of Federal Law

1. The FTC Act does not expressly preempt state-law causes of action for unfair trade practices. Indeed, with respect to injured consumers, the Act's savings

clause expressly provides that the remedies set out in 15 U.S.C. 57b are "in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. 57b(e). Of course, even in the absence of an express preemption clause, state law may still be preempted under principles of conflict preemption. See, *e.g.*, *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 281 (1987). Thus, as the courts of appeals have recognized, state law concerning unfair or deceptive trade practices would be displaced insofar as it conflicts with or stands as an obstacle to accomplishment of policies embodied in Commission action having the force of law. See, *e.g.*, *General Motors Corp.* v. *Abrams*, 897 F.2d 34, 39-40 (2d Cir. 1990); *American Fin. Servs. Ass'n* v. *FTC*, 767 F.2d 957, 989-990 (D.C. Cir. 1985), cert. denied, 475 U.S. 1011 (1986); *Katharine Gibbs Sch. (Inc.)* v. *FTC*, 612 F.2d 658, 667 (2d Cir. 1979).

Yet, while conflict preemption is possible where the FTC has taken regulatory action, it is notable that neither petitioner nor its amici cite a single judicial decision holding that FTC action with respect to unfair or deceptive practices—in any sphere, not just as to cigarettes—did in fact preempt a particular state law. See *General Motors*, 897 F.2d at 41, 43 (State's more stringent Lemon Law did not frustrate FTC consent order); *American Fin. Servs.*, 767 F.2d at 989-990 (noting that FTC regulation prohibiting practices that certain States authorized did not present preemption question); *Katharine Gibbs*, 612 F.2d at 667 (invalidating FTC regula-

tion asserting broader preemptive effect than Supremacy Clause provides).[5]

The absence of cases finding conflict preemption reflects the cooperative relationship between the Commission and state consumer protection agencies noted above. See p. 3, *supra*. It also reflects the nature of the statutory provisions at issue. The fact that the FTC might not regard certain conduct as unfair or deceptive under the federal statute does not mean that it would necessarily undermine the FTC's policy objectives for a state regulator to take action against the same conduct under the State's own law. Indeed, when the FTC closes its own investigation without taking enforcement action, it may refer the matter to state or local officials "for such action as may be warranted under state or local law." *FTC Operating Manual*, ch. 14.2.3.1 (Illustration 1, model transmittal memorandum). Unlike those contexts in which a federal agency acts as a gatekeeper to the market and its approvals, embodying its own cost-benefit analysis, would necessarily be frustrated by a state agency or jury weighing costs and benefits differently, see, *e.g.*, *Riegel* v. *Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (FDA's premarket approval of medical de-

---

[5] The National Association of Manufacturers (NAM) brief cites (at 15) only an unpublished state administrative decision. The Ex-FTC Staff brief (at 32-33) cites *Brown* v. *Brown & Williamson Tobacco Corp.*, 479 F.3d 383 (5th Cir. 2007), and *Price* v. *Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005), cert. denied, 127 S. Ct. 685 (2006), but neither case concerned implied preemption. *Brown* held the plaintiff's claims expressly preempted by the Labeling Act, 479 F.3d at 386, and *Price* concerned whether "as a matter of state law" FTC policies satisfied an exception from liability for conduct authorized by "agency policy and practice," 848 N.E.2d at 38. The court of appeals in this case rejected a similar defense under MUTPA, see Pet. App. 55a-61a, and that holding is not before this Court.

vices), the FTC's regulatory actions are more likely to set a floor below which trade practices cannot fall, and not a ceiling that precludes a more demanding state standard. Cf. *Royal Oil Corp.* v. *FTC*, 262 F.2d 741, 743 (4th Cir. 1959) (retailer of used oil could label product both as "reprocessed," as required by state law, and "previously used," as required by FTC); *Geier* v. *American Honda Motor Co., Inc.*, 529 U.S. 861, 868 (2000) ("where federal law creates only a floor," there is no conflict preemption). As we demonstrate below, see pp. 21-31, the policy statements, consent orders, and other actions of the Commission relied upon by petitioner fail to establish that petitioner's alleged conduct was not deceptive under the FTC Act, much less that the Commission's accomplishment of that Act's objectives would be frustrated by a State declaring that conduct deceptive.

2. Petitioner's implied preemption argument also fails because, apart from two consent orders to which petitioner was not a party, the types of Commission actions on which they rely do not have the force of law. The Supremacy Clause makes the "Constitution, and the Laws of the United States" supreme. U.S. Const. Art. VI, Cl. 2. Accordingly, "[t]here is no federal preemption *in vacuo*, without a constitutional text or a federal statute to assert it." *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). Federal agency action having the force of law may preempt inconsistent state requirements, just as a federal statute may. *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982). State law may also be preempted by a federal agency's "inaction joined with action." *Isla Petroleum*, 485 U.S. at 503; see, *e.g.*, *Ray* v. *Atlantic Richfield*, 435 U.S. 151, 174-175, 178

(1978). But, at least as a general matter, "Executive Branch actions" that "express federal policy but lack the force of law" do not preempt state law. *Barclays Bank PLC* v. *Franchise Tax Bd.*, 512 U.S. 298, 329-330 (1994) (dormant Foreign Commerce Clause).

It is particularly clear, in light of the careful distinctions that the FTC Act and the Commission's regulations draw between FTC actions that have the force of law and those that do not, that the types of agency action relied upon by petitioner in this case do not carry preemptive effect. As noted above, see pp. 2-3, *supra*, the FTC Act draws a clear distinction between "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices," and trade regulation rules. 15 U.S.C. 57a(a)(1)(A) and (B). Only trade regulation rules are subject to the Act's extensive procedural requirements, 15 U.S.C. 57a(b), 57b-3(a)(1), and only violations of such rules are declared violations of law, 15 U.S.C. 57a(d)(3), subject to judicial actions for civil penalties or to remedy injuries to consumers, see 15 U.S.C. 45(m)(1)(A), 57b(a)(1). The statute specifically denies enforcement under those provisions to an "interpretive rule." *Ibid.* See *FTC Operating Manual*, ch. 8.3.2 (industry "guide does *not* have the force or effect of law and is not legally binding on the Commission or on the public"). Thus, where the FTC has issued an interpretive rule, any enforcement action must be based on an alleged violation of the substantive provision of the Act itself (or a duly adopted trade regulation rule), as construed by the interpretive rule. Because the FTC Act itself has no applicable preemptive effect in this setting, and there is no trade regulation rule, it follows that industry guides and similar interpretive materials issued by the Commission have no preemptive effect.

The FTC Act similarly distinguishes between fully litigated cease and desist orders and orders entered into by consent. Although fully litigated cease and desist orders that establish that conduct is unfair or deceptive can, in limited circumstances, be enforced against persons who were not parties to the original order, consent orders are expressly excluded from such enforcement. 15 U.S.C. 45(m)(1)(B).[6]

In light of the carefully calibrated statutory scheme delineating the enforceability of FTC rules and orders, only trade regulation rules, litigated cease and desist orders, and consent orders (with respect to the parties subject to them) qualify as federal "law" that can preempt conflicting state law pursuant to the Supremacy Clause. Because, as we discuss further below, none of the FTC actions on which petitioner relies falls within any of those categories, petitioner's implied preemption argument must be rejected on that ground alone.

B. Petitioner Mischaracterizes The Scope And Effect Of The FTC Actions That It Claims Are Preemptive

Petitioner's implied preemption argument rests on the twin assertions that the FTC "has *required* tobacco companies to disclose tar and nicotine yields in cigarette advertising using a government-mandated testing methodology and has *authorized* them to use descriptors as

---

[6] A litigated order may be enforced against a non-party only if the person knew the act or practice was unfair or deceptive, 15 U.S.C. 45(m)(1)(B), and the person would be entitled to de novo determination by the court of disputed questions of fact as well as review of the Commission's legal determination in the earlier proceeding, 15 U.S.C. 45(m)(2). All orders, including consent orders, are enforceable against the party named in the order, 15 U.S.C. 45(*l*), 57b(a)(2).

shorthand references to those numerical test results." Br. 2; see also *id.* at 47, 49. Neither assertion is correct.

1. The FTC has not legally "required" tobacco companies to disclose tar and nicotine yields under the Cambridge Method. In support of its contrary contention, petitioner relies on industry guidance from 1966 and 1967, a voluntary agreement among industry members in 1970, a 1978 advisory opinion, and a 1983 court action. Br. 5-10, 47, 50. In none of those instances did the Commission "require" petitioner to disclose tar and nicotine yields, and, as the Commission's own enforcement actions demonstrate—and as common sense dictates—none of those actions remotely suggests an FTC policy favoring *deceptive* use of descriptors in cigarette advertising.

a. *1966 industry guidance.* The Commission's 1966 letter to cigarette manufacturers informed manufacturers that the FTC would not view "a factual statement of the tar and nicotine content (expressed in milligrams)" based on the Cambridge Method as violating the FTC Act or the 1955 industry guidance. J.A. 478a-479a. As a legal matter, such industry guidance "does *not* have the force or effect of law and is not legally binding." *FTC Operating Manual*, ch. 8.3.2. And as a factual matter, it did not "require" any action on the part of petitioner, but merely indicated that, based on "pertinent evidence available" at that time, the FTC would not regard a truthful factual statement of Cambridge Method results as "*per se* false and misleading." J.A. 392a-393a (4/11/1966 letter from FTC Chair Paul Rand Dixon to Senator Warren G. Magnuson). Moreover, the guidance made clear that it applied only if "no collateral representation[s] (other than factual statements of tar and nicotine contents of cigarettes offered for sale to the

public) are made, expressly or by implication, as to reduction or elimination of health hazards." *Cigarette Advertising Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012.70 (Oct. 6, 2004). The complaint in this action is not based on petitioner's disclosure of Cambridge Method test results, but on allegations that petitioner fraudulently used descriptors such as "light" with the intent to convey that the cigarettes would yield less tar to human smokers than full-flavor cigarettes, and that petitioner knew that message to be untrue. See J.A. 30a-31a (First Amended Compl. ¶¶ 25-29).

The Commission's 1967 letter to the NAB (J.A. 366a-370a), which addressed statements of and representations about tar and nicotine content, likewise did not have the effect of law, nor did it "require" disclosures by petitioner. Although the letter stated that, "[a]s a general rule, *the Commission will not challenge* such statements or representations where they are shown to be accurate and fully substantiated" by the Cambridge Method, J.A. 368a (emphasis added), the letter did not "require" such disclosures. Moreover, the letter stressed that "no matter how relatively low its tar and nicotine content, no cigarette may truthfully be advertised or represented to the public, expressly or by implication, as 'safe' or 'safer,'" and that any inter-brand comparisons "should be factual, fair, and not misleading." J.A. 369a. The conduct alleged by respondents—that petitioner's use of descriptors constituted fraudulent comparisons because petitioner knew its "light" cigarettes would not yield less tar to actual human smokers—is thus not covered by the guidance.

b. *1970 voluntary agreement.* Although in 1970 the FTC initiated proceedings for a trade regulation rule to require disclosure of tar and nicotine yields, those

rulemaking proceedings were suspended indefinitely after leading tobacco companies, including petitioner, agreed among themselves to provide such information in cigarette advertisements. See *Brown & Williamson*, 778 F.2d at 37. The FTC was not a party to that agreement. Rather, as the tobacco companies stressed six times in their two-page letter to the FTC, it was a "voluntary" program that was "in lieu of any formal Trade Regulation Rule." J.A. 899a-900a, 905a. Indeed, they informed the FTC that any enforcement mechanism would be "completely unacceptable to their member companies." J.A. 326a. As recently as 2002, petitioner's request for rulemaking reaffirmed that disclosures of Cambridge Method data under the 1970 program are "voluntarily" made. J.A. 1046a. The FTC likewise confirmed in 1987 congressional testimony that tobacco companies "are not required by law or regulation to use this FTC method." J.A. 946a. Moreover, the 1970 agreement concerned only federal statements of tar and nicotine yields, not descriptors, which are the subject of this suit.

c. *1978 advisory opinion*. An advisory letter issued by the Commission does not bind the recipient at all, but merely advises the recipient of the Commission's understanding of the FTC Act as applied to facts as represented by the recipient. See 16 C.F.R. 1.2(a), 1.3(b). In particular, the one-page 1978 opinion on which petitioner relies (Br. 10) did not "require" Lorillard to publish tar and nicotine results in its advertising at all; it advised Lorillard that, in the Commission's view, using figures other than from the Cambridge Method would lead to "consumer confusion" because it would depart from the measure consumers were accustomed to seeing. *Advisory Opinion Letter*, 92 F.T.C. 1035 (1978); see

Brown & Williamson, 778 F.2d at 43. But stating a view that it would be confusing to use results from a test different than the one consumers expected is not the same as "requiring" disclosure of standardized test results.

d. *1983 court action.* The 1983 court proceeding concerning Barclay cigarettes on which petitioner also relies (at 50-51) actually contradicts its argument. Far from "requiring" disclosure of Cambridge Method test results, the Commission sought to *enjoin* reference to those results because it was, in context, deceptive. The Commission challenged a "literally true" statement of Cambridge Method results for Barclay cigarettes as deceptive because the cigarette "yields substantially more tar * * * when smoked by humans" than the comparison of machine results would indicate. *Brown & Williamson*, 778 F.2d at 38, 41.

2. Petitioner's claim that the FTC "authorized" the use of descriptors such as "light" and "lowered tar and nicotine" fares no better. As support for that assertion, petitioner cites the 1967 NAB guidance letter and two consent orders. See Br. 12-13, 47 (citing *In re American Brands, Inc.*, 79 F.T.C. 255 (1971), and *In re American Tobacco Co.*, 119 F.T.C. 3 (1995)). As we have already discussed, the 1967 guidance to the NAB does not constitute federal law that can have preemptive effect, and, in any event, it expressly warned against brand comparisons that were "misleading" or otherwise not "fair." J.A. 369a.

Although an FTC consent order does constitute federal law that is enforceable against the parties to it, and that would preempt conflicting state law, see *General Motors*, 897 F.2d at 39, "a consent order is binding only on the parties to the agreement," *id.* at 36, and only such a party could assert a preemption defense based on the

order's requirements, see *id.* at 42. Because petitioner was not a party to the consent orders it cites, its reliance on those orders is misplaced. In any event, even with respect to the parties, the consent orders addressed advertising, not the statements on cigarette packages at issue in this case, and they did not affirmatively "authorize" the use of descriptors in the deceptive manner alleged by the complaint—much less do so in a way that would immunize their private choice to do so from all liability under state law. Compare *Geier*, 529 U.S. at 874-886.[7]

a. The 1971 consent order arose out of a charge that American Brands was advertising as low in tar brands that had higher-than-average tar ratings under the Cambridge Method. See *In re American Brands, Inc.*, *supra*. The order required American Brands to stop "advertising that any cigarette manufactured by it, or the smoke therefrom, is low or lower in 'tar' by use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms, unless the statement is accompanied by a clear and conspicuous disclosure of * * * the 'tar' and nicotine content" as measured under the Cambridge Method. 79 F.T.C. at 258. That decree enjoined, rather than authorized, conduct. And, as the Commission's later enforcement proceedings against the Barclay and Carlton advertisements demonstrate, the 1971 consent order cannot be read to authorize the use of such descriptors when, as respondents allege, the message thereby conveyed would be false or misleading. Moreover, as the court of appeals stressed, on the order's own terms, the

[7] The Commission has included a provision in a consent decree with cigar manufacturers that expressly bars States from requiring different health warnings. See *In re Havatampa, Inc.*, No. C-3965 (F.T.C. Aug. 18, 2000) <http://www.ftc.gov/os/2000/08/havatampado.htm>.

conduct at issue in this case falls outside the scope of the "unless" clause, because "Philip Morris uses the terms 'light' and 'Lowered Tar and Nicotine' on the packages of Marlboro and Cambridge Lights *without* mentioning their tar and nicotine ratings." Pet. App. 57a.[8]

b. In the 1995 consent order, the Commission found that American Tobacco's "represent[ation], directly or by implication, that consumers will get less tar by smoking ten packs of Carlton brand cigarettes than by smoking a single pack of the other brands" was deceptive, even though it was based on the results of Cambridge Method testing, because, "[i]n truth and in fact, consumers will not necessarily get less tar" due to "such behavior as compensatory smoking." *In re American Tobacco Company*, 119 F.T.C. at 4. The consent order required American to cease making such representations, directly or indirectly, "through the presentation of the tar ratings of any of respondent's brands of cigarettes as a numerical multiple, fraction or ratio of the tar of any other brand" *Id.* at 10. A proviso to the order indicated that "presentation of the tar and/or nicotine ratings of any of respondent's brands of cigarettes and the tar and/or nicotine ratings of any other brand (with or without an express or implied representation that respondent's

[8] Petitioner seeks (at 52-53) to draw a comparison between FDA drug approval, which has preemptive effect, see U.S. Br. at 17-28, *Wyeth* v. *Levine*, No. 06-1249 (June 2, 2008), and the consent order's asserted "authorization" of descriptors. But the two situations are fundamentally different. There is no question that FDA "approval" has the force of federal law, because without that approval, it is a violation of federal law to introduce a new drug into interstate commerce. See 21 U.S.C. 355(a). By contrast, petitioner cannot seriously contend that the consent order with American Brands, which enjoined certain conduct, constituted comparable regulatory approval of descriptors that were otherwise unlawful.

brand is 'low,' 'lower,' or 'lowest' in tar and/or nicotine) shall not be deemed to constitute a numerical multiple, fraction or ratio and *shall not, in and of itself, be deemed to violate paragraph I or II of this order*." *Id.* at 11 (emphasis added). That proviso did not authorize American to use the cited descriptors; it simply indicated that the presentation of Cambridge Method ratings, whether or not accompanied by the descriptors, would not "in and of itself" be deemed to violate the consent order. In any event, the proviso does not apply here for the independent reason that the cigarette package labels at issue in this case do not contain any Cambridge Method ratings. See Pet. App. 57a.

3. As the court of appeals observed, the "only policy" to emerge from the FTC's enforcement actions "is that certain tar and nicotine claims consistent with the Cambridge Filter Method test results can still amount to unfair or deceptive acts or practices." Pet. App. 52a-53a. In the Carlton case, it was misleading to imply that the ratio of two cigarettes' Cambridge Method ratings directly correlated to the ratio of human tar intake. In the Barclay case, the FTC charged that advertising the Cambridge Method results themselves was misleading because it did not correlate to human exposure. *Brown & Williamson*, 778 F.2d at 37-39.

Those enforcement proceedings demonstrate that if, due to design features (Barclay) or other compensatory smoking behavior (Carlton), Cambridge Method results do not offer a valid basis for comparing the relative tar yields of cigarettes "when smoked by humans," 778 F.2d at 38, implied representations about human exposure based on Cambridge Method results become deceptive. And they are fraudulent if done intentionally, even though they were "literally true" insofar as they state

the tar yield to the smoking machine. See Restatement (Second) of Torts § 527(a) (1977) (where maker of representation knows it is capable of both true and false interpretations, and makes it "with the intention that it be understood in the sense in which it is false," it is fraudulent); *United States* v. *95 Barrels of Vinegar*, 265 U.S. 438, 443 (1924) ("Deception may result from the use of statements not technically false or which may be literally true."). Thus, the Commission's enforcement actions do not even evidence a policy of "authorizing" all technically true statements of Cambridge Method results, much less use of descriptors that rely on such results to imply false health benefits to smokers.

Finally, petitioner's assertion that the Commission has adopted a definitive policy under the FTC Act concerning descriptors is contrary to both the stated position of the Commission and petitioner's own prior admissions. As the FTC stated in its 1997 request for public comment, there are "*no official definitions*" for descriptive terms such as "light" and "low tar." 62 Fed. Reg. at 48,163 (emphasis added). Accordingly, the Commission asked whether there is "a need for official guidance with respect to the terms used in marketing lower rated cigarettes?" *Ibid.* In response, petitioner stated:

> The manufacturers are not convinced that there is a need for official guidance with respect to the terms used in marketing lower rated cigarettes.

Joint Comments 94. In 2002, petitioner filed a petition with the FTC, urging the Commission "to promulgate rules governing * * * the use of descriptors, such as 'light' and 'ultra light.'" J.A. 1043a. Having agreed in 1998 that its descriptors are unregulated, and having later urged the Commission to regulate them—a request

that has not been acted upon—petitioner cannot now contend that the descriptors actually received affirmative "authorization" from the FTC decades ago.

4. Petitioner seeks further support for its implied preemption argument from the Labeling Act, urging that it "granted the FTC the authority to regulate health-related statements in cigarette advertising and expressly preempted the States' overlapping authority." Br. 56. That argument is at odds with the plain terms and evolution of the statute.

The Labeling Act provides:

> Nothing in this chapter [other than the grant of authority concerning the rotation of Surgeon General warnings] shall be construed to limit, restrict, *expand, or otherwise affect* the authority of the [FTC] with respect to unfair or deceptive acts or practices in the advertising of cigarettes.

15 U.S.C. 1336 (emphasis added). By its plain text, the Labeling Act is not the *source* of the FTC's authority to prevent deceptive cigarette advertising; that source is the FTC Act. Nor does the Labeling Act "expand" that authority.

Congress did, in 1969, limit the specific prohibition on legal requirements concerning cigarette advertising "based on smoking and health" to requirements "imposed under state law." See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 88. While that amendment removed a limitation on federal officers and agencies, including the Attorney General and the FTC, the amended provision, which does not even refer to federal agencies, does not "*grant*[]" any authority by them, and certainly does not do so with respect to the FTC exclusively. To the contrary, the

1969 amendments reaffirmed that the Labeling Act does not "expand, or otherwise affect" the FTC's authority with respect to cigarette advertising. 15 U.S.C. 1336.

Given the breadth of the FTC's responsibilities, it is unsurprising that Congress has not chosen to give the FTC alone responsibility for policing the cigarette industry's marketing practices. The FTC's jurisdiction is not narrowly trained on that industry; it extends to unfair or deceptive acts or practices "in or affecting commerce." 15 U.S.C. 45(a)(2). The FTC is thus unlike other agencies that may have mandates to oversee particular practices in particular industries. Compare, *e.g.*, *Riegel*, 128 S. Ct. at 1004-1005 (addressing FDA's responsibilities to evaluate medical devices for safety and efficacy). Nor does the FTC have the resources to oversee all relevant practices of the cigarette industry. Indeed, when it was proposed in Congress in 1988 that the FTC be required to test the constituent parts of cigarette smoke, the FTC objected, explaining that the Commission "is a law enforcement agency composed of attorneys and economists," "not a scientific body," and that it had closed its cigarette testing laboratory because the operation "was incompatible with the expertise and overall responsibilities of the agency." C.A. App. 301, Exh. 203.

C. The FTC's Failure To Modify the Cambridge Method Does Not Support A Finding Of Preemption

Petitioner also seeks support for its implied preemption claim from the FTC's failure to modify the Cambridge Method. It urges that the FTC "has been well aware of the FTC Method's inherent inability to replicate the variability of human smoking behavior and has repeatedly reevaluated the propriety of this testing procedure," yet has "retained the testing method for four

decades." Br. 47. Because, as we have demonstrated, the Commission's guidance concerning the Cambridge Method did not have preemptive effect, the Commission's failure to modify that guidance does not have preemptive force. In any event, petitioner's characterization of the Commission's conduct is inaccurate.

Petitioner contends that the Commission has been aware of smokers' tendency "to smoke 'light' cigarettes more intensely to compensate for lower nicotine yields" since the 1980s. Br. 10-11. Petitioner fails to note that, as late as 1998, petitioner represented to the Commission, which was seeking information on the issue, that "compensatory smoking" was a "hypothesized" and "weakly documented phenomenon" as to which the "evidence * * * is highly equivocal," and that "[t]he evidence that vent-blocking occurs is extremely limited and inconclusive." Joint Comments 43-44, 60, 82.[9] We now know that petitioner was well aware of the phenomena for decades. See pp. 8-9, *supra*. Petitioner cannot take advantage of the fact that it concealed its knowledge from the Commission by now asserting that the Commission knew all along that petitioner's denials regarding compensation were false. Because "all the relevant facts" were not "fully, completely, and accurately presented to the Commission," petitioner cannot take advantage of guidance the Commission gave (or refrained from rescinding) on that subject. 16 C.F.R. 1.3(b) (advi-

---

[9] Petitioner's reference to compensation for "lower nicotine yields," Br. 11, reflects implicit recognition that it is the smoker's addiction to nicotine that drives compensatory behavior. But petitioner has expended considerable efforts to sow doubt about that fact as well. See *Philip Morris*, 449 F. Supp. at 272-274 (citing statements from 1994 through 2002).

sory opinions valid only if all relevant facts were disclosed).

Although, as petitioner notes, the Commission began enquiring about compensation in the early 1980s, the fact that it has not, to date, rescinded the 1966 guidance or modified the test method reflects the FTC's ongoing consideration of the issue, rather than a definitive and binding determination by the Commission that petitioner's use of descriptors is not deceptive, despite compensation behavior. For example, no definitive action was taken after the 1977 investigation due to an "absence of information." J.A. 655a (*Historical Overview*) (quoting 43 Fed. Reg. at 11,857). Likewise, a final determination based on the 1983 study "would have been premature" in light of the information then available. J.A. 661a. And the information-gathering process—which began with the convening of the NCI conference in 1994, proceeded to solicitation of comments in 1997, and continues with the study by the Department of Health and Human Services—has not been completed. The failure to take definitive action in such circumstances does not constitute a definitive and binding policy concerning the interpretation and enforcement of the federal Act, much less one that would bar the application of state law. See *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 60-62, 66-68 (2002) (failure to adopt propeller guard regulation for recreational boats, which had been under consideration for fourteen years, did not "convey an 'authoritative' message of a federal policy against propeller guards" but only that "available data did not meet the [statute's] 'stringent' criteria for federal regulation").

CONCLUSION

Petitioner's implied preemption claim should be rejected.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General
WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
MARK B. STERN
ALISA B. KLEIN
Attorneys

JUNE 2008