SUPREME COURT OF THE UNITED STATES

No. 90–1038

THOMAS CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE, PETITIONER *v.* LIGGETT GROUP, INC., ET AL.

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

[June 24, 1992]

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI.

``WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH.'' A federal statute enacted in 1969 requires that warning (or a variation thereof) to appear in a conspicuous place on every package of cigarettes sold in the United States.[1] The questions presented to us by this case are whether that statute, or its 1965 predecessor which required a less alarming label, pre-empted petitioner's common law claims against respondent cigarette manufacturers.

Petitioner is the son of Rose Cipollone, who began smoking in 1942 and who died of lung cancer in 1984. He claims that respondents are responsible for Rose Cipollone's death because they breached express warranties contained in their advertising, because they failed to warn consumers about the

[1]Public Health Cigarette Smoking Act of 1969, Pub. L. 91–222, 84 Stat. 87, as amended, 15 U. S. C. §§1331–1340. In 1984, Congress amended the statute to require four more explicit warnings, used on a rotating basis. See Comprehensive Smoking Education Act, Pub. L. 98–474, 98 Stat. 2201. Because petitioner's claims arose before 1984, neither party relies on this later Act.

hazards of smoking, because they fraudulently misrepresented those hazards to consumers, and because they conspired to deprive the public of medical and scientific information about smoking. The Court of Appeals

held that petitioner's state law claims were pre-empted by federal statutes, 893 F. 2d 541 (CA3 1990), and other courts have agreed with that analysis.[2] The highest courts of the States of Minnesota and New Jersey, however, have held that the federal statutes did not pre-empt similar common law claims.[3] Because of the manifest importance of the issue, we granted certiorari to resolve the conflict, 500 U. S. ––– (1991). We now reverse in part and affirm in part.

On August 1, 1983, Rose Cipollone and her husband filed a complaint invoking the diversity jurisdiction of the Federal District Court. Their complaint alleged that Rose Cipollone developed lung cancer because she smoked cigarettes manufactured and sold by the three respondents. After her death in 1984, her husband filed an amended complaint. After trial, he also died; their son, executor of both estates, now maintains this action.

Petitioner's third amended complaint alleges several different bases of recovery, relying on theories of strict liability, negligence, express warranty, and intentional tort. These claims, all based on New Jersey law, divide into five categories. The ``design defect claims'' allege that respondents'

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[2]The Court of Appeals' analysis was initially set forth in *Cipollone* v. *Liggett Group, Inc.,* 789 F.2d 181 (CA3 1986). Other federal courts have adopted a similar analysis. See *Pennington* v. *Vistron Corp.*, 876 F. 2d 414 (CA5 1989); *Roysdon* v. *R. J. Reynolds Tobacco Co.,* 849 F. 2d 230 (CA6 1988); *Stephen* v. *American Brands, Inc.*, 825 F.2d 312 (CA11 1987); *Palmer* v. *Liggett Group, Inc.*, 825 F.2d 620 (CA1 1987).

[3]*Forster* v. *R. J. Reynolds Tobacco Co.,* 437 N. W. 2d 655 (Minn. 1989); *Dewey* v. *R. J. Reynolds Tobacco Co.,* 121 N.J. 69, 577 A. 2d 1239 (1990).

cigarettes were defective because respondents failed to use a safer alternative design for their products and because the social value of their product was outweighed by the dangers it created (Count 2, App. 83–84). The ``failure to warn claims'' allege both that the product was ``defective as a result of [respondents'] failure to provide adequate warnings of the health consequences of cigarette smoking'' (Count 3, App. 85) and that respondents ``were negligent in the manner [that] they tested, researched, sold, promoted, and advertised'' their cigarettes (Count 4, App. 86). The ``express warranty claims'' allege that respondents had ``expressly warranted that smoking the cigarettes which they manufactured and sold did not present any significant health consequences'' (Count 7, App. 88). The ``fraudulent misrepresentation claims'' allege that respondents had wilfully ``through their advertising, attempted to neutralize the [federally mandated] warnin[g]'' labels (Count 6, App. 87–88), and that they had possessed, but had ``ignored and failed to act upon'' medical and scientific data indicating that ``cigarettes were hazardous to the health of consumers'' (Count 8, App. 89). Finally, the ``conspiracy to defraud claims'' allege that respondents conspired to deprive the public of such medical and scientific data (Count 8, App. 89).

As one of their defenses, respondents contended that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from any liability based on their conduct after 1965. In a pretrial ruling, the District Court concluded that the federal statutes were intended to establish a uniform warning that would prevail throughout the country and that would protect cigarette manufacturers from being ``subjected to varying requirements from state to state,'' *Cipollone* v. *Liggett Group, Inc.,* 593 F. Supp. 1146, 1148 (NJ 1984), but

that the statutes did not pre-empt common law actions. *Id.,* at 1153–1170.[4] Accordingly, the court granted a motion to strike the pre-emption defense entirely.

The Court of Appeals accepted an interlocutory appeal pursuant to 28 U. S. C. §1292(b), and reversed. *Cipollone* v. *Liggett Group, Inc.,* 789 F.2d 181 (CA3 1986). The court rejected respondents' contention that the federal Acts expressly pre-empted common law actions, but accepted their contention that such actions would conflict with federal law. Relying on the statement of purpose in the statutes,[5]

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[4]The court explained:

``However, the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates, and that therefore such warning is inadequate. The court recognizes that it will be extremely difficult for a plaintiff to prove that the present warning is inadequate to inform of the dangers, whatever they may be. However, the difficulty of proof cannot preclude the opportunity to be heard, and affording that opportunity will not undermine the purposes of the Act.'' 593 F. Supp., at 1148.

[5]``It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

``(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

``(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and

the court concluded that Congress' ``carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy'' would be upset by state law damages actions based on noncompliance with ``warning, advertisement, and promotion obligations other than those prescribed in the [federal] Act.'' *Id.*, at 187. Accordingly, the court held:

> ``the Act pre-empts those state law damage[s] actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. [W]here the success of a state law damage[s] claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are pre-empted as conflicting with the Act.'' *Ibid.* (footnote omitted).

The court did not, however, identify the specific claims asserted by petitioner that were pre-empted by the Act.

This Court denied a petition for certiorari, 479 U. S. 1043 (1987), and the case returned to the District Court for trial. Complying with the Court of Appeals mandate, the District Court held that the failure to warn, express warranty, fraudulent misrepresentation, and conspiracy to defraud claims were barred to the extent that they relied on respondents' advertising, promotional, and public relations activities after January 1, 1966 (the effective date of the 1965 Act). *Cipollone* v. *Liggett Group, Inc.,* 649 F. Supp. 664, 669, 673–675 (NJ 1986). The

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advertising regulations with respect to any relationship between smoking and health.'' 15 U. S. C. §1331 (1982 ed.).

court also ruled that while the design defect claims were not pre-empted by federal law, those claims were barred on other grounds.[6] *Id.*, at 669–672. Following extensive discovery and a four-month trial, the jury answered a series of special interrogatories and awarded $400,000 in damages to Rose Cipollone's husband. In brief, it rejected all of the fraudulent misrepresentation and conspiracy claims, but found that respondent Liggett had breached its duty to warn and its express warranties before 1966. It found, however, that Rose Cipollone had ``voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes'' and that 80% of the responsibility for her injuries was attributable to her. See 893 F.2d, at 554 (summarizing jury findings). For that reason, no damages were awarded to her estate. However, the jury awarded damages to compensate her husband for losses caused by respondents' breach of express warranty.

On cross-appeals from the final judgment, the Court of Appeals affirmed the District Court's pre-emption rulings but remanded for a new trial on several issues not relevant to our decision. We granted the petition for certiorari to consider the pre-emptive effect of the federal statutes.

Although physicians had suspected a link between smoking and illness for centuries, the first medical studies of that connection did not appear until the 1920s. See U. S. Dept. of Health and Human Services, Report of the Surgeon General, Reducing the Health Consequences of Smoking: 25 Years of Progress 5 (1989). The ensuing decades saw a wide range of epidemiologic and laboratory studies on the health hazards of smoking. Thus, by the time the

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[6]We are not presented with any question concerning these claims.

Surgeon General convened an advisory committee to examine the issue in 1962, there were more than 7,000 publications examining the relationship between smoking and health. *Id.*, at 5–7.

In 1964, the advisory committee issued its report, which stated as its central conclusion: ``Cigarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.'' U. S. Dept. of Health, Education, and Welfare, U. S. Surgeon General's Advisory Committee, Smoking and Health 33 (1964). Relying in part on that report, the Federal Trade Commission (FTC), which had long regulated unfair and deceptive advertising practices in the cigarette industry,[7] promulgated a new trade regulation rule. That rule, which was to take effect January 1, 1965, established that it would be a violation of the Federal Trade Commission Act ``to fail to disclose, clearly and prominently, in all advertising and on every pack, box, carton, or container [of cigarettes] that cigarette smoking is dangerous to health and may cause death from cancer and other diseases.'' 29 Fed. Reg. 8325 (1964). Several States also moved to regulate the advertising and labeling of cigarettes. See, *e.g.*, 1965 N.Y. Laws, ch.470; see also 111 Cong. Rec. 13900–13902 (1965) (statement of Sen. Moss). Upon a congressional request, the FTC postponed enforcement of its new regulation for six months. In July 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act.[8] The 1965 Act effectively adopted half of the FTC's regulation: the

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[7]See, *e.g.*, Brown & Williamson Tobacco Corp., 56 F.T.C. 956 (1960); Liggett & Myers Tobacco Co., 55 F.T.C. 354 (1958); Philip Morris & Co., Ltd, 51 F.T.C. 857 (1955); R. J. Reynolds Tobacco Co., 48 F.T.C. 682 (1952); London Tobacco Co., 36 F.T.C. 282 (1943).

[8]Pub. L. 89–92, 79 Stat. 282, as amended, 15 U. S. C. §§1331–1340.

Act mandated warnings on cigarette packages (§5(a)), but barred the requirement of such warnings in cigarette advertising (§5(b)).[9]

Section 2 of the Act declares the statute's two purposes: (1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform and confusing cigarette labeling and advertising regulations.[10] In furtherance of the first purpose, §4 of the Act made it unlawful to sell or distribute any cigarettes in the United States unless the package bore a conspicuous label stating: ``CAUTION: CIGARETTE SMOKING MAY BE HAZARDOUS TO YOUR HEALTH.'' In furtherance of the second purpose, §5, captioned ``Preemption,'' provided in part:

> ``(a)No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.
>
> ``(b)No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.''

Although the Act took effect January 1, 1966, §10 of the Act provided that its provisions affecting the regulation of advertising would terminate on July 1, 1969.

As that termination date approached, federal authorities prepared to issue further regulations on cigarette advertising. The FTC announced the reinstitution of its 1964 proceedings concerning a

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[9]However, §5(c) of the Act expressly preserved ``the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.'' 79 Stat. 283.

[10]See n. 5, *supra*.

warning requirement for cigarette advertisements. 34 Fed. Reg. 7917 (1969). The Federal Communications Commission (FCC) announced that it would consider ``a proposed rule which would ban the broadcast of cigarette commercials by radio and television stations.'' 34 Fed. Reg. 1959 (1969). State authorities also prepared to take actions regulating cigarette advertisements.[11]

It was in this context that Congress enacted the Public Health Cigarette Smoking Act of 1969,[12] which amended the 1965 Act in several ways. First, the 1969 Act strengthened the warning label, in part by requiring a statement that cigarette smoking ``is dangerous'' rather than that it ``may be hazardous.'' Second, the 1969 Act banned cigarette advertising in ``any medium of electronic communication subject to [FCC] jurisdiction.'' Third, and related, the 1969 Act modified the pre-emption provision by replacing the original §5(b) with a provision that reads:

> ``(b)No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.''

Although the Act also directed the FTC not to ``take any action before July 1, 1971, with respect to its pending trade regulation rule proceeding relating to cigarette advertising,'' the narrowing of the pre-emption provision to prohibit only restrictions ``imposed under State law'' cleared the way for the

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[11]For example, the California State Senate passed a total ban on both print and electronic cigarette advertisements. ``California Senate Votes Ban On Cigarette Advertising,'' Washington Post, June 26, 1969, p. A9.

[12]Pub. L. 91–222, 84 Stat. 87, as amended, 15 U. S. C. §§1331–1340.

FTC to extend the warning-label requirement to print advertisements for cigarettes. The FTC did so in 1972. See *In re Lorillard,* 80 F.T.C. 455 (1972).

Article VI of the Constitution provides that the laws of the United States ``shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.'' Art. VI, cl. 2. Thus, since our decision in *McCulloch* v. *Maryland*, 4 Wheat. 316, 427 (1819), it has been settled that state law that conflicts with federal law is ``without effect.'' *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981). Consideration of issues arising under the Supremacy Clause ``start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'' *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Accordingly, ```[t]he purpose of Congress is the ultimate touchstone''' of pre-emption analysis. *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978) (quoting *Retail Clerks* v. *Schermerhorn*, 375 U. S. 96, 103 (1963)).

Congress' intent may be ``explicitly stated in the statute's language or implicitly contained in its structure and purpose.'' *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, see *Pacific Gas & Elec. Co.* v. *Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 204 (1983), or if federal law so thoroughly occupies a legislative field ```as to make reasonable the inference that Congress left no room for the States to supplement it.''' *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153 (1982) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230).

The Court of Appeals was not persuaded that the pre-emption provision in the 1969 Act encompassed state common law claims.[13] 789 F.2d, at 185–186. It was also not persuaded that the labeling obligation imposed by both the 1965 and 1969 Acts revealed a congressional intent to exert exclusive federal control over every aspect of the relationship between cigarettes and health. *Id.*, at 186. Nevertheless, reading the statute as a whole in the light of the statement of purpose in §2, and considering the potential regulatory effect of state common law actions on the federal interest in uniformity, the Court of Appeals concluded that Congress had impliedly pre-empted petitioner's claims challenging the adequacy of the warnings on labels or in advertising or the propriety of respondents' advertising and promotional activities. *Id.*, at 187.

In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in §5 of each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a ``reliable indicium of congressional intent with respect to state authority,'' *Malone* v. *White Motor Corp.,* 435 U. S., at 505, ``there is no need to infer congressional intent to pre-empt state laws from the substantive provisions'' of

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[13]In its express pre-emption analysis, the court did not distinguish between the pre-emption provisions of the 1965 and 1969 Acts; it relied solely on the latter, apparently believing that the 1969 provision was at least as broad as the 1965 provision. The court's ultimate ruling that petitioner's claims were impliedly pre-empted effective January 1, 1966, reflects the fact that the 1969 Act did not alter the statement of purpose in §2, which was critical to the court's implied pre-emption analysis.

the legislation. *California Federal Savings & Loan Assn.* v. *Guerra,* 479 U. S. 272, 282 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius:* Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. In this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond §5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections. As the 1965 and 1969 provisions differ substantially, we consider each in turn.

In the 1965 pre-emption provision regarding advertising (§5(b)), Congress spoke precisely and narrowly: ``No *statement* relating to smoking and health shall be required *in the advertising* of [properly labeled] cigarettes.'' Section 5(a) used the same phrase (``No *statement* relating to smoking and health'') with regard to cigarette labeling. As §5(a) made clear, that phrase referred to the sort of warning provided for in §4, which set forth verbatim the warning Congress determined to be appropriate. Thus, on their face, these provisions merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels (§5(a)) or in cigarette advertisements (§5(b)).

Beyond the precise words of these provisions, this reading is appropriate for several reasons. First, as discussed above, we must construe these provisions in light of the presumption against the pre-emption of state police power regulations. This presumption reinforces the appropriateness of a narrow reading of §5. Second, the warning required in §4 does not by its own effect foreclose additional obligations imposed under state law. That Congress requires a

particular warning label does not automatically pre-empt a regulatory field. See *McDermott* v. *Wisconsin*, 228 U. S. 115, 131–132 (1913). Third, there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions. For example, in the Comprehensive Smokeless Tobacco Health Education Act of 1986,[14] Congress expressly pre-empted State or local imposition of a ``statement relating to the use of smokeless tobacco products and health'' but, at the same time, preserved state law damages actions based on those products. See 15 U. S. C. §4406. All of these considerations indicate that §5 is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels.[15]

This reading comports with the 1965 Act's statement of purpose, which expressed an intent to avoid ``diverse, nonuniform, and confusing labeling and advertising *regulations* with respect to any relationship between smoking and health.'' Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies in response to the Surgeon General's report, the term ``regulation'' most naturally refers to positive enactments by those bodies, not to common law damages actions.

The regulatory context of the 1965 Act also supports such a reading. As noted above, a warning requirement promulgated by the FTC and other requirements under consideration by the States were

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[14]Pub. L. 99–252, 100 Stat. 30, as codified, 15 U. S. C. §§4401–4408.

[15]Cf. *Banzhaf* v. *FCC,* 132 U. S. App. D.C. 14, 405 F.2d 1082 (1968), cert. denied, 396 U. S. 842 (1969) (holding that 1965 Act did not pre-empt FCC's fairness policy as applied to cigarette advertising).

the catalyst for passage of the 1965 Act. These regulatory actions animated the passage of §5, which reflected Congress' efforts to prevent ``a multiplicity of State and local regulations pertaining to labeling of cigarette packages,'' H.R. Rep. No. 89–449, 89th Cong., 1st Sess., 4 (1965), and to ``pre-empt [all] Federal, State, and local authorit[ies] from requiring *any statement* . . . relating to smoking and health in the advertising of cigarettes.'' *Id.,* at 5 (emphasis supplied).[16]

For these reasons, we conclude that §5 of the 1965 Act only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions.[17]

Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader. First, the later Act bars not

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[16]JUSTICE SCALIA takes issue with our narrow reading of the phrase "No statement." His criticism, however, relies solely on an interpretation of those two words, artificially severed from both textual and legislative context. As demonstrated above, the phrase "No statement" in §5(b) refers to the similar phrase in §5(a), which refers in turn to §4, which itself sets forth a *particular* statement. This context, combined with the regulatory setting in which Congress acted, establishes that a narrow reading of the phrase "No statement" is appropriate.

[17]This interpretation of the 1965 Act appears to be consistent with respondents' contemporaneous understanding of the Act. Although respondents have participated in a great deal of litigation relating to cigarette use beginning in the 1950's, it appears that this case is the first in which they have raised §5 as a pre-emption defense.

simply ``statements'' but rather ``requirement[s] or prohibition[s] . . . imposed under State law.'' Second, the later Act reaches beyond statements ``in the advertising'' to obligations ``with respect to the advertising or promotion'' of cigarettes.

Notwithstanding these substantial differences in language, both petitioner and respondents contend that the 1969 Act did not materially alter the pre-emptive scope of federal law.[18] Their primary support for this contention is a sentence in a Committee Report which states that the 1969 amendment ``clarified'' the 1965 version of §5(b). S. Rep. No. 91–566, p. 12 (1969). We reject the parties' reading as incompatible with the language and origins of the amendments. As we noted in another context, ``[i]nferences from legislative history cannot rest on so slender a reed. Moreover, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'' *United States* v. *Price*, 361 U. S. 304, 313 (1960). The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions and in light of the substantial changes in wording, we cannot accept the parties' claim that the 1969 Act did not alter the reach of §5(b).[19]

Petitioner next contends that §5(b), however

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[18]See Brief for Petitioner 23–24; Brief for Respondents 21–23.

[19]As noted above, the 1965 Act's statement of purpose (§2) suggested that Congress was concerned primarily with ``regulations''—positive enactments, rather than common law damages actions. Although the 1969 Act did not amend §2, we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to §5(b).

broadened by the 1969 Act, does not pre-empt *common law* actions. He offers two theories for limiting the reach of the amended §5(b). First, he argues that common law damages actions do not impose ``requirement[s] or prohibition[s]'' and that Congress intended only to trump ``state statute[s], injunction[s], or executive pronouncement[s].''[20] We disagree; such an analysis is at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions. The phrase ``[n]o requirement or prohibition'' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules. As we noted in another context, ``[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'' *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959).

Although portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities, see S. Rep. No. 91–566, p. 12, the language of the Act plainly reaches beyond such enactments. ``We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.'' *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 97 (1983). In this case there is no ``good reason to believe'' that Congress meant less than what it said; indeed, in light of the narrowness of the 1965 Act, there is ``good reason to believe'' that Congress meant precisely what it said in amending that Act.

Moreover, common law damages actions of the sort

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[20]Brief for Petitioner 20.

raised by petitioner are premised on the existence of a legal duty and it is difficult to say that such actions do not impose ``requirements or prohibitions.'' See W. Prosser, Law of Torts 4 (4th ed. 1971); Black's Law Dictionary 1489 (6th ed. 1990) (defining ``tort'' as ``always [involving] a violation of some duty owing to plaintiff''). It is in this way that the 1969 version of §5(b) differs from its predecessor: Whereas the common law would not normally require a vendor to use any specific *statement* on its packages or in its advertisements, it is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions.* We therefore reject petitioner's argument that the phrase ``requirement or prohibition'' limits the 1969 Act's pre-emptive scope to positive enactments by legislatures and agencies.

Petitioner's second argument for excluding common law rules from the reach of §5(b) hinges on the phrase ``imposed under State law.'' This argument fails as well. At least since *Erie R.* v. *Tompkins*, 304 U. S. 64 (1938), we have recognized the phrase ``state law'' to include common law as well as statutes and regulations. Indeed just last Term, the Court stated that the phrase ``all other law, including State and municipal law'' ``does not admit of [a] distinction . . . between positive enactments and common-law rules of liability.'' *Norfolk & Western R. Co.* v. *Train Dispatchers,* 499 U. S. ––––, ––– (1991) (slip op., at 11). Although the presumption against pre-emption might give good reason to construe the phrase ``state law'' in a pre-emption provision more narrowly than an identical phrase in another context, in this case such a construction is not appropriate. As explained above, the 1965 version of §5 was precise and narrow on its face; the obviously broader language of the 1969 version extended that section's pre-emptive reach. Moreover, while the version of the 1969 Act passed by the Senate pre-empted ``any State *statute*

or regulation with respect to . . . advertising or promotion,'' S. Rep. No. 91–566, p. 16, the Conference Committee replaced this language with ``State *law* with respect to advertising or promotion.'' In such a situation, §5(b)'s pre-emption of ``state law'' cannot fairly be limited to positive enactments.

That the pre-emptive scope of §5(b) cannot be limited to positive enactments does not mean that that section pre-empts all common law claims. For example, as respondents concede, §5(b) does not generally pre-empt ``state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes.''[21] For purposes of §5(b), the common law is not of a piece.

Nor does the statute indicate that any familiar subdivision of common law claims is or is not pre-empted. We therefore cannot follow petitioner's passing suggestion that §5(b) pre-empts liability for omissions but not for acts, or that §5(b) pre-empts liability for unintentional torts but not for intentional torts. Instead we must fairly but—in light of the strong presumption against pre-emption—narrowly construe the precise language of §5(b) and we must look to each of petitioner's common law claims to determine whether it is in fact pre-empted.[22] The

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[21]Brief for Respondents 14.

[22]Petitioner makes much of the fact that Congress did not expressly include common law within §5's pre-emptive reach, as it has in other statutes. See, *e.g.*, 29 U. S. C. §1144(c)(1); 12 U. S. C. §1715z-17(d). Respondents make much of the fact that Congress did not include a savings clause preserving common law claims, again, as it has in other statutes. See, *e.g.*, 17 U. S. C. §301. Under our analysis of §5, these omissions make perfect sense: Congress was neither pre-empting nor saving common law as a whole—it was simply pre-empting particular common law

central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a ``requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion,'' giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common law claims pre-empted by the statute.

We consider each category of damages actions in turn. In doing so, we express no opinion on whether these actions are viable claims as a matter of state law; we assume *arguendo* that they are.

Failure to Warn

To establish liability for a failure to warn, petitioner must show that ``a warning is necessary to make a product . . . reasonably safe, suitable and fit for its intended use,'' that respondents failed to provide such a warning, and that that failure was a proximate cause of petitioner's injury. Tr. 12738. In this case, petitioner offered two closely related theories concerning the failure to warn: first, that respondents ``were negligent in the manner [that] they tested, researched, sold, promoted, and advertised'' their cigarettes; and second, that respondents failed to provide ``adequate warnings of the health consequences of cigarette smoking.'' App. 85–86.

Petitioner's claims are pre-empted to the extent that they rely on a state law ``requirement or prohibition . . . with respect to . . . advertising or promotion.'' Thus, insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted. The Act does not, however, pre-empt petitioner's claims

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claims, while saving others.

that rely solely on respondents' testing or research practices or other actions unrelated to advertising or promotion.

Breach of Express Warranty

Petitioner's claim for breach of an express warranty arises under N. J. Stat. Ann. §12A:2–313(1)(a) (West 1991), which provides:

> ``Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.''

Petitioner's evidence of an express warranty consists largely of statements made in respondents' advertising. See 893 F. 2d, at 574, 576; 683 F. Supp. 1487, 1497 (NJ 1988). Applying the Court of Appeals' ruling that Congress pre-empted ``damage[s] actions . . . that challenge . . . the propriety of a party's actions with respect to the advertising and promotion of cigarettes,'' 789 F.2d, at 187, the District Court ruled that this claim ``inevitably brings into question [respondents'] advertising and promotional activities, and is therefore pre-empted'' after 1965. 649 F. Supp., at 675. As demonstrated above, however, the 1969 Act does not sweep so broadly: the appropriate inquiry is not whether a claim challenges the ``propriety'' of advertising and promotion, but whether the claim would require the imposition under state law of a requirement or prohibition based on smoking and health with respect to advertising or promotion.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the ``requirements'' imposed by a express warranty claim are not ``imposed under State law,'' but rather imposed *by*

the warrantor.[23] If, for example, a manufacturer expressly promised to pay a smoker's medical bills if she contracted emphysema, the duty to honor that promise could not fairly be said to be ``imposed under state law,'' but rather is best understood as undertaken by the manufacturer itself. While the general duty not to breach warranties arises under state law, the particular "requirement . . . based on smoking and health . . . with respect to the advertising or promotion [of] cigarettes" in an express warranty claim arises from the manufacturer's statements in its advertisements. In short, a common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a ``requirement . . . *imposed under State law*'' within the meaning of §5(b).[24]

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[23]Thus it is that express warranty claims are said to sound in contract rather than in tort. Compare Black's Law Dictionary 1489 (6th ed. 1990) (defining ``tort'': ``There must always be a violation of some duty. . .and generally such duty must arise by operation of law and not by mere agreement of the parties'') with *id.*, at 322 (defining ``contract'': ``An agreement between two . . . persons which creates an obligation'').

[24]JUSTICE SCALIA contends that because the general duty to honor express warranties arises under state law, every express warranty obligation is a "requirement. . .imposed under State law," and that, therefore, the Act pre-empts petitioner's express warranty claim. JUSTICE SCALIA might be correct if the Act pre-empted *"liability"* imposed under state law (as he suggests, *post*, at 8); but instead the Act expressly pre-empts only a *" requirement or prohibition"* imposed under state law. That a "contract has no legal force apart from the [state] law that acknowledges its binding character," *Norfolk & Western Railway Co.* v. *American Train Dispatchers*

That the terms of the warranty may have been set forth in advertisements rather than in separate documents is irrelevant to the pre-emption issue (though possibly not to the state law issue of whether the alleged warranty is valid and enforceable) because although the breach of warranty claim is made ``with respect to advertising'' it does not rest on a duty imposed under state law. Accordingly, to the extent that petitioner has a viable claim for breach of express warranties made by respondents, that claim is not pre-empted by the 1969 Act.

Fraudulent Misrepresentation

Petitioner alleges two theories of fraudulent misrepresentation. First, petitioner alleges that respondents, through their advertising, neutralized the effect of federally mandated warning labels. Such a claim is predicated on a state-law prohibition against statements in advertising and promotional materials that tend to minimize the health hazards associated with smoking. Such a *prohibition,* however, is merely the converse of a state law *requirement* that warnings be included in advertising and promotional materials. Section 5(b) of the 1969 Act pre-empts both requirements and prohibitions; it therefore supersedes petitioner's first fraudulent misrepresentation theory.

Regulators have long recognized the relationship between prohibitions on advertising that downplays the dangers of smoking and requirements for warnings in advertisements. For example, the FTC, in

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Assn., ___ U. S. ___, ___ (1991), does not mean that every contractual provision is "imposed under State law." To the contrary, common understanding dictates that a contractual requirement, although only enforceable under state law, is not "imposed" by the state, but rather is "imposed" by the contracting party upon itself.

promulgating its initial trade regulation rule in 1964, criticized advertising that ``associated cigarette smoking with such positive attributes as contentment, glamour, romance, youth, happiness . . . at the same time suggesting that smoking is an activity at least consistent with physical health and well-being.'' The Commission concluded:

> ``To avoid giving a false impression that smoking [is] innocuous, the cigarette manufacturer who represents the alleged pleasures or satisfactions of cigarette smoking in his advertising must also disclose the serious risks to life that smoking involves.'' 29 Fed. Reg., at 8356.

Long-standing regulations of the Food and Drug Administration express a similar understanding of the relationship between required warnings and advertising that ``negates or disclaims'' those warnings: ``A hazardous substance shall not be deemed to have met [federal labeling] requirements if there appears in or on the label . . . statements, designs, or other graphic material that in any manner negates or disclaims [the required warning].'' 21 CFR §191.102 (1965). In this light it seems quite clear that petitioner's first theory of fraudulent misrepresentation is inextricably related to petitioner's first failure to warn theory, a theory that we have already concluded is largely pre-empted by §5(b).

Petitioner's second theory, as construed by the District Court, alleges intentional fraud and misrepresentation both by ``false representation of a material fact [and by] conceal[ment of] a material fact.'' Tr. 12727.[25] The predicate of this claim is a

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[25]The District Court stated that this claim ``consists of the following elements: 1) a material misrepresentation of . . . fact [by false statement or concealment]; 2) knowledge of the falsity . . .; 3) intent

state law duty not to make false statements of material fact or to conceal such facts. Our pre-emption analysis requires us to determine whether such a duty is the sort of requirement or prohibition proscribed by §5(b).

Section 5(b) pre-empts only the imposition of state law obligations ``with respect to the advertising or promotion'' of cigarettes. Petitioner's claims that respondents concealed material facts are therefore not pre-empted insofar as those claims rely on a state law duty to disclose such facts through channels of communication other than advertising or promotion. Thus, for example, if state law obliged respondents to disclose material facts about smoking and health to an administrative agency, §5(b) would not pre-empt a state law claim based on a failure to fulfill that obligation.

Moreover, petitioner's fraudulent misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by §5(b). Such claims are not predicated on a duty ``based on smoking and health'' but rather on a more general obligation—the duty not to deceive. This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 Act, Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud. To the contrary, both the 1965 and the 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices—an authority that the FTC had long exercised and continues to exercise. See §5(c) of the 1965 Act; §7(b) of the 1969 Act; see also nn.7, 9,

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that the misrepresentation be relied upon; 4) justifiable reliance . . .; 5) resultant damage.'' 683 F. Supp. 1487, 1499 (NJ 1988).

supra. This indicates that Congress intended the phrase ``relating to smoking and health'' (which was essentially unchanged by the 1969 Act) to be construed narrowly, so as not to proscribe the regulation of deceptive advertising.[26]

Moreover, this reading of ``based on smoking and health'' is wholly consistent with the purposes of the 1969 Act. State law prohibitions on false statements of material fact do not create ``diverse, nonuniform, and confusing'' standards. Unlike state law obligations concerning the warning necessary to render a product ``reasonably safe,'' state law proscriptions on intentional fraud rely only on a single, uniform standard: falsity. Thus, we conclude that the phrase ``based on smoking and health'' fairly but narrowly construed does not encompass the more general duty not to make fraudulent statements. Accordingly, petitioner's claim based on allegedly fraudulent statements made in respondents' advertisements are not pre-empted by §5(b) of the 1969 Act.[27]

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[26]The Senate Report emphasized that the ``preemption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health*. It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*.'' S. Rep. No. 91–566, p. 12 (emphasis supplied).

[27]Both JUSTICE BLACKMUN and JUSTICE SCALIA challenge the level of generality employed in our analysis. JUSTICE BLACKMUN contends that, as a matter of consistency, we should construe failure-to-warn claims *not* as based on smoking and health, but rather as based on the broader duty "to inform consumers of known risks." *Post*, at 13. JUSTICE SCALIA contends that, again as a matter of consistency, we

Conspiracy to Misrepresent or Conceal Material Facts

Petitioner's final claim alleges a conspiracy among respondents to misrepresent or conceal material facts concerning the health hazards of smoking.[28] The predicate duty underlying this claim is a duty not to conspire to commit fraud. For the reasons stated in our analysis of petitioner's intentional fraud claim, this duty is not pre-empted by §5(b) for it is not a prohibition ``based on smoking and health'' as that

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should construe fraudulent misrepresentation claims *not* as based on a general duty not to deceive but rather as "based on smoking and health." Admittedly, each of these positions has some conceptual attraction. However, our ambition here is not theoretical elegance, but rather a fair understanding of congressional purpose.

To analyze failure to warn claims at the highest level of generality (as JUSTICE BLACKMUN would have us do) would render the 1969 amendments almost meaningless and would pay too little respect to Congress' substantial reworking of the Act. On the other hand, to analyze fraud claims at the lowest level of generality (as JUSTICE SCALIA would have us do) would conflict both with the background presumption against preemption and with legislative history that plainly expresses an intent to preserve the "police regulations" of the States. See *supra*, n.25.

[28]The District Court described the evidence of conspiracy as follows:

``Evidence presented by [petitioner], particularly that contained in the documents of [respondents] themselves, indicates . . . . that the industry of which these [respondents] were and are a part entered into a sophisticated conspiracy. The conspiracy was organized to refute, undermine, and neutralize information coming from the scientific and medical community . . . .'' 683 F. Supp., at 1490.

phrase is properly construed. Accordingly, we conclude that the 1969 Act does not pre-empt petitioner's conspiracy claim.

To summarize our holding: The 1965 Act did not pre-empt state law damages actions; the 1969 Act pre-empts petitioner's claims based on a failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in respondents' advertising or promotions; the 1969 Act does not pre-empt petitioner's claims based on express warranty, intentional fraud and misrepresentation, or conspiracy.

The judgment of the Court of Appeals is accordingly reversed in part and affirmed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.