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 BLACKMUN, with whom JUSTICE KENNEDY and JUSTICE SOUTER join, concurring in part, concurring in the judgment in part, and dissenting in part.

The Court today would craft a compromise position concerning the extent to which federal law pre-empts persons injured by cigarette manufacturers' unlawful conduct from bringing state common-law damages claims against those manufacturers. I, however, find the Court's divided holding with respect to the original and amended versions of the federal statute entirely unsatisfactory. Our precedents do not allow us to infer a scope of pre-emption beyond that which clearly is mandated by Congress' language. In my view, *neither* version of the federal legislation at issue here provides the kind of unambiguous evidence of congressional intent necessary to displace state common-law damages claims. I therefore join parts I, II, III, and IV of the Court's opinion, but dissent from parts V and VI.

I agree with the Court's exposition, in part III of its opinion, of the underlying principles of pre-emption law, and in particular with its recognition that the pre-emptive scope of the Federal Cigarette Labeling and Advertising Act (the 1965 Act) and the Public Health Cigarette Smoking Act of 1969 (the 1969 Act) is "governed entirely by the express language" of the statutes' pre-emption provisions. *Ante*, at 10. Where, as here, Congress has included in legislation a

specific provision addressing—and indeed, entitled—pre-emption, the Court's task is one of statutory interpretation—only to "identify the domain expressly pre-empted" by the provision. *Ante*, at 11. An interpreting court must "`begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *FMC Corp.* v. *Holliday*, 498 U. S. ___, ___ (1990) (slip op. 4), quoting *Park 'N Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 194 (1985). See *California Coastal Comm'n.* v. *Granite Rock Co.*, 480 U. S. 572, 591–593 (1987); *California Federal Savings & Loan Assn.* v. *Guerra*, 479 U. S. 272, 282 (1987) (opinion of Marshall, J.). We resort to principles of implied pre-emption—that is, inquiring whether Congress has occupied a particular field with the intent to supplant state law or whether state law actually conflicts with federal law, see *English* v. *General Electric Co.*, 496 U. S. 72, 79 (1990)—only when Congress has been silent with respect to pre-emption.

I further agree with the Court that we cannot find the state common-law damages claims at issue in this case pre-empted by federal law in the absence of clear and unambiguous evidence that Congress intended that result. See *ante*, at 9. The Court describes this reluctance to infer pre-emption in ambiguous cases as a "presumption against the pre-emption of state police power regulations." *Ante*, at 11–12. Although many of the cases in which the Court has invoked such a presumption against displacement of state law have involved implied pre-emption, see, *e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 146–152 (1963); *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 236–237 (1947), this Court often speaks in general terms without reference to the nature of the pre-emption at issue in the given statutory scheme. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U. S. 725, 746 (1981) ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law"); *Avocado Growers*, 373 U. S., at 146–147 ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect"); *Bethlehem Steel Co.* v. *New York State Labor Relations Bd.*, 330 U. S. 767, 780 (1947) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States") (opinion of Frankfurter, J.).

The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not *whether* Congress intended to pre-empt state regulation, but to what *extent*. We do not, absent unambiguous evidence, infer a scope

of pre-emption beyond that which clearly is mandated by Congress' language.[1] I therefore agree with the Court's unwillingness to conclude that the state common-law damages claims at issue in this case are pre-empted unless such result is "`the clear and manifest purpose of Congress.'" *Ante*, at 9 (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S., at 230).

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[1]The Court construes congressional inroads on state power narrowly in other contexts, as well. For example, the Court repeatedly has held that, in order to waive a State's sovereign immunity from suit in federal court, Congress must make its intention "unmistakably clear in the language of the statute." *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 242 (1985); *Dellmuth* v. *Muth*, 491 U. S. 223, 228 (1989).

I also agree with the Court's application of the foregoing principles in part IV of its opinion, where it concludes that none of petitioner's common-law damages claims are pre-empted by the 1965 Act. In my view, the words of §5(b) of that Act ("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") can bear only one meaning: that States are prohibited merely from "mandating particular cautionary statements . . . in cigarette advertisements." *Ante*, at 11. As the Court recognizes, this interpretation comports with Congress' stated purpose of avoiding "`diverse, nonuniform, and confusing labeling and advertising *regulations*'" relating to smoking and health. *Ante*, at 12 (quoting 15 U. S. C. §1331(2)). The narrow scope of federal pre-emption is thus apparent from the statutory text, and it is correspondingly impossible to divine any "clear and manifest purpose" on the part of Congress to pre-empt common-law damages actions.

My agreement with the Court ceases at this point. Given the Court's proper analytical focus on the scope of the express pre-emption provisions at issue here and its acknowledgement that the 1965 Act does not pre-empt state common-law damages claims, I find the Court's conclusion that the 1969 Act pre-empts at least some common-law damages claims little short of baffling. In my view, the modified language of §5(b), 15 U. S. C. §1334(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"), no more "clearly" or "manifestly" exhibits an intent to pre-empt state

common-law damages actions than did the language of its predecessor in the 1965 Act. Nonetheless, the Court reaches a different conclusion, and its reasoning warrants scrutiny.

The Court premises its pre-emption ruling on what it terms the "substantial changes" wrought by Congress in §5(b), *ante*, at 14, notably, the rewording of the provision to pre-empt any "requirement or prohibition" (as opposed merely to any "statement") "imposed under State law." As an initial matter, I do not disagree with the Court that the phrase "State law," in an appropriate case, can encompass the common law as well as positive enactments such as statutes and regulations. See *ante*, at 16. I do disagree, however, with the Court's conclusion that "State law" as used in §5(b) represents such an all-inclusive reference. Congress' intention in selecting that phrase cannot be understood without considering the narrow range of actions—any "requirement or prohibition"—that Congress specifically described in §5(b) as "imposed under" state law. See *United States* v. *Morton*, 467 U. S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole. Thus, the words [in question] must be read in light of the immediately following phrase"); *Jarecki* v. *G.D. Searle & Co.*, 367 U. S. 303, 307 (1961) ("The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress"); see also *Norfolk & Western R. Co.* v. *Train Dispatchers*, 499 U. S. ___, ___ (1991) (slip op. 5–6) (STEVENS, J., dissenting) (declining to read the phrase "all other law, including State and municipal law" broadly).

Although the Court flatly states that the phrase "no requirement or prohibition" "sweeps broadly" and

"easily encompass[es] obligations that take the form of common law rules," *ante*, at 15, those words are in reality far from unambiguous and cannot be said clearly to evidence a congressional mandate to pre-empt state common-law damages actions. The dictionary definitions of these terms suggest, if anything, specific actions mandated or disallowed by a formal governing authority. See, *e.g.*, Webster's Third New International Dictionary 1929 (1981) (defining "require" as "to ask for authoritatively or imperatively: claim by right and authority" and "to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation)"); Black's Law Dictionary 1212 (6th ed. 1990) (defining "prohibition" as an "[a]ct or law prohibiting something"; an "interdiction").

More important, the question whether common-law damages actions exert a regulatory effect on manufacturers analogous to that of positive enactments—an assumption crucial to the Court's conclusion that the phrase "requirement or prohibition" encompasses common-law actions—is significantly more complicated than the Court's brief quotation from *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 247 (1959), see *ante*, at 15, would suggest.

The effect of tort law on a manufacturer's behavior is necessarily indirect. Although an award of damages by its very nature attaches additional consequences to the manufacturer's continued unlawful conduct, no particular course of action (*e.g.*, the adoption of a new warning label) is required. A manufacturer found liable on, for example, a failure-to-warn claim may respond in a number of ways. It may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. See *Goodyear Atomic Corp.* v. *Miller*, 486 U. S. 174, 185–186 (1988) (corporation "may choose to disregard [state] safety regulations and simply pay an

additional" damages award if an employee is injured as a result of a safety violation). Or, by contrast, it may choose to avoid future awards by dispensing warnings through a variety of alternative mechanisms, such as package inserts, public service advertisements, or general educational programs. The level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations. See *Dewey* v. *R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 90, 577 A.2d 1239, 1249 (1990); Garner, Cigarette Dependency and Civil Liability: A Modest Proposal, 53 S. Cal. L. Rev. 1423, 1454 (1980). Moreover, tort law has an entirely separate function—compensating victims—that sets it apart from direct forms of regulation. See *Ferebee* v. *Chevron Chemical Co.*, 237 U. S. App. D.C. 164, 175, 736 F. 2d 1529, 1540, cert. denied, 469 U. S. 1062 (1984).

Despite its earlier acknowledgement, consistent with the foregoing conception of damages actions, that "there is no general, inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions," *ante*, at 12,[2] the Court apparently finds *Garmon*'s statement that "regulation can be as effectively exerted through an award of damages as

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[2]Congress, in fact, has expressly allowed common-law damages actions to survive while pre-empting other, more direct forms of state regulation. See, *e.g.*, Comprehensive Smokeless Tobacco Health Education Act of 1986, §7, 100 Stat. 34, 15 U. S. C. §4401 *et seq.*; Occupational Safety and Health Act of 1970, 84 Stat. 1500, 29 U. S. C. §651 *et seq.*, as construed in *Gade* v. *National Solid Wastes Mgmt. Assn.*, ___ U. S. ___ (1992).

through some form of preventive relief," 359 U. S., at 247, sufficient authority to warrant extinguishing the common-law actions at issue in this case. See *ante*, at 14–15. I am not persuaded. Not only has the Court previously distinguished *Garmon*,[3] but it has declined on several recent occasions to find the regulatory effects of state tort law direct or substantial enough to warrant pre-emption.

In *Goodyear Atomic Corp.* v. *Miller*, for example, the Court distinguished, for purposes of pre-emption analysis, "direct state regulation" of safety matters from "the incidental regulatory effects" of damages awarded pursuant to a state workers' compensation law. 486 U. S., at 185. Relying in part on its earlier decision in *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984),[4] the Court stated that "Congress

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[3]The Court has explained that *Garmon*, in which a state common-law damages award was found to be pre-empted by the National Labor Relations Act, involved a special "presumption of federal pre-emption" relating to the primary jurisdiction of the National Labor Relations Board. See *Brown* v. *Hotel Employees*, 468 U. S. 491, 502 (1984); *English* v. *General Electric Co.*, 496 U. S. 72, 86–87, n. 8 (1990).

[4]The Court in *Silkwood* declined to find state punitive damages awards pre-empted by federal nuclear safety laws, explaining: "It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." 464 U. S., at 256. Although the Court has noted that the decision in *Silkwood* was

may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." 486 U. S., at 186. Even more recently, the Court declined in *English* v. *General Electric Co.*, 496 U. S., at 86, to find state common-law damages claims for emotional distress pre-empted by federal nuclear energy law. The Court concluded that, although awards to former employees for emotional distress would attach "additional consequences" to retaliatory employer conduct and could lead employers to alter the underlying conditions about which employees were complaining, *ibid.*, such an effect would be "neither direct nor substantial enough" to warrant pre-emption. *Id.*, at 85.

In light of the recognized distinction in this Court's jurisprudence between direct state regulation and the indirect regulatory effects of common-law damages actions, it cannot be said that damages claims are clearly or unambiguously "requirements" or "prohibitions" imposed under state law. The plain language of the 1969 Act's modified pre-emption provision simply cannot bear the broad interpretation the Court would impart to it.

Not only does the text of the revised §5(b) fail clearly or manifestly to require pre-emption of state common-law damages actions, but there is no

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based in "substantial part" on affirmative evidence in the legislative history suggesting that Congress did not intend to include common-law damages remedies within the pre-empted field, see *English*, 496 U. S., at 86, *Silkwood*'s discussion of the regulatory effects of the common law is instructive and has been relied on in subsequent cases. See, *e.g.*, *Goodyear*, 486 U. S., at 186.

suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision when it amended the statute in 1969. The Court acknowledges the evidence that Congress itself perceived the changes in §5(b) to be a mere "clarifi[cation]" of the existing narrow pre-emption provision, *ante*, at 14 (quoting S. Rep. No. 91–566, p. 12 (1969) (hereinafter S. Rep.)), but it dismisses these statements of legislative intent as the "`views of a subsequent Congress.'" *Id.*, at 14, quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960). The Court is wrong not only as a factual matter—for the statements of the Congress that amended §5(b) are contemporaneous, not "subsequent," to enactment of the revised pre-emption provision—but as a legal matter, as well. This Court accords "great weight" to an amending Congress' interpretation of the underlying statute. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 & n. 8 (1969).

Viewing the revisions to §5(b) as generally nonsubstantive in nature makes sense. By replacing the word "statement" with the slightly broader term, "requirement," and adding the word "prohibition" to ensure that a State could not do through negative mandate (*e.g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements), Congress sought to "clarif[y]" the existing precautions against confusing and nonuniform state laws and regulations. S. Rep., p. 12.[5]

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[5]In the one reported case construing the scope of pre-emption under the 1965 Act, *Banzhaf* v. *FCC*––a case of which Congress was aware, see S. Rep., p. 7––the Court of Appeals for the District of Columbia Circuit used the term "affirmative requirements" to describe §5(b)'s ban on

Just as it acknowledges the evidence that Congress' changes in the pre-emption provision were nonsubstantive, the Court admits that "portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by States and localities." *Ante*, at 15. Indeed, the relevant Senate report explains that the revised pre-emption provision is "intended to include not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State," a list remarkable for the absence of any reference to common-law damages actions. S. Rep., p. 12. Compare, *e.g.*, 29 U. S. C. §§1144(a) and (c)(1) (ERISA statute defines "any and all State laws" as used in pre-emption provision to mean "all laws, *decisions*, rules, regulations, or *other State action* having the effect of law") (emphasis added). The Court dismisses this statement with the simple observation that "the language of the Act plainly reaches beyond such [positive] enactments." *Ante*, at 15. Yet, as discussed above, the words of §5(b) ("requirement or prohibition") do not so "plainly" extend to common-law damages actions, and the Court errs in placing so much weight on this fragile textual hook.

The Court further acknowledges that, at the same time that Congress amended the pre-emption provision of §5(b), it made no effort to alter the statement of purpose contained in §2 of the 1965 Act.

"statement[s]." 132 U. S. App. D.C. 14, 22, 405 F. 2d 1082, 1090 (1968), cert. denied *sub nom. Tobacco Institute, Inc.* v. *FCC*, 396 U. S. 842 (1969). It is but a small step from "affirmative requirement" to the converse, "negative requirement" ("prohibition"), and, from there, to the single explanatory phrase, "requirement or prohibition."

Ante, at 14, n. 19. Although the Court relegates this fact to a footnote, the continued vitality of §2 is significant, particularly in light of the Court's reliance on the same statement of purpose for its earlier conclusion that the 1965 Act does *not* pre-empt state common-law damages actions. See *ante*, at 12 (concluding that Congress' expressed intent to avoid diverse, nonuniform, and confusing regulations "most naturally refers to positive enactments by [state legislatures and federal agencies], not to common law damages actions").

Finally, there is absolutely no suggestion in the legislative history that Congress intended to leave plaintiffs who were injured as a result of cigarette manufacturers' unlawful conduct without any alternative remedies; yet that is the regrettable effect of the Court's ruling today that many state common-law damages claims are pre-empted. The Court in the past has hesitated to find pre-emption where federal law provides no comparable remedy. See Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 869 (1992) (noting the "rather strong tradition of federal deference to competing state interests in compensating injury victims"). Indeed, in *Silkwood*, the Court took note of "Congress' failure to provide any federal remedy" for injured persons, and stated that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 464 U. S., at 251. See also *id*., at 263 (BLACKMUN, J., dissenting) ("[i]t is inconceivable that Congress intended to leave victims with no remedy at all").

Unlike other federal statutes where Congress has eased the bite of pre-emption by establishing "comprehensive" civil enforcement schemes, see, *e.g.*, *Ingersoll–Rand Co.* v. *McClendon*, 498 U. S. ___, ___ (1990) (slip op. 9–10) (discussing §502(a) of ERISA), the Cigarette Labeling and Advertising Act is

barren of alternative remedies. The Act merely empowers the Federal Trade Commission to regulate unfair or deceptive advertising practices (15 U. S. C. §1336), establishes minimal criminal penalties (misdemeanor and fine not to exceed $10,000) for violations of the Act's provisions (§1338), and authorizes federal courts, upon the Government's application, to enjoin violations of the Act (§1339). Unlike the Court, I am unwilling to believe that Congress, without any mention of state common-law damages actions or of its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by cigarette manufacturers' unlawful conduct.

Thus, not only does the plain language of the 1969 Act fail clearly to require pre-emption of petitioner's state common-law damages claims, but there is no suggestion in the legislative history that Congress intended to expand the scope of the pre-emption provision in the drastic manner that the Court attributes to it. Our obligation to infer pre-emption only where Congress' intent is clear and manifest mandates the conclusion that state common-law damages actions are not pre-empted by the 1969 Act.[6]

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[6]Every Court of Appeals to consider the question, including the Third Circuit in an earlier opinion in this case, similarly has concluded that state common-law damages claims are *not* expressly pre-empted under the 1969 Act. See, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 789 F. 2d 181, 185–186 (CA3 1986), cert. denied, 479 U. S. 1043 (1987); *Pennington* v. *Vistron Corp.*, 876 F. 2d 414, 418 (CA5 1989); *Roysdon* v. *R.J. Reynolds Tobacco Co.*, 849 F. 2d 230, 234 (CA6 1988); *Palmer* v. *Liggett Group, Inc.*, 825 F. 2d 620, 625

Stepping back from the specifics of the Court's pre-emption analysis to view the result the Court ultimately reaches, I am further disturbed. Notwithstanding the Court's ready acknowledgement that "`[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis," *ante*, at 9 (quoting *Malone* v. *White Motor Corp.*, 435 U. S. 497, 504 (1978)), the Court proceeds to create a crazy quilt of pre-emption from among the common-law claims implicated in this case, and in so doing reaches a result that Congress surely could not have intended.

The most obvious problem with the Court's analysis is its frequent shift in the level of generality at which it examines the individual claims. For example, the Court states that fraudulent misrepresentation claims (at least those involving false statements of material fact in advertisements) are "not predicated on a duty `based on smoking and health' but rather on a more general obligation—the duty not to deceive," and therefore are not pre-empted by §5(b) of the 1969 Act. *Ante*, at 22. Yet failure to warn claims—which could just as easily be described as based on a "more general obligation" to inform consumers of known risks—implicitly are found to be "based on smoking and health" and are declared pre-empted. See *ante*, at 18. The Court goes on to hold that express warranty claims are not pre-empted because the duty at issue is undertaken by the manufacturer and is not "imposed under State law." *Ante*, at 19. Yet, as the Court itself must acknowledge, "the *general duty* not to breach warranties arises under state law," *ibid.* (emphasis added); absent the State's decision to

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(CA1 1987). See also *Dewey* v. *R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 85, 577 A.2d 1239, 1247 (1990); *Forster* v. *R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 658 (Minn. 1989).

penalize such behavior through the creation of a common-law damages action, no warranty claim would exist.

In short, I can perceive no principled basis for many of the Court's asserted distinctions among the common-law claims, and I cannot believe that Congress intended to create such a hodge-podge of allowed and disallowed claims when it amended the pre-emption provision in 1970. Although the Court acknowledges that §5(b) fails to "indicate that any familiar subdivision of common law claims is or is not pre-empted," *ante*, at 17, it ignores the simplest and most obvious explanation for the statutory silence: that Congress never intended to displace state common-law damages claims, much less to cull through them in the manner the Court does today. I can only speculate as to the difficulty lower courts will encounter in attempting to implement the Court's decision.

By finding federal pre-emption of certain state common-law damages claims, the Court today eliminates a critical component of the States' traditional ability to protect the health and safety of their citizens. Yet such a radical readjustment of federal-state relations is warranted under this Court's precedents only if there is clear evidence that Congress intended that result. Because I believe that neither version of the Federal Cigarette Labeling and Advertising Act evidences such a clear congressional intent to pre-empt state common-law damages actions, I respectfully dissent from parts V and VI of the Court's opinion.