OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: THOMAS CIPOLLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE D. CIPOLLONE, Petitioner V. LIGGETT GROUP, INC., et al.

CASE NO: 90-1038

PLACE: Washington, D.C.

DATE: January 13, 1992

PAGES: 1 - 46

RE-ARGUMENT

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS CIPOLLONE, INDIVIDUALLY :

AND AS EXECUTOR OF THE ESTATE :

OF ROSE D. CIPOLLONE, :

Petitioner :

v. : No. 90-1038

LIGGETT GROUP, INC., ET AL. :

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Washington, D.C.

Monday, January 13, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on behalf of the Petitioner.

H. BARTOW FARR, III, ESQ., Washington, D.C.; on behalf of the Respondents.

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CONTENTS

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 90-1038, Thomas Cipollone v. the Liggett Group.

Mr. Tribe.

ORAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE PETITIONER

MR. TRIBE: Mr. Chief Justice, and may it please the Court:

Although the substance of this case focuses on fair warning to consumers, at a structural level the case is really about fair warning to the 50 States.

The premise of their ability to defend their interests in the national legislative process is, of course, that they be, clearly, warned of what they are about to lose as Congress considers a new statute.

The Cigarette Labeling Act undoubtedly warned the states that with respect to three specific areas -- cigarette package labels, cigarette advertisements, and cigarette promotions -- the States were about to lose the authority to tell the cigarette companies what health messages they must include, once those companies had put the Surgeon General's warning on their package labels.

But if the Third Circuit is upheld and

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respondents prevail here, the States will end up having lost considerably more than that, because affixing the Surgeon General's warning to a cigarette companies' packages would absolve that company, prospectively, of any legally enforceable duty, regardless of how longstanding or broadly applicable that duty might be, in the context of that company's communications with the public about smoking and health.

Now in that context, the placement of the Surgeon General's warning on all of the company's cigarette packages becomes an iron-clad guarantee that, as far as the 50 States are concerned, the company can do no wrong. That is if it should deliberately lie or break its promises, no State can make that company compensate its victims providing the deception involves smoking and health.

If the company should suddenly discover some new health information that a similarly situated manufacturer of another product would be duly bound under the background law of the States in some way to communicate to its buyers or to bystanders who are at risk, no State can pressure this cigarette company to communicate that information or to make it compensate those who are hurt because it chooses not to.

Now it is, of course, possible but I think quite

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remarkable for Congress to take quite that much authority away from all 50 States on the basis of a cigarette company's compliance with this one requirement. I do submit that the Surgeon General's warnings are obviously very important and quite effective, but this result, if correct, treats them as though they were almost a rather magical cure-all. And the issue, certainly, is whether Congress did that. Did it do it in a way that would have alerted any State at the time that so large a part of its basic body of law was being cut away?

Now, let me say very clearly at the outset, the fact that Congress probably -- I say probably because I'm no mind reader -- was not thinking in terms of preempting damage actions, as such, is not decisive and I do not intend to rely on it. I will not suggest that all State court damage actions are simply beyond the reach of this labeling act just because the act's invocation in the context of a damage action might surprise some of those who drafted it or voted on it.

The only way to tell what the act does is to look carefully at its text. It's on page 3 of our opening brief, and I think it would be helpful if I focused precisely on it to analyze what legally enforceable duties it preempts.

And I would like, if I might, to begin with

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duties not to deceive and then turn to duties to warn. With respect to deception -- broken promises, conspiracy to mislead by neutralizing -- the active wrongs as opposed to the omissions -- the issue arises, of course, in part because cigarette companies have so many avenues of communication besides just the package. It's rather hard to deceive people on the package, although I suppose it can be done.

They have advertisements, which are subject to the act's warning requirements, including, as of 1984, Congress' own four rotating warnings. And they have promotions, which they have maintained are not subject to the warning requirements. It's a little ambiguous, but that seems to be the current state of the law. They have what they call advertorials, opinion pieces, where they communicate to the public and do not place the warnings.

One thing I should call to the Court's attention, which I think escaped me the first few times I read the statute, is that failure to comply with the Federal warning requirements as to the advertisements is a misdemeanor, a $10,000 fine, but it does not prevent the preemption provision of section 5 from kicking in. That provision is triggered by compliance with the requirements with respect to the package.

So the issue becomes could Congress have meant,

could it have said, does this language say, that once you have stamped the proper warning on the package, you are home free with regard to deliberate torts like lying about smoking and health. Well, certainly not in 1965. I think that's clear.

QUESTION: Mr. Tribe?

MR. TRIBE: Yes.

QUESTION: When you say lying about smoking and health, you're not then referring just to the general sort of misrepresentation, which I think doesn't ordinarily require actual lying. You're referring to something more specific?

MR. TRIBE: No, actually Mr. Chief Justice, I would refer to anything positive that would otherwise violate the background law of torts. Whatever scienter might be required or even none -- that is, if it a false statement and meets the State's requirement with respect to whatever the state of mind is, then, in 1965, the question I think one would ask is, look at the language --

QUESTION: Well, then, but your use of the word lying, then, is somewhat hyperbolic.

MR. TRIBE: I don't mean, Mr. Chief Justice, to do that.

QUESTION: You don't mean lying.

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MR. TRIBE: I would simply call it misrepresentation. It includes lying, but is not limited to lying. That's correct.

Section 5 provides essentially that no statement, and I'm now talking about the way it stood in 1965, let me be clear, just 1965. I will turn to 1969 in a moment. No statement relating to smoking and health, other than the Surgeon General's package label, shall be required on any cigarette package or ad.

Now, obviously that did confer a certain, I suppose a limited, but a significant right of silence as it were. In a certain sense, the cigarette companies could take the Fifth.

They were free to say more, no ceiling, but they had a right to stay mute. They did not have to say anything. Of course, as we know from the Fifth Amendment context, the right to say nothing does not include a right to chose to say something and say something false.

There is no conflict between section 5 in any sense that arises from the fact that all 50 States, and I now continue to speak of it just as it was in 1965, that all 50 States have concurrent authority to say, if you make a false statement to our residents and they get hurt, you will be liable if our other background requirements are met. It's not at all like -- and I'll deal with this

in a moment -- it's not at all like 50 different authorities each affirmatively telling you what you must say on your packages and ads in order to avoid liability there.

So it is curious that the Third Circuit, nonetheless, held and that the respondents, as I understand it, in this Court agree, that effective January 1, 1966, even liability for making false statements, including deliberately false statements, is preempted. What I want to do is try to figure out how they got there.

QUESTION: I suppose that depends to some extent, doesn't it, upon whether the falsity consists of an omission. I mean, couldn't misrepresentation be based upon an omission, for instance, under some State law perhaps it would be said that if you show people, young people, having a good time smoking cigarettes that this is deceptive and misrepresentation. It would at least eliminate that kind of misrepresentation. Isn't that --

MR. TRIBE: I think, Justice Scalia, I would be prepared to say that most omissions, I will have to establish, are not preempted if they're not under the general rubric of failure to warn. It's not so clear to me, there will be grey areas where the classification is not going to be easy. But it is quite clear that if there is a positive misrepresentation by anyone's standards --

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QUESTION: Smoking is good for you.

MR. TRIBE: Smoking is good for you, it doesn't addict you, and so forth. I'm trying to figure out how they got to the conclusion there. And I think what I see is a two-step procedure. The first is a kind of travel back from the future.

That is, they rely heavily and repeatedly on the 1969, '70 text, which is different. It talks about no requirement or prohibition with respect to advertising or promotion. And then they use it in a sense to retroactively read back meaning into the 1965 law. Now, I submit, at the most elementary level, there is a problem with that.

That is, if the 1965 law, in its text, will not bear this meaning that liability for a positive misstatement is somehow preempted, it can't acquire that meaning retroactively in '69. It's entirely possible for the law to have changed in 1969. The Third Circuit does -- didn't think it did. The respondents did not argue it did.

QUESTION: Well, what about that? There is substantially different language as of 1970, which makes your argument more difficult.

MR. TRIBE: It makes it more difficult from 1970 on. It still means that the judgment below cannot be

affirmed as to the intermediate period.

But let me focus on 1970. That is, suppose there were no 3-year gap. Suppose the language always had been as it is in this new version. The second step --

QUESTION: That makes it a little easier for you, if the language were always the way it is in the new version.

MR. TRIBE: Does it make it easier or harder?

QUESTION: I think it makes it a little easier. If it always were the way it is in the new version?

MR. TRIBE: Well, in the new version, with respect to part (b), no requirement or prohibition shall be imposed with respect to advertising.

QUESTION: I mean, when one changes from a version that is less restrictive upon the States to one that is more restrictive, when the change is in that direction, don't you think that one is inclined to think that the change made a difference?

MR. TRIBE: In theory, I'm prepared to assume that it may have made a difference, but what I'm interested in establishing is that whatever difference it might have made does not establish that liability for misrepresentation could possibly be preempted. And that's really the gist of it.

The reason I say that is that it's terribly

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important, and this is the second step in their argument, to say that they make really nothing significant of the language based on smoking and health. That is, they rewrite the text so that effectively it preempts not requirements or prohibitions based on smoking and health, but requirements or prohibitions having some impact on smoking and health or triggered in the particular case by a relation between smoking and health.

Now, the prohibition against making misstatements, it seems pretty plain to me, is grounded in, rooted in, based on something rather broader and more general than smoking and health. Its roots are far more universal: the Ten Commandments and the Koran, for starters. The law of virtually every jurisdiction. Although there are questions of much scienter, as the Chief Justice points out, might be required.

But this prohibition is based on a society-wide norm, the prohibition against making misstatements. And the reason I stress this as particularly significant in the context of this act, is that making that shift in the statute, apart from a general aversion that I have to rewriting other people's work, I think has a problem. The problem is that it involves an attempt by the industry to persuade the Federal judiciary to give it something that the Congress was never asked to give it.

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QUESTION: Mr. Tribe, it seems to me that at the most general level, it's not based on smoking and health, it's based upon the Ten Commandments or the Koran: people should not lie. But at a more specific level, it's based on smoking or health, isn't it?

I mean, that is to say, in this area of smoking and health, since in fact cigarettes are harmful to you, it amounts to a misrepresentation because they -- cigarettes are harmful to you, to show people having a good time smoking without any thought of the harmfulness. Now isn't that specific prohibition at a more specific level, based on smoking and health?

MR. TRIBE: The prohibition, I think, has a different route or basis, but I fully agree that the reason that it comes into play here is because of empirical things in the world about smoking and health.

QUESTION: So it depends upon at what -- how general a level you want to consider the "based on" language here.

MR. TRIBE: Well, but it does modify the word requirement or prohibition. And it seems to me that the State should at least have the authority, if it is a general prohibition and if it's not peculiar to this industry, to have some say in the level of generality.

In particular, the industry came to Congress and

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at no point suggested that it wanted protection from anything but industry-specific regulation. Joseph Coleman, who was then the industry's chief spokesman in '69 in Congress, told the Senate Commerce Subcommittee on July 22d, page 80 cigarette advertising shouldn't be the target of discriminatory regulation. He told the House Commerce Committee, on April 23d, page 555, the only issue is whether cigarette advertising should be regulated altogether differently.

Now this Court, this Court contrasted, in one recent case, in a different context to be sure, rules regulating an industry from rules that are rooted in something broader but happen to be applied in a particular case to the industry. The respondents twice cite Pilot Life against Dedeaux, and the Court there says to regulate an industry, a law must not just have an impact on that industry, but must be specifically directed toward that industry.

The roots of the State law of bad faith, the Mississippi law at issue in Pilot Life, in Justice O'Connor's opinion, are firmly planted, I continue quoting, in general principles of the State tort and contract law. And I submit the same is true of the law of broken promises and the law of deception.

QUESTION: Mr. Tribe, just so I follow your

argument, your emphasis on the "based on smoking and health" language is directed only to the affirmative half of the case, or is that also applied to the omission?

MR. TRIBE: Well, with respect to express preemption, to the extent that anyone relies on part (b) of the statute, section 5(b) in the current version, I think it has to apply across the board. It seems to me --

QUESTION: Well, wouldn't you say that, say, preemption of an additional requirement in the label itself was based on smoking and health?

MR. TRIBE: No doubt, if it was an additional requirement in the label itself, and I will get to that in just a moment.

QUESTION: A duty to say something more, wouldn't that be --

MR. TRIBE: A duty to say something more in the label of a cigarette --

QUESTION: The duty, or even in the advertising, because the -- (b) --

MR. TRIBE: Because the statute says advertising.

QUESTION: Yeah.

MR. TRIBE: That's right, and I'm going to concede that in a moment.

QUESTION: That's what I'll -- you take it.

MR. TRIBE: I only want to say one final word about deception, and then let me turn immediately to the --

QUESTION: Before you do that, before we get too far away from the based on, if I am uncertain whether based on smoking and health refers to the general Ten Commandments level or the more specific level, why wouldn't I look to the congressional declaration of policy and purpose, section 1331, which doesn't use the "based on" language, but speaks much more broadly, saying that it is the policy of Congress to deal with cigarette labeling and advertising with respect to any relationship between smoking and health?

Now, to be faithful to that purpose, it seems to me I ought to read the "based on" language at a more specific level rather than a general level.

MR. TRIBE: But if you were to continue, Justice Scalia, with the rest of the preamble, it makes it clear that the purpose is that there not be diverse, nonuniform, and confusing cigarette labeling and advertising regulations. That's the phrase. And the industry came to Congress and said, don't regulate us differently.

Indeed, it's interesting to note that the respondents themselves, at page 14 of their brief, define the preempted field so as to exclude, and I quote duties

imposed on third parties unrelated to the cigarette industry, unquote.

QUESTION: Isn't this argument made in your brief, by the way? I thought that what you were relying on was simply the distinction between regulation and the common law.

MR. TRIBE: Well, I think that in candor, Justice Scalia, the brief's emphasis and what I think is a convincing and compelling reason to reject preemption are not quite the same. The brief made the more ambitious argument, that Congress didn't mean to encompass damage actions at all, and that it's rather like the Smokeless Tobacco Act.

QUESTION: I don't recall its making this argument at all.

MR. TRIBE: I think it's implicit, but I can't cite chapter and verse precisely, Justice Scalia. But I do think that the law is not preempted with respect to deception.

Let me turn to duties to warn, affirmative duties. Like the much older duty not to make an affirmative misstatement, duties to warn also have fairly old roots in the common law, but they are a more recent development in their modern versions. They've grown some new branches.

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QUESTION: Do you think that a suit on duty to warn could have been successful, generally, in the various states at the time this act was originally passed?

MR. TRIBE: Only under some fairly stringent circumstances. Even now it's hard to bring these suits, because one has to establish a number of things in terms that would trigger the duty.

And indeed, the main point I want to make, initially, about the duty to warn, is that though it's grown new branches, even now it hasn't grown a branch that would confer anything like, or impose anything like, a duty to transmit warning messages in the middle of a company's own advertisements and promotions. In effect, to interrupt a sales pitch with warning bells.

QUESTION: In a suit unfair to warn, could the tobacco companies argue to the jury that compliance with the Federal statute was evidence that the company was acting reasonably?

MR. TRIBE: I certainly think so, Justice Kennedy. I think they could go further. I think that they could ask for an instruction to make sure that the law is not violated, that the jury will not penalize them for the fact that in the specific places designated in the statute, namely the package, the advertising, and the promotion, all they did was what the Surgeon General's

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warning said, and nothing more.

I do think, and that I think is a response in part to Justice Stevens' question, that the statute gives them some protection in the context of damage litigation.

Their main worry though, to get to your point, I think isn't so much the advertising. And that's principally because, as a realistic matter, very few juries are going to say, even to a company that has suddenly learned some disastrous thing, that what you should do is put it in the middle of your advertising.

I think a very good example is what happened when Johnson & Johnson discovered that there was some cyanide in the Tylenol. They didn't change all the advertising -- take Tylenol, watch out for the cyanide. But they did do a great many things. That is they did set up a -- sort of a very elaborate hot line. They did set up a series of special ways of reaching people. They recalled some 83,000 copies, 83,000 of the Tylenol bottles. It was a hot line with sort of free health information. They contacted people around the country. Two million messages went to health care professionals.

That's the sort of thing that I suspect cigarette companies are rather afraid of. That is, when you suddenly learn that it's more addictive than we thought, why didn't you put out a lot of information?

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Of course, there is another concern, and that's the way in which duty to warn cases usually arise. They usually arise, as the National Association of Manufacturers' brief on the respondents' side of the case pointed out, they usually arise in the context of a complaint that a rather ample package didn't contain much information.

Now, obviously, cigarette packages are rather small; there's not that much you can say on them. But the principle point is under section 5(a), and with respect to section 5(a), which talks about the package, we have no doubt whatever that it would be impermissible to penalize them for violating that provision. But when one --

QUESTION: Penalize them for obeying that provision?

MR. TRIBE: I'm sorry, penalize them for obeying it and not going further.

But when this Court has a concern that perhaps a jury, in some case, may go further, limiting instructions would take care of the problem. It seems to me that what the court of appeals did was reread the statute as though it said that, with respect not only to advertising and promotion and packages, you may not be subject to any further duty to let people know when something happens, but with respect to all modes of communication. So that

the cigarette companies -- which now they have package inserts. When R.J. Reynolds, for example, learned about some fire problems, they put package inserts. Now it's Camel Cash redeemable coupons. They have their advertorials.

QUESTION: So could the jury be instructed that the tobacco companies must rely on something other than the ads themselves? Or, pardon me, that the plaintiffs must rely on something other than the ads themselves.

MR. TRIBE: Well, certainly that the plaintiffs cannot rely solely on the ads. Perhaps that they must rely on something other than the ads themselves for the failure to warn claim.

It seems to me, once that is done, there is no longer any risk whatever. I mean, when this Court, in a defamation action brought by, for example a -- you know, brought by a public official, public figure against a magazine, is worried about the First Amendment, it doesn't eliminate the cause of action in order to protect the First Amendment. It just says the jury must be properly charged.

And when this Court quite recently, in the --

QUESTION: I hope you're not -- you're not using the defamation cases against public figures as a model for tort litigation generally.

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MR. TRIBE: No, it's not that they're a model. But it's that the Cigarette Liability Act cannot be put on a higher plane than the First Amendment, and that there is no reason to eliminate, in the name of the Cigarette Liability Act, a complete cause of action because of some marginal thought that maybe a jury will impose the duty in the wrong place.

This statute does not establish a -- sort of a cigarette communication act. It's Cigarette Labeling Act, and that's the only place where no additional duties may be imposed.

QUESTION: May I just --

MR. TRIBE: I'd like to reserve the remainder of my time.

QUESTION: Can I just ask one clear question?

MR. TRIBE: Sure.

QUESTION: When you talk about failure to warn, are you talking about failure to warn about information that's in the public domain or about information known only to the tobacco companies?

MR. TRIBE: Well, in most jurisdictions, including New Jersey, if it's completely in the public domain, the failure to warn claim is very unlikely to succeed. I think it must be shown that you knew something that other people didn't know. And in any event, there

are assumption of risk and other defenses that can be made.

But let me make one other point, I -- no, I think I'd better reserve the time for rebuttal.

QUESTION: Very well, Mr. Tribe.

Mr. Farr, we'll hear from you.

ORAL ARGUMENT OF H. BARTON FARR, III

ON BEHALF OF THE RESPONDENTS

MR. FARR: Mr. Chief Justice, and may it please the Court:

I believe that the basis for deciding this case is to be found in three simple points, and I'd like briefly to set them forth at the outset. The first is that the Cigarette Labeling and Advertising Act makes clear that it does not contemplate the usual scheme of Federal action supplemented by State action. Instead, so that Federal law could set the balance among competing interests, Congress expressly barred the States from imposing their own health-based requirements with respect to labeling and advertising.

The second point is that under the usual preemption principles followed by this Court in Garmon and numerous other cases, including, of course, before the Cigarette and Labeling and Advertising Act was passed, preemption of State law typically includes State law in

any form, including tort, law because all State law has a regulatory effect.

The exception is when there is a savings clause in the act, indicating that Congress meant to separate part of State law from the rest of State law. But there is no savings clause in this act.

The third point involves the specific tort claims at issue here. Each of them, in our view, is well within the boundaries of the preempted area -- that is, each specifically challenges something that the cigarette companies either said or did not say with respect to smoking and health.

The claims, to be specific, allege misrepresentation about the effects of smoking on health, conspiracy to misrepresent the effects of smoking on health, failure to warn about the effects of smoking on health, and express warranty about the effects of smoking on health.

QUESTION: May I ask right on your description of failure to warn claim, do you read it as failure to warn about information that the tobacco companies knew and the public did not know?

MR. FARR: I do not think it is limited to that. I think it is intended to say that the tobacco companies bore a duty of providing additional warning to consumers

than the warning that Congress provided, regardless of whether that information is known only to cigarette companies or not.

QUESTION: Do you think at least analytically one might break the two kinds of failure to warn claims into two different parts for purposes of preemption analysis?

MR. FARR: Your Honor, in the end I do not think so. I think what Congress ultimately did here in the act was to make a structural decision about whether Federal law would ultimately be controlling or whether Federal law would be supplemented by State law, and I think the structural decision Congress made is that Federal law would be controlling, and I think that applies in all circumstances, so long as we are within the subject matter of the act.

Now, I think it's important, in addressing the argument made by petitioner, to see that Congress has done here is somewhat unusual. It has to a great degree answered what is usually the most difficult question in a preemption case, and that is whether Congress intended to bar States from adding their own legal duties to those that have been imposed by Federal law.

In this particular act, in section 1334, the specific preemption provision, Congress has expressly,

explicitly, unmistakably barred the States from adding their own requirements and prohibitions with respect to labeling, advertising, and promotion.

And Congress did something additional. It explained why it had done so. In the arguments made by petitioner, there is not one mention of the statement of policies and purposes in section 1331, which describes Congress' intent to set a balance among competing interests and not to have that balance disturbed.

QUESTION: Where do we find section 1331 set out in the briefs, Mr. Farr?

MR. FARR: Your Honor, I'm not sure. It's in the appendix to one of the amicus briefs.

QUESTION: Is it petitioner's blue brief on page 2 that you are referring to?

QUESTION: Yes, there. The Declaration of Policy section.

QUESTION: The Declaration of Policy section?

MR. FARR: That's correct. Thank you, Justice O'Connor. That is where it's set out.

There -- what Congress did in 1965 and then again reinforced in 1969 and again in 1984 is to address the problem of a number of different proposals respecting obligations that would be put on the cigarette companies, proposals I might add that came at the Federal level and

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at the State level. What Congress ultimately tried to do was to find a solution that balanced all of the competing interests.

The interest in having the companies themselves warn consumers, the interest in having the warning be uniform, and the interest in avoiding excessive harm to an important part of the economy. Congress did not want the obligations on the companies to be set on a State-by-State basis.

So what Congress did, essentially was that it ordered the cigarette companies to put the warning on the package, in a very unusual thing at the time, I might point out, essentially cautioning consumers against use of the very product that they were buying, but then left the companies free to market on a national basis, so long as they met Federal standards set and enforced by the Federal Trade Commission.

The other thing that Congress did at this time is that it made clear that it would continue to have the ultimate control over this area because only it was in a position to assure that all of these different interests were taken into account. Thus it not only barred the States from acting in this area, but it actually put the Federal Trade Commission on a short leash, in 1965, expressly barring them from taking certain action with

respect to warnings and advertisements, and then in 1969 requiring the Commission to come back to Congress, before it could impose a rule again affecting warnings in advertisements.

So this is an unusually active role by Congress in terms of supervising and seeing that this area is not over-regulated.

Now, petitioner has tried to draw a line throughout this case between different types of State law saying that statutes and regulations are preempted but that tort suits are not. And I would just point out that this sort of judicial line-drawing has been rejected by this court time and time again.

QUESTION: Mr. Farr, why is it not implicit in subsection 2B of the Declaration of Policy, which expressly states that it is the policy that commerce and the national economy not be impeded by diverse, et cetera, labeling and advertising regulations? Why isn't that some support there?

MR. FARR: Your Honor, I think the reason is that the cases from this court, including cases decided relatively shortly before the Cigarette Labeling Act, made clear that tort law had a regulatory effect, just as statutory law or administrative law has.

QUESTION: Well, it has a regulatory effect, but

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we -- do we normally refer it to standards of tort law as regulations?

MR. FARR: I think that the natural meaning of the terms, for example, "under State law," which is used in 1334, would include tort law. And when Congress is talking about, in the Statement of Policies and Purposes, regulations, I don't think that would be a limiting construction of the language under State law in 1334.

I think the -- one would then ask properly, does State tort law have the same effects on uniformity, on the national economy, as statutes or administrative regulations do. And I think if the answer to that is, yes, and I believe it quite clearly is in this case, then it seems to me the term would naturally include tort law as well.

QUESTION: What is the case that is best for you from this Court, in what you say disapproving the distinction that you think petitioners are trying to draw?

MR. FARR: In 1959, Your Honor, 6 years before this act was passed, the Court decided Garmon, in which --

QUESTION: So I -- then your answer is that Garmon is your best case?

MR. FARR: Garmon is the case that says that explicitly, or is a case that says that explicitly, and I use it here in particular as I say because it was decided

right before the act, or 5 or 6 years before the act, so that it would be perfectly natural for Congress to have an understanding that when it was preempting State law broadly and was concerned about the effects that this Court would not attribute to tort law a different effect on Federal law than it would other statutes.

Now the Court has adopted the same principle in cases since then, International Paper v. Ouellette, for example, the Court recognized that tort law would have a direct regulatory effect, contrary to Federal law, and indeed the Court did so just last term in Ingersoll-Rand, so I think all of those cases stand for the proposition generally.

Now as I've said, there is one exception to that rule, which is that where Congress itself has put a savings clause in the act, saying that it intends to make a distinction among different kinds of State law, this Court has, of course, honored that.

But what this Court has not done is itself create a judicial savings clause that puts tort law on different footing, even though it would have the same effect on the purposes that Congress intends to achieve in the act.

Now, one, I think, should notice that an effort to try to distinguish tort law in a situation where

Congress has struck a balance seems particularly difficult to defend.

Again, turning to the purposes and policies, one sees discussion there of not just the interest in providing information to consumers -- an interest by the way that Congress intended to serve not just as a -- in some general, unspecified way, but in any particular way, by the inclusion of a warning drafted by Congress and placed on the package. And the Statement of Policies and Purposes indicates that is the method to be used.

But then Congress talks about the concerns, as Justice Souter points out, about uniformity and also about harm to the national economy. Certainly tort suits, with the potential for damages in the millions of dollars, including punitive damages which have been sought, have as much if not more potential to disrupt uniformity, disrupt the economy, than would a fine that was levied pursuant to statute. And although the petitioners talk about the interest in providing further notification to consumers or further warnings, what they never talk about is any of the other interests.

QUESTION: Mr. Farr, you say that lawsuits tend to disrupt the economy. I'm sure the American Bar Association would not agree with this.

(Laughter.)

MR. FARR: Well, indeed, the trial lawyers filed a brief on the other side, Your Honor.

But I think that this Court has recognized that the effect of damages is one that controls behavior, that any business that is facing liability for violation of a particular duty, and the duties here are directly related to what is being said, will have to take that into account in governing its conduct.

QUESTION: So it's the effect of the lawsuits on regulating behavior, not the amount of dollars that they consume?

MR. FARR: That's correct, that that ultimately is the effect of them, and the Court has said that -- that what the Court looks at in preemption analysis is the effect of the regulation, not the particular form of the regulation.

QUESTION: Although you have spoken in terms of millions of dollars.

MR. FARR: Well, I certainly -- all I am saying is that there is a potential for that. One could not make a de minimis argument here and suggest that it could not be regulatory because of that reason.

Now, turning to the final point, of course, the particular State law to be preempted and the particular tort suits to be preempted must be within the subject

matter of the preempted field. We are not contending, as we have said before, that every tort suit is necessarily preempted.

But the claims here are very specific. As I mentioned at the beginning, they seek to require additional warnings about smoking and health, or they allege misrepresentations about the effects of smoking on health. If the State sought to impose exactly the same requirements by statute, it seems to us clear that they would be preempted. And so --

QUESTION: What if -- let me ask you the hard question. Supposing they passed a statute and says that if you find out that this stuff is poisonous and will kill people in 20 minutes, you have a duty to advise the public of that -- just something of that. Would that statute be preempted?

MR. FARR: Your Honor, again, I go back to the answer I gave before. I think when Congress addresses the issue of preemption, it does so in structural terms. It does not make its decisions about preemption --

QUESTION: Supposing my statute said with regard to any product and lists about 40 of them, including smoking, but just the part dealing with smoking would be preempted, and the rest of it would be -- would not be preempted.

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MR. FARR: Ultimately, I think, when that is applied to the State's own view about the relationship between smoking and health, that still is a requirement or prohibition that is based on smoking and health.

And, as I say, I think when Congress was addressing this area, Congress was not looking at what is obviously a troubling hypothetical in terms of conduct. What I think Congress is looking at is saying, is this an area that we believe should be governed exclusively by Federal law, or is this an area in which we think there ought to be essentially concurrent jurisdiction, with the States free to take their own views about smoking and health, whatever they may be, and impose them on the cigarette companies by making the cigarette companies say something on their packages, their advertising, or their other materials, or tell them that they cannot say something.

Justice Scalia earlier brought up --

QUESTION: Just to make it clear, my hypothetical didn't require them to say anything in advertising, said they just had to write a letter to the Federal Trade Commission if they found this information, had this hypothetical situation. The statute, State statute, says if you have this -- discover something that will poison the people next week, you have a duty to write

a letter to the Governor, say, period.

MR. FARR: Well, Your Honor, that possibly moves toward being outside the scope of the subject matter area that we're talking about. What we are talking about, essentially --

QUESTION: Well, then let's confine it to cigarettes, then. The statute just related to cigarettes.

MR. FARR: Well, even with cigarettes what we're talking about, essentially, is communications, either forced or prohibited, in one sense, between the cigarette companies, to use the term very loosely, and consumers and the public. Now, if one is talking about a requirement of notification to an agency, that conceivably would be outside the particular scope of the statute.

But the claims in this case are all claims that the company, in its communications with consumers, either was incomplete or misleading. And so I think within that core element, the statute clearly does preempt all State law.

QUESTION: Mr. Farr, what do you do with the language that was in effect between 1966 and 1970? How does that -- how can that possibly cover a flat misrepresentation, not because something's omitted, but just because you lie?

A statement that cigarettes are good for you.

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And prior to '70 it read no statement relating to smoking and health shall be required. The State is not requiring any statement; it's just saying don't lie.

MR. FARR: Well, Justice Scalia, if the only provision in the act, from 1965 to '69, was 1334(b), I think that argument would be difficult to, or more difficult to answer. The fact is, though, that from 1965 to 1969, even without the broader language that Congress ultimately adopted and put in place for the rest of the period of the suit, Congress still had a policy against State law that would create disuniformity, and would create obstacles and burdens on the national economy.

Now, what happened, in fact, in the statute, is that during the period from '65 to '69, the Federal Communications Commission was addressing the question of whether it could ban cigarette advertising on television and radio. And the FCC, itself, believed that the language of 1334(b), supplemented by the statement of purposes and policies in 1331, along with some legislative history in 1965 which suggested that the States had simply been barred -- States and Federal agencies had been barred from the area of regulating advertising -- except for the FTC.

There's a specific exclusion in the 1965 act, which says we don't want this to be read as saying that

the FTC can't take its usual action in the realm of misleading advertising, with no mention that anyone else, including the States, could do so. And what I think in fact happened, is in 1969 Congress found itself forced to resolve that dispute, because there were views on the other side.

The court in Banzhaf, the D.C. Circuit, had indicated that the act had to be read as if 1334(b) essentially were the exclusive thing to look for for preemption. And when Congress did address the question, Congress chose the broadened meaning, clearly put that into the statute.

And I think that this Court has said in cases like Red Lion and Seatrain, that the view about Congress -- of Congress about the meaning of a prior statute when it clarifies that, is to be given significant weight.

QUESTION: Mr. Farr, could a State legally pass and enforce a law that says, generally, no person shall import into this State any product that is dangerous, as defined in this statute -- and the State lists certain products in the statute and includes cigarettes -- and anybody who does is subject to damages?

MR. FARR: Justice White, the argument that I am making this morning, and I want to -- be precise about that, does not address that particular point.

QUESTION: I know it doesn't.

(Laughter.)

MR. FARR: Because that obviously is outside the immediate scope of preemption that 1334(b) addresses. I will say --

QUESTION: That would not be -- you say that that would not be preempted.

MR. FARR: I believe that we would -- we do argue, in fact, that certain kinds of State regulation, even of sale of cigarettes, might be preempted, but under quite a different analysis than the analysis that I'm making this morning.

Now, I would like to turn for a moment to an argument that seems to have achieved sudden prominence this morning, the use of the terms "based on" in section 1334(b). And I'd just like to make a couple of comments.

First of all, to return to Garmon for a second, the Court in Garmon, and in other cases which are cited in our brief and in the amicus briefs, have consistently rejected a distinction between general and specific law, at least in terms of applying preemption principles as a normal matter. The Court has, I think quite properly, again, not looked to the particular form of the law, but has looked to its effect on Federal law.

And looking at this particular statute, I think,

there is no sound reason for thinking that Congress, having said it was concerned about particular effects, was perfectly happy to have those effects imposed on the cigarette companies, on the economy, have disuniform obligations throughout the 50 States, so long as essentially the States did it by a two-step process.

They just took a general law, made a specific application with respect to cigarettes and smoking, instead of simply passing a specific law that directly attacks cigarettes and smoking itself. That would simply leave all of that outside the area of preemption. And I think that really doesn't follow from anything the Congress has tried to do in the act.

The second point I would make about that is that it doesn't even really make sense as a textual matter. Quite apart from the language in section 1331, the words "with respect to," it certainly suggests a broader scope. In 1965, when I think everybody agrees that the preemption provision, on its face, was now -- or 1334(b); 1334(b) used the words "relating to" in 1965. To then say that Congress, when it broadened the preemption provision in 1969 actually was at the same time narrowing it by some sort of sleight of hand by --

QUESTION: You surprise me. Do you say that they did broaden the provision in '69?

MR. FARR: Pardon me?

QUESTION: Did you just say they broadened the package?

MR. FARR: They broadened the language.

QUESTION: You think the provision, as enacted in '69, is broader than it was in '65. I thought before you said they were exactly the same. That's what I --

MR. FARR: Let me make sure that I'm clear about this, because I think this is the second time I've been unclear about it in two arguments. What -- I believe that the language of the 1969 act is broader than the 1965 act. I don't think anybody can reasonably read the two and not think that.

I do not think the scope of preemption is broader. I think the intent of the nine -- one of the intents of the 1969 provision was to indicate what the intent of Congress had been all along, with respect to the scope of preemption. In 1965, I think, to get to that point, one looks at the language of the provision, and reads it in light of section 1331.

QUESTION: But you're saying that the broader language has the same legal meaning, I think --

MR. FARR: What I'm saying is --

QUESTION: -- insofar as it's relevant to a preemption issue.

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MR. FARR: What I'm saying is, that the 1969 act and the 1965 act both had the same legal preemptive effect, but that the 1969 act can do that by the force of the language of 1334(b) alone, whereas in the 1965 act, I think it is necessary to read 1334(b) together with 1331 to reach that conclusion. And I think that's ultimately what Congress did, Your Honor.

Now, I'd just like to make one final point, because petitioner has, throughout this case, argued that the Labeling and Advertising Act effectively leaves him without a remedy. And just in closing, I would like to point out that that -- it is important to look at just what that argument is.

What is at issue in this case, is a remedy for these particular claims, each one of which is based upon a State law duty to say more about smoking and health in your advertising and promotion, or perhaps to say less about it if you believe that it is misleading. So that the issue is not about remedies generally, but it is simply whether the particular duties imposed by State law may support a remedy.

And we think the general principles that the Court has followed, and that one would naturally follow, are that once Congress has preempted the power of the States to set the substantive duty, then Congress has

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naturally preempted the power of the States to award damages for breaching that duty, or in fact to provide any other sanction for breaching that duty. And that is all that is involved in this particular case.

Thank you.

QUESTION: Thank you, Mr. Farr.

Mr. Tribe, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF LAURENCE H. TRIBE

ON BEHALF OF THE PETITIONER

MR. TRIBE: Thank you, Mr. Chief Justice.

Let me begin with this issue of whether the law changed in 1969. Mr. Farr is really very clear in his expositions; I just think the underlying proposition is inherently clouded. If you look at the things cited in his brief about the supposed reasons for the change, I do not think they will support the picture he conveys.

In 1969, Congress had to deal with the fact that no longer could it say that there shall be no statement related to smoking and health required in advertising, because the FTC was being empowered to do just that. And it had to deal with prohibitions because, effective a certain day in '71, they were going to prohibit electronic advertising.

The language simply reflects the fact that now requirements and prohibitions based on smoking and health

could only be ruled out with respect to advertising under State law. And if you look at the language in context, it's not a matter of shifting between "based on" and "related to" -- that is, the earlier language. It's important to quote it in context. It said no statement relating to smoking and health, just as the provision about regulations says, in the preamble, cigarette labeling and advertising regulations with respect to smoking and health.

All of that is of a piece. What it means is that in 1965, and again in '69, Congress was asked by the industry, and responded affirmatively, to give it protection from a special kind of targeted rule that told it what to do in terms that were not simply an application to it of preexisting background norms. And it is simply not true that in Garmon, which they say is their strongest case, that in that whole line of cases this Court has drawn no distinction.

QUESTION: Mr. Tribe, it isn't just preexisting background norms that your "based on" argument reaches. It reaches new regulations adopted by a State agency, so long as the regulation is phrased generally, so long as the regulation does not say cigarette advertisers shall point out the health disadvantages of their products, so long as the regulation says all advertisers shall point

out the health disadvantages of their product.

You would assert that that is not covered by this language, isn't it?

MR. TRIBE: Justice Scalia, I think you've found the very most difficult problem for me. I think the based on --

QUESTION: It's most difficult for me, with your position.

(Laughter.)

MR. TRIBE: My answer to it is this. My answer to it is that if there is with respect to, not what they call communications with consumers, but as the statute now says, with respect to advertising and promotion, a specific decision by a State, whether across the board or otherwise, then all advertising, there shall be listed the following kinds of things.

Then, even though it's not literally covered by the statute, as I understand "based on smoking and health," the tension between Congress' purpose of avoiding disuniformity, with respect to advertising and promotion and labeling, and this kind of authority, would become unbearable.

It's very important to recognize --

QUESTION: Why should I rely on an interpretation that requires me to intuit tensions,

instead of an interpretation that makes sense initially?

MR. TRIBE: Well, Justice Scalia, the only thing I'm doing with respect to this additional hypothetical is saying that I would be prepared to see the act given broader preemptive effect.

What they are arguing, however, with respect to "based on," is that this Court's decisions show that it doesn't matter whether the law is general or particular. And even in the labor field, New York Telephone Company has made the point, importantly, that a law of general applicability is less likely to be preempted when the problem that Congress addresses is regulation targeted at an industry.

And when the consequence of reading the "based on" language the way they read it is in, for example Justice Stevens' hypothetical, to say that the State cannot impose any obligation to let people know about the most recently discovered danger -- any obligation -- that's an extraordinary reading. They call the act unusual. That's an understatement.

That is, one would want affirmative evidence in the words, that Congress had really decided, in the name of a statute that is trying to avoid disuniformity in the regulation of three specific things: package labeling, advertisement, and promotion. That in the name of that,

what they're doing is saying, that you may not, in any circumstances, hold someone responsible --

QUESTION: Thank you, Mr. Tribe.

MR. TRIBE: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

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BY Michelle Sanders

(REPORTER)