

NO. A05-1359

State of Minnesota
 In Court of Appeals

Michael S. Dahl and David Scott Huber, Individually,
 and on Behalf of All Others Similarly Situated,

Appellants,

v.

R.J. Reynolds Tobacco Company and
 R.J. Reynolds Tobacco Holdings, Inc.,

Respondents.

BRIEF OF RESPONDENTS

William L. Davidson (#0201777)
 Richard A. Lind (#63381)
 Sara J. Lathrop (#0310232)
 LIND, JENSEN, SULLIVAN &
 PETERSON, P.A.
 150 South Fifth Street, Suite 1700
 Minneapolis, MN 55402
 (612) 333-3637
 James S. Simonson (#101333)
 Brian L. McMahon (#295863)
 GRAY, PLANT, MOOTY, MOOTY
 & BENNETT, P.A.
 500 IDS Center
 80 South Eighth Street
 Minneapolis, MN 55402
 (612) 632-3300

Of Counsel:
 Hugh R. Whiting
 JONES DAY
 717 Texas, Suite 3300
 Houston, TX 77002
 (832) 239-3939
 Sean P. Costello
 Todd J. Poole
 JONES DAY
 1420 Peachtree Street, Suite 800
 Atlanta, GA 30312
 (404) 521-3939
 Jeffrey L. Furr
 Amy L. Burcher
 WOMBLE CARLYLE SANDRIDGE
 & RICE
 One West Fourth Street
 Winston-Salem, NC 27101
 (336) 721-3600

*Attorneys for Respondents
 (Additional Counsel Listed on following page)*

Kay Nord Hunt (#138289)
Phillip A. Cole (#17802)
Ehrich L. Koch (#159670)
LOMMEN, ABDO, COLE, KING
& STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Gale D. Pearson (#244673)
Martha K. Wivell (#0128090)
Stephen J. Randall (#221910)
Suite 1025
100 South Fifth Street
Minneapolis, MN 55402
(612) 767-7500

Of Counsel:

Stephen A. Sheller
SHELLER, LUDWIG & BADEY
1528 Walnut Street
Philadelphia, PA 19102
(215) 790-7300

Esther Berzofsky
Mark Cuker
WILLIAMS, CUKER & BEREZOFSKY
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002

Attorneys for Appellants

LORI SWANSON
Attorney General
State of Minnesota
Mark B. Levinger (#62686)
445 Minnesota Street, Suite 1100
St. Paul, MN 55101-2128
(651) 282-5718

*Attorneys for Amicus Curiae
State of Minnesota*

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	iv
Statement of the Issues	1
Statement of the Case and Facts.....	2
Standard of Review	8
Argument.....	9
I. Introduction.....	9
II. The FCLAA Expressly Preempts State-Law Claims That Seek To Impose Prohibitions Or Requirements Concerning Smoking And Health with Respect To The Advertising Or Promotion Of Cigarettes	9
A. The Provisions Of The FCLAA.....	9
B. The History Of The FCLAA Reveals Congress’ Intent To Maintain A Single, Comprehensive Federal Warning Regime	11
III. As The Trial Court Held, Appellants’ Claims Fall Squarely Within The Express Preemption Provisions Of The FCLAA.....	13
A. All Of Appellants’ Claims Are Preempted Because They Are “Motivated By Concerns About Smoking And Health”	14
1. It is the <i>Claim</i> , Not the Underlying Statute or Common Law Under which It is Brought, That Matters for Purposes of the Express Preemption Analysis.....	14
2. Appellants’ Claims Are Motivated By Concerns About “Smoking and Health,” Not a “General Duty Not to Deceive.	16

B.	The FCLAA Preempts Claims That Directly Or Indirectly Challenge The Adequacy Of Congress’ Federal Warning Scheme	19
1.	Affirmative Misrepresentation Claims Premised On “Neutralization” Of The Federally-Mandated Warnings Are Preempted.....	21
a.	In <i>Cipollone</i> The Supreme Court Distinguished Between Two Types Of “Affirmative Misrepresentation” And Held That Claims Of Implied Misrepresentation Do No Escape Preemption	21
b.	Appellants’ Claims Are Not Premised On Alleged False Representations of Material Fact, But Are Instead Based On Allegations Of Implied Misrepresentation, Which Are Thus Preempted Under <i>Cipollone</i>	23
2.	The FCLAA Applies To “Packaging” And Preempts Appellants’ Claims Directed At The Package Itself.....	28
3.	The Fact That Appellants Do Not Use The Phrase “Failure-To-Warn” Does Not Save Their Claims From Preemption Under <i>Cipollone</i>	31
4.	A “Presumption Against Preemption” Has No Applicability to the Express Provisions of the FCLAA	34
5.	Appellants’ Reliance On <i>Forster</i> Is Misplaced	35
IV.	Conflict Preemption Bars Appellants’ Claims Because They Conflict With The FTC’s Actions And Policies With Respect To The Measurement And Disclosure Of “Tar” And Nicotine And Authority Over Cigarette Advertising	37
A.	Appellants’ Claims Are Preempted By Congress’ Decision To Create One National Program To Govern Cigarette Labeling And Advertising	38

B.	Appellants’ Claims Conflict With The FTC’s Careful Regulation Of Cigarette Advertising Under Its Exclusive Federal Authority	40
1.	The FTC Requires RJR To Publish “Tar” And Nicotine Values, As Measured By The FTC Test Method	41
2.	The FTC Has Determined That Cigarette Advertising And Promotion Using Descriptors Like “Lights” Is Not Deceptive	43
3.	Appellants’ Claims Are In Direct Conflict With The FTC’s Requirements To Publish Tar And Nicotine Yields	45
	Conclusion.....	47

TABLE OF AUTHORITIES

	Page
United States Constitution	
<i>U.S. Const.</i> art. VI, cl.2	9
Cases	
<i>Allgood v. R.J. Reynolds Tobacco Co.</i> , 80 F.3d 168 (5th Cir.), <i>cert. denied</i> , 519 U.S. 930 (1996)	33
<i>Allis-Chalmers Corp. v. Lueck</i> , 471 U.S. 202 (1985)	35
<i>Am. Airlines, Inc. v. Wolens</i> , 513 U.S. 219 (1995)	35
<i>Am. Tobacco Co. v. Grinnell</i> , 951 S.W.2d 420 (Tex. 1997)	24, 32
<i>Aspinall v. Philip Morris Cos., Inc.</i> , No. 98-6002, 2006 WL 2971490 (Mass. Super. Aug. 9, 2006)	8
<i>Bethlehem Steel Co. v. New York State Labor Relations Bd.</i> , 330 U.S. 767 (1947)	35
<i>Brown v. Brown & Williamson Tobacco Corp.</i> , 479 F.3d 383 (5th Cir. 2007)	1, 3-4, 7, 17-18, 22-23, 25, 28, 32, 34, 44
<i>Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local</i> 54, 468 U.S. 491 (1984)	35
<i>Buckman Co. v. Plaintiffs' Legal Comm.</i> , 531 U.S. 341 (2001),	24, 38
<i>Burton v. R.J. Reynolds Tobacco Co.</i> , 884 F. Supp. 1515 (D. Kan. 1995)	32
<i>Cambern v. Hubbling</i> , 307 Minn. 168, 238 N.W.2d 622 (1976)	37
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984)	39
<i>Cipollone v. Liggett Group, Inc.</i> , 505 U.S. 504 (1992)	1, 3, 7, 9, 12, 14-15, 17-29, 31, 32, 34-38

<i>City of New York v. FCC</i> , 486 U.S. 57 (1988).....	40
<i>Crosby v. National Trade Council</i> , 530 U.S. 363 (2000)	9
<i>English v. Gen. Elec. Co.</i> , 496 U.S. 72 (1990)	34
<i>Flanagan v. Altria Group, Inc.</i> , No. 05-71697, 2005 WL 2769010 (E.D. Mich. Oct. 25, 2005)	42
<i>FMC Corp. v. Holliday</i> , 498 U.S. 52 (1990)	35
<i>Forster v. R.J. Reynolds Tobacco Co.</i> , 437 N.W.2d 655 (Minn. 1989)	36, 36
<i>Freightliner Corp. v. Myrick</i> , 514 U.S. 280 (1995)	35
<i>FTC v. Brown & Williamson Tobacco Corp.</i> , 580 F.Supp. 981 (D.D.C. 1983), <i>aff'd in part and rev'd in part</i> , 778 F.2d 35 (D.C. Cir. 1985)	41
<i>Geier v. Am. Honda Motor Co.</i> , 529 U.S. 861 (2000)	37-38, 47
<i>Geiger v. Am. Tobacco Co.</i> , 674 N.Y.S.2d 775 (N.Y. App. Div. 1998).....	22
<i>Gen. Motors Corp. v. Abrams</i> , 897 F.2d 34 (2d Cir. 1990)	40
<i>Good v. Altria Group</i> , 436 F.Supp.2d 132 (D. Me. 2006), <i>appeal</i> <i>docketed</i> , No. 06-1965 (1 st Cir. June 23, 2006)	7, 18-19, 27
<i>Griesenbeck v. Am. Tobacco Co.</i> , 897 F.Supp. 815 (D.N.J. 1995).....	29
<i>Haefele v. Haefele</i> , 621 N.W.2d 758 (Minn. App. 2001)	8
<i>Herrmann v. McMenemy & Severson</i> , 590 N.W.2d 641 (Minn. 1999).....	8
<i>Hill v. R.J. Reynolds Tobacco Co.</i> , 44 F.Supp.2d 837 (W.D. Ky. 1999).....	22
<i>Hulsey v. America Brands, Inc.</i> , 1997 WL 271755 (S.D. Tex., Apr. 7, 1998), <i>aff'd per curiam</i> (1998)	32
<i>In re Tobacco Cases II</i> , No. JCCP 4042, 2004 WL 2445337 (Cal. Super. Ct. Aug. 4, 2004), <i>aff'd on other grounds</i> , 142 Cal App. 4 th 891 (2006)	7, 24-25

<i>Int'l Paper Co. v. Ouellette</i> , 479 U.S. 481 (1987)	37
<i>Jones v. Vilsack</i> , 272 F.3d 1030 (8th Cir. 2001)	29-30
<i>Kahn v. State</i> , 289 N.W.2d 737 (Minn. 1980)	37
<i>Lacey v. Lorillard Tobacco Co.</i> , 956 F. Supp. 956 (N.D. Ala. 1997)	29, 32
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).....	1-2, 7, 10-12, 14-16, 18-20, 29, 32, 34, 36, 38
<i>Louisiana Public Serv. Comm'n v. FCC</i> , 476 U.S. 355 (1986).....	40
<i>Malone v. White Motor Corp.</i> , 435 U.S. 497 (1978)	37
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992).....	15
<i>Mulford v. Altria Group, Inc.</i> , No. 05-659 (D.N.M. March 16, 2007)	8
<i>Newton v. R.J. Reynolds Tobacco Co.</i> , No. C-02-1415 (N.D. Cal. Mar. 17, 2003).....	18
<i>Penniston v. Brown & Williamson Tobacco Corp.</i> , 2000 WL 1585609 (D. Mass. June 15, 2000).....	11
<i>Perez v. Brown & Williamson Tobacco Corp.</i> , 967 F. Supp. 920 (S.D. Tex. 1997)	32
<i>Price v. Philip Morris, Inc.</i> , 848 N.E.2d 1 (Ill. 2005).....	42, 44
<i>Roysdon v. R.J. Reynolds Tobacco Co.</i> , 849 F.2d 230 (6th Cir. 1988).....	32
<i>Simonsen v. BTH Properties</i> , 410 N.W.2d 458 (Minn. Ct. App. 1987)	25
<i>Small v. Lorillard Tobacco Co.</i> , 679 N.Y.S.2d 593 (N.Y. App. Div. 1st Dep't. 1998), <i>aff'd</i> , 94 N.Y.2d 43 (N.Y. 1999)	31
<i>Sonnenreich v. Philip Morris, Inc.</i> , 929 F.Supp. 416 (S.D. Fla. 1996)	29
<i>Spain v. Brown & Williamson Tobacco Corp.</i> , 363 F.3d 1183 (11th Cir. 2004)	22
<i>State v. Lussier</i> , 130 N.W.2d 484 (Minn. 1964)	36

<i>Stevens v. Fed. Cartridge Corp.</i> , 32 N.W.2d 312 (Minn. 1948).....	36
<i>Waterhouse v. R.J. Reynolds Tobacco Co.</i> , 270 F.Supp.2d 678 (D. Md. 2003)	29
<i>Wisconsin Dep't. of Indus. Labor & Human Relations v. Gould, Inc.</i> , 475 U.S. 282 (1986)	35
<i>Wright v. Brooke Group, Inc.</i> , 114 F.Supp.2d 797 (N.D. Iowa 2000).....	29

Statutes

5 U.S.C. § 553	42
15 U.S.C. § 45	45
15 U.S.C. § 1331	1-2, 9, 11, 20, 37, 46
15 U.S.C. § 1333	10, 13
15 U.S.C. § 1334	7, 10, 18, 28-29, 38
15 U.S.C. § 1336	38
Minn. Stat. § 325D.09-.16.....	4-5
Minn. Stat. § 325D.43-.48.....	5
Minn. Stat. § 325F.68-.70	4
Minn. Stat. § 325F.67.....	5

Regulations

29 Fed.Reg. 530, 532	41
29 Fed.Reg. 8324-26, 8343-44, 8346, 8356.....	22
31 Fed.Reg. 14,278	3, 41
62 Fed.Reg. 48,158 n.5	3, 42

35 Fed.Reg. 12,671 3, 42

Miscellaneous

FTC Staff Report, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-1974*..... 46

In the Matter of American Brands, 79 F.T.C. 255 (1971) 1, 43

In the Matter of American Tobacco Co., 119 F.T.C. 4 (1995) 44

STATEMENT OF THE ISSUES

1. The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1339, mandates specific warning statements on cigarette packages and advertising. The Act prohibits States from imposing requirements or prohibitions based on smoking and health with respect to advertising and promotion of cigarettes labeled in conformity with the Act. Two smokers brought suit under Minnesota law claiming that cigarettes advertised and labeled as “lights” or “low tar” were misleading and deceptive by implying that they were safer than regular cigarettes. Does the Act expressly preempt these state law claims?

The district court concluded that the Act expressly preempted the state law claims.

Apposite authority: 15 U.S.C. §§ 1331-1339

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)

Brown v. Brown & Williamson Tobacco Corp., 479 F.3d 383
(5th Cir. 2007)

2. Congress gave the Federal Trade Commission (“FTC”) exclusive authority to regulate cigarette advertising. Respondents’ cigarette packaging and advertising use the terms “lights” and “low tar” on cigarettes yielding 15 milligrams or less of “tar” as measured by the testing procedures the FTC mandated. Are Appellants’ claims barred by the doctrine of conflict preemption because imposing liability upon Respondents under state law for using “lights” and “low tar” on cigarette packaging and advertising would conflict with the FTC’s regulation of cigarette advertising, pursuant to its congressional mandate?

The district court did not reach this issue.

Apposite Authority: 15 U.S.C. §§ 1331-1339

In the Matter of American Brands, 79 F.T.C. 255
(1971)

STATEMENT OF THE CASE AND FACTS

Appellants Dahl and Huber ask this Court to reverse the dismissal of their statutory and common law damage claims. By those claims, Appellants sought to challenge Respondents R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco Holdings, Inc. (“RJR”)’s use of the words “lights” and “low tar” in its advertising and packaging of Winston Lights and Camel Lights cigarette brand styles. The district court, the Honorable Diana S. Eagon presiding, granted RJR’s motion for summary judgment, concluding that Appellants’ claims are expressly preempted by the Federal Cigarette Labeling and Advertising Act (“FCLAA”), 15 U.S.C. § 1331 *et seq.* See Appellants’ Appendix at 1 (“A.1”). This appeal followed.

RJR began selling Winston Lights and Camel Lights in 1974 and 1979, respectively. Respondents’ Appendix at 5 (“R.A.5”). Years before RJR began selling these two brand styles, Congress had already established a comprehensive federal program governing cigarette labeling and advertising and vested authority in the Federal Trade Commission (“FTC”) to monitor and further regulate cigarette advertising.

This federal program includes a number of critical elements:

1. In 1965, Congress enacted the FCLAA, requiring that every pack of cigarettes bear a uniform, federally-mandated warning. Congress declared that this warning “adequately inform[s]” consumers about “any adverse health effects” of smoking, and precluded the States from requiring any other statement on cigarette packages or in ads. 15 U.S.C. §§ 1331 *et seq.*; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001).
2. In 1967, the FTC instituted a mandatory testing procedure to measure the “tar” and nicotine yields of cigarettes. This procedure was intended to measure the comparative yields of cigarettes smoked in the same manner.

31 Fed. Reg. 14, 278 (Nov. 4, 1966); 62 Fed. Reg. 48,158 n.5 (Sept. 12, 1997).

3. In its 1968 report to Congress the FTC made clear that “as a general rule [it would] not challenge a statement on representations of or relating to tar and nicotine content of cigarettes where they are shown to be accurately and fully substantiated by tests conducted in accordance with [the FTC test].” R.A.15.
4. In 1969, Congress amended the FCLAA, mandated a new warning and “expanded the pre-emption provision in the FCLAA with respect to the States [while] at the same time [allowing] the FTC to regulate cigarette advertising.” *Reilly*, 533 U.S. at 543-44; *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515 (1992).
5. In 1970, the FTC initiated action that required cigarette manufacturers to publish the “tar” and nicotine yields from the FTC test in all cigarette ads. 35 Fed. Reg. 12, 671 (Aug. 8, 1970); *Brown v. Brown & Williamson Tobacco Corp.*, 479 F.3d 383, 388 (5th Cir. 2007).
6. In its 1979 report to Congress, the FTC defined “low tar” to mean cigarette brand styles with “tar” yields of 15 milligrams (“mg”) or less as measured by the FTC test. R.A.51, 120, 136, 138.

This federal regulatory scheme has been in place throughout the time that RJR has marketed and promoted its Winston Lights and Camel Lights brand styles. RJR’s compliance with these federal requirements is not at issue. Every pack of Winston Lights and Camel Lights has included the federal warning, and Appellants admit this. *See* Appellants’ Brief at 11 (“[RJR] placed these warnings on its cigarette packages”). Every ad for these cigarettes has included both the federal health warning and the FTC-measured “tar” and nicotine yields—yields that are in fact below 15 milligrams of “tar” and in fact lower for each of these “lights” brand styles than the yields for their respective regular brand styles. R.A.51.

RJR has used the term “lights” or “low tar” on the packages and in advertisements for Winston Lights and Camel Lights, but nowhere else. Thus each and every time these descriptors have been used in RJR’s marketing and promotion of these brand styles, the FCLAA-mandated warning has also been on the package or in the ad. R.A.142, 145.

Appellants, both longtime smokers, allege that they smoked Camel Lights and Winston Lights for many years before they filed suit.¹ They seek damages on behalf of themselves and a putative class, in the form of a refund of what they paid for every pack of Camel Lights or Winston Lights cigarettes they bought through the date of class certification.² Neither Appellant claims that he sustained physical injury from smoking these cigarettes and neither seeks recovery for physical injury on behalf of the putative class.

Appellants bring six claims, four under Minnesota “consumer protection” statutes, and two under Minnesota common law. In support of their claims, Appellants allege:

1. Respondents violated the Consumer Protection Act, Minn. Stat. § 325F.68-.70, by, *inter alia*, “failing to disclose that the design and composition of Camel Lights and Winston Lights are intended to deliver lowered tar and nicotine levels under machine testing conditions and to deliver higher tar and nicotine levels to consumers who smoke Camel Lights and Winston Lights thereby rendering the ‘light’ product descriptor deceptive and misleading.” Appellants’ Second Amended Complaint ¶ 36 (A.32-33).
2. Respondents violated the Unlawful Trade Practices Act, Minn. Stat. § 325D.09-.16 by, *inter alia*, “knowingly, in connection with the sale of

¹ See Second Amended Complaint at ¶¶ 17-18 (A.28).

² This would constitute a period of time of *at least* 33 years, according to Appellants’ proposed class definition. See *id.* at ¶ 21 (defining class period extending “from the first date defendants sold Camel Lights and/or Winston Lights in Minnesota through the date of the certification of the class”).

cigarettes, misrepresent[ing] the true quality and ingredients of the cigarettes.... advertis[ing] a light cigarette that represented health benefits as compared to a regular cigarette.... embark[ing] on and carr[ying] out a scheme of marketing and selling light cigarettes by falsely and deceptively advertising that the cigarettes were lights or contained lowered tar and nicotine.” *Id.* at ¶ 44 (A.35).

3. Respondents violated the Deceptive Trade Practices Act, Minn. Stat. § 325D.43-.48 by “[r]epresenting in both advertisement and on a cigarette package that light cigarettes delivered less quantities of tar and nicotine to consumers, thereby conferring a health benefit to consumers as compared to non-light cigarettes.” *Id.* at ¶50 (A.36-37).
4. Respondents violated the False Statement in Advertising Act, Minn. Stat. § 325F.67, by “engag[ing] in the dissemination of false advertising.... by publishing advertising that promoted light cigarettes as a less harmful alternative to regular cigarettes....” *Id.* at ¶ 56 (A.38).
5. Respondents engaged in common law advertising low tar and light cigarettes with the intention that Appellants would believe that the cigarettes “were healthier as they delivered less harmful substances” than regular cigarettes. *Id.* at ¶ 60 (A.39).
6. Respondents were unjustly enriched because they “failed to inform consumers that the tar in their light cigarette smoke contains higher levels of harmful toxins that he [sic] tar in regular cigarette smoke.” *Id.* at ¶ 69 (A.40).

Fundamentally, Appellants’ theory throughout is that the use of the “lights” descriptor is misleading because (1) RJR failed to disclose to consumers that Camel Lights and Winston Lights are allegedly as hazardous as regular cigarettes; (2) RJR failed to tell consumers that if they engaged in “compensatory” behavior, they could increase the “tar” and nicotine they obtained from smoking “lights”;³ and (3) the “lights” and “low tar” descriptors *imply* that these brand styles are healthier than regular cigarettes when they are not. Appellants do not contend that RJR ever said that Winston Lights or Camel Lights are safer or produce less adverse health effects than Winston or Camel regular

³ See, e.g., Second Am. Compl. ¶¶ 36, 44, 49, 62 (A.32-33, 35-39, 39).

brand styles, and RJR has never made any such representation. Undisputed consumer survey evidence shows, moreover, that not all smokers believe what Appellants claim to believe about “lights” cigarettes; a substantial percentage of “lights” smokers believe that “lights” cigarettes are *not* healthier than regular cigarettes. Ultimately, whatever this case may be about, it is not about claims of misrepresentations of material fact. It is, instead, a case built around allegations of “false impression through implication, innuendo and ambiguity.” Appellants’ Brief at 40.

Appellants’ claims are at odds with the comprehensive federal program Congress put in place, are contrary to the Congressional intent embodied in the FCLAA, and are foreclosed under the Supremacy Clause of the U.S. Constitution by the express terms of the FCLAA. Each claim is preempted because each is a state-law claim that seeks to impose a requirement or prohibition motivated by concerns about smoking and health with respect to the advertising or promotion of cigarettes. Judge Eagon so concluded, and two paragraphs from her 22-page decision aptly capture the reasons why her decision was correct:

In general, a lawsuit based on tobacco smoking which alleges that it avoids pre-emption by not being about “smoking and health” has a tough row to hoe. Plaintiffs claim that Reynolds cheated them out of money, not that Reynolds hurt the Plaintiffs’ health, possibly getting around the “based on smoking and health” part of the analysis. However, but for meticulous pleading, Plaintiffs’ allegations are likely also to be, in the end, health-based claims because were it not for the detrimental health effects of the product—effects allegedly as detrimental as if the cigarettes were regular cigarettes rather than “Lights”—Plaintiffs would not have any claim to have been cheated. Plaintiffs do not allege that the cigarette packages had nineteen cigarettes when they paid for twenty or that the cigarettes were defective but that the cigarettes’ effect on Plaintiffs’ health was different

from the packaging suggested to the Plaintiffs. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

* * *

Plaintiffs maintain that they drafted their Complaint fully aware of *Cipollone*, its progeny, and the implications of those cases for their claims. Therefore, they drafted their Complaint as a failure by Reynolds to do certain things—to warn or to disclose—rather than accusing Reynolds of performing certain positive acts. Nevertheless, the underlying actions—or omissions—of which Plaintiffs complain substantively violate the preemption provision of the Labeling Act by seeking to impose liability on Reynolds for, in effect, advertising the health benefits of their “Light” cigarettes or not labeling their cigarette packages with more information about the health consequences of smoking those cigarettes. The Labeling Act spells out what health-related language must be on packages of cigarettes, “Lights” and regulars, and forbids a state, by positive enactment or a finding of liability for an omission, from imposing further requirements. Therefore, all of Plaintiffs’ claims must be dismissed as preempted by the federal Labeling Act, 15 U.S.C. 1334.

A.12, 22-23.

As demonstrated below, Judge Eagon followed controlling Supreme Court precedent, including *Cipollone* and *Reilly*, to the letter. Judge Eagon, moreover, does not stand alone concluding that “lights” cigarette claims like the ones here are preempted by the FCLAA. Most recently, the United States Fifth Circuit Court of Appeals – the only appellate court to have so far ruled on the issue – found the reasoning of Judge Eagon and other courts “compelling” and held that “lights” cigarette claims premised on fraudulent misrepresentation and fraudulent omission are expressly preempted under the FCLAA. *See, e.g., Brown*, 479 F.3d at 383 (holding similar class action “lights” cigarette claims preempted by the FCLAA): *See also Good v. Altria Group*, 436 F. Supp. 2d 132 (D. Me. 2006) (dismissing nearly identical “lights” cigarette class action claims as preempted), *appeal docketed*, No. 06-1965 (1st Cir. June 23, 2006); *In re Tobacco Cases II*, 2004 WL

2445337 (Cal. Super. Ct. Aug. 4, 2004), *aff'd on other grounds*, 142 Cal. App.4th 891 (2006) (dismissing “lights” cigarette claims as expressly preempted). *But see Aspinall v. Philip Morris Cos., Inc.*, No. 98-6002, 2006 WL 2971490 (Mass. Super. Aug. 9, 2006) (R.A.304) (finding that “lights” cigarette claims were not expressly preempted); *Mulford v. Altria Group, Inc.*, No. 05-659 (D. N.M. March 16, 2007) (R.A.317) (granting in part and denying in part motion for summary judgment seeking dismissal of “lights” cigarette claims based on federal preemption), *motion for reconsideration pending*.

Appellants’ claims also are impliedly conflict preempted, because what they seek conflicts with the FTC’s authority, policy and actions with respect to cigarette advertising and “lights” cigarettes in particular. Appellants’ claims challenge not only the FTC-mandated testing procedure that provides the “tar” and nicotine yields upon which the “lights” and “low tar” descriptors are based, but also the FTC’s approval of using such descriptors in advertising when based on “tar” and nicotine yields measured under the FTC-mandated test. At bottom, Appellants’ claims seek to forbid that which the FTC has blessed. That presents a conflict. Consequently, such claims are preempted.

For the reasons set forth below, this Court should affirm.

STANDARD OF REVIEW

Because the material facts are undisputed, the issue is whether the trial court erred in its application of the law. *See Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). This court reviews questions of law *de novo*. *See, e.g., Haefele v. Haefele*, 621 N.W.2d 758, 761 (Minn. App. 2001).

ARGUMENT

I. INTRODUCTION

Under the Supremacy Clause of the United States Constitution,⁴ state law that conflicts with federal law is without effect. *Cipollone*, 505 U.S. at 516; *Crosby v. Nat'l Trade Council*, 530 U.S. 363, 372 (2000). Congress' preemptive purpose may be expressed in the statute, or it may be implied by the objectives and operation of a federal regulatory regime that would be undermined by a conflicting application of state law. *Cipollone*, 505 U.S. at 516.

Appellants' claims are both expressly preempted by the FCLAA and impliedly preempted because they conflict with the FTC's policies and actions with respect to the advertising and sale of "lights" cigarettes.

II. THE FCLAA EXPRESSLY PREEMPTS STATE-LAW CLAIMS THAT SEEK TO IMPOSE PROHIBITIONS OR REQUIREMENTS CONCERNING SMOKING AND HEALTH WITH RESPECT TO THE ADVERTISING OR PROMOTION OF CIGARETTES.

A. The Provisions Of The FCLAA.

The FCLAA is the "supreme Law of the land" when it comes to the labeling, advertising, and promotion of cigarettes. Congress was not modest about the FCLAA's purpose and scope (15 U.S.C. § 1331):

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—

⁴ U.S. Const. art. VI, cl. 2.

(1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement 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 advertising regulations with respect to any relationship between smoking and health.

To ensure the supremacy of its “comprehensive Federal program,” Congress expressly preempted any state attempt to mandate different cigarette labeling or advertising rules:

(a) Additional statements

No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) State regulations

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 chapter.

15 U.S.C. § 1334.

By its terms, the FCLAA confirms that the only warnings to be used on cigarettes sold in the U.S. are the ones mandated by Congress. The statute expressly precludes states from imposing any: (1) requirement or prohibition; (2) that is “motivated by concerns about smoking and health”; (3) with respect to cigarette advertising or promotion. *Reilly*, 533 U.S. at 548. Appellants’ claims satisfy all three requirements. Under the Supremacy Clause of the U.S. Constitution, they are, therefore, preempted.

B. The History Of The FCLAA Reveals Congress' Intent To Maintain A Single, Comprehensive Federal Warning Regime.

The FCLAA was Congress' considered response to the Surgeon General's watershed 1964 declaration that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." *Reilly*, 533 U.S. at 542. At the time of the Surgeon General's 1964 report on smoking and health, there was no federal legislation governing cigarette warnings or advertising. However, there was "impending regulation by federal agencies and the States," including proposals for mandatory warning labels in individual states. *Reilly*, 533 U.S. at 542. "Fearing . . . a Balkanized patchwork of conflicting state and federal regulations," *Penniston v. Brown & Williamson Tobacco Corp.*, 2000 WL 1585609 (D. Mass. June 15, 2000), at *3 (D. Mass. June 15, 2000) (R.A.349), Congress enacted the FCLAA "as a proactive measure." *Reilly*, 533 U.S. at 542.

Through the FCLAA, Congress has mandated the specific words, typeface and location of uniform warnings about the health consequences of smoking that must appear on *all* cigarette packages and advertising, without regard for brand style or "tar" content. Congress declared that these unalterable warnings "adequate[ly] inform" consumers of "any adverse health effects of cigarette smoking." 15 U.S.C. §1331.

Uniformity and certainty were the chief goals, so the FCLAA mandated a single warning for all cigarettes. It also directed the Secretary of Health, Education, and Welfare ("HEW") and the FTC "to report annually to Congress about the health consequences of smoking and the advertising and promotion of cigarettes." *Reilly*, 533

U.S. at 543. The FCLAA “was enacted with the expectation that Congress would reexamine it . . . in light of the developing information about cigarette smoking and health.” *Id.* Thus, Congress amended the FCLAA through the Public Health Cigarette Smoking Act of 1969. At that time, Congress mandated stronger warning language, expanded the scope of preemption of state law, and returned authority to the FTC to continue regulating cigarette advertising and promotion. *See id.* at 544; *Cipollone*, 505 U.S. at 515.

Congress amended the FCLAA again in 1984, establishing the current rotating warning regime. *Reilly*, 533 U.S. at 545. Before that amendment, Congress received reports regarding “lights” cigarettes, including reports about the very things Appellants complain about here, such as smoker “compensation.” For example, the Surgeon General’s 1979 report stressed that “[a]n individual smoker does not necessarily consume cigarettes in [a] standardized manner. It is possible for a low ‘tar’ and nicotine smoker to inhale in one day much more of these constituents than a smoker of higher ‘tar’ and nicotine content cigarettes.” R.A.156.

In addition, the entire 1981 Report of the Surgeon General was devoted to “light” and “low-tar” cigarettes.” One of the findings in that report was that “[c]ompensatory smoking behavior may negate any advantage of the lower yield product or even increase the health risk.” R.A.162. The Surgeon General therefore recommended that “[s]mokers of the lower yield cigarettes should be warned not to begin smoking more cigarettes or inhaling more deeply.” R.A.163. But Congress declined to follow the recommendation and chose instead to maintain a single, uniform warning regime for all cigarettes.

The logic of Congress' uniform warning requirement is clear. A warning like "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy" (15 U.S.C. §1333(a)) confirms that *all* cigarettes pose the same stark health risks to those who choose to smoke. There is no need for a different warning, such as that "lights" are *as dangerous* as regular cigarettes, because the very uniformity of the federal warning makes clear that the type or style of cigarette, whether it be "lights," "menthol," "king," "wide," "slim," or something else, is irrelevant to the health consequences of smoking a particular cigarette. A smoker may choose a cigarette for any number of reasons, including some subjective belief drawn from his perception of the statements, imagery or even color of cigarette packaging or advertising. But the required warning exists to tell him that, no matter what cigarette he chooses to smoke, he is subjecting himself to the very same risks that he would encounter by smoking another cigarette bearing the same warning, irrespective of tar or nicotine content.

III. AS THE TRIAL COURT HELD, APPELLANTS' CLAIMS FALL SQUARELY WITHIN THE EXPRESS PREEMPTION PROVISIONS OF THE FCLAA.

Appellants seek to avoid the preemptive reach of the FCLAA, and to overturn the trial court's dismissal, in two principal ways. First, Appellants argue that their claims are not preempted because they are pled under statutes and laws of general applicability, and are based on alleged violations of a "general duty not to deceive," Appellants' Brief at 29, rather than being motivated by concerns about smoking and health. Second, they assert that their claims are "affirmative misrepresentation" claims, rather than "failure to warn" claims and thus fall outside the preemptive reach of *Cipollone*. Appellants are

mistaken on both points.

A. All Of Appellants' Claims Are Preempted Because They Are "Motivated By Concerns About Smoking And Health."

Seeking refuge in certain of the language in *Cipollone*, Appellants argue that state law claims are not preempted if they are based on a statute of general applicability or are premised on an alleged "general duty" "not to lie," rather than a duty based on "smoking and health." *See, e.g.* Appellants' Brief at 29-31. Appellants' argument is directly at odds with the Supreme Court's decisions in *Cipollone* and *Reilly*.

1. It is the Claim, Not the Underlying Statute or Common Law Under Which It is Brought, That Matters for Purposes of the Express Preemption Analysis.

That Appellants sue under laws of general applicability is beside the point for purposes of preemption analysis. Appellants' argument to the contrary is a red herring. RJR did not challenge the statutes or common laws of Minnesota, and need not do so for Appellants' claims to be preempted. Rather, RJR challenged Appellants' specific claims asserted under various statutes and common law.

The FCLAA preempts *claims* brought under state statutes or common law that impose a general duty that may be applicable to conduct unrelated to cigarette advertising or promotion, just as the FCLAA preempts a statute or regulation that itself expressly creates a requirement or prohibition concerning smoking and health with respect to the advertising or promotion of cigarettes. *Cipollone* itself makes the point. The "failure to warn claim" in *Cipollone* concededly was "based on the broader duty 'to inform consumers of known risks,'" *Cipollone*, 505 U.S. at 527, 529 (quoting Blackmun

dissenting opinion). But *the claim in that case* was preempted, nonetheless, because it would have required a determination under state-law of whether tobacco companies “advertising or promotion should have included additional, or more clearly stated, warnings.” *Id.*, 505 U.S. at 524.⁵

It is therefore abundantly clear that claims pled under state laws of general application may be “based on smoking and health” if the effect of the claims would be to add labeling or warning requirements or prohibitions beyond those that Congress promulgated. If Appellants’ view were correct, the *Cipollone* Court could not have held the plaintiffs’ common law *claims* preempted without also finding the basic state law torts themselves preempted.

The Supreme Court’s subsequent decision in *Reilly* puts the issue to rest. In *Reilly*, the Court found that the Massachusetts Attorney General’s regulations prohibiting cigarette advertising to youth were “based on smoking and health,” even though they were promulgated pursuant to a *general* state statute to “prevent unfair or deceptive practices in trade.” *Reilly*, 533 U.S. at 533.

Appellants argue that the particular regulation in *Reilly* applied only to tobacco products. But that misses the point. The *regulation* there is the equivalent of the statutory and common law *claims* here. Just as the specific regulation in *Reilly* was

⁵ Accepting Appellants’ position that there is no express preemption unless the underlying statute or common law rule is preempted would result in an “utterly irrational loophole,” because “there is little reason why state impairment of the federal scheme should be deemed acceptable so long as it is effected by the particularized application of a general statute.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (holding that claims under state deceptive practices act were preempted by the Airline Deregulation Act).

issued under a statute of general applicability, here the specific claims being pursued are claims under statutes (and tort laws) of general applicability. Preemption of the predicate statutes (and tort laws) is not at issue in this case, just as preemption of the predicate statute was not at issue in *Reilly*.

2. Appellants' Claims Are Motivated By Concerns About "Smoking and Health," Not a "General Duty" Not To Deceive.

Appellants' argument that their claims are based on "a general duty not to deceive" ignores the core holding of *Reilly*. There the Court ruled that the relevant inquiry to determine whether a claim is "based on smoking and health" under the FCLAA, rather than a general duty not to deceive, is whether it is "motivated by concerns about smoking and health." 533 U.S. at 548. The regulation in *Reilly* failed this test, although it had nothing to do with cigarette advertising content or any claims made by tobacco companies about the safety of cigarettes. Rather, it was a ban on advertising in certain locations accessible to children. In fact, the Massachusetts Attorney General argued that, because of this, the regulation was not based on "smoking and health." *See id.* at 547. But as the Supreme Court explained, "[a]t bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus the Attorney General's attempt to distinguish one concern from the other must be rejected." *Id.* at 548. Likewise, "at bottom," Appellants' challenge to the sale and marketing of "lights" cigarettes is clearly "intertwined with the concern about cigarette smoking and health," and their effort to argue otherwise must be rejected. Indeed, if Massachusetts' attempt to do no more than restrict the location of advertising is

a prohibition “based on smoking and health,” Appellants’ claims here, which are ostensibly and emphatically *defined* by reference to concerns about the health effects of smoking “lights” cigarettes, clearly must be deemed as “motivated by concerns about smoking and health.”

Judge Eagon, therefore, was quite right to conclude that Appellants had a “tough row to hoe” when they argued that their claims were motivated by something other than concerns about smoking and health, and she was therefore correct to conclude that Appellants’ claims are, ultimately, health-based claims. *See* A.12. Several courts have, like Judge Eagon, rejected similar “general duty” arguments and concluded that nearly identical claims challenging the sale and marketing of “lights” cigarettes are preempted because they are necessarily and fundamentally motivated by concerns about smoking and health.

In the most recent decision, the United States Fifth Circuit Court of Appeals reversed a trial court that had refused to follow Judge Eagon’s *Dahl* decision. In *Brown v. Brown & Williamson Tobacco Co.*, plaintiffs brought a variety of state-law damage claims on behalf of a putative class of smokers who bought “lights” cigarettes in Louisiana. 479 F.3d at 386-87. The Fifth Circuit held that all of the plaintiffs’ claims – including claims premised on alleged omissions as well as claims premised on alleged “affirmative fraud” – were preempted under *Cipollone*, despite the plaintiffs’ arguments that the duties at issue were general duties “not to lie.” The Fifth Circuit easily saw through the argument and recognized that “to impose state liability on the basis of the Manufacturers’ use of the FTC mandated terms is necessarily to impose a state

requirement or prohibition on cigarette advertising as it relates to the relationship between cigarettes and health.” *Id.* at 393.

The year before *Brown*, a federal district court, following *Reilly*, held that claims involving “lights” brought under state consumer protection statutes (like those here), are preempted. In *Good v. Altria Group*, the court concluded that *Cipollone* and *Reilly* together compel a finding of preemption, because the plaintiffs’ claims “would run head first into what *Reilly* describes as the ‘comprehensive federal scheme governing the advertising and promotion of cigarettes.’” 436 F.Supp.2d at 152 (quoting *Reilly*, 533 U.S. at 541). *Good* flatly rejected the very distinction Appellants attempt to draw with respect to whether their claims are based on “smoking and health”:

Although the Plaintiffs proclaim that the difference between what they thought they were getting and what they got amounts to deliberate fraud, it is only because Philip Morris labeled the cigarettes and advertised and promoted them as “light” that there is even an arguable difference between perception and product. But, it is precisely this area that Congress pre-empted as part of “a comprehensive federal scheme governing the advertising and promotion of cigarettes.” *Reilly*, 533 U.S. at 541. As in *Reilly*, the difference is “intertwined with the concern about cigarette smoking and health.” *Id.* at 548. . . . As such, under § 1334(b), they are expressly pre-empted.

Good, 436 F.Supp.2d at 153.

Similarly, in *Newton v. R.J. Reynolds Tobacco Co.*, No. C-02-1415 VRW (N.D. Cal. Mar. 17, 2003) (R.A.353), the plaintiffs sought to amend their complaint to add statutory consumer fraud claims based on RJR’s alleged “false and fraudulent claims regarding . . . the dangers of so-called ‘light,’ ‘low-tar,’ [and] ‘low-nicotine’ . . . cigarettes.” *Id.* at *11. The court, however, rejected the proposed claims as “futile

because they are preempted by the” FCLAA. *Id.* at *12. “[B]y enacting the FCLAA, Congress pre-empted state regulation of cigarette advertising and promotion based on smoking and health. This includes enforcement of state laws barring unfair or deceptive trade practices concerning these labels and advertisements.” *Id.* at *12 (citing *Reilly*, 533 U.S. at 550-51). “But,” the court found, “that is precisely what the [plaintiffs] seek to accomplish here, by basing their . . . claims on defendants’ allegedly false and misleading statements concerning their products’ effects on consumer health if smoked. These claims,” the court held, “fall squarely within the pre-emption provision of the FCLAA.” *Id.* at *13.

The core of Appellants’ claims is that the advertising and promotion of “lights” cigarettes misleads smokers about their safety. Indeed, Appellants flatly state that “their complaint is that [RJR’s] description of their cigarettes as ‘Lights’ or ‘low tar’” deceived them into “believ[ing] ‘light’ products were less harmful than other cigarettes.” Appellants’ Brief at 29. Claims proceeding under such a theory are unquestionably “motivated by concerns about smoking and health” and are therefore preempted under *Cipollone* and *Reilly*.

B. The FCLAA Preempts Claims That Directly Or Indirectly Challenge The Adequacy Of Congress’ Federal Warning Scheme.

Congress decided that the federally mandated warnings “adequate[ly] inform” consumers of “*any* adverse health effects of cigarette smoking.” 15 U.S.C. § 1331. Congress *chose* not to mandate special or different warnings for “lights” cigarettes, even though it has had every opportunity to do so and even though the Surgeon General

recommended a warning to “lights” smokers about the possibility that they could obtain more “tar” from a “lights” cigarette.

Nevertheless, the gravamen of all of Appellants’ claims is that consumers were misled into believing “that ‘Lights’ cigarettes were less likely than other cigarettes to cause adverse health effects,” Appellants’ Brief at 29, even in the face of uniform federal warnings clearly stating that *all* cigarettes present the same health risks. Any determination that consumers are somehow misled about the health risks of “light” cigarettes would necessarily be premised on one of two conclusions: (1) that the “light” or “low-tar” descriptor neutralizes the uniform warning applicable to all cigarettes; or (2) that the uniform federal warning is inadequate when applied to “light” cigarettes. Either way, Appellants’ claims are preempted. As *Cipollone* and *Reilly* make clear, state law claims that attempt to base liability on either of these two premises are preempted “because they would upset federal legislative choices to require specific warnings . . . in order to address concerns about smoking and health.” *Reilly*, 553 U.S. at 551. Each of Appellants’ claims, regardless of the title used to describe it, attempts to base liability on one of these two theories and proceeds from the assumption that RJR had a duty to say more about “lights” cigarettes or that the terms “lights” and “low tar” neutralized the words Congress required RJR to say. As such, they are preempted.

1. Affirmative Misrepresentation Claims Premised On “Neutralization” of the Federally-Mandated Warnings Are Preempted.

Appellants try to divorce themselves from the many express allegations of failure to disclose, and the omission and concealment theories advanced in their complaint.

Instead, they try to portray their claims as based on affirmative misrepresentations saying that consumers infer from the descriptors “lights” or “low tar” that Winston Lights and Camel Lights brand styles are safer than the regular styles of those brands. But merely calling a claim an “affirmative misrepresentation” claim does not save it from FCLAA preemption.

a. **In *Cipollone* the Supreme Court Distinguished Between Two Types of “Affirmative Misrepresentation” And Held That Claims of Implied Misrepresentation Do Not Escape Preemption.**

Cipollone does not provide the protection against preemption that Appellants claim, because it did not hold what Appellants claim. Put simply, *Cipollone* does not hold that *all* affirmative misrepresentation claims are immune from FCLAA preemption. To the contrary, in *Cipollone* the Court held that certain affirmative misrepresentation claims most certainly *are* preempted. *Cipollone* drew a distinction between “two theories of fraudulent misrepresentation.” 505 U.S. at 527. Fraudulent misrepresentation claims premised on “false representation of a *material fact*” are *not* preempted. *Id.* at 528 (emphasis added). Misrepresentation claims proceeding from a theory of *implied* misrepresentation, by which a tobacco company, “through [its] advertising, neutralized the effect of federally mandated warning labels,” *are* preempted. *Id.* at 527. The Court explained that “*statements, designs, or other graphic material that in any manner negates or disclaims the [required warning]*” are examples of “representations” that would give rise to neutralization preemption. *Id.* at 527-28 (emphasis added).

In further explaining its holding that claims involving implied neutralization of the

FCLAA warning are expressly preempted, *Cipollone* referred to the FTC's initial 1964 trade regulation rule on cigarette advertising. In that rule, the FTC recognized the "relationship" between federal health-warning requirements and marketing that implicitly "downplays the dangers of smoking." *Id.* at 527 (citing 29 Fed. Reg. 8324, 8356 (July 2, 1964)). In particular, the FTC referred to advertising that "intimated, without claiming outright, that . . . smoking the advertised brand is . . . at least less hazardous than smoking other brands." *Id.* (emphasis added). The FTC's proposed rule was intended in part to correct the "false impression" of comparative safety created by marketing "filter" lower-tar cigarettes—which gave rise to the "implication" that such cigarettes were "safer" or "less hazardous" than other cigarettes, and tended to have the "effect of neutralizing much of the impact of the medical findings on the dangers of smoking." 29 Fed. Reg. at 8325-26, 8343-44, 8346, 8356 (emphases added). The *Cipollone* Court viewed this FTC example as a paradigmatic example of "neutralization" preemption.⁶

⁶ Since *Cipollone*, courts have repeatedly recognized that "warning neutralization" claims are preempted in a variety of lawsuits challenging the sale and marketing of cigarettes. See *Brown*, 479 F.3d at 392-93; *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1192 (11th Cir. 2004); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 840 (W.D. Ky. 1999); *Geiger v. Am. Tobacco Co.*, 674 N.Y.S.2d 775, 776 (N.Y. App. Div. 1998).

b. Appellants' Claims Are Not Premised On Alleged False Representations of Material Fact, But Are Instead Based On Allegations Of Implied Misrepresentation, Which Are Thus Preempted Under *Cipollone*.

Appellants have never alleged or argued in this case that their claims are based on alleged false representations of "material fact." They do not, for instance, claim that RJR made any express claim of safety, such as "Lights do not cause cancer" or "Lights cure cancer."⁷ And the record here is devoid of evidence of any affirmative misrepresentation of material fact.

Moreover, it is undisputed that "lights" yield less tar and nicotine than regular cigarettes when measured by the FTC Test. Thus, given the history of the FTC's policies with respect to tar and nicotine measurements, disclosures, and marketing, it is not tenable to claim that the descriptor "lights" is inherently deceptive. Indeed, the Fifth Circuit made precisely this point in *Brown*, explaining that:

Cigarettes labeled as "light" and "low-tar" do deliver less tar and nicotine as measured by the only government-sanctioned methodology for their measurement. In fact, the Manufacturers are essentially forbidden from making any representations as to the tar and nicotine levels in their marketing about tar that are not based on the FTC method. *The terms "light" and "lowered tar and nicotine" cannot, therefore, be inherently deceptive or untrue.*

479 F.3d at 392 (emphasis added).

⁷ Indeed, the undisputed record in this case is that "lights" cigarette smokers hold a variety of beliefs about the relative health effects of "lights" cigarettes. See R.A.176, 203-04.

Appellants thus resort to arguing that, while the descriptors are accurate under the FTC Method, the descriptors nonetheless mislead consumers.⁸ It is Appellants' theory here that the descriptors "lights" or "low tar" implicitly convey a message that "lights" brand styles cigarettes are safer than regular brand styles. *See, e.g.*, Appellants' Brief at 29, 40. But this theory is, analytically, the same one preempted in *Cipollone*—that advertising depicting smokers engaging in physical activity implies that smoking is not harmful to health. Both rely on the same predicate – that the implication of the alleged misrepresentation "diminish[es] the impact of the federal warnings." *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 440 (Tex. 1997). Thus, as Judge Eagon ruled, "[i]f, as alleged, the use of the word 'Lights' in the cigarette packaging creates the 'false' or 'misleading' impression that leads to liability under the [consumer fraud] statute, then Reynolds' only recourse would be to modify [its] advertising, promotion, or labeling in some way," and that would be a "*de facto* labeling requirement." A.15.⁹

Judge Eagon recognized that any limitation on the use of the descriptor "lights" is really nothing more than a preempted "requirement" under the FCLAA. Her ruling

⁸ Appellants have not advanced a "fraud on the FTC" argument in this case, no doubt because any such fraud-on-an-agency arguments would be preempted under the Supreme Court's decision in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) (holding that claims premised on alleged fraud on the Federal Drug Administration were preempted). *See also Flynn v. American Home Products Corp.*, 627 N.W.2d 342, 347-49 (Minn. App. 2001) (following *Buckman* and rejecting "fraud on an agency" theories).

⁹ *See also, In re Tobacco Cases II*, 2004 WL 2445337, at *19, 21. Because "it is obvious that Defendants' alleged deception respecting their use of the term 'Light' as part of the brand name of cigarettes that actually contain less tar and nicotine (per the FTC method, of course) could easily be corrected by requiring an additional warning on the packages," Appellants' case is "ostensibly a preempted neutralization, failure-to-warn claim." *Id.* at *21.

correctly follows *Cipollone*: “Such a *prohibition* . . . is merely the converse of a state law *requirement* that warnings be included in advertising and promotional materials.”

Cipollone, 505 U.S. at 527. As the Fifth Circuit explained, “[t]he *Cipollone* Court held that the Labeling Act pre-empts these ‘implied misrepresentation’ claims, which arise from statements or imagery in marketing that misleadingly downplay the dangers of smoking, and thus minimize or otherwise neutralize the effect of the federally mandated safety warnings.” *Brown*, 479 F.3d at 392 (citing *Cipollone*, 505 U.S. at 527); *see also In re Tobacco Cases II*, 2004 WL 2445337 at *22 (“[I]f Defendants’ use of the term ‘Lights’ constitutes an actionable *half-truth* (because of compensation) then it is the type of half-truth that is preempted because any prohibition relating thereto would ‘merely be the converse of a State law requirement that warnings be included in advertising and promotion materials’”) (emphasis added).¹⁰ Thus, “to hold that the . . . use of the FTC-approved terms relating to the FTC-approved measurement system constitutes affirmative mis-statement under State law would directly undermine the entire purpose of the standardized federal labeling system. . . .” *Brown*, 479 F.3d at 392. To do so “is necessarily to impose a state requirement or prohibition on cigarette advertising as it relates to the relationship between cigarettes and health.” *Id.* at 393.

¹⁰ In their brief, Appellants explicitly assert that their case is built around a theory of “half-truths,” Appellants’ Brief at 40, but then argue that claims premised on “half-truths” are not preempted. *Id.* The case they cite in support of this proposition, *Simonsen v. BTH Properties*, 410 N.W.2d 458, 461 (Minn. App. 1987), recognizes the existence of claims for “half truths” under Minnesota law under some circumstances, but does not hold that such claims avoid preemption. Indeed, *Simonsen* does not concern preemption at all. *Cipollone* and its progeny, of course, clearly hold that “half-truth” claims seeking requirements or prohibitions motivated by concerns about smoking and health with respect to promotion or advertising of cigarettes are preempted.

That Appellants did not use the word “neutralization” is inconsequential. Artful pleading does not suffice to avoid preemption. Preemption does not depend on “magic words” in the complaint or after-the-fact re-characterization. As Judge Eagon correctly noted when Appellants advanced a similar argument below, “[t]he analysis must look at not what the count or allegation is called or how the question is framed in the Complaint, but whether the plaintiff, to prevail, would have to show ‘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.9-10 (quoting *Cipollone*, 505 U.S. at 525). Here, Appellants’ claims would impose a requirement or prohibition motivated by smoking and health with respect to the advertising and promotion of “lights” cigarettes.¹¹

Appellants thus resort to the slippery slope. They contend that their claims *should* be allowed because, otherwise, a tobacco company would have a “license to lie.” This is hyperbole. Congress determined that its uniform warning regime adequately warns consumers of the health risks of all cigarettes, notwithstanding any descriptors on packaging or advertising that are said to neutralize the effect of those warnings. A state requirement or prohibition to address the asserted “evil” of descriptors alleged to imply that cigarettes are safer than the warnings say they are is necessarily preempted. To

¹¹ Appellants also argue that their claims are not neutralization claims because they do not contend that the “lights” and “low tar” descriptors imply that “lights” cigarettes are *safe*, only that the descriptors imply that such cigarettes are *safer* than regular cigarettes. See Appellants’ Brief at 29. The fact that Appellants’ theory is that the descriptors neutralize the warnings partially rather than completely is of no consequence. *Cipollone* and its progeny have established no distinction between partial and complete neutralization.

impose any such requirement or prohibition necessarily requires state courts to conclude, contrary to Congress' judgment, that the federally-mandated warnings are inadequate in certain circumstances. Claims challenging misrepresentations about material *facts* are not preempted under *Cipollone*, but this case is not about alleged misrepresentations of material fact, despite Appellants' assertions regarding differences between the "tar" delivered to actual smokers and the "tar" yields measured under the FTC test method. *Good* addressed this very argument, and rejected it for cogent reasons:

[T]he record . . . [wa]s devoid of any *affirmative* misstatement. Thus, the Plaintiffs point to no . . . representation [by the Defendant] about light cigarettes inconsistent with what the FTC condoned; no evidence [that the defendant] ever affirmed that light cigarettes were good for you, were healthy, or would not cause the host of physical problems listed on every package; no evidence that any descriptors [the defendant] applied to ["lights" cigarettes] contravened what the FTC and Congress knew the tobacco companies as a group and [the defendant] in particular were saying about these cigarettes. . . ."

436 F. Supp.2d at 152 (emphasis in original).¹² Indeed, it is Appellants who are trying to take this Court down a slippery slope. Under Appellants' theory, a tobacco company could be subject to lawsuits for the use of any word on its packs or the color of its packaging on any cigarettes that have lower FTC-measured yields, based on allegations that the word or the color was interpreted by some smokers to convey that such cigarettes

¹² As *Good* also concluded: "If Philip Morris had not advertised and promoted its cigarettes as "light" and having "lowered tar and nicotine", the Plaintiffs would have no claim whatsoever. If they thought they were purchasing Marlboro "full flavor" cigarettes and instead received Marlboro Lights, they could not say that Philip Morris deceived them about the health benefits of their purchase. Thus, the law suit is grounded not on the properties of the cigarette itself, but on what the Defendant said about the cigarette – and what they said about the cigarette is substantially intertwined with what the federal government told them to say. . . ." *Id.* at 152-53.

were healthier than regular cigarettes. That would present the very patchwork of conflicting state laws that Congress sought to protect against. *See Brown*, 479 F.3d at 392. Thus, neither “lights” nor the colors used on a cigarette pack can be deemed “material facts.”

2. The FCLAA Applies To “Packaging” and Preempts Appellants’ Claims Directed At the Package Itself.

Appellants suggest that their claims are not preempted because they are premised on RJR’s use of the words “Lights,” or “low tar” on *packaging* rather than “advertising.” Appellants’ Brief at 23. They are wrong.

First, the argument leads inexorably to an absurd result. Appellants suggest that preemption of a claim regarding cigarette packaging should be governed only by 15 U.S.C. § 1334(a), which states that “[n]o statement relating to smoking and health . . . shall be required on any cigarette package.” They contend that their claim does not seek to require any “statement” and that, for them, is the end of the inquiry. Appellants’ position would turn the FCLAA and Congress’ comprehensive federal warning program on its head. It would mean that states could impose unlimited prohibitions – and totally inconsistent requirements – on cigarette packaging, so long as no specific “statement” was required. But this debate has been settled against Appellants already. *Cipollone* recognized that a prohibition is merely the converse of a requirement for a different warning – a different statement than the federal warning now on the package.

Appellants’ argument would mean that claims challenging print advertisements would be expressly preempted, while claims challenging the very same thing in

packaging are not, even though print advertisements generally depict the packages themselves. *See* R.A.208-229. Appellants' argument is premised on the very sort of "overly narrow" interpretation of the FCLAA that courts have rejected because it would frustrate Congress' intent. *See, e.g., Jones v. Vilsack*, 272 F.3d 1030, 1035 (8th Cir. 2001).

Appellants' argument also requires ignoring the changes that Congress made to the FCLAA in order to make it more far-reaching. In 1969, Congress added "far more sweeping" preemptive language to the FCLAA. *Reilly*, 533 U.S. at 542. Congress substituted "with respect to advertising and promotion" for the much more limited phrase "in advertising." 15 U.S.C. §1334(b). To say that cigarette packaging and the use of words and images on the packages are not part of, and are not "with respect to" advertising or promotion ignores the more expansive preemptive reach that Congress intended with its 1969 amendment. *See Wright v. Brooke Group, Inc.*, 114 F.Supp.2d 797, 823, 826 (N.D. Iowa 2000) (rejecting effort to "circumvent" FCLAA preemption by contending that "cigarette packaging" falls outside the preemptive scope of §1334(b)'s phrase "with respect to the advertising or promotion of [any] cigarettes").¹³

¹³ Indeed, as the Supreme Court and many other courts have recognized, every communication between a cigarette manufacturer and consumers is "advertising and promotion." *See, e.g., Cipollone*, 505 U.S. at 528 (distinguishing between communications with consumers and "channels of communication other than advertising or promotion," such as communications with the government); *Waterhouse v. R.J. Reynolds Tobacco Co.*, 270 F. Supp. 2d 678, 683 (D. Md. 2003); *Lacey v. Lorillard Tobacco Co.*, 956 F. Supp. 956, 964 (N.D. Ala. 1997); *Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996); *Griesenbeck v. Am. Tobacco Co.*, 897 F. Supp. 815, 823 (D.N.J. 1995).

An analysis of the plain language of the statute also precludes reading the FCLAA with Appellants' squint. The ordinary meaning of the terms determines what "naturally falls within the range of meaning ordinarily attributed to the term[s] 'promotion' [and advertising]," *Jones*, 272 F.3d at 1035. "Promotion" occurs when retailers "place and display products in ways that will maximize the opportunity for purchase." *Id.* at 1035 (citing 1994 Surgeon General Report). Packaging clearly is part of what manufacturers do to maximize purchases – to promote the brand and brand style. In fact, it is an integral part of a product's branding, promotion, and advertising. Companies spend vast sums on package design. The Coke® bottle shape and can design are famous examples; the Tiffany's® box another. Use of the description "lights" on cigarette packages is clearly part of the advertising and promotion of those brand styles. There is simply no merit to the suggestion that packaging is not a part of "advertising or promotion" under the FCLAA.

Finally, Appellants' argument cannot be reconciled with their allegations, which challenge advertising in various forms. *See, e.g.*, Second Amended Complaint at ¶¶ 44, 50, 56 (A.35-36, 38). For instance, their False Statement in Advertising count – the name of the statute itself should belie the argument they make – is based on allegations that RJR falsely advertised Camel Lights and Winston Lights by using the word "lights" on "cigarette[] packages." *Id.* at ¶55 (A.37-38). Thus, Appellants' claims would not be rescued from preemption even if this Court accepted Appellants' view that claims about cigarette packaging are immune from preemption.

3. The Fact That Appellants Do Not Use The Phrase “Failure-To-Warn” Does Not Save Their Omissions-Based Claims From Preemption Under *Cipollone*.

Appellants suggest that their claims are spared from preemption because they are not asserted as part of a formal “failure to warn” cause of action. But, again, the inquiry is not whether a claim is styled or captioned as a *cause of action* for “failure to warn.” What matters under *Cipollone* is the substance of what a plaintiff seeks to accomplish through his claim, not how he characterizes it. *See id.*, 505 U.S. at 523-24 (“The 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. . . .’”). Thus, to the extent claims are premised on the theory “that [a cigarette manufacturer’s] advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted.” *Id.* at 524.

Indeed, many courts have dismissed “omissions-based” claims because they seek what *Cipollone* held could not be sought under state law: the imposition of different or additional warnings or language in cigarette packaging and advertising. And these courts have done so when such claims have been styled as fraudulent concealment or fraud-by-omission claims, rather than “failure to warn” claims. As observed in *Small v. Lorillard Tobacco Co.*, 679 N.Y.S. 2d 593, 603 (N.Y. App. Div. 1st Dep’t. 1998), *aff’d*, 94 N.Y.2d 43 (N.Y. 1999), “[m]any . . . courts agree that the [Labeling] Act preempts all claims by consumers that the tobacco companies failed to disclose information to the public beyond what was required by federal law.” Thus, the court in *Allgood v. R.J. Reynolds Tobacco*

Co., 80 F.3d 168, 171 (5th Cir.), *cert. denied*, 519 U.S. 930 (1996), held: “To the extent that plaintiffs’ claims are based on *fraudulent concealment* . . . they are preempted by the [FCLAA].” Likewise, the Texas Supreme Court ruled that “fraudulent concealment claims are preempted because they too are premised on [the tobacco manufacturer’s] failure to disclose information regarding the dangers of cigarettes.” *Grinnell*, 951 S.W.2d at 439-40.¹⁴

Clearly, Appellants’ case is premised on allegations about what RJR did or did not say, even though Appellants argue otherwise. To the extent there is any doubt on this score, given the arguments that Appellants make in their brief,¹⁵ their Second Amended

¹⁴ See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 235 (6th Cir. 1988) (affirming dismissal of preempted failure to warn claim); *Sonnereich v. Philip Morris, Inc.*, 929 F.Supp. 416, 419 (S.D. Fla. 1996) (dismissing post-1969 inadequate warning claims); *Lacey*, 956 F. Supp. at 962 (“the Labeling Act specifically enumerates what information must be provided by tobacco companies,” and any claims that seeks to require the disclosure of more information would impose “a de facto labeling requirement”); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F.Supp. 1515, 1521 (D. Kan. 1995) (dismissing preempted failure to warn claims); *Hulsey v. Am. Brands, Inc.*, 1997 WL 271755 *3 (S.D. Tex., Apr. 7, 1998) (fraudulent concealment claims preempted), *aff’d per curiam*, 139 F.3d 898 (5th Cir.), *cert. denied*, 525 U.S. 868 (1998); *Perez v. Brown & Williamson Tobacco Corp.*, 967 F. Supp. 920, 928 (S.D. Tex. 1997) (fraud claims were preempted because they “allege[d] that the Defendants misrepresented and concealed the health risks of cigarette smoking” and thus “stem from duties based on smoking and health”).

¹⁵ Appellants criticize Judge Eagon for observing that their case concerned allegations of omission and failure to disclose. See Appellants’ Brief at 4 n.1. That criticism is entirely unfair. First, Judge Eagon acknowledged that Appellants were asserting both species of fraud – omission and affirmative misrepresentation – but concluded that they were simply two sides of the same coin, and thus the claims were either preempted because they sought prohibitions or because they sought to impose requirements. Either way, they are preempted under *Cipollone* and *Reilly*. Second, it was Appellants who emphatically insisted that theirs is a case “involving primarily a failure to disclose or fraud through omission” when they argued for class certification. Pls.’ Reply Br. in Support of Class Cert. at 13. Appellants characterized their case in this manner in order to argue that they

Complaint removes it. Appellants' Second Amended Complaint is packed with allegations about RJR's purported failure to disclose in its advertising and promotion information regarding the health consequences of smoking "lights." The examples following are taken verbatim from Appellants' Second Amended Complaint (emphases added):

- "By *failing to disclose* that the design and composition of Camel Lights and Winston Lights are intended to deliver lowered tar and nicotine levels under machine testing conditions and to deliver higher tar and nicotine levels to consumers who smoke Camel Lights and Winston Lights thereby rendering the 'light' product descriptor deceptive and misleading." (§36) (Count I)
- "By *failing to disclose to consumers* that smoking Defendants' cigarettes with the vent holes blocked results in the smoker receiving an increased amount of tar and nicotine..." (*Id.*)
- "Defendants *failed to inform consumers* that the tar in their lights cigarette smoke contains higher levels of harmful toxins than the tar in regular cigarette smoke." (§44) (Count II)
- "Defendants *failed to inform consumers* that the tobacco in their Camel Lights and Winston Lights was manipulated through the addition of chemicals..." (*Id.*)
- Defendants engaged in intentional fraud "in its acts and *omissions of material facts in its advertisements to the consumer.*" (§59) (Count V)
- "Defendants' *omissions* and practices substantially induced Plaintiffs and the Class to purchase purportedly 'light' cigarettes..." (§62) (Count V)

(continued...)

were entitled to a "rebuttable presumption of causation" on their claims, which, in their view, made their case a better candidate for class certification. *Id.* It was only in response to RJR's preemption motion that they did an about-face and argued that their claims "are **not** primarily premised on claims of omission." Pls.' Preemption Opp. at 34 (emphasis is Appellants').

- “Defendants *omissions* and practices resulted in Plaintiffs and the Class purchasing purportedly ‘light’ cigarettes...” (§70) (Count VI).

See A.32-33, 35, 38-39, 41.

There can be no dispute that these aspects of Appellants’ claims are premised on an alleged failure of RJR to disclose information in advertising and promotion of Camel Lights and Winston Lights. And there can be no dispute that these allegations concern smoking and health. Appellants’ omissions-based claims are expressly preempted. See *Brown*, 479 F.3d at 394-95 (reversing trial court for failing to dismiss similar omission-based claims).

4. A “Presumption Against Preemption” Has No Applicability to the Express Provisions of the FCLAA.

Appellants make much of a “presumption against preemption,” argument. But neither their argument nor this principle adds to the analysis here. To begin with, despite any such presumption, *Cipollone* and *Reilly* held that state law claims that seek to supplement the federally-mandated warnings, or that seek to penalize cigarette companies for purportedly attempting to neutralize the effects of the warnings, are preempted. Indeed, the Supreme Court recognized that the scope of FCLAA preemption is a matter of congressional intent, and in *Cipollone* and *Reilly* recognized that Congress intended FCLAA preemption to sweep widely to maintain its comprehensive federal program related to cigarette packaging and advertising. Thus, the presumption has already been dealt with in the context of the FCLAA and it is not an obstacle here.

Contrary to Appellants’ apparent belief, the rule in all cases is that “preemption fundamentally is a question of congressional intent.” *English v. Gen. Elec. Co.*, 496 U.S.

72, 78-79 (1990). Thus, the presumption against preemption cannot be viewed as talismanic or be applied in such a way as to skew the inquiry into congressional intent. For this reason, in all areas of preemption, the Supreme Court has routinely examined the preemptive purpose and effect of the statute pursuant to normal interpretive rules, without any discussion of the “presumption.” In fact, the Supreme Court has disregarded any principle of a presumption against preemption in cases involving express preemption, *e.g.* *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); field preemption, *e.g.*, *Wisconsin Dep’t. of Indus. Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947); and conflict preemption, *e.g.*, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Brown v. Hotel & Restaurant Employees & Bartenders Int’l. Union Local 54*, 468 U.S. 491 (1984).

5. Appellants’ Reliance on *Forster* is Misplaced.

Appellants rely on *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655 (Minn. 1989), to support many of their arguments, even going so far as to assert, incorrectly, that it utilized the same analysis as *Cipollone*. Appellants’ Brief at 6. In *Forster*, the Minnesota Supreme Court addressed the same types of claims analyzed in *Cipollone*, but unlike the later *Cipollone* decision, it held that the FCLAA did *not* expressly preempt such claims on the ground that Congress did not express a clear intent to preempt state-law claims. *Forster*, 437 N.W.2d at 658 (“Express preemption requires Congress to

speak plainer”). Instead, *Forster* engaged in an implied preemption analysis and found that some claims were impliedly preempted while others were not.

Appellants’ reliance on *Forster* is misplaced. *Forster* is not controlling authority on the question of express preemption. It was decided several years before *Cipollone* and *Reilly*, and, thus, Justice Simonett, who wrote the majority opinion, did not have the benefit of the United States Supreme Court’s decisions or analysis. Because *Forster* found no express preemption, it is inconsistent with the Supreme Court’s later *Cipollone* and *Reilly* decisions.¹⁶ *Cipollone* and *Reilly* resolved the scope of federal preemption under the FCLAA with respect to the same statute addressed in *Forster*. *Cipollone* and *Reilly* thus control the question of preemption, not *Forster*. Accordingly, *Forster*’s contrary analysis must yield to the United States Supreme Court’s later decisions. *Stevens v. Fed. Cartridge Corp.*, 226 Minn. 148, 32 N.W.2d 312, 314 (1948) (“It is established law that the decisions of the United States Supreme Court on the construction of a federal statute are binding on state courts.”); see also *State v. Lussier*, 269 Minn. 176, 130 N.W.2d 484, 488 (1964) (“This decision of the United States Supreme Court is, of course, binding on state courts in its interpretation of Federal law.”). At any rate, even under *Forster*, Appellants’ omission-based claims would be preempted one way or the other.

¹⁶ For Appellants to claim that *Forster* and *Cipollone* used the same analysis to resolve preemption is, at a minimum, an overstatement. *Forster* applied an analysis directly contrary to that used in *Cipollone* and rejected the very express preemption theory that *Cipollone* adopted.

IV. CONFLICT PREEMPTION BARS APPELLANTS' CLAIMS BECAUSE THEY CONFLICT WITH THE FTC'S ACTIONS AND POLICIES WITH RESPECT TO THE MEASUREMENT AND DISCLOSURE OF "TAR" AND NICOTINE AND AUTHORITY OVER CIGARETTE ADVERTISING.

In addition to being expressly preempted, Appellants' claims conflict with the comprehensive federal scheme Congress imposed. Appellants' claims would create the very threat of "diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to . . . smoking and health" that Congress sought to avoid, 15 U.S.C. § 1331(2), and are, thus, impliedly preempted as well. Though Judge Eagon did not expressly rely on conflict preemption in reaching her decision, this Court may affirm on this basis. *Kahn v. State*, 289 N.W.2d 737 (Minn. 1980); *Cambern v. Hubbling*, 307 Minn. 168, 238 N.W.2d 622 (1976).

State laws that conflict with Federal laws are "without effect." *See Cipollone*, 505 U.S. at 516. A conflict exists not only where it is *impossible* for a party to comply with both state and Federal law, but also where there is discord between the two. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). State law cannot "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" as manifested in the language, structure, and underlying goals of the statute at issue. *Id.* (citation omitted). Nor can state law "interfere[] with the methods by which [a] federal statute was designed to reach [its] goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). A federal statute, therefore, impliedly preempts any State law claim that would interfere with Congress' intent in passing that Federal statute. *Malone*

v. White Motor Corp., 435 U.S. 497, 504 (1978). Conflict preemption does not require an “express statement of pre-emptive intent.” *Geier*, 529 U.S. at 884.

Moreover, an “express pre-emption provision[] does not bar the ordinary workings of conflict preemption.” *Id.* at 869; *see also Buckman*, 531 U.S. at 352 (rejecting “suggest[ion] that [the Court] should be reluctant to find a pre-emptive conflict here because Congress included an express pre-emption provision in [a statute]”); *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918, 923 (Minn. 1996) (claim may be analyzed under both express and implied preemption analysis). Thus, the FCLAA’s express preemption provision does not preclude a finding of conflict preemption on the record here.

A. Appellants’ Claims Are Preempted By Congress’ Decision To Create One National Program To Govern Cigarette Labeling And Advertising.

By preempting cigarette advertising requirements and prohibitions “imposed under State law,” 15 U.S.C. § 1334(b), while also preserving FTC authority “with respect to unfair or deceptive acts or practices in the advertising of cigarettes,” 15 U.S.C. § 1336, Congress both embraced the FTC’s authority over cigarette advertising and cloaked that authority with exclusivity. *See Cipollone*, 505 U.S. at 515 (explaining that Congress’ decision to “narrow[] the pre-emption provision to prohibit only restrictions ‘imposed under State law’ cleared the way for the FTC” to regulate cigarette advertising); *Reilly*, 533 U.S. at 545-46 (emphasizing that, when Congress amended the FCLAA in 1969, it “expanded the pre-emption provision with respect to the States, [but] at the same time, it allowed the FTC to regulate cigarette advertising”). Congress thus dictated the

regulatory scheme that *it* deemed necessary to preserve its comprehensive federal program for cigarette labeling, advertising, and promotion.

Indeed, the FTC has opposed proposals to repeal the preemption provision, noting (among other things) the “potential for significantly inconsistent results” with respect to tar and nicotine disclosures and marketing, and explaining as follows:

[I]f one state determined that tar, nicotine and carbon monoxide figures were per se deceptive, while another state determined that the disclosure of these data should be required in all cigarette advertising, advertisers would be faced with an irreconcilable conflict . . .

R.A.237.

Administrative agencies like the FTC have special knowledge and the capacity to provide nationally uniform answers to particular concerns while remaining accountable to Congress for their policy judgments. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 865-66 (1984). Unlike state courts and agencies, the FTC already had the experience and expertise necessary to balance competing interests in cigarette advertising regulation. And unlike state courts and agencies, the FTC has the jurisdiction to proceed against suspected violations on a nationwide basis. Where the States speak with fifty different voices, a federal agency is better suited to craft informed and uniform national rules.

Over time, the FTC has provided Congress with thousands of pages of data regarding cigarette advertising practices and related regulatory concerns, including many of the precise issues regarding “lights” cigarette that Appellants raise here. *See, e.g.*, Federal Trade Commission Report to Congress for 1997 at 3-4 (explaining purposes of its

machine-based testing program, recognizing the program's limitations, and identifying actions that the agency has undertaken to reexamine the propriety of its testing and measurement protocols) (R.A.240-43).

B. Appellants' Claims Conflict With The FTC's Careful Regulation Of Cigarette Advertising Under Its Exclusive Federal Authority.

Appellants' claims conflict with the FTC's own policy judgments: "[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); *see also City of New York v. FCC*, 486 U.S. 57, 63-64 (1988) (same). The FTC's rulemaking and adjudicative "actions [both] have the binding force of 'federal law'" and can, therefore, preempt state law. *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990).

As explained in detail below, the record, including the Affidavits of former FTC official John Peterman, demonstrates that the FTC:

- Developed and mandated the use of a uniform testing method for determining tar and nicotine yields of all cigarettes sold by RJR, with full awareness of the limitations of that method and the fact that it does not – and never was intended to – measure how much “tar” and nicotine an individual smoker will obtain when smoking “lights” or any other cigarette.
- Required disclosure of “tar” and nicotine yields of cigarettes in advertising.
- Prohibited the publishing of “tar” and nicotine values not obtained through the FTC testing method.
- Approved the use of “low tar” and “like qualifying terms,” such as “lights,” when such terms are based on “tar” values at or below 15 milligrams, as measured by the FTC testing method.

1. The FTC Requires RJR To Publish “Tar” And Nicotine Values, as Measured by the FTC Test Method.

The FTC has made a series of policy judgments regarding cigarette “tar” and nicotine measurement and reporting, all geared toward one common end: To provide consumers with a way to compare “tar” and nicotine levels in different cigarettes. *See* 62 Fed. Reg. 48,158 (Sept. 12, 1997); R.A.20, 26-36. Just as Congress requires uniformity in its warning system, the FTC requires uniformity in the measurement and disclosure of “tar” and nicotine yields.

In 1964, the FTC concluded that consumer “[c]onfusion can be obviated, and the ability of consumers to make an intelligent choice among competing brands protected, *only* if the measurement of cigarette-smoke ingredients accords with a *uniform . . .* testing procedure.” 29 Fed. Reg. 530, 532 (1964) (emphasis added). The FTC, therefore, prescribed a “tar” and nicotine testing methodology. 31 Fed. Reg. 14,278 (Nov. 4, 1966). The “tar” and nicotine levels determined by this method are published as the Federal Government’s “official” statement of cigarette “tar” and nicotine levels for all cigarettes sold in the United States. *FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981, 982 (D.D.C. 1983) (concluding that “tar” and nicotine values published by FTC are the Federal Government’s “official figures”), *aff’d in part and rev’d in part*, 778 F.2d 35 (D.C. Cir. 1985).

The FTC’s testing method is the *only* method allowed. R.A.21. Indeed, “[t]he FTC has mandated the use of the FTC Method *despite known limitations to the test*

method.” *Id.* (emphasis added). In 1970, the FTC decided that advertising “tar” and nicotine yields under its method should be *required*. 35 Fed. Reg. 12,671 (Aug. 8, 1970).

In 1978, the FTC issued an Advisory Opinion rejecting a request to use a measurement method other than the FTC testing method, *even though* the other method would have resulted in *higher* “tar” and nicotine yields. As the FTC explained:

If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry’s voluntary disclosure agreement, consumer confusion might be generated Therefore, in the Commission’s opinion, tar values which are set forth in cigarette advertisements must be consistent with the latest applicable *FTC* tar number.

R.A. 244-45.

The FTC determined that only “tar” and nicotine values generated by its testing methodology could be published,¹⁷ and “tar” and nicotine testing and disclosure continue under the FTC’s protocols to this day. 62 Fed. Reg. 48,158 n.5 (Sept. 12, 1997) (“the

¹⁷ The FTC “retain[ed] the unconditional right to reschedule the trade regulation rule proceedings and to take any other action” necessary to ensure the disclosure of these “tar” and nicotine values in the manner that the FTC deems “necessary or desirable in the public interest.” R.A.248. This agreement “was placed in the public record . . . for comment from all interested parties” (R.A.247), in substantial compliance with the requirements for formal agency rulemaking (5 U.S.C. § 553). The FTC has made clear that it would consider any violation of this compliance agreement to be a violation of Federal law. Indeed, the FTC has brought several actions to enforce its cigarette testing regime. *See* Appendix of regulatory actions at Ex. A21. The nation’s largest cigarette manufacturers, including RJR, agreed to comply with the agency’s proposed mandate. *See* FTC Report to Congress (Dec. 31, 1970) at 19 (Ex. A20). The fact that the FTC’s testing method and disclosure requirements were “voluntarily” agreed to by tobacco manufacturers does not dilute the fact that RJR’s testing, measurement and disclosure of “tar” and nicotine yields, upon which its “lights” descriptor is based, were done pursuant to the FTC’s authorization. *See Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 152-53 (Ill. 2005); *Flanagan v. Altria Group, Inc.*, 2005 WL 2769010, at *4 (E.D. Mich. Oct. 25, 2005) (R.A.372) (dismissing class action consumer fraud claim challenging marketing of “lights” cigarettes on the ground that the FTC “specifically authorized” measurement and disclosure of “tar” and nicotine yields under the FTC testing method).

modified Cambridge Filter [cigarette testing] Method adopted by the Commission in 1967 remains essentially in place today”).

2. The FTC Has Determined That Cigarette Advertising And Promotion Using Descriptors Like “Lights” Is Not Deceptive.

The FTC has made the policy judgment that cigarette manufacturers can advertise cigarettes using descriptors such as “low tar,” “lower tar” and similar “like qualifying terms.” In 1967, the FTC announced its “enforcement policy” concerning “representations relating to . . . tar and nicotine content of cigarettes.” R.A.251. It stated that, “[a]s a general rule, the Commission will not challenge such statements or representations where they are shown to be accurate and fully substantiated by” results under the FTC testing method. *Id.* The FTC reaffirmed this policy statement in its 1968 Annual Report to Congress. R.A.15.

The FTC has demonstrated its commitment to the above-stated policy in subsequent enforcement actions. For example, in *In the Matter of American Brands Inc.*, 79 F.T.C. 255 (1971), the FTC ordered the manufacturer to cease and desist advertising cigarettes as “low or lower in ‘tar’ by use of the words ‘low,’ ‘lower,’ or ‘reduced’ or like qualifying terms, *unless* the term is accompanied by a clear and conspicuous disclosure of . . . [t]he ‘tar’ and nicotine content in milligrams in the smoke produced by the advertised cigarette . . . as determined by the testing method employed by the [FTC]” *Id.* at 258-59 (emphasis added). The FTC intended its *American Brands* order to provide *industry-wide* guidance as to what activities the FTC would permit, and prohibit. Then, in its 1995 final order and consent decree in *American Tobacco*, the FTC

reaffirmed its authorization of “express or implied representation[s] ... and [a] brand is ‘low,’ ‘lower,’ or ‘lowest’ in tar and/or nicotine” if such representations were substantiated by FTC Method test results. *In the Matter of American Tobacco Co.*, 119 F.T.C. 3 at 4, 8 (1995).

Thus, ever since Winston Lights and Camel Lights were introduced, the FTC has permitted product descriptors “lights” or “low tar”. Indeed, in *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 116, 137 (Ill. 2005), the Illinois Supreme Court held that the FTC’s orders in *American Brands* and *American Tobacco* were intended to authorize “all United States tobacco companies to use the words ‘low,’ ‘lower,’ ‘reduced’ or like qualifying terms, such as ‘light’” where substantiated by FTC Method test results. *See also Brown*, 479 F.3d at 388 (“Following an enforcement action against a manufacturer for stating that certain brands were ‘lower’ in tar when the claim was not substantiated by the FTC method, the FTC declared that it would permit use of descriptive terms, *i.e.*, ‘light’ or ‘low-tar,’ if their use was substantiated by FTC method results”).

Since the inception of its testing program, the FTC has been keenly aware of the limitations of its method, including the fact that it does not measure the actual “tar” intake of individual smokers, given that individuals smoke cigarettes differently; but it has adhered to the same method. *See Price*, 848 N.E.2d at 9 (“The record is clear that both the FTC and the cigarette manufacturers were aware at [the time of the adoption of the FTC method] that no method of measurement, including the FTC method, could accurately predict the actual exposure of individual smokers.”); *see also Brown*, 479 F.3d at 388 (“Despite the apparently acknowledged weaknesses in the FTC method, therefore,

it remains the federal mandated standard for cigarette testing.”).

Indeed, “[d]uring the 1990s, the FTC examined whether ‘low tar’/‘light’ descriptors may be misleading to consumers.” R.A.52. The judgment Appellants seek — a determination that the use of terms such as “lights” to describe low tar cigarettes is deceptive and unlawful — was rejected by the FTC in 1992. At that time, the American Heart Association, the American Lung Association, and the American Cancer Society jointly petitioned the FTC to take action concerning “cigarettes advertised as low tar, light, ultra low tar, or lower in tar.” R.A.259. That petition raises the same issues Appellants raise with their complaint: Terms such as “light” “are perceived by consumers to imply that these cigarettes are safe or safer than other brands of cigarettes,” when, in fact, “[s]witching to low-yield brands may even increase the health risk for smokers” R.A.260. For this reason, the petition claimed, advertising the cigarettes as “light” is deceptive. R.A.262-65. Despite its congressional mandate to take action whenever it finds a deceptive advertising practice, 15 U.S.C. § 45(b), the FTC declined to act on the petition. *See* R.A.52-53.

3. Appellants’ Claims Are In Direct Conflict With The FTC’s Requirements To Publish Tar And Nicotine Yields.

The FTC has established rules for the testing and advertising of cigarette products, including “low tar” products. These rules reflect the FTC’s considered judgment about how best to serve American smokers. The FTC’s own statements and initiatives prove that it has promulgated, enforced, reassessed, and retained its policies fully aware of Appellants’ concerns. At all times, too, the FTC has reported to Congress on cigarette

advertising. To allow Minnesota tort law to interfere with the existing “comprehensive Federal program,” 15 U.S.C. § 1331, would eviscerate Congress’ intent to establish national uniformity and inject into the marketplace the instability that Congress sought to avoid in the FCLAA. Appellants’ claims squarely conflict with virtually every policy judgment that the FTC has made under its congressionally-delegated authority.

As demonstrated above, RJR is *required* to test its products and include the test results in its ads. The FTC test method is the *only* method that RJR may use without fear of FTC reprisals. The FTC *precludes* RJR from advertising higher “tar” values than those measured by the FTC test method, and from using the FTC’s values as a basis for predicting actual “tar” intake. Moreover, the FTC has never concluded that the “low tar” label is deceptive for cigarettes that yield an FTC Test Method “tar” level of 15 milligrams or less, and it has never prevented RJR from using that term to describe its “low tar” cigarettes.¹⁸

If Appellants were to prevail, RJR would find itself in an irreconcilable dilemma: It could *either* disregard state-law based directives and risk crippling damages awards and contempt proceedings *or* comply with those directives and face sanctions from the FTC for violating agency mandates. RJR would find itself paying money damages for using the terms “low tar” and “lights” – terms that the FTC has permitted so long as all advertisements disclose the “tar” and nicotine results obtained under the FTC Method.

¹⁸ See FTC Staff Report, *Brand Performance in the Cigarette Industry and the Advantage to Early Entry, 1913-1974*, June 1979, at 35 (describing “tar” and nicotine reports and stating that FTC’s “official definition of low-tar cigarettes” is “15 or less milligrams of tar”) R.A.270; see also R.A.51, 120 (discussing FTC’s definition of “low tar” as 15 or less milligrams of tar).

Put differently, RJR would find itself liable for complying with the elaborate program that the FTC has had in place for decades for measuring tar and nicotine and disclosing test results in advertising. This scenario is the Supreme Court's textbook example of implied conflict preemption: "an actual conflict" exists where "state law . . . duties . . . would conflict directly with federal regulatory mandates, say, by premising liability upon the presence of the very . . . [conduct] that federal law requires" *Geier*, 529 U.S. at 871-72.

CONCLUSION

Appellants' state-law claims are barred under both express and conflict preemption principles. Accordingly, for all of the foregoing reasons, RJR respectfully requests that this Court affirm the judgment of the district court.

Date: April 17, 2007

Respectfully submitted,

Lind, Jensen, Sullivan & Peterson, P.A.



William L. Davidson, I.D. No. 201777

Sara J. Lathrop, I.D. No. 310232

Richard A. Lind, I.D. No. 63381

150 South Fifth Street, Suite 1700

Minneapolis, Minnesota 55402

(612) 333-3637

James S. Simonson, I.D. No. 101333

GRAY, PLANT, MOOTY, MOOTY

& BENNETT, P.A.

James S. Simonson, I.D. No. 101333

500 IDS Center, 80 So. 8th Street, Suite 500

Minneapolis, MN 55402

(612) 632.3300

OF COUNSEL:

Hugh R. Whiting
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
(832) 239-3939

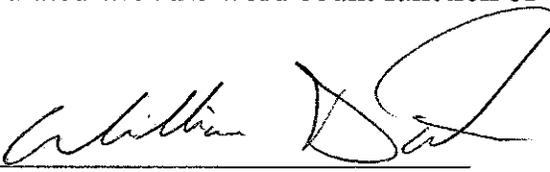
Sean P. Costello
JONES DAY
1420 Peachtree Street, N.E., Suite 800
Atlanta, GA 30309
(404) 581-8327

Jeffrey L. Furr
Amy L. Burcher
WOMBLE CARLYLE SANDRIDGE & RICE
One West Fourth Street
Winston-Salem, NC 27101
(336) 721-3600

Attorneys for Respondents

CERTIFICATE OF BRIEF LENGTH

I, William L. Davidson, hereby certify that this brief complies with the typeface requirements set forth in Minn. R. App. P. 132.01, subd. 1, as the brief is printed in a proportional font in at least 13-point size. I also hereby certify that this brief complies with the length limit set forth in Minn. R. App. P. 132.01, subd. 3(a), in that it contains 13,579 words, exclusive of pages containing the table of contents, tables of citation, any addenda or appendices. This number was calculated with the word count function of Microsoft Word 2000 Version 9.0.6926 SP-3.



William L. Davidson