Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LORILLARD TOBACCO CO. ET AL. *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

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

No. 00–596. Argued April 25, 2001– Decided June 28, 2001*

After the Attorney General of Massachusetts (Attorney General) promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars, petitioners, a group of tobacco manufacturers and retailers, filed this suit asserting, among other things, the Supremacy Clause claim that the cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), which prescribes mandatory health warnings for cigarette packaging and advertising, 15 U. S. C. §1333, and pre-empts similar state regulations, §1334(b); and a claim that the regulations violate the First and Fourteenth Amendments to the Federal Constitution. In large measure, the District Court upheld the regulations. Among its rulings, the court held that restrictions on the location of advertising were not pre-empted by the FCLAA, and that neither the regulations prohibiting outdoor advertising within 1,000 feet of a school or playground nor the sales practices regulations restricting the location and distribution of tobacco products violated the First Amendment. The court ruled, however, that the point-of-sale advertising regulations requiring that indoor advertising be placed no lower than five feet from the floor were invalid because the Attorney General had not provided sufficient justification for that restriction. The First Circuit affirmed the District Court's rulings that the cigarette advertising regulations are not pre-empted by the FCLAA and

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*Together with No. 00–597, *Altadis U. S. A. Inc., as Successor to Consolidated Cigar Corp. and Havatampa, Inc., et al.* v. *Reilly, Attorney General of Massachusetts, et al.,* also on certiorari to the same court.

that the outdoor advertising regulations and the sales practices regulations do not violate the First Amendment under *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557, but reversed the lower court's invalidation of the point-of-sale advertising regulations, concluding that the Attorney General is better suited than courts to determine what restrictions are necessary.

Held:

1. The FCLAA pre-empts Massachusetts' regulations governing outdoor and point-of-sale cigarette advertising. Pp. 9–23.

(a) The FCLAA's pre-emption provision, §1334, prohibits (a) requiring cigarette packages to bear any "statement relating to smoking and health, other than the statement required by" §1333, and (b) any "requirement or prohibition based on smoking and health . . . imposed under state law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with" §1333. The Court's analysis begins with the statute's language. *Hughes Aircraft Co.* v. *Jacobson,* 525 U. S. 432, 438. The statute's interpretation is aided by considering the predecessor pre-emption provision and the context in which the current language was adopted. See, *e.g., Medtronic, Inc.* v. *Lohr,* 518 U. S. 470, 486. The original provision simply prohibited any "statement relating to smoking and health . . . in the advertising of any cigarettes the packages of which are labeled in conformity with the [Act's] provisions." Without question, the current pre-emption provision's plain language is much broader. *Cipollone* v. *Liggett Group, Inc.,*505 U. S. 504, 520. Rather than preventing only "statements," the amended provision reaches all "requirement[s] or prohibition[s] . . . imposed under State law." And, although the former statute reached only statements "in the advertising," the current provision governs "with respect to the advertising or promotion" of cigarettes. At the same time that Congress expanded the pre-emption provision with respect to the States, it enacted a provision prohibiting cigarette advertising in electronic media altogether. Pp. 10–15.

(b) Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the First Circuit concentrated on whether they are "with respect to" advertising and promotion, concluding that the FCLAA only pre-empts regulations of the content of cigarette advertising. The court also reasoned that the regulations are a form of zoning, a traditional area of state power, and, therefore, a presumption against pre-emption applied, see *California Div. of La-*

bor Standards Enforcement v. *Dillingham Constr., N. A., Inc.,* 519 U. S. 316, 325. This Court rejects the notion that the regulations are not "with respect to" cigarette advertising and promotion. There is no question about an indirect relationship between the Massachusetts regulations and cigarette advertising: The regulations expressly target such advertising. *Id.,* at 324–325. The Attorney General's argument that the regulations are not "based on smoking and health" since they do not involve health-related content, but instead target youth exposure to cigarette advertising, is unpersuasive because, at bottom, the youth exposure concern is intertwined with the smoking and health concern. Also unavailing is the Attorney General's claim that the regulations are not pre-empted because they govern the location, not the content, of cigarette advertising. The content/location distinction cannot be squared with the pre-emption provision's language, which reaches *all* "requirements" and "prohibitions" "imposed under State law." A distinction between advertising content and location in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere. The Attorney General's assertion that a complete state ban on cigarette advertising would not be pre-empted because Congress did not intend to preclude local control of zoning finds no support in the FCLAA, whose comprehensive warnings, advertising restrictions, and pre-emption provision would make little sense if a State or locality could simply target and ban all cigarette advertising. Pp. 15–21.

(c) The FCLAA's pre-emption provision does not restrict States' and localities' ability to enact generally applicable zoning restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products, see, *e.g., Metromedia, Inc.* v. *San Diego,* 453 U. S. 490, 507–508, or to regulate conduct as it relates to the sale or use of cigarettes, as by prohibiting cigarette sales to minors, see 42 U. S. C. §§300x–26(a)(1), 300x–21, as well as common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt, cf. *Central Hudson, supra,* at 563–564. Pp. 21–22.

(d) Because the issue was not decided below, the Court declines to reach the smokeless tobacco petitioners' argument that, if the outdoor and point-of-sale advertising regulations for cigarettes are pre-empted, then the same regulations for smokeless tobacco must be invalidated because they cannot be severed from the cigarette provisions. Pp. 22–23.

2. Massachusetts' outdoor and point-of-sale advertising regulations relating to smokeless tobacco and cigars violate the First Amendment, but the sales practices regulations relating to all three tobacco

products are constitutional. Pp. 23–41.

(a) Under *Central Hudson*'s four-part test for analyzing regulations of commercial speech, the Court must determine (1) whether the expression is protected by the First Amendment, (2) whether the asserted governmental interest is substantial, (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest. 447 U. S., at 566. Only the last two steps are at issue here. The Attorney General has assumed for summary judgment purposes that the First Amendment protects the speech of petitioners, none of whom contests the importance of the State's interest in preventing the use of tobacco by minors. The third step of *Central Hudson* requires that the government demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Edenfield* v. *Fane,* 507 U. S. 761, 770–771. The fourth step of *Central Hudson* requires a reasonable fit between the legislature's ends and the means chosen to accomplish those ends, a means narrowly tailored to achieve the desired objective. *E.g., Florida Bar* v. *Went For It, Inc.*, 515 U. S. 618, 632. Pp. 23–26.

(b) The outdoor advertising regulations prohibiting smokeless tobacco or cigar advertising within 1,000 feet of a school or playground violate the First Amendment. Pp. 26–38.

(1) Those regulations satisfy *Central Hudson*'s third step by directly advancing the governmental interest asserted to justify them. The Court's detailed review of the record reveals that the Attorney General has provided ample documentation of the problem with underage use of smokeless tobacco and cigars. In addition, the Court disagrees with petitioners' claim that there is no evidence that preventing targeted advertising campaigns and limiting youth exposure to advertising will decrease underage use of those products. On the record below and in the posture of summary judgment, it cannot be concluded that the Attorney General's decision to regulate smokeless tobacco and cigar advertising in an effort to combat the use of tobacco products by minors was based on mere "speculation and conjecture." *Edenfield, supra,* at 770. Pp. 26–31.

(2) Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, the regulations do not satisfy *Central Hudson*'s fourth step. Their broad sweep indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, 417. The record indicates that the regulations prohibit advertising in a substantial portion of Massachusetts' major metropolitan areas; in some areas, they would constitute nearly a complete ban on the communication of

truthful information. This substantial geographical reach is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if visible from outside. Moreover, the regulations restrict advertisements of any size, and the term advertisement also includes oral statements. The uniformly broad sweep of the geographical limitation and the range of communications restricted demonstrate a lack of tailoring. The governmental interest in preventing underage tobacco use is substantial, and even compelling, but it is no less true that the sale and use of tobacco products by adults is a legal activity. A speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. The Attorney General has failed to show that the regulations at issue are not more extensive than necessary. Pp. 31–36.

(c) The regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than 5 feet from the floor of a retail establishment located within 1,000 feet of a school or playground fail both the third and fourth steps of the *Central Hudson* analysis. The 5-foot rule does not seem to advance the goals of preventing minors from using tobacco products and curbing demand for that activity by limiting youth exposure to advertising. Not all children are less than 5 feet tall, and those who are can look up and take in their surroundings. Nor can the blanket height restriction be construed as a mere regulation of communicative action under *United States* v. *O'Brien,* 391 U. S. 367, since it is not unrelated to expression, see, *e.g., Texas* v. *Johnson,* 491 U. S. 397, 403, but attempts to regulate directly the communicative impact of indoor advertising. Moreover, the restriction does not constitute a reasonable fit with the goal of targeting tobacco advertising that entices children. Although the First Circuit decided that the restriction's burden on speech is very limited, there is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. Pp. 36–38.

(d) Assuming that petitioners have a cognizable speech interest in a particular means of displaying their products, cf. *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, the regulations requiring retailers to place tobacco products behind counters and requiring customers to have contact with a salesperson before they are able to handle such a product withstand First Amendment scrutiny. The State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest. See *e.g., O'Brien, supra,* at 382. Because unattended displays of such products present an opportunity for access without the proper age verification required by law, the

State prohibits self-service and other displays that would allow an individual to obtain tobacco without direct contact with a salesperson. It is clear that the regulations leave open ample communication channels. They do not significantly impede adult access to tobacco products, and retailers have other means of exercising any cognizable speech interest in the presentation of their products. The Court presumes that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel. As for cigars, there is no indication that a customer is unable to examine a cigar prior to purchase, so long as that examination takes place through a salesperson. Pp. 38–40.

(e) The Court declines to address the cigar petitioners' First Amendment challenge to a regulation prohibiting sampling or promotional giveaways of cigars and little cigars. That claim was not sufficiently briefed and argued before this Court. Pp. 40–41.

218 F. 3d 30, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, Parts I, II–C, and II–D of which were unanimous; Parts III–A, III–C, and III–D of which were joined by REHNQUIST, C. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ.; Part III–B–1 of which was joined by REHNQUIST, C. J., and STEVENS, SOUTER, GINSBURG, and BREYER, JJ.; and Parts II–A, II–B, III–B–2, and IV of which were joined by REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SCALIA, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment. SOUTER, J., filed an opinion concurring in part and dissenting in part. STEVENS, J., filed an opinion concurring in part, concurring in the judgment in part, and dissenting in part, in which GINSBURG and BREYER, JJ., joined, and in Part I of which SOUTER, J., joined.