SUPREME COURT OF THE UNITED STATES

Nos. 00–596 and 00–597

LORILLARD TOBACCO COMPANY, ET AL., PETITIONERS
00–596 *v.*
THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

ALTADIS U. S. A. INC., ETC., ET AL., PETITIONERS
00–597 *v.*
THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL.

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

[June 28, 2001]

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, and with whom JUSTICE SOUTER joins as to Part I, concurring in part, concurring in the judgment in part, and dissenting in part.

This suit presents two separate sets of issues. The first— involving preemption— is straightforward. The second— involving the First Amendment— is more complex. Because I strongly disagree with the Court's conclusion that the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA or Act), 15 U. S. C. §1331 *et seq*. as amended, precludes States and localities from regulating the location of cigarette advertising, I dissent from Parts II–A and II–B of the Court's opinion. On the First Amendment questions, I agree with the Court both that the outdoor advertising restrictions imposed by Massachusetts serve legitimate and important state interests and

that the record does not indicate that the measures were properly tailored to serve those interests. Because the present record does not enable us to adjudicate the merits of those claims on summary judgment, I would vacate the decision upholding those restrictions and remand for trial on the constitutionality of the outdoor advertising regulations. Finally, because I do not believe that either the point-of-sale advertising restrictions or the sales practice restrictions implicate significant First Amendment concerns, I would uphold them in their entirety.

I

As the majority acknowledges, *ante*, at 11, under prevailing principles, any examination of the scope of a preemption provision must "'start with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 516 (1992) (quoting *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218, 230 (1947)); see also, *e.g.*, *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.,* 519 U. S. 316, 325 (1997); *Medtronic, Inc.* v. *Lohr,* 518 U. S. 470, 475 (1996). As the regulations at issue in this suit implicate two powers that lie at the heart of the States' traditional police power— the power to regulate land usage and the power to protect the health and safety of minors— our precedents require that the Court construe the preemption provision "narrow[ly]." *Id.*, at 485; see also *Cippolone*, 505 U. S., at 518. If Congress' intent to preempt a particular category of regulation is ambiguous, such regulations are not preempted.[1]

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[1] See, *e.g.*, *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 146–147 (1963) ("[W]e are not to conclude that Congress legislated the ouster of this [state] statute . . . in the absence of an unambiguous congressional mandate to that effect"); *Cippolone,* 505 U. S., at 533

The text of the preemption provision must be viewed in context, with proper attention paid to the history, structure, and purpose of the regulatory scheme in which it appears. See, *e.g.*, *Medtronic*, 518 U. S., at 484–486; *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655–656 (1995); *Cippolone*, 505 U. S., at 513–515, 519–520, 529, 530, n.27; accord, *ante*, at 11–12.[2] An assessment of the scope of a preemption provision must give effect to a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic*, 518 U. S., at 486.

This task, properly performed, leads inexorably to the conclusion that Congress did not intend to preempt state and local regulations of the location of cigarette advertising when it adopted the provision at issue in this suit. In both 1965 and 1969, Congress made clear the purposes of its regulatory endeavor, explaining with precision the federal policies motivating its actions. According to the acts, Congress adopted a "comprehensive Federal program to deal with cigarette labeling and advertising with re-

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(Blackmun, J., joined by KENNEDY and SOUTER, JJ., concurring in part, concurring in judgment in part, and dissenting in part) ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. In such cases, the question is not whether Congress intended to pre-empt state regulation, but to what extent. We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language" (emphasis deleted)).

[2] Cf. *Central Hanover Bank & Trust Co.* v. *Commissioner*, 159 F. 2d 167, 169 (CA2 1947) (L. Hand, J.) ("There is no more likely way to misapprehend the meaning of language– be it in a constitution, a statute, a will or a contract– than to read the words literally, forgetting the object which the document as a whole is meant to secure").

spect to any relationship between smoking and health," for two reasons: (1) to inform the public that smoking may be hazardous to health and (2) to ensure that commerce and the interstate economy not be "impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health." 15 U. S. C. §1331.

In order to serve the second purpose it was necessary to preempt state regulation of the content of both cigarette labels and cigarette advertising. If one State required the inclusion of a particular warning on the package of cigarettes while another State demanded a different formulation, cigarette manufacturers would have been forced into the difficult and costly practice of producing different packaging for use in different States. To foreclose the waste of resources that would be entailed by such a patchwork regulatory system, Congress expressly precluded other regulators from requiring the placement on cigarette packaging of any "statement relating to smoking and health." §1334(a). Similar concerns applied to cigarette advertising. If different regulatory bodies required that different warnings or statements be used when cigarette manufacturers advertised their products, the text and layout of a company's ads would have had to differ from locale to locale. The resulting costs would have come with little or no health benefit. Moreover, given the nature of publishing, it might well have been the case that cigarette companies would not have been able to advertise in national publications without violating the laws of some jurisdictions. In response to these concerns, Congress adopted a parallel provision preempting state and local regulations requiring inclusion in cigarette advertising of any "statement relating to smoking and health." §1334(b) (1970 ed.) (amended 1970).

There was, however, no need to interfere with state or local zoning laws or other regulations prescribing limita-

tions on the location of signs or billboards. Laws prohibiting a cigarette company from hanging a billboard near a school in Boston in no way conflict with laws permitting the hanging of such a billboard in other jurisdictions. Nor would such laws even impose a significant administrative burden on would-be advertisers, as the great majority of localities impose general restrictions on signage, thus requiring advertisers to examine local law before posting signs whether or not cigarette-specific laws are preempted. See *Greater N. Y. Metroploitan Food Council, Inc.* v. *Giuliani*, 195 F. 3d 100, 109 (CA2 1999) ("Divergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them"). Hence, it is unsurprising that Congress did not include any provision in the 1965 Act preempting location restrictions.

The Public Health Cigarette Smoking Act of 1969 (1969 Act), §2, 84 Stat. 87, made two important changes in the preemption provision. First, it limited the applicability of the advertising prong to States and localities, paving the way for further federal regulation of cigarette advertising. FCLAA., §4. Second, it expanded the scope of the advertising preemption provision. Where previously States were prohibited from requiring particular statements in cigarette advertising based on health concerns, they would henceforth be prohibited from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion" of cigarettes. §5(b), 15 U. S. C. §1334(b).[3]

Ripped from its context, this provision could theoreti-

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[3] In *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 521 (1992), we held that one of the consequences of this change in language was that after 1969 the statute preempts some common-law actions.

cally be read as a breathtaking expansion of the limitations imposed by the 1965 Act. However, both our precedents and common sense require us to read statutory provisions– and, in particular, preemption clauses– in the context of both their neighboring provisions and of the history and purpose of the statutory scheme. See *supra*, at 3. When so viewed, it is quite clear that the 1969 amendments were intended to expand the provision to capture a narrow set of content regulations that would have escaped preemption under the prior provision, not to fundamentally reorder the division of regulatory authority between the Federal and State Governments.

All signs point inescapably to the conclusion that Congress only intended to preempt content regulations in the 1969 Act. It is of crucial importance that, in making modifications of the preemption provision, Congress did not alter the statement laying out the federal policies the provision was intended to serve. See 15 U. S. C. §1331. To this day, the stated federal policies in this area are (1) to inform the public of the dangers of cigarette smoking and (2) to protect the cigarette companies from the burdens of confusing and contradictory state regulations of their labels and advertisements. See *ibid.* The retention of this provision unchanged is strong evidence that Congress' only intention in expanding the preemption clause was to capture forms of content regulation that had fallen through the cracks of the prior provision– for example, state laws prohibiting cigarette manufacturers from making particular claims in their advertising or requiring them to utilize specified layouts or include particular graphics in their marketing.[4]

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[4] Because of the nature of magazine publishing and distribution, it is conceivable that a State or locality might cause the kind of regulatory confusion the statute was drafted to prevent by adopting a law prohibiting the advertising of cigarettes in any publication distributed within

The legislative history of the provision also supports such a reading. The record does not contain any evidence that Congress intended to expand the scope of preemption beyond content restrictions.[5] To the contrary, the Senate Report makes it clear that the changes merely "clarified" the scope of the original provision. S. Rep. No. 91–566, p. 12 (1969). Even as amended, Congress perceived the provision as "narrowly phrased" and emphasized that its purpose is to "avoid the chaos created by a multiplicity of conflicting regulations." *Ibid.* According to the Senate Report, the changes "in no way affect the power of any state or political subdivision of any state with respect to . . . the sale of cigarettes to minors . . .or similar police regulations." *Ibid.*

In analyzing the scope of the preemption provision, the Courts of Appeals have almost uniformly concluded that state and local laws regulating the location of billboards and signs are not preempted. See *Consolidated Cigar Corp.* v. *Reilly*, 218 F. 3d 30, 39–41 (CA1 2000) (case below); *Greater New York Metropolitan Food Council, Inc.* v.

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its boundaries. There is at least a modicum of support for the suggestion that Congress may have intended the preemption of such restrictions. See *id.*, at 515, n. 11 (noting that California was considering such a ban at the time Congress was considering the 1969 Act). However, the concerns posed by the diverse regulation of national publications are not present with regard to the local regulation of the location of signs and billboards.

[5] At one point, the Court briefly argues that it would be wrong to conclude that Congress intended to preclude only content restrictions, because it imposed a location restriction (a ban on television and radio advertising) in another provision of the same bill. See *ante*, at 18. This argument is something of a non sequitur. The fact that Congress, in adopting a comprehensive legislative package, chose to impose a federal location restriction for a national medium has no bearing on whether, in a separate provision, the Legislature intended to strip States and localities of the authority to impose location restrictions for purely local advertising media.

Giuliani, 195 F. 3d 100, 104–110 (CA2 1999); *Federation of Advertising Industry Representatives, Inc.* v. *Chicago*, 189 F. 3d 633, 636–640 (CA7 1999); *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 63 F. 3d 1318 (CA4 1995); contra *Lindsey* v. *Tacoma-Pierce County Health Dept*, 195 F. 3d 1065 (CA9 1999). The decisions in those cases relied heavily upon our discussion of the same preemption provision in *Cipollone,* 505 U. S., at 515–524. In *Cipollone*, while the Members of the Court expressed three different opinions concerning the scope of preemption mandated by the provision, those differences related entirely to which, if any, of the plaintiff's claims based on the *content* of the defendants' advertising were preempted by §5. Nary a word in any of the three *Cipollone* opinions supports the thesis that §5 should be interpreted to preempt state regulation of the location of signs advertising cigarettes. Indeed, seven of the nine Justices subscribed to opinions that explicitly tethered the scope of the preemption provision to Congress' concern with "diverse, nonuniform, and confusing cigarette labeling and advertising regulations." *Id.*, at 519; *id.*, at 534, 541 (opinion of Blackmun, J., joined by KENNEDY, and SOUTER, JJ.).

I am firmly convinced that, when Congress amended the preemption provision in 1969, it did not intend to expand the application of the provision beyond content regulations.[6] I, therefore, find the conclusion inescapable that

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[6] Petitioners suggest in passing that Massachusetts' regulation amounts to a "near-total ba[n]," Brief for Petitioners Lorillard Tobacco Co. et al. 22, and thus is a *de facto* regulation of the content of cigarette ads. But we need not consider today the circumstances in which location restrictions approximating a total ban might constitute regulation of content and thus be preempted by the Act, because petitioners have failed to introduce sufficient evidence to create a genuine issue as to that claim. Petitioners introduced maps purporting to show that cigarette advertising is barred in 90.6% of Boston proper, 87.8% of Worcester, and 88.8% of Springfield. See App. 165–167. But the maps

the zoning regulation at issue in this suit is not a "requirement or prohibition . . . with respect to . . . advertising" within the meaning of the 1969 Act.[7] Even if I were not so convinced, however, I would still dissent from the Court's conclusion with regard to preemption, because the provision is, at the very least, ambiguous. The historical record simply does not reflect that it was Congress' "'clear and manifest purpose,'" *Id.*, at 516, to preempt attempts by States to utilize their traditional zoning authority to

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do not distinguish between the area restricted due to the regulation at issue here and the area restricted due to pre-existing regulations, such as general zoning requirements applicable to all outdoor advertising. Nor do the maps show the percentage (with respect to either area or population) of the State that is off limits to cigarette advertising; they cover only three cities containing approximately 14% of the State's population. See U. S. Census Bureau, Statistical Abstract of the United States 28, 47, 49 (1999) (providing population figures for 1998). The area in which cigarette advertising is restricted is likely to be considerably less in less densely populated portions of the State. And even on the interpretation of this data most favorable to petitioners, the Massachusetts regulation still permits indoor and outdoor cigarette advertising in at least 10% of the geographical area of the State. In short, the regulation here is not the equivalent of a total ban on cigarette advertising.

[7] Hence, while I agree in large part with the substance of the arguments proffered by the respondents and the United States on the preemption issue, I reject their conclusion that the content/location distinction finds expression in the limiting phrase "based on smoking and health." See Brief for Respondent 20; Brief for United States as *Amicus Curiae* 5; accord *Penn Advertising of Baltimore, Inc.* v. *Mayor and City Council of Baltimore*, 63 F. 3d 1318 (CA4 1995). Instead, I would follow the First, Second, and Seventh Circuits in concluding that a statute regulating the location of advertising is not a "requirement or prohibition . . . with respect to . . . advertising" within the meaning of the 1969 Act. See *Consolidated Cigar Corp. v. Reilly*, 218 F. 3d 30, 39–41 (CA1 2000) (case below); *Greater N.Y. Metropolitan Food Council, Inc.* v. *Giuliani*, 195 F. 3d 100, 104–110 (CA2 1999); *Federation of Advertising Industry Representatives, Inc.* v. *Chicago*, 189 F. 3d 633, 636–640 (CA7 1999).

protect the health and welfare of minors. Absent such a manifest purpose, Massachusetts and its sister States retain their traditional police powers.[8]

II

On the First Amendment issues raised by petitioners, my disagreements with the majority are less significant. I would, however, reach different dispositions as to the 1,000-foot rule and the height restrictions for indoor advertising, and my evaluation of the sales practice restrictions differs from the Court's.

The 1,000-Foot Rule

I am in complete accord with the Court's analysis of the importance of the interests served by the advertising restrictions. As the Court lucidly explains, few interests are more "compelling," *ante*, at 34, than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance. Unlike other products sold for human consumption, tobacco products are addictive and ultimately lethal for many long-term users. When that interest is combined with the

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[8] The Court's holding that federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of a school is particularly ironic given the Court's conclusion six years ago that the Federal Government lacks the constitutional authority to impose a similarly-motivated ban. See *United States* v. *Lopez*, 514 U. S. 549 (1995). Despite the absence of any identified federal interest in creating "an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property," as the majority construes it today, the "statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise," *id.*, at 583 (KENNEDY, J., concurring). I wonder why a Court sensitive to federalism concerns would adopt such a strange construction of statutory language whose quite different purpose Congress took pains to explain.

State's concomitant concern for the effective enforcement of its laws regarding the sale of tobacco to minors, it becomes clear that Massachusetts' regulations serve interests of the highest order and are, therefore, immune from any ends-based challenge, whatever level of scrutiny one chooses to employ.

Nevertheless, noble ends do not save a speech-restricting statute whose means are poorly tailored. Such statutes may be invalid for two different reasons. First, the means chosen may be insufficiently related to the ends they purportedly serve. See, *e.g.*, *Rubin* v. *Coors Brewing Co.,* 514 U. S. 476 (1995) (striking a statute prohibiting beer labels from displaying alcohol content because the provision did not significantly forward the government's interest in the health, safety, and welfare of its citizens). Alternatively, the statute may be so broadly drawn that, while effectively achieving its ends, it unduly restricts communications that are unrelated to its policy aims. See, *e.g.*, *United States* v. *Playboy Entertainment Group, Inc.,* 529 U. S. 803, 812 (2000) (striking a statute intended to protect children from indecent television broadcasts, in part because it constituted "a significant restriction of communication between speakers and willing adult listeners"). The second difficulty is most frequently encountered when government adopts measures for the protection of children that impose substantial restrictions on the ability of adults to communicate with one another. See, *e.g.*, *Playboy Entertainment Group, Inc., supra*; *Reno* v. *American Civil Liberties Union,* 521 U. S. 844 (1997); *Sable Communications of Cal., Inc.* v. *FCC,* 492 U. S. 115 (1989).

To my mind, the 1,000-foot rule does not present a tailoring problem of the first type. For reasons cogently explained in our prior opinions and in the opinion of the Court, we may fairly assume that advertising stimulates

consumption and, therefore, that regulations limiting advertising will facilitate efforts to stem consumption.[9] See, *e.g.*, *Rubin,* 514 U. S., at 487; *United States* v. *Edge Broadcasting Co.,* 509 U. S. 418, 434 (1993); *ante*, at 27. Furthermore, if the government's intention is to limit consumption by a particular segment of the community— in this case, minors— it is appropriate, indeed necessary, to tailor advertising restrictions to the areas where that segment of the community congregates— in this case, the area surrounding schools and playgrounds.

However, I share the majority's concern as to whether the 1,000-foot rule unduly restricts the ability of cigarette manufacturers to convey lawful information to adult consumers. This, of course, is a question of line-drawing. While a ban on all communications about a given subject would be the most effective way to prevent children from exposure to such material, the state cannot by fiat reduce the level of discourse to that which is "fit for children." *Butler* v. *Michigan,* 352 U. S. 380, 383 (1957); cf. *Bolger* v. *Youngs Drug Products Corp.,* 463 U. S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"). On the other hand, efforts to protect children from exposure to harmful material will undoubtedly have some spillover effect on the free speech rights of adults. See, *e.g.*, *FCC* v. *Pacifica Foundation,* 438 U. S. 726, 749–750, and n. 28 (1978).

Finding the appropriate balance is no easy matter. Though many factors plausibly enter the equation when calculating whether a child-directed location restriction goes too far in regulating adult speech, one crucial ques-

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[9] Moreover, even if it were our practice to require a particularized showing of the effects of advertising on consumption, the respondents have met that burden in this suit. See *ante*, at 27–31 (summarizing the evidence).

tion is whether the regulatory scheme leaves available sufficient "alternative avenues of communication." *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41, 50 (1986); *Members of City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U. S. 789, 819 (1984) (BRENNAN, J., dissenting); accord *ante,* at 33. Because I do not think the record contains sufficient information to enable us to answer that question, I would vacate the award of summary judgment upholding the 1,000-foot rule and remand for trial on that issue. Therefore, while I agree with the majority that the Court of Appeals did not sufficiently consider the implications of the 1,000-foot rule for the lawful communication of adults, see *ante,* at 31–36, I dissent from the disposition reflected in Part III–B–2 of the Court's opinion.

There is no doubt that the 1,000-foot rule prohibits cigarette advertising in a substantial portion of Massachusetts' largest cities. Even on that question, however, the parties remain in dispute as to the percentage of these urban areas that is actually off limits to tobacco advertising. See *ante,* at 32. Moreover, the record is entirely silent on the impact of the regulation in other portions of the Commonwealth. The dearth of reliable statistical information as to the scope of the ban is problematic.

More importantly, the Court lacks sufficient qualitative information as to the areas where cigarette advertising is prohibited and those where it is permitted. The fact that 80% or 90% of an urban area is unavailable to tobacco advertisements may be constitutionally irrelevant if the available areas are so heavily trafficked or so central to the city's cultural life that they provide a sufficient forum for the propagation of a manufacturer's message. One electric sign in Times Square or at the foot of the Golden Gate Bridge may be seen by more potential customers than a hundred signs dispersed in residential neighborhoods.

Finally, the Court lacks information as to other avenues of communication available to cigarette manufacturers

and retailers. For example, depending on the answers to empirical questions on which we lack data, the ubiquity of print advertisements hawking particular brands of cigarettes might suffice to inform adult consumers of the special advantages of the respective brands. Similarly, print advertisements, circulars mailed to people's homes, word of mouth, and general information may or may not be sufficient to imbue the adult population with the knowledge that particular stores, chains of stores, or types of stores sell tobacco products.[10]

In granting summary judgment for the respondents, the District Judge treated the First Amendment issues in this suit as pure questions of law and stated that "there are no material facts in dispute concerning these issues." 84 F. Supp. 2d, at 183. With due respect, I disagree. While the ultimate question before us is one of law, the answer to that question turns on complicated factual questions relating to the practical effects of the regulations. As the record does not reveal the answer to these disputed questions of fact, the court should have denied summary judgment to both parties and allowed the parties to present further evidence.

I note, moreover, that the alleged "overinclusivity" of the advertising regulations, *ante*, at 8, (THOMAS, J., concurring in part and concurring in judgment), while relevant to whether the regulations are narrowly tailored, does not "beli[e]" the claim that tobacco advertising imagery misleads children into believing that smoking is healthy, glamorous, or sophisticated, *ibid.* See Brief of *Amicus*

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[10] As the above observations indicate, the analysis as to whether the 1,000-foot rule impermissibly curtails speech between adults will require a particularized analysis that may well ask slightly different questions– and conceivably could reach different results– with regard to the constitutionality of the restrictions as applied to manufacturers and retailers.

Curiae American Legacy Foundation in Support of Respondent 4–5 and nn. 9, 10; Brief of *Amicus Curiae* City of Los Angeles in Support of Respondent 4 (documenting charge that advertisements for cigarettes and smokeless tobacco target underage smokers). For purposes of summary judgment, the State conceded that the tobacco companies' advertising concerns lawful activity and is not misleading. Under the Court's disposition of the case today, the State remains free to proffer evidence that the advertising is in fact misleading. See *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 771 (1976) ("[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem"). I would vacate the grant of summary judgment to respondents on this issue and remand for further proceedings.

The Sales Practice and Indoor Advertising Restrictions

After addressing petitioners' challenge to the sales practice restrictions imposed by the Massachusetts statute, the Court concluded that these provisions did not violate the First Amendment. I concur in that judgment, but write separately on this issue to make two brief points.

First, I agree with the District Court and the Court of Appeals that the sales practice restrictions are best analyzed as regulating conduct, not speech. See 218 F. 3d, at 53. While the decision how to display one's products no doubt serves a marginal communicative function, the same can be said of virtually any human activity performed with the hope or intention of evoking the interest of others. This Court has long recognized the need to differentiate between legislation that targets expression and legislation that targets conduct for legitimate non-speech-related reasons but imposes an incidental burden on expression. See, *e.g.*, *United States* v. *O'Brien,* 391

U. S. 367 (1968). However difficult that line may be to draw, it seems clear to me that laws requiring that stores maintain items behind counters and prohibiting self-service displays fall squarely on the conduct side of the line. Restrictions as to the accessibility of dangerous or legally-restricted products are a common feature of the regulatory regime governing American retail stores. I see nothing the least bit constitutionally problematic in requiring individuals to ask for the assistance of a salesclerk in order to examine or purchase a handgun, a bottle of penicillin, or a package of cigarettes.

Second, though I admit the question is closer, I would, for similar reasons, uphold the regulation limiting tobacco advertising in certain retail establishments to the space five feet or more above the floor.[11] When viewed in isolation, this provision appears to target speech. Further, to the extent that it does target speech it may well run into constitutional problems, as the connection between the ends the statute purports to serve and the means it has chosen are dubious. Nonetheless, I am ultimately persuaded that the provision is unobjectionable because it is little more than an adjunct to the other sales practice restrictions. As the Commonwealth of Massachusetts can properly legislate the placement of products and the nature of displays in its convenience stores, I would not draw a distinction between such restrictions and height restrictions on related product advertising. I would accord the Commonwealth some latitude in imposing restrictions that can have only the slightest impact on the ability of adults to purchase a poisonous product and may save some children from taking the first step on the road to

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[11] This ban only applies to stores located within 1,000-feet of a school or playground and contains an exception for adult-only establishments. See *ante*, at 5.

addiction.

III

Because I strongly disagree with the Court's conclusion on the preemption issue, I dissent from Parts II–A and II–B of its opinion. Though I agree with much of what the Court has to say about the First Amendment, I ultimately disagree with its disposition or its reasoning on each of the regulations before us.[12]

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[12] Reflecting my partial agreement with the Court, I join Parts I, II–C, II–D, and III–B–1 and concur in the judgment reflected in Part III–D.