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 O'CONNOR delivered the opinion of the Court.

In January 1999, the Attorney General of Massachusetts promulgated comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. 940 Code of Mass. Regs. §§21.01–21.07, 22.01–22.09 (2000). Petitioners, a group of cigarette, smokeless tobacco, and cigar manufacturers and retailers, filed suit in Federal District Court claiming that the regulations violate federal law and the United States Constitution. In large measure, the District Court determined that the regulations are valid and enforceable. The United States Court of Appeals for the First Circuit affirmed in part and reversed in part, concluding that the regulations are not

pre-empted by federal law and do not violate the First Amendment. The first question presented for our review is whether certain cigarette advertising regulations are pre-empted by the Federal Cigarette Labeling and Advertising Act (FCLAA), 79 Stat. 282, as amended, 15 U. S. C. §1331 *et seq*. The second question presented is whether certain regulations governing the advertising and sale of tobacco products violate the First Amendment.

I

In November 1998, Massachusetts, along with over 40 other States, reached a landmark agreement with major manufacturers in the cigarette industry. The signatory States settled their claims against these companies in exchange for monetary payments and permanent injunctive relief. See App. 253–258 (Outline of Terms for Massachusetts in National Tobacco Settlement); Master Settlement Agreement (Nov. 23, 1998), http://www.naag.org. At the press conference covering Massachusetts' decision to sign the agreement, then-Attorney General Scott Harshbarger announced that as one of his last acts in office, he would create consumer protection regulations to restrict advertising and sales practices for tobacco products. He explained that the regulations were necessary in order to "close holes" in the settlement agreement and "to stop Big Tobacco from recruiting new customers among the children of Massachusetts." App. 251.

In January 1999, pursuant to his authority to prevent unfair or deceptive practices in trade, Mass. Gen. Laws, ch. 93A, §2 (1997), the Massachusetts Attorney General (Attorney General) promulgated regulations governing the sale and advertisement of cigarettes, smokeless tobacco, and cigars. The purpose of the cigarette and smokeless tobacco regulations is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in

order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age . . .. [and] in order to prevent access to such products by underage consumers." 940 Code of Mass. Regs. §21.01 (2000). The similar purpose of the cigar regulations is "to eliminate deception and unfairness in the way cigars and little cigars are packaged, marketed, sold and distributed in Massachusetts [so that] . . . consumers may be adequately informed about the health risks associated with cigar smoking, its addictive properties, and the false perception that cigars are a safe alternative to cigarettes . . . [and so that] the incidence of cigar use by children under legal age is addressed . . . in order to prevent access to such products by underage consumers." *Ibid.* The regulations have a broader scope than the master settlement agreement, reaching advertising, sales practices, and members of the tobacco industry not covered by the agreement. The regulations place a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and labels for cigars.

The cigarette and smokeless tobacco regulations being challenged before this Court provide:

> "(2) Retail Outlet Sales Practices. Except as otherwise provided in [§21.04(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigarettes or smokeless tobacco products through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:
>
> . . . . .
>
> "(c) Using self-service displays of cigarettes or smokeless tobacco products;
>
> "(d) Failing to place cigarettes and smokeless tobacco products out of the reach of all consumers, and in a location accessible only to outlet personnel." §§21.04(2)(c)–(d).

> "(5) Advertising Restrictions. Except as provided in [§21.04(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:
> "(a) Outdoor advertising, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location that is within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
> "(b) Point-of-sale advertising of cigarettes or smokeless tobacco products any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§21.04(5)(a)–(b).

The cigar regulations that are still at issue provide:

> "(1) Retail Sales Practices. Except as otherwise provided in [§22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars directly to consumers within Massachusetts to engage in any of the following practices:
> "(a) sampling of cigars or little cigars or promotional give-aways of cigars or little cigars." §21.06(1)(a).
> "(2) Retail Outlet Sales Practices. Except as otherwise provided in [§22.06(4)], it shall be an unfair or deceptive act or practice for any person who sells or distributes cigars or little cigars through a retail outlet located within Massachusetts to engage in any of the following retail outlet sales practices:
>
> . . . . .

"(c) Using self-service displays of cigars or little cigars;
"(d) Failing to place cigars and little cigars out of the reach of all consumers, and in a location accessible only to outlet personnel." §§22.06(2)(c)–(d).
"(5) Advertising Restrictions. Except as provided in [§22.06(6)], it shall be an unfair or deceptive act or practice for any manufacturer, distributor or retailer to engage in any of the following practices:
"(a) Outdoor advertising of cigars or little cigars, including advertising in enclosed stadiums and advertising from within a retail establishment that is directed toward or visible from the outside of the establishment, in any location within a 1,000 foot radius of any public playground, playground area in a public park, elementary school or secondary school;
"(b) Point-of-sale advertising of cigars or little cigars any portion of which is placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of any public playground, playground area in a public park, elementary school or secondary school, and which is not an adult-only retail establishment." §§22.06(5)(a)– (b).

The term "advertisement" is defined as:

"any oral, written, graphic, or pictorial statement or representation, made by, or on behalf of, any person who manufactures, packages, imports for sale, distributes or sells within Massachusetts [tobacco products], the purpose or effect of which is to promote the use or sale of the product. Advertisement includes, without limitation, any picture, logo, symbol, motto, selling message, graphic display, visual image, recognizable color or pattern of colors, or any other indicia of product identification identical or similar to, or identifiable with, those used for any brand of [tobacco

> product]. This includes, without limitation, utilitarian items and permanent or semi-permanent fixtures with such indicia of product identification such as lighting fixtures, awnings, display cases, clocks and door mats, but does not include utilitarian items with a volume of 200 cubic inches or less." §§21.03, 22.03.

Before the effective date of the regulations, February 1, 2000, members of the tobacco industry sued the Attorney General in the United States District Court for the District of Massachusetts. Four cigarette manufacturers (Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation, R. J. Reynolds Tobacco Company, and Philip Morris Incorporated), a maker of smokeless tobacco products (U. S. Smokeless Tobacco Company), and several cigar manufacturers and retailers claimed that many of the regulations violate the Commerce Clause, the Supremacy Clause, the First and Fourteenth Amendments, and Rev. Stat. §1979, 42 U. S. C. §1983. The parties sought summary judgment. 76 F. Supp. 2d 124, 127 (1999); 84 F. Supp. 2d 180, 183 (2000).

In its first ruling, the District Court considered the Supremacy Clause claim that the FCLAA, 15 U. S. C. §1331 *et seq*., pre-empts the cigarette advertising regulations. 76 F. Supp. 2d, at 128–134. The FCLAA prescribes the health warnings that must appear on packaging and in advertisements for cigarettes. The FCLAA contains a pre-emption provision that prohibits a State from imposing any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes." §1334(b). The FCLAA's pre-emption provision does not cover smokeless tobacco or cigars.

The District Court explained that the central question for purposes of pre-emption is whether the regulations create a predicate legal duty based on smoking and health. The court reasoned that to read the pre-emption provision

to proscribe any state advertising regulation enacted due to health concerns about smoking would expand Congress' purpose beyond a reasonable scope and leave States powerless to regulate in the area. The court concluded that restrictions on the location of advertising are not based on smoking and health and thus are not pre-empted by the FCLAA. The District Court also concluded that a provision that permitted retailers to display a black and white "tombstone" sign reading "Tobacco Products Sold Here," 940 Code of Mass. Regs. §21.04(6) (2000), was pre-empted by the FCLAA.

In a separate ruling, the District Court considered the claim that the Attorney General's regulations violate the First Amendment. 84 F. Supp. 2d, at 183–196. Rejecting petitioners' argument that strict scrutiny should apply, the court applied the four-part test of *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.,* 447 U. S. 557 (1980), for commercial speech. The court reasoned that the Attorney General had provided an adequate basis for regulating cigars and smokeless tobacco as well as cigarettes because of the similarities among the products. The court held that the outdoor advertising regulations, which prohibit outdoor advertising within 1,000 feet of a school or playground, do not violate the First Amendment because they advance a substantial government interest and are narrowly tailored to suppress no more speech than necessary. The court concluded that the sales practices regulations, which restrict the location and distribution of tobacco products, survive scrutiny because they do not implicate a significant speech interest. The court invalidated the point-of-sale advertising regulations, which require that indoor advertising be placed no lower than five feet from the floor, finding that the Attorney General had not provided sufficient justification for that restriction. The District Court's ruling with respect to the cigar warning requirements and the Commerce Clause is not before this Court.

The United States Court of Appeals for the First Circuit issued a stay pending appeal, App. 8–9, and affirmed in part and reversed in part the District Court's judgment, *Consolidated Cigar Corp.* v. *Reilly*, 218 F. 3d 30 (2000). With respect to the Supremacy Clause, the Court of Appeals affirmed the District Court's ruling that the Attorney General's cigarette advertising regulations are not pre-empted by the FCLAA. The First Circuit was persuaded by the reasoning of the Second and Seventh Circuits, which had concluded that the FCLAA's pre-emption provision is ambiguous, and held that the provision pre-empts regulations of the content, but not the location, of cigarette advertising. See *Greater New York 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).

With respect to the First Amendment, the Court of Appeals applied the *Central Hudson* test. 447 U. S. 557 (1980). The court held that the outdoor advertising regulations do not violate the First Amendment. The court concluded that the restriction on outdoor advertising within 1,000 feet of a school or playground directly advances the State's substantial interest in preventing tobacco use by minors. The court also found that the outdoor advertising regulations restrict no more speech than necessary, reasoning that the distance chosen by the Attorney General is the sort of determination better suited for legislative and executive decisionmakers than courts. The Court of Appeals reversed the District Court's invalidation of the point-of-sale advertising regulations, again concluding that the Attorney General is better suited to determine what restrictions are necessary. The Court of Appeals also held that the sales practices regulations are valid under the First Amendment. The court found that the regulations directly advance the State's interest in

preventing minors' access to tobacco products and that the regulations are narrowly tailored because retailers have a variety of other means to present the packaging of their products and to allow customers to examine the products.

As for the argument that smokeless tobacco and cigars are different from cigarettes, the court expressed some misgivings about equating all tobacco products, but ultimately decided that the Attorney General had presented sufficient evidence with respect to all three products to regulate them similarly. The Court of Appeals' decision with respect to the cigar warning requirements and the Commerce Clause is not before this Court.

The Court of Appeals stayed its mandate pending disposition of a petition for a writ of certiorari. App. 13. The cigarette manufacturers and U. S. Smokeless Tobacco Company filed a petition, challenging the Court of Appeals' decision with respect to the outdoor and point-of-sale advertising regulations on pre-emption and First Amendment grounds, and the sales practices regulations on First Amendment grounds. The cigar companies filed a separate petition, again raising a First Amendment challenge to the outdoor advertising, point-of-sale advertising, and sales practices regulations. We granted both petitions, 531 U. S. 1068 (2001), to resolve the conflict among the Courts of Appeals with respect to whether the FCLAA pre-empts cigarette advertising regulations like those at issue here, cf. *Lindsey* v. *Tacoma-Pierce County Health Dept.*, 195 F. 3d 1065 (CA9 1999), and to decide the important First Amendment issues presented in these cases.

II

Before reaching the First Amendment issues, we must decide to what extent federal law pre-empts the Attorney General's regulations. The cigarette petitioners contend that the FCLAA, 15 U. S. C. §1331 *et seq.*, pre-empts the Attorney General's cigarette advertising regulations.

A

Article VI of the United States Constitution commands that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. See also *McCulloch* v. *Maryland,* 4 Wheat. 316, 427 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments"). This relatively clear and simple mandate has generated considerable discussion in cases where we have had to discern whether Congress has pre-empted state action in a particular area. State action may be foreclosed by express language in a congressional enactment, see, *e.g.*, *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 517 (1992), by implication from the depth and breadth of a congressional scheme that occupies the legislative field, see, *e.g.*, *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta,* 458 U. S. 141, 153 (1982), or by implication because of a conflict with a congressional enactment, see, *e.g.*, *Geier* v. *American Honda Motor Co.,* 529 U. S. 861, 869–874 (2000).

In the FCLAA, Congress has crafted a comprehensive federal scheme governing the advertising and promotion of cigarettes. The FCLAA's pre-emption provision provides:

> "(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.

The FCLAA's pre-emption provision does not cover

smokeless tobacco or cigars.

In this case, our task is to identify the domain expressly pre-empted, see *Cipollone*, *supra*, at 517, because "an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters," *Freightliner Corp.* v. *Myrick,* 514 U. S. 280, 288 (1995). Congressional purpose is the "ultimate touchstone" of our inquiry. *Cipollone, supra*, at 516 (internal quotation marks omitted). Because "federal law is said to bar state action in [a] fiel[d] of traditional state regulation," namely, advertising, see *Packer Corp.* v. *Utah,* 285 U. S. 105, 108 (1932), we "wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress." *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.,* 519 U. S. 316, 325 (1997) (internal quotation marks omitted). See also *Medtronic, Inc.* v. *Lohr,* 518 U. S. 470, 475 (1996).

Our analysis begins with the language of the statute. *Hughes Aircraft Co.* v. *Jacobson,* 525 U. S. 432, 438 (1999). In the pre-emption provision, Congress unequivocally precludes the requirement of any additional statements on cigarette packages beyond those provided in §1333. 15 U. S. C. §1334(a). Congress further precludes States or localities from imposing any requirement or prohibition based on smoking and health with respect to the advertising and promotion of cigarettes. §1334(b). Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted. We must give meaning to each element of the pre-emption provision. We are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted. See *Medtronic*, *supra*, at 486; *McCarthy* v. *Bronson,* 500 U. S. 136, 139 (1991); *K mart*

Corp. v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988).

In 1964, the groundbreaking Report of the Surgeon General's Advisory Committee on Smoking and Health concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." Department of Health, Education, and Welfare, U. S. Surgeon General's Advisory Committee, Smoking and Health 33. In 1965, Congress enacted the FCLAA as a proactive measure in the face of impending regulation by federal agencies and the States. Pub. L. 89–92, 79 Stat. 282. See also *Cipollone*, *supra*, at 513–515. The purpose of the FCLAA was twofold: to inform the public adequately about the hazards of cigarette smoking, and to protect the national economy from interference due to diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health. Pub. L. 89–92, §2. The FCLAA prescribed a label for cigarette packages: "Caution: Cigarette Smoking May Be Hazardous to Your Health." §4. The FCLAA also required the Secretary of Health, Education, and Welfare (HEW) and the Federal Trade Commission (FTC) to report annually to Congress about the health consequences of smoking and the advertising and promotion of cigarettes. §5.

Section 5 of the FCLAA included a pre-emption provision in which "Congress spoke precisely and narrowly." *Cipollone*, *supra*, at 518. Subsection 5(a) prohibited any requirement of additional statements on cigarette packaging. Subsection 5(b) provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Section 10 of the FCLAA set a termination date of July 1, 1969 for these provisions. As we have previously explained, "on their face, [the pre-emption] provisions merely prohibited state and federal rulemaking bodies

from mandating particular cautionary statements on cigarette labels [subsection (a)] or in cigarette advertisements [subsection (b)]." *Cipollone*, 505 U. S., at 518.

The FCLAA was enacted with the expectation that Congress would reexamine it in 1969 in light of the developing information about cigarette smoking and health. H. R. Rep. No. 586, 89th Cong., 1st Sess., 6 (1965); 111 Cong. Rec. 16541 (1965). In the intervening years, Congress received reports and recommendations from the HEW Secretary and the FTC. S. Rep. No. 91–566, pp. 2–6 (1969). The HEW Secretary recommended that Congress strengthen the warning, require the warning on all packages and in advertisements, and publish tar and nicotine levels on packages and in advertisements. *Id.*, at 4. The FTC made similar and additional recommendations. The FTC sought a complete ban on radio and television advertising, a requirement that broadcasters devote time for health hazard announcements concerning smoking, and increased funding for public education and research about smoking. *Id.*, at 6. The FTC urged Congress not to continue to prevent federal agencies from regulating cigarette advertising. *Id.*, at 10. In addition, the Federal Communications Commission (FCC) had concluded that advertising which promoted the use of cigarettes created a duty in broadcast stations to provide information about the hazards of cigarette smoking. *Id.*, at 6–7.

In 1969, House and Senate committees held hearings about the health effects of cigarette smoking and advertising by the cigarette industry. The bill that emerged from the House of Representatives strengthened the warning and maintained the pre-emption provision. The Senate amended that bill, adding the ban on radio and television advertising, and changing the pre-emption language to its present form. H. R. Conf. Rep. No. 91–897, pp. 4–5 (1970).

The final result was the Public Health Cigarette Smok-

ing Act of 1969, in which Congress, following the Senate's amendments, made three significant changes to the FCLAA. Pub. L. 91–222, §2, 84 Stat. 87. First, Congress drafted a new label that read: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health." FCLAA, §4. Second, Congress declared it unlawful to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the FCC. §6. Finally, Congress enacted the current pre-emption provision, which proscribes any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion" of cigarettes. §5(b). The new subsection 5(b) did not pre-empt regulation by federal agencies, freeing the FTC to impose warning requirements in cigarette advertising. See *Cipollone*, *supra*, at 515. The new pre-emption provision, like its predecessor, only applied to cigarettes, and not other tobacco products.

In 1984, Congress again amended the FCLAA in the Comprehensive Smoking Education Act. Pub. L. 98–474, 98 Stat. 2200. The purpose of the Act was to "provide a new strategy for making Americans more aware of any adverse health effects of smoking, to assure the timely and widespread dissemination of research findings and to enable individuals to make informed decisions about smoking." §2. The Act established a series of warnings to appear on a rotating basis on cigarette packages and in cigarette advertising, §4, and directed the Health and Human Services Secretary to create and implement an educational program about the health effects of cigarette smoking, §3.

The FTC has continued to report on trade practices in the cigarette industry. In 1999, the first year since the master settlement agreement, the FTC reported that the cigarette industry expended $8.24 billion on advertising and promotions, the largest expenditure ever. FTC, Ciga-

rette Report for 1999, p. 1 (2000). Substantial increases were found in point-of-sale promotions, payments made to retailers to facilitate sales, and retail offers such as buy one, get one free, or product giveaways. *Id.*, at 4–5. Substantial decreases, however, were reported for outdoor advertising and transit advertising. *Id.*, at 2. Congress and federal agencies continue to monitor advertising and promotion practices in the cigarette industry.

The scope and meaning of the current pre-emption provision become clearer once we consider the original pre-emption language and the amendments to the FCLAA. Without question, "the plain language of the pre-emption provision in the 1969 Act is much broader." *Cipollone,* 505 U. S., at 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. See *ibid.* Congress expanded the pre-emption provision with respect to the States, and at the same time, it allowed the FTC to regulate cigarette advertising. Congress also prohibited cigarette advertising in electronic media altogether. Viewed in light of the context in which the current pre-emption provision was adopted, we must determine whether the FCLAA pre-empts Massachusetts' regulations governing outdoor and point-of-sale advertising of cigarettes.

B

The Court of Appeals acknowledged that the FCLAA pre-empts any "requirement or prohibition based on smoking and health . . . with respect to the advertising or promotion of . . . cigarettes," 15 U. S. C. §1334(b), but concluded that the FCLAA does not nullify Massachusetts' cigarette advertising regulations. The court concentrated

its analysis on whether the regulations are "with respect to" advertising and promotion, relying on two of its sister Circuits to conclude that the FCLAA only pre-empts regulations of the content of cigarette advertising. The Court of Appeals also reasoned that the Attorney General's regulations are a form of zoning, a traditional area of state power; therefore the presumption against pre-emption applied.

The cigarette petitioners maintain that the Court of Appeals' "with respect to" analysis is inconsistent with the FCLAA's statutory text and legislative history, and gives the States license to prohibit almost all cigarette advertising. Petitioners also maintain that there is no basis for construing the pre-emption provision to prohibit only content-based advertising regulations.

Although they support the Court of Appeals' result, the Attorney General and United States as *amicus curiae* do not fully endorse that court's textual analysis of the pre-emption provision. Instead, they assert that the cigarette advertising regulations are not pre-empted because they are not "based on smoking and health." The Attorney General and the United States also contend that the regulations are not pre-empted because they do not prescribe the content of cigarette advertising and they fall squarely within the State's traditional powers to control the location of advertising and to protect the welfare of children.

Turning first to the language in the pre-emption provision relied upon by the Court of Appeals, we reject the notion that the Attorney General's cigarette advertising regulations are not "with respect to" advertising and promotion. We disagree with the Court of Appeals' analogy to the Employee Retirement Income Security Act of 1974 (ERISA). In some cases concerning ERISA's pre-emption of state law, the Court has had to decide whether a particular state law "relates to" an employee benefit

plan covered by ERISA even though the state law makes no express reference to such a plan. See, *e.g.*, *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.,* 519 U. S., at 324–325. Here, however, there is no question about an indirect relationship between the regulations and cigarette advertising because the regulations expressly target cigarette advertising. 940 Code of Mass. Regs. §21.04(5) (2000).

Before this Court, the Attorney General focuses on a different phrase in the pre-emption provision: "based on smoking and health." The Attorney General argues that the cigarette advertising regulations are not "based on smoking and health," because they do not involve health-related content in cigarette advertising but instead target youth exposure to cigarette advertising. To be sure, Members of this Court have debated the precise meaning of "based on smoking and health," see *Cipollone*, *supra*, at 529, n. 7 (plurality opinion), but we cannot agree with the Attorney General's narrow construction of the phrase.

As Congress enacted the current pre-emption provision, Congress did not concern itself solely with health warnings for cigarettes. In the 1969 amendments, Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.

The context in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health. Massachusetts has attempted to address the incidence of underage cigarette smoking by regulating advertising, see 940 Code

of Mass. Regs. §21.01 (2000), much like Congress' ban on cigarette advertising in electronic media. At 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.

The Attorney General next claims that the State's outdoor and point-of-sale advertising regulations for cigarettes are not pre-empted because they govern the location, and not the content, of advertising. This is also JUSTICE STEVENS' main point with respect to pre-emption. *Post*, at 6 (opinion concurring in part and dissenting in part).

The content versus location distinction has some surface appeal. The pre-emption provision immediately follows the section of the FCLAA that prescribes warnings. See 15 U. S. C. §§1333, 1334. The pre-emption provision itself refers to cigarettes "labeled in conformity with" the statute. §1334(b). But the content/location distinction cannot be squared with the language of the pre-emption provision, which reaches *all* "requirements" and "prohibitions" "imposed under State law." A distinction between the content of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere. See §1335. We are not at liberty to pick and choose which provisions in the legislative scheme we will consider, see *post*, at 7, n. 5 (opinion of STEVENS, J.), but must examine the FCLAA as a whole.

Moreover, any distinction between the content and location of cigarette advertising collapses once the implications of that approach are fully considered. At oral argument, the Attorney General was pressed to explain what types of state regulations of cigarette advertising, in his view, are pre-empted by the FCLAA. The Attorney General maintained that a state law that required cigarette

retailers to remove the word "tobacco" from advertisements, or required cigarette billboards to be blank, would be pre-empted if it were a regulation of "health-related content." Tr. of Oral Arg. 41, 42. The Attorney General also maintained, however, that a complete ban on all cigarette advertising would not be pre-empted because Congress did not intend to invade local control over zoning. *Id.*, at 42–44. The latter position clearly follows from the factual distinction between content and location, but it finds no support in the text of the FCLAA's pre-emption provision. We believe that Congress wished to ensure that "a State could not do through negative mandate (*e.g.*, banning all cigarette advertising) that which it already was forbidden to do through positive mandate (*e.g.*, mandating particular cautionary statements)." *Cipollone*, 505 U. S., at 539 (BLACKMUN, J., joined by KENNEDY and SOUTER, JJ., concurring in part and dissenting in part). See also *Vango Media, Inc.* v. *New York*, 34 F. 3d 68 (CA2 1994) (holding pre-empted a regulation that required one public health message for every four cigarette advertisements).

JUSTICE STEVENS, *post*, at 6–10, maintains that Congress did not intend to displace state regulation of the location of cigarette advertising. There is a critical distinction, however, between generally applicable zoning regulations, see *infra*, at 21–22, and regulations targeting cigarette advertising. The latter type of regulation, which is inevitably motivated by concerns about smoking and health, squarely contradicts the FCLAA. The FCLAA's 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.

JUSTICE STEVENS finds it ironic that we conclude that "federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of

a school," in light of our prior conclusion that the "Federal Government lacks the constitutional authority to impose a similarly-motivated ban" in *United States* v. *Lopez,* 514 U. S. 549 (1995). *Post*, at 10, n. 8. Our holding is not as broad as the dissent states; we hold only that the FCLAA pre-empts state regulations targeting cigarette advertising. States remain free to enact generally applicable zoning regulations, and to regulate conduct with respect to cigarette use and sales. *Infra*, at 21–22. The reference to *Lopez* is also inapposite. In *Lopez,* we held that Congress exceeded the limits of its Commerce Clause power in the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm in a school zone. 514 U. S., at 553–568. This case, by contrast, concerns the Supremacy Clause and the doctrine of pre-emption as applied in a case where Congress expressly precluded certain state regulations of cigarette advertising. Massachusetts did not raise a constitutional challenge to the FCLAA, and we are not confronted with whether Congress exceeded its constitutionally delegated authority in enacting the FCLAA.

In sum, we fail to see how the FCLAA and its pre-emption provision permit a distinction between the specific concern about minors and cigarette advertising and the more general concern about smoking and health in cigarette advertising, especially in light of the fact that Congress crafted a legislative solution for those very concerns. We also conclude that a distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation in the text of the pre-emption provision. 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. Accordingly, we hold that the Attorney General's outdoor and point-of-sale

advertising regulations targeting cigarettes are pre-empted by the FCLAA.

C

Although the FCLAA prevents States and localities from imposing special requirements or prohibitions "based on smoking and health" "with respect to the advertising or promotion" of cigarettes, that language still leaves significant power in the hands of States to impose generally applicable zoning regulations and to regulate conduct. As we noted in *Cipollone*, "each phrase within [the provision] limits the universe of [state action] pre-empted by the statute." 505 U. S., at 524 (plurality opinion).

For instance, the FCLAA does not restrict a State or locality's ability to enact generally applicable zoning restrictions. We have recognized that state interests in traffic safety and esthetics may justify zoning regulations for advertising. See *Metromedia, Inc.* v. *San Diego,* 453 U. S. 490, 507–508 (1981). See also *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269, 274 (1919); *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526, 529–531 (1917). Although Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not "based on smoking and health."

The FCLAA also does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The

FCLAA's pre-emption provision explicitly governs state regulations of "advertising or promotion."* Accordingly, the FCLAA does not pre-empt state laws prohibiting cigarette sales to minors. To the contrary, there is an established congressional policy that supports such laws; Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities. 106 Stat. 394, 388, 42 U. S. C. §§300x–26(a)(1), 300x–21.

In Massachusetts, it is illegal to sell or distribute tobacco products to persons under the age of 18. Mass. Gen. Laws, ch. 270, §6 (2000). Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt. Cf. *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of New York,* 447 U. S. 557, 563–564 (1980); *Carey* v. *Population Servs. Int'l,* 431 U. S. 678, 701 (1977); *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U. S. 748, 772 (1976); 60 Fed. Reg. 41330–41332 (1995) (citing evidence that industry may be attempting to induce individuals under 18 to smoke cigarettes). States and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes. See Part III–D, *infra.*

D

The smokeless tobacco petitioners argue that if the State's outdoor and point-of-sale advertising regulations

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*The Senate Report explained that the pre-emption provision "would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." S. Rep. No. 91–566, p. 12 (1969).

for cigarettes are pre-empted, then the same advertising regulations with respect to smokeless tobacco must be invalidated because they cannot be severed from the cigarette provisions. Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, p. 4, n. 5. The District Court did not reach the severability issue with respect to the advertising provisions that are before this Court. 76 F. Supp. 2d, at 134, n. 11. The Court of Appeals also did not reach severability because that court likewise concluded that the cigarette advertising regulations were not pre-empted. 218 F. 3d, at 37, n. 3. We decline to reach an issue that was not decided below. *National Collegiate Athletic Assn.* v. *Smith,* 525 U. S. 459, 470 (1999).

III

By its terms, the FCLAA's pre-emption provision only applies to cigarettes. Accordingly, we must evaluate the smokeless tobacco and cigar petitioners' First Amendment challenges to the State's outdoor and point-of-sale advertising regulations. The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations. Thus, we must analyze the cigarette as well as the smokeless tobacco and cigar petitioners' claim that certain sales practices regulations for tobacco products violate the First Amendment.

A

For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment. See, *e.g.*, *Virginia Bd. of Pharmacy, supra,* at 762. Instead, the Court has afforded commercial speech a measure of First Amendment protection "'commensurate'" with its position in relation to other constitutionally guaranteed expression. See, *e.g.*, *Florida Bar* v. *Went For It, Inc.,* 515 U. S. 618, 623 (1995) (quoting *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S. 469, 477

(1989)). In recognition of the "distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech," *Central Hudson*, *supra*, at 562 (internal quotation marks omitted), we developed a framework for analyzing regulations of commercial speech that is "substantially similar" to the test for time, place, and manner restrictions, *Board of Trustees of State Univ. of N. Y.* v. *Fox*, *supra*, at 477. The analysis contains four elements:

> "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, *supra*, at 566.

Petitioners urge us to reject the *Central Hudson* analysis and apply strict scrutiny. They are not the first litigants to do so. See, *e.g.*, *Greater New Orleans Broadcasting Assn., Inc.* v. *United States*, 527 U. S. 173, 184 (1999). Admittedly, several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases. See, *e.g.*, *Greater New Orleans*, *supra*, at 197 (THOMAS, J., concurring in judgment); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, 501, 510–514 (1996) (joint opinion of STEVENS, KENNEDY, and GINSBURG, JJ.); *id.*, at 517 (SCALIA, J. concurring in part and concurring in judgment); *id.*, at 518 (THOMAS, J., concurring in part and concurring in judgment). But here, as in *Greater New Orleans*, we see "no need to break new ground. *Central Hudson*, as applied in our more recent

commercial speech cases, provides an adequate basis for decision." 527 U. S., at 184.

Only the last two steps of *Central Hudson*'s four-part analysis are at issue here. The Attorney General has assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection. 218 F. 3d., at 43; 84 F. Supp. 2d, at 185–186. With respect to the second step, none of the petitioners contests the importance of the State's interest in preventing the use of tobacco products by minors. Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, p. 41; Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 16; Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, p. 8.

The third step of *Central Hudson* concerns the relationship between the harm that underlies the State's interest and the means identified by the State to advance that interest. It requires that

> "the speech restriction directly and materially advanc[e] the asserted governmental interest. 'This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Greater New Orleans*, *supra*, at 188 (quoting *Edenfield* v. *Fane*, 507 U. S. 761, 770–771 (1993)).

We do not, however, require that "empirical data come . . . accompanied by a surfeit of background information. . . [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Florida Bar* v. *Went For It, Inc.*, 515 U. S., at 628 (citations and internal

quotation marks omitted).

The last step of the *Central Hudson* analysis "complements" the third step, "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans*, *supra*, at 188. We have made it clear that "the least restrictive means" is not the standard; instead, the case law 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.'" *Went For It, Inc.*, *supra*, at 632 (quoting *Board of Trustees of State Univ. of N. Y.* v. *Fox,* 492 U. S., at 480). Focusing on the third and fourth steps of the *Central Hudson* analysis, we first address the outdoor advertising and point-of-sale advertising regulations for smokeless tobacco and cigars. We then address the sales practices regulations for all tobacco products.

B

The outdoor advertising regulations prohibit smokeless tobacco or cigar advertising within a 1,000-foot radius of a school or playground. 940 Code of Mass. Regs. §§21.04(5)(a), 22.06(5)(a) (2000). The District Court and Court of Appeals concluded that the Attorney General had identified a real problem with underage use of tobacco products, that limiting youth exposure to advertising would combat that problem, and that the regulations burdened no more speech than necessary to accomplish the State's goal. 218 F. 3d, at 44–53; 84 F. Supp. 2d, at 186–193. The smokeless tobacco and cigar petitioners take issue with all of these conclusions.

1

The smokeless tobacco and cigar petitioners contend that the Attorney General's regulations do not satisfy *Central Hudson*'s third step. They maintain that although the Attorney General may have identified a problem with

underage cigarette smoking, he has not identified an equally severe problem with respect to underage use of smokeless tobacco or cigars. The smokeless tobacco petitioner emphasizes the "lack of parity" between cigarettes and smokeless tobacco. Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 19; Reply Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, pp. 4, 10–11. The cigar petitioners catalogue a list of differences between cigars and other tobacco products, including the characteristics of the products and marketing strategies. Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 9–11. The petitioners finally contend that the Attorney General cannot prove that advertising has a causal link to tobacco use such that limiting advertising will materially alleviate any problem of underage use of their products. Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 20–22; Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 9–16.

In previous cases, we have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. See *Rubin*, 514 U. S., at 487; *United States* v. *Edge Broadcasting Co.*, 509 U. S. 418, 434 (1993); *Central Hudson*, 447 U. S., at 568–569. The Attorney General cites numerous studies to support this theory in the case of tobacco products.

The Attorney General relies in part on evidence gathered by the Food and Drug Administration (FDA) in its attempt to regulate the advertising of cigarettes and smokeless tobacco. See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents, FDA Proposed Rule, 60 Fed. Reg. 41314 (1995); Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents,

FDA Final Rule, 61 Fed. Reg. 44396 (1996). The FDA promulgated the advertising regulations after finding that the period prior to adulthood is when an overwhelming majority of Americans first decide to use tobacco products, and that advertising plays a crucial role in that decision. FDA Final Rule, 61 Fed. Reg., at 44398–44399. We later held that the FDA lacks statutory authority to regulate tobacco products. See *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U. S. 120 (2000). Nevertheless, the Attorney General relies on the FDA's proceedings and other studies to support his decision that advertising affects demand for tobacco products. Cf. *Erie* v. *Pap's A. M.,* 529 U. S. 277, 296 (2000) (plurality opinion) (cities and localities may rely on evidence from other jurisdictions to demonstrate harmful secondary effects of adult entertainment and to justify regulation); *Barnes* v. *Glen Theatre, Inc.,* 501 U. S. 560, 583–584 (1991) (SOUTER, J., concurring in judgment) (same); *Renton* v. *Playtime Theatres, Inc.,* 475 U. S. 41, 50–52 (1986) (same). See also *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 393, and n. 6 (2000) (discussing evidence of corruption and the appearance of corruption in campaign finance).

In its rulemaking proceeding, the FDA considered several studies of tobacco advertising and trends in the use of various tobacco products. The Surgeon General's report and the Institute of Medicine's report found that "there is sufficient evidence to conclude that advertising and labeling play a significant and important contributory role in a young person's decision to use cigarettes or smokeless tobacco products." 60 Fed. Reg. 41332. See also Pierce et al., Tobacco Industry Promotion of Cigarettes and Adolescent Smoking, 279 JAMA 511, 514 (1998).

For instance, children smoke fewer brands of cigarettes than adults, and those choices directly track the most heavily advertised brands, unlike adult choices, which are more dispersed and related to pricing. FDA Proposed

Rule, 60 Fed. Reg. 41332. Another study revealed that 72% of 6 year olds and 52% of children ages 3 to 6 recognized "Joe Camel," the cartoon anthropomorphic symbol of R. J. Reynolds' Camel brand cigarettes. *Id.*, at 41333. After the introduction of Joe Camel, Camel cigarettes' share of the youth market rose from 4% to 13%. *Id.*, at 41330. The FDA also identified trends in tobacco consumption among certain populations, such as young women, that correlated to the introduction and marketing of products geared toward that population. *Id.*, at 41333.

The FDA also made specific findings with respect to smokeless tobacco. The FDA concluded that "[t]he recent and very large increase in the use of smokeless tobacco products by young people and the addictive nature of these products has persuaded the agency that these products must be included in any regulatory approach that is designed to help prevent future generations of young people from becoming addicted to nicotine-containing tobacco products." *Id.*, at 41318. Studies have analyzed smokeless tobacco use by young people, discussing trends based on gender, school grade, and locale. See, *e.g.*, Boyd et al., Use of Smokeless Tobacco among Children and Adolescents in the United States, 16 Preventative Medicine 402–418 (1987), Record, Doc. No. 38, Exh. 63.

Researchers tracked a dramatic shift in patterns of smokeless tobacco use from older to younger users over the past 30 years. See, *e.g.*, FDA Proposed Rule, 60 Fed. Reg., at 41317; Tomar et al., Smokeless tobacco brand preference and brand switching among US adolescents and young adults, 4 Tobacco Control 67 (1995), Record, Doc. No. 38, Exh. 62; Department of Health and Human Services, Preventing Tobacco Use Among Young People: A Report of the Surgeon General 163 (1994), Record, Doc. No. 36, Exh. 1. In particular, the smokeless tobacco industry boosted sales tenfold in the 1970s and 1980s by targeting young males. FDA Proposed Rule, 60 Fed. Reg., at

41331. See also National Cancer Institute, Cigars: Health Effects and Trends, Smoking and Tobacco Control Monograph No. 9, p. 16 (1998), Record, Doc. No. 39, Exh. 67. Another study documented the targeting of youth through smokeless tobacco sales and advertising techniques. Ernster, Advertising and Promotion of Smokeless Tobacco Products, National Cancer Institute Monograph No. 8, pp. 87–93 (1989), Record, Doc. No. 38, Exh. 66.

The Attorney General presents different evidence with respect to cigars. There was no data on underage cigar use prior to 1996 because the behavior was considered "uncommon enough not to be worthy of examination." Smoking and Tobacco Control Monograph No. 9, at 13; FTC Report to Congress: Cigar Sales and Advertising and Promotional Expenses for Calendar Years 1996 and 1997, p. 9 (1999), Record, Doc. No. 39, Exh. 71. In 1995, the FDA decided not to include cigars in its attempted regulation of tobacco product advertising, explaining that "the agency does not currently have sufficient evidence that these products are drug delivery devices . . . . FDA has focused its investigation of its authority over tobacco products on cigarettes and smokeless tobacco products, and not on pipe tobacco or cigars, because young people predominantly use cigarettes and smokeless tobacco products." 60 Fed. Reg. 41322.

More recently, however, data on youth cigar use has emerged. The National Cancer Institute concluded in its 1998 Monograph that the rate of cigar use by minors is increasing and that, in some States, the cigar use rates are higher than the smokeless tobacco use rates for minors. Smoking and Tobacco Control Monograph No. 9, at 19, 42–51. In its 1999 Report to Congress, the FTC concluded that "substantial numbers of adolescents are trying cigars." FTC Report to Congress, at 9. See also Department of Health and Human Services, Office of Inspector General, Youth Use of Cigars: Patterns of Use and Percep-

tions of Risk (1999), Record, Doc. No. 39, Exh. 78.

Studies have also demonstrated a link between advertising and demand for cigars. After Congress recognized the power of images in advertising and banned cigarette advertising in electronic media, television advertising of small cigars "increased dramatically in 1972 and 1973," "filled the void left by cigarette advertisers," and "sales . . . soared." Smoking and Tobacco Control Monograph No. 9, at 24. In 1973, Congress extended the electronic media advertising ban for cigarettes to little cigars. Little Cigar Act, §3, Pub. L. 93–109, 87 Stat. 352, as amended, 15 U. S. C. §1335. In the 1990s, cigar advertising campaigns triggered a boost in sales. Smoking and Tobacco Control Monograph No. 9, at 215.

Our 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, we disagree with petitioners' claim that there is no evidence that preventing targeted campaigns and limiting youth exposure to advertising will decrease underage use of smokeless tobacco and cigars. On this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere "speculation [and] conjecture." *Edenfield* v. *Fane*, 507 U. S., at 770.

2

Whatever the strength of the Attorney General's evidence to justify the outdoor advertising regulations, however, we conclude that the regulations do not satisfy the fourth step of the *Central Hudson* analysis. The final step of the *Central Hudson* analysis, the "critical inquiry in this case," requires a reasonable fit between the means and ends of the regulatory scheme. 447 U. S., at 569. The Attorney General's regulations do not meet this standard.

The broad sweep of the regulations indicates that the Attorney General did not "carefully calculat[e] the costs and benefits associated with the burden on speech imposed" by the regulations. *Cincinnati* v. *Discovery Network, Inc.,* 507 U. S. 410, 417 (1993) (internal quotation marks omitted).

The outdoor advertising regulations prohibit any smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds. In the District Court, petitioners maintained that this prohibition would prevent advertising in 87% to 91% of Boston, Worchester, and Springfield, Massachusetts. 84 F. Supp. 2d, at 191. The 87% to 91% figure appears to include not only the effect of the regulations, but also the limitations imposed by other generally applicable zoning restrictions. See App. 161–167. The Attorney General disputed petitioners' figures but "concede[d] that the reach of the regulations is substantial." 218 F. 3d, at 50. Thus, the Court of Appeals concluded that the regulations prohibit advertising in a substantial portion of the major metropolitan areas of Massachusetts. *Ibid.*

The substantial geographical reach of the Attorney General's outdoor advertising regulations is compounded by other factors. "Outdoor" advertising includes not only advertising located outside an establishment, but also advertising inside a store if that advertising is visible from outside the store. The regulations restrict advertisements of any size and the term advertisement also includes oral statements. 940 Code of Mass. Regs §§21.03, 22.03 (2000).

In some geographical areas, these regulations would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers. The breadth and scope of the regulations, and the process by which the Attorney General adopted the regulations, do not demonstrate a careful calculation of the speech interests involved.

First, the Attorney General did not seem to consider the impact of the 1,000-foot restriction on commercial speech in major metropolitan areas. The Attorney General apparently selected the 1,000-foot distance based on the FDA's decision to impose an identical 1,000-foot restriction when it attempted to regulate cigarette and smokeless tobacco advertising. See FDA Final Rule, 61 Fed. Reg. 44399; Brief for Respondents 45, and n. 23. But the FDA's 1,000-foot regulation was not an adequate basis for the Attorney General to tailor the Massachusetts regulations. The degree to which speech is suppressed– or alternative avenues for speech remain available– under a particular regulatory scheme tends to be case specific. See, *e.g.*, *Renton*, 475 U. S., at 53–54. And a case specific analysis makes sense, for although a State or locality may have common interests and concerns about underage smoking and the effects of tobacco advertisements, the impact of a restriction on speech will undoubtedly vary from place to place. The FDA's regulations would have had widely disparate effects nationwide. Even in Massachusetts, the effect of the Attorney General's speech regulations will vary based on whether a locale is rural, suburban, or urban. The uniformly broad sweep of the geographical limitation demonstrates a lack of tailoring.

In addition, the range of communications restricted seems unduly broad. For instance, it is not clear from the regulatory scheme why a ban on oral communications is necessary to further the State's interest. Apparently that restriction means that a retailer is unable to answer inquiries about its tobacco products if that communication occurs outdoors. Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs. To the extent that studies have identified particular advertising and promotion practices that appeal to youth, tailoring would involve targeting those practices while permitting others. As

crafted, the regulations make no distinction among practices on this basis.

The Court of Appeals recognized that the smokeless tobacco and cigar petitioners' concern about the amount of speech restricted was "valid," but reasoned that there was an "obvious connection to the state's interest in protecting minors." 218 F. 3d, at 50. Even on the premise that Massachusetts has demonstrated a connection between the outdoor advertising regulations and its substantial interest in preventing underage tobacco use, the question of tailoring remains. The Court of Appeals failed to follow through with an analysis of the countervailing First Amendment interests.

The State's 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. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products. In a case involving indecent speech on the Internet we explained that "the governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno* v. *American Civil Liberties Union,* 521 U. S. 844, 875 (1997) (citations omitted). See, *e.g., 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"); *Butler* v. *Michigan,* 352 U. S. 380, 383 (1957) ("The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children"). As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication. Cf. *American Civil Liberties Union, supra,*

at 886–889 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (discussing the creation of "adult zones" on the Internet).

In some instances, Massachusetts' outdoor advertising regulations would impose particularly onerous burdens on speech. For example, we disagree with the Court of Appeals' conclusion that because cigar manufacturers and retailers conduct a limited amount of advertising in comparison to other tobacco products, "the relative lack of cigar advertising also means that the burden imposed on cigar advertisers is correspondingly small." 218 F. 3d, at 49. If some retailers have relatively small advertising budgets, and use few avenues of communication, then the Attorney General's outdoor advertising regulations potentially place a greater, not lesser, burden on those retailers' speech. Furthermore, to the extent that cigar products and cigar advertising differ from that of other tobacco products, that difference should inform the inquiry into what speech restrictions are necessary.

In addition, a retailer in Massachusetts may have no means of communicating to passersby on the street that it sells tobacco products because alternative forms of advertisement, like newspapers, do not allow that retailer to propose an instant transaction in the way that onsite advertising does. The ban on any indoor advertising that is visible from the outside also presents problems in establishments like convenience stores, which have unique security concerns that counsel in favor of full visibility of the store from the outside. It is these sorts of considerations that the Attorney General failed to incorporate into the regulatory scheme.

We conclude that the Attorney General has failed to show that the outdoor advertising regulations for smokeless tobacco and cigars are not more extensive than necessary to advance the State's substantial interest in preventing underage tobacco use. JUSTICE STEVENS urges

that the Court remand the case for further development of the factual record. *Post*, at 12–14. We believe that a remand is inappropriate in this case because the State had ample opportunity to develop a record with respect to tailoring (as it had to justify its decision to regulate advertising), and additional evidence would not alter the nature of the scheme before the Court. See *Greater New Orleans*, 527 U. S., at 189, n. 6.

A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but 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. After reviewing the outdoor advertising regulations, we find the calculation in this case insufficient for purposes of the First Amendment.

C

Massachusetts has also restricted indoor, point-of-sale advertising for smokeless tobacco and cigars. Advertising cannot be "placed lower than five feet from the floor of any retail establishment which is located within a one thousand foot radius of" any school or playground. 940 Code of Mass. Regs. §§21.04(5)(b), 22.06(5)(b) (2000). The District Court invalidated these provisions, concluding that the Attorney General had not provided a sufficient basis for regulating indoor advertising. 84 F. Supp. 2d, at 192–193, 195. The Court of Appeals reversed. 218 F. 3d, at 50–51. The court explained: "We do have some misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level, but we find that such [a] determination falls within that range of reasonableness in which the Attorney General is best suited to pass judgment." *Id.*, at 51.

We conclude that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis. A regulation cannot be sustained if it "'provides only ineffective or remote support for the government's purpose,'" *Edenfield*, 507 U. S., at 770 (quoting *Central Hudson*, 447 U. S., at 564), or if there is "little chance" that the restriction will advance the State's goal, *Greater New Orleans*, *supra*, at 193 (internal quotation marks omitted). As outlined above, the State's goal is to prevent minors from using tobacco products and to curb demand for that activity by limiting youth exposure to advertising. The 5 foot rule does not seem to advance that goal. Not all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.

By contrast to JUSTICE STEVENS, *post*, at 16–17, we do not believe this regulation can be construed as a mere regulation of conduct under *United States* v. *O'Brien,* 391 U. S. 367 (1968). To qualify as a regulation of communicative action governed by the scrutiny outlined in *O'Brien*, the State's regulation must be unrelated to expression. *Texas* v. *Johnson,* 491 U. S. 397, 403 (1989). See also *Erie* v. *Pap's A. M.,* 529 U. S. 277, 289–296 (2000) (plurality opinion). Here, Massachusetts' height restriction is an attempt to regulate directly the communicative impact of indoor advertising.

Massachusetts may wish to target tobacco advertisements and displays that entice children, much like floor-level candy displays in a convenience store, but the blanket height restriction does not constitute a reasonable fit with that goal. The Court of Appeals recognized that the efficacy of the regulation was questionable, but decided that "[i]n any event, the burden on speech imposed by the provision is very limited." 218 F. 3d, at 51. There is no *de minimis* exception for a speech restriction that lacks sufficient tailoring or justification. We conclude that the re-

striction on the height of indoor advertising is invalid under *Central Hudson*'s third and fourth prongs.

D

The Attorney General also promulgated a number of regulations that restrict sales practices by cigarette, smokeless tobacco, and cigar manufacturers and retailers. Among other restrictions, the regulations bar the use of self-service displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons. 940 Code of Mass. Regs. §§21.04(2)(c)–(d), 22.06(2)(c)–(d) (2000). The cigarette petitioners do not challenge the sales practices regulations on pre-emption grounds. Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, at 5, n. 2. Two of the cigarette petitioners (Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company), petitioner U. S. Smokeless Tobacco Company, and the cigar petitioners challenge the sales practices regulations on First Amendment grounds. The cigar petitioners additionally challenge a provision that prohibits sampling or promotional giveaways of cigars or little cigars. 940 Code of Mass. Regs. §22.06(1)(a).

The District Court concluded that these restrictions implicate no cognizable speech interest, 84 F. Supp. 2d, at 195–196, but the Court of Appeals did not fully adopt that reasoning. The Court of Appeals recognized that self-service displays "often do have some communicative commercial function," but noted that the restriction in the regulations "is not on speech, but rather on the physical location of actual tobacco products." 218 F. 3d, at 53. The court reasoned that nothing in the regulations would prevent the display of empty tobacco product containers, so long as no actual tobacco product was displayed, much like movie jackets at a video store. *Ibid.* With respect to cigar products, the court observed that retailers tradition-

ally allow access to those products, so that the consumer may make a selection on the basis of a number of objective and subjective factors including the aroma and feel of the cigars. *Ibid.* Even assuming a speech interest, however, the court concluded that the regulations were narrowly tailored to serve the State's substantial interest in preventing access to tobacco products by minors. *Id.*, at 54. The court also noted that the restrictions do not apply to adult-only establishments. *Ibid.*

Petitioners devoted little of their briefing to the sales practices regulations, and our understanding of the regulations is accordingly limited by the parties' submissions. As we read the regulations, they basically require tobacco retailers to place tobacco products behind counters and require customers to have contact with a salesperson before they are able to handle a tobacco product.

The cigarette and smokeless tobacco petitioners contend that "the same First Amendment principles that require invalidation of the outdoor and indoor advertising restrictions require invalidation of the display regulations at issue in this case." Brief for Petitioners Lorillard Tobacco Co. et al. in No. 00–596, at 46, n. 7. See also Reply Brief for Petitioner U. S. Smokeless Tobacco Co. in Nos. 00–596 and 00–597, at 12, n. 7. The cigar petitioners contend that self-service displays for cigars cannot be prohibited because each brand of cigar is unique and customers traditionally have sought to handle and compare cigars at the time of purchase. Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 23, n. 9; Reply Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, p. 10, n. 7.

We reject these contentions. 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 (1993) (distribution of a magazine through newsracks), these regulations withstand First Amendment scrutiny.

Massachusetts's sales practices provisions regulate conduct that may have a communicative component, but Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas. See *O'Brien*, *supra*, at 382. See also *Pap's A. M.*, 529 U. S., at 289 (plurality opinion); *id.*, at 310 (SOUTER, J., concurring in part and dissenting in part); *Johnson*, 491 U. S., at 403. We conclude that 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 *O'Brien*, *supra*, at 382.

Unattended displays of tobacco products present an opportunity for access without the proper age verification required by law. Thus, the State prohibits self-service and other displays that would allow an individual to obtain tobacco products without direct contact with a salesperson. It is clear that the regulations leave open ample channels of communication. The regulations do not significantly impede adult access to tobacco products. Moreover, retailers have other means of exercising any cognizable speech interest in the presentation of their products. We presume 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 in the regulations that a customer is unable to examine a cigar prior to purchase, so long as that examination takes place through a salesperson.

The cigar petitioners also list Massachusetts' prohibition on sampling and free giveaways among the regulations they challenge on First Amendment grounds. See 940 Code of Mass. Regs. §22.06(1)(a) (2000); Brief for Petitioners Altadis U. S. A. Inc. et al. in No. 00–597, at 2. At no point in their briefs or at oral argument, however, did the cigar petitioners argue the merits of their First Amendment claim with respect to the sampling and

giveaway regulation. We decline to address an issue that was not sufficiently briefed and argued before this Court. See *Northwest Airlines, Inc.* v. *County of Kent,* 510 U. S. 355, 366, n. 10 (1994); *Williams* v. *United States,* 503 U. S. 193, 206 (1992); *Granfinanciera, S. A.* v. *Nordberg,* 492 U. S. 33, 38–40 (1989).

We conclude that the sales practices regulations withstand First Amendment scrutiny. The means chosen by the State are narrowly tailored to prevent access to tobacco products by minors, are unrelated to expression, and leave open alternative avenues for vendors to convey information about products and for would-be customers to inspect products before purchase.

IV

We have observed that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U. S., at 161. From a policy perspective, it is understandable for the States to attempt to prevent minors from using tobacco products before they reach an age where they are capable of weighing for themselves the risks and potential benefits of tobacco use, and other adult activities. Federal law, however, places limits on policy choices available to the States.

In this case, Congress enacted a comprehensive scheme to address cigarette smoking and health in advertising and pre-empted state regulation of cigarette advertising that attempts to address that same concern, even with respect to youth. The First Amendment also constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in receiving that information.

To the extent that federal law and the First Amendment

do not prohibit state action, States and localities remain free to combat the problem of underage tobacco use by appropriate means. The judgment of the United States Court of Appeals for the First Circuit is therefore affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.