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3 LORILLARD TOBACCO COMPANY, :

4 ET AL., :

5 Petitioners :

6 v. : No. 00-596

7 THOMAS F. REILLY, ATTORNEY :

8 GENERAL OF MASSACHUSETTS, :

9 ET AL.; :

10 and :

11 ALTADIS U.S.A. INC., ETC., :

12 ET AL., :

13 Petitioners :

14 v. : No. 00-597

15 THOMAS F. REILLY, ATTORNEY :

16 GENERAL OF MASSACHUSETTS, :

17 ET AL. :

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19 Washington, D.C.

20 Wednesday, April 25, 2001

21 The above-entitled matter came on for oral
22 argument before the Supreme Court of the United States at
23 10:12 a.m.

24

25

1 APPEARANCES:

2 JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of
3 the Petitioners.

4 WILLIAM W. PORTER, ESQ., Assistant Attorney General,
5 Boston, Massachusetts; on behalf of the Respondents.

6 BARBARA D. UNDERWOOD, ESQ., Acting Solicitor General,
7 Department of Justice, Washington, D.C.; on behalf of
8 the United States, as amicus curiae, supporting the
9 Respondents.

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 00-596, Lorillard Tobacco Company v. Thomas
5 Reilly, and Number 00-597, Altadis, Inc. v. Thomas Reilly.
6 Mr. Sutton.

7 ORAL ARGUMENT OF JEFFREY S. SUTTON

8 ON BEHALF OF THE PETITIONERS

9 MR. SUTTON: Thank you, Mr. Chief Justice and
10 may it please the Court:

11 The Massachusetts Attorney General's advertising
12 ban constitutes a prohibition, based on smoking and
13 health, imposed under State law with respect to cigarettes
14 and other tobacco products. For those straightforward
15 reasons, it is preempted by Federal law and, for these and
16 other reasons, it abridges free speech in violation of the
17 First and Fourteenth Amendments.

18 As to the preemption argument, the Court of
19 Appeals analysis is no longer being defended. It cannot
20 be. This ban is emphatically a prohibition with respect
21 to advertising.

22 Nor can the ban, alternatively, be defended on
23 the ground that it is not based on smoking and health. Of
24 course it is based on smoking and health, as one look at
25 Massachusetts' First Amendment argument proves, and as

1 they ultimately concede.

2 Massachusetts' alternative argument is that the
3 ban can be sustained so long as there are other
4 permissible nonpreemptive grounds for the ban, but if --

5 QUESTION: Well, what is it on the face of the
6 statutory scheme, of the Massachusetts scheme that tells
7 us that it is based on health?

8 MR. SUTTON: Well, we know, Your Honor, as a
9 matter of motivation, it's based on, the phrase is based
10 on, so it has a subjective component to it and, as the
11 Attorney General acknowledged when he announced the
12 regulations -- look at J.A. page 251.

13 QUESTION: Well, but I --

14 MR. SUTTON: The reason --

15 QUESTION: Before we get into the -- on the --
16 if I look at this on its face, what tells me that it's
17 based on health?

18 MR. SUTTON: Well, the very fact, Your Honor,
19 that the word based on, if you look at 5(b), they use the
20 word based on, and I think what they're trying to do is
21 read that out of the statute. That has a motivational
22 component to it, and so it is fully appropriate --

23 QUESTION: Well, you want me to go to motivation
24 again. I want to stay with the statutory scheme. Can you
25 help me with that at first?

1 MR. SUTTON: Well, if you look at the --

2 QUESTION: Just from an objective standpoint,
3 why is this based on health?

4 MR. SUTTON: Well, the fact is, under the ban
5 you're not allowed to have advertisements specifically
6 with the warning label that is required under Federal law,
7 so in that way, operationally, it's precluded.

8 But I just want to make sure that our position
9 is clear. It has both an effects and an intent component
10 to it, the based-on-smoking-and-health language, and
11 that's why it's banned under either theory.

12 QUESTION: So the fact that the Surgeon
13 General's warning cannot be advertised in conjunction with
14 a proposal for a commercial transaction means that health
15 is adversely affected?

16 MR. SUTTON: Absolutely, Your Honor, and here's
17 the reason. In 1969, when they were looking at whether to
18 amend section 5(d) and how to amend it, one of the great
19 concerns was that States or localities ultimately would
20 respond to the FTC's warning requirement on advertising by
21 ultimately expressing disagreement with that warning
22 requirement.

23 The concern was after '69 they'd say, that's not
24 enough, we don't like it, and so what they'd do in
25 response is, they'd say, we're just going to ban

1 advertising altogether, and that's exactly what California
2 was considering in '69, New York City was considering in
3 '69. It was before the Congress in 1969, and that's why
4 they banned this very type of thing.

5 QUESTION: Other than the elimination and the
6 unavailability of the Surgeon General's warning, are there
7 any other objective and not subjective or motivational
8 features that I -- that show that this is based on health
9 that I can determine from the -- by looking at the
10 regulatory scheme itself?

11 MR. SUTTON: Everything, Your Honor -- you're
12 saying specifically regulations themselves, and you're
13 saying we're not going to look at why Massachusetts did
14 that, and so just for a second we'll suspend that and
15 assume you don't look at intent. But even if you look at
16 intent, at what they did in effect, it's not just that you
17 can't get the warnings. Obviously, it just relates to
18 schools. I mean, that is a health-related reason. They
19 were concerned about underage sales to children. That's a
20 health --

21 QUESTION: Well, of course, the very fact that
22 they applied this to tobacco advertising and no other kind
23 of advertising suggests something peculiar about tobacco
24 that they didn't like.

25 MR. SUTTON: Absolutely, Your Honor, and I mean,

1 that alone on the face of the statute proves the very
2 fact.

3 QUESTION: Mr. Sutton what are -- the response
4 to that was -- or one response to that was in the
5 Massachusetts brief, and it said, look, in the real world,
6 any -- as the Chief Justice suggested, any advertising ban
7 or limitation directed to tobacco is going to be based on
8 smoke -- on the relationship between tobacco and health.
9 We recognize that.

10 They said, however, if you read the ban that
11 broadly, if you read the preemption that broadly, rather,
12 then the words of limitation, which are -- which refer to
13 smoking and health are going to have no limitation at all,
14 because it's going to include everything, and therefore
15 you've got to pull back or the words become meaningless.

16 What is your response to that?

17 MR. SUTTON: Well, Your Honor, that's an
18 important point. In 1969, the reason you had to have
19 based-on-smoking-and-health language there is, otherwise
20 this ban would apply to all general zoning laws. In other
21 words, you'd have ERISA II without the based-on-smoking-
22 and-health language.

23 QUESTION: Well, I suppose --

24 MR. SUTTON: The very point --

25 QUESTION: I suppose if it were directed solely

1 to tobacco, it wouldn't be confused with a -- it wouldn't
2 be thought to raise a conflict with the general zoning
3 law, would it?

4 MR. SUTTON: No, but that's my point. My point
5 is that, without the based-on-smoking-and-health language
6 you'd have ERISA in the sense that every State law that
7 had any application to cigarette advertising would be
8 covered. That would mean the States or localities
9 couldn't have general zoning laws regarding advertising,
10 billboards, or store front signs. The based-on-smoking-
11 and-health language critically --

12 QUESTION: Well, that would assume -- it would
13 assume that the State laws would be interpreted to mean
14 that they were intended to modify zoning laws rather than
15 intended to regulate tobacco, and I don't know that that
16 would have been a realistic interpretation, would it?

17 MR. SUTTON: Maybe I'm not understanding your
18 question, but --

19 QUESTION: You're talking about general zoning
20 laws that preclude not just tobacco billboards but all
21 billboards.

22 MR. SUTTON: Exactly. Exactly, and I'm making
23 the point that, without the based-on-smoking-and-health
24 language you'd have a situation where section 5(b)
25 conceivably, a little bit like ERISA, could cover every

1 single general zoning law regarding all commercial, all
2 noncommercial --

3 QUESTION: It's a very indirect way for the
4 Congress to accomplish that objective, it seems to me.

5 MR. SUTTON: Not at all, Your Honor. If you
6 take --

7 QUESTION: Rather, it could have said,
8 specifically directed to cigarettes, and that would have
9 done it just as easily.

10 MR. SUTTON: Well, the based-on-smoking-and-
11 health language, I think, does it very directly. I mean,
12 keep in mind, they were amending section 5(b) in 1969.
13 Prior to 1969 they had the language that said, statements
14 in advertising. In '69 they go to requirements or
15 prohibitions with respect to advertising. That would
16 cover an awful lot of general laws but for the based-on-
17 smoking-and-health language, and that's exactly --

18 QUESTION: Well, I suppose, though, that here
19 the State might say, what we're concerned about is
20 underage smoking. Do you say that the State laws that
21 prohibit children from smoking are invalid somehow?

22 MR. SUTTON: No, Your Honor, and that's a
23 critical, and again if you go back to section 5(b), you'll
24 see why. Conspicuously missing from 5(b) is the word
25 sale. It just preempts bans on advertising or promotion,

1 but not sale, so for example -- and this is in Cippolone
2 at footnote 26 --

3 QUESTION: Well, it's not that the State has to
4 address all aspects of the problem, but is the State not
5 entitled to do something about promotion and advertising
6 to the extent that it encourages underage people to smoke?

7 MR. SUTTON: Well, I think there would be some
8 situations where State laws along those lines would not be
9 preempted, but they're very few. Let me give you one
10 example.

11 QUESTION: Well, and these laws have some of
12 that in there. For instance, the requirement that to sell
13 cigarettes it has to be a person-to-person transaction.
14 You can't get it from a vending machine, in order to
15 protect children.

16 MR. SUTTON: But that's not a law at this Court
17 that we're arguing is preempted here, and it's not one we
18 sought preemption on.

19 QUESTION: Okay, so now what we have is outdoor
20 advertising, in effect, which the State says would
21 encourage children to smoke, so they want to restrict it.

22 MR. SUTTON: I understand what you're saying. I
23 think there is a line here that the Court is going to have
24 to draw, and I think it goes something like this. We know
25 the States after '69 could still have bans on sales to

1 minors. That also must mean you couldn't have offers to
2 sell, conspiracies to sell, or a direct solicitation
3 for --

4 QUESTION: Well, there may be limits on
5 advertising of some kind. That's what we're dealing with
6 here, so I think the focus on smoking and health may be
7 just slightly off-base here.

8 MR. SUTTON: But Your Honor, once you're beyond
9 a direct solicitation for a legal sale, you're into the
10 main core language of section 5(b), and keep in mind,
11 Congress was not unaware of the problems you're raising,
12 and that's why they made sure that the FTC had authority
13 in this industry to investigate unfair and deceptive trade
14 practices.

15 QUESTION: But when you read the Federal
16 statute, it does seem to be directed more toward what has
17 to be on cigarette labels than anything else. I mean,
18 they didn't want a whole conflicting array of State
19 requirements of how the package had to be labeled.

20 MR. SUTTON: I respectfully disagree, Your
21 Honor, and this was the quid pro quo in 1969. On the one
22 hand, in the same act they said there shall be no
23 cigarette advertising on radio and TV. On the other
24 hand, the other side of the bargain is, we're not going to
25 let localities and States after the fact start to ban it

1 as well, just as they were considering doing.

2 But I think -- there are two things that get to
3 the children's solicitation. If it is not a direct
4 solicitation for an illegal sale, then it is preempted,
5 but there are two reasons the Court may not be concerned
6 about that. First, the FTC does have authority to
7 investigate this very thing. In fact, the State of
8 Massachusetts in 1993 asked the FTC to investigate a
9 tobacco company on just these accounts. The FTC did, and
10 so it shows they understood it, and the FTC knew how to
11 operate.

12 Secondly --

13 QUESTION: But then you're saying it has to be
14 Federal authority, the FTC, and the FDA, at the time they
15 thought they might regulate nicotine as a drug --

16 MR. SUTTON: In 1996, right.

17 QUESTION: -- also had a similar ban, as I
18 understand it.

19 If there's doubt on this, as to how this should
20 be interpreted, doesn't the presumption against preemption
21 of State control prevail, and isn't -- has -- it's not
22 just the First Circuit who has said no preemption -- isn't
23 that so?

24 MR. SUTTON: Well, Your Honor, on this -- the
25 theory that's being advanced to this Court has been

1 embraced by only one circuit, the Fourth, and --

2 QUESTION: How many circuits have held that
3 there is no preemption of size and location regulations?

4 MR. SUTTON: Well, all told, four, but the three
5 others that have done it have done it with respect to
6 advertising, which is a theory that is no longer being
7 defended. The only court that has embraced the based-on-
8 smoking-and-health theory was the fourth, and the Second
9 Circuit dismissed that as mere sophistry, as I think they
10 should have.

11 QUESTION: With respect to allowing States to
12 regulate the location and the size, of signs.

13 MR. SUTTON: Exactly.

14 QUESTION: There are four circuits that have
15 held that there is no preemption of that. They may have
16 given different reasons, but four have said that the
17 States' authority has not been taken away from them by the
18 Federal Government.

19 MR. SUTTON: And I'm just making the point that
20 three of those circuits embraced a reasoning that is no
21 longer being defended, which leaves the based-on-smoking-
22 and-health theory advocated here, and I don't know how you
23 can look honestly at their brief, the press release of the
24 Attorney General when he announced these regulations, and
25 say they weren't based on smoking and health. That

1 animated everything they did.

2 QUESTION: So would you like this Court, then,
3 to send it back and say, First Circuit, consider the
4 theories that other courts of appeals have accepted?

5 MR. SUTTON: Well, that is fully up to the
6 Court. I mean, we've been willing to argue the
7 alternative ground that Massachusetts presented, but if
8 the Court wishes to send it back, that's fine. We're
9 agnostic about that point. But we do think either theory
10 does not work.

11 And the other point I wanted to make that I
12 think gets to your point, Justice Ginsburg, and yours,
13 Justice O'Connor, is, keep in mind these children's
14 solicitation hypotheticals are really hypotheticals. I
15 mean, all of the major tobacco manufacturers entered into
16 an MSA, multisettlement agreement, multi-State settlement
17 agreement, in November of 1998, that prohibits this very
18 thing. I mean, this is something that cannot happen after
19 1998 by 98 percent of the cigarette manufacturers in this
20 country.

21 QUESTION: Can I go back to your first point?
22 You started off saying this is a ban, and suppose
23 hypothetically I were to think that it's okay for the
24 State to regulate location, but not okay for them to ban
25 all advertising. Then, at that point, you get to your

1 maps. You have a number, and you have the maps.

2 When I saw the number, I thought, well, this is
3 a ban, because 90 percent of the area can't advertise.
4 Then I looked at the maps. It didn't seem to me -- I
5 can't make heads or tails out of them. I would have
6 thought the right question is, of the area previously
7 available for advertising, in how much of that area can
8 you no longer advertise as a result of this, and I can't
9 get an answer to that question from the map, and the map
10 only covers Boston and not the suburbs. It doesn't cover
11 the suburbs of Worcester. I mean, most of the population
12 of Massachusetts, I don't know what the situation is -- we
13 now have those maps -- and yet I think it's very important
14 to your argument, on my assumption.

15 MR. SUTTON: Your Honor, this provides a
16 transition to the First Amendment argument. I mean,
17 ultimately, you are allowed to aggregate all State
18 conduct, so the 90-percent figure is a legitimate figure,
19 because it is aggregating all State conduct.

20 QUESTION: I'm not saying legitimate or not, but
21 in my own mind, I thought the relevant distinction turned
22 on taking the area previously available for advertising.
23 What percentage of that area was cut off? I take it I
24 cannot get an answer to that question in the State of
25 Massachusetts.

1 MR. SUTTON: That is not --

2 QUESTION: So I cannot get a -- even a guess as
3 to whether this is more a ban, which sounds like content,
4 or more like location, which sounds like not content.

5 MR. SUTTON: Well, either way, Your Honor, I
6 would submit it is an advertising ban. It is a regulation
7 with respect to advertising cigarettes and, as Justice
8 Blackmun said in Cippolone, you cannot, after 1969, do by
9 negative mandate what you can't do by positive mandate.

10 QUESTION: But my question is about maps --

11 MR. SUTTON: To the extent of the --

12 QUESTION: What -- is there anything you can say
13 that can, in the light --

14 MR. SUTTON: It's not in the record. It's
15 simply not in the record as to what the additional
16 percentage of restriction is by the advertising ban.

17 QUESTION: So then, if I thought my question was
18 important, then the answer would be -- and I'm not saying
19 it is, but if I came to that conclusion, I would then have
20 to think, we should send it back to get this fact
21 developed.

22 MR. SUTTON: Conceivably, Your Honor, yes.

23 If I could turn to the First Amendment
24 argument --

25 QUESTION: Just before you do, Mr. Sutton, I

1 want to double-check on one assumption I'm making. You
2 referred a minute ago to a quid pro quo relationship
3 between subsection (a) and subsection (b).

4 MR. SUTTON: But I was actually referring to
5 1335, which is the ban on radio and TV advertising.

6 QUESTION: Okay. Okay.

7 MR. SUTTON: And then section 5 of 1334(b) is
8 what has the preemption.

9 QUESTION: Is there any -- I have assumed --
10 there is no indication in the record, but I will ask you,
11 is there any indication in the legislative record that
12 there was in effect a legislative agreement between the
13 tobacco companies and the people who were pushing the
14 legislation that, in response to withdrawing tobacco
15 company opposition to some things that the companies
16 didn't like, there would -- they would be rewarded by a
17 preemption ban as broad as you are arguing for?

18 MR. SUTTON: Your Honor, the legislative history
19 is pretty extensive in 1969. It's clear, we know one
20 reason for the radio and TV ban was protecting children
21 health, and I think that's one reason why the 5(b)
22 preemption, after section 5(b), would still apply to types
23 of hypotheticals we've been talking about.

24 But your question, you know, as to whether --
25 what were the cigarette companies getting out of the quid

1 pro quo --

2 QUESTION: They -- to put it --

3 MR. SUTTON: -- obviously --

4 QUESTION: Did they make a deal to get what you
5 say they are entitled to under (b)?

6 MR. SUTTON: I have no idea, but it's clear
7 there was one thing animating the discussion. We're not
8 going to say there's a complete ban on radio and TV, and
9 then after the fact every city and State in this country
10 can then suppress the rest of the speech.

11 QUESTION: Mr. Sutton, with respect to that
12 trade-off, as you've described it, I take it now you're
13 making a transition to First Amendment.

14 MR. SUTTON: Trying, yes.

15 (Laughter.)

16 QUESTION: If I read you correctly on your
17 strict standard, then that ban on radio and television
18 would flunk, would it not?

19 MR. SUTTON: Not necessarily at all, Your Honor,
20 and again this is hypothetical. The industry agreed they
21 they were going to withdraw from that particiular form of
22 advertising before the ban went into effect. They've not
23 challenged it since and, in fact, this Court has already
24 upheld the ban.

25 QUESTION: But on your theory of strict scrutiny

1 of Federal restrictions, on what basis could the ban on
2 television and radio survive, other than the embrace of
3 the tobacco people, who say, well, we'll put up with it?

4 MR. SUTTON: On the view that different
5 medium -- a different medium is treated differently, and
6 that's what the Court did in Red Lion. The Court has
7 followed Red Lion since and, in fact, in Virginia Board of
8 Pharmacy, the key case in 1976 that started to recognize
9 the constitutional protection for commercial speech,
10 that's exactly what the Court did. We said, we're going
11 to -- we've got here a price advertising ban. We're not
12 going to deal with the question of how that ban would be
13 treated if it were on a different medium of communication.
14 I think the Court should do the same thing here.

15 The key problem with this particular law and why
16 it gets strict scrutiny is the fact that it does suppress
17 a substantial amount of speech directed to adults about a
18 lawful product, and does so solely based on the message in
19 the speech.

20 QUESTION: What's your case authority for the
21 proposition you just stated, Mr. Sutton?

22 MR. SUTTON: Well, Your Honor, I would say it is
23 very much like Playboy Entertainment, and we would submit,
24 Your Honor -- and RV, but if indecent speech, if racist
25 fighting words get strict scrutiny, then surely commercial

1 speech should as well.

2 QUESTION: Well, you don't need to argue that in
3 order to prevail, do you? I mean, just -- you began by
4 saying that since this prohibits all adult speech, isn't
5 that more extensive than necessary under the Central
6 Hudson test?

7 MR. SUTTON: You're exactly right, Justice
8 Kennedy. We do not need to have a strict scrutiny
9 argument in order to win. We think the Court should
10 embrace ultimately the plurality reasoning in 44 Liquor
11 Mart, and we think this is a good case and a good vehicle
12 to do it, but you're right, we do not need to do that.
13 This law does have a more fatal flaw, particularly under
14 prong 4 of Central Hudson.

15 QUESTION: Mr. Sutton, may I tell you why I at
16 least am concerned about your saying this is like any
17 other commodity, but it really isn't. I mean, we're
18 dealing with a commodity that is like no other. This is
19 highly addictive, and especially dangerous to children,
20 who can get hooked at age 13, and can't get off it for the
21 rest of their lives, so it isn't like even sticks and
22 stones can break my bones, bad words.

23 MR. SUTTON: But Your Honor, even if you take
24 that view, our theory allows legislatures to take into
25 account the commercial aspects of speech that they're

1 allowed to regulate. One aspect of that speech they can
2 regulate is deceptive advertising, or advertising that
3 solicits an illegal sale.

4 QUESTION: But my question to you is, can't you
5 make a distinction with respect to the danger of the
6 product and, in that respect, I don't know anything else
7 that's lawful to sell that's like cigarettes.

8 MR. SUTTON: Well, Your Honor, just 2 years ago
9 in Greater New Orleans the Court said there is not a vice
10 exception to the First Amendment, and now it's being
11 suggested there's a vice exception to the no-vice
12 exception rule.

13 I mean, this is a product that is lawful in this
14 country. Whenever you've got a product that's lawful for
15 adults but not for children, you always have the problem,
16 invariably, that speech directed to adults ultimately will
17 get to children.

18 QUESTION: Well, that changes the approach a
19 little bit. Justice Ginsburg points out that it's
20 addictive and therefore dangerous from that standpoint.

21 MR. SUTTON: And Your Honor --

22 QUESTION: And then you equate that with vice,
23 and I think that slides away a little bit from the thrust
24 of her concern.

25 MR. SUTTON: But if that was, let's say, a

1 commercial aspect concern the legislature was entitled to
2 regulate, they'd have to follow up with regulations that
3 were focused on that concern.

4 These regulations do no such thing. They make
5 tobacco -- QUESTION: Well my question
6 to you is, is it legitimate to say there is something
7 about this commodity that's not true of -- some people are
8 compulsive gamblers, but most people aren't. Some people
9 are sensitive to alcohol, but most people aren't, but this
10 is a drug that most people will be addicted to if they get
11 hooked on it.

12 MR. SUTTON: Your Honor, my only point is, if
13 you take that view, and let's say, for the sake of
14 argument, you do, that still means you have to tailor,
15 whether under strict or intermediate scrutiny, your
16 regulation to that concern. You cannot say that about
17 this law. It draws --

18 QUESTION: But has the State tried to tailor it
19 by saying we're going to prohibit it where it's near
20 places that children congregate, schools and parks, and
21 within a certain distance we're going to be concerned
22 about advertising cigarettes?

23 MR. SUTTON: Well, Your Honor, we would say that
24 geographically it is still too broad, but the point I'm
25 trying to make with Justice Ginsburg, and I hope addresses

1 your concern, is that the regulation doesn't focus on
2 words, advertisements that are uniquely appealing to
3 children. It bars the mere mention of the word, tobacco,
4 cigarettes, cigar, anywhere. There's no --

5 QUESTION: What is the message that the
6 advertising tries to convey?

7 MR. SUTTON: Brand loyalty, in the case of most
8 of the petitioners. Brand loyalty.

9 QUESTION: Just brand loyalty, that's all --

10 MR. SUTTON: Yes.

11 QUESTION: -- that's at issue?

12 MR. SUTTON: Absolutely, Your Honor.

13 But the -- I think this issue --

14 QUESTION: You were saying that the only
15 advertising, then, that could be targeted under a properly
16 tailored scheme is an ad which literally had a juvenile,
17 literal juvenile appeal, you know, smart kids smoke, Wind
18 in the Willows characters with cigarettes? You're not --

19 (Laughter.)

20 MR. SUTTON: Your Honor --

21 QUESTION: But I mean, it can't be that -- I
22 mean, it can't be that narrow, so what is it about the
23 content that could be better targeted to children than
24 simply the content of cigarette advertising which gives,
25 tries to give the message that it's a nice and

1 sophisticated thing to smoke? I mean, what --

2 MR. SUTTON: But Your Honor, that's exactly my
3 point. That's not what all cigarette advertising does,
4 and that's not what a Mom and Pop tobacco store would do.
5 They just want to communicate to their consumers what the
6 price is, what the brand is, whether there's a sale, what
7 the contents of the --

8 QUESTION: Well, if that were the case, then all
9 cigarette advertising would simply have brand names, or
10 the photographs of the cigarette packages, and it would
11 not have people in cowboy suits or people in bars or
12 people in beaches doing sophisticated and healthy things,
13 and that's just not the way the advertising is --

14 MR. SUTTON: But Your Honor, I respectfully
15 think you're proving my point. There are different types
16 of advertising out there, and they've banned everything,
17 even something as basic as price --

18 QUESTION: Mr. Sutton, I understand you were
19 prepared to acknowledge that the State could ban ads that
20 say, smoking ain't so bad, it's worth it. Could the State
21 ban adults from receiving advertising of that sort?

22 MR. SUTTON: Not across the board, Your Honor,
23 no, they cannot, and the key point --

24 QUESTION: So that the necessity of narrowing
25 the ban to children who hear the terrible message would

1 exist whether it's just brand loyalty or smoking's a good
2 thing, right? I assume you're entitled to say, smoking's
3 okay.

4 MR. SUTTON: Absolutely, under the First
5 Amendment you are, absolutely correct. I'm making the
6 point that --

7 QUESTION: But you're not entitled, you say, to
8 say smoking's a good thing within 20 feet of a school.

9 MR. SUTTON: You clearly could not, and Carey
10 points the path here. You cannot incite illegal conduct.

11 QUESTION: What is it here, 1,000 --

12 MR. SUTTON: 1,000 feet, which ultimately is 90
13 percent of the three major metropolitan areas in
14 Massachusetts.

15 QUESTION: So what is -- isn't it a question of
16 degree? This is not a legal product in respect to
17 children.

18 MR. SUTTON: That's right, Your Honor.

19 QUESTION: So you yourself concede that it's
20 okay to ban ads from the air, from television and radio.

21 MR. SUTTON: Yes.

22 QUESTION: All right, and so then it's just a
23 question of degree. That is, to what extent are there
24 other avenues for advertising.

25 MR. SUTTON: Your Honor --

1 QUESTION: I take it there are many, so I just
2 want to get your --

3 MR. SUTTON: Anyone concerned about -- just --
4 anyone concerned about the radio and TV badge -- ban
5 should not be trying to sustain these laws. I mean, we're
6 going to have more suppression that's only going to make
7 the radio and TV ban more suspect, so I want to make sure
8 we're clear about that point.

9 The second problem I would say, here, is a
10 tailoring problem, and it's the notion that the issues
11 they purported to be addressing in January of 1999 were
12 issues they claimed to the State of Massachusetts they had
13 resolved in November of 1999 -- excuse me, 1998.

14 That is exactly what the MSA did. What the MSA
15 did is, it dealt with all of the major cigarette
16 manufacturers. It made sure that there would not be any
17 youth targeting when it comes to advertisement. It banned
18 all billboards. This is not a billboard case. In fact,
19 it's barely a storefront sign case, because it only
20 applies to storefront signs that are less than 14 square
21 foot in size.

22 So the very issues, in May of 1998 -- this is
23 the only time they held a hearing -- they thought they
24 should address were addressed in November of 1998. They
25 do not --

1 QUESTION: But you're not arguing that the
2 agreement precluded this. You're not saying that the
3 Attorney General was breaking the agreement.

4 MR. SUTTON: Absolutely not. Absolutely not.

5 QUESTION: You're not saying that he's estopped.

6 MR. SUTTON: He's breaking the law of the First
7 Amendment. You've got to show there is a reason to
8 suppress speech before you do so. You've got to show
9 you've tried all conduct channels, and you've got to show
10 that the alleged commercial aspects of the speech that you
11 consider problematic are still problematic. He could not
12 say that after November of 1998.

13 QUESTION: Well, I don't -- I'm not -- I have to
14 say I don't think your argument is sound. He could not
15 say that with respect to the areas covered by the
16 agreement. What he is saying is that there are dangers
17 that justify the ban, and those dangers exist outside the
18 area covered by the agreement.

19 MR. SUTTON: Your Honor, that's not what the
20 research shows. They relied on the FDA rule. The FDA
21 rule was based on billboards. That's where they got the
22 1,000-foot measurement, that you could see large
23 billboards from two to three blocks away, and despite all
24 that, and despite the fact that after November '98 --

25 QUESTION: Then your argument is that he doesn't

1 have any evidence that would justify a regulation beyond
2 the scope of the regulation in the settlement.

3 MR. SUTTON: Absolutely, and that's exactly what
4 the First Amendment requires.

5 QUESTION: In other words, it is not -- but your
6 argument is not that the settlement covered what he
7 claims. You're saying his evidence does not justify doing
8 what he claims, in addition to the settlement.

9 MR. SUTTON: Absolutely.

10 QUESTION: Okay.

11 MR. SUTTON: Absolutely, and in fact that's what
12 Sable Communications says at pages 129 and 130, that in
13 that case it was the FCC that had a rule, and they'd not
14 waited to see how the rule worked, in other words, how
15 effective it was. They simply passed another speech
16 suppression measure, and this is exactly what the Court
17 said. You've got to see if that conduct-related measure
18 works first and then, if it doesn't, and only if it
19 doesn't, can you narrowly tailor an additional law that
20 perhaps suppresses some speech, but only what is
21 necessary.

22 If I could, I'd like to --

23 QUESTION: Who is bound, and to what extent, by
24 this MSA?

25 MR. SUTTON: Excuse me, Your Honor?

1 QUESTION: Who is bound, and to what extent?

2 MR. SUTTON: 98 percent of the tobacco
3 manufacturers and, indeed, at the cert stage Massachusetts
4 noted in its opposition brief at pages 9 and 10 that the
5 Court shouldn't take this case, because it only affects
6 these petitioners. I think that's right. The issue --

7 QUESTION: These petitioners are not part of the
8 agreement?

9 MR. SUTTON: They are part of the agreement.

10 QUESTION: So -- but there are at least --
11 everything that you've said about the agreement doesn't
12 apply to the tobacco sellers, manufacturers who are not
13 party to the agreement.

14 MR. SUTTON: And that would be 2 percent of the
15 industry, and there's no showing in this record, and there
16 cannot be, that there are trying to put up billboards, or
17 that they're trying to put up alluring storefront signs
18 that cause problems with --

19 QUESTION: And that goes for the smokeless
20 tobacco and cigars as well?

21 MR. SUTTON: The smokeless tobacco and the
22 cigars do not have a multi-State agreement with
23 Massachusetts, but they were clearly add-ons when it comes
24 to these regulations. There's no evidence with respect to
25 them. Cigars, I think, in 1997 spent \$50,000 total just

1 on storefront signs and, as to smokeless tobacco in
2 Massachusetts, it was going down the very time they were
3 thinking about this particular issue, so they were clearly
4 add-ons.

5 If I could, I'd like to reserve the rest of my
6 time for rebuttal.

7 QUESTION: Very well, Mr. Sutton.

8 Mr. Porter, we'll hear from you.

9 ORAL ARGUMENT OF WILLIAM W. PORTER

10 ON BEHALF OF THE RESPONDENTS

11 MR. PORTER: Mr. Chief Justice, and may it
12 please the Court:

13 The petitioners argue that Congress has
14 expressly preempted the States from passing any law that
15 limits the location of cigarette advertising. If that
16 view is correct, no State or locality may forbid cigarette
17 advertising at the town Little League field, or cigarette
18 billboards which overlook its elementary schools.

19 QUESTION: What -- I'm having trouble hearing
20 you. Do you want to speak up --

21 MR. PORTER: Yes, Your Honor.

22 QUESTION: -- a little bit? Thank you.

23 MR. PORTER: Yes.

24 Nothing in the act compels the result that
25 petitioners urge. Instead, Congress' main purpose in the

1 Cigarette Labeling Act was to provide a uniform national
2 health warning for cigarette packages and cigarette
3 advertising, and to avoid burdening cigarette
4 manufacturers with conflicting warning requirements that
5 might be set by the States.

6 Section 5(b) protects these specific interests
7 by preempting only those State laws that dictate the
8 health-related information in or with respect to --

9 QUESTION: That -- your proposition is by no
10 means clear from just a reading of section 5(b). I mean,
11 certainly it could be read more broadly.

12 MR. PORTER: Your Honor, we would urge that
13 section 5(b) should and must be construed in the context
14 of the act as a whole. I think Your Honor's question
15 points out the possibility of alternative constructions,
16 but the problem with section 5(b) is exactly that. It's
17 ambiguous, and its ambiguity comes from the fact that,
18 when read in isolation, one does not know at what level of
19 generality to apply the phrases in section 5(b).

20 QUESTION: I don't see how your -- what's
21 your -- how do you want it read? That is, I have the
22 words in front of me, and I took you as having wanted it
23 read as, with respect to the information contained in
24 advertising, or the content of advertising, but maybe
25 there's a different way to read it.

1 MR. PORTER: Well --

2 QUESTION: How specifically do you want us to
3 read it?

4 MR. PORTER: Your Honor, the purpose of the
5 statute, we would argue, defines or provides a specific
6 meaning to section 5(b).

7 QUESTION: Right.

8 MR. PORTER: And the words, based on smoking and
9 health, are what limit the scope of preemption to the --

10 QUESTION: You mean, this isn't based on smoking
11 and health? I'd find it hard to say that with a straight
12 face. I don't know what I'm supposed to say about that.
13 Of course they're doing this because they feel there's a
14 bad relationship between smoking and health. What's the
15 answer to that?

16 MR. PORTER: The answer, Your Honor, is that the
17 phrase, based on smoking and health in section 5(b),
18 should obtain a more objective meaning than that, and the
19 objective meaning comes from construing that phrase in the
20 larger context of the act as a whole, otherwise, what we
21 have is a situation where the phrase, based on smoking and
22 health, really does become virtually unlimited. It is a
23 phrase potentially of great breadth when construed, as
24 petitioners have, in isolation, and referring to any
25 health concern that might arise in the motivation behind

1 the statute or in any health-related effect of an
2 advertise -- of a State law respecting cigarette
3 advertising.

4 QUESTION: Assume for argument's sake I agree
5 with everything you say. It's wonderful. I'm faced with
6 this language. Now you tell me how to read it to get to
7 the place that you want to get to.

8 Now, that's where I -- it says you can't have a
9 regulation based on smoking and health and I'm beginning,
10 naively, to think, if this isn't based on smoking and
11 health, what is, and so therefore, however I might feel
12 about it, that's what the language says. Now, I want you
13 to tell me what, in your view, I would -- supposed to be
14 doing.

15 MR. PORTER: Two things, Your Honor. Again, I
16 think a close look at section 1331, the statement of
17 purpose, indicates that what Congress was trying to
18 achieve is to obtain control over the health-related
19 information in cigarette advertising, and we see that with
20 specific language in section 1331, where Congress says,
21 we're going to provide a warning and we want to avoid
22 nonuniform laws, advertising laws, and now I quote, with
23 respect to any relationship between smoking and health.

24 QUESTION: Mr. Porter, I don't think that on its
25 face it says that. It does say the broader thing on its

1 face, but I'm especially struck by the fact that this
2 language amended an earlier text which did say exactly
3 what you say this new text says. The old text said, no
4 statement relating to smoking and health shall be required
5 in the advertising of any cigarettes.

6 They could have simply tracked that language and
7 said, no State shall require any additional, or prohibit
8 in the advertising of any cigarettes. They went out of
9 their way to change that text into this broad text.

10 MR. PORTER: Your Honor, I think that what is
11 significant is what Congress didn't change in 1969. Your
12 Honor is correct that the 1965 preemption language
13 preempted statements relating to smoking and health. The
14 phrase, relating to smoking and health, has an objective
15 meaning in that provision. It clearly refers to the
16 health-related content of the statement.

17 The phrase, relating to smoking and health, was
18 retained essentially unchanged in 1969.

19 QUESTION: Yes, but as Justice Scalia has
20 pointed out, it did amend and broaden the preemption
21 provision at the same time that it banned all advertising
22 in electronic media. Now, maybe the inference from that
23 is that it left out, Congress wanted to leave out
24 billboard and print media advertising, let that not be
25 covered.

1 MR. PORTER: Your Honor, I -- the 1969
2 amendments clearly did expand the possible forms of
3 regulation that could be preempted, but it still retained
4 the focus on health-related content by virtue of the
5 retention of the phrase, based on smoking and health.

6 In addition, Your Honor, the fact that Congress
7 at the same time prohibited advertising on television and
8 radio, I don't think provides any basis for an
9 inference -- I think it would be a great stretch to infer
10 from that that Congress was invading the traditional
11 authority of the States to regulate the location of
12 advertising.

13 QUESTION: No, but it may well have been part of
14 the legislative deal. Look, this happened in 1969, over
15 30 years ago. Public attitudes regarding cigarettes were
16 not nearly what they are today. It was much more
17 controversial as to how much you're going to move against
18 them.

19 I don't know what the legislative deal was, but
20 there's always a deal going on there, give me this, I'll
21 give you that and so forth. The best way to tell what the
22 fair deal was, it seems to me, is to read the text of the
23 statute, and this is phrased as a very broad ban against
24 the States going beyond the electronic media ban that was
25 contained in the statute. That's what it reads like, it

1 seems to me, and if that was the deal, it seems to me we
2 should enforce it.

3 MR. PORTER: Your Honor, I don't think we should
4 infer a deal of that type. At the same time, considering
5 the environment in 1969, and this is apparent in the
6 legislative history, Congress was concerned in general
7 with the prevalence of tobacco advertising and what to do
8 about a warning. It provided, ultimately, for a warning
9 in advertising. It did prohibit advertising on television
10 and radio.

11 But what you see in the legislative history is a
12 great concern that the advertising dollars that were saved
13 when TV advertising stopped would simply migrate to other
14 places. Well, Congress -- that concern is expressed
15 throughout. It would be unlikely that in the face of that
16 kind of concern, at the same time Congress would pass a
17 preemption provision that would essentially guarantee
18 tobacco, cigarette advertisers the right to advertise
19 anywhere.

20 QUESTION: Well, could you put it -- could I ask
21 you to put it this way. I'm looking on page 15 of the
22 Government's brief that sets out the text of the
23 predecessor section, the one that Justice Scalia quoted.
24 It starts by saying, no statement relating to smoking and
25 health shall be required in advertising, and so on.

1 You acknowledge that at least that has been
2 broadened to the extent of saying, no statement shall be
3 required or prohibited, I suppose.

4 MR. PORTER: Yes.

5 QUESTION: Now, it seems to me that where you
6 come out is to say that the new section means basically
7 what the old one did, except that it adds prohibited to
8 required. What more, on your view, does the new section,
9 does the new preemption section preempt?

10 MR. PORTER: Here are two examples, Your
11 Honor --

12 QUESTION: On your reading.

13 MR. PORTER: Yes, on the State's reading. The
14 Court's holding in Cippolone illustrates that the addition
15 of the words, require -- requirements or prohibitions,
16 allows the potential for preemption of certain common law
17 claims. Prior to that, when the word in the 1965 law was
18 statements, only positive enactments could be preempted,
19 and then on the back end of the provision --

20 QUESTION: Excuse me. Statement doesn't refer
21 to the governmental prohibition. It doesn't refer to
22 whether it's a statute or a common law case. It says, no
23 statement relating to smoking and health shall be
24 required.

25 MR. PORTER: Yes, Your Honor.

1 QUESTION: It has nothing to do with common law
2 versus legislation, does it?

3 MR. PORTER: I'm simply mentioning that in the
4 Cippolone decision, much of the decision was devoted to
5 determining whether the addition of the words,
6 requirements or prohibitions in 1969, what was the effect
7 of that, and the Court, the plurality determined that
8 those new words provided for the possibility of preemption
9 of common law claims.

10 QUESTION: Well, you had --

11 QUESTION: Which a mere reference to statement
12 would not do? That's your --

13 MR. PORTER: Precisely, Your Honor.

14 QUESTION: Well, but it says statement shall be
15 required. Why wouldn't required embrace the common law as
16 well as -- I don't see any difference.

17 MR. PORTER: I'm only describing --

18 QUESTION: All right.

19 MR. PORTER: -- the Cippolone holding.

20 Just to finish, the words at the end of the
21 provision in the advertising were changed to, with respect
22 to advertising. The Vango Media case from the Second
23 Circuit is a good example of the effect of that provision.
24 In Vango Media, a law was held preempted which required
25 cigarette advertisers, every time they published four ads,

1 to add a fifth anti-tobacco ad totally outside of any
2 cigarette advertising, and the Court held that was with
3 respect to advertising, but it was preempted.

4 QUESTION: That wouldn't have been possible
5 under the phrase, in the advertising?

6 MR. PORTER: I don't believe so, Your Honor,
7 because the phrase, in the advertising, would have limited
8 the scope to the four corners of a pro-tobacco
9 advertisement. I think that would be the natural reading
10 of it, so beyond that --

11 QUESTION: Would it have preempted, in your
12 view, the new one, the one we're talking about?

13 Supposing Massachusetts passed a law which said,
14 every cigarette pack sold in every, or let's say every
15 billboard ad, has to take out the word cigarette, take out
16 the word tobacco. You can advertise as you want. You
17 can't have certain words in it.

18 MR. PORTER: Your Honor, if the --

19 QUESTION: That doesn't say, talk about health.
20 The reason they don't want it is because they think
21 cigarettes are bad for you, and they don't want people to
22 know what they are. Now, is that, in your view,
23 preempted?

24 MR. PORTER: That's where it becomes difficult,
25 but if there is a -- if the basis for that --

1 QUESTION: The reason is the following. We want
2 the word cigarette and tobacco taken out, because we don't
3 want people to buy them because it will kill them, all
4 right. That's why they do it. Now, what's the answer?

5 MR. PORTER: If it's a regulation of the health-
6 related content --

7 QUESTION: I'm telling you what it is.

8 MR. PORTER: Yes.

9 QUESTION: I want to know what your answer is.
10 Is that preempted or not, in your view?

11 MR. PORTER: Yes, that would be preempted.

12 QUESTION: All right.

13 MR. PORTER: Yes.

14 QUESTION: If that is preempted, then suppose
15 they say, it has to be blank, the ad, blank. Now --
16 because we don't want people to know what it is, we don't
17 want them to buy it, because it's dangerous. Now, is that
18 preempted?

19 MR. PORTER: If the regulation --

20 QUESTION: I'm telling you the reg. I've given
21 you the reg.

22 MR. PORTER: Yes.

23 QUESTION: That's just what it is. The words in
24 this ad are to be nothing, okay. That's -- is that
25 preempted?

1 MR. PORTER: If it's a regulation of the health-
2 related content, it is preempted, and under that --

3 QUESTION: I'm asking you, is my example
4 preempted, in your opinion?

5 MR. PORTER: It appears that it would be, Your
6 Honor.

7 QUESTION: All right. Then they're saying, and
8 if you say no billboard at all, that's the same thing.

9 MR. PORTER: And that's fundamentally different,
10 Your Honor.

11 QUESTION: Because?

12 MR. PORTER: Because they're -- the act is not
13 sufficient to go that last step. What doesn't happen
14 is -- what Congress was intending to do is to require a
15 warning, a uniform warning that the States couldn't tinker
16 with, anywhere that advertising was otherwise permitted.
17 But Congress, there's no indication in the act that
18 Congress was attempting to invade local control as had
19 been traditionally exercised over the location of
20 commercial advertising, and so there's a fundamental
21 distinction between a location base, really a zoning style
22 ad, and one where the State is invading the content --

23 QUESTION: Well, just to make sure -- I think
24 this was Justice Breyer's hypothetical. Can Massachusetts
25 ban all cigarette advertising, period?

1 MR. PORTER: In considering --

2 QUESTION: Massachusetts says, in the State of
3 Massachusetts you cannot advertise cigarettes anywhere, on
4 any billboard, or on any store sign.

5 MR. PORTER: If we're only considering that
6 issue with respect to preemption, the answer is yes.

7 QUESTION: But I can't, to be honest with you --

8 QUESTION: You think Massachusetts can do that
9 under this language?

10 MR. PORTER: If the question is, could
11 advertising be prohibited in all locations, purely under
12 the preemption --

13 QUESTION: Every ad in every location is banned
14 for cigarettes in Massachusetts, that's not preempted?

15 MR. PORTER: A good example of that, Your Honor,
16 is Utah in the 1920's did exactly that. The Utah law has
17 been in effect continuously since the 1920's. It raised
18 no concerns in Congress when the Cigarette Labeling Act
19 was passed.

20 QUESTION: There was no preemption law in the
21 twenties either, was there?

22 MR. PORTER: That's correct, Your Honor, but
23 since 1969 the Utah law has been continuously in effect.
24 The tobacco industry has never challenged it. It was not
25 raised as an issue in Congress. In fact, Senator Frank

1 Moss of Utah was an ardent foe of tobacco, and yet was one
2 of the Senate managers of the Cigarette Labeling Act.

3 QUESTION: What did Utah do about radio and
4 television advertising of cigarettes?

5 MR. PORTER: Utah -- Utah --

6 QUESTION: Did it prohibit that, too?

7 MR. PORTER: Excuse me. Utah had prohibited
8 essentially fixed advertising --

9 QUESTION: Right.

10 MR. PORTER: -- on billboards.

11 QUESTION: So that might have been a pretty good
12 deal for Mr. Moss, to get all this stuff off of radio and
13 television, where it does a lot more harm to kids, and the
14 risk being that the billboard prescription would be
15 overturned. I -- that doesn't seem like a bad deal to me.

16 MR. PORTER: We would submit that it wouldn't
17 have been, given his views on tobacco, but if I --

18 QUESTION: Suppose in the hypothetical case,
19 where Massachusetts bans all advertising at any location
20 of all cigarettes, it recites, because of our concerns
21 with health, all advertising of cigarettes is banned in
22 the State of Massachusetts, would that be preempted?

23 MR. PORTER: I think it makes it more clearly --
24 it clarifies any ambiguity that the hypothetical may have
25 had, yes, Your Honor.

1 If I may, in my time, turn to the First
2 Amendment. These regulations meet each requirement in the
3 Central Hudson test, and would present exactly the wrong
4 case for the application of strict scrutiny. As some of
5 the questions have pointed out, tobacco advertising
6 concerns an addictive product, and there's ample evidence
7 that that advertising stimulates demand for the product,
8 which is illegal for sale to children in all 50 States.

9 These regulations --

10 QUESTION: You can say the same thing about
11 pornography, and we've been very picky-picky about what
12 the Federal Government or any State can do with regard to
13 pornography, for the very purposes that you're talking
14 about, too, by way of keeping it away from children.
15 We've been very insistent that you can't keep it away from
16 adults, although a lot of people think it's addictive and
17 harmful.

18 MR. PORTER: A critical distinction, Your Honor,
19 is that these regulations prohibit advertising that
20 children will see unavoidably, day in and day out, as they
21 walk to and from school. The Playboy Entertainment case,
22 for example, related to indecent speech. The Court found
23 that there was a less-restrictive alternative there,
24 because an individual household could block the receipt of
25 the sexually explicit transmissions.

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1 Here, parents have no opportunity to block
2 tobacco advertising the children will see as they walk to
3 and from school and the park each day. That's the
4 critical distinction in this case, and it's the
5 evidence --

6 QUESTION: Is it like the seven dirty words case
7 in that respect, that you had to stop it for the adult at
8 that time of day, as well as for the child, because
9 there's no way to make it safe for the adult without --

10 MR. PORTER: Yes, Your Honor, it's exactly that
11 notion, that to the extent they were time-channeling in
12 that case, Massachusetts is channeling of a different
13 type, but it's focused on the places that we know children
14 will be day-in and day out, and that's why the
15 tailoring -- that's why these regulations are narrowly
16 tailored, is -- there's been no argument from the
17 cigarette companies that children are not in the areas
18 we've targeted. Their only comment is to say that
19 sometimes those arguments -- those areas might overlap and
20 aggregate to a larger space, but the point is, is that
21 Massachusetts has focused its efforts in the right place.

22 QUESTION: Well, as a practical matter, I guess,
23 billboards are not at issue, because they're dealt with by
24 the agreement, right?

25 MR. PORTER: Only --

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1 QUESTION: So what we're really dealing with
2 here are the little signs on a store, for instance.

3 MR. PORTER: Yes, Your Honor.

4 QUESTION: A storefront sign.

5 MR. PORTER: Only the signatories to the master
6 settlement agreement are the major cigarette
7 manufacturers. It does not cover smokeless tobacco or
8 cigar manufacturers, but Your Honor is correct, under that
9 agreement, the exception -- and the advertising that is
10 still allowed is advertising at retail locations that's
11 under 14 square feet --

12 QUESTION: But don't we have an issue here
13 between billboards more than 500 and less than 1,000 feet
14 from the schools?

15 MR. PORTER: The issue, Your Honor, is simply
16 that in 1990 the tobacco companies voluntarily decided to
17 stop advertising on billboards that are located within 500
18 feet of schools or playgrounds. That, we would submit,
19 is --

20 QUESTION: But that doesn't answer the question
21 about a 750-foot billboard.

22 MR. PORTER: Your Honor, the process of line-
23 drawing is one that was considered carefully, and we would
24 submit is the State's to do -- Massachusetts here adopted
25 the number that the FDA had proposed, which translates

1 to --

2 QUESTION: And is that the number in the
3 agreement, too? Is it 1,000 feet in the agreement?

4 MR. PORTER: In the master settlement agreement,
5 all outdoor advertising is prohibited, regardless of where
6 it's located, with the exception of advertising at retail
7 that's 14 square feet or smaller.

8 That, I must point out, is a significant
9 exception to the master settlement agreement. The FTC
10 report that came out just a month or two ago indicates a
11 significant increase in cigarette advertising at retail
12 locations since the execution of the master settlement
13 agreement, so that the advertising dollars -- it also
14 indicates that total, aggregate advertising by the
15 cigarette companies is at its largest level ever. That
16 shows two things. That shows there are plenty of --

17 QUESTION: Thank you, Mr. Porter.

18 General Underwood, we'll hear from you.

19 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

21 SUPPORTING THE RESPONDENTS

22 GENERAL UNDERWOOD: Mr. Chief Justice, and may
23 it please the Court:

24 This State regulation is not preempted, because
25 it is not based on smoking and health within the meaning

1 of the Federal cigarette labeling and advertising law.
2 The regulation is based on smoking and health for purposes
3 of that statute only if it requires or prohibits claims
4 about smoking and health, and not just because it was
5 motivated by some underlying concern about smoking and
6 health based on --

7 QUESTION: Why isn't a rule that says you can't
8 advertise at all a rule that prohibits claims based on
9 smoking and health?

10 GENERAL UNDERWOOD: Well, a rule that says that
11 you can't advertise at all is a blanket rule like a rule
12 that prohibits deception, which might also prohibit some
13 claims about smoking and health and isn't aimed at claims
14 on smoking and health, so I would say it's not prohibited
15 under that understanding of the preemption statute, but
16 one could distinguish that from this case.

17 I'd like to point out that based on can have
18 different meanings in different contexts, but when one
19 statute describes another statute as a rule based on
20 something, as a regulation based on something, that
21 language ordinarily refers to the operating criteria of
22 the regulation, and not the reason why it was adopted.

23 For example, when Congress in one statute refers
24 to another statute -- to taxes based on revenues, or it
25 refers to requirements imposed on vehicles based on size

1 or weight, it is using a shorthand description of a
2 category of statute, and it is describing the text of
3 the -- of that other statute, the criteria that that
4 statute uses, and not the reasons it came into existence.

5 It is, of course --

6 QUESTION: Would you explain -- to make that
7 clear to me, would you explain to me, as I asked your
8 brother to do, what, then, on your view, the differences
9 are between the old preemption section, assuing that, what
10 was it, prohibition had been added to requirement, and the
11 new preemption section?

12 GENERAL UNDERWOOD: Yes. Of course, the 1965
13 version expressly preempted laws that required statements
14 relating to smoking and health. The '69 amendment was
15 designed, said the Senate report, as a clarification and
16 not a radical reform.

17 That doesn't mean nothiong was changed, but it
18 does mean that it was designed to reach various devices
19 that were the functional equivalent of required
20 statements, and weren't picked up by the old language.

21 QUESTION: So the old law was thought to have no
22 application to implicit statements.

23 GENERAL UNDERWOOD: That's one --

24 QUESTION: Nonverbal suggestions.

25 GENERAL UNDERWOOD: That's one example. By

1 dropping the term, statements, what Congress reached was,
2 with apologies to Justice Scalia, common law duties which
3 the Cippolone plurality noted might be requirements, but
4 weren't required statements, because required statements,
5 in the '65 act, was thought to refer to specific texts
6 that were required and it may also, as, Justice Souter,
7 you suggested, have reached attempts to regulate claims
8 that were made not by statement but by implication, such
9 as by images, or other implication.

10 And then by adding prohibitions Congress reached
11 State laws that would have the effect of requiring new
12 warnings, but would do so in the form of a prohibition,
13 say, for example, no advertising without this warning,
14 which in effect requires a warning, but does it in the
15 form of a prohibition, and it would also reach State laws
16 prohibiting affirmative health claims about filters, say,
17 or the safety of a particular cigarette.

18 There was for a period an incipient advertising
19 war about the safer cigarette, and there was some concern
20 about whether the States would choose to bar that, and the
21 FTC at various times had thought it was desirable to
22 promote that sort of competition or not, depending on --

23 QUESTION: General Underwood, what is your
24 paraphrase of what this statute means, no requirement or
25 prohibition -- you don't want to say, based on smoking and

1 health. You want, no requirement or prohibition, what?

2 GENERAL UNDERWOOD: No requirement or
3 prohibition that regulates claims about smoking and
4 health, assertions, representations.

5 QUESTION: That regulates assertions
6 about smoking --

7 GENERAL UNDERWOOD: Things that are like
8 statements --

9 QUESTION: And you think that based on smoking
10 and health is a reasonable way to say, that regulates
11 assertions of?

12 GENERAL UNDERWOOD: I think that regulation
13 based on means regulation that operates on the basis of,
14 that tells you what the operating criteria of the
15 regulation are. If a regulation is based on weight, then
16 you look to weight to find out if it applies or not, and
17 if a regulation is based on -- if a tax is based on
18 revenue, then you look at revenue to find out whether or
19 how it applies.

20 QUESTION: How are these regulations based on --
21 the ones that you say are prohibited, how are they based
22 on health?

23 GENERAL UNDERWOOD: On smoking and health. They
24 prohibit making statements -- they prohibit saying
25 anything about smoking and health, and I don't think an

1 inference can be drawn from the fact that the ban on
2 television and radio occurred at the same time, because
3 television and radio have traditionally been Federal
4 concerns. Billboards and signs have traditionally been
5 local concerns. There's no reason to infer any connection
6 between them. They've always been regulated --

7 QUESTION: But one change in the statute was
8 that the '69 statute was just based on -- just applies to
9 State laws and the '65 statute applied to State and
10 Federal.

11 GENERAL UNDERWOOD: That's correct.

12 QUESTION: Yes.

13 GENERAL UNDERWOOD: Another thing that happened
14 is that promotions were added. The regulation is not now
15 only with respect to advertising, but also with respect to
16 promotions, because give-away hats and T-shirts and
17 keychains can also make claims about smoking and health,
18 and because promotions in the form of endorsements or
19 events could be subject to a State requirement that health
20 disclaimers, that health warnings be given, and what
21 Congress wanted to do was take the States out of the
22 business of making judgments about and regulating on the
23 basis of claims about smoking and health.

24 QUESTION: General Underwood, in the few minutes
25 remaining, do you think you could give us a 1-minute

1 explanation of your views about the First Amendment
2 issues?

3 GENERAL UNDERWOOD: Yes. I think the State's
4 interest in preventing school-age children from smoking is
5 truly compelling, in light of all the evidence that has
6 been recited, and that this regulation under Central
7 Hudson serves that goal in a significant way, because the
8 State had evidence showing that the ban to sales to
9 children was not effective, that it was reducing retail
10 sales to children, but not underage smoking, because
11 presumably that suggests that the children were getting
12 their cigarettes from people --

13 QUESTION: If there was a prohibition as to all
14 advertising, would that be no more extensive than
15 necessary, in your view?

16 GENERAL UNDERWOOD: If there was a prohibition
17 as to all advertising, I think that would be more
18 expensive -- extensive than necessary.

19 QUESTION: And if that were the practical effect
20 of this regulation because of the 1,000-foot dynamic,
21 would that change your answer?

22 GENERAL UNDERWOOD: No, because this is just
23 outdoor -- I'm sorry. A prohibition on all advertising is
24 different from a prohibition on outdoor advertising.
25 There are still ample avenues, even if there were a

1 prohibition on all advertising, which this is not --

2 QUESTION: General Underwood --

3 GENERAL UNDERWOOD: -- there would still be --
4 yes.

5 QUESTION: What is the Government's position on
6 a State law that prohibits adult bookstores from having a
7 sign in the front which says, adult bookstore, or a sign
8 that says, pornography on sale here --

9 GENERAL UNDERWOOD: Well --

10 QUESTION: -- because of the concern for
11 children? I mean, adults are entitled to get the
12 pornography. Now, can an adult bookstore just -- this
13 statute, you can't even say, tobacco for sale.

14 GENERAL UNDERWOOD: Well, actually, this statute
15 does permit tobacco for sale. The district court struck
16 that tombstone requirement, that tombstone permission on
17 what we believe to be the mistaken ground that it, itself,
18 was preempted, but the First Circuit observed -- expressed
19 some reservations about that, and observed that in any
20 event it would be possible to reframe that kind of
21 tombstone permission.

22 QUESTION: Can you say, Marlboro?

23 GENERAL UNDERWOOD: Not under the -- not under
24 Massachusetts regulations.

25 QUESTION: You can't say Marlboro, okay, so the

1 bookstore says -- you know --

2 GENERAL UNDERWOOD: But the distinction is
3 between advertising and merely information identifying
4 that a product is sold here.

5 I did want to say that this, unlike pornography,
6 is commercial speech, and so it is open to the -- more
7 open to the possibility that alternate avenues of
8 communicating with adults --

9 QUESTION: General Under --

10 GENERAL UNDERWOOD: -- except for somebody who
11 thinks there's no distinction between --

12 QUESTION: General Underwood, just one
13 assumption. Let's assume that it can be demonstrated that
14 eating regularly at fast food joints, including
15 McDonald's, causes health problems throughout life for
16 kids, would you give me the principle in your reasoning
17 that would prevent the State of Massachusetts from
18 similarly restricting advertising by McDonald's --

19 GENERAL UNDERWOOD: Yes. The --

20 QUESTION: -- that is directed exclusively to
21 kids?

22 GENERAL UNDERWOOD: Yes. The principle, as I
23 understand your hypothetical, is that -- is a distinction
24 between a wide variety of possible health dangers and a
25 health danger of unparalleled magnitude that -- for which

1 the window of time between 14-1/2 and 18 is the critical
2 window.

3 It's the average -- the evidence is that the
4 average child begins smoking at 14-1/2, and that very few
5 people begin after 18, and that the product is addictive,
6 so if you have a 14-1/2-year-old child, as I do, and you
7 can get that child to 18 without --

8 QUESTION: Thank you, General Underwood. I
9 think you've answered the question.

10 Mr. Sutton, you have 1 minute remaining.

11 REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

12 ON BEHALF OF THE PETITIONERS

13 MR. SUTTON: A few brief points. The Solicitor
14 General has just acknowledged that the tombstone, even
15 though that's content-based, would not be preempted. They
16 now no longer have a content-location dichotomy. They've
17 just rewritten 5(b) to say, with respect to statements in
18 advertising. That's the only way to give content to 1969
19 under their theory, and their theory ultimately does not
20 give content to those significant amendments.

21 The Little League hypothetical is just not true.
22 That would be a direct solicitation, an illegal sale. It
23 would not be preempted, would not be barred by the First
24 Amendment. They've acknowledged that a total ban would not
25 be preempted. I mean, they've just said that you could

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1 have a total ban here. That's exactly what they were
2 getting at in 1969.

3 Now, clearly they were banning not just brand-
4 favorable messages, but all messages that are favorable to
5 tobacco. That's exactly what 44 Liquormart is about.
6 This is not seven dirty words. Tobacco is not a four-
7 letter word. It is not just about one word -- thank you,
8 Your Honor.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Sutton.
10 The case is submitted.

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

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