LORILLARD TOBACCO COMPANY v. REILLY

121 S. Ct. 2404 (2001)

Editors Note: This decision and the Notes and Questions were contributed by Nancy E. Stroud, Esq., a land use attorney in Boca Raton, Florida, who will be joining the Sixth Edition of this casebook as coauthor

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.

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).. . .

III

By its terms, the FCLAA's preemption 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 preemption 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.. . .[SEP]A...

[The Court noted that for 25 years it has held that commercial speech falls within the First Amendment, and discussed the *Central Hudson* tests.]

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. [The Court noted opinons by Justices Thomas, Stevens, Kennedy and Ginsburg].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. 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.

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 advance 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. [citing cases]

We do not, however, require that "empirical data come . . . accompanied by a surfeit of background information . . . We 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.'" [citing case]

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."[citing case] 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.'"[cite case]. 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. 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.* 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. The cigar petitioners catalogue a list of differences between cigars and other tobacco products, including the characteristics of the products and marketing strategies. 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.

In previous cases, we have acknowledged the theory that product advertising stimulates demand for products, while suppressed advertising may have the opposite effect. 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. 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. 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.

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.*

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. 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%. 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.

The FDA also made specific findings with respect to smokeless tobacco. The FDA concluded that "the 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." Studies have analyzed smokeless tobacco use by young people, discussing trends based on gender, school grade, and locale.

Researchers tracked a dramatic shift in patterns of smokeless tobacco use from older to younger users over the past 30 years. In particular, the smokeless tobacco industry boosted sales tenfold in the 1970s and 1980s by targeting young males. Another study Another study documented the targeting of youth through smokeless tobacco sales and advertising techniques . . . .

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."[citing case]

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. The Attorney General's regulations do not meet this standard. The broad sweep of the regulations indicates that the Attorney General did not "carefully calculate 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.* 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. The Attorney General disputed petitioners' figures but "conceded that the reach of the regulations is substantial."[citing court of appeals decision] 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.

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. 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.* 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). As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.

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 passers-by 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. 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.

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.. . .

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." [citing case] 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.

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring in part and concurring in the judgment.

The obvious overbreadth of the outdoor advertising restrictions suffices to invalidate them under the fourth part of the test in *Central Hudson.* As a result, in my view, there is no need to consider whether the restrictions satisfy the third part of the test, a proposition about which there is considerable doubt. Cf. *post*, (THOMAS, J., concurring in part and concurring in judgment). Neither are we required to consider whether *Central Hudson* should be retained in the face of the substantial objections that can be made to it. See *post*, (opinion of THOMAS, J.). My continuing concerns that the test gives insufficient protection to truthful, nonmisleading commercial speech require me to refrain from expressing agreement with the Court's application of the third part of *Central Hudson*.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

I join the opinion of the Court (with the exception of Part III-B-1) because I agree that the Massachusetts cigarette advertising regulations are preempted by the Federal Cigarette Labeling and Advertising Act. I also agree with the Court's disposition of the First Amendment challenges to the other regulations at issue here, and I share the Court's view that the regulations fail even the intermediate scrutiny of *Central Hudson.* At the same time, I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as "commercial." I would subject all of the advertising restrictions to strict scrutiny and would hold that they violate the First Amendment. . . .

JUSTICE SOUTER, concurring in part and dissenting in part.

I join Parts I, II-C, II-D, III-A, III-B-1, III-C, and III-D of the Court's opinion. I join Part I of the opinion of JUSTICE STEVENS concurring in the judgment in part and dissenting in part. I respectfully dissent from Part III-B-2 of the opinion of the Court, and like JUSTICE STEVENS would remand for trial on the constitutionality of the 1,000-foot limit.

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

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

NOTES AND QUESTIONS

1. What Lorillard Tobacco held. Although the Supreme Court decided, as argued by the tobacco companies, that the Massachusetts regulations regarding tobacco signs are pre-empted by the Federal Cigarette Licensing and Advertising Act, it disagreed with the companies' argument that commercial speech should receive the same level of First Amendment protection as noncommercial speech. Thus, the court reaffirmed the use of the *Central Hudson* tests holding that commercial speech restrictions must advance a substantial governmental interest and must be narrowly tailored to achieve their desired objective.

Four Justices (Ginsburg, Breyer and Stevens, with Souter's agreement) would have remanded the case to the trial court for evidence regarding the implications of the one thousand foot distance regulations, such as whether tobacco signs are sufficiently able reach an adult audience despite the distance rule, and whether other avenues of communication regarding cigarettes are sufficiently available to the tobacco companies. The posture of the case, having reached the court from the First Circuit Court of Appeal's affirmance of summary judgment for the state, resulted in a "dearth of reliable statistical information as to the scope of the ban…." This split in the court's views of the case highlights the importance that free speech cases place on the adequacy of the justification for the speech restrictions, particularly the justification of the "fit" between the means and the ends of the regulation. How might this affect the strategy of the government when considering an alternate regulation? What alternate regulations could be considered?

2. *Infinity Outdoor, Inc. v. City of New York.* A recent case upheld a challenge to the New York City zoning ordinance prohibiting off-site commercial signs within 200 feet of highways and public parks and in residential areas, while allowing noncommercial signs. *Infinity Outdoor, Inc. v. City of New York,* 165 F. Supp. 2d 403 (E.D. N.Y. 2001), describes the city's study and hearings regarding the effect of outdoor advertising in certain zoning districts under the existing zoning code (including testimony that "Our neighborhoods have become a nightmarish streetscape out of the movie *Bladerunner*, where every inch of every surface in covered in advertisements.") The district court found ample justification in *Metromedia v. City of San Diego* for the sign ordinance to pass muster as serving a substantial

government interest. It also found that the ordinance was narrowly enough tailored, even though the plaintiff argued that there was little factual evidence that commercial signs are more distracting than noncommercial signs. See 165 F. Supp. 2d at note
10. Given *Lorillard's* analysis requiring a factual basis to support the means/ends test, what explains the district court's acceptance of the City's justification for the distinction? How convincing is the court's reference to the City's interest in "accommodating the requirements of *Metromedia"* so as not to favor commercial over noncommercial signs?

3. *Greater New Orleans Broadcasting*. In *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173 (1999), the Supreme Court also refused to modify the commercial speech doctrine of *Central Hudson.* New Orleans had enacted a ban on broadcast advertising of legal gambling at area casinos. There, as in *Lorillard Tobacco*, advocates for the commercial party argued that the regulation of truthful, nonmisleading commercial speech deserves the same level of scrutiny as noncommercial speech such as political or ideological speech. While explaining the development of the distinction between commercial and noncommercial speech, and noting the criticism of it, the Supreme Court simply stated that it saw no need to break new ground by changing the analysis. Note that in *Lorillard Tobacco*, Justices Kennedy, Scalia and Thomas reject the majority's continued use of *Central Hudson's* distinction between commercial and noncommercial speech. What are the reasons for maintaining the distinction? Practically, how difficult is it to separate commercial from noncommercial speech?