

No. S121009
(Court of Appeal No. B160571)
(Los Angeles Super. Ct. No. KC036109)
(Hon. Conrad R. Aragon)

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

THE PEOPLE EX REL. BILL LOCKYER, as Attorney General
of the State of California,
Plaintiff and Respondent,

v.

R.J. REYNOLDS TOBACCO COMPANY,
Defendant and Petitioner.

PETITIONER'S REPLY BRIEF ON THE MERITS

H. JOSEPH ESCHER III (No. 85551)
MARC HABER (No. 192981)
CHANDRA MILLER FIENEN (No. 225502)
HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111-4024
Telephone: 415/434-1600

*Attorneys for Defendant and Petitioner
R.J. Reynolds Tobacco Company*

INTRODUCTION

Respondent admits that “giving away samples to potential consumers is commonly understood to be a means of promoting consumer products” (Respondent’s Brief (“RB”) 25), and acknowledges uniform federal authorities applying this common understanding of “promotion” to the Federal Cigarette Labeling and Advertising Act’s (“FCLAA”) express preemption provision. RB 17. Faced with these necessary concessions, Respondent tries (but fails) to craft an alternative definition of “promotion” that would exclude giving free product to likely consumers. Ignoring FCLAA’s text in favor of a misreading of the “context” of the statute and a misuse of the general presumption against preemption, Respondent goes so far as to argue that the statutory term “promotion” is “too slender a textual reed” (RB 22) on which to base preemption. But the United States Supreme Court has rejected any preemption analysis that uses the context of a statute to trump its text. *See Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, No. 02-1343, 541 U.S. —, 2004 U.S. LEXIS 3232, at *17 (Apr. 28, 2004). Health and Safety Code Section 118950’s prohibition of free samples meets all the criteria for FCLAA preemption: it is a prohibition, under State law, based on smoking and health, and with respect to cigarette promotion.

An alternative basis for reversal is Reynolds’ compliance with Section 118950. The California Legislature provided a safe harbor for cigarette sampling on public grounds in Section 118950’s Subdivision (f). In order to read the safe harbor out of the statute, Respondent refuses to state what it would take to comply with Subdivision (f), including whether Reynolds was required to exclude minors from all or only a portion of the public grounds. Reynolds’ sampling activities complied with any reasonable interpretation of Subdivision (f), as they took place within age-restricted areas on public grounds leased for private functions. The legislative history of Section 118950 confirms that this is exactly the kind of activity that the safe harbor provision allows. *See Appellant’s Request for*

Judicial Notice, filed in the Court of Appeal on January 15, 2003 (“RJN”) Ex. F at 2.

Finally, the constitutionality of the \$14.8 million fine must be determined with reference to the degree of Reynolds’ culpability and the gravity of harm caused. The courts below did not consider either of those clearly relevant factors, despite Reynolds’ good faith belief in the legality of its actions and lack of evidence of any actual harm produced by Reynolds’ conduct.

ARGUMENT

I.

FCLAA PREEMPTS STATE REGULATION OF CIGARETTE SAMPLING.

A. State Courts Should Accord “Great Weight” To Federal Courts’ Interpretation Of Explicit Federal Statutory Language.

As this Court has noted, “[p]re-emption fundamentally is a question of congressional intent, . . . and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.” *Dowhal v. SmithKline Beecham Healthcare*, 32 Cal. 4th 910, 2004 Cal. LEXIS 3040, at *18 (2004) (quoting *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)). In FCLAA, Congress manifested its intent to preempt *any* “requirement or prohibition” that is “with respect to the advertising or promotion of . . . cigarettes” and “based on smoking and health.” 15 U.S.C. §1334(b). This express language has led both of the federal courts to have addressed this exact issue to conclude that FCLAA preempts state prohibitions on cigarette sampling. *See Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001); *Rockwood v. City of Burlington, Vermont*, 21 F. Supp. 2d 411 (D. Vt. 1998). The federal courts’ unanimous interpretation of a federal law is “persuasive and entitled to great weight.” *Etcheverry v. Tri-Ag Serv., Inc.*, 22 Cal. 4th 316, 320 (2000). Respondent affords these federal precedents no weight at all, arguing only that the decisions are “not persuasive.” RB 21.

B. Sampling Is A Promotion.

Cigarette sampling is a promotion under any definition of that term. This is the clear holding of the only two federal courts to have addressed this precise issue. *See Jones*, 272 F.3d at 1035; *Rockwood*, 21 F. Supp. 2d at 419-20. The FTC, to which FCLAA delegated the responsibility to track “cigarette advertising and promotion” (15 U.S.C. §1337(b)(1) (2000)), considers the “‘distribution of cigarette samples . . .’ as ‘sales promotion activities.’” *Jones*, 272 F.3d at 1035. The Surgeon General and the FTC also recognize sampling as promotion. *Id.* The California Legislature acknowledged that it intended Section 118950 to restrict “[t]obacco product advertising and promotion.” HEALTH & SAFETY CODE §118950(a)(9). Even the Attorney General has admitted that cigarette sampling is a “promotional practice[.]” *See* JA 194.

This meaning of promotion is confirmed by the relevant dictionaries and textbooks. *Jones*, 272 F.3d at 1036 (quoting DICTIONARY OF TERMINOLOGY 2, 20 (Univ. of Texas, Dep’t of Advertising); Appellant’s Supplemental Request for Judicial Notice, filed in the Court of Appeal on May 12, 2003 (“Supp. RJN”) Ex. E at 65-66 (John A. Cleary, *Product Sampling*, in HANDBOOK OF SALES PROMOTION (Stanley M. Ulanoff ed., 1985) (describing product sampling as a “time tested” method of “generating consumer trial and purchase of a product”)). The United States Supreme Court recently approved the reference to dictionaries in order to ascertain the ordinary usage of statutory text, including a preemption provision. *See Engine Mfrs. Ass’n*, 2004 U.S. LEXIS 3232, at *11 (citing WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 2455 (1945) for definition of “standard”).

Respondent criticizes the *Jones* court for using the plain meaning of promotion (RB 18), which Respondent concedes includes “giving away samples to potential customers.” RB 25. Yet Respondent can offer no alternative definition of promotion that would exclude sampling, arguing that preempted advertising and promotions must involve “the communication or dissemination of

information or images about cigarettes.” RB 4. Even under this restricted view, sampling is still a “promotion” because sampling disseminates information about cigarettes, allowing a potential customer actually to experience the product’s quality and characteristics. Respondent also acknowledges that promotions “attempt to stimulate desire” for a product. RB 9. Again, sampling accomplishes this by demonstrating a particular brand’s superiority. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 112 Cal. App. 4th 1377, 1413 (2003) (Doi Todd, J., dissenting).

C. FCLAA’s Express Preemption Provision Describes Its Preemptive Scope.

The United States Supreme Court has reconfirmed the primacy of a statute’s text in defining the scope of preemption: “Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Ass’n*, 2004 U.S. LEXIS 3232, at *11 (quoting *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)). Neither any “presumption against preemption” nor generalized notions of a statute’s context can invalidate the statutory text:

The dissent objects to our interpretive method, which neither invokes the “presumption against pre-emption” to determine the *scope* of pre-emption nor delves into legislative history. . . . The textual obstacles to the strained interpretation that would validate the Rules by reason of the “commercial availability” provisos are insurmountable—principally, the categorical words of [the preemption provision]. (*Id.* at *17-*18 (citation omitted))

Respondent constructs its “contextual” analysis from a flawed reading of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).¹

¹The fact that the five Justices in *Cipollone* who relied on the “plain meaning” rule did not ultimately agree on whether state common-law claims constituted a “requirement or prohibition” (RB 14) does not change the fact that they all agreed on the proper method of analysis. Respondent’s claim that the Court in *Medtronic* “rejected the
(continued . . .)

RB 14. In fact, the Court subsequently rejected Respondent’s proffered contextual analysis in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 590-93 (2001) (Stevens, J., with whom Ginsburg, Breyer and Souter, JJ., join, dissenting). Respondent is mistaken in suggesting that the *Reilly* Court used the context of FCLAA to contradict the plain meaning of its text. RB 15, 20. *Reilly* rejected a “narrow” reading of FCLAA *both* because such a narrow reading contradicted the language of the statute *and* because consideration of FCLAA’s context and structure *confirmed* the plain meaning. *Reilly*, 533 U.S. at 548-49 (rejecting a “distinction [that] cannot be squared with the language of the pre-emption provision”). Nothing in *Reilly* suggests that invocation of vague notions of “context” allows courts to *contradict* FCLAA’s plain meaning.

In any event, the “context” of FCLAA does not suggest that Congress intended “promotion” to have a specialized meaning that excluded cigarette sampling. First, Respondent cannot explain why Congress amended FCLAA in 1969 specifically to include “promotions.” To ignore the addition of the word “promotion” would violate basic canons of statutory construction that “requir[es] a change in language to be read, if possible, to have some effect.” *American Nat’l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992); *see also Cipollone*, 505 U.S. at 520 (plurality opinion). Second, Congress clearly was aware that tobacco companies promoted cigarettes through sampling when it approved the 1969 amendments. *See* RJN Ex. B at 12 (S. REP. NO. 91-566 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2652, 2660) (cigarette manufacturers testified before Senate that they “would continue not to distribute sample cigarettes

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‘plain language’ argument advanced by Medtronic . . . [as] ‘unpersuasive’ and ‘implausible’” is misleading. RB 19. Four members of the Court used those terms to describe Medtronic’s proffered *interpretation* of the words of the statute, *not* its reliance on the plain language analysis. *Medtronic v. Lohr*, 518 U.S. 470, 486-87 (1996) (Stevens, J., with whom Kennedy, Souter, and Ginsburg, J.J. join).

or engage in promotional activities on school and college campuses”).

The fact that Congress did not change FCLAA’s purpose provision (15 U.S.C. §1331) as part of the 1969 amendments is irrelevant. *See* RB 22. *Cipollone* held that this fact cannot be used to narrow the plain language of the preemption provision. *Cipollone*, 505 U.S. at 521 n.19 (plurality opinion) (“[W]e are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to [the preemption provision]”). Similarly, the fact that “sale or distribution” is defined to include sampling in the statute requiring specific warning labels (RB 23 (citing 15 U.S.C. §1332(6))) does not indicate that Congress considered sampling not to be a promotion. That provision merely was intended to ensure that all cigarettes distributed *by whatever means* were labeled in conformity with FCLAA. *See* 15 U.S.C. §1333(a)(1) (making it unlawful for anyone to “manufacture . . . for sale or distribution” any cigarettes whose package does not contain the required warning label). Indeed, by specifically mentioning sampling Congress confirmed that it was well aware of this type of promotion. Congress nonetheless chose not to exclude the activity from the scope of FCLAA preemption.

Finally, Respondent blurs the distinction between “advertising and promotion” and the sale or use of cigarettes. RB 9-10. This ignores the plain language of FCLAA. Congress preempted state regulation of cigarette *advertising and promotion*, while permitting the states to retain their authority to regulate “the *sale or use* of cigarettes.” *Reilly*, 533 U.S. at 552 (emphasis added). Respondent’s effort to re-cast the analysis as one about state regulation of “actual cigarettes” or “physical cigarettes themselves” (RB 4) is nothing more than a word game. Under FCLAA, state regulation of the sale and use of cigarettes is not preempted while regulation of advertising and promotion of cigarettes is. This gives states sufficient authority to prevent the parade of horrors suggested by Respondent (*see* RB 25) or by the Court of Appeal (*Reynolds*, 112 Cal. App. 4th at

1390). FCLAA allows states to ban all sale to and use of cigarettes by minors, as well as the offenses related to such prohibitions, including the distribution of free samples to minors.² *See Reilly*, 533 U.S. at 552. However, the plain language of FCLAA preempts states from prohibiting promotional distribution of cigarettes to adults, as long as the prohibition targets cigarettes and is with respect to smoking and health. *Id.* at 549-50.

II.

REYNOLDS' DISTRIBUTION OF CIGARETTES WITHIN AGE-RESTRICTED AREAS IS SPECIFICALLY PERMITTED BY SECTION 118950.

A. The Safe Harbor Provision Does Not Require That Reynolds Exclude Minors From An "Entire" Public Grounds.

The plain language of Section 118950 requires that Reynolds be allowed to conduct promotional sampling of its products on public grounds under certain conditions. Far from ignoring the requirements of the safe harbor provision (RB 29), Reynolds' reading of Subsection (f) gives meaning to each word.

Respondent offers no coherent reading of this provision. Respondent's current position seems to be that for some distributions "the entire public grounds" must be age-restricted, and where that is impossible (because, for example, it would require keeping minors off an entire street), then the entire area set aside for the public event at which the distributions occur must be age-restricted. *See* RB 33.

²Respondent notes that under the Synar Amendment states must take steps to prevent the sale and distribution of cigarettes to minors. *See* RB 23-24. Nothing in that 1992 statute (enacted long after FCLAA) authorizes states to regulate *promotions* solely involving adults. The California statute that complies with the Synar Amendment is Penal Code Section 308, not Section 118950. Similarly, the fact that the federal government bans promotional distributions of cigarettes on federal property (RB 24) is hardly proof that a *state* prohibition would not be preempted. FCLAA's preemption clause deals only with *state* requirements and prohibitions. 15 U.S.C. §1334(b).

This does not square with the decision of the Court of Appeal, which held that regardless of the type of public grounds at issue, the age-restricted area had to be “coterminous with the . . . events within which R.J. Reynolds was distributing free cigarettes.” *Reynolds*, 112 Cal. App. 4th at 1396. The Court of Appeal’s decision in turn does not comport with the language of Subsection (f), which says nothing about excluding minors from events surrounding age-restricted areas. The safe harbor is defined by the area “leased for private functions where minors are denied access.” HEALTH & SAFETY CODE §118950(f).

The legislative history makes clear that Section 118950 allows cigarette sampling on age-restricted portions of public grounds. Respondent mischaracterizes Reynolds’ summary of the events surrounding the addition of a safe harbor provision as a claim that the “Legislature intended to enact a different exemption from the one that now appears in subdivision (f).” RB 32. But Respondent’s own declarations show that the safe harbor provision was added specifically in order to allow cigarette sampling “in public areas where minors are denied access.” JA 578 ¶2. This comports with the legislative history that shows that the Legislature intended to allow the distribution of cigarettes within tents or booths on public grounds. RJN Ex. F at 2 (S.B. 1100, Senate Third Reading at 2 (as amended Sept. 9, 1991)).

According to Respondent, Reynolds’ interpretation of Subdivision (f) would violate the policy considerations behind Section 118950, including “keeping children from beginning to use tobacco products” and “encouraging all persons to quit tobacco use.” RB 30 (citing HEALTH & SAFETY CODE §118950(a)(11) (emphasis deleted)). This argument proves too much. It would justify the elimination of the safe harbor provision from Section 118950, as *any* exception would conflict with these general policies. For example, “this state disfavors the business of gambling.” BUS. & PROF. CODE §19801(a). The State has determined that “[g]ambling can become addictive and is not an activity to be promoted or legitimized as

entertainment for children and families.” *Id.* §19801(b). Nonetheless, as an exception, the state allows certain forms of gambling, such as “parimutuel wagering on horse racing” under certain circumstances. *Id.* §19801(a). Allowing betting on horses obviously “violates” the general policy against gambling. But this does not mean that the exception allowing parimutuel wagering should be read out of the statute.

B. The Age-Restricted Areas Were “Leased For A Private Function” Within The Meaning Of The Safe Harbor Provision.

Both sides agree that Reynolds contracted for the right to set up tents on particular pieces of public property in order to conduct product sampling. *See* RB 29. Respondent claims that Reynolds failed to comply with Subdivision (f) because the public grounds were not “‘leased’ for ‘private functions.’” RB 27. In its brief to the Court of Appeal (“Resp. Ct. App. Br.”), Respondent claimed that in order to qualify as a lease, Reynolds had to gain “the exclusive possession” of the property. Resp. Ct. App. Br. at 12 (quoting 7 H. MILLER & M. STARR, CALIFORNIA REAL ESTATE §19.1, at 12 (3d ed. 2001)). The various definitions of “lease” in the cases cited below by Respondent show that the term’s definition depends largely upon the context in which it is used. For example, at issue in *Golden West Baseball v. City of Anaheim* was a dispute over development rights between the owner of real property and a party who claimed a leasehold interest. *See* Resp. Ct. App. Br. at 12 (citing *Golden West Baseball Co. v. City of Anaheim*, 25 Cal. App. 4th 11, 18-19 (1994)). In a dispute regarding property rights courts necessarily take a strict view of whether a party has a lease. *See* 25 Cal. App. 4th at 31-32. On the other hand, against the backdrop of defining the State’s authority to *lease public grounds* (the very issue at stake here), a “‘lease’ includes a permit, easement, or license.” PUB. RES. CODE §6501.

Similarly, Respondent argues that Reynolds’ activities were not “private functions,” without defining the term. RB 27. Before the

Court of Appeal, Respondent stated (without citation) that “functions” are limited to “formal ceremon[ies]” like a “wine-tasting, a shareholders’ meeting, or a wedding,” and that such affairs are “private” only if they are “limited to a special group such as . . . invited guests.” Resp. Ct. App. Br. at 13. There is no dispute that Reynolds invited only a narrow group of people to the sampling tent: current smokers at least twenty-one years of age. In other words, it was a “private function” because it was not “open to the general public.” This is consistent with the way “private function” is used in other California statutes. *See* BUS. & PROF. CODE §23358 (allowing a winegrower to sell alcohol only “during private events or private functions not open to the general public”).

Complying with Respondent’s version of the “leased for a private function” language would require Reynolds to obtain the “exclusive possession” of, for example, some portion of a sidewalk, and to hold a “formal ceremony” open only to invited guests (all eighteen years of age or older) and patrolled by a licensed security guard. Nothing in the language, history or purpose of Section 118950 requires such an artificial interpretation.

III.

THE \$14.8 MILLION PENALTY IS DISPROPORTIONAL TO THE GRAVITY OF THE OFFENSE.

A. Reynolds’ Good Faith Belief In The Legality Of Its Conduct Reduces Its Culpability.

Respondent does not dispute that courts must assess a defendant’s culpability in determining the proportionality of a fine. *See* RB 36 (citing *United States v. Bajakajian*, 524 U.S. 321, 337-38 (1998)).³ Nor does Respondent claim that a defendant’s good faith

³Respondent wrongly implies that a defendant’s “ability to pay” is the “constitutional lodestar” in courts’ proportionality review. RB 37 (citing *People ex rel. State Air Res. Bd. v. Wilmshurst*, 68 Cal. App. 4th 1332, 1350 (1999)). *Wilmshurst* has been criticized as contrary to fed-

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is *per se* irrelevant to this determination. Instead, Respondent wrongly argues that a defendant’s good faith is only relevant if it “relied on favorable interpretations of the statute by the administrative agency charged with its enforcement.” RB 44 (citing *People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 314 n.8 (1996)). *Lungren* cannot be read that narrowly:

[In *Hale v. Morgan*, 22 Cal. 3d 388 (1978) w]e held that the statute in question violated the due process clause of the federal and California Constitutions because it did not permit the trial court any discretion in imposing the civil penalty—it did not allow the court, for example, to take into account the good faith motivation of the offending landlord. (*People ex rel. Lungren*, 14 Cal. 4th at 313)

It is axiomatic that one who willfully violates a statute is more culpable than one who violates the same statute because of a reasonable, good faith, but ultimately mistaken reading of the law.

Like the Court of Appeal, Respondent denies the importance of Reynolds’ motivation even as it presumes Reynolds’ bad faith.⁴ See RB 44 (“Reynolds chose to ignore at its peril the condition that the public facilities where it gave away cigarettes must have been ‘leased for private functions’”). Reynolds did not willfully ignore Section 118950, but rather went to great lengths to conform its

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eral and state authority on this very point. See *Reynolds*, 112 Cal. App. 4th at 1397 n.9.

⁴Respondent’s claim that “Reynolds [did] not raise[] the issue of good faith in its motion for summary judgment” (RB 42) misstates the basis for the trial court’s decision. See JA 1605, 1611-15. Reynolds presented undisputed evidence of its good faith, including that it: (1) notified the State of its distribution of free cigarettes; (2) informed the Attorney General about the distribution that was the initial subject of this lawsuit; (3) revealed through discovery the other five distributions at issue; (4) attempted to meet or exceed the requirements of Subdivision (f); and (5) ceased its promotions as soon as the Attorney General complained about the practice. See JA 1214, 1218-20. The trial court wrongly granted summary judgment *to Respondent*—the party that had the burden of showing that there was “no triable issue as to any material fact.” CODE CIV. PROC. §437c(c).

conduct to a reasonable interpretation of what Section 118950 and the Master Settlement Agreement required.

B. A Multimillion Dollar Fine Exceeds Any Conceivable Harm Caused By Reynolds' Distribution Of Free Cigarettes To Adult Smokers.

The United States Supreme Court has ruled that courts *must* consider the actual harm caused by a defendant's conduct and not some abstract harm to the State. *See Bajakajian*, 524 U.S. at 334-40. Although it spends a considerable portion of its brief reciting the dangers of tobacco in the abstract (RB 3-6), Respondent has omitted any discussion of what possible harm the State suffered because of Reynolds' actions here—distributing cigarettes to current adult smokers. Because the cigarettes were given only to current adult smokers, no new smokers were created and no minors received cigarettes from Reynolds.

Moreover, the very conduct that Respondent now claims justifies a multimillion dollar fine—distributing cigarettes in age-restricted tents or booths to verified current adult smokers—is exactly what the Attorney General demanded of Reynolds in other contexts. The Attorney General required the tobacco companies to employ these very procedures for conducting cigarette sampling as part of the Master Settlement Agreement. *See* JA 1236 (excerpts from the MSA); Supp. RJN Ex. F (MSA at 3 §II(c); *id.* at 26 §III(g)). Respondent cannot now legitimately claim that the procedures that it insisted on “would wreak havoc in social and economic costs.” RB 45 (citation omitted). There is no “relationship between the penalty and the harm to the victim caused by the defendant's actions” in this case. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001).

The size of the proposed fine here relates only to the method of calculating “violations” defined in Section 118950 and the State's delay in making known its interpretation of the statute. Respondent is incorrect that the “per-violation” fines assessed under Section 118950 do not result in the type of “unlimited” penalties criticized in

Hale. RB 40. To the contrary, the *Hale* Court cited two cases dealing with per-violation penalties as *examples* of “ever-mounting penalties” that this Court looked on “with disfavor.” *Hale v. Morgan*, 22 Cal. 3d 388, 401-02 (1978) (citing *People v. Superior Court*, 9 Cal. 3d 283, 288 (1973) and *Walsh v. Kirby*, 13 Cal. 3d 95, 103-04 (1974)). There is no reason to look more favorably on penalties calculated per-violation than per-day. Under both mandatory “per-day” and “per-violation” penalty provisions, “[t]he exercise of a reasoned discretion is replaced by an adding machine.” *Hale*, 22 Cal. 3d at 402-03.

The penalties increased here not because Reynolds willfully violated the statute thousands of times, but because the statute is written in such a way that by the time an honest mistake is discovered, it already has been violated thousands of times. In other words, the penalty assessed here is related solely to the delay by the State in bringing the lawsuit and the “per-package” structure of the penalty provision. As was the case in *Walsh*, the accrual of violations in this manner necessitates a finding that the resulting penalty is unconstitutionally disproportional.

CONCLUSION

This Court should defer to and agree with the unanimous and persuasive federal authorities ruling that FCLAA preempts state regulation of cigarette sampling. In addition, Reynolds’ promotional activities fully complied with Section 118950(f)’s requirement for distributions that take place in secured, adult-only areas. Finally, the imposition of a \$14,826,200 fine was unconstitutionally

disproportional to the gravity of any offense committed by Reynolds.
The judgment should be reversed.

DATED: May ____, 2004.

Respectfully,

H. JOSEPH ESCHER III
MARC HABER
CHANDRA MILLER FIENEN
HOWARD RICE NEMEROVSKI CANADY
FALK & RABKIN
A Professional Corporation

By _____
H. JOSEPH ESCHER III

*Attorneys for Defendant and Petitioner
R.J. Reynolds Tobacco Company*

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CAL. R. CT. 29.1(c)**

Pursuant to California Rule of Court 29.1(c), and in reliance on the word count feature of the software used to prepare this document, I certify that the foregoing Petitioner's Reply Brief On The Merits contains 4,173 words, exclusive of those materials not required to be counted under Rule 29.1(c).

H. JOSEPH ESCHER III

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PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the documents are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business.

On May 17, 2004, I served the following document(s) described as **PETITIONER'S REPLY BRIEF ON THE MERITS** on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, 7th Floor, San Francisco, California, to be served by mail addressed as follows:

Peter W. Williams, Esq.
Office of the Attorney General
1300 "I" Street, Suite 125
Sacramento, CA 95814

Hon. Conrad R. Aragon
Los Angeles Superior Court
Pomona Court
350 West Mission Blvd.
Pomona, CA 91766

California Court of Appeal
Second Appellate District,
Division 2
300 So. Spring Street
2nd Flr., North Tower
Los Angeles, CA 90013

Clerk of Court
Los Angeles County Superior
Court
County Courthouse
111 North Hill St., Room 102
Los Angeles, CA 90012

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 17, 2004.

JAY GRESHAM

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