IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA ex rel. BILL LOCKYER, as Attorney General, etc.,

Plaintiff and Respondent,

v.

R.J. REYNOLDS TOBACCO COMPANY,

Defendant-Appellant.

S121009

Second Appellate District, Division Two, No. B160571
Los Angeles County Superior Court No. KC036109
The Honorable Conrad R. Aragon, Judge

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STATEMENT OF ISSUES[1/]

1. Whether Congress, in the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), intended to preempt the state's authority to ban cigarette giveaways on public property.

2. Whether Reynolds violated California's ban on cigarette giveaways (Health & Saf. Code, § 118950) by giving away cigarettes to members of the general public at six public events held on public property.

3. Whether a $14,826,200 civil penalty for giving away 108,155 packs of cigarettes to 14,834 people is "grossly disproportional" under the Excessive Fines Clause or "excessive" under the Due Process Clause of the federal and state constitutions.

INTRODUCTION

In our federal system, it is the states which historically have guarded and protected the health and welfare of those who reside within their borders. The

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1. In its Opening Brief on the Merits, Reynolds sets forth the issues it presented in its Petition for Review, as required by Rule 29.1(b)(2)(B) of the California Rules of Court. The People have attempted to restate the issues in more simple and direct terms.

U.S. Supreme Court has termed this "the historic primacy of state regulation of matters of health and safety." (*Medtronic v. Lohr* (1996) 518 U.S. 470, 485.) The Supreme Court has recognized that "tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States." (*Lorillard v. Reilly* (2001) 525, 570, quoting *FDA v. Brown & Williamson Tobacco Corp.* (2000) 529 U.S. 120, 161.)

This Court, too, has cited the tremendous toll in diminished health and lives lost that tobacco use engenders.

> Tobacco-related illnesses are a leading cause of death in this state and worldwide, and these debilitating illnesses have imposed enormous costs on tobacco users, their families, and society. [Citation.] Although the risk of illness and death from tobacco use has become increasingly well known in recent decades, tobacco consumption continues to be widespread, at least in part because tobacco contains nicotine, a substance the Surgeon General of the United States has determined to be addictive. [Citation.]

(*Naegele v. Meyers* (2002) 28 Cal.4th 856, 860.)

More than a century ago California made it a crime to sell or give cigarettes to minors. (Pen. Code, § 308(a).) In 1991, having concluded that children were taking up smoking at an alarming rate and that cigarette giveaways were one way children got cigarettes, the Legislature banned cigarette giveaways on public property and declared: "It is the intent of the Legislature that keeping children from beginning to use tobacco products in any form and encouraging all persons to quit tobacco use shall be among the highest priorities in disease prevention for the State of California." (Former Health & Saf. Code, § 25967, subds. (a)(4), (10) & (11), as added by Stats. 1991, ch. 829, § 1, now section 118950.)

R.J. Reynolds Tobacco Company challenges a $14.8 million civil

penalty awarded to the People of the State of California for violating section 118950 14,834 times. Reynolds makes three arguments: that the state's ban on cigarette giveaways is preempted by the FCLAA (15 U.S.C. § 1331 et seq.), that its giveaways complied with the spirit, if not the letter, of state law, and that the fine is constitutionally excessive. But Congress never intended to usurp the state's power to regulate actual cigarettes in any manner. Instead, the FCLAA preempts only a state's ability to regulate the communication or dissemination of information or images about cigarettes – not the physical cigarettes themselves. Moreover, Reynolds violated California's ban on cigarette giveaways and failed to qualify for the express exception in subdivision (f) of section 118950. Lastly, giving away 108,155 packs of cigarettes to 14,834 people more than justifies the $14.8 million civil penalty.

FACTUAL AND PROCEDURAL BACKGROUND

Section 118950 bans tobacco companies, like Reynolds, from "engaging in the nonsale distribution of any smokeless tobacco or cigarettes to any person in any public building, park or playground, or on any public sidewalk, street, or other public grounds." (Subd. (b).)[2/] Each violation of section 118950 carries a minimum penalty: "Any person who violates this section shall be liable for a civil penalty of not less than two hundred dollars ($200) for one act, five hundred dollars ($500) for two acts, and one thousand dollars ($1,000) for each subsequent act constituting a violation. Each

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2. The current version of subdivision (b), which is not at issue in this case, also bans cigarette giveaways on "any private property that is open to the general public." (Section 118950(b), as amended by Stats. 2001, ch. 376, § 3, effective 1/1/02.)

distribution of a single package . . . to an individual member of the general public in violation of this section shall be considered a separate violation."

When the Legislature was considering the bill (S.B. 1100) that enacted the free-sampling ban, a prime concern was tobacco companies giving cigarettes to minors. (Reynolds' Request for Judicial Notice (RJN),[3/] Exh. E, p. 2, 2nd par. [California Medical Association videotaped free samples of cigarettes being given to children at two separate events on public grounds and cited a survey that found 14% of public school children had received free cigarettes].) California's Tobacco Education Oversight Committee (see Health & Saf. Code, § 104365 et seq.) told the Legislature that such illegal activity occurred even though tobacco companies said they did not give free cigarettes directly to minors, that policing the distribution of free cigarettes to minors would be a near-impossible task for law enforcement and that free samples of cigarettes "inevitably fall into the hands of minors." (People's RJN, Exh. B, p. 2.)

The Legislature cited these concerns and others as reasons for banning cigarette giveaways on public property:

> (1) Smoking is the single most important source of preventable disease and premature death in California.
>
> . . . . . .
>
> (4) Despite laws in at least 44 states prohibiting the sale of tobacco products to minors, each day 3,000 children start using tobacco products in this nation. Children under the age of 18 years consume 947 million packages of cigarettes in this country yearly.
>
> (5) The earlier a child begins to use tobacco products, the more likely it is that the child will be unable to quit.

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3. The Court of Appeal granted an initial and a supplemental RJN submitted by Reynolds and an RJN submitted by the People.

> (6) More than 60 percent of all smokers begin smoking by the age of 14 years, and 90 percent begin by the age of 19 years.
>
> . . . . . .
>
> (9) Tobacco product advertising and promotion are an important cause of tobacco use among children. More money is spent advertising and promoting tobacco products than any other consumer product.
>
> (10) Distribution of tobacco product samples and coupons is a recognized source by which minors obtain tobacco products, beginning the addiction process.

(Section 118950, subd. (a).)

"Legislative findings, while not binding on the courts, are given great weight and will be upheld unless they are found to be unreasonable and arbitrary." (*Cal. Housing Fin. Agency v. Elliot* (1986) 17 Cal.3d 575, 583.) Reynolds was the only tobacco company to oppose S.B. 1100 (Reynolds' RJN, Exh. D, p. 4), but never attacked, and does not attack now, any of these findings.

Three years after California banned cigarette giveaways on public property, the U.S. Surgeon General noted the serious problem of minors' receiving free cigarettes. ("Preventing Tobacco Use Among Young People," People's RJN, Exh. E, p. 249, 2nd par. [intentionally or unintentionally "adults can be a source of tobacco for some adolescents"]; *id*. at p. 186, 4th par. ["although the cigarette manufacturers argue that samples are not intended for nonusers or minors, there is little evidence of distribution control"].)

In 2003 the Second Circuit upheld New York's ban on direct sales of cigarettes over the Internet and noted the problem of minors as secondary recipients of legally-obtained cigarettes. "We are particularly persuaded that this evidence tips the balance in the State's favor in light of the pernicious effects of cigarette smoking and the possibility that purchasers of any age may supply youthful smokers who do not themselves purchase through direct

channels." (*Brown & Williamson Tobacco Corp. v. Pataki* (2d Cir. 2003) 320 F.3d 200, 217.)

The parties stipulated to the material facts in this case. (Joint Appendix (JA) 110-118.) At six separate events held on public property in 1999, Reynolds gave away 108,155 packs of cigarettes to 14,834 people.[4/] (JA 1604, 1614-1615.) At each event Reynolds set up one or more sampling booths or tents and gave away cigarettes to adults drawn from the surrounding crowd. (See JA 1609.) At the Sunset Junction Festival, a street fair held on Sunset Boulevard in Los Angeles, Reynolds gave away 3,418 packs of Camel cigarettes. (JA 114.) At the Del Mar Mile Motorcycle Championship held at the Del Mar Fairgrounds in San Diego County, Reynolds gave away 951 packs of Camels. (JA 112.) At the Blessing of the Cars in Verdugo Park in Glendale, Reynolds gave away 968 packs of Camels. (JA 113-4.) At the Long Beach Jazz Festival, Reynolds gave away 2,470 packs of Winston cigarettes. (JA 115.) At the San Jose International Beer Festival in Guadalupe River Park, Reynolds gave away 4,078 packs of Camels. (JA 116.) And, at the Pomona Raceway at the Los Angeles County Fairplex, Reynolds gave away 9,600 cartons (96,000 packs) of Winstons. (JA 111-2.) Every one of these events was open to the general public and people of all ages, including children, could attend. (JA 464 ¶ 3; 111 ¶ 14; 112 ¶ 22; 113 ¶ 33; 115 ¶ 52; and 116 ¶ 61.)

The trial court concluded that Reynolds had violated section 118950 14,834 times and fined the company $14,826,200 — $200 and $500,

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4. At an event in February 2000, Reynolds gave away coupons worth $1 off two packs of cigarettes. (JA 110-111.) The trial court ruled for Reynolds on this claim. (JA 1609 ¶ B.) While the People believe that ruling is based on an erroneous interpretation of the statute (see JA 575), this giveaway is not at issue on appeal.

respectively, for the first and second person who received free cigarettes at each event, and $1000 for every other recipient. (JA 1605:1-4; see section 118950, subd. (d).) The Court of Appeal agreed and upheld the fine in its entirety. *(People ex rel. Lockyer v. Reynolds* (2003) 112 Cal.App.4th 1377 (*Reynolds*).)

ARGUMENT
I.

CALIFORNIA MAY REGULATE CIGARETTE GIVEAWAYS DESPITE FEDERAL PREEMPTION OF STATE LAWS BASED ON SMOKING AND HEALTH WITH RESPECT TO PROMOTION OF CIGARETTES

Reynolds contends that section 118950 is preempted by the FCLAA, as amended by the Public Health Cigarette Smoking Act of 1969 (Pub. L. 91-222, 84 stat. 87.) Both the FCLAA and the 1969 Act contain express preemption clauses. As originally enacted in 1965, the FCLAA provided, in pertinent part, that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (Former 15 U.S.C. § 1334(b).) The 1969 Act replaced former section 1334(b) with a new preemption clause: "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (15 U.S.C. § 1334(b).)

The U.S. Supreme Court has addressed questions about the preemptive reach of section 1334(b) in two cases. The first, *Cipollone v. Liggett Group* (1992) 505 U.S. 504), decided whether and, if so, to what extent section 1334(b) preempted the plaintiff's state common law claims against the tobacco

company defendants. Eleven years later, in *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525 (*Lorillard*), the Court decided whether section 1334(b) preempted state rules relating to the location of cigarette advertising.

After *Cipollone* was decided, but before *Lorillard*, this Court addressed the preemptive effect of section 1334(b) in *Mangini v. R.J. Reynolds* (1994) 7 Cal.4th 1057. The Court applied the predicate legal duty analysis developed by the U.S. Supreme Court in *Cipollone* to decide whether certain legal claims under California's unfair competition law (Bus. & Prof. Code, § 17200 et seq.) were preempted. As Reynolds acknowledges in its opening brief in this Court (AOB 13, n. 4), the federal preemption question presented by the case at bar does not require the Court to revisit or reexamine *Mangini* because that case involved application of the phrase "based on smoking and health" in section 1334(b), while in this case the People recognize that section 118950 is based on smoking and health.

Reynolds's federal preemption argument can be reduced to a simple, but faulty, syllogism: in the FCLAA Congress preempted all state requirements or prohibitions with respect to cigarette promotion; cigarette giveaways promote cigarettes; therefore, any ban on cigarette giveaways is preempted. The fault in Reynolds's logic, which the Court of Appeal detected, is that while Congress has foreclosed states from regulating cigarette-related advertising and promotion in the name of health, Congress has not intruded on the states' power to regulate cigarettes. There is a critical difference between cigarette advertising and promotion, which attempt to stimulate desire for cigarettes, and activities involving cigarettes themselves, such as sales, distribution and use.

The People's argument can also be summarized in simple terms: because Congress has not preempted states' authority to regulate the sale and use of cigarettes, as confirmed definitively in *Lorillard*, Congress has not

preempted states' authority to ban cigarette giveaways.

A. Even When Congress Expresses An Intent To Preempt State Authority, A Reviewing Court Still Must Assume That States May Continue To Exercise Their Traditional Police Powers Absent An Unambiguous Indication Of Congressional Intent To The Contrary

Faced with an express preemption statute, the court's task is to "identify the domain expressly pre-empted" by that language. (*Cipollone*, at p. 517; *Lorillard*, at p. 541 and *Medtronic v. Lohr*, *supra*, 518 U.S. at p. 485.) This is so because, as the Court explained in *Lorillard*, " 'an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters' [citation]." (*Lorillard*, at p. 541.)

Although the analysis "begins with the text" of the preemption statute, it "does not occur in a contextual vacuum. Rather that interpretation is informed by two presumptions about the nature of pre-emption." (*Medtronic*, at p. 485; cf. *Lorillard*, at pp. 541-2 and *Cipollone*, at p. 516.) The first of these presumptions arises from the nature of our federal system of government. "First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." (*Medtronic*, *ibid.*; see also *Cipollone*, at p. 516, *Lorillard*, at p. 541.) Thus, "[i]n ***all*** pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied' [citation], we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [Citations]" (*Medtronic*, *ibid.*, emphasis added; *Dowhal v. SmithKline Beecham Healthcare* (2004) ___ Cal.4th ___, 2004 Cal.Lexis 3040, pp. *16-7.) This presumption makes practical sense because Congress can make its preemptive intent clear, but "if

the court erroneously finds preemption, the State can do nothing about it, while if the court errs in the other direction, Congress can correct the problem. [Citation.]" (*Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941, 943.)

The second assumption arises from and complements the first. For, if the court must presume that state authority is not preempted, the court must also discern precisely what state authority Congress intends to preempt when it enacts an express preemption statute. "[O]ur analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment, . . . [citation] that 'the purpose of Congress is the ultimate touch-stone' in ***every*** pre-emption case. [Citations.]" (*Medtronic*, p. 486, emphasis added; see also *id.* at p. 494; *Cipollone*, at p. 516; *Lorillard*, at p. 541.)

Five years after deciding in *Cipollone* that the FCLAA preempted only state common law causes of action that are based on smoking and health, the Court characterized the effect of applying the first of these two presumptions to section 1334(b) as resulting in a "narrow" interpretation of the scope of preemption. "We used a 'presumption against the pre-emption of state police power regulations' to support a narrow interpretation of such an express command in Cipollone. [Citation.] That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." (*Medtronic*, at p. 485.)

The process of uncovering the "ultimate touchstone" and discerning Congressional purpose begins with the words of the statute, but, significantly, the process does not end there. In *Medtronic*, the Court dictated a contextual approach to discerning Congressional intent, beginning with the language of the preemption statute, but also considering the way the statute fits into the framework of the Act and the goal Congress sought to achieve.

> Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the "statutory framework" surrounding it. [Citation.] Also relevant, however, is the "structure and purpose of the statute as a whole," [citation] as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

(*Medtronic*, at p. 486; accord *California Federal Sav. & Loan Assn. v. Guerra* (1987) 479 U.S. 272, 284.)

In *Cipollone* and later in *Lorillard*, where the Court focused specifically on the preemptive domain of section 1334(b), a majority of the Court endorsed and applied a contextual approach to discerning the intent of Congress.

B. Seven Supreme Court Justices In *Cipollone* Utilized A Contextual Approach In Deciding Which Of The Plaintiff's Common Law Claims Were Preempted By The FCLAA

In *Cipollone* the Court began by reviewing the major events that led up to enactment of the FCLAA in 1965, with particular emphasis on the ground-breaking 1964 report of the U.S. Surgeon General and the Federal Trade Commission's proposed rule that would have required cigarette packs and advertising to carry a health warning. (*Cipollone*, at p. 513.) Next, the Court examined the stated purposes of the FCLAA — "(1) adequately informing the public that cigarette smoking may be hazardous to health, and (2) protecting the national economy from the burden imposed by diverse, nonuniform, and confusing cigarette labeling and advertising regulations" (*id.* at p. 514) — and the wording of the initial preemption provision. From there, the Court reviewed the major events between 1965 and 1969, which helped shape the 1969 amendments to the FCLAA, including a proposed regulatory ban by the FTC of radio and television ads for cigarettes. (*Id.* at pp. 514-5.) Finally, the Court reviewed the three principal changes made to the FCLAA in 1969:

Congress (1) "strengthened the warning label," (2) "banned cigarette advertising in 'any medium of electronic communication subject to [FCC] jurisdiction,' " and (3) "modified the pre-emption provision." (*Id.* at p. 515.)

Against this backdrop of events and legislative history, the Court set forth the basic principles of preemption analysis, including the two initial presumptions, described above. (*Id.* at p. 516.) Next, the Court stated that where, as in the FCLAA, Congress has included an express preemption provision in a statute, there is no need to look to the other provisions of the statute to determine *whether* Congress intended to preempt certain state authority. "In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act. . . . Therefore, we need only identify the domain expressly pre-empted by each of those sections." (*Cipollone*, at p. 517.)

However, as the analysis in *Cipollone* makes clear, the task of determining the "domain expressly preempted" cannot be accomplished by examining only the text of Congress's declaration of preemption but that declaration must be considered within the broader context of the FCLAA, its purposes and legislative history. Thus, the Court examined in detail the words Congress used in the initial version of section 1334(b) and the "regulatory context" of the Act. (*Cipollone*, at pp. 518-519.) The Court read the original version of section 1334(b) as merely prohibiting federal and state agencies from mandating additional statements on cigarette packages and ads. This "narrow" reading of the statute was "appropriate," according to the Court, for a number of reasons, including that the Court had to apply the presumption against preemption of state police power regulations, which in this case "reinforces the appropriateness of a narrow reading," because it "comports with the 1965 Act's statement of purpose" and the "[t]he regulatory context of the

1965 Act also supports such a reading." (*Cipollone*, at p. 519.)

Up to this point in *Cipollone*, seven justices concurred in the plurality opinion authored by Justice Stevens. But only four justices concurred in Parts V and VI, in which the plurality considered the preemptive effect of the changes wrought by the 1969 amendments to the FCLAA. The plurality concluded that state common law claims not based on smoking and health were still viable, i.e., not preempted. Three other justices (Blackmun, Kennedy and Souter), who joined the plurality's analysis in Parts I-IV of the opinion, construed section 1334(b) more narrowly and would have held that section 1334(b) did not preempt any common law claims. (*Cipollone*, at pp. 535-537, Blackmun, J., concurring and dissenting in part.) By concurring in Parts I-IV of the plurality opinion, these three justices agreed that when faced with an express preemption provision, a court should look no further in the statutory scheme for Congressional intent to preempt, but the court must still apply the presumption against preemption of state police powers in determining the precise domain encompassed by the preemptive provision. (*Id*. at pp. 532-3.)

In determining that section 1334(b)'s preemptive domain includes some state common law claims, namely, those that arise from a predicate legal duty "based on smoking and health," the plurality relied on what they believed to be the "plain meaning" of the words Congress used. (*Cipollone*, at p. 521.) However, Justices Blackmun, Kennedy and Souter read those same words and came to the opposite conclusion about their "plain meaning": ". . . the words of § 5(b) ('requirement or prohibition') do not so 'plainly' extend to common-law damages actions, and the plurality errs in placing so much weight on this fragile textual hook." (*Id.* at p. 540, Blackmun, J., concurring and dissenting.) Only Justices Scalia and Thomas rejected outright a "plain statement" rule, as articulated by the majority, and concluded that application of "ordinary

principles of statutory construction" would result in a holding that Congress intended to preempt all common law claims. (*Id.* at p. 546., Scalia, J., concurring and dissenting; see *Reynolds*, at pp. 1392-3.)

C. In *Lorillard* The Court Again Utilized A Contextual Approach To Decide That Massachusetts' Restrictions On Where Cigarettes Could Be Advertised Were Preempted

In *Lorillard* the five-justice majority acknowledged that "[o]ur analysis ***begins*** with the language of the statute" (*Lorillard*, at p. 542, emphasis added), but also recognized the need for and benefit of examining the statute's context: "[w]e are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted" (*ibid.*, citing *Medtronic*, at p. 486.) The majority in *Lorillard* explained the nature of its task: "Viewed in light of the ***context*** in which the current pre-emption provision was adopted, we must determine whether the FCLAA pre-empts Massachusetts' regulations governing outdoor and point-of-sale advertising of cigarettes." (*Lorillard*, at p. 546, emphasis added.)

Lorillard looked to Congress's use of the phrase "all requirements" and "prohibitions," as indicating an intent to preempt not just state regulation of the content of cigarette ads, but regulation of their location, as well. (*Id.* at p. 549.) But then the Court immediately cautioned that this does not mean looking at the preemption provision in isolation. "We are not at liberty to pick and choose which provisions in the legislative scheme we will consider . . . , but must examine the FCLAA as a whole." (*Ibid.*) It is apparent from the Court's stated rationale for its ultimate holding in the case that it did just that: "Congress pre-empted state cigarette advertising regulations like the Attorney General's because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic

media in order to address concerns about smoking and health." (*Lorillard*, at p. 551.) Such a view of the preemptive domain of section 1334(b) simply cannot be garnered from the words of section 1334(b) alone.

Significantly for the instant case, all nine Justices concurred in Part II-C of the Court's opinion in *Lorillard*, explicitly recognizing that section 1334(b)'s preemptive domain has limits. "Although the FCLAA prevents States and localities from imposing special requirements or prohibitions 'based on smoking and health' 'with respect to the advertising or promotion' of cigarettes, that language still leaves ***significant power*** in the hands of States to impose generally applicable zoning regulations and ***to regulate conduct***." (*Lorillard*, at p. 551, emphasis added.) Importantly, "[t]he FCLAA also does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes." (*Id.* at p. 552.)

In that same part II-C of the opinion, the Court relied on legislative history to support its reading of section 1334(b): "[t]he Senate Report explained that the pre-emption provision 'would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, ***or similar police regulations***. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." (*Lorillard*, at p. 552, quoting from Sen. Rep. No. 91-566, at p. 12 (1969), emphasis added.)

Of course, neither *Cipollone* nor *Lorillard* addresses the precise question presented here — a state law prohibiting cigarette giveaways on public property. Nonetheless, this issue could have been raised in *Lorillard* because the regulations promulgated by the Massachusetts Attorney General also prohibit cigarette giveaways except in limited circumstances at retail

establishments. (940 Code of Massachusetts Regulations (CMR) 21.04(1)(a).[5/]) But Reynolds and the other major domestic cigarette companies chose not to challenge that part of the regulations. (*Lorillard*, at p. 567.)

D. In Striking Down An Iowa Law Banning Promotional Giveaways Of Cigarette-related Merchandise And Cigarettes, The Eighth Circuit In *Jones v. Vilsac* Failed To Apply The Contextual Analysis Dictated By *Cipollone, Medtronic And Lorillard*

Besides the Court of Appeal below, the only other appellate court in the nation to have considered whether Congress intended to preempt states' authority to regulate cigarette giveaways is the Eighth Circuit. Indeed, *Jones v. Vilsac* (8th Cir. 2001) 272 F.3d 1030 is the only other appellate decision to have addressed the effect of Congress' addition of the word "promotion" to section 1334(b).[6/]

In *Jones* tobacco retailers challenged an Iowa statute that banned a whole range of cigarette-related giveaways—articles, products, commodities, gifts, and concessions in exchange for the purchase of cigarettes—as well as

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5. Section 21.04(a) provides, in pertinent part,

> "Except as otherwise provided in 940 CMR 21.04(4), 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) sampling, promotional give-aways, or any other free distribution of cigarettes or smokeless tobacco products . . . ."

Section 21.04(4) allows distribution of one free sample per day to adults in a retail outlet.

6. *Rockwood v. City of Burlington* (D. Vt. 1998) 21 F.Supp.2d 411 is the only other published decision to have applied section 1334(b)'s preemption of state laws regulating promotion of cigarettes based on smoking and health. *Rockwood* reached a result similar to *Jones*, but without significant analysis. (See *Reynolds*, at p. 1391.)

free cigarettes. The Eighth Circuit concluded that Congress had stripped Iowa of authority to ban such giveaways because product sampling promotes cigarettes. The court understood its task to be a simple one: to find the "plain meaning" of the word "promotion" in section 1334(b). "[W]e must not interpret the term 'promotion' more narrowly than its plain and ordinary meaning would suggest." (*Jones*, 272 F.3d at p. 1035.)

The court arrived at this so-called "plain meaning" rule in a most unorthodox way: it found what it perceived to be an analytical convergence of the two partially dissenting and partially concurring opinions in *Cipollone*. (*Ibid.*) However, in doing so, the Court of Appeals completely ignored the fact that these two opinions reached diametrically opposite conclusions about whether or not section 1334(b) preempted state common law claims and the fact, noted above, that seven justices in *Cipollone* construed section 1334(b) contextually and eschewed a literalistic approach, while only Justices Scalia and Thomas argued for adhering strictly to the ordinary meaning of the words of the statute. (*Cipollone,* at pp. 535-537, Blackmun, J., concurring and dissenting in part; *id.* at pp. 546-9, Scalia, J. concurring and dissenting in part; see *Reynolds*, at p. 1392.)

Although the court in *Jones* referred in passing to the presumption against preemption (*Jones,* at p. 1033), it failed to apply that presumption anywhere in its analysis. This was an error of fundamental magnitude, for, as noted above, seven justices in *Cipollone* concurred that this presumption underlies all preemption analysis and both *Medtronic* and *Lorillard* require this, as well. (*Medtronic,* at p. 485; *Lorillard,* at p. 541.) Although *Jones* creatively, but improperly, cobbled together the two partially dissenting and concurring opinions in *Cipollone*, it accorded absolutely no significance to the four-justice plurality's contextual approach in part IV of the opinion in

Cipollone or to the fact that three other Justices (Blackmun, Kennedy and Souter) also concurred in part IV.

Nowhere does *Jones* acknowledge that while *Lorillard* stresses the importance of giving "meaning to each element of the pre-emption provision" (*Jones*, at p. 1037, quoting *Lorillard*), *Lorillard* also reiterates the benefits of examining the context and structure of the FCLAA to determine whether Congress intended to preclude the states from regulating both the content and the location of cigarette advertising. On the same page from which the 8th Circuit extracted the passage just quoted, the Supreme Court said: "We are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted." (*Lorillard*, at p. 542.)

Lorillard follows *Medtronic*, where the Court endorsed and applied a contextual approach to federal preemption analysis under the Medical Devices Act. But *Jones* does not even cite *Medtronic*, which may explain why *Jones* ignored the presumption against preemption and applied a literalistic approach to the words of section 1334(b). In *Medtronic* the Court soundly rejected the "plain language" argument advanced by Medtronic, Inc., finding the argument both "unpersuasive" and "implausible." (*Medtronic*, at pp. 486-7.) Literalistic approaches to statutory construction "make a fortress out of the dictionary." *(Cabell v. Markham* (2d Cir. 1945) 148 F.2d 737, 739 [Learned Hand, J.], aff'd (1945) 326 U.S. 404.)[7/]

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7. *Jones* resorted to several dictionaries for a definition of "promotion" but also relied on the Federal Trade Commission's annual cigarette report to Congress (see 15 U.S.C. § 1337(b) and JA 280 ¶ 1) and the Surgeon General's 1994 report "Preventing Tobacco Use Among Young People" (People's RJN, Exh. E). (*Jones*, *supra*, 272 F.3d at p. 1035.) But neither report controls how the term "promotion" in section 1334(b) of the

As noted above, *Lorillard* applied a contextual analysis to determine whether the Massachusetts' tobacco control regulations were preempted. (*Lorillard*, at pp. 542-545.) On the central question, whether Congress intended to preempt the states' authority to regulate both the content and the location of cigarette advertising, the Court found particularly significant the fact that in addition to enhancing the public warnings about cigarettes, the 1969 amendments "also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes." (*Id.* at p. 548.) These facts, which can in no way be gleaned from the words of section 1334(b) itself, led the majority in *Lorillard* to conclude that Massachusetts could not restrict the location of tobacco advertising on the basis of smoking and health. "The ***context*** in which Congress crafted the current pre-emption provision leads us to conclude that Congress prohibited state cigarette advertising regulations motivated by concerns about smoking and health." (*Ibid.*, emphasis added.)

Thus, in stark contrast to Reynolds' argument in its opening brief, based on *Jones*, that *Lorillard* rejected a contextual approach and that the court below and the dissenters in *Lorillard* improperly adopted a contextual approach, the Court of Appeal properly rejected a "plain meaning" analysis in this case and

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FCLAA is to be construed, because Congress did not delegate to either the FTC or the Surgeon General any responsibility to define the term, and neither agency has formally defined it. For that reason, as *Jones* acknowledged, courts owe no deference to these reports in construing "promotion" in section 1334(b). (*Jones*, at p. 1035.) Moreover, the Surgeon General's report urges states to ban cigarette giveaways. (People's RJN at Exh. E, p. 3 ¶ 4 and p. 256 ¶ 3.)

correctly concluded that California's ban on cigarette giveaways on public property is not preempted.

> The stated purpose of the FCLAA is to inform the public of the relationship between smoking and health. Significantly, the FCLAA does not purport to regulate how and where cigarettes are distributed. Also, how and where cigarettes are distributed is unrelated to the labeling and advertising obligations imposed by the FCLAA. In other words, excluding nonsale distribution from the meaning of "promotion" works no violence on the intended beneficial effect of the FCLAA. That analysis, coupled with the presumption that Congress left unfettered the historic police powers of the states, leads us to hold that the FCLAA permits the states to enact laws designed to restrict the free distribution of cigarettes.

(*Reynolds*, at p. 1389.)

Because *Jones* misapplied the dictates of *Cipollone* and *Lorillard*, it reached the wrong result, sweeping away Iowa's ban on cigarette giveaways along with the state's other restrictions on giveaways of non-cigarette promotional items. Thus, as the Court of Appeal below correctly concluded, *Jones* is not persuasive federal authority nor is the decision entitled to great weight. (*Reynolds*, at p. 1393, citing *Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321 [California courts should "hesitate to reject" decisions of lower federal courts on federal questions, but only so long as such decisions are "both numerous and consistent"].)

Thus, just as Congress did not intend to preempt state authority to regulate where and to whom cigarettes may be sold and where and by whom cigarettes may be smoked (*Lorillard*, at p. 552), Congress did not intend to preempt state authority to regulate where cigarettes may be given away.

E. Congress's Insertion Of The Word "Promotion" Into The FCLAA Is Too Slender A Textual Reed To Demonstrate A Clear And Manifest Intent To Preempt State Authority To Regulate Cigarette Giveaways

When Congress enacted the FCLAA in 1965, it did not use the word "promotion." When Congress amended the FCLAA in 1969, it used the word only twice, in section 1334(b) and in section 1337(b)(1), relating to the FTC's reporting responsibilities, but nowhere defined it. In 1969 Congress did not change the declaration of overall purpose in the 1965 Act: "to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health," nor did it change either of the more specific statements of purpose, that:

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
>
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

(15 U.S.C. § 1331.) A state ban on cigarette giveaways in no way frustrates either of these purposes, further indicating that Congress did not intend to preempt states' authority to regulate such activity. (See *Smiley v. Citibank* (1995) 11 Cal.4th 138, 154, aff'd (1996) 517 U.S. 735; *Lorillard,* at pp. 551-2.)

Legislative history sheds no light on what Congress intended by adding the word "promotion" to section 1334(b). Senate Report 91-566 (1970 U.S. Code Cong. & Admin. News at p. 2652 et seq.) describes the 1969 amendments as having "clarified" the 1965 preemption provision in the

FCLAA and characterizes the revised preemption provision as limited in scope:

> The State preemption of regulation or prohibition with respect to cigarette advertising is narrowly phrased to preempt only State action based on smoking and health. It would in no way affect the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes.

(*Id.* at p. 2663.)

In the FCLAA, Congress defined "sale or distribution" as including sampling or any other distribution not for sale" (15 U.S.C. § 1332(6)), but, unfortunately, the FCLAA does not shed any more light on what Congress thought about cigarette giveaways. It certainly did not speak "clearly and manifestly" on the subject.

F. Subsequent Acts Of Congress Indicate That Congress Itself Treats Cigarette Giveaways As Outside The Domain Of FCLAA Preemption

In 1992 Congress passed the "Synar Amendment." (42 U.S.C. § 300x - 26(a).) The Synar Amendment placed a condition on the states' right to receive certain federal grants: "only if the State involved has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such product" to minors. (*Id.*) The state must enforce such a law "in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18." (42 U.S.C. § 300x - 26(b)(1).)

While an act of a subsequent Congress is not direct evidence of a previous Congress's intent, courts do look to subsequent acts as evidence of Congress's understanding of its prior acts. (*California Div. of Labor Standards*

Enforcement v. Dillingham Constr., N.A., Inc. (1997) 519 U.S. 316, 331, fn. 7; *Mangini v. R.J. Reynolds, supra*, 7 Cal.4th at 1070-1071 [Synar Amendment is evidence that action for fraud against Reynolds is not preempted].) Here, too, the Court of Appeal cited the Synar Amendment as evidence of Congress's understanding that the FCLAA does not preempt state regulation of cigarette giveaways: "It is implausible that Congress intended to require states to prohibit the sale or distribution of cigarettes to minors as a condition to certain federal funding, yet at the same time preempt any state law prohibiting the distribution of free cigarettes, which includes the distribution of free cigarettes to minors." (*Reynolds,* at p. 1390.)

In 1995 Congress exercised its own authority to protect the public's health from tobacco use, in conjunction with its authority to regulate commercial activity on federal property, by enacting The Prohibition of Cigarette Sales to Minors in Federal Buildings and Lands Act. (P.L. 104-52, 109 Stat. 507, Title VI, sec. 636.) Despite its slightly misleading title, this Act directs federal agencies to ban cigarette vending machines and cigarette giveaways "in or around any Federal building."[8/] A number of federal agencies have adopted formal regulations to implement this Congressional directive. (See 31 C.F.R. § 12.4 (Treasury Dept.), 41 C.F.R. § 102-74.415 (General Services Administration), 20 C.F.R. § 368.5 (Railroad Retirement Board), and 18 C.F.R. § 1303.3(b) (Tennessee Valley Authority).)

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8. 40 U.S.C. § 3101, subdivision (b) provides that "No later than 45 days after the date of enactment of this Act, the Administrator of General Services and the head of each Federal agency shall promulgate regulations that prohibit . . . (B) the distribution of free samples of tobacco products in or around any Federal building under the jurisdiction of the Administrator or such agency head."

Subdivision (a) defines "tobacco product" as including "cigarettes."

Although no published legislative history explains Congress's reasons for banning cigarette giveaways on federal property, it took this action one year after the U.S. Surgeon General cited with approval a recommendation that states ban "the distribution of free samples of tobacco products," as one way to restrict minors' access to tobacco. ("Preventing Tobacco Use Among Young People: A Report of the Surgeon General (1994)," p. 256, People's RJN at Exh. E.) Whatever its origin, this law evidences Congressional intent to protect the health of minors and adults by banning cigarette giveaways on federal property. It also indicates an understanding on the part of Congress that cigarette giveaways are different from other forms of product promotion and that despite whatever promotional aspect cigarette giveaways may have, it did not cede regulation of such matters to the Federal Trade Commission via the FCLAA. (See 15 U.S.C. § 1336.)

In the final analysis, Reynolds's argument for preemption of section 118950 is too facile. Simply because giving away samples to potential consumers is commonly understood to be a means of promoting consumer products does not mean that Congress intended to preempt states' authority to restrict cigarette giveaways. Having celebrities and attractive young men and women smoke cigarettes while they give away free cigarettes on public grounds would undoubtedly promote Reynolds's products, too, but not even Reynolds would contend that the FCLAA preempts state law banning smoking in public buildings. (*Lorillard*, at p. 552; see Gov. Code, §§ 7596-7598.) Reynolds's argument ignores the impact of the negative presumption against federal preemption of state police power authority, the context and structure of the FCLAA, and the import of Congress's subsequent indications of its own understanding of just how far FCLAA preemption extends.

Because the Court of Appeal, below, applied the presumption against

preemption and the contextual approach to section 1334(b), it reached the correct result and upheld section 118950 as a legitimate exercise of the state's authority to regulate how and where cigarettes may be given away.

II.

REYNOLDS'S CIGARETTE GIVEAWAYS AT SIX PUBLIC EVENTS ON PUBLIC PROPERTY VIOLATED SECTION 118950

As pertinent to this case, section 118950, subdivision (b), prohibits cigarette companies, like Reynolds, from engaging in the "nonsale distribution" of cigarettes "to any person in any public building, park, or playground, or on any sidewalk, street, or other public grounds . . . ." "Nonsale distribution" includes giving away cigarettes "to the general public at no cost, or at nominal cost . . . ." (Section 118950, subd. (c)(1).) The statute permits cigarette giveaways on public property only where "minors are prohibited by law" or in "any public building, park, playground, sidewalk, street or other public grounds . . . leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises." (Section 118950, subd. (f).)

Reynolds admits that at the six events at issue here it gave away 108,155 packs of cigarettes on public property that was open to the general public. Reynolds first attempts to maneuver these cigarette giveaways into the second of the statutory "safe harbors" by arguing that its cigarette giveaways met all the conditions set forth in subdivision (f), because Reynolds contracted for the right to set up small booths or tents from which minors were barred entry by a licensed security guard. But this argument founders on the words of subdivision (f). Not one of the public grounds where Reynolds gave away cigarettes was "leased" for "private functions."

Reynolds next claims that the Legislature did not intend that an *entire*

public building, facility or property had to be leased for a non-public event. In support of this strained interpretation of unambiguous statutory language, Reynolds resorts to legislative history in an attempt to show that the Legislature intended to allow the very practice Reynolds utilized. But this argument fails, as well, because it would thwart the express purposes of section 118950, preventing minors from taking up smoking and encouraging smokers to quit. (Section 118950(a)(11).)

A. Statutes Intended To Protect The Public Are Construed Broadly, To Achieve Their Salutary Purpose, While Exceptions To Such Statutes Are Interpreted Strictly

The most basic rule, and the ultimate goal, of statutory construction is discerning and giving effect to the intent of the Legislature. (*Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 743.) "In construing a statute, our first task is to look to the language of the statute itself. [Citation.] When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. [Citations.] . . . [¶] . . . Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. [Citations.]' " (*Ibid.*, internal quotation marks omitted.)

Another basic rule of statutory construction dictates that laws, like section 118950, enacted for the purpose of protecting the public, are construed broadly. "[T]he general rule [is] that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose. [Citations.]" (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.)

When section 118950 is considered as a whole, there is no doubt that the Legislature intended this statute as a means of protecting the health and welfare

of the general public (both minors and adults) from the devastating consequences of tobacco addiction. Eleven express declarations detail the toll tobacco use exacts in lost lives and compromised health, as well as the importance of preventing minors from beginning to use tobacco and of encouraging adult users to quit. (Section 118950, subds. (a)(1) - (11).) With these findings as a contextual backdrop, the Legislature went on to ban, in the broadest of terms, cigarette giveaways on public property.

The public property ban expressly extends to "any public building, park or playground, or on any public sidewalk, street, or other public grounds" (subd. (b)), but the Legislature went on to define these already inclusive terms to mean:

> . . . any structure or outdoor area that is owned, operated, or maintained by any public entity, including, but not limited to: city and county streets and sidewalks, parade grounds, fair grounds, public transportation facilities and terminals, public reception areas, public health facilities, public recreational facilities, and public office buildings owned, operated or maintained by any public entity.

(Section 118950, subd. (c)(3).)

Thus, even if there were no rule of construction dictating that a civil statute enacted to protect the public be broadly construed to achieve its intended purpose, section 118950's coverage of public buildings and grounds would be broadly construed because the words of the statute indicate an intent to cover every conceivable piece of public property in the state. And, but for the two

exceptions contained in subdivision (f), the statute's ban on cigarette giveaways on public property would be complete.

Express exceptions to a statutory scheme are subject to the same basic

rules of construction, including the fundamental rule that legislative intent is to be found primarily in the words of the statute and that "every word, phrase, sentence and part of an act" is considered. (*Renee J., supra,* 26 Cal.4th at p. 743, internal quotation marks omitted.) But another rule comes into play here, a rule that requires express exceptions or provisos in a statutory scheme, like subdivision (f), to be construed narrowly. "Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. . . ." (*McAlpine v. Baumgartner* (1937) 10 Cal. 2d 409, 417-418 [internal quotation marks omitted]; *Hurst v. San Francisco* (1949) 33 Cal.2d 298, 301; *Goins v. Board of Pension Commissioners* (1979) 96 Cal.App.3d 1005, 1009 ["When a statute contains an exception to a general rule laid down therein, that exception is strictly construed"].)

Subdivision (f)'s second exception has four elements: the public property must be (1) "leased" (2) "for private functions," where (3) "minors are denied access" (4) "by a peace officer or licensed security guard on the premises." Reynolds urges the Court to either ignore the first two elements, because no lease of any kind was involved in any of the six public events where Reynolds gave away cigarettes, or, alternatively, to replace the first two elements with a different element, one that would countenance the type of arrangement Reynolds had with the event organizers – permitting a small booth or tent for its cigarette giveaways. This self-serving construction must be rejected.

Ignoring the first element of the exception would violate the rule that all the words and phrases in a statute must be given effect (*Renee J.*, at p. 743), and reading a different element into subdivision (f) would "violate the cardinal

rule that courts may not add provisions to a statute. [Citations.]" (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827.) Moreover, neither alternative would effectuate the Legislature's intent expressed in section 118950.

B. Reynolds's Giveaways Failed To Qualify For The Statutory Safe Harbor Because None Of The Public Grounds Were Leased For Private Functions And Subdivision (f) Does Not Authorize Sampling Booths Within A Larger Public Event

Reynolds claims it fully complied with subdivision (f) because at all six events it "contracted for the right to set up an age-restricted booth or tent in which to conduct sampling" and "ensured that minors were excluded by licensed security guards on the premises." (AOB 26-7.) Although the steps Reynolds took probably did prevent minors from receiving free cigarettes directly from Reynolds' representatives, it is disingenuous of Reynolds to assert that its conduct "vindicated" the statutory goal of "keeping children from beginning to use tobacco products." (AOB 27, quoting section 118950(a)(11).) Not only does Penal Code section 308(a) already outlaw giving cigarettes to minors, but section 118950 has several other stated goals, including a second goal set forth in subdivision (a)(11) itself: "encouraging ***all persons*** to quit tobacco use." (Emphasis added.) Moreover, when section 118950 is read as a whole, the Legislature's overall intent is evident, namely to prohibit cigarette sampling on all public property unless the building or other venue has been "*leased* for private functions." (Section 118950(f); see subd. (a)(11).)

Even if Reynolds could convince the Court that securing some kind of "contractual right" to set up age-restricted sampling booths on public property during public, family-oriented events satisfies the requirement that the public facility be "leased for private functions," Reynolds has another problem: subdivision (f) says nothing about sampling from little booths in the midst of a public building or outdoor venue, such as a fairground or park during a car

race, street fair or other public event.

Reynolds relies on a snippet of legislative history which the company claims supports its view that the Legislature meant to allow cigarette companies to do exactly what Reynolds did at the six events at issue here. Reynolds's resort to legislative history is both unnecessary and unpersuasive. It is unnecessary because the words of subdivision (f) are not ambiguous. "[W]e look to the language of the statute itself to determine if the ordinary meaning is unambiguous; if so, the statutory language controls, and there is no need to look to legislative intent for construction or interpretation. [Citation.]" (*Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 39.) It is unpersuasive because, despite what a legislative staffer thought the words "leased for private functions" "suggests" Reynolds could do (Reynolds's RJN at Exh. F, p. 2), allowing sampling tents or booths at public events on public property would frustrate legislative intent. As the Court of Appeal below observed, "[t]o construe [subdivision (f)] to include age restricted areas would mean that children could be exposed to points of free cigarette distribution, and there would be more immediate opportunities for adults to pass samples on to children. This is contrary to the purpose of the enactment." (*Reynolds*, at p. 1395.)

According to Senator Marian Bergeson, the author S.B. 1100, and contrary to the legislative staffer's "suggestion," the Legislature never formally considered a version of the bill that would have allowed Reynolds to set up sampling booths within a larger public venue. (JA 578-9.)[9/] One legislator did

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9. Former Senator Bergeson's declaration is properly considered because it is "a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. [Citations.]" (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 700.)

suggest to Ms. Bergeson that such an exemption be added, and Ms. Bergeson agreed to consider it. (*Ibid.*) But after consulting with a representative of the bill's sponsor, the California Medical Association, Ms. Bergeson amended the bill to add subdivision (f) and also "do away with any idea that 'portions' of a public grounds could be leased as a private event and thereby be exempt from the restrictions in the Bill." (JA 579.) Ultimately, the Legislature passed and sent to the Governor the bill as formally amended by Senator Bergeson without any mention of portions of public buildings or grounds.

Reynolds goes to great lengths in an ultimately futile attempt to show that the Legislature intended to enact a different exemption from the one that now appears in subdivision (f). (AOB 29.) In essence, Reynolds accuses a former state senator of trickery and her colleagues of being duped into voting for something they did not understand. As a matter of fact and law, however, since examination of individual legislators' subjective motivation is improper (*California Teachers Assn.*, *supra*, 28 Cal.3d at pp. 699-700), it must be conclusively presumed that the legislators who voted for the bill voted for the version that was before them, not a bill described by a legislative staff person. If a majority of the legislators in both houses believed that a mistake had been made here, they could, and presumably would, have corrected it by subsequent amendment.

C. Reading Subdivision (f) To Require That An *Entire* Public Venue Be Leased For A Private, Adults-only Function Fulfills, Rather Than Frustrates, The Legislature's Intent

In a final attempt to redeem its cigarette giveaways, Reynolds points out what it contends is the absurdity of both the lower courts' purportedly different views about how much of a public building or grounds has to be leased for private, age-restricted functions. (AOB 29-30.) But Reynolds's attempt at a *reductio ad absurdum* fails. The lower courts' respective views of how to

apply subdivision (f) differ only with respect to one of the events in question, the Sunset Junction Festival, a seven-block-long street fair that was open to the general public. The trial court did not specifically address this event, but did conclude that subdivision (f) requires the entire public grounds to be leased for age-restricted private functions. (JA 1609.) On appeal Reynolds argued that the trial court's interpretation would mean that at the Sunset Junction Festival Reynolds could give away cigarettes only if the entire 20-mile extent of Sunset Boulevard were leased. (AOB 30.)

The Court of Appeal addressed this patently unreasonable application of the statutory language and concluded that "leased public grounds is functionally coterminous with the six events within which Reynolds was distributing free cigarettes." (*Reynolds*, at p. 1396.) Thus, for example, only the seven blocks set aside for the Sunset Junction Festival would have to be leased for an age-restricted private event. (*Ibid.*)[10/] With respect to all the other public venues where Reynolds gave away cigarettes, the lower courts' conclusions are in synch, and, contrary to Reynolds's contention, the courts' views "square with the language of " subdivision (f) and "with common sense." (AOB 29.) As noted above, the Legislature went to great lengths to make clear its intent to ban cigarette giveaways from every public venue in the state. (Section 118950, subds. (b) and (c)(3).) This intent would be frustrated by the interpretation Reynolds advances.

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10. At oral argument in the Court of Appeal, the Court asked Deputy Attorney General Peter Williams about applying the "leased for private functions" condition to a street fair, like the Sunset Junction Festival. Mr. Williams responded that subdivision (f) could reasonably be interpreted, consistent with the whole of section 118950, as requiring that a pre-existing, well delineated area, such as a city block or series of blocks, could be leased for a private, age-restricted function.

Reynolds suggests that its reading of subdivision (f) advances the legislative purpose of section 118950 because there is no evidence that any minor received any free cigarettes at the six events at issue here, and because there is no evidence that allowing cigarette giveaways "within age-restricted areas would result in 'more immediate opportunities for adults to pass samples on to children.' " (AOB 31, quoting *Reynolds*, at p. 1395.) The Court of Appeal responded to essentially the same argument:

> Implicitly, R.J. Reynolds suggests that our holding will result in more children starting the addiction cycle because they will sneak into adult events and then be able to obtain free samples without anyone asking questions. Not only is this sophistry of the highest order, but it is bad sophistry. The statutory provisions, as do we, contemplate that every effort will be made to exclude children from places where sampling occurs. If children sneak in, we presume that they will be ejected. Contrary to R.J. Reynolds's argument, our holding enforces section 118950 as intended.

(*Reynolds*, at pp. 1396-7, footnote omitted.) The appellate court's beliefs in this regard square with the Legislature's finding that "[d]istribution of tobacco product samples and coupons is a recognized source by which minors obtain tobacco products, beginning the addiction process." (Section 118950, subd. (a)(10).) Reynolds's views square only with its self-serving interest in justifying what it did and avoiding a substantial penalty.

III.

THE $14.8 MILLION CIVIL PENALTY PASSES MUSTER UNDER BOTH THE EXCESSIVE FINES CLAUSE AND THE DUE PROCESS CLAUSE

Reynolds gave away 108,155 packs of cigarettes to 14,834 people in violation of section 118950. The $14.8 million penalty is neither "grossly disproportional" under the Excessive Fines Clause (U.S. Const., 8th Amend.; Cal. Const., art. 1, § 17) nor "excessive" under the Due Process Clause (U.S. Const., 14th Amend.; Cal. Const., art. 1, § 7).

A. The $14.8 Million Civil Penalty Is Not an Excessive Fine Because It Is Proportional to the Gravity of Reynolds's Offense

Neither the U.S. Supreme Court nor this Court has ever conducted an Excessive Fine Clause analysis in a case involving an award of civil penalties. However, civil penalties that have at least a partially punitive purpose are subject to review under the Eighth Amendment's Excessive Fines Clause. (*Austin v. United States* (1993) 509 U.S. 602, 609-10.) *Austin* involved a criminal forfeiture and did not set out standards for deciding when a particular penalty would be deemed excessive. But in *United States v. Bajakajian* (1998) 524 U.S. 321, the Court again applied the Excessive Fines Clause to a criminal forfeiture and announced a constitutional standard of proportionality, in essence, whether the punishment exacted by the forfeiture fits the crime in which the forfeited property was used. (*Bajakajian*, at p. 335.) The Court rejected the need for strict correlation between the gravity of the offense and the severity of the punishment but held that a forfeiture is excessive only if it is "grossly disproportional" to the defendant's offense. (*Id.* at p. 336.)

Looking for help in drawing a line between a disproportionate, constitutionally valid forfeiture and a disproportionate constitutionally infirm

one, but finding none in either the text of the Excessive Fines Clause or its historical origins, the Court reiterated two policies it considered "particularly relevant": (1) that substantial deference should be paid to legislative judgments about what punishment should be meted out for a particular offense and (2) that judicial determinations of the gravity of an offense are "inherently imprecise." (*Ibid.*)

With these policies of legislative deference and judicial imprecision as a backdrop, the Court compared the gravity of the defendant's crime (failing to report removal of more than $10,000 in currency from the country) with the severity of the resulting punishment (forfeiture of $357,144 of his lawfully obtained funds). (*Bajakajian*, at pp. 337-8.) In assessing proportionality the Court focused on the defendant's culpability (his crime was unrelated to any other illegal conduct, and he was neither a drug trafficker nor a money-launderer, principal targets of the law), the harm he caused by failing to report removal of currency from the U.S., and the potential criminal penalties he could incur for the same conduct (a maximum $5,000 fine and up to six months in prison). (*Ibid.*)

Because *Bajakajian* dealt with a forfeiture, courts look to *Bajakajian* for general guidance, not for definitive answers, when deciding whether a civil penalty offends the Excessive Fines Clause. "*Bajakajian* does not mandate the consideration of any rigid set of factors in deciding whether a punitive fine is 'grossly disproportional to the gravity of a defendant's offense.' " (*U.S. v. Mackby* (9th Cir. 2003) 339 F.3d 1013, 1016.) *Bajakajian* ". . . is not a perfect fit for our situation, but we draw upon it for guidance." (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321.)

In *Mackby* the Ninth Circuit upheld a $729,454.92 fine imposed on a Medicare provider for submitting 8,499 false claims to the federal government. The court found it significant that the defendant was among the class of persons targeted by the False Claims Act and that Congress believed, as evidenced by the automatic civil penalty for each violation of the Act and the availability of treble damages, that making a false claim to the government is a serious offense. (*Mackby, supra,* 339 F.3d, at pp. 1017-8.) The Ninth Circuit accorded substantial deference to Congress's judgment in devising the penalty scheme of the Act. (*Ibid.*; accord *Newell Recycling Co. v. U.S. EPA* (5th Cir. 2000) 231 F.3d 204, 210 ["No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment"].)

In contrast to forfeitures, where the defendant's ability to pay is presumed or uncontested, a civil fine may be "grossly disproportional" if it exceeds the defendant's ability to pay. (*Sainez*, *supra*, 77 Cal.App.3d at p. 1322; *People ex rel. Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1350.) In upholding $45,000 fines against an automobile dealership and its owner for selling vehicles that did not comply with California emissions standards, the Court of Appeal in *Wilmshurst* held that the defendants' ability to pay the fine was "a critical factor" in the analysis. (*Wilmshurst*, at p. 1350.) *Wilmshurst* went so far as to say that the defendant's ability to pay is "the constitutional lodestar," making irrelevant the "defendant's concern with the relationship between the amount of the fines and nature of their offenses." (*Wilmshurst*, at p. 1350).

In *Sainez,* the Court of Appeal upheld $663,000 in civil penalties against the owners of an apartment building for violations of San Francisco's building

and housing codes. *Sainez* followed *Wilmshurst* in holding that ability to pay is a critical factor in determining the constitutionality of a civil penalty and concluded that the defendants' net worth of $2.3 million "supported the constitutionality of the fine." (*Sainez,* at p. 1322-3.) Unlike *Wilmshurst,* however, *Sainez* also considered the defendants' culpability and fines authorized for similar offenses. (*Ibid.*)

In this case Reynolds has made "no argument regarding ability to pay [and] . . . impliedly . . . concedes that it has the ability to pay the $14,826,200 fine." (*Reynolds,* at p. 1400.) "[I]n 1999 Reynolds earned $195 million; in 2000, $352 or $353 million; and in 2001, $444 million; and . . . at the end of 2001, Reynolds's holding company held cash and short-term investments of more than $2.2 billion." (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal.App.4th 1253, 1290.) Additionally, Reynolds has apparently abandoned any claim that section 118950 does not compare favorably with other statutory penalty schemes, as it fails to even hint that the Court of Appeal erred in concluding that section 118950 "is not out of proportion to Penal Code section 308, subdivision (a)" and that New York's ban on cigarette giveaways is "more severe." (*Reynolds,* at pp. 1399-1400.)

Like the statute involved in *Wilmshurst*, section 118950 imposes strict liability on persons in the business of selling a particular type of product, who engage in conduct the Legislature has decided is inimical to the public's health and well-being. In section 118950 the Legislature decreed that $1,000 for every violation (after the first two violations) was an appropriate minimum penalty to encourage compliance with the ban on cigarette giveaways on public property and to punish any violations. "While the civil penalties [for violating the Long Term Care Act] may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure

important public policy objectives. [Citation.]" (*Kizer v. San Mateo County* (1991) 53 Cal.3rd 139, 147-8.) Thus, in establishing a nondiscretionary minimum penalty for each violation of section 118950, the Legislature addressed issues of proportionality, culpability and harm. (See section 118950, subd. (a).)

B. The $14.8 Million Penalty Does Not Offend Basic Notions Of Fairness

The Due Process Clause is fundamentally a check on arbitrary government action. "In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal." (*Hale v. Morgan* (1973) 22 Cal.3d 388, 398.) "It is equally well accepted that a state may impose reasonable penalties as a means of securing obedience to statutes validly enacted under the police power." (*Ibid.*)

In *Hale* the Court examined Civil Code section 789.3, subd. (b)(2), which exacts a $100 per day penalty from a landlord who deprives a tenant of utilities with the intent to evict the tenant from the property. (*Hale*, at p. 399.) Despite having serious misgivings about the constitutionality of the statute, the Court upheld the law against the landlord's facial due process attack, but ultimately concluded that application of the statutory penalty scheme in that case, which resulted in a $17,300 penalty being awarded to the tenant, was constitutionally excessive. (*Id.* at p. 405.)

Among the Court's most serious concerns about potential applications of the statute in *Hale* was that for a landlord's single act of cutting off a tenant's utilities, penalties could accumulate on an "infinite" basis. (*Id.* at p. 402.) This feature distinguishes section 798.3 from statutes, like section 118950, that specify a penalty for each separate violation. "Section 789.3

requires such cumulation; it measures penalties not on a 'per-violation' basis, but strictly by the day, leaving little room for that form of narrow interpretation of the penalty's scope and reach, such as we applied in Younger [*Younger v. Superior Court* (1976) 16 Cal.3d 30], Jayhill [*People v. Superior Court (Jayhill Corp.)* (1973) 9 Cal.3d 283], and Walsh [*Walsh v. Kirby* (1974) 13 Cal.3d 95]." (*Hale*, at p. 402.)

The Court in *Hale* also compared section 789.3 with a number of other California statutory penalty schemes regulating a variety of businesses, and concluded that "[u]nlike the environmental and public utility regulations discussed above, the section's impact extends beyond sizeable and well established business organizations to individuals of extremely modest means." (*Id.* at p. 402.) Expanding on this point, the Court noted the potential for significant abuse: ". . . we note that section 789.3 permits the occasional experienced and designing tenant to ambush an unknowing landlord converting the single wrongful act of the latter into a veritable financial bonanza." (*Id.* at p. 403.)

None of these concerns are present here. Section 118950 imposes a penalty only on persons in the business of selling or distributing cigarettes, who give away cigarettes on public property. (Section 118950, subd. (b).) Thus, it is not the kind of "mandatory, fixed, substantial and cumulative punitive sanction against persons of such disparate culpability" that *Hale* found to be "manifestly suspect." (*Hale*, at p. 400.) The trial court calculated the $14.8 million civil penalty based not on the number of packs of cigarettes Reynolds gave away, which would have resulted in a minimum assessment of more than $108 million in penalties, but on the number of persons who received cigarettes. This calculation resulted in a penalty only 14 percent of the minimum authorized amount. (*Reynolds*, at p. 1399.) This Court endorsed

just such a per-victim basis for calculating civil penalties in *Jayhill Corp.*, where the number of violations of Business and Professions Code section 17500 were counted not by the number of false or deceptive ads consumers saw but by the number of persons who saw the ads. (*Jayhill Corp.*, *supra*, 9 Cal.3d at p. 289.)

Reynolds places considerable reliance, throughout its discussion of its putative good faith and the lack of direct harm, on several decisions in which the U.S. Supreme Court applied a due process analysis to punitive damage awards. But *BMW of N. America v. Gore* (1996) 517 U.S. 559, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424 and *TXO Products Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443 are not on point because the due process analysis of a punitive damage award differs in significant ways from the analysis of a civil penalty payable to the government. "[C]ivil penalties, unlike punitive damages, are imposed without regard to motive and require no showing of malfeasance or intent to injure." (*Kizer v. San Mateo, supra*, 53 Cal.3d at p. 146.) Punitive damages punish wrongdoing and deter others from similar conduct, but "[w]hile the civil penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives." (*Id.* at pp. 147-8.)

C. Reynolds's Culpability is Great — It Gave Away 108,115 Packs of Cigarettes to 14,834 Persons on Public Property in Direct Violation of Section 118950

Reynolds's cigarette giveaways on public property conflict directly with California's policy of keeping children from beginning to use tobacco products and encouraging all persons to quit. (Section 118950, subd. (a)(11).) The enormous social and economic costs of tobacco are notorious and cannot reasonably be disputed. (See section 118950(a).)

Despite its claimed "good faith" belief that its conduct complied with the terms of the statutory exception in subdivision (f), Reynolds made no serious attempt to comply with its terms. None of the six public grounds where Reynolds set up its sampling booths or tents was "leased for private functions," and all the events were open to the general public regardless of age. The size of the penalty is directly proportional to the number of times Reynolds violated the statute. Reynolds is a highly sophisticated company with tremendous financial and staff resources. The Legislature targeted section 118950 at companies, like Reynolds, that are in the business of selling cigarettes.

In the trial court, Reynolds made two different "good faith" arguments: one sounding in estoppel – that Reynolds relied on alleged assurances from the People's attorneys that if the company engaged in cigarette giveaways in an enclosed tent it would not run afoul of the statute – and another drawing an inference from Reynolds's conduct at the six events – that Reynolds restricted access to smokers 21 years and older. The trial court rejected both arguments, declining to find an estoppel as to liability (JA 1609) and refusing to reduce the fine on grounds of Reynolds's alleged good faith conduct because Reynolds had not raised the issue of good faith in its motion for summary judgment (JA 1612).

Reynolds has apparently abandoned its estoppel argument, as it makes no mention of having relied on representations by anyone from the Attorney General's Office about the configuration of its sampling booths.[11/] To the

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11. In footnote 15 on page 36 of its Opening Brief on the Merits, Reynolds irrelevantly claims that its conduct conformed to the requirements of the Master Settlement Agreement. Although the MSA does govern some aspects of cigarette sampling, its requirements do not supersede the requirements of section 118950. See also footnote 16 (AOB 37), where Reynolds irrelevantly points to a letter from the Attorney General's Office to

extent that "good faith" is an inference to be drawn from the facts, the Court reviews "factual matters in the light most favorable to the prevailing party," resolving all conflicts in favor of the party who prevailed below. (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 507.)

As discussed in argument II, above, broadly construing section 118950's ban on cigarette giveaways on public grounds dictates that the safe harbor exception in subdivision (f) be strictly and narrowly construed. This approach is consistent with the due process analysis employed in *Hale*. Any doubt about that was resolved by the Court in *People ex. rel. Lungren v. Superior Court, supra*, 14 Cal.4th 294, where the defendant faucet manufacturers were relying on language in *Hale*, *supra*, 22 Cal.3d at p. 405, that seemed to require a narrow construction of both the liability clause and the penalty clause of statutes enacted for protection of the public. (*Lungren*, at p. 314.) The Court in *Lungren* explained, however, that this dictum in *Hale* had been directed only at the penalty clause of the statute and that the defendant in *Hale* had not contested his liability, only the amount of the penalties imposed. (*Id.* at p. 313.) *Lungren* then emphasized the long-standing rule "that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose." (*Ibid*.)

Here Reynolds contests both its liability and the amount of penalties assessed. Reynolds extracts a fragment from a footnote in *Lungren* for the

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one of Reynolds's lawyers (JA 193-6). The letter, written after all six of the giveaways at issue, refers only to matters arising under the MSA, contrary to Reynolds's characterization of its contents, and says nothing about section 118950 or about Reynolds's duty to refrain from distributing free cigarettes or discount cigarette coupons in publicly owned venues.

proposition that a defendant's good faith belief that it was not breaking the law "could 'make imposition of statutory penalties a violation of defendants' due process rights.' " (AOB at p. 34.) But, as the remainder of the footnote and the surrounding text indicate, the defendants in *Lungren* were claiming to have relied on favorable interpretations of the statute by the administrative agency charged with its enforcement. (*Lungren*, at p. 314, n. 8.) In asserting its "good faith belief" in the lawfulness of its conduct at the cigarette giveaways here, Reynolds does not argue that it relied on anything other than its own mistaken interpretation of section 118950's safe harbor provision. *Lungren* gives no hint about how Reynolds' purported good faith should be factored into the calculation of civil penalties in this case because *Lungren* considered only what conduct was forbidden by the statute in issue and "the scope of the government's authority to enjoin and prohibit that conduct, rather than the method of assessing the amount of penalty for transgressing the proscription." (*Lungren*, at p. 314.)

Reynolds' purported good faith is based on nothing more than its own, self-serving interpretation of subdivision (f). 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." "In essence, this argument amounts to putting the wolf of ignorance of the law in the sheep's clothing of notice." (*Wilmshurst, supra*, 68 Cal.App.4th at p. 1346.) Ignorance or misapprehension of one's duties under the law, particularly for the second largest cigarette maker in the U.S., is no defense to a violation of section 118950. "[I]t does not offend traditional notions of fair play and substantial justice to apply the true meaning of a statute regardless of a defendant's claimed reliance on mistaken opinions which do not have the weight of a ruling of a court of law. [Citation.]" (*Id.* at p. 1347.)

D. Proof Of Actual Harm Is Unnecessary Because Section 118950 Is A Strict Liability Statute Enacted To Reduce The Enormous Harm Caused By Tobacco Use

As noted above, when the Legislature decided to outlaw cigarette giveaways on public property, it did so because it determined that such giveaways encourage tobacco use and addiction which, in turn, wreak havoc in social and economic costs. (Section 118950, subd. (a).) Even in the absence of the explicit, and extensive, legislative findings in section 118950, there is no constitutional basis for considering whether or not any of the 108,155 packs of cigarettes caused any demonstrable harm.

"A penalty statute presupposes that its violation produces damage beyond that which is compensable." (*State of California v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 531.) "Regulatory statutes would have little deterrent effect if violators could be penalized only where a plaintiff demonstrated quantifiable damages." (*Wilmshurst*, at p. 1351.) And even assuming that courts had discretion to reduce the amount of the penalties for violations of section 118950 based on a showing that the actual damage caused by the free cigarettes was less than the penalties assessed, the burden of proving such mitigation would be on the defendant, not on the plaintiff. (*Ibid.*; *State of California v. San Francisco, supra*, 94 Cal.App.3d at pp. 531-2.)

In arguing that harm is a factor in the due process analysis in this case, Reynolds again relies on inapposite authorities, *Cooper, supra*, 532 U.S. 424 and *BMW v. Gore, supra*, 517 U.S. 559. These decisions involved punitive damage awards, and the constitutional restraints on such awards under the Due Process Clause do not apply to civil penalties where the Legislature has

specified a punishment for conduct it has concluded is inimical to the public

good.

In *Kizer v. County of San Mateo, supra*, 53 Cal.3d 139, this Court examined the statutory scheme of civil penalties intended to protect residents of nursing homes from abuse and neglect (Health & Saf. Code, § 1417 et seq.). In holding that civil penalties under the statute can be imposed on a public entity despite governmental immunity from punitive damages, *Kizer* distinguished punitive damages, which can be imposed on a defendant for intentional or malicious conduct but only if the defendant has already been found liable for compensatory damages, from civil penalties, which, as noted, can be imposed on a lawbreaker for a violation of a protective statute without any showing of actual damage. (53 Cal.3d at pp. 146-7.)

In *People ex rel. Lockyer v. Fremont Life Insurance Co.* (2002) 104 Cal. App.4th 508, the Court of Appeal upheld a $2.5 million penalty under the unfair competition law (Bus. & Prof. Code, § 17200 et seq.). The court rejected the defendant's contention that the penalty was excessive under standards enunciated in *BMW v. Gore* (*id.* at pp. 520-1), and noted that the UCL is a strict liability statute, that the statute itself requires the court to exercise discretion and consider "the equities of the case" in determining the appropriate amount of penalties (*id.* at p. 523), but also that in the event of a violation civil penalties are mandatory (*id.* at p. 529). "Appellant draws the 'reprehensible' standard from *BMW v. Gore*, which we have previously determined is not applicable here because that case deals with the propriety of a punitive damage award rather than a civil penalty." (*Fremont Life*, at p. 527.)

Indeed Reynolds's argument about harm boils down to the feeble, and ultimately unpersuasive, complaint a speeding motorist might make when pulled over by a traffic officer, "I didn't know I was driving 90 miles an hour.

I guess I wasn't looking at my speedometer, but I didn't run into anybody." No reasonable person would argue that the officer's decision to give the speeder a ticket is unfair because the speeder has not caused an accident. So, too, Reynolds's pleas that its misconduct caused no harm ring hollow.

E. Reynolds Is Solely Responsible For The Size Of The Civil Penalty Imposed For Its Cigarette Giveaways

Lastly Reynolds argues that the $14.8 million civil penalty should be reduced by some unspecified amount because the Attorney General delayed suing Reynolds until the potential penalties had mounted up. (AOB pp. 41-3.) Not only does Reynolds rely on inapposite legal authority, *Walsh v. Kirby, supra*, 13 Cal.3d 95, but also fails to show how the evidence in the record proves that the Attorney General knew about Reynolds's cigarette giveaways on public grounds long before it sued to stop them.

In *Walsh* this Court struck down a $9,250 penalty assessment imposed on a liquor store owner who sold distilled spirits at less than the required minimum price to an undercover operative of the Department of Alcoholic Beverage Control. The Court held that the department's practice of failing to notify the owner of the initial violations and accumulating penalties over a five-week period until the total amount constituted an impermissible "de facto revocation of a license without prior adequate notice of wrongdoing to a licensee." (*Walsh*, at p. 104.) This practice contravened the purpose of the penalty section of the minimum-pricing statute, which the Court said was intended to effect compliance with the law and not result in revocation or suspension of licenses. (*Ibid.*)

Although the Attorney General represented the respondent Director of ABC on appeal in *Walsh* and represents the People in this action, any alleged similarity between that case and the case at bar is completely ephemeral. No

undercover operatives of the Attorney General witnessed or participated in any of Reynolds's cigarette giveaways on public grounds. As the record indicates, the Attorney General first discovered that Reynolds was engaging in conduct that violated section 118950, in February of 2000, when an investigator engaged by the Attorney General's Office received free discount coupons from a Reynolds's representative at the Los Angeles County fairgrounds.[12/] (JA 223.)

Reynolds's misguided attempt to impute knowledge to the Attorney General of information provided to the State Board of Equalization also fails. (AOB at p. 42.) Reynolds's periodic reports to the board relate only to Reynolds's tax liability for the free cigarettes it planned to give away, not its compliance with section 118950. (See *Reynolds*, at p. 1403.)

There is simply no evidence in the record that the Attorney General, either through a deliberate plan or even simple inattention or inaction, allowed potential penalties against Reynolds to accumulate. Reynolds is solely responsible for the amount of civil penalties awarded in this case.

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12. As previously noted, the trial court dismissed the cause of action arising from Reynolds's coupon giveaway in February 2000, and it is not an issue on appeal.

CONCLUSION

Section 118950, a weapon in the state's arsenal to combat the devastating effects of cigarette smoking and addiction, regulates how and where cigarettes may be given away. Like the state's restrictions on the sale and use of cigarettes, section 118950 is not preempted by the FCLAA. Reynolds violated section 118950 at each of the six public events at issue here, neither satisfying the strict requirements of the statutory "safe harbor" nor somehow furthering the purposes of keeping children from starting to smoke cigarettes and encouraging all persons to quit. A civil penalty of $14,826,200 is a constitutionally permissible punishment for a sophisticated and prosperous tobacco company, like Reynolds, that gave away 108,155 packs of cigarettes to 14,834 people in violation of state law. The People urge the Court to affirm the decision of the Court of Appeals.

Dated: April 27, 2004

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 13927 words.

Dated: April 27, 2004

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