

TABLE OF CONTENTS

	Page
APPLICATION FOR LEAVE TO FILE PROPOSED <i>AMICUS</i> <i>CURIAE</i> BRIEF	2
[PROPOSED] BRIEF	5
STATEMENT OF INTEREST AS AMICI	5
INTRODUCTION	7
ARGUMENT	8
I. REYNOLDS SETS FORTH AN OVERLY BROAD INTERPRETATION OF “PROMOTION” AS USED IN THE FCLAA	8
A. Congress Clearly Intended to Preempt Regulation of “Advertising and Promotion” but Not Sale, Distribution and Use.....	8
1. The Lorillard Court used a communication/distribution dichotomy in addressing the preemptive scope of the FCLAA.	8
2. As revealed in the FCLAA’s structure and legislative history, the preemption provision covers only communication, not distribution.....	13
3. The well-established presumption against preemption as to traditional state regulation of health and safety must be applied in the context of the FCLAA	16
B. Congress Anticipated and Asked for State Regulation of Tobacco Distribution and Use In Two Statutes Enacted in the Wake of the FCLAA.....	18
1. The Prohibition of Sales to Minors Act could have preempted similar state laws, but it does not.....	19
2. In enacting the Synar Amendment, Congress insisted on state regulation of tobacco distribution	20

TABLE OF CONTENTS

(continued)

	Page
C. Reynolds’ Overly Broad Interpretation Is Newly Found	22
II. REYNOLDS’ INTERPRETATION OF “PROMOTION” WOULD ENCOMPASS VIRTUALLY ALL AREAS OF TRADITIONAL STATE AND LOCAL REGULATION OF TOBACCO, CONTRARY TO CONGRESS’ INTENT	24
III. REYNOLDS’ RELIANCE ON JONES V. VILSACK AND ENGINE MANUFACTURER. ASSOCIATION V. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT ARE NOT SUPPORTABLE UNDER LORILLARD	27
A. Vilsack’s Interpretation of Lorillard is Severely Flawed	27
1. Vilsack applied the wrong preemption standard.....	27
2. Vilsack defined “promotion” broadly, contrary to Congress’ intent	28
B. Engine Manufacturers Did Not Alter the Court’s Preemption Analysis	30
CONCLUSION	31
ENDNOTE	33
CERTIFICATE OF WORD COUNT	36

TABLE OF AUTHORITIES

Page

Federal Cases

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002)	15
Branch v. Smith, 538 U.S. 254 (2003)	18
Cipollone v. Liggett Group, 505 U.S. 504 (1992).....	passim
Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 124 S.Ct. 1756, 1761 (2004).....	28, 30
Erie v. Pap's A.M., 529 U.S. 277 (2000).....	10
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).....	29
Hillsborough County v. Automated Medical Laboratories, 471 US 707, 715-16 (1985)	6, 17
Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).....	passim
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).....	passim
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....	16, 17, 30, 31
New Hampshire v. Maine, 532 U.S. 742 (2001).....	22
O'Brien v. United States, 391 U.S. 367, 382 (1968)	10
Petition for Writ of Certiorari of Lorillard Tobacco Co., Brown & Williamson Tobacco Co., R.J. Reynolds Tobacco Co., Phillip Morris Inc., and United States Tobacco Co., 2000 WL 339979542 (U.S. filed Oct. 16, 2000)	22
Sigmon Coal Co. v. Apfel, 226 F.3d 291 (4th Cir. 2000)	15
Texas v. Johnson, 491 U.S. 397 (1989).....	10
United States v. Freeman, 44 U.S. 556 (1845).....	18

State Cases

TABLE OF AUTHORITIES

(continued)

	Page
Aguilar v. Lerner, 32 Cal. 4th 974 (2004).....	22
Forsyth v. Jones, 57 Cal.App.4th 776 (1997).....	28
People v. RJ Reynolds Tobacco Co., 112 Cal.App.4th 1377 (2003).....	8, 12

Federal Statutes

15 U.S.C. § 1331	13
15 U.S.C. § 1332(6).....	14
15 U.S.C. §§ 1334(a).....	14
15 U.S.C. § 1336	29
40 U.S.C. § 486 note	19
42 U.S.C. §300x - 26	20, 21
Pub. L. 104-52 (Title VI § 636), 40 U.S.C. § 486 note	19

State Statutes

Ark. Code Ann. Section 5-27-227 (Michie 2003).....	33
Cal. Bus. & Prof. Code § 22951	21
Cal. Bus. & Prof. Code §§ 22958.....	25
Cal. Bus. & Prof. Code §§ 22962.....	24, 25
Cal. Health & Safety Code § 104495	26
Cal. Health & Safety Code §§ 1596.795	26
Cal. Health & Safety Code §104420(p)	26
Cal. Penal Code § 308	21

TABLE OF AUTHORITIES

(continued)

	Page
Cal. Penal Code § 308.2	25
Cal. Penal Code § 308.3	25
Cal. Labor Code § 6404.5	26
Conn. Gen. Stat. § 12.314a (2003).....	33
D.C. Code Ann. § 7-1731 (2003).....	33
Ga. Code Ann. § 16-12-174 (2002).....	33
Haw. Rev. Stat. § 328K-22 (2003).....	33
Idaho Code § 39-5707 (Michie 2003).....	33
Iowa Code § 142A.6 (2003).....	33
Kansas Stat. Ann. § 79-3321 (2003).....	34
Michigan Comp. Laws § 750.42(b) (2003).....	34
Minn. Stat. § 325F.77 (2003).....	34
New York Pub. Health Law § 1399-bb (Consol. 2003).....	34
Okla. Stat. tit. 37 § 600.8 (2003).....	34
S.D. Codified Laws § 34-46-2 (Michie 2003).....	35
Tenn. Code Ann. §§ 39-17-1502, 39-17, 1504 (2003).....	35
Utah Code Ann. §§ 76-10-111 (2003).....	35
Wash. Rev. Code § 70.155.060 (2004).....	35

TABLE OF AUTHORITIES

(continued)

Page

Other Authority

Mass. Regs. Code tit. 940, § 21.04 (2004)	34
S. Rep. No. 566, 1970 U.S.C.C.A.N. 2652	15
San Jose Mun. Code § 9.45.100	25

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

PEOPLE OF THE STATE OF CALIFORNIA *ex rel.* BILL LOCKYER, as
Attorney General of the State of California,
Plaintiff and Respondent,
v.
R.J. REYNOLDS TOBACCO COMPANY,
Defendant and Petitioner

**APPLICATION OF LEAGUE OF CALIFORNIA CITIES,
CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND
TOBACCO CONTROL LEGAL CONSORTIUM, FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF POSITION OF
RESPONDENT THE PEOPLE; [PROPOSED] BRIEF**

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**APPLICATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF**

To the Honorable Ronald M. George, Chief Justice of this Court:

The League of California Cities, the California State Association of Counties (“CSAC”), and the Tobacco Control Legal Consortium (hereafter “applicants”) request leave to file an *amicus curiae* brief in this case in support of the position of Respondent The People.

Applicant League of California Cities is an association of California Cities and city officials who work together to enhance their knowledge and skills, exchange information, and combine resources to address issues concerning public entities in California. The League was founded in 1898 and currently has 476 member cities.

Applicant California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Both the League and CSAC have three primary interests in this case. First, cities and counties are charged with protecting the public’s health,

which is damaged by the sale, distribution and use of tobacco. Second, many member cities and counties have ordinances regulating tobacco sale, distribution and use that may be affected by the Supreme Court's decision in this case. Third, the League and CSAC wish to support the Supreme Court's well-settled presumption against preemption – particularly in the area of health and safety regulation.

Amicus the Tobacco Control Legal Consortium (TCLC) is a national network of legal resource centers dedicated to advancing tobacco control policy change in the United States and providing technical legal assistance in tobacco control. TCLC, organized in 2003, grew out of a network of existing legal resource centers on tobacco control in California, Maryland, Massachusetts, Michigan, Minnesota, New Jersey and, most recently, Arkansas. TCLC's initial funding was provided by the Tobacco Technical Assistance Consortium, located in the Rollins School of Public Health at Emory University in Atlanta. TCLC's coordinating office is located at the William Mitchell College of Law in St. Paul, Minnesota. TCLC's primary purpose is ensuring the rigorous enforcement of statutes such as that at issue here.

Applicants' counsel is familiar with the issues in this case and the scope of their presentation, and believes further argument is needed on the following points: (1) the continued ability of states to pass and enforce laws regarding the distribution and use of tobacco in light of the FCLAA's

preemption provision and the Supreme Court's ruling in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), (2) the sweeping impact that R.J. Reynolds' broad interpretation of "promotion" would have on regulations of tobacco throughout the State and in other states, and (3) the presumption against preemption that the Supreme Court has established particularly in cases such as the present one.

DATED: _____ Respectfully Submitted,

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[PROPOSED] BRIEF

STATEMENT OF INTEREST AS *AMICI*

Amicus League of California Cities is an association of California cities and city officials who work together to enhance their knowledge and skills, exchange information, and combine resources to address issues impacting public entities in California. The League was founded in 1898 and currently has 476 member cities.

Amicus California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League and CSAC have a clear interest in this matter for three principal reasons. First, they are interested in enforcement of the statute at issue in communities throughout the State, in order to prevent further damage to public health. The League and CSAC are the representative of cities and counties that fund hospitals and other public health measures, so they are on the front line of dealing with the damage that smoking can

cause. The Attorney General's vigorous enforcement of section 118950 is in *amici's* interests.

Second, the League of California Cities and CSAC speak for the 124 or more California cities and counties that have adopted ordinances to regulate aspects of the sale and distribution of tobacco. Those ordinances are at risk based upon the overly broad interpretation of "promotion" that Reynolds urges this Court to adopt.

Third, the U.S. Supreme Court's precedents in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) and *Cipollone v. Liggett Group*, 505 U.S. 504 (1992) both reiterate the "presumption against preemption" in traditional state and local regulation of health and safety matters. *See also Hillsborough County v. Automated Medical Laboratories*, 471 US 707, 715-16 (1985). A ruling by this Court that the regulation of Reynolds' conduct is preempted by federal law would necessarily disrupt the federal / state balance in the area of health and safety, critical to the League and CSAC.

Amicus the Tobacco Control Legal Consortium (TCLC) is a national network of legal resource centers dedicated to advancing tobacco control policy change in the United States and providing technical legal assistance in tobacco control. TCLC, organized in 2003, grew out of a network of existing legal resource centers on tobacco control in California, Maryland, Massachusetts, Michigan, Minnesota, New Jersey and, most recently,

Arkansas. TCLC's initial funding was provided by the Tobacco Technical Assistance Consortium, located in the Rollins School of Public Health at Emory University in Atlanta. TCLC's coordinating office is located at the William Mitchell College of Law in St. Paul, Minnesota. TCLC's primary purpose is ensuring the rigorous enforcement of statutes such as that at issue here.

INTRODUCTION

In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001), R.J. Reynolds could have challenged state limitations on self-service displays as preempted "promotion." It chose not to do so. Now it raises the question of promotion in virtually the same situation. Faced with a reasonable penalty for distribution of free samples in violation of California law, it newly asserts that California is preempted by the FCLAA from regulating cigarette handouts because such handouts are "promotion." In so doing, Reynolds seeks to expand the definition of "promotion" to mean essentially anything that will help it sell cigarettes. Such an interpretation is contrary to settled Supreme Court precedent, the clear pronouncements of Congress, and the well-settled presumption against preemption that the Supreme Court has enunciated for tobacco control enactments in particular and health and safety regulations in general. Moreover, Reynolds' construction of "promotion" is dangerous because it would undercut a wide variety of valid state assertions of police power in the arena of tobacco control.

ARGUMENT

I. REYNOLDS SETS FORTH AN OVERLY BROAD INTERPRETATION OF “PROMOTION” AS USED IN THE FCLAA

Congress Clearly Intended to Preempt Regulation of “Advertising and Promotion” but Not Sale, Distribution and Use

All parties to the present proceeding agree that almost any tobacco control regulation has some aspects that are communicative and others that relate to product distribution and use.¹ Congress clearly intended to preempt state and local regulation of tobacco labeling and advertising, but to preserve state and local legislative power over the sale, distribution and use of tobacco products.

1. The *Lorillard* Court used a communication/distribution dichotomy in addressing the preemptive scope of the FCLAA.

In *Lorillard*, the Supreme Court analyzed the scope of the FCLAA’s preemptive force by distinguishing between advertisements and promotions

¹ See, e.g., Petitioner’s Brief on the Merits at 24 (filed Feb. 27, 2004) (“FCLAA Preempts State Regulation of Cigarette ‘Advertising Or Promotion’ While Permitting States to Regulate the Sale And Use Of Cigarettes.”); Respondent’s Answer Brief on the Merits at 4 (“[T]he FCLAA preempts only a state’s ability to regulate the communication or dissemination of information or images about cigarettes – not the physical cigarettes themselves.”); *People v. RJ Reynolds Tobacco Co.* 112 Cal.App.4th 1377, 1387 (2003) (quoting *Lorillard Tobacco Co. v. Reilly* 533 U.S. 525, 541 (2001) (“our task is to identify the domain expressly pre-empted . . . because “an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters.””))).

on the one hand, and the sale, distribution and use of tobacco on the other. The Court recognized that it is possible to draw a distinction between communication, as to which state and local regulation is preempted, and activities around tobacco sales, distribution and use, which non-federal actors are free to regulate. The Court’s preemption analysis in *Lorillard* makes clear that the product distribution at issue in this case remains within the reach of state and local police powers.

While the *Lorillard* Court struck down Massachusetts’ *advertising* regulations as preempted, it specifically noted that Congress left state and local governments free to “*regulate conduct with respect to cigarette use and sales.*” 533 U.S. at 550 (emphasis added), *see also* 533 U.S. at 551-52.² It further elucidated that the regulation of tobacco distribution was not preempted: “In Massachusetts, it is illegal to sell *or distribute* tobacco products to [minors]. Having prohibited the sale *and distribution* of tobacco products to minors, the State may prohibit common inchoate offenses.” 533 U.S. at 552 (emphasis added).

The Court proceeded to import a First Amendment speech / conduct distinction into its preemption analysis by citing Part III-D of its opinion in the section discussing preemption. After stating in the preemption section

² Reynolds seeks to sweep this portion of the *Lorillard* opinion under the rug, implying that states can only regulate conduct with respect to cigarette “sale or use.” Petitioner’s Reply Brief (“PRB”) at 6, citing *Lorillard*, 533 U.S. at 552. This unduly limits *Lorillard*. *See also* footnote 9.

that states may regulate inchoate offenses relating to the criminal distribution of tobacco to minors, the Court wrote, “States and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes,” and referred to Part III-D of its opinion.

In Part III-D, the Court upheld a state ban on the self-service display of tobacco products against a First Amendment challenge. Drawing a speech / conduct distinction, the Court validated the ban because the State was seeking “to regulate the placement of the tobacco products for reasons unrelated to the communication of ideas.” 533 U.S. at 569. The Court then cited cases clarifying the speech / conduct distinction. 533 U.S. at 569, *citing O’Brien v. United States*, 391 U.S. 367, 382 (1968) (holding that the burning an item of federal property like a draft card is not protected under the First Amendment because the conduct sought to be regulated differs from the expressive content of the message), *Erie v. Pap’s A.M.*, 529 U.S. 277, 289, 310 (2000) (finding the city’s stated interest in combating the secondary effects associated with nude dancing establishments is unrelated to the suppression of expression because nude dancing contains little if any expressive content), *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (assessing whether flag burning constituted conduct which the State had an interest in regulating separately from the speech it imparted), *see also id.* at 407 (concluding that the State sought to regulate expression based on its content).

By incorporating the First Amendment analysis of Part III-D into the preemption analysis of Part II-C, the Court inferred that the speech / conduct distinction drawn for First Amendment purposes sheds light on where the line should be drawn between what is and what is not preempted for FCLAA purposes. The Court grouped speech with communication on the one hand, and conduct with tobacco sales, distribution and use on the other. The Court made a clear finding that a self-service display ban did not violate the FCLAA or the First Amendment because it was motivated by a desire to regulate conduct separate from the communication or speech at issue. 533 U.S. at 552 (referring to Part III-D), 559.

The Court's reference to Part III-D is particularly relevant here, because self-service displays are quite similar to the product giveaways at issue in this case. If the regulation of self-service displays is not preempted, then neither is the control of more outright attempts at tobacco distribution, such as product giveaways. Both self-service displays and giveaways involve a communicative component – in the case of self-service displays, the visual display of the cigarettes; in the case of giveaways, the advertising and packaging that accompany the physical handout. And both involve a non-communicative component as well – making cigarettes available in a manner that risks their falling into the hands of minors. *See Lorillard*, 533 U.S. at 569 (“Unattended displays of tobacco products

present an opportunity for access without the proper age verification required by law”), *Reynolds*, 112 Cal.App.4th at 1385 (quoting the Legislature’s finding that the “[d]istribution of tobacco product samples and coupons is a recognized source by which minors obtain tobacco products”). The U.S. Supreme Court recognized that the communicative component and the non-communicative component can be analytically separated in order to preserve the ability of state and local governments to take measures to protect the public’s health:

Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the communication of ideas. We conclude that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest. . . . [R]etailers have other means of exercising any cognizable speech interest in the presentation of their products. We presume that vendors may place empty tobacco packaging on open display, and display actual tobacco products so long as that display is only accessible to sales personnel. 533 U.S. at 569-70 (citations omitted).

Similarly, a tobacco company that wishes to promote its products without running afoul of section 118950 could hand out empty packages or promotional flyers.³ Thus, section 118950 is not preempted by the FCLAA because it targets product distribution, not communication.

³ Petitioner makes the sinister argument in its Reply that the provision of cigarettes imparts “information” about them. PRB at 3-4. In so doing, it entirely ignores the Court’s rejection of the very same argument in the First Amendment section of *Lorillard*, and the Court’s reliance on that discussion in the preemption section of its opinion.

2. As revealed in the FCLAA’s structure and legislative history, the preemption provision covers only communication, not distribution.

The structure and legislative history of the FCLAA entirely support the *Lorillard* Court’s determination that the regulation of conduct such as that in issue in this case is not preempted.

The communication of information is the core concern of the preemption section of FCLAA; the statement of Policy and Purpose for the statute provides:

It is the policy of the Congress, and the purpose of this Chapter to establish a comprehensive Federal Program to deal with cigarette *labeling and advertising* with respect to any relationship between smoking and health, whereby –

- (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 (emphasis added). The most reasonable inference from this statement of Policy and Purpose is that Congress intended the term “promotion” to have a scope closely tied to the term “labeling and advertising.” It would be anomalous for Congress to have preempted an

area of state and local regulation that differs in nature from these areas regulated by the “comprehensive Federal program” established by the FCLAA. It would be natural, however, for Congress to have preempted an area of state and local regulation that closely parallels the areas regulated by the FCLAA.⁴

Whereas the preamble shows that Congress was concerned with the communication and labeling requirements expressed in the statute, other sections of the statute reveal that Congress clearly intended to leave the distribution and use of tobacco open to state and local regulation. The definitions section of the FCLAA provides: “The term ‘sale or distribution’ includes sampling or any other distribution not for sale.” 15 U.S.C. § 1332(6). Yet the preemption sections of the FCLAA do not address the “sale or distribution” of cigarettes. 15 U.S.C. §§ 1334(a), (b). The most reasonable inference from this omission is that Congress did not intend to preempt state or local regulation of the sale or distribution of cigarettes, including the free distribution of cigarettes. As the Court of Appeal properly noted below, “If Congress had intended to preempt state laws

⁴ Petitioner seeks to persuade this Court to ignore the Congressional Statement of Purpose, arguing “*Cipollone* held that this section of the statute has no relevance to Section 5(b).” PRB at 6 (emphasis added). *Cipollone* “held” no such thing. In the first place, the quotation is from the *plurality* opinion in the case, to which only four Justices adhered. In the second, the quote is entirely out of context: the four Justices there were concerned with whether the amendment to Section 5(b) altered the statute’s application to common law prohibitions, as opposed to regulations or enactments of law.

pertaining to nonsale distribution, then the preemption provision would have pertained to advertising, promotion *and* ‘sale and distribution.’” 6 Cal.Rptr.3d at 68 (emphasis in original).⁵

Likewise, the legislative history indicates that Congress was concerned with labeling and advertising, not product distribution and use. In the 1969 amendments that added preemption of state and local regulation of tobacco “advertising and promotion,” Congress acted within a context in which states were seeking to ban or limit tobacco advertising. *Cipollone*, 505 U.S. at 515 & n.11. This setting can be presumed to be the genesis of the statute. *Cf. Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 307 (4th Cir. 2000) (relying on historical background to support statutory interpretation), *aff’d sub nom. Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002).

In addition, the Senate Report in support of the 1969 amendments confirms that section 1334(b) is “narrowly phrased” and not intended to limit state and local “police regulations. It is limited entirely to State or local requirements or prohibition[s] in the advertising of cigarettes.”

S. Rep. No. 566, 91st Cong., 2d Sess. (1969), reprinted in 1970

⁵ Reynolds argues that the inclusion of “sampling” as a type of “sale or distribution” merely signifies that warning labels must be on cigarettes distributed by any means. PRB at 6. Reynolds misses the point. By defining sampling as one method of dispersing cigarettes, Congress demonstrated that in the context of the FCLAA, it considered the primary characteristic of sampling as a distribution method, not a promotion. Thus, like state regulation of cigarette distribution via sales, that via free sampling was not preempted.

U.S.C.C.A.N. 2652, 2663. The “police regulations” this Report cites as examples of local and state regulations not to be preempted include sales to minors, taxation, and indoor smoking – classic restrictions on product distribution and use. *Id.* The Senate Report also reiterates that the preemption provision “is limited entirely to state or local requirements or prohibitions in the advertising of cigarettes.” *Id.*⁶

Thus, when Congress used the term “promotion” in the FCLAA, it arguably meant to cover the distribution of free non-tobacco promotional items, such as hats with cigarette company logos. It in no way, however, intended to impinge on traditional state police powers by restricting the ability of states and local jurisdictions to protect the public’s health by limiting the distribution of tobacco products themselves.

3. The well-established presumption against preemption as to traditional state regulation of health and safety must be applied in the context of the FCLAA.

As the Supreme Court recognized in the context of FCLAA preemption, tobacco regulation involves the States’ “historic primacy . . . in matters of health and safety.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The Court wrote in *Medtronic*:

⁶ This “narrow[] phras[ing]” should not be at all surprising in light of the intent of the Act. The stated purpose and summary section sets out five goals for the legislation – all of them dealing with advertising and the duties of the Federal Trade Commission and Department of Health, Education and Welfare to report to Congress, and none of them impinging upon state police powers. *See* 1970 U.S.C.C.A.N. at 2652-2653.

Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are ‘primarily, and historically, . . . matter(s) of local concern,’ the ‘States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.’ (citations omitted).

Id. From this premise, the Court concluded:

In all pre-emption cases, and particularly in those in which Congress has ‘legislated . . . in a field which the States have traditionally occupied,’ 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. . . . [This] approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.’

518 U.S. at 485 (emphasis added). *See also Hillsborough County v.*

Automated Medical Laboratories, Inc., 471 U.S. 707, 715-16 (1985) (citing the presumption against preemption of state and local health and safety laws).

Since the instant case addresses a quintessential health and safety regulation of local concern, Congress must speak clearly and manifestly regarding its preemptive intent and courts must take into account the presumption against preemption. In fact, the Supreme Court applied the presumption against preemption in both cases it heard involving FCLAA preemption, and it cited *Medtronic* with approval in *Lorillard*. *Lorillard*, 533 U.S. at 540, 542, *Cipollone v. Liggett Group*, 505 U.S. 504, 523 (1992).

In light of the historic presumption against federal preemption of state and local health and safety laws, a plain reading of the FCLAA and the cases interpreting it point to the patent conclusion that Congress left the door open for states and localities to regulate the distribution of tobacco products as California has done via section 118950.

Congress Anticipated and Asked for State Regulation of Tobacco Distribution and Use In Two Statutes Enacted in the Wake of the FCLAA

Subsequent to the FCLAA, Congress enacted two statutes that bear on cigarette distribution control. Congress' later enactments are strong evidence of its intent in promulgating an earlier statute. As the Court recently wrote in *Branch v. Smith*,

courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes:

‘The correct rule of interpretation is, that if diverse statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them. . . . If a thing contained in a subsequent statute, be within the reason of a former statute, it shall be taken to be within the meaning of that statute . . . ; and if it can be gathered from a subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.’

538 U.S. 254, 281 (2003), *quoting United States v. Freeman*, 44 U.S. 556, 564 (1845).

1. The Prohibition of Sales to Minors Act could have preempted similar state laws, but it does not.

After enacting the FCLAA, Congress passed two key statutes relevant to tobacco distribution and use. The first is the Prohibition of Cigarette Sales to Minors in Federal Buildings and Lands Act (the “Prohibition of Sales to Minors Act”), Pub. L. 104-52 (Title VI, § 636), 40 U.S.C. § 486 note. This statute requires the Administrator of General Services and the head of each federal agency to promulgate regulations prohibiting “the distribution of free samples in or around any Federal building.” The statute protects minors by prohibiting distribution in a public forum, whether minors are present or not. While the statute allows the Administrator of General Services or head of the appropriate Federal agency to “designate areas not subject to” this ban “if such area also prohibits the presence of minors,” the Act presumptively applies to *all* Federal buildings and the real property on which such buildings are located. § 636(b)(2), (a)(2).

The Prohibition of Sales to Minors Act is notable because it is applicable only in federal enclaves into which state law cannot reach. Thus, Congress demonstrated its understanding that banning the distribution of tobacco products to minors is a proper function of state law. In the Prohibition of Sales to Minors Act, Congress left standing the pervasive state regulation in this area. In other words, Congress would

have regulated tobacco handouts in other areas if it did not think that such handouts were already being addressed under state law.⁷

2. In enacting the Synar Amendment, Congress insisted on state regulation of tobacco distribution.

If Congress' choice not to preempt regulation of tobacco distribution in the Prohibition of Sales to Minors Act does not make clear enough its assumption that states had the power to regulate in this field, that intent is made still clearer by the second key statute – the Synar Amendment, 42 U.S.C. §300x – 26. There, Congress affirmatively required states to regulate the distribution of tobacco products to receive federal funds. The statute prohibits financial grants to states that do not have “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 a minor. 42 U.S.C. §300x – 26(a) (emphasis added).

The Synar Amendment shows that the FCLAA does not preempt the California statute in issue here. By insisting that states regulate in the field, Congress obviously affirmed that they might do so. More to the point, however, it is arguable that the Synar Amendment would have called for the passage of the California statute at issue if California had not already

⁷ The statute is also notable because it is more sweeping than that challenged here – it presumptively prohibits handouts around federal buildings to *anyone*. Congress thus more than tolerated an approach such as California's that kept cigarettes out of the hands of adults in order to prevent them from falling into the hands of minors – it adopted such an approach itself.

adopted it.⁸ 42 U.S.C. section 300x – 26(b)(1) provides that funding will be available if the “State involved will enforce the law described in subsection (a) of this section *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.*” (emphasis added). Thus, to be truly compliant with the Synar Amendment, states should have done exactly what California did here – pass a statute that regulates conduct which *may allow* tobacco products to fall into the hands of minors.

To conclude on this point, Congress’ later enactments show its intent to regulate conduct – including tobacco distribution – not falling within the communication arena preempted by the FCLAA. These enactments are important for two reasons. If Congress thought that it had already regulated this conduct through the FCLAA, these new statutes would not have been necessary. Second, and perhaps even more damaging to Petitioner’s

⁸ Reynolds makes the argument “the California statute that complies with the Synar Amendment is Penal Code Section 308.” PRB at 7, n. 2. This is patently incorrect. Rather, Business and Professions Code section 22951, which provided for augmented enforcement of existing restrictions on sales of tobacco to minors, and which was enacted immediately after the Synar Amendment, states: “California must fully comply with federal regulations, particularly the ‘Synar Amendment,’ that restrict tobacco sales to minors and require states to vigorously enforce their laws prohibiting the sale and distribution of tobacco products to persons under 18 years of age.” Just like Business and Professions Code section 22951, section 118950 bans a method of cigarette distribution from areas where minors may access them. Therefore, just as section 22951 is not preempted since it is directed by Congress, the unavoidable implication is that laws such as section 118950 were never intended to be preempted by Congress, either.

arguments, Congress' later acts either implicitly affirm that states may enact similar provisions, or straightforwardly demand that they do.

Reynolds' Overly Broad Interpretation Is Newly Found

Reynolds essentially makes the argument that anything that helps it sell cigarettes is "promotion." As discussed above, this construction is in line with neither Congress' nor the U.S. Supreme Court's interpretation of the term. Reynolds' overly broad interpretation of "promotion" is newly found because cigarette manufacturers such as Reynolds could have chosen to, but did not, challenge state limits on distribution channels on this new ground in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).⁹

Petitioner here was also a petitioner before the U.S. Supreme Court in *Lorillard*. See Petition for Writ of Certiorari of Lorillard Tobacco Co.,

⁹ *Amici* suggest that principles of judicial estoppel should prevent Reynolds from attempting to expand the definition of "promotion" at this belated hour. The Court may decide in the exercise of equity to invoke judicial estoppel based on three factors: (i) whether the party's later position is "clearly inconsistent" with its earlier position, (ii) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and (iii) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. See *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). While this Court recently interpreted judicial estoppel under state law more narrowly, see *Aguilar v. Lerner*, 32 Cal. 4th 974 (2004), for purposes of federal preemption, the broader federal analysis should apply. At a minimum, *amici* suggest that Reynolds is taking unfair advantage of the courts and wasting judicial resources by offering to this Court a broader interpretation of the preemptive sweep of the FCLAA than it did to the U.S. Supreme Court in *Lorillard*.

Brown & Williamson Tobacco Co., R.J. Reynolds Tobacco Co., Phillip Morris Inc., and United States Tobacco Co., 2000 WL 339979542 (U.S. filed Oct. 16, 2000). Nevertheless, in *Lorillard*, Reynolds chose not to challenge Massachusetts’ regulations on self-service displays as preempted. *See* 533 U.S. at 553 (“The cigarette petitioners did not raise a pre-emption challenge to the sales practices regulations”).¹⁰ Under Reynolds’ logic, a self-service display should be promotion every bit as much as the distribution of free cigarettes. As discussed above, the Court ultimately did imply that the regulation of self-service displays is not preempted, so that the point is moot. However, *amici* wish this Court to note that Reynolds’ interpretation of “promotion” appears to grow deliberately more expansive over time.

¹⁰ At issue in *Lorillard* were self-service displays, which Reynolds challenged pursuant to the First Amendment on commercial speech grounds, and advertising, which Reynolds challenged as preempted under section 1334(b). Reynolds did not contend that the self-service display ban was preempted under section 1334(b). The Court should also note that the Massachusetts regulations limited free sampling of cigarettes as well. *See* Endnote 1. Reynolds did not attack these sampling limitations in the Supreme Court in *Lorillard* on either preemption or First Amendment grounds.

II. REYNOLDS' INTERPRETATION OF "PROMOTION" WOULD ENCOMPASS VIRTUALLY ALL AREAS OF TRADITIONAL STATE AND LOCAL REGULATION OF TOBACCO, CONTRARY TO CONGRESS' INTENT

The interpretation of "promotion" which Reynolds proffers here is so broad that it could swallow virtually all areas of traditional state police regulation of tobacco.

For example, vending machines or self-service displays would help Reynolds sell cigarettes. However, Reynolds would read the FCLAA as proscribing laws prohibiting such sales methods – laws that the State and numerous local entities within the State have adopted. *See* Cal. Bus. & Prof. Code §§ 22962, 22960 (barring self-service displays), § 22957 (prohibiting cigarette vending machines); *see also* Americans for Nonsmokers' Rights Foundation, *California Municipalities with Ordinances Restricting Youth Access to Tobacco: Ordinances Restrict Self-Service Tobacco Displays* (2004), at http://talc.phlaw.org/pdf_files/0021.pdf. These laws seek to prevent youth access to tobacco, as Congress not only permits, but requires.

Not only is a challenge to self-service displays as preempted "promotion" a possible result of Reynolds' theory – it appears to be an *actual* one – at least for some in the tobacco industry. In *City of San Jose v. Cigarettes Cheaper!, Inc.* (Cal. Ct. App., 6th Dist., No. H026141 filed June 27, 2003), a cigarette retailer is arguing that self-service display bans are

preempted by section 1334(b). This newly expansive view of the preemption clause would write both state and local prohibitions on self-service displays out of the law. *See* Cal. Bus. & Prof. Code §§ 22962, 22960 (barring self-service displays), San Jose Mun. Code § 9.45.100.

Making cigarettes available in packs of less than 20 would help Reynolds sell cigarettes, for it would give consumers more options regarding the amount of money they want to spend on cigarettes at any one time. Yet California law also prohibits the sale of single cigarettes or of packs of fewer than 20, conduct which is at the distribution end of the communication/distribution duality and therefore plainly outside the sweep of FCLAA preemption. Cal. Penal Code §§ 308.2, 308.3.¹¹

Handing out cigarettes to minors would definitely help Reynolds sell cigarettes. Such conduct is “promotion,” as Reynolds would have this Court define it. After all, it does constitute “the act of furthering growth or development of something; *especially*: the furtherance of the acceptance and sale of merchandise through advertising, publicity, discounting.” *See Jones v. Vilsack*, 272 F.3d 1030, 1036 (8th Cir. 2001). Yet handing out cigarettes to minors would plainly violate state laws enacted in response to the Synar Amendment, *see e.g.* Cal. Bus. & Prof. Code §§ 22958, 22952(f),

¹¹ Cigarette packages are cheaper when they contain fewer cigarettes, and are thus more accessible to minors. These laws were enacted in part as part of the Stop Tobacco Access to Kids Enforcement Act (“the STAKE Act”) and it can be presumed that they were motivated, at least in part, by a desire to keep tobacco from minors.

22957, and the Federal Prohibition of Sales to Minors Act discussed above.¹²

Finally, hiring a teenage celebrity to smoke in a public place would help sell cigarettes. Yet if this is “promotion,” it could require the invalidation of state and local laws against smoking in an enclosed area within a place of employment, Labor Code §§ 6404.5, 2698-2699, laws against smoking near a playground, Health & Safety Code § 104495, laws prohibiting funding for schools that permit smoking on school grounds, Health & Safety Code §104420(p), and laws against smoking in day care facilities. Health & Safety Code §§ 1596.795, 1596.890. These laws clearly fall on distribution side of the communication / distribution dichotomy and are unarguably within the area which Congress left open for state regulation.

Reynolds’ commercial interests might well be served if all these forms of tobacco distribution and use were immune from state and local legislation – especially since there are virtually no federal statutes on these topics applicable other than in federal enclaves. However, this is plainly not what Congress intended. *See* 1970 U.S.C.C.A.N. at 2663 (preemption

¹² The Court also should be aware that California is far from the only state to regulate tobacco handouts in general. A list of laws from 17 states and the District of Columbia governing the free distribution of tobacco is included below. *See* Endnote 1.

provision “is limited entirely to state or local requirements or prohibitions in the *advertising* of cigarettes.”) (emphasis added).

III. REYNOLDS’ RELIANCE ON *JONES V. VILSACK AND ENGINE MANUFACTURER ASSOCIATION V. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT* ARE NOT SUPPORTABLE UNDER *LORILLARD*

In construing the meaning of “promotion” in the FCLAA, the Court should look to Supreme Court precedent regarding the FCLAA and should reject attempts by the Petitioner to rely on a lower court case improperly interpreting the FCLAA or a Supreme Court case addressing an entirely different statute.

***Vilsack’s* Interpretation of *Lorillard* is Severely Flawed**

1. *Vilsack* applied the wrong preemption standard.

Petitioners’ argument for preemption relies heavily on *Jones v. Vilsack*, 272 F.3d 1030 (8th Cir. 2001). *Amici* respectfully contend that *Vilsack* was not correctly decided and that this Court should not follow the 8th Circuit on this point.¹³ This Court is only bound by the holdings of the U.S. Supreme Court on questions of federal law.

¹³ While the *Jones v. Vilsack* decision suffers from faulty analysis, it should be noted that the decision is distinguishable. In *Vilsack*, the statute in question regulated *many* forms of what it termed “promotion,” including sampling, some of which were clearly protected from state regulation by the FCLAA. Perhaps because the severability of sampling from other prohibited activities was apparently not argued, the activities in their entirety were invalidated. However, the *Vilsack* Court expressly limited its holding to the facts of that case: “Our obligation to establish an all-purpose definition capable of deciding each and every section 1334(b) preemption

‘On a federal question, the decisions of the United States Supreme Court are binding on state courts. However, the decisions of the lower federal courts, while persuasive, are not binding on [this Court].’ Thus, in the absence of a controlling United States Supreme Court opinion, we make an independent determination of federal law. *Forsyth v. Jones*, 57 Cal.App.4th 776, 782-83 (1997) (citation omitted).

The *Vilsack* court pointed to statements from concurring opinions in *Cipollone* for the proposition that preemption should not be construed “narrowly.” 272 F.3d 1030, 1035. This ignores the majority and plurality commands in *Lorillard* and *Cipollone* that we “‘wor(k) on the assumption that the historic police powers of States (a)re not to be superseded by the Federal Act unless that (is) the clear and manifest purpose of Congress.” *Lorillard*, 533 U.S. at 541-42 (majority opinion), *see also Cipollone*, 505 U.S. 504, 523 (“we must fairly but – in light of the strong presumption against pre-emption – narrowly construe” the Act) (plurality opinion).

2. *Vilsack* defined “promotion” broadly, contrary to Congress’ intent.

In *Vilsack*, the court relied upon a dictionary definition of “promotion” without evidence that Congress intended to give “promotion” as wide a sweep as does Webster’s. 272 F.3d at 1036. Reliance on a dictionary definition may be appropriate where the structure of the statute supports the interpretation provided in the dictionary. *See, e.g., Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 124 S.Ct. 1756, 1761

dispute that might arise. We are not lexicographers, nor should we be.” *Vilsack*, 272 F.3d at 1035.

(2004). However, such is not the case here, where (as discussed above) both the preamble and definition sections of the statute instruct that the term at issue should have a far more limited scope.

The *Vilsack* court also read too much into a passage in *Lorillard* which discussed both sampling and “promotion:”

Substantial increases were found in point-of-sale *promotions*, payments made to retailers to facilitate sales, and retail offers such as buy one, get one free, or product giveaways.

533 U.S. at 545 (emphasis added). *Vilsack* completely misinterpreted this passage to conclude that the Supreme Court was conflating “product giveaways” with “promotions.” In the quoted sentence, the Supreme Court specifically distinguished “product giveaways” from “promotions” by listing them separately. Moreover, the *Lorillard* Court did not even purport to define the term “promotion” in this sentence. It was simply quoting from an FTC report as background information.¹⁴

Finally, other Court opinions and opinions of certain Justices use the term “promotion” more narrowly than the *Vilsack* court realized, excluding the free distribution of cigarettes from the ambit of that term. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 129 (2000) (distinguishing FDA’s “access regulations,” including “prohibit[ing] the

¹⁴ Nor does the FTC, in turn, have any power to define the terms in the FCLAA. *See* 15 U.S.C. § 1336 (“Nothing in this chapter . . . shall be construed to limit, restrict, expand, or otherwise affect the authority of the [FTC] with respect to unfair or deceptive . . . practices in the advertising of cigarettes.”)

distribution of free samples,” from its “promotion regulations,” including restrictions on advertising and “distribution of any promotional items, such as T-shirts or hats, bearing the manufacturer’s brand name.”)

***Engine Manufacturers Did Not Alter the Court’s
Preemption Analysis***

The Petitioners argue that *Engine Manufacturers*, 124 S.Ct. 1756, somehow alters the Supreme Court’s approach to preemption analysis in *Lorillard*. *Engine Manufacturers* does no such thing. As it did in *Lorillard*, 533 U.S. at 541-42, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), and *Cipollone*, 505 U.S. at 523 (1992) (plurality), in *Engine Manufacturers* the Court applied the basic presumption that Congress must speak clearly and manifestly in order to preempt traditional state regulation. 127 S.Ct. 1765. In *Engine Manufacturers* eight members of the Court agreed that Congress had spoken in just such a manner in the Clean Air Act, where it preempted states from imposing standards on vehicle emissions.

Petitioner makes too much of the majority’s brief rejoinder to Justice Souter’s dissent in *Engine Manufacturers*:

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. . . . Application of those methods, on which not all Members of this Court agree, demonstrably makes no difference to resolution of the principal question.

124 S.Ct. 1756, 1763 (2004) (emphasis in original). The Court did not engage in a searching inquiry into the legislative history of the Clean Air Act because the Court concluded that Congress had made clear in the statute's text and structure just what it intended to preempt. *See* 124 S.Ct. at 1762.

This case involves no such clearly delineated preemptive intent. In construing the FCLAA in *Lorillard* and in *Cipollone*, the Court has struggled mightily with the extent of Congress' intent. In the FCLAA Congress did not make clear what it meant by the word "promotion."

The fact remains that the presumption against preemption, which is really just another way of saying that Congress must speak clearly and manifestly when preempting traditional state authority, is an analytical tool to which all nine Justices of the Supreme adhere. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), *Cipollone*, 505 U.S. at 523 (1992) (plurality opinion), 505 U.S. at 531 (concurrence of Justices Blackmun, Kennedy, and Souter), *Lorillard*, 533 U.S. at 541-42.

CONCLUSION

It is clear from the structure of section 1334(b), and from its legislative history, that Congress meant to regulate advertising, labeling and other activities in which the primary element is communication. Equally plain is that Congress not only intended to permit, but in some instances

required, state and local governments to regulate conduct which amounts to the sale, distribution and use of tobacco in which the communicative element is not dominant. The FCLAA’s circumscribed use of “promotion” is supported by the *Lorillard* Court’s treatment of self-service displays. Reynolds’ new-found argument that “promotion” encompasses virtually anything that will help it sell cigarettes – an argument it was unwilling to raise on appeal or before the U.S. Supreme Court in *Lorillard* – should be flatly rejected here as both too late and too self-serving to reflect the manifest purpose of the FCLAA. Accordingly, *amici* respectfully request that this Court affirm the lower courts and reject Reynolds’ claim that section 118950 is preempted.

DATED: _____

Respectfully Submitted,

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ENDNOTE

- ¹ At least 17 States and the District of Columbia regulate the distribution of free or discounted tobacco products. *See Amici's Request for Judicial Notice*, filed herewith. *See also Ark.* Code Ann. Section 5-27-227 (Michie 2003) (Prohibits tobacco product sample distribution in or on any public street or sidewalk within 500 feet of a playground, public school, or other facility primarily used by people under 18 years of age. Violations are punishable with notice by a fine of \$250 for a first violation within a 48-month period, a fine of \$500 and suspension of license for a period not to exceed 2 days for a second violation within such a period, a fine of \$1000 and suspension of license for a period not to exceed 7 days for a third violation within such a period, a fine of \$2,000 and suspension of license for a period not to exceed 14 days for a fourth violation within such a period, and a revocation of license for a fifth violation within such a period.); **Conn.** Gen. Stat. Section 12.314a (2003) (Allows Commissioner of Revenue Services to authorize distribution of cigarettes under certain conditions, including that the location of the giveaway be the premises of a licensed dealer or at an event or establishment with an area that is limited to adult access only and distribution is in such area.); **D.C.** Code Ann. Section 7-1731 (2003) (Prohibits distribution of cigarettes or other tobacco product on a public street, sidewalk, park, playground, in a public building, other public property, or private property open to the public, except a tobacco store, convention, or a conference catering to adults. Punishable with a fine of \$250 per violation.); **Ga.** Code Ann. Section 16-12-174 (2002) (Prohibits distribution of samples on a public street, sidewalk or park 500 feet from a school or playground; punishable as a misdemeanor.); **Haw.** Rev. Stat. Section 328K-22 (2003) (Prohibits distribution of sample tobacco products or coupons in or on any public street, sidewalk, or park, or within 1,000 feet of any elementary, middle, or intermediate, or high school. Does not apply within private commercial establishments or to commercial establishments where access to the premises by persons under 18 years of age is prohibited by law. Punishable by fine of not more than \$1000); **Idaho** Code Section 39-5707 (Michie 2003) (Prohibits distribution, for free or below cost, of tobacco products to members of the general public in public places or at public events); **Iowa** Code Section 142A.6 (2003) (Prohibits distribution of tobacco giveaways by manufacturers, distributors, wholesalers, retailers, and distribution agents from giving away cigarettes. This section was successfully challenged in *Jones v.*

Vilsack, supra); **Kansas** Stat. Ann. Section 79-3321 (2003) (Makes it unlawful to distribute samples within 500 feet of any school when such facility is being used primarily by persons under 18 years of age unless the sampling is (1) in an area which prohibits access to persons under 18 years of age, (2) in or at a retail location where cigarettes and tobacco products are the primary commodity offered for sale at retail, or (3) at or adjacent to an outdoor production, repair, or construction site facility.); **Mass.** Regs. Code tit. 940, Section 21.04 (2004) (Prohibits tobacco giveaways unless distribution of no more than one free sample per day to an individual adult. A free sample of cigarettes is defined as the smallest size package distributed by the manufacturer for consumer use); **Michigan** Comp. Laws Section 750.42(b) (2003) (Prohibits distribution as a part of a business of free tobacco samples unless they are regularly sold by that person and the person distributing the tobacco product ascertains that the person receiving the tobacco product is 18 years of age or older. Violations are a misdemeanor, subject to a fine of not more than \$500 and imprisonment of up to 90 days, community service for up to 180 days or both); **Minn.** Stat. Section 325F.77 (2003) (No person shall distribute tobacco products except that single-serving samples of tobacco may be distributed in tobacco stores. Statute is based on a finding that a less broad restriction would make it impracticable to ensure that cigarettes do not fall into the hands of minors.); **N.H.** Rev. Stat. Ann. Section 126-K:5 (2003) (Prohibits distribution of free samples in a public place except for (a) areas in which minors are denied access, (b) stores to which a retailer's license has been issued, and (c) factory sites, construction sites, conventions, trade shows, fairs or motorsport facilities in areas to which minors are denied access. Punishable by a fine of \$250 for the first offense, \$500 for the second, from \$500 to \$1500 and suspension of license for between 10 and 30 days for the third; from \$750 to \$3000 and a suspension of 10 to 40 days for a fourth, and revocation of license for a period of a year for any further violation); **New York** Public Health Law Section 1399-bb (Consol. 2003) (No person engaged in the business of selling tobacco products may distribute cigarettes without charge except at (a) private social functions, (b) conventions and trade shows; (c) events sponsored by tobacco manufacturers provided that the distribution is confined to designated areas generally accessible only to persons over 18, (d) bars, (e) tobacco businesses, and (f) factories provided distribution is confined to areas accessible only to persons over 18.); **Okla.** Stat. tit. 37, Section 600.8 (2003) (No person shall distribute tobacco product samples in or on any public

street, sidewalk, or park that is within 300 feet of any playground, school or other facility when the facility is being used primarily by persons under 18. Violations are punishable by a maximum \$100 fine for first offense, \$200 for the second, and \$300 for the third); **S.D.** Codified Laws Section 34-46-2 (Michie 2003) (Unlawful to distribute tobacco product samples in or on a public street, sidewalk, or park within 500 feet of a playground, school, or other facility when the facility is being used primarily by persons under 18); **Tenn.** Code Ann. Sections 39-17-1502 and 39-17-1504 (2003) (No person shall distribute tobacco product samples in or on any public street, sidewalk, or park); **Utah** Code Ann. Sections 76-10-111 and 76-10-112 (2003) (It is unlawful for a manufacturer, wholesaler, or retailer to give or distribute cigarettes without charge upon purchase of cigarette or other tobacco products, except at professional conventions where the general public is excluded or to persons of legal age. Violation is a class C misdemeanor for the first offense and a class B misdemeanor for any subsequent offenses.); **Wash.** Rev. Code Section 70.155.060 (2004) (No person may distribute or offer to distribute tobacco samples in a public place, except (a) in an area to which persons under 18 are denied admission, (b) in or at a store or concession to which a retailer's license has been issued, or (c) at or adjacent to a production, repair, or outdoor construction site or facility, but in no case on a public street, sidewalk or park that is within 500 feet of a playground, school or other facility when that facility is being used primarily by persons under 18 for recreational, educational, or other purposes.)

CERTIFICATE OF WORD COUNT

I, Hannah Bentley, appellate counsel to [Proposed] Amici Curiae League of California Cities, California State Association of Counties, and Tobacco Control Legal Consortium, hereby certify that the within application and proposed brief total 8,263 words as counted by the computer program used to prepare this brief.

Dated: _____

Hannah Bentley