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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE ex rel. BILL LOCKYER, as Attorney General, etc., Plaintiff and Respondent, v. R.J. REYNOLDS TOBACCO COMPANY, Defendant and Appellant.	B160571 (Los Angeles County Super. Ct. No. KC036109)

APPEAL from a judgment of the Superior Court of Los Angeles County. Conrad Richard Aragon, Judge. Affirmed.

Howard, Rice, Nemerovski, Canady, Falk & Rabkin, H. Joseph Escher III, Marc C. Haber, and Chandra Miller Fienen for Defendant and Appellant.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Dennis Eckhart, Senior Assistant Attorney General, Peter M. Williams and Michelle Fogliani, Deputy Attorneys General, for Plaintiff and Respondent.

Exercising independent review,[1] we affirm summary judgment in favor of the People against R.J. Reynolds Tobacco Company (R.J. Reynolds) for violating Health and Safety Code section 118950.[2] We hold: (1) the Federal Cigarette Labeling and Advertising Act (FCLAA) does not preempt section 118950's restriction on the distribution of free cigarettes; (2) the distribution of free cigarettes on public grounds violates section 118950 even if it is confined to an adult only area inside a private function; and (3) the $14,826,200 penalty levied against R.J. Reynolds for distributing free cigarettes to 14,834 people does not violate the excessive fines or due process clauses of the United States Constitution.[3]

FACTUAL AND PROCEDURAL HISTORY

1. Background.

Between February 1999 and October 1999, R.J. Reynolds operated tents through which it distributed 108,155 free packs of cigarettes to 14,834 people at the Pomona Raceway, the Del Mar Mile Motorcycle Championship, the Blessing of the Cars, the Sunset Junction Festival, the Long Beach Jazz Festival, and the San Jose International Beer Festival (the six events). At the six events, licensed security guards were stationed at the entrances to the tents. They admitted only adults who were 21 years of age or older and in possession of both a pack of cigarettes containing at least one cigarette and a completed survey card. Cigarettes were distributed to the admitted adults, but only after

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1 See *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (summary judgments are reviewed independently).

2 All further statutory references are to the Health and Safety Code unless otherwise indicated.

3 R.J. Reynolds challenges the constitutionality of the penalty under both the United States Constitution and the California Constitution. However, R.J. Reynolds analyzes only the federal issue. For purposes of this opinion only, we presume that the federal and state issues are coterminus.

they provided personal identification information, brand and style preference, purchase information, and permission to be added to R.J. Reynolds's mailing list.

2. The proceedings below.

The People sued R.J. Reynolds, alleging that the distribution of free cigarettes at the six events violated section 118950.[4] After the parties stipulated to the facts pertaining to the six events, the People moved for summary judgment. R.J. Reynolds opposed by raising federal preemption as a bar to the complaint and by arguing that its conduct fell within the safe harbor provision set forth in section 118950, subdivision (f), which allows the distribution of free cigarettes on public grounds leased for private functions where minors are denied access by a peace officer or a licensed security guard. The trial court rejected both arguments. Following briefing and a hearing regarding the amount and constitutionality of the penalty under section 118950, subdivision (d), the trial court entered judgment for the People.

Strictly calculated, the penalty provided by section 118950, subdivision (b) would have been over $108 million because every package of cigarettes distributed on public grounds was a violation. However, the trial court's order provided in relevant part: "JUDGMENT SHALL BE ENTERED IN FAVOR OF THE PEOPLE IN THE AMOUNT OF $14,826,200. The People agreed in open court . . . that the 9,600 cartons distributed at Pomona in 1999 and alleged in the 2nd Cause of Action, were to be considered as 9,600 single packages -- thus amounting to 9,600 violations -- for the limited purpose of calculating the statutory fine for that particular event. Further, the parties have stipulated that a total number of 14,834 people received free samples at the

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[4] The People's pleading pertained to nine different events and alleged that R.J. Reynolds violated section 118950 by distributing nonsale cigarette coupons as well as by distributing nonsale cigarettes. The People sought statutory penalties, but also relief pursuant to Business and Professions Code section 17200 et seq. The People agreed to dismiss their claims related to the nonsale distribution of cigarette coupons and their unfair business practices claims. The summary judgment motion only pertained to the six events.

events in question. The Court imposed a nondiscretionary fine of $200 for the 1st violation at each event, a nondiscretionary $500 fine for the 2nd violation at each event, and $1,000 fine for each subsequent violation at each event. The Court has calculated the amount of the fine pursuant to subdivision (d) of [section 118950] based on the number of recipients of the tobacco samples who received cigarettes in violation of [section 118950] for all the subject events."

This timely appeal followed.

DISCUSSION

I. California's restriction on the distribution of free cigarettes on public grounds.

For purposes of this opinion, we apply the prior version of section 118950, which was in effect during the six events in 1999.[5]

Pursuant to subdivision (b) of the prior version of section 118950, it was unlawful for persons engaged in the business of selling or distributing cigarettes to distribute free cigarettes to people "in any public building, park or playground, or on any public sidewalk, street, or other public grounds." Any person who violated this statute was "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 succeeding violation. Each distribution of a single package . . . to an individual member of the general public in violation of this section [was] considered a separate violation." (§ 118950, subd. (d).) The statute did not apply to "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." (§ 118950, subd. (f).)[6]

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[5] Section 118950 was enacted in 1995 to replace former section 25967, Statutes 1991, chapter 829, section 1.

[6] The current version of section 118950, which was amended in 2001, is substantially the same as the prior version. It provides in relevant part: "(b) It is unlawful for any person, agent, or employee of a person in the business of selling or distributing smokeless tobacco or cigarettes from engaging in the nonsale distribution of

In section 118950, subdivision (a), the Legislature declared, inter alia: "(1) Smoking is the single most important source of preventable disease and premature death in California. [¶] (2) Smoking is responsible for one-quarter of all death caused by fire. [¶] (3) Tobacco-related disease places a tremendous financial burden upon the persons with the disease, their families, the health care delivery system, and society as a whole. [¶] (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 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. [¶] (6) More than 60 percent of all smokers begin smoking by the age of 14, and 90 percent begin by the age of 19. [¶] . . . [¶] (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. [¶] (11) 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

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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, or on any private property that is open to the general public. [¶] . . . [¶] (d) 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 distribution of a single package, coupon, coupon offer, or rebate offer to an individual member of the general public in violation of this section shall be considered a separate violation. [¶] . . . [¶] (f) This section does not apply to any public building, park, playground, sidewalk, street, or other public grounds or any private property that is open to the general public where minors are prohibited by law. This section also shall not apply to any public building, park, playground, sidewalk, street, or other public ground open to the general public and leased for private functions where minors are denied access by a peace officer or licensed security guard on the premises."

highest priorities in disease prevention for the State of California."

II. California law is not preempted.

R.J. Reynolds posits that the trial court erred when it ruled that section 118950 is not preempted by the FCLAA. We disagree.

A. *The FCLAA*.

As a preamble, the FCLAA 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.)

To further the FCLAA's policy, title 15 United States Code section 1333 establishes that it is unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear specified Surgeon General's warnings. Similarly, manufacturers or importers of cigarettes must include the specified Surgeon General's warnings when they advertise via outdoor billboards or other mediums.

Relevant to this appeal, the FCLAA preempts any state requirement or prohibition "based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the FCLAA]." (15 U.S.C. § 1334(b).)

B. *Preemption law.*

Article VI of the United States Constitution provides that the laws of the United States shall be the supreme law of the land. (*Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516 (*Cipollone*).) It is axiomatic that any state law that conflicts with federal

law has no effect. (*Ibid*.) "State action may be foreclosed by express language in a congressional enactment, [citation], by implication from the depth and breadth of a congressional scheme that occupies the legislative field, [citation], or by implication because of a conflict with a congressional enactment, [citation]." (*Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525, 541 (*Lorillard*).)

When analyzing a preemption issue, a reviewing court "'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' [Citation.] Accordingly, "'the purpose of Congress is the ultimate touchstone'" of pre-emption analysis. [Citation.]" (*Cipollone*, *supra*, 505 U.S. at p. 516.) There are "two practical reasons for this presumption. First, Congress has the power to make preemption clear in the first instance. Second, 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 (*Chemical Specialties*).) This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485 (*Medtronic*).) As a result of this approach, "preemption will not be easily found." (*National Warranty Ins. Co. RRG v. Greenfield* (9th Cir. 2000) 214 F.3d 1073, 1077.)

Medtronic teaches that the "interpretation of [preemption] language does not occur in a contextual vacuum." (*Medtronic*, *supra*, 518 U.S. at p. 485.) In furtherance of this principle, "any understanding of the scope of a pre-emption statute must rest primarily on 'a fair understanding of *congressional purpose*.' [Citation.] 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." (*Id.* at pp. 485-486.)

We recognize that the Supreme Court has been home to disagreement about preemption analysis and the FCLAA. In *Cipollone*, for example, Justice Scalia, joined by Justice Thomas, called for a plain meaning analysis of the FCLAA's preemption provision in his separate opinion concurring in part and dissenting in part. (*Cipollone*, *supra*, 505 U.S. at p. 544.) Moreover, *Cipollone* and *Medtronic* contain language that, when taken alone, suggests that a reviewing court's analysis begins and ends with the plain meaning of a preemption provision. (See *id*. at p. 517; *Medtronic*, *supra*, 518 U.S. at p. 484 [there is no need to go beyond the preemption language to determine whether Congress intended to preempt at least *some* state law].) As a result, the lower federal courts are divided as to how the FCLAA's preemption provision should be read. (See *Federation of Advert. Indus. v. City of Chicago* (7th Cir. 1999) 189 F.3d 633 (*F.A.I.R.*) and *Greater NY Metropolitan Food Council v. Giuliani* (2nd Cir. 1999) 195 F.3d 100 (*Metro Food*) [interpreting the scope of FCLAA preemption contextually and narrowly]; but see *Rockwood v. City of Burlington, VT.* (D. Vt. 1998) 21 F. Supp. 2d 411 (*Rockwood*) and *Jones v. Vilsack* (8th Cir. 2001) 272 F.3d 1030 (*Jones*) [analyzing the plain meaning of the FCLAA's preemption provision].) Nonetheless, *Lorillard*, the Supreme Court's most recent pronouncement regarding the preemptive scope of the FCLAA, settles any dispute about the current state of the law. In short, it places its imprimatur on the contextual approach.

Lorillard examined whether location based restrictions on cigarette advertising in Massachusetts were preempted by the FCLAA. (*Lorillard*, *supra*, 533 U.S. at p. 532.) In part II-A, Justice O'Connor noted that "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,' [citation]." (*Lorillard*, *supra*, 533 U.S. at p. 541.) Relying on the bromides of past opinions, Justice O'Connor added that congressional intent is the "'ultimate touchstone'" of preemption analysis, and a court must work on the assumption that the historic police powers of the states are not to be superseded by a federal act unless that is the clear and manifest purpose of Congress. (*Id*. at pp. 541-542.) Continuing on, she

stated that the analysis "begins with the language of the statute", that meaning must be given to each element of the preemption provision, and that "[w]e are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted." (*Id*. at p. 542.) Accordingly, the court's task was to interpret FCLAA preemption "in light of the context in which the current pre-emption provision was adopted." (*Id*. at p. 546.)

In part II-B, Justice O'Connor rejected the lower court's conclusion that the FCLAA preempts only content-based regulations. (*Lorillard*, *supra*, 533 U.S. at pp. 546-551.) To arrive at this holding, she looked beyond the preemption language to the substantive provisions. (*Id*. at pp. 547-548 ["As Congress enacted the current pre-emption provision, Congress did not concern itself solely with health warnings for cigarettes. In the 1969 amendments, Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but 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."].) Additionally, she pointed out that "[w]e 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." (*Id*. at p. 549.)

California courts are in accord.

Our Supreme Court followed *Cipollone* in *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057 and reiterated the general principles of preemption analysis, namely that a reviewing court must look to congressional intent. (*Id*. at p. 1066.) As precedent, it calls upon the lower California courts to presume against preemption when state police powers are involved, construe the scope of preemption under the FCLAA narrowly, and to consider the purposes of the FCLAA as a whole. (*Id*. at pp. 1066, 1069.) *Washington Mutual Bank v. Superior Court* (1999) 75 Cal.App.4th 773 (*Washington Mutual I*) posited that "courts are reluctant to find that state provisions are inconsistent with federal law unless the state law directly conflicts with the federal law, undermines the federal law, or makes it impossible to comply with both federal and state

law." (*Id*. at p. 783.)

Indeed, we are no strangers to preemption issues, having recently been confronted with them in both *LaPlante v. Wellcraft Marine Corp.* (2001) 94 Cal.App.4th 282 [holding that negligence claims arising out of injuries caused by a boat were not preempted by the Federal Boat Safety Act of 1971] and *Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606 (*Washington Mutual II*) [holding that state statutory claims challenging preclosing interest charges on home loans are preempted by the Home Owner's Loan Act and the act's implementing regulations]. Both *LaPlante* and *Washington Mutual II* acknowledged that we presume against preemption in an area of the law traditionally occupied by the states, such as the exercise of police power, unless Congress clearly intended otherwise. (*LaPlante*, *supra*, at p. 290; *Washington Mutual II*, *supra*, 95 Cal.App.4th at pp. 612-613.)

With these precedents firmly in mind, we turn to the question of whether the FCLAA preempts section 118950.

C. *Contextual analysis.*

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.

It is R.J. Reynolds's position that *Lorillard* thwarts our analysis because it requires us to read FCLAA preemption broadly. However, as we have already explained, *Lorillard* is consistent with *Cipollone* and *Medtronic*. Beyond that, *Lorillard* stated: "The FCLAA also does not foreclose all state regulation of conduct as it relates to the sale or use of cigarettes. The FCLAA's pre-emption provision explicitly governs state

regulations of 'advertising or promotion.' Accordingly, the FCLAA does not pre-empt state laws prohibiting cigarette sales to minors. To the contrary, there is an established congressional policy that supports such laws; Congress has required States to prohibit tobacco sales to minors as a condition of receiving federal block grant funding for substance abuse treatment activities. [Citation.]" (*Lorillard*, *supra*, 533 U.S. at p. 552, fn. omitted.) Also, in a footnote, *Lorillard* indicated: "The 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.' S. Rep. No. 91-566, p. 12 (1969)." (*Lorillard*, *supra*, 533 U.S. at p. 552 & asterisk fn.) To be sure, section 118950 is a police regulation that is similar to state laws proscribing the sale of cigarettes to minors. As a result, *Lorillard* left the door open for statutes such as section 118950.

That a regulation such as section 118950 escapes preemption is bolstered by the existence of title 42 United States Code Service section 300x-26, the enactment referenced by *Lorillard* in the quote above.[7] 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. Though not dispositive, this is indirect evidence that Congress did not intend to include the distribution of free cigarettes within the definition of "promotion." (See *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.* (1997) 519 U.S.

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[7] In relevant part, title 42 United States Code Service section 300x-26 provides: "Subject to paragraph (2), for fiscal year 1994 and subsequent fiscal years, the Secretary may make a grant under section 1921 [42 USCS § 300x-21] 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 any individual under the age of 18."

316, 331, fn. 7.) Inferring that Congress intended the contrary is implausible for a second reason. We would be left with the paradoxical situation that a state could prohibit the sale but not giveaway of cigarettes to minors.

Faced with this potential conundrum, we heed the reminder in *Chemical Specialties* that Congress has the power to make preemption clear and that if it failed to do so, our analysis should err on the side of upholding the police power of the states. Here, Congress did not make the meaning of "promotion" clear. The FCLAA contains a definition section, yet "promotion" is not defined. Moreover, title 15 United States Code section 1332(6) provides: "The term 'sale or distribution' includes sampling or any other distribution not for sale." If Congress had intended to preempt state laws pertaining to nonsale distribution, then the preemption provision would have pertained to advertising, promotion *and* "sale and distribution." A fair reading of the FCLAA reveals that "sale and distribution" is defined in order to inform distributors and others that even if tobacco products are given away, they must contain the required warnings. That definition in no way demonstrates that "sale and distribution" are being regulated. Finally, we note that the word "promotion" appears only once in the FCLAA. We decline to let "promotion" be the tail that wags the dog.

The legislative history of the FCLAA is ambiguous on the topic. If anything, it supports our holding. Senate Report No. 91-566, in which the Commerce Committee recommended amending the FCLAA in 1969, contains the word "promotion." But nothing in its context suggests that the Legislature meant to regulate cigarette giveaways through the FCLAA. For example, the report stated that the provisions requiring reporting by the FTC will allow Congress "to consider any future questions relating to nonbroadcast advertising and promotion of cigarettes as the facts develop under the markedly changed conditions which will follow the termination of broadcast advertising. The committee cannot overstate its strong desire that the cigarette industry not only honor its statement carefully to limit print advertising so as not to appeal to youth, but that it will also exercise restraint in the overall use of print advertising and other forms of promotion." The report noted that the FTC reports are expected to discuss, inter alia, "the

performance of the cigarette industry in avoiding advertisements with particular appeal to young people" and "the utilization by the cigarette industry of print advertising for the nondeceptive promotion of cigarettes which are progressively lower in tar, nicotine, and hazardous gases." Senate Report No. 91-566 went on to state that "[t]here is no doubt that cigarette advertising in the broadcast media has been by far the most offensive means of cigarette promotion to the public health community, particularly because of the defenselessness of young people against the impact of radio and television." It is possible, of course, that the Senate Report was giving the word "promotion" a meaning that includes cigarette giveaways, but there is no hint of that, and we see no reason to strain the report's language.

D. *Rockwood and Jones.*

R.J. Reynolds relies heavily on *Rockwood* and *Jones* in urging us to reverse. They are the only two reported decisions that have applied the FCLAA preemption provision to state laws that restrict cigarette giveaways. However, we decline to follow *Jones* and *Rockwood*. Simply put, neither case is persuasive because neither interpreted the FCLAA contextually, as required.

Rockwood applied the FCLAA to invalidate a city ordinance that prohibited, among other things, the promotional distribution of free samples of tobacco products and also the "visible tobacco advertising of any sort within one thousand feet of a school property." (*Rockwood, supra,* 21 F.Supp.2d at p. 420.) Based on the plurality opinion in parts V and VI in *Cipollone,* and Justice Scalia's separate opinion, *Rockwood* stated: "Thus, six members of the *Cipollone* Court agreed that the plain language of the phrase is broad." (*Id*. at p. 419.) From this premise, the court concluded that the challenged provisions "directly affect the advertisement and promotion of cigarettes, and consequently, however well-advised the measures are, they are preempted by the FCLAA." (*Rockwood,* at p. 420.)

Without engaging in analysis, the *Rockwood* court assumed that "promotion" encompassed tobacco giveaways. Furthermore, joining Justice Stevens's plurality opinion in *Cipollone* with Justice Scalia's concurring and dissenting opinion did not

justify that assumption. Even though Justice Stevens's plurality opinion in *Cipollone* did state that the preemption clause is broad, that opinion nonetheless engaged in a contextual analysis. (*Cipollone*, *supra*, 505 U.S. at pp. 520-521 ["The 1969 Act worked substantial changes in the law: rewriting the label warning, banning broadcast advertising, and allowing the FTC to regulate print advertising. In the context of such revisions and in light of the substantial changes in wording, we cannot accept the parties' claim that the 1969 Act did not alter the reach of § 5(b)."].) As a result, the analytical underpinnings of *Rockwood* are suspect.

In *Jones*, the court held that the plain meaning of the FCLAA preemption provision barred a law that prohibited "retailers from giving away tobacco products, and from providing free goods and other concessions in exchange for purchase of tobacco products." (*Jones, supra,* 272 F.3d at p. 1032.) Setting forth what it viewed as controlling precedent, the *Jones* court stated: "In *Cipollone*, a majority of the Justices of the Supreme Court rejected an invitation to construe [15 U.S.C.] § 1334(b) preemption narrowly. 'Under the Supremacy Clause, . . . our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.' *Cipollone*, 505 U.S. at [p.] 544 (Scalia, J., with whom Thomas, J., joins); [505 U.S. at p.] 532 (Blackmun, J., with whom Kennedy and Souter, JJ., join) ('An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'). More recently, the Court described the language of [15 U.S.C.] § 1334(b) as 'sweeping,' *Lorillard*, 533 U.S. at [p.] 536, further eschewing the 'narrow construction' approach proposed by the State in this appeal. We think the Court's position is clear: we must not interpret the term 'promotion' more narrowly than its plain and ordinary meaning would suggest." (*Jones*, at p. 1035.)

In order to pinpoint the plain meaning of "promotion," the *Jones* court noted that past FTC and Surgeon General reports identified cigarette giveaways as promotional activities. (*Jones*, *supra*, 272 F.3d at pp. 1033, 1035.) *Jones* cited *FDA v. Brown & Williamson Tobacco Corp.* (2000) 529 U.S. 120 and *Lorillard* for the proposition that

"[t]he [Supreme Court] has twice employed the term [promotion] in its tobacco regulation cases to describe conduct akin to that proscribed in the [act]." (*Jones*, *supra*, 272 F.3d at p. 1036.) Next, *Jones* looked to dictionary definitions to aid its interpretation, concluding that various broad definitions suggested that "promotion" encompassed cigarette giveaways. (*Ibid*.)

Contrary to *Jones*, it is impossible to stitch together Justice Scalia's and Justice Blackmun's separate opinions in *Cipollone* and create a precedent. While Justice Scalia espoused a plain meaning rule and dissented from the statement of preemption law in part III of the majority opinion (*Cipollone*, *supra*, 505 U.S. at p. 545), Justice Blackmun joined part III of the majority opinion (*id*. at p. 531). Justice Blackmun did indeed say that the analysis must *begin* with the language employed by Congress. (*Id*. at p. 532.) But he also said that the court's task was to determine the domain of preemption, and that the negative presumption in implied preemption cases applies with equal force in cases where Congress provides for preemption, but does so ambiguously. (*Id*. at pp. 532-533.) In the end, Justice Scalia and Justice Blackmun were diametrically opposed -- Justice Scalia believed that all the state law at issue in *Cipollone* was preempted, whereas Justice Blackmun believed that none of it was preempted. In reaching his conclusion, inter alia, Justice Blackmun reviewed the legislative history and analyzed the FCLAA as a whole. (*Id*. at pp. 541-542.)

It is axiomatic that "[n]o opinion has any value as a precedent on points as to which there is no agreement of a majority of the court. [Citations.]" (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 974, pp. 1023-1024.) Therefore, Justice Scalia's separate opinion in *Cipollone* was never binding precedent. But even if it once was, it was superseded by *Medtronic*. Also, ironically, we note that in 2000 Justice Scalia joined Justice O'Connor's entire opinion in *Lorillard*.

In deciding not to follow *Rockwood* and *Jones*, we give credence to the following considerations: "While we are not bound by decisions of the lower federal courts, even on federal questions, they are persuasive and entitled to great weight. [Citation.] Where lower federal precedents are divided or lacking, state courts must necessarily make an

independent determination of federal law [citation], but where the decisions of the lower federal courts on a federal question are 'both numerous and consistent,' we should hesitate to reject their authority [citation]." (*Etcheverry v. Tri-Ag Service, Inc.* (2000) 22 Cal.4th 316, 320-321 (*Etcheverry*).)

Rockwood and *Jones* do not constitute a "numerous" body of law. Additionally, *Jones* and *Rockwood* employed reasoning that conflicts with the dictates of *Cipollone*, *Medtronic* and *Lorillard*. As a result, neither case examined the FCLAA as a whole, nor did they apply the presumption against preemption. Consequently, in the words of *Etcheverry*, they are lacking.

Finally, the tacit plain meaning approach in *Rockwood* was criticized by other federal courts. In *F.A.I.R., supra,* 189 F.3d 633, the court was called upon to analyze whether the FCLAA preempted an ordinance restricting public advertisement of tobacco products and alcohol. (*F.A.I.R.*, at p. 634.) The Seventh Circuit ultimately held that the ordinance was preempted as it related to tobacco advertising. (*Id*. at p. 640.) Nonetheless, in reviewing the applicable law, *F.A.I.R.* noted that congressional intent is the ultimate touchstone and must be discerned from the language of the Act, the statutory framework, and the structure and purpose of the Act as a whole. (*F.A.I.R.,* at p. 637.) It then stated that "[a]ny other approach leads to results that we cannot believe Congress intended" (*id*. at p. 638, fn. omitted) and referenced *Rockwood* in a footnote. In reference to *Rockwood*, it stated: "We need not hypothesize such results; adherence to a more rigid approach already has produced them. One court has held that the FCLAA prevents states and municipalities from restricting both advertisements of cigarettes near schools and distributions of free cigarette samples" (*F.A.I.R.*, at p. 638, fn. 3.) The *F.A.I.R.* court then put the finishing touches on its criticism of *Rockwood*, stating: "We cannot imagine that Congress intended the states to be without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard. However, failure to remember that Congress was concerned about the states' capacity to utilize their traditional police powers on matters that do not tread on federal interests inevitably will lead to such results. We can expect Congress to be far more explicit if it intends to dilute

this residual authority of the states." (*Id*. at p. 638.) *Metro Food* cited this criticism with approval. (*Metro Food*, *supra*, 195 F.3d at pp. 105-106.)

In sum, we reject the plain meaning analysis espoused in *Jones* and implied in *Rockwood* as contrary to Supreme Court precedent.

III. R.J. Reynolds violated section 118950.

According to R.J. Reynolds, the safe harbor provision in section 118950 applies to age-restricted areas operated pursuant to a contractual right at private functions on public grounds. As a result, contends R.J. Reynolds, it did not violate the law when it distributed free cigarettes at the six events. Upon close scrutiny, however, R.J. Reynolds's arguments cannot stand.

A. *The rules for statutory interpretation*.

When interpreting a statute, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) We must "look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.]" (*Id*. at pp. 1386-1387.)

"'If the statute does not have a plain meaning and legislative history sheds no light, then a court must apply reason, practicality, and common sense to the language at hand.' [Citation.]" (*U.D. Registry, Inc. v. Municipal Court* (1996) 50 Cal.App.4th 671, 674.) Consistent with the foregoing, a court will not give a statute's language a literal meaning """if doing so would result in absurd consequences which the Legislature did

not intend." [Citations.] . . . Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act."'" (*People v. Townsend* (1998) 62 Cal.App.4th 1390, 1395.)

We end our summary of statutory interpretation law by setting forth two rules that have particular application to this case. First, "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.) Second, "[w]hen a statute contains an exception to a general rule laid down therein, that exception is strictly construed. [Citation.]" (*Goins v. Board of Pension Commissioners* (1979) 96 Cal.App.3d 1005, 1009.)

B. *Public grounds leased for private functions.*

From the context of the statute, we glean that the phrase public grounds leased for private functions (leased public grounds) does not refer to areas sectioned off inside private functions. If the Legislature had intended to create a safe harbor provision for areas sectioned off inside private functions, it could easily have done so. Moreover, because one of the salutary purposes of section 118950, among other things, is to prevent children from becoming addicted to cigarettes, we broadly construe the reach of section 118950, subdivision (b) and narrowly construe the leased public grounds exception in a section 118950, subdivision (f) to ensure that children are nowhere near the points of free cigarette distribution. To construe it 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.

Our view of leased public grounds is backed up by the chronology of the underlying legislative events. The People submitted a declaration from Senator Marian Bergeson, the author of the Bill that eventually became section 118950, who stated that there was a proposed amendment to the Bill that would have allowed "portions" of public grounds to be leased. That amendment did not make it into the final version of the statute. "In construing a statute we do not consider the motives or understandings of

individual legislators who cast their votes in favor of it. . . . A legislator's statement is entitled to consideration, however, when 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, 699-700.) That the Legislature rejected the proposed amendment demonstrates that it rejected language that would support the interpretation R.J. Reynolds is urging us to adopt.

In defense of its position, R.J. Reynolds relies on a digest of the third reading of Senate Bill No. 1100 (1991-1992 Reg. Sess.) September 9, 1991. In part, that digest stated: "The language about public facilities leased for private functions suggests that booths, tents or barricaded areas may be used for sampling if there is a uniformed guard present." However, this digest hurts rather than helps R.J. Reynolds. When coupled with Senator Bergeson's declaration, it demonstrates that the Legislature was aware of the issue but did nothing to change the Bill. All in all, this legislative history highlights the infirmity of R.J. Reynolds's position.

R.J. Reynolds further attacks the interpretation we advance on the basis that it will lead to absurd results. As its sole example, R.J. Reynolds states: "[T]he Sunset Junction Festival . . . took place on 'Sunset Boulevard (between Fountain and Edgecliff) in Los Angeles.' . . . This encompasses approximately seven city blocks. Under the lower court's interpretation, in order lawfully to engage in nonsale distribution of cigarettes, [R.J. Reynolds] would have had to lease and exclude minors from all of Sunset Boulevard, from the ocean to downtown Los Angeles -- *a distance of over twenty miles*. The absurdity of such a requirement disproves the lower court's reading of Section 118950."

Simply put, such desperate hyperbole only serves to demonstrate the weakness of R.J. Reynolds's position. Reasonably construed in the context of this case, leased public grounds is functionally coterminous with the six events within which R.J. Reynolds was distributing free cigarettes. In R.J. Reynolds's example, R.J. Reynolds was not permitted to offer samples unless the approximately seven blocks of the Sunset Junction Festival

was leased for a private function, manned by peace officers or licensed security guards, and age-restricted. R.J. Reynolds's suggestion that section 118950, subdivision (f), somehow requires more is a straw man argument that is unworthy of credence and gives us no pause.

Rounding out its position, R.J. Reynolds makes yet another leap in logic. It argues that the interpretation we advance undermines the express legislative purpose of keeping children from beginning to use tobacco products because it is easier to exclude children from small, enclosed areas rather than large areas such as fairgrounds. 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.[8]

IV. The fine was not excessive.

R.J. Reynolds asserts that the $14,826,200 fine levied by the trial court is grossly excessive and violates the United States Constitution. For reasons we discuss, we reject this challenge.

A. *The test for determining whether a civil penalty is excessive*.

Following the lead of *United States v. Bajakajian* (1998) 524 U.S. 321, 324 (*Bajakajian*), we must consider whether a civil penalty is grossly disproportional to the gravity of the defendant's offense. (See *Id*. at p. 334 [holding that a forfeiture "must bear some relationship to the gravity of the offense that it is designed to punish" and that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to

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[8] Based on our interpretation of the scope of leased public grounds, we need not determine whether R.J. Reynolds "leased" the tents or whether R.J. Reynolds's activities fell within the definition of "private function."

the gravity of a defendant's offense"].) Although *Bajakajian* involved a forfeiture rather than a civil penalty, it stated: "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." (*Bajakajian,* at p. 334.) We utilize this statement as our guide. (For similar reliance, see *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1321 (*Sainez*) ["The question is whether [the fine] is excessive. So far the federal high court has spoken only in the context of forfeiture laws -- where property is forfeited for involvement in criminal offenses. [Citations.] This is not a perfect fit for our situation, but we draw upon it for guidance."].) *Bajakajian* made no distinction between types of fines when making its pronouncement, and neither do we.[9]

First, we must examine the defendant's culpability. (See *Bajakajian*, *supra*, 524 U.S. at pp. 337-338.) Second, we must assess the relationship between the harm and the civil penalty. (*Id*. at p. 339.) Third, as indicated in *Sainez*, we must "examine whether a penalty seems so far out of proportion to other such penalties that we can say the provision lacked conformity with the drafting body's own perceptions of the nature of the problem and the appropriate sanctions for achieving the desired policy goals. [Citation.]" (*Sainez*, *supra*, 77 Cal.App.4th at p. 1320.) The fourth and final factor is the defendant's ability to pay the civil penalty. (*Id.* at p. 1322 [""""Proportionality is likely to be the most important issue in a forfeiture case, since the claimant-defendant is able to pay by forfeiting the disputed asset. In imposing a fine, on the other hand, ability to pay

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9 The People argue that "the 'grossly disproportionate' Excessive Fines Clause test is reserved for criminal and forfeiture cases, not statutory fines." They cite *People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, which held that ability to pay is the only inquiry when an appellate court reviews a statutory fine. (*Id*. at p. 1350 ["The defendants' concern with the relationship between the amount of the fines and nature of their offenses or the amounts of fines imposed in other cases is consequently irrelevant; it is their ability to pay which is the constitutional lodestar."].) To the extent *Wilmshurst* disagrees with *Bajakajian* and *Sainez*, we decline to follow it.

becomes a critical factor." . . . ' [Citation.]"].)

B. *Degree of culpability*.

The exact meaning of "culpability" in the context of the excessive fines clause is elusive. An examination of the prior treatment of this issue is in order.

The defendant in *Bajakajian* tried to take $357,144 out of the country to pay a lawful debt. He was convicted of failing to comply with federal disclosure laws and the entire $357,144 was deemed forfeited. (See *Bajakajian*, *supra*, 524 U.S. at p. 325.) The Supreme Court held that the forfeiture was grossly disproportional to the gravity of the offense. In reaching its conclusion, the court found that the defendant was minimally culpable because he merely failed to report currency, the violation was not related to any other illegal activities, the funds were proceeds from legal activity and were to be used to repay a lawful debt, the respondent was not a money launderer or drug trafficker and did not fall within the class of persons for whom the statute was principally designed, and the maximum sentence that could have been imposed was six months. (*Id*. at pp. 337-338, 339, fn. 14.) In *U. S. v. 3814 NW Thurman Street, Portland, OR* (9th Cir. 1999) 164 F.3d 1191, 1197, the Ninth Circuit stated that "[t]he culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract." The Ninth Circuit went on to consider whether the violation at issue was related to other illegal activities. (*Ibid*.) Subsequently, *Sainez* tackled the issue of culpability and considered the defendant's "numerous instances of ignoring or disobeying orders to abate or rectify substandard housing conditions affecting the public health and safety." (*Sainez*, *supra*, 77 Cal.App.4th at p. 1322.)

As we parse the issue, an excessive fine proportionality analysis requires a court to look at a statute's intended reach and the context of a violation.

Having determined that R.J. Reynolds violated section 118950, we find that its degree of culpability was high. Unlike the respondent in *Bajakajian*, who was not a criminal for whom the disclosure laws were designed, R.J. Reynolds is exactly the type of entity for which section 118950 was designed. Moreover, R.J. Reynolds was facilitating tobacco use and therefore, in the eyes of the Legislature, was actively

promoting or perpetuating tobacco addiction.

We are quite aware that R.J. Reynolds made every attempt to restrict sampling to smokers 21 years of age or older and that it claims that it acted in good faith. But that does not render it any less culpable under the precedents. "[A] constitutional distinction between those persons who have actual knowledge of a law and those who do not, directly offends the fundamental principle that, in the absence of specific language to the contrary, ignorance of a law is not a defense to a charge of its violation. [Citations.]" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 396 (*Hale*).)

C. *The relationship between the harm and the size of the penalty*.

R.J. Reynolds argues that the fine is grossly excessive because it is speculative to say that the free cigarettes it distributed will lead to addiction, disease, and death. Whether that is true is irrelevant,; R.J. Reynolds has missed the point. Our Legislature, by enacting section 118950, seeks to combat addiction, disease, and death by regulating the availability of free cigarette samples. Therefore, the harm at issue was sampling in violation of the statute, not the unknown health consequences for each individual who received a sample.

Additionally, under the literal terms of section 118950, the trial court noted that the fine would be over $108 million. However, because the People stipulated that the distribution of 9,600 cartons containing ten packs of cigarettes each would be considered 9,600 violations instead of 96,000, and due to the trial court's decision to issue a fine based on the number of donees instead of total packs of cigarettes distributed, the adjusted fine was $14,826,200. This resulted in the adjusted fine being approximately 14 per cent of the authorized fine.

For these reasons, we conclude that there is a close relationship between the harm and the size of the penalty, i.e., it relates directly to the number of people unlawfully given free cigarettes on public grounds.

D. *Penalties for similar offenses*.

We start with Penal Code section 308, subdivision (a), which provides that anyone who sells or gives away cigarettes to a person under 18 years of age is "punishable by a

fine of two hundred dollars ($200) for the first offense, five hundred dollars ($500) for the second offense, and one thousand dollars ($1,000) for the third offense." This fine is identical to the one imposed by section 118950.

R.J. Reynolds argues that the section 118950 fine is excessive because, unlike Penal Code section 308, subdivision (a), it does not contain a defense for a person who "reasonably relied upon evidence of majority." This distinction is minor. Section 118950 is not out of proportion to Penal Code section 308, subdivision (a). Moreover, the two statutes serve similar yet different purposes that explain the strict liability of section 118950. While Penal Code section 308, subdivision (a), is designed to prevent direct cigarette distribution to minors, section 118950 seeks to diminish smoking opportunities for all individuals, to prevent cigarettes distributed to adults from later falling into the hands of minors, and to restrict any other smoking enticements. These purposes are beyond the scope of Penal Code section 308, subdivision (a), and could not be accomplished without strict liability.

Additionally, we have reviewed New York Public Health Law sections 1399-bb and 1399-ee. The New York scheme is more severe. It makes the distribution of a free package of tobacco an unlawful act. Upon a first violation, the guilty party is subject to a fine of $300 to $1,000. For each subsequent violation, the fine increases to a range of $500 to $1,500.[10]

E. *Conclusion*.

We conclude that the fine levied against R.J. Reynolds meets the excessive fines proportionality test. R.J. Reynolds's degree of culpability was high and the size of the fine bears a close relationship to the harm, i.e., free cigarettes distributed to 14,834

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10 R.J. Reynolds asked us to compare similar statutes from other states. However, it did not provide us with case law or legislative history indicating what constitutes a violation under those statutes, i.e., whether each distribution of a package of cigarettes or whether multiple distributions occurring at an event would be considered a single violation for purposes of imposing a fine.

people on public grounds. Section 118950 is proportional to Penal Code section 308, subdivision (a) and to the New York scheme. Finally, R.J. Reynolds made no argument below or on appeal regarding ability to pay. Therefore, impliedly, it concedes that it has the ability to pay the $14,826,200 fine.

V. The fine does not violate due process.

Last, R.J. Reynolds posits that the $14,826,200 fine violates due process. This position is unavailing.

A. *Due process considerations*.

An enactment pursuant to a state's police power "does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (*Hale*, *supra*, 22 Cal.3d at p. 398.) "Since there is no definite test to determine whether a statute complies with the 'notions of fairness' which make up the concept of 'substantive due process,' and since there is no definite test to determine whether a statute is 'unreasonable' or 'arbitrary,' courts must be cautious not to interfere with proper legislative judgment when considering claims of violation of substantive due process." (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1330.) As a result, a statutory fine should be upheld unless its unconstitutionality clearly, positively, and unmistakably appears. (*Sainez*, *supra*, 77 Cal.App.4th at p. 1311.)

If a penalty may, "in a given case, be a perfectly legitimate means of encouraging compliance with law," then "courts evaluate the propriety of the sanction on a case-by-case basis." (*Hale*, *supra*, 22 Cal.3d at p. 404.)

Courts have considered various factors in assessing the reasonableness of a fine as applied, such as: (1) whether the violation was provoked (*Kinney v. Vaccari* (1980) 27 Cal.3d 348, 353-354); (2) whether the prosecuting entity exercised restraint, provided warnings and attempted to resolve the issue (*Sainez*, *supra*, 77 Cal.App.4th at p. 1314); (3) whether remediation or compliance were impeded by unreasonable inaction or

demands by the prosecuting entity (*ibid*); (4) whether a uniform fine applies in disparate situations (*Hale*, *supra*, 22 Cal.3d at pp. 399-400); (5) whether a fine is mandatory in amount and potentially unlimited in duration (*Sainez*, *supra*, 77 Cal.App.4th at p. 1312); (6) whether a person protected by the statute manipulated it to obtain a "veritable financial bonanza" (*Hale*, *supra*, 22 Cal.3d at p. 403); (7) whether the fine is proportional to the number of violations and flagrant disregard of those violations (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 398); (8) a comparison to other punishments imposed for similar or more serious conduct (*Hale*, *supra*, 22 Cal.3d at pp. 400-403); (9) the violator's net worth (*Sainez*, *supra*, 77 Cal.App.4th at pp. 1317, 1319); (10) whether the amount exceeds the level necessary to punish and deter (*id*. at p. 1319); and (11) whether the governmental entity knew of the violations but allowed the penalties to accumulate (*Walsh v. Kirby* (1975) 13 Cal.3d 95).

B. *Analysis of the facts in this case.*

Section 118950 is procedurally fair and reasonably related to the legislative goal of protecting the public health by regulating the distribution of free cigarettes. Our task is to determine whether it was unconstitutional as applied.

We begin by noting that regardless of the procedures R.J. Reynolds employed to restrict the distribution of free cigarettes to current smokers who were 21 years of age or older, R.J. Reynolds did in fact violate section 118950. Significantly, R.J. Reynolds is not an unsophisticated litigant. Rather, it is a large, profitable corporation that chose to take a business risk by flirting with the boundaries of section 118950. This alone may be enough to justify the penalty.

Here the penalty is mandatory in amount, but it was not unlimited in duration. R.J. Reynolds always had the power to stop distributing free cigarettes in a manner prohibited by section 118950. Moreover, the harshness of a per violation penalty can be ameliorated by calculating it based on the number of persons affected rather than the actual number of violations. (*Hale*, *supra*, 22 Cal.3d at p. 402, citing *People v. Superior Court* (1973) 9 Cal.3d 283, 288.) Here, the trial court utilized that method of calculation. The penalty levied, therefore, was proportional to the number of violations. Further, we

are not privy to R.J. Reynolds's balance sheets, but we hazard to guess that the penalty is a small percentage of its net worth. Once again, we point out that R.J. Reynolds is silent regarding whether it has the ability to pay. Also, the penalty in this case will not result in a private person obtaining a windfall, and in no way can R.J. Reynolds claim that its conduct was provoked.

There is no danger that a uniform fine will be imposed on dissimilar defendants because section 118950 applies only to persons engaged in the business of selling or distributing cigarettes. Significantly, as we noted in section IV.b., *ante*, section 118950, subdivision (d), is commensurate with Penal Code section 308, subdivision (a) and the New York scheme. Additionally, we are cognizant that tobacco is big business. To deter manufacturers in a lucrative business, a civil penalty must be more than nominal. In this case, we conclude that the penalty levied will serve a deterrent effect without transgressing the notions of fairness which are embodied in the concept of substantive due process.

Finally, there is no evidence that the Attorney General was aware that R.J. Reynolds was violating section 118950 and abdicated its responsibility to obtain compliance with the law as it waited idly by while the penalties stacked up. All R.J. Reynolds is left to claim is that the state, and therefore the Attorney General, was on notice because the California State Board of Equalization (SBE) was on notice of the sampling activities. (From 1995 to 1998, R.J. Reynolds periodically wrote to the SBE to announce its plans to distribute free cigarettes at various events.) But the function of the SBE is separate from that of the Attorney General, and the knowledge of one does not equate to knowledge of the other.

Due to the foregoing, the unconstitutionality of the penalty as applied does not clearly, positively, and unmistakably appear.

DISPOSITION

Summary judgment is affirmed.

The People shall recover costs on appeal.

CERTIFIED FOR PUBLICATION.

_____, J.
ASHMANN-GERST

I concur:

_____, Acting P. J.
NOTT

Doi Todd, J., Dissenting.

I dissent. I would reverse the judgment against R.J. Reynolds on the ground that the Federal Cigarette Labeling and Advertising Act (FCLAA) preempts Health and Safety Code section 118950.[1] Contrary to the majority's conclusion, I find that the nonsale distribution of cigarettes to any person on public property is a promotional activity. By making such activity unlawful, section 118950 is a "prohibition based on smoking and health . . . with respect to the advertising or promotion of any cigarettes" preempted by the FCLAA. (15 U.S.C. § 1334(b).)

A. *Scope of FCLAA Preemption*.

The FCLAA contains an express preemption provision: "State regulations. [¶] No 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).) In analyzing the scope of this provision, the majority concedes that *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525 (*Lorillard*) provides the "Supreme Court's most recent pronouncement regarding the preemptive scope of the FCLAA," but attempts to minimize the import of this decision by asserting that the Supreme Court has expressed disagreement about FCLAA preemption. (Maj. opn., pp. 6-10.) I find any disagreement among individual Justices concerning the appropriate reach of FCLAA preemption to be inconsequential. Rather, in reaching the conclusion that section 118950 is preempted, I am guided by the fact that a majority of the Supreme Court has consistently construed the FCLAA

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[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

preemption provision broadly to preempt a host of state law claims. (See *Lorillard,* at pp. 542, 545-546; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 520-521 (*Cipollone*).)

In *Lorillard*, the Supreme Court held that the FCLAA preempted a state statute regulating outdoor and point-of-sale cigarette advertising. In reaching this conclusion, the court acknowledged it works under "'the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress,'" but used this principle as a springboard for a more complete analysis ascertaining congressional intent. (*Lorillard*, *supra*, 533 U.S. at pp. 541-542; see also *Jones v. Vilsack* (8th Cir. 2001) 272 F.3d 1030, 1033 ["We do not lightly deem state law to be superseded by federal law due to our solicitude for the states' exercise of their traditional police powers. [Citation.] Yet we may not shrink from recognizing that federal law supplants state law when Congress clearly manifests that intention"].)

To determine whether Congress intended to preempt the state statute at issue there, the *Lorillard* court first turned to the statutory language of the FCLAA's preemption provision. The court characterized the provision as "expansive" and employing "sweeping language," and observed that it was bound to give meaning to each element of the provision. (*Lorillard*, *supra*, 533 U.S. at p. 542.) To aid in its interpretation of the provision, the court also considered the predecessor preemption provision and the circumstances surrounding the adoption of the current language. (*Ibid*.; e.g., *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387 [both legislative history and the wider historical circumstances surrounding a statute's enactment may be considered in ascertaining legislative intent].)

The *Lorillard* court explained that in 1965, Congress originally enacted the FCLAA as a proactive response to the Surgeon General's 1964 report, which had concluded that cigarette smoking was a significant health hazard. The twofold

purpose of the FCLAA was to inform the public about the health hazards of smoking and to prevent the public from receiving diverse and confusing information regarding the relationship between smoking and health. The FCLAA prescribed a cigarette package label and required two federal agencies (the Secretary of Health, Education and Welfare (HEW) and the Federal Trade Commission (FTC)) to report annually to Congress about the health consequences of smoking, and the advertising and promotion of cigarettes. (*Lorillard*, *supra*, 533 U.S. at pp. 542-543.) In addition, the FCLAA included a preemption provision "in which 'Congress spoke precisely and narrowly.'" (*Id*. at p. 543, quoting *Cipollone, supra,* 505 U.S. at p. 518.) It provided that "'no 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.'" (*Lorillard, supra*, 533 U.S. at p. 543; see Pub. L. 89-92, 79 Stat. 282, § 5(b).) The original preemption provision had a limited purpose—to prevent federal or state entities from mandating particular statements on cigarette packages or in cigarette advertising. (*Lorillard*, at p. 543; *Cipollone*, at p. 518.)

Congress enacted the FCLAA with the expectation that it would reexamine the Act in 1969 in light of emerging information regarding smoking and health. As anticipated, Congress received a wealth of information in the intervening years about the health effects of smoking, as well as specific recommendations from the HEW Secretary and the FTC to strengthen and broaden the FCLAA. (*Lorillard, supra*, 533 U.S. at pp. 543-544.) Following public hearings, Congress enacted the Public Health Cigarette Smoking Act of 1969, which made three significant amendments to the FCLAA. First, Congress drafted a new, unequivocal warning label stating that cigarette smoking is a known health hazard. Second, it barred the advertising of cigarettes on any electronic medium. Third, it expanded the reach of the preemption provision. (*Lorillard*, at pp. 544-545.)

The *Lorillard* court explained the importance of this chronology: "The scope and meaning of the current pre-emption provision become clearer once we

consider the original pre-emption language and the amendments to the FCLAA. Without question, 'the plain language of the pre-emption provision in the 1969 Act is much broader.' [Citation.]" (*Lorillard, supra*, 533 U.S. at p. 545.) This conclusion echoed the court's previous conclusion in *Cipollone*. There, the court addressed whether the FCLAA preempted certain state common law causes of action, and thus the court's focus was on the change in the preemption provision's language from "statements" in 1965 to "requirements or prohibitions" in 1969. *Cipollone* rejected the assertion that the 1969 Act did not materially alter the scope of FCLAA preemption, finding the assertion incompatible with the language and origins of the amendments. Rather, the court determined that the 1969 Act worked substantial changes in the law and altered the reach of the FCLAA preemption provision. (*Cipollone*, *supra*, 505 U.S. at pp. 520-521.) In light of these changes, the court elected to construe the phrase "no requirement or prohibition" broadly to encompass both positive enactments and common law. (*Id*. at p. 521.)

I agree with *Lorillard* and *Cipollone* that any determination as to the scope of FCLAA preemption must be made with the foregoing background in mind. Indeed, *Lorillard* relied heavily on Congress's decision to expand the scope of FCLAA preemption in rejecting the claim that the FCLAA reaches only the content, and not the location, of cigarette advertising. (*Lorillard*, *supra*, 533 U.S. at pp. 548-551 ["a distinction between state regulation of the location as opposed to the content of cigarette advertising has no foundation in the text of the pre-emption provision"].) Thus, it is the language and legislative history of the FCLAA's preemption provision that must govern the determination of whether the FCLAA preempts section 118950.

B. *Prohibiting the Nonsale Distribution of Cigarettes Is a Prohibition With Respect to the Promotion of Cigarettes.*

The majority concludes that construing "promotion" to exclude nonsale cigarette distribution works no violence on the intent of the FCLAA. Based on

Congress's failure to provide an independent definition of the term "promotion," as well as its single reference to that term, it is the majority's position that Congress must not have intended to regulate conduct which the majority characterizes as involving "how and where cigarettes are distributed." (Maj. opn., pp. 10-13.) I disagree. The majority's interpretation is directly contrary to well-reasoned, unanimous federal authority, and results in an artificially and arbitrarily limited interpretation of the term "promotion" as used in the FCLAA.

1. *Federal authority addressing FCLAA preemption is persuasive and should be followed.*

In *Jones v. Vilsack, supra*, 272 F.3d 1030 (*Jones*), the Eighth Circuit held that the FCLAA preempted an Iowa statute prohibiting a "manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof" from "giv[ing] away cigarettes" or "provid[ing] free articles, products, commodities, gifts, or concessions in exchange for the purchase of cigarettes . . . ." (*Id*. at p. 1033; see Iowa Code § 142A.6(6)(a)-(b).) In reaching this conclusion, *Jones* winnowed the dispositive question to the same one at issue here: "do the activities prohibited in [the state statute] constitute the promotion of cigarettes?" (*Jones*, at p. 1034.)

To answer this question, *Jones* recognized that there was no reasoned basis for it to apply a narrow construction of the term "promotion." Rather, in light of the Supreme Court's analysis of the FCLAA preemption provision in both *Lorillard, supra*, 533 U.S. 525 and *Cipollone, supra,* 505 U.S. 504, the court stated: "We think the Court's position is clear: we must not interpret the term 'promotion' more narrowly than its plain and ordinary meaning would suggest."[2]

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[2] The majority criticizes the *Jones* court's reliance on the concurring and dissenting opinions in *Cipollone* to support its premise that the preemption provision need not be narrowly construed. (Maj. opn., p. 15.) Though such reliance would seem suspect at first blush, a close reading of *Jones*'s citations to *Cipollone* reveals that *Jones* is relying on the relatively uncontroversial

(*Jones, supra*, 272 F.3d at p. 1035.) This approach finds ample support in California law. (E.g., *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919 ["when interpreting a statute we must discover the intent of the Legislature to give effect to its purpose, being careful to give the statute's words their plain, commonsense meaning"]; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 ["'Words used in a statute . . . should be given the meaning they bear in ordinary use. [Citation.]'"].)

Acknowledging that the FCLAA did not define the term "promotion," *Jones* properly turned to dictionary definitions of the term in order to ascertain its ordinary meaning. (*Jones, supra*, 272 F.3d at p. 1036; see *Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189 ["in the absence of a specifically defined meaning, a court looks to the plain meaning of a word as understood by the ordinary person, which would typically be a dictionary definition"]; *Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 86 [to ascertain legislative intent, "the court should first look to the plain dictionary meaning of the words of the statute and their juxtaposition by the Legislature"].) One dictionary defined "promotion" as "'the act of furthering the growth or development of something; *especially*: the furtherance of the acceptance and sale of merchandise through advertising,

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proposition set forth by Justices Blackmun and Scalia that a preemption clause—like any other statute—must be interpreted in accordance with its ordinary meaning. (*Jones, supra*, 272 F.3d at p. 1035, citing *Cipollone, supra,* 505 U.S. at p. 532 (Blackmun, J., concurring in part and dissenting in part, with whom Kennedy, J. and Souter, J., join) ["An interpreting court must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"] and p. 544 (Scalia, J., concurring in part and dissenting in part, with whom Thomas, J., joins) ["our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning"].) In any event, *Lorillard* provides sufficient support for the *Jones* court's preemption analysis. (*Lorillard, supra*, 553 U.S. at p. 542 ["Our analysis begins with the language of the statute"].)

publicity or discounting'"; another dictionary more specifically defined the term as encompassing "'[a]ll forms of communication other than advertising that call attention to products and services by adding extra values toward the purchase. Includes temporary discounts, allowances, premium offers, coupons, contests, sweepstakes, etc.'" (*Jones*, at p. 1036.) *Jones* concluded that these definitions were consistent with the Legislature's intent to differentiate conduct constituting advertising from that constituting promotion, and suggested a plain meaning of the term "promotion" that would encompass the giveaway of free coupons or products, including the giveaway of cigarettes. (*Id*. at pp. 1036-1037 ["Retailers who offer consumers free cigarettes or other free products unquestionably add extra value to consumers' underlying purchases"].)

The *Jones* court found further support for its interpretation of the term "promotion" in two federal reports on tobacco use and marketing. (*Jones, supra*, 272 F.3d at pp. 1035-1036.) The Surgeon General's 1994 report, entitled Preventing Tobacco Use Amongst Young People, detailed a variety of promotions conducted by tobacco companies. The report observed that "'[p]romotional activities can take many forms,'" and specifically addressed the practice of cigarette giveaways: "'Free samples do away with cost-sensitivity altogether and actually give consumers an opportunity to try something new. Promotional devices such as these are more likely than advertising alone to lead consumers to purchase a product more than once—a pattern sought by all manufacturers.'" (*Id*. at p. 1035.) Likewise, the FTC's 1998 report to Congress described the "'distribution of cigarette samples and specialty gift items' as 'sales promotion activities.'" (*Ibid*.) *Jones* appropriately found it significant that these federal agencies had characterized cigarette giveaways as being a type of promotional activity. (See *Podolsky v. First Healthcare Corp.* (1996) 50 Cal.App.4th 632, 644, fn. 6 ["In the absence of express congressional intent, the interpretation of a statute adopted by the federal agency charged with enforcing it is entitled to great deference. [Citations.]"].)

Finally, *Jones* noted that in tobacco regulation cases, the Supreme Court had employed the term "promotion" to apply to several forms of tobacco company giveaways. (*Jones, supra*, 272 F.3d at p. 1036, citing *Lorillard, supra*, 533 U.S. at p. 545 and *FDA v. Brown & Williamson Tobacco Corp.* (2000) 529 U.S. 120, 128.) On the basis of consistent dictionary, agency and judicial definitions of the term "promotion," *Jones* found it "abundantly clear that the activities prohibited by the [state statute] are promotions" and that, therefore, the FCLAA preempted the challenged state law provisions. (*Jones*, at pp. 1036-1037.)

Earlier, the court in *Rockwood v. City of Burlington* (D.Vt. 1998) 21 F.Supp.2d 411 similarly held that the FCLAA preempted a city ordinance which, among other things, prohibited the distribution of free samples or coupons for the purpose of promoting tobacco products. (*Id*. at p. 420.) Though without significant analysis, the court found that the ordinance was a prohibition with respect to the promotion of cigarettes, expressly preempted by the broad, plain language of the FCLAA's preemption provision. (*Id*. at pp. 419-420.)

The majority dismisses this on-point authority on the basis that the decisions of lower federal courts should be followed only when the decisions are both """numerous and consistent . . . ."""" (Maj. opn., p. 16, quoting *Etcheverry v. Tri-Ag Serv., Inc.* (2000) 22 Cal.4th 316, 320.) But in *Conrad v. Bank of America* (1996) 45 Cal.App.4th 133, 150, the case on which *Etcheverry* relies for the foregoing principle, the court explained the principle in greater detail: "[O]n questions of federal law, decisions of the lower federal courts are entitled to great weight. [Citations.] And generally a refusal to adhere to federal precedent occurs where federal decisions provide scant authority for the proposition urged or are divided on an issue. (See *Rohr Aircraft Corp. v. County of San Diego* [(1959)] 51 Cal.2d [759,] 764-765 [rejecting a single trial court (F.Supp.) decision]; *Alicia T. v. County of Los Angeles* [(1990)] 222 Cal.App.3d [869,] 879 [federal authorities conflicting].) We should be hesitant to reject the authority of federal decisions on questions of federal law where those decisions are both numerous and consistent."

Here, the Court of Appeals' decision in *Jones* and the district court's decision in *Rockwood* provide ample authority for the precise matter at issue—whether the FCLAA preempts a statute prohibiting cigarette giveaways. Moreover, the decisions are unanimous. No federal court has held to the contrary.

The majority attempts to reason otherwise, relying on a comment in *Federation of Adver. Indus. Representatives, Inc. v. City of Chicago* (7th Cir. 1999) 189 F.3d 633, 638 (*F.A.I.R.*) which criticized *Rockwood* on the ground that construing the FCLAA to preempt prohibitions on cigarette giveaways infringes on a state's police power.[3] This comment has no effect on the unanimity of *Jones* and *Rockwood* for at least two reasons. First, *F.A.I.R.* addressed whether the FCLAA preempted a city ordinance that did not involve any prohibition against cigarette giveaways, and commented on *Rockwood* only in the context of a more general discussion about the preemptive scope of the FCLAA. (*F.A.I.R., supra*, 189 F.3d at pp. 637-638.) Second, *F.A.I.R.* preceded *Jones*, and thus did not consider what is admittedly a far more well-reasoned preemption analysis than the discussion in *Rockwood*. It is well-established that cases are not authority for points not considered. (*Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1081, fn. 3; *Styne v. Stevens* (2001) 26 Cal.4th 42, 57, fn. 8.) *F.A.I.R.* considered neither the issue of cigarette giveaways nor the *Jones* analysis. Federal authority on the

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[3] The majority notes that *Greater New York Metropolitan Food Council v. Giuliani* (2d Cir. 1999) 195 F.3d 100, 105-106 (*Metro Food*), cited *F.A.I.R.*'s criticism with approval. (Maj. opn., p. 17.) I do not find this citation persuasive. The continued viability of *Metro Food* is questionable, as that decision drew a distinction between state regulation of cigarette advertising content versus cigarette advertising location—a distinction which *Lorillard* later decisively rejected. (Compare *Metro Food, supra,* 195 F.3d at pp. 107-110 with *Lorillard, supra,* 533 U.S. at pp. 550-551; see also *Lindsey v. Tacoma-Pierce County Health Dept.* (9th Cir. 1999) 195 F.3d 1065, 1072-1075 [criticizing *F.A.I.R.* and *Metro Food*, reasoning that "[t]he distinction between location and content regulations is not only unsupportable by reference to the text, but the Congressional purpose of § 1334(b) supports the preemption of a ban on outdoor tobacco advertising"].)

issue of FCLAA's preempting a prohibition against cigarette giveaways is undivided and should be followed. (E.g., *Flynt v. California Gambling Control Com.* (2002) 104 Cal.App.4th 1125, 1132 [noting that because a lower federal court decision on the same issue was persuasive, "we are moved to give it the great weight to which its compelling rationale is entitled"].)

2. *The language and legislative history of the FCLAA require that the term "promotion" be interpreted broadly*.

The majority contends that other portions of the FCLAA, coupled with the statute's legislative history, compel the conclusion that the term "promotion" must not be read to encompass regulations that involve the free distribution of cigarettes. (Maj. opn., pp. 10-13.) *Jones* rejected similar contentions, and I, too, find the majority's position unpersuasive. (See *Jones, supra*, 272 F.3d at pp. 1037-1038.)

The majority observes that while the "Definitions" section of the FCLAA does not include the term "promotion," the FCLAA defines the term "sale or distribution" to include "sampling or any other distribution not for sale." (15 U.S.C. § 1332(6).) Thus, reasons the majority, if Congress had intended for the FCLAA to preempt cigarette giveaways, it would have drafted the preemption provision to apply to advertising, promotion and "sale and distribution." (Maj. opn., p. 12.)

I read the FCLAA somewhat differently. Apart from the definitions section, the term "sale or distribution" is used three times throughout the FCLAA. (See 15 U.S.C. §§ 1333(a)(1) ["It shall be unlawful for any person to manufacture, package, or import for sale or distribution within the United States any cigarettes the package of which fails to bear, in accordance with the requirements of this section, one of the following labels"]; 1333(d) ["Subsection (a) of this section does not apply to a distributor or retailer of cigarettes who does not manufacture, package, or import cigarettes for sale or distribution within the United States"]; 1340 [certain statutory exemptions "shall not apply to cigarettes manufactured,

imported, or packaged for sale or distribution to members or units of the Armed Forces of the United States located outside of the United States"].) As the majority suggests, these provisions confirm that a distributor or retailer cannot avoid the FCLAA's labeling requirements by giving away, rather than selling, cigarettes. (Maj. opn., p. 12.) But these provisions do not lead me to the further conclusion that cigarette giveaways are implicitly excluded from the FCLAA's preemption provision because the term "sale or distribution" is not expressly included in that provision.

Faced with the argument that other substantive provisions of the FCLAA evidenced Congress's intent to regulate only advertising and labeling, and not cigarette giveaways, *Jones* concluded that congressional intent must be deduced from the language of the preemption provision itself, and not from the structural composition of the FCLAA's other provisions. (*Jones, supra*, 272 F.3d at p. 1037.) As discussed above, the plain and ordinary meaning of the term "promotion" encompasses cigarette giveaways. Like the court in *Jones*, I "reject the [majority's] effort to discard § 1334(b)'s plain and ordinary meaning in favor of a competing interpretation forged from the substantive provisions within the FCLAA." (*Ibid*.; see also *Lindsey v. Tacoma-Pierce County Health Dept., supra,* 195 F.3d at p. 1069 [when "Congress considers the issue of preemption and adopts a preemption statute that provides a reliable indication of its intent regarding preemption, the scope of federal preemption is determined by the preemption statute and not by the substantive provisions of the legislation"].)

Even if I were to rely on other portions of the FCLAA to construe the preemption provision, I would reach the same conclusion. The use of the term "sale or distribution" in the FCLAA does not suggest an intent to exclude cigarette giveaways from the term "promotion." To the contrary, the failure to use the defined term in other portions of the FCLAA suggests that Congress intended for state regulations to be directed at conduct other than nonsale distribution. The FCLAA expressly directs the HEW Secretary to establish and carry out a public

information program on the health hazards of cigarettes, and as part of that program, requires the Secretary to "compile and make available information on State and local laws relating to the *use and consumption* of cigarettes . . . ." (15 U.S.C. § 1341(a)(5), italics added.) Moreover, in explaining that the FCLAA left the states with ample powers, *Lorillard* stated that "[t]he FCLAA . . . does not foreclose all state regulation of conduct as it relates to the *sale or use* of cigarettes." (*Lorillard, supra*, 533 U.S. at p. 558, italics added.) Thus, both Congress and the Supreme Court have declined to employ the FCLAA's defined term "sale or distribution" to describe the type of conduct that state and local regulations may address without running afoul of the FCLAA's preemption provision. I, too, decline to rely on that term to determine the scope of FCLAA preemption.

Further, the majority relies on legislative history, noting that the Senate Report produced in connection with Congress's 1969 amendment of the FCLAA does not contradict the majority's narrow construction of the term "promotion." (Maj. opn, pp. 12-13.) But the provisions of that report on which the majority relies are uninformative. As cited by the majority, the report merely discusses the concept of cigarette advertising as a subset of cigarette promotion; it makes no effort to provide any definition of the term "promotion." Indeed, *Jones* dismissed the argument that legislative history showed that Congress was concerned only with labeling and advertising when it enacted the FCLAA: "[T]he scant legislative history to which the State directs our attention is decidedly unhelpful. The plain fact remains that Congress's reports address neither the meaning of 'promotion' in § 1334(b) nor the relationship between 'promotion' and 'advertising.' In these circumstances, we must interpret 'promotion' according to its ordinary meaning." (*Jones, supra*, 272 F.3d at p. 1037.)

Likewise, I find that neither the substantive provisions of the FCLAA nor the statute's legislative history affords any basis for construing the term "promotion" more narrowly than its plain and ordinary meaning suggests. Thus, I

decline to adopt the conclusion implicit in the majority's opinion that the term "promotion" has no independent meaning apart from the term "advertising." I must respect Congress's deliberate word choice in adding the term "promotion" to the preemption provision, and give the term an independent meaning. As aptly stated in *San Jose v. Superior Court* (1993) 5 Cal.4th 47, 55: "In using two quite different terms . . . the Legislature presumably intended to refer to two distinct concepts. . . . We ordinarily reject interpretations that render particular terms of a statute mere surplusage, instead giving every word some significance." (Accord, *San Diego Police Officers' Assn. v. City of San Diego Civil Service Com.* (2002) 104 Cal.App.4th 275, 285 ["In construing a statute we are required to give independent meaning and significance to each word, phrase, and sentence in a statute and to avoid an interpretation that makes any part of a statute meaningless"]; see also *In re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 939 ["In general, 'a substantial change in the language of a statute . . . by an amendment indicates an intention to change its meaning.' [Citation.] It is presumed the Legislature made changes in wording and phraseology deliberately [citation] and intended different meanings when using different words [citation]"].)

Applying these well-established principles of statutory construction, I must conclude that by adding the term "promotion," Congress intended to broaden the scope of the preemption provision to reach prohibitions and regulations dealing with matter distinctively different from advertising. The court in *Jones* similarly explained: "We may not conflate the 'advertising' and 'promotion' of cigarettes; both words appear in the text of § 1334(b) and we 'must give meaning to each element of the pre-emption provision.' [Citation.] Congress added the word 'promotion' to § 1334(b) in 1969 though the term 'advertising' was already present. Conflating the terms would render the 1969 amendment nugatory, a position we cannot accept because the Supreme Court has indicated that the 1969 amendment expanded the scope of preemption under the FCLAA. [Citation.]"

(*Jones, supra*, 272 F.3d at pp. 1037-1038.) Viewing the issue from a different angle, if Congress had intended to craft a more limited preemption provision, focused primarily on advertising, it easily could have referred to state law requirements or prohibitions with respect to "labeling or advertising," a phrase prevalent in the FCLAA. (E.g., 15 U.S.C. § 1331.)

Though the majority does not undertake to define what would be preempted as a "promotion," the state has suggested that "promotion" refers to the communication of information about cigarettes by means other than traditional advertising, such as giving away novelty logo items or sponsoring public events. These examples, however, seem to highlight the problem with excluding cigarette giveaways from any reasonable interpretation of the term "promotion." What real difference is there between giving away a lighter bearing a tobacco company logo, a coupon for a free pack of cigarettes or a cigarette? None of those activities involves either the sale or use of cigarettes. Rather, each is an activity calculated to induce the consumer to purchase cigarettes in the future, which is precisely what a promotion is designed to do. (See *Jones, supra*, 272 F.3d at p. 1036.) Indeed, giving away a free cigarette is an effective type of promotion; it informs the recipient of the product's qualities far more instantly and accurately than any other form of advertisement or communication. I find no reasoned basis for drawing a line between the giveaway of cigarette-related products and the giveaway of cigarettes. Both are promotions preempted by the FCLAA.[4]

3. *Section 118950 goes beyond an exercise of police powers reserved for the states.*

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[4] In enacting section 118950, the Legislature, itself, implicitly recognized the promotional nature of cigarette giveaways, finding: "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. . . . Distribution of tobacco product samples and coupons is a recognized source by which minors obtain tobacco products, beginning the addiction process." (§ 118950, subds. (a)(9) and (10).)

In concluding that the FCLAA has no preemptive effect here, the majority characterizes "section 118950 [a]s a police regulation that is similar to state laws proscribing the sale of cigarettes to minors." (Maj. opn., p. 11.) The majority observes that federal law expressly contemplates that states will enact laws banning the sale or distribution of cigarettes to minors. (Maj. opn., pp. 11-12, citing 42 U.S.C. § 300x-26.)[5] Thus, the majority reasons that Congress could not have intended the paradoxical situation created by preempting a state law prohibiting cigarette giveaways to minors, while at the same time conditioning federal funding on the requirement that states prohibit cigarette sales to minors. (Maj. opn., pp. 11-12.)

The majority's reasoning results in large part from a mischaracterization of section 118950. Though that statute indicates that one of its purposes is to keep "children from beginning to use tobacco products in any form," section 118950 is not solely directed at minors. (§ 118950, subd. (a)(11).) Rather, the Legislature stated that its further intent in enacting the provision was to "encourage[e] *all* persons to quit tobacco use . . . ." (*Ibid*., italics added.) As a result, the focus of the statute's prohibition is the *locale* of the giveaway, not the recipient. Specifically, the operative version of section 118950, subdivision (b), provides: "It is unlawful for any person, agent, or employee of a person in the business of selling or distributing cigarettes from engaging in the nonsale distribution of cigarettes to any person in any public building, park or playground, or on any public sidewalk, street, or other public grounds." Though the statute does not apply to areas where "minors are prohibited by law" or where "minors are denied

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[5] In 1992, Congress enacted the Synar Amendment, title 42 of the United States Code section 300x-26, which provides in relevant part that states are eligible 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 any individual under the age of 18."

access by a peace officer or licensed security guard on the premises" (§ 118950, subd. (f)), the majority's application of this exception demonstrates its limited utility. (Maj. opn., pp. 18-21.) Indeed, the effect of section 118950 is to ban cigarette giveaways to both adults and minors in virtually every public area. For this reason, I do not construe section 118950 as a valid exercise of police powers targeted at protecting minors.

My conclusion is buttressed by the fact that California expressly prohibits the sale or distribution of cigarettes to minors via Penal Code section 308. In relevant part, that statute provides that a civil or criminal action may be brought against one who knowingly "sells, gives, or in any way furnishes to another person who is under the age of 18 years any . . . cigarette . . . ." (Pen. Code, § 308, subd. (a); see also *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1069-1070 [Penal Code section 308, originally enacted in 1891, "prohibits the sale of cigarettes to minors"; the state's protective role motivated the prohibition].) In sharp contrast to section 118950, Penal Code section 308 specifically targets the sale and distribution of cigarettes to minors and is an appropriate exercise of the state's police power.

Jones acknowledged that there is an important distinction between prohibiting cigarette giveaways in their entirety and prohibiting the sale and distribution of cigarettes to minors. There, the court observed that its preemption holding did not disturb an entirely separate Iowa statute, similar to Penal Code section 308, which prohibited persons from selling or giving away cigarettes to minors. (*Jones, supra* 272 F.3d at p. 1038, citing Iowa Code, § 453A.2(1).) Likewise, *Lorillard* explained that Congress did not intend to preclude states from prohibiting the sale and distribution of cigarettes to minors, noting that state and local governments retain the ability to regulate conduct to ensure that minors do not obtain cigarettes. (*Lorillard, supra*, 533 U.S. at p. 552; see also *Rockwood v. City of Burlington, supra*, 21 F.Supp.2d at p. 421 [noting it is significant that cigarettes are lawful for adults to possess and unlawful for minors to possess].)

While the Legislature likely had noble intentions in enacting section 118950, its statutory prohibition against cigarette giveaways is simply too broad to survive preemption as a police regulation. Unlike statutes addressed solely to the sale of cigarettes to minors or to the use of cigarettes by minors, prohibiting the nonsale distribution of cigarettes to "*any person*" on public property treads on federal ground. (§ 118950, subd. (b).) It regulates a promotional activity—cigarette giveaways to adults. Section 118950 is a prohibition with respect to the promotion of cigarettes.

Accordingly, I would reverse the trial court's judgment on the ground that section 118950 is preempted by the FCLAA.

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DOI TODD, J.