

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

vs.

R.J. REYNOLDS TOBACCO COMPANY

Defendant and Appellant.

After a decision by the Court of Appeal,
Second Appellate District
Case No. B160571

**BRIEF OF AMICI CURIAE CALIFORNIA MEDICAL
ASSOCIATION, AMERICAN MEDICAL ASSOCIATION,
AMERICAN ACADEMY OF PEDIATRICS, AMERICAN CANCER
SOCIETY, AMERICAN HEART ASSOCIATION, AND AMERICAN
LUNG ASSOCIATION IN SUPPORT OF RESPONDENT**

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I. INTRODUCTION

We file this brief of *amici curiae*, the California Medical Association, American Academy of Pediatrics, American Cancer Society, American Heart Association, American Lung Association, and American Medical Association in support of the State of California. We respectfully urge the Court to reject all of R.J. Reynolds’ convoluted arguments, uphold Health & Safety Code §118950,¹ and uphold the fine imposed on Reynolds for violating Section 118950, as decided by the Court of Appeal in *People v. R.J. Reynolds* (2004) 6 Cal.Rptr.3d 58.

In 1991, CMA successfully sponsored California legislation to ban the free distribution of tobacco products in public places. This law was codified as Health & Safety Code §118950, the statute at issue in this case. CMA sponsored the legislation because elimination of tobacco “sampling” is particularly important to prevent distribution of tobacco products to minors, as well as to encourage all persons to quit tobacco use.

In furtherance of this legislative objective, we strongly support the State of California’s efforts to curb tobacco use and the Court of Appeal’s decision that the State has acted properly under the historic police powers of the states, “the historic primacy of state regulation of matters of health

¹ All citations are to the Health & Safety Code unless otherwise noted.

and safety” as termed by the United States Supreme Court (*Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485.), and was not preempted by the Federal Cigarette Labeling and Advertising Act (15 U.S.C. §§1331 *et seq.*) from enacting laws designed to restrict the free distribution of cigarettes.

II. TOBACCO USE IS A PUBLIC HEALTH CRISIS

Section 118950 was enacted to respond to a serious and well known public health crisis. It is crucial for the health and well-being of Californians that this section be viewed within that context – tobacco use is this nation’s single most preventable cause of premature death and disease. (U.S. Dept. Health & Human Services (“USDHHS”) (1994) *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at p. 6.) Each year, 440,000 Americans die from smoking, and another 8.6 million suffer from serious tobacco-related illness. (USDHHS (2003) *Cigarette Smoking – Attributable Morbidity – United States, 2000*, 52 *Morbidity and Mortality Weekly Report (MMWR)* 842-4; U.S. Centers for Disease Control and Prevention (“CDC”) (Oct. 2000) *Youth Tobacco Surveillance – United States, 1998-1999*, 49 *MMWR* 1, 2.) More Americans die every year from tobacco than from AIDS, car accidents, homicides, alcohol, illegal drugs, suicide and fires combined. (Lynch, B., et al. (1994) *Growing Up Tobacco Free: Preventing Nicotine Addition in Children and Youths* at pp. 3-4.)

In California alone, each year, 42,000 people die of diseases attributable to smoking and tobacco use. (U.S. Department of the Treasury, (1998) *The Economic Costs of Smoking in the U.S. and the Benefits of Comprehensive Tobacco Legislation*, at p. 1.; McGinnis, J. Michael & Foege, William H. (1993) *Actual Causes of Death in the United States*, 270 *Journal of the American Medical Association (“JAMA”)* 2207, 2208.)

Smoking also has enormous financial costs. In 1999, Californians spent nearly \$15.8 billion in smoking-related costs, including \$8.6 billion in treating and caring for those suffering from diseases caused by smoking. (California Department of Health Services/Tobacco Control Section, (November 2002) *California Tobacco Control Update*, at p. 8.) The harms of smoking are compounded by the fact that cigarettes are extremely addictive. Their addictiveness, coupled with other factors, leads to very low success rates in quitting (approximately 2.5% of those who smoke at least once a day). (Giovano, Gary A., et al., (1993) *Trends in Cigarette Smoking Cessation in the United States*, 2 (supp.) at pp. S3, S7-8.)

III. TOBACCO USE IS A PEDIATRIC EPIDEMIC

The death and disease caused by tobacco use is truly a pediatric epidemic. More than five million children are current smokers. (CDC (May 2002) *Trends in Cigarette Smoking Among High School Students – United States, 1991-2001*, 51 MMWR 409.) The vast majority of people who suffer from tobacco-related disease began using tobacco as children. Eighty-two percent of adults who have ever smoked had their first cigarette before the age of 18, and more than one-half of them had already become regular smokers by that age. (USDHHS (1994) *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at p. 65.) Moreover, children and adolescents are beginning to smoke at younger ages than ever before. (61 Fed. Reg. 44396, 44398.) By one estimate, the average teenage smoker initiates smoking at age 13 and becomes a regular smoker by age 14.5. (61 Fed. Reg. at 44421.) These data are particularly alarming because the earlier a smoker starts, the more likely he or she is to become a long-term tobacco user and the more likely he or she will suffer from a tobacco-related disease. (Taioli, E. & Wynder, E. (1991) *Effect of the Age at Which Smoking Begins on Frequency of Smoking in Adulthood*,

325 New Eng. J. Med. at pp. 968-969; Benowitz, N. (2001) *The Nature of Nicotine Addiction*, in *Smoking Risk, Perception & Policy* at p. 159 (Slovic, P., ed.) For example, 67 percent of children who begin smoking in the sixth grade become regular adult smokers. (Benowitz at p. 159.)

In 1994, the Surgeon General estimated that approximately three million American adolescents smoked cigarettes and an additional one million adolescent males used smokeless tobacco products. (CDC (Oct. 1998) *Incidence of Initiation of Cigarette Smoking - United States, 1965-1996*, 47 MMWR 837.) While progress has been made in recent years, even today more than 4,000 children use tobacco for the first time every day, and more than 2,000 children become regular smokers every day. (Substance Abuse and Mental Health Services Administration (“SAMHSA”) (2002) *Results From the 2001 Household Survey on Drug Abuse*, Vol. II Technical Appendices and Selected Data Tables.)

Youthful experimentation with tobacco has particularly devastating consequences because tobacco is so addictive. The vast majority of kids think they can experiment with tobacco and quit whenever they want without suffering the harmful consequences of smoking. (Jamieson, P. & Romer, D. (2001) *What Do Young People Think They Know About the Risks of Smoking*, in *Smoking Risk, Perception & Policy* at pp. 59 - 61 (Slovic, P., ed.) They are, of course, wrong. Of daily smokers who thought they would not be smoking in five years, nearly 75 percent were still smoking five to six years later. (Slovic, P., *Cigarette Smokers: Rational Actors or Regional Fools?*, in *Smoking Risk, Perception & Policy* at p. 115 (Slovic, P., ed.); 61 Fed. Reg. at 44440.)

Among smokers aged 12 to 17 years, 70 percent already regret the decision to smoke, and 66 percent say they want to quit. (George H. Gallup

Int'l Institute (Sept. 1992) *Teenage Attitudes and Behavior Concerning Smoking*, at p. 54.) More than half of students who smoke at least a half a pack a day say that they have tried to quit smoking and found that they could not. (CDC (Oct. 2000) *Youth Tobacco Surveillance – United States 1998-1999*, 49 MMWR at pp. 33, 42.)

Unfortunately, children do not have a consistent and realistic understanding of the power of addiction. (Jamieson, P. & Romer, D. (2001) *What Do Young People Think They Know About the Risks of Smoking* at pp. 59-61.) Once a child becomes addicted, tobacco use no longer becomes a matter of free choice. The consequences are tragic. Roughly one-third of all youth smokers will die of a tobacco-caused disease. (CDC (Nov. 1996) *Projected Smoking-Related Deaths Among Youth – United States*, 45 MMWR 971.)

IV. TOBACCO INDUSTRY “SAMPLING” PLAYS AN IMPORTANT ROLE IN YOUTH TOBACCO USE

Tobacco sampling plays a significant role in youth tobacco use. The decision to smoke is a complex one that is affected by many attitudes, beliefs, and perceptions. The evidence is overwhelming that tobacco promotional practices have had a devastating effect on youths starting to use tobacco products. For example, a study in the *Journal of the American Medical Association* showed that tobacco industry promotional activities influence previously non-susceptible non-smokers to become susceptible or to experiment with smoking. (Pierce, J. et al. (Feb. 1998) *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA at pp. 511-515.) The U.S. Surgeon General concluded a decade ago that:

Distribution of free samples is one of the most powerful devices available to marketers. It allows a company to put its product into the hands of possible consumers in circumstances where consumers are more likely to try it (e.g.,

outside of work or school). In the case of cigarettes, the power of sampling may be especially great (Popper 1986), because these are free samples of an addictive product. Although the cigarette manufacturers argue that samples are not intended for nonusers or minors, there is little evidence of distribution control (U.S. Congress 1986; Davis and Jason 1988).

The power of sampling in the cigarette marketplace is reflected by industry growth. Expenses for distributing samples increased from just under \$25 million in 1975 to over \$100 million in 1990 (FTC 1992). The tobacco industry agrees, however, that samples should not be given to anyone under age 21 or on school, college, or university campuses (Tobacco Institute 1986).

(USDHHS (1994) *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at p. 186.)

A. Even When Free Cigarettes Are Given To Recipients Of Legal Age, They Fall Into The Hands Of Children

As a major part of the State's effort to encourage all persons to quit tobacco use, a principle purpose of Section 118950 is to prevent the "inevitable" situation where cigarettes are "passed along" and "fall into" the hands of minors when they are given out for free on public grounds. (See e.g., People's RJN at Exh. B, p. 2 ¶ 1 [samples of free cigarettes and smokeless tobacco "inevitably fall into the hands of minors"].) The statute does not limit itself to situations where cigarettes are given directly to minors. Those situations were already illegal before the enactment of Section 118950. (Penal Code §308.)

Numerous public health studies have proven that a significant number of minors obtain cigarettes through "social sources," i.e., friends (adults and minors), particularly if they believe the government is increasing its enforcement of illegal sales by retailers. (See e.g., Rigotti, N.

(2001) *Regulating Tobacco, Reducing the Supply of Tobacco to Youths*, in *Regulating Tobacco*, at p. 146 (Rabin, R.L., et al. eds.) [data in California supports the conclusion that social sources of cigarettes have become even more important as tobacco control efforts limit young people’s access to tobacco from commercial sources]; Chaloupka, F., et al. (2001-2002) *Policy Levers For The Control Of Tobacco Consumption*, 90 Ky. L.J. 1009, 1031 [citing Kentucky study, author states that “even if very high rates of merchant compliance were achieved, adolescent smokers might rely to a greater extent on older friends to buy or give them cigarettes”]; see also, Altman, D.G., et al. (1996) *Tobacco Promotion And Susceptibility To Tobacco Use Among Adolescents Aged 12 Through 17 Years In A Nationally Representative Sample*, 86 Am. J. Pub. Health 1590 (abstract available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=8916525&dopt=Abstract) [finding that for adolescents, there is a “strong association” between, *inter alia*, the receipt of free tobacco samples and “being susceptible to tobacco use”].)

R.J. Reynolds (“Reynolds”) does not deny that the statute’s clear purpose was to reduce situations whereby minors obtain free samples of cigarettes. Rather, Reynolds claims it has fully complied with Section 118950(f) and that its conduct “vindicated” the statutory goal of “keeping children from beginning to use tobacco products.” (Petitioner’s Brief on the Merits (PBM) p. 27.) Reynolds’ actions may have effectively prevented direct distribution of cigarettes to minors. Reynolds’ cavalier belief that it was “[m]ore than just complying with the letter of the statute,” however, ignores its failure to mention what effective steps, if any, it took to prevent cigarettes from “passing along” to minors attending the same public events. Moreover, Reynolds, by cigarette sampling on public grounds, ignores

another stated goal in Section 118950 of “encouraging *all persons* to quit tobacco use.” [Emphasis added.]

B. Reynolds Has Known Of The Problem Of Secondary Recipients Since 1978 And Relies On Them To Expand Its Market

Reynolds’ own records show that it knows that almost one (1) out of every four (4) of its free cigarettes handed out to recipients over the age of 18 are then passed on to someone else. Reynolds was aware of this secondary recipient problem as early as 1978. (R.J. Reynolds Marketing Research Report on file at Minnesota Repository: RJR Document Aug. 25, 1978, Document ID 505630295-0302. Also available at <http://legacy.library.ucsf.edu/cgi/getdoc?tid=ifd15d00&fmt=pdf&ref=results>.) The document reveals that 23 percent of persons receiving samples in non-retail settings (“mass sampling market”) give them to someone else. (*Id.* at p. 3.)²

It is noteworthy that not only does Reynolds know that almost one (1) out of four (4) of its samples is given to someone else, but it is likely relying on that fact. The fact that cigarettes are passed on is undoubtedly one of the purposes behind the free distribution. Reynolds and the other major cigarette companies have long known that their free samples

² These documents are required to be posted as a result of a settlement between the State of Minnesota and the major tobacco companies, including Reynolds. (See e.g., Associated Press (May 8, 1998) *Tobacco Industry “Surrenders” to Minnesota*, CNN U.S. News; available at <http://www.cnn.com/US/9805/08/tobacco.settlement> [“settlement also requires the tobacco industry to maintain and keep open to the public the Minnesota repository of once-secret documents”].)

typically will not convert an established, adult smoker from a competitor's brand to their own. Rather, free samples are more significant as a ploy to increase the "trial" (i.e., first-time use) and subsequent purchase of Reynolds' cigarettes. Since most smokers try their first cigarette before the age of 18, it would appear that free samples are effective mainly for their ability to attract minors. (See 1979 RJR document "Evaluation on RJR Sampling Experience" on file at Minnesota Repository: Document ID 503537286-7299. Also available at <http://legacy.library.ucsf.edu/cgi/getdoc?tid=nlz85d00&fmt=pdf&ref=results> (p. 2, ¶5 of report) [report states that "sampling can be used effectively to increase trial and follow-up purchase" but "there is no evidence to indicate that sampling increase [sic] conversion or volume".])

Given this, why would Reynolds want to give out free cigarettes to adult smokers who already smoke its brands, or who smoke competitors' brands and are unlikely to convert to Reynolds' cigarettes? It is because Reynolds knows that almost a quarter of the cigarettes will be given to people who do not, or cannot, obtain them for themselves, namely minors. As the Tobacco Education Oversight Committee report that was the impetus for Section 118950 explains:

Interestingly, the tobacco industry claims that its promotional activities are designed to induce existing smokers to switch brands, and not to attract new smokers. However, if they were not trying to enlist new smokers, their markets would disappear after one generation; obviously, this is not the case. (People's RJN at Exh. B, 2nd page, ¶ 1.)

Thus, as much as Reynolds claims that it does not intend for cigarettes to fall into the hands of minors, the company's financial status depends on it, and this stimulus is implicit in its sampling activities. Reynolds knows that even if it does not directly hand over free cigarettes to

a minor (an act already illegal long before Section 118950 was in existence), if it blankets a community fairground with thousands and thousands of free cigarettes, minors in attendance will inevitably obtain many of them from the initial recipients. Those cigarettes will contribute to some of those minors experimenting and possibly becoming addicted to nicotine, particularly to Reynolds' brand of cigarettes. Reynolds' booths do *nothing* to address this problem any more than if Reynolds' representatives walked around the event handing out free cigarettes to attendees 18 or older. It cannot be credibly argued that Reynolds' booths "vindicate" the purpose of the law and are legal under subdivision (f) of the statute.

Neither do Reynolds' booths effectuate the secondary purpose of Section 118950 – helping adult smokers quit. Free samples of cigarettes to adults attempting to quit are a temptation to relapse into the life-threatening, addictive habit. (See Section 118950(a)(11) ["it is the intent of the Legislature [to] encourag[e] all persons to quit tobacco use"]; see also, People's RJN at Exh. C, p. 2 ¶ 6 ["according to CMA, the sponsor . . . , banning the free distribution of tobacco products may help adults who are attempting to kick the habit"]; *Id.* at Exh. D p. 2 ¶ 2 [same].) Thus, a secondary insidious purpose of passing out free samples is to maintain or reestablish addiction among former smokers.

**C. Philip Morris Stopped Free Sampling In Public Venues
And Altered Its Magazine Advertising Practice In An
Effort to Limit Youth Targeting**

Because minors will inevitably be the secondary recipients of at least some free samples, the largest U.S. cigarette manufacturer, Philip Morris, ceased giving away free samples in 1995. (Doughton, S. (December 1,

2002) *Free Tobacco Not The Same As Lollipops*, News Tribune, available at <http://www.tpchd.org/news/tobaccodoughton.htm>.) The Philip Morris spokesman explained, “[w]ith sampling, it’s impossible to verify . . . where every product is winding up.” (*Ibid.*; see also, http://www.philipmorrisusa.com/responsible_marketing/marketing_practices.asp.) Reynolds, on the other hand, has continued this questionable practice, turning a blind eye to the inevitable collateral damage that it creates.

More recently, Philip Morris and B & W, another competitor of Reynolds, altered their magazine advertising practices after signing the Master Settlement Agreement (MSA). In a case challenging Reynolds’ magazine advertising practices, the Court of Appeal reviewed the trial court’s evidence including an announcement in May 2000 that Philip Morris would no longer place tobacco advertisements in any publication with a youth composition of more than 15 percent or that is exposed to more than two million youth. The Court of Appeal agreed with the trial court that “the conduct of Philip Morris and B&W [provided] ‘strong circumstantial evidence that they believed that dramatic steps to reduce Youth exposure to tobacco advertising had to be taken to comply with the requirements of the MSA.’” (*People v. R.J. Reynolds* (2004) 116

Cal.App.4th 1253, 1281.)³ Moreover, as stated by the trial court, the "actual practice of other tobacco companies, such as Philip Morris, demonstrates that it is possible to reduce Youth exposure in print media advertising to levels below those for targeted adult smokers while maintaining significant exposure to adult smokers." (*Id.*) Despite this change in advertising practice by its competitors, Reynolds has conspicuously failed to follow suit and curb its deplorable targeting of youth.

V. THE LEGISLATIVE HISTORY OF SECTION 118950 SUPPORTS THE STATE'S INTERPRETATION OF THE LAW

A. The Problem Of Free Samples In California Prior To Section 118950

Prior to the enactment of Section 118950, tobacco companies routinely gave out cigarettes directly to minors in spite of criminal laws prohibiting such conduct. Even when free cigarettes were given to adults, children inevitably wound up obtaining some of them. As a result, CMA felt that the only way to prevent this occurrence was to urge the California Legislature to ban the practice of free sampling altogether in or on public property. CMA convinced Senator Marian Bergeson (35th Sen. Dist., Irvine) to author the bill (S.B. 1100) that became Section 118950.

³ On June 9, 2004, the California Supreme Court denied Reynolds' Petition for Review.

The problems inherent in free sampling of cigarettes were well documented in the legislative history of Section 118950. A survey of students in Chicago found that 14% of all respondents had received free samples of cigarettes, and 46% of the elementary school students and 54% of the high school students reported having seen cigarettes distributed to children and adolescents. (Position paper by Sen. Bergeson at JA 621; Reynold’s initial RJN at Exh. E, p. 2 ¶ 2.) CMA also videotaped tobacco company representatives giving away free samples to children at two (2) separate public events and submitted this information to the Legislature. (*Ibid.*) Reynolds itself was guilty of such conduct. (See JA 627 [letter from County of Alameda to Sen. Petris whereby Reynolds’ employees who were handing out free samples of cigarettes were witnessed “approach[ing] two young women, obviously under 21, both wearing high school T-shirts, one of whom was clearly pregnant”].)

These free distributions were happening in California even though they were clearly illegal. The Legislature understood that it would simply be impossible for law enforcement to enforce Penal Code section 308(a) – the statute that makes it illegal to give or sell cigarettes directly to minors. (Position paper by Sen. Bergeson at JA 632 [lack of resources make distribution of cigarettes to minors a low priority for law enforcement].)

Prior to Section 118950, the tobacco companies routinely cited to their “voluntary code” whereby they promised that they did not, and would not, give cigarettes to minors. (People’s RJN at Exh. B, p. 2 ¶ 1; JA 614, p. 1 ¶ 5-6.) This promise was not kept.⁴

⁴ California cannot afford to rely on the tobacco companies word that the law is being obeyed. The problems inherent in such a “honor” system are obvious. (See e.g., JA 685 [smokeless tobacco company claimed

Even if the tobacco companies actually wanted to control the distribution of free samples to minors, they cannot because a recipient of a free sample is far more likely to give away cigarettes to a teenage friend or sibling than anyone who actually paid for the cigarettes with all of the applicable excise taxes. (People’s RJN at Exh. B, p. 2 ¶ 1 [although illegal, distribution of free samples is difficult to control]; JA 630 ¶ 2, letter from co-sponsor of bill to Governor [“ it is impossible to control the distribution of free samples”].) In order to counter the lack of control inherent in free samples given out to the public, the language of Section 118950 was clear – free sampling was banned from public property during public events. (Section 118950(b).)

B. The Legislature Never Considered The Interpretation Of 118950(f) That Reynolds Advances in this Case

Reynolds claims that Section 118950(f) allows for small parts of a public venue, like its sampling booths, to be leased for a private function and thereby be free from the restrictions in the statute. However, “[w]hen a statute contains an exception to a general rule laid down therein, that exception is strictly construed.” (*Goins v. Board of Pension Commissioners* (1979) 96 Cal.App.3d 1005, 1009.) The Court of Appeal correctly applied this rule of thumb, deciding that “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,

it gave out tobacco from a guarded booth, but witnesses said that samples were given directly to minors].) Moreover, in spite of Reynolds’ continual recantation of all of its safeguards regarding its cigarette distribution booths, the record shows that Reynolds’ engaged in little training or supervision of its booth personnel at the events in question. (See, e.g., JA 521:12-18; 526:10-25.)

subdivision (b) and narrowly construe the leased public grounds exception in 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.” (*People v. R.J. Reynolds* (2004) 6 Cal.Rptr.3d 58, 72.) Moreover, the legislative history of S.B. 1100 demonstrates that the Legislature never intended the interpretation of Section 118950(f) that Reynolds advances here. In fact, the author of the bill specifically rejected language that would have given subdivision (f) that meaning.

Reynolds spent considerable time and money trying to thwart CMA’s efforts for strong regulation of sampling through S.B. 1100. Toward the end of the legislative process for S.B. 1100, Senator Doris Allen, who had previously been uninvolved with S.B. 1100, gave Senator Bergeson a potential amendment to add to 118950 without revealing on whose behalf she was proposing the new language. (JA 578, ¶ 3.) The proposed language would have allowed “portions” of public grounds that were “used” for a private function to be exempt from the restrictions encompassed in the rest of the bill. (JA 582.) Such language, if it had actually been enacted, might have given some credence to Reynolds’ current argument that their sampling booths were within the exemption found in subdivision (f) of Section 118950.

However, because such language would have clearly gutted the rest of the bill, Senator Bergeson rejected the language upon advisement from CMA. Consequently, the language on which Reynolds relies never made it into the final law. (JA 583-588.) Instead, the provision that would have allowed for “portions” of public grounds to be exempt from the sampling

restrictions was removed. Moreover, in order for a tobacco company to give out cigarette samples on public grounds, the public grounds would have to be “leased,” not just “used,” for a private function. (Compare JA 582 with Section 118950(f).) Shortly after she altered Senator Allen’s proposal, the Legislature ratified Senator Bergeson’s final language and enacted S.B. 1100 into law. (See JA 579 ¶ 5.) As a result, the language upon which Reynolds’ entire argument relies never made it into law.

Reynolds claims that if it could not have given out free samples of cigarettes on small portions of certain public venues that are geographically large, it would have been impossible for them to sample there at all. (PBM at pp. 29-30.) To the extent it is a public venue, that is precisely what the Legislature intended in enacting Section 118950. Unfortunately for the health of the people of California, Reynolds’ situation was not so dire under the applicable statute. Reynolds is still allowed to conduct its sampling from private property. In fact, Reynolds routinely uses this practice. (Compare JA 24 ¶ 21 with JA 680 at 34:6-20 [Reynolds leased private property adjacent to the Adams Street Fair which occurred on public streets in downtown San Diego].) Reynolds also has a “Camel Club Program” in 53 cities, including many in California, where it hands out free cigarettes in private bars. (JA 678 at pp. 44:23 - 46:3.)

VI. REYNOLDS’ VIOLATION OF SECTION 118950 IN THIS CASE IS PART OF A CONTINUING PATTERN OF TARGETING MINORS

Reynolds’ assertion of an unfounded interpretation of Section 118950 to justify its free sampling program is its latest action in a pattern of targeting minors under the guise of innocent marketing. If this Court accepts Reynolds’ interpretation of Section 118950, or its argument

regarding preemption, there would be little to stop Reynolds from passing out cigarettes to anyone, anywhere, anytime. Understanding the weakness of such a legal position, Reynolds soft-pedals and alludes that as its efforts abide by the MSA, it must have acted reasonably and in good faith. (PBM at p. 36.)

We believe that Reynolds' assertion that because it has complied with the MSA, the Court should accept that Reynolds acted in good faith is particularly incredible, as Reynolds itself does not comply with many of the MSA's restrictions. For example, a California court recently found that Reynolds violated the MSA's restrictions on outdoor advertising for tobacco products. (*People v. R.J. Reynolds* (2003) 107 Cal.App.4th 516, *rev. denied.*) Also, an Ohio court recently found that Reynolds violated the MSA advertising restrictions on merchandise. (*Ohio ex rel. Petro v. R.J. Reynolds* (2003) 787 N.E.2d 717.)

More significantly, in another California case, the Court of Appeal affirmed the trial court's decision finding Reynolds guilty of intentionally targeting youth in its print advertisements in violation of the MSA. The Court found that Reynolds knew to a substantial certainty that its advertising reached minors to the same extent that it was exposed to young adults:

The trial court concluded that although Reynolds had access to data showing that the level of exposure of its advertising to youth was about the same as exposure to the targeted young adult smokers, Reynolds "studiously avoided" measuring its advertising exposure to youth or comparing exposure to youth with exposure to young adults, probably because Reynolds "knew the likely result of such analysis." The court also found that Reynolds "willingly engaged in an aggressive print advertising campaign to maximize exposure to targeted groups such as Young adult smokers, simply choosing to

ignore the foreseeable consequence of significant Youth exposure." The court further stated "it is reasonable to conclude that [Reynolds], even without examining all the data it had at its disposal, realized or should have realized that it was reaching Youth at levels at least as great as adults in its print advertising...." (*Reynolds* 116 Cal.App.4th at 1264)⁵

In affirming the decision that Reynolds violated the MSA, the Court rejected Reynolds' foundational objections to the reliability of the evidence. Like its aggressive print advertising campaign that exposed minors to its cigarette advertising in violation of the MSA, Reynolds' aggressive program of massive free cigarette distribution inevitably facilitates minors obtaining cigarettes – directly or indirectly from legal recipients – in violation of Section 118950.

VII. CONCLUSION

Health & Safety Code section 118950 serves an important public health purpose. It must not be gutted. Reynolds' interpretation of subdivision (f) conflicts with the actual language of the statute, and in fact, perpetuates the problems Section 118950 sought to solve. We strongly urge this Court to preserve the legislative effort, and the heroic effort by Senator Bergeson, in passing this important law. Every year, thousands of children in California become addicted to cigarettes and eventually become incapacitated as a result, or die. Additionally, many addicted adults who want to quit are led back into the deadly habit because free samples prove to be an irresistible temptation. The toll on their families, and the financial toll on California, cannot be understated. For all of these reasons, we respectfully request this Court to reject all of Reynolds' convoluted

⁵ As noted above, on June 9, 2004, the California Supreme Court denied Reynolds' Petition for Review.

arguments, uphold Section 118950, and uphold the fine imposed on Reynolds for violating Section 118950.

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Dated: June 14, 2004

Respectfully Submitted,

BY:

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California Medical Association
American Academy of Pediatrics
American Cancer Society
American Heart Association
American Lung Association
American Medical Association

Certification Under Section 14 of the California Rules of Court

I, Hans P. Lee, am an attorney at law licensed to practice before all courts of the State of California. I am Counsel of Record for amici curiae herein, the California Medical Association, American Academy of Pediatrics, American Cancer Society, American Heart Association, American Lung Association, and American Medical Association. I hereby certify that the word counting feature on the computer word processing program with which this brief was written indicates that the actual text of this brief, excluding the cover page and addresses of counsel, the Table of Authorities, the Table of Contents, this certification, and the Proof of Service, is 4,808 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and that this Declaration was executed on June 14, 2004, in San Francisco, California.

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