

No. S129522

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE TOBACCO CASES II, JCCP 4042

DEVIN DANIELS, *et al.*,
Plaintiffs-Appellants-Petitioners,
vs.

PHILIP MORRIS INCORPORATED, *et al.*,
Defendants-Respondents.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division One (No. D041356)

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* SUPPORTING RESPONDENTS**

Susan Liebeler
P.O. Box 4362
Malibu, CA 90264
(310) 589-5546

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: September 14, 2005

Counsel for *Amicus Curiae*
Washington Legal Foundation

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ISSUES PRESENTED FOR REVIEW	1
INTERESTS OF <i>AMICUS CURIAE</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. APPELLANTS' CLAIMS ARE PREEMPTED BY THE FCLAA	6
A. The FCLAA Preempts State and Local Requirements/Prohibitions Imposed on Cigarette Advertising "Based on Smoking and Health"	6
B. Only Admitted Lawbreakers Such As Appellants Are Disadvantaged by a Preemption Finding; California and the Federal Government Still Have Numerous Tools With Which To Police Cigarette Advertising	10
C. <i>Bates</i> Does Not Alter Federal Preemption Law	16
D. <i>Reilly's</i> Inchoate Offense Exception to FCLAA Preemption Is Inapplicable to Appellants' Claims	19
II. THE FIRST AMENDMENT PROVIDES AN INDEPENDENT BASIS FOR AFFIRMING THE COURT OF APPEAL	23
CONCLUSION	29

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Aguilar v. Avis Rent A Car Sys., Inc.</i> , (1999) 21 Cal. 4th 121	24, 25
<i>Bates v. Dow Agrosciences LLC</i> , (2005) 125 S. Ct. 1788	15, 16, 17, 18
<i>Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y.</i> , (1980) 447 U.S. 557	26, 27
<i>Cipollone v. Liggett Group, Inc.</i> , (1992) 505 U.S. 504	7, 8, 18, 20
<i>City of Cincinnati v. Discovery Network, Inc.</i> , (1993) 507 U.S. 410	27
<i>Discover Bank v. Superior Court</i> , (2005) 36 Cal. 4th 148	13
<i>Kendall-Jackson Winery, Ltd. v. Superior Court</i> , (1999) 76 Cal. App. 4th 970	11
<i>Lorillard Tobacco Co. v. Reilly</i> , (2001) 533 U.S. 525	<i>passim</i>
<i>People v. R.J. Reynolds Tobacco Co.</i> , (2004) 116 Cal. App. 4th 1253	12
<i>Precision Co. v. Automotive Co.</i> , (1945) 324 U.S. 806	11
<i>Simon & Schuster, Inc. v. Members of New York State Crime Victims Board</i> , (1991) 502 U.S. 105	27
 Statutes and Constitutional Provisions:	
U.S. Const., amend. i	4, 5, 23, 25, 26, 27
 Federal Cigarette Labeling and Advertising Act (FCLAA),	
15 U.S.C. § 1331 <i>et seq.</i>	<i>passim</i>
15 U.S.C. § 1331	6, 7, 9
15 U.S.C. § 1331(2)	9
15 U.S.C. § 1334	12
15 U.S.C. § 1334(b)	<i>passim</i>
15 U.S.C. § 1336	12

	Page
P.L. 91-222 § 2, 84 Stat. 89, <i>codified at</i> 15 U.S.C. § 1336(a) (1970)	14
Federal Trade Commission Act, 15 U.S.C. § 45(a)(2)	10
Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 <i>et seq.</i>	15, 16, 17, 18
7 U.S.C. § 136v(b)	16
California Unfair Competition Laws (UCL), Bus. & Prof. Code §§ 17200 <i>et seq.</i>	<i>passim</i>
Penal Code § 31	17
Penal Code § 308	3-4, 21
§ 308(a)	2
§ 308(b)	2, 5, 10
Mass. Gen. Laws, ch. 270 § 6 (2000)	19
 Miscellaneous:	
S. Rep. No. 91-566 (1969)	13
H.R. Rep. No. 91-897 (1970)	13
115 Cong. Rec. 38742 (1969)	13
116 Cong. Rec. 6640 (1970)	14
116 Cong. Rec. 6642 (1970)	13

ISSUES PRESENTED FOR REVIEW

(1) Does the Federal Cigarette Labeling and Advertising Act (“FCLAA,” 15 U.S.C. §§ 1331 *et seq.*) preempt claims under the California Unfair Competition Laws (Bus. & Prof. Code §§ 17200 *et seq.*) for advertising that does not directly encourage youth to purchase cigarettes illegally, but that Appellants allege was motivated by Respondents’ desire to encourage such purchases?

(2) Does the trial court’s ruling granting summary judgment to Respondents on First Amendment grounds provide an independent basis upon which to affirm the judgment of the Court of Appeal?

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are more fully set forth in the application for leave to file, accompanying this brief. WLF is a public interest law and policy center with supporters in all 50 states, including many in California. WLF devotes a substantial portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court and numerous other State and federal courts in cases raising commercial speech issues. *See, e.g., Johanns v. Livestock Marketing Ass’n* (2005) 125 S. Ct. 2055; *Nike, Inc. v. Kasky* (2003) 539 U.S. 364; *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525. WLF successfully

challenged the constitutionality of certain Food and Drug Administration restrictions on truthful speech about FDA-approved products.

Washington Legal Found. v. Friedman (D.D.C. 1998) 13 F. Supp. 2d 51, *appeal dismissed* (D.C. Cir. 2000) 202 F.3d 331. WLF also believes strongly in the importance of preserving the policy of national uniformity embodied in the FCLAA. That policy significantly reinforces First Amendment values and, consequently, commercial free speech rights by limiting state and local power to restrict advertising.

STATEMENT OF THE CASE

California Penal Code § 308(a) prohibits anyone from knowingly selling or giving tobacco products to anyone under the age of 18.

Similarly, California Penal Code § 308(b) prohibits anyone under the age of 18 from purchasing or receiving tobacco products.

Appellants Devin Daniels, Bryce Clements, Daimon Fullerton, Nicole Morrow, and Maren Sandler admit that, in violation of § 308(b), they regularly purchased and/or received cigarettes prior to the time that they reached their eighteenth birthdays. None of the Appellants allege that they were unaware that California prohibited them from purchasing and/or receiving cigarettes before turning 18. None of the Appellants allege that they obtained cigarettes from any of the Respondents. They

nonetheless contend that they are entitled, under the doctrine of equitable restitution, to recover from Respondents the cost of the cigarettes that they consumed. They contend that they were induced to purchase cigarettes in part by Respondents' cigarettes advertisements. Their complaint does not contend that those advertisements contained any material false statements or any language explicitly encouraging youth smoking, but Appellants do contend Respondents intended their advertisements to reach minors because they wanted to induce minors to smoke cigarettes.

Appellants filed suit against Respondents, four cigarette manufacturers, alleging violations of California's Unfair Competition Law ("UCL"), Business and Professions Code §§ 17200 *et seq.* and 17500 *et seq.* They purport to represent a class consisting of "all persons who as California resident minors (under 18 years of age) smoked one or more cigarettes in California between April 2, 1994 and December 31, 1999." They allege that Respondents engaged in unfair or deceptive business practices in violation of the UCL, by undertaking "systematic advertising efforts that appeal not only to adults but also to children under the age of 18. . . . Defendants' scheme was to market cigarettes for consumption to California consumers, *including minors below 18,*" in violation of Penal

Code § 308. See *In re Tobacco Cases II* (2004) 123 Cal. App. 4th 617, 625 (emphasis in original). They further allege that “Defendants never warned class members or any other California consumer that cigarettes are highly addictive.” *Id.* The only relief sought by Appellants is restitution. *Id.* at 624 n.3.

On November 22, 2002, the trial court granted two separate summary judgment motions filed by Respondents, and entered final judgment in their favor. The trial court ruled that Appellants’ claims were preempted by federal law (the FCLAA) and were barred by the First Amendment to the U.S. Constitution. *Id.* at 626.

On appeal, the Court of Appeal affirmed. The appeals court held that the FCLAA preemption finding was mandated by the U.S. Supreme Court’s decision in *Lorillard Tobacco Co. v. Reilly* (2001) 533 U.S. 525. *In re Tobacco Cases II*, 123 Cal. App. 4th at 634. The court stated that, in light of its conclusion that Respondents’ claims were preempted by the FCLAA, it need not address the trial court’s alternative holding that those claims were also barred by the First Amendment. *Id.* at 648 n.26.

SUMMARY OF ARGUMENT

The U.S. Supreme Court’s decision in *Reilly* mandates a finding that Appellants’ claims are preempted by the FCLAA. The FCLAA

preempts State requirements/prohibitions regarding cigarette advertising that are “based on smoking and health.” Appellants claim that California youth are being exposed inappropriately to Respondents’ advertisements; *Reilly* held explicitly that “the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health.” *Reilly*, 533 U.S. at 548.

A finding that Appellants’ claims are preempted by the FCLAA will still allow for effective policing of cigarette advertising by both California and the federal government. The only group that would be disadvantaged by a preemption finding would be those, such as Appellants, who admit having violated Penal Code § 308(b) (which prohibits the purchase of tobacco products by minors) yet seek restitution of funds they paid to receive a product they knew full well they were prohibited from receiving.

The First Amendment provides the Court with an independent basis for affirming the judgment of the Court of Appeal. Because Respondents’ advertising concerns lawful activity (cigarette sales to adults), their commercial speech is entitled to substantial First Amendment protection. Appellants have failed to demonstrate either that the restrictions they seek to impose on Respondents’ speech directly advances any interests of the

State of California, or that the restrictions are not more extensive than necessary to serve those interests.

ARGUMENT

I. APPELLANTS' CLAIMS ARE PREEMPTED BY THE FCLAA

A. The FCLAA Preempts State and Local Requirements/ Prohibitions Imposed on Cigarette Advertising "Based on Smoking and Health"

In the FCLAA, Congress sought to ensure that the public would be "adequately informed" about the health risks associated with smoking by requiring every cigarette package (and, later, by requiring every cigarette advertisement) to carry health warnings specified by Congress itself. At the same time, Congress also sought to "protect commerce and the national economy" to "the maximum extent consistent with [that] declared policy" by preserving the cigarette manufacturers' ability to advertise their products free from "diverse, nonuniform, and confusing" state and local regulations based on smoking and health. 15 U.S.C. § 1331.¹

¹ Section 1331, which declares the policy and purpose of the Federal Cigarette Labeling and Advertising Act, provides in its current form:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette

To give effect to this policy of national uniformity – protecting cigarette advertising while providing for the dissemination of government warnings about smoking – the FCLAA contains an explicit preemption provision that provides:

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 chapter.

15 U.S.C. § 1334(b).

As the U.S. Supreme Court has noted, Congress passed the current form of the FCLAA preemption provision in 1969, in the face of efforts at the state level to regulate and even ban cigarette advertising. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515 & n.11 (1992) (“For

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 nation 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.

example, the California State Senate passed a total ban on both print and electronic cigarette advertisements.”). The Court has observed that, when Congress amended the Act in 1969-70, it substantially broadened the preemption provision. *See id.* at 520 (“Compared to its predecessor in the 1965 Act, the plain language of the 1969 Act is much broader.”); *Reilly*, 533 U.S. at 542 (“Without question, the second clause is more expansive than the first; it employs far more sweeping language to describe the state action that is pre-empted.”). Prior to the 1969 amendment, § 1334(b) had merely precluded state and local authorities from requiring any “statement relating to smoking and health . . . in the advertising of any cigarettes.” As amended, the expansive language of the preemption provision does much more than prohibit state and local regulation of the content of cigarette advertising; it now precludes any state or local authority from passing “requirement[s] or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion” of cigarettes. 15 U.S.C. § 1334(b).

Even giving this expansive preemption provision a “narrow” reading (*Cipollone*, 505 U.S. at 518), there can be little doubt that it preempts Appellants’ UCL action. Appellants assert that their suit imposes requirements/ prohibitions on cigarette advertising for the

purpose of protecting California’s interest in banning cigarette sales to minors. But as *Reilly* determined, Congress prohibited *all* state and local cigarette advertising requirements/ prohibitions “motivated by concerns about smoking and health,” and:

At bottom, the concern about youth exposure to cigarette advertising is intertwined with the concern about cigarette smoking and health. Thus [a State’s] attempt to distinguish one concern from the other must be rejected.

Reilly, 533 U.S. at 548.²

Moreover, permitting this suit to proceed would be inconsistent with the purposes of the FCLAA, as set forth in 15 U.S.C. § 1331. In particular, the suit creates a very real danger that the national economy will be impeded by “nonuniform and confusing” cigarette advertising requirements “with respect to any relationship between smoking and health.” 15 U.S.C. § 1331(2). Unless courts in other States were to interpret their own unfair competition laws *precisely* as the California

² Appellants insist that *Reilly* never indicated that a ban on tobacco sales to minors should be deemed a requirement/prohibition “based on smoking and health.” Appellants Reply Br. 8. To the contrary, that is the only plausible interpretation that can be given the language from *Reilly* quoted in the text. The reason that State bans on tobacco sales to minors are not preempted by 15 U.S.C. § 1334(b) is *not* because they are not “based on smoking and health,” but because they are not imposed “with respect to the advertising or promotion of cigarettes.”

courts do with respect to what constitutes acceptable tobacco advertising and with respect to when a cigarette advertiser should be deemed to be “targeting” youth, the uniformity of regulation created by the FCLAA would quickly evaporate.

B. Only Admitted Lawbreakers Such As Appellants Are Disadvantaged by a Preemption Finding; California and the Federal Government Still Have Numerous Tools With Which to Police Cigarette Advertising

A constant refrain of Appellants’ briefs is that effective policing of cigarette advertising is impossible unless this suit is permitted to proceed. For example, they assert, “The narrow criminal act exception [to FCLAA preemption] that Respondents advocate is purely illusory and would, if adopted, give tobacco companies *carte blanche* authority to freely promote the illegal sales of cigarettes to minors through imagery advertisements.” Appellants Reply Br. 7.

To the contrary, the ability of both the federal government and California to effectively police tobacco advertising is in no way threatened by Respondents’ preemption arguments. The only group that would be disadvantaged if Appellants’ claims were deemed preempted by the FCLAA would be those, such as Appellants, who admit having violated Penal Code § 308(b) (which prohibits the purchase of tobacco products by

minors) yet seek “equitable restitution” of funds they paid (not to Respondents, but to third parties) to receive a product they knew full well they were prohibited from receiving. Given the adequacy of alternative policing mechanisms, *amicus curiae* sees nothing inequitable about applying a preemption statute to deny a windfall to admitted lawbreakers and their attorneys.³

If California officials conclude that cigarette manufacturers are running advertisements that unfairly target minors, they are entitled to bring an action to enforce the terms of the 1998 Master Settlement Agreement (MSA). Pursuant to the MSA, major cigarette manufacturers

³ Indeed, even if the FCLAA did not so clearly preempt Appellants’ UCL claims, a good argument could be made that the doctrine of unclean hands bars recovery by those, such as Appellants, whose suit is based entirely on their admitted violations of California law. As one California court has explained:

The unclean hands doctrine protects judicial integrity and promotes justice. It protects judicial integrity because allowing a plaintiff with unclean hands to recover in an action creates doubt as to the justice provided by the judicial system. . . . The doctrine promotes justice by making a plaintiff answer for his own misconduct in the action. It prevents “a wrongdoer from enjoying the fruits of his transgression.” *Precision Co. v. Automotive Co.* [(1945)], 324 U.S. [806,] 815.

Kendall-Jackson Winery, Ltd., v. Superior Court (1999) 76 Cal. App. 4th 970, 978.

agreed, *inter alia*, not to “target” youth in their advertising in return for an agreement by the States (including California) to drop pending damage claims. Indeed, California officials utilized that policing mechanism on at least one recent occasion. *See People v. R.J. Reynolds Tobacco Co.* (2004) 116 Cal. App. 4th 1253 (cigarette manufacturer alleged to have violated MSA by placing advertisements in magazine whose youth readership exceeded 15%). Such actions to enforce the MSA (which may only be brought by State attorneys general) are not preempted by the FCLAA, by virtue of the express agreement of the parties to the MSA.

The federal government is similarly entitled to bring enforcement actions to prevent unfair cigarette advertising. Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), empowers the Federal Trade Commission (FTC) to prevent persons or entities “from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.” The FCLAA does not limit the FTC’s power in any way. *See* 15 U.S.C. § 1336 (“Nothing in this Act . . . shall be construed to . . . affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes.”). Accordingly, one can expect the FTC also to step forward if cigarette manufacturers begin engaging in

the types of unfair trade practices that Appellants hypothesize. Given the ample State and federal policing mechanisms currently available, enforcing the FCLAA preemption provision as written – such that Appellants and other lawbreakers are denied a cause of action – will not result in the parade of horrors envisioned by Appellants.⁴

Indeed, the legislative history of the FCLAA makes quite clear that Congress fully anticipated that the FCLAA’s preemption provision would impose some limits on enforcement actions that could be brought against tobacco manufacturers were they to run advertisements that targeted youth. The version of the 1969 FCLAA amendments that was reported by the Senate Commerce Committee on December 5, 1969 included

⁴ The appeals court was also clearly correct in concluding that Appellants lack standing to assert that Respondents gained unfair competitive advantage by cheating their competitors. 123 Cal. App. 4th at 634 n.11. In their reply brief, Appellants attempt to buttress their standing claim by citing this Court’s recent decision in *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148. Appellants Reply Br. 4 & n.2. *Discover Bank* is inapposite. Appellants cite language from the decision that recites several of the “justifications” for permitting consumer class actions – including that class actions have such “salutary by-products” as providing “aid to legitimate business enterprises by curtailing illegitimate competition.” *Discover Bank*, 36 Cal. 4th at 156. But the fact that class actions may have certain “salutary by-products” has never been deemed sufficient justification for abandoning normal standing requirements in class actions, and nothing in *Discover Bank* suggests otherwise.

preemption language identical to the language ultimately adopted⁵ as well as a provision that barred FTC action regarding cigarette advertising for two years. S. Rep. No. 91-566 (1969). A number of Committee members – including Sen. Magnuson, Chair of the Committee – expressed concern over the combined effect of those two provisions. These Senators stated that preempting the FTC while simultaneously preempting State regulation would result in there being “no meaningful defense” against advertising “designed to make smoking appealing to young people,” because both the FTC and the States would be powerless to act. S. Rep. No. 91-566 at 19 (1969) (individual views of Senators Magnuson, Pastore, Hart, Cannon, Moss, Long, Inouye, Tydings, and Goodell).⁶ To meet that concern, the legislation was amended to shorten by one year the period during which the FTC would be precluded from acting. 115 Cong. Rec. 38742 (1969). The amendment solved Senator Magnuson’s concern that the federal government, having precluded state and local regulation of cigarette advertising, should not tie its own hands

⁵ Now codified as 15 U.S.C. § 1334.

⁶ Senators Magnuson, Pastore, and Moss were later the Senate Managers of the bill. H.R. Rep. No. 91-897 at 8 (1970). All nine Senators voted for the legislation. 116 Cong. Rec. 6642 (1970).

unnecessarily.⁷ However, it remained Senator Magnuson’s view that the FCLAA’s expanded preemption language barred any State regulation of cigarette advertising based on smoking and health.⁸

In sum, not only does the appeals court’s conclusion that Appellants’ UCL cause of action is preempted by the FCLAA leave in place more than adequate policing mechanisms to ensure that advertising by cigarette manufacturers does not unfairly target youth, but also the legislative history of the FCLAA makes plain that Congress fully anticipated that § 1334(b) would impose some significant restraints on those policing mechanisms. Under those circumstances, we respectfully submit that there is no reason to adopt Appellants’ tortured interpretation

⁷ The legislation as finally enacted in April 1970 provided that the FTC “shall not take any action on cigarette advertising before July 1, 1971.” *See* P.L. 91-222 § 2, 84 Stat. 89, *codified at* 15 U.S.C. § 1336(a) (1970).

⁸ Sen. Magnuson confirmed this interpretation in a colloquy with Sen. Cooper in the final Senate floor debate on the conference report. In the colloquy, Sen. Cooper posed a series of questions to Sen. Magnuson, as Senate Manager of the conference report, to establish an authoritative interpretation of the legislation. For his very first question, Sen. Cooper asked Sen. Magnuson to confirm that the conference report “preempts the states from *any* action restricting [cigarette] advertising.” Sen. Magnuson’s answer was an unequivocal “*Yes*” (emphasis added). 116 Cong. Rec. 6640 (1970).

of the FCLAA for the purpose of avoiding preemption of a cause of action brought by admitted lawbreakers.

C. *Bates* Does Not Alter Federal Preemption Law

In their reply brief, Appellants repeatedly cite a recent U.S. Supreme Court preemption decision, *Bates v. Dow Agrosciences LLC* (2005) 125 S. Ct. 1788, in support of their argument that their UCL cause of action is not preempted by the FCLAA. *See* Appellants Reply Br. 2, 9-13. Appellants have badly misinterpreted the *Bates* decision.

Bates presented the question whether certain state-law tort actions against the manufacturer of a pesticide were preempted by an explicit preemption provision contained in the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.* We note initially that the Supreme Court in *Bates* cautioned against the very type of legal analysis in which Appellants engage: attempting to apply statements contained in an opinion addressing one preemption provision to an analysis of another preemption provision contained in a totally separate federal law. *Bates*, 125 S. Ct. at 1800 (in light of “the rather obvious textual differences between the two preemption clauses” contained in FIFRA and the FCLAA, the Court cautioned against “too quickly” concluding that preemption issues decided under one of those laws are

relevant to preemption issues arising under the other law).⁹

Appellants cite *Bates* for the proposition that any jury verdict entered in their favor would not constitute a State-law “requirement” with respect to cigarette advertising (within the meaning of § 1334(b)) because while cigarette manufacturers might be induced thereby to alter their advertising, they would also be free to pay any judgment and leave their advertising unchanged. Appellants Reply Br. 9. *Bates* held no such thing. Rather, *Bates* was critiquing a lower-court ruling that the FIFRA preemption provision (which preempts certain State-law labeling and packaging requirements) operates to preempt State-law causes of action *whenever* a finding of liability on those claims would “induce” a manufacturer to alter its product label. The Court rejected that approach, stating, “This effects-based test finds no support in the text of [the FIFRA preemption provision], which speaks only of ‘requirements.’” *Bates*, 125

⁹ *Bates* noted one particularly “obvious textual difference” between the two preemption provisions. While the FCLAA preempts *all* State “requirement[s]” and “prohibitions” based on smoking and health with respect to cigarette advertising, FIFRA preempts only those “state-law labeling and packaging requirements that are ‘*in addition to or different from*’ the labeling and packaging requirements under FIFRA. Thus, a state-law labeling requirement is not preempted by [7 U.S.C.] § 136v(b) if it is equivalent to, or fully consistent with, FIFRA’s misbranding provisions.” *Bates*, 125 S. Ct. at 1800.

S. Ct. at 1799. Rather, the Court explained, “The proper inquiry calls for an examination of the elements of the common law duty at issue.” *Id.* (citing *Cipollone*, 505 U.S. at 524).

Under *Bates*’s examine-the-elements-of-the-duty approach, Appellants’ UCL cause of action, if successful, unquestionably would constitute a “requirement” and/or “prohibition” with respect to cigarette advertising. The crux of Appellants’ cause of action is a duty not to run advertisements that “target” youth; according to Appellants, any cigarette manufacturer that breaches that duty can be held liable under the UCL and be subjected to equitable remedies, including restitution. *Bates* confirms that such duties constitute “requirements” subject to preemption under either the FCLAA or FIFRA.

Our reading of *Bates* is confirmed by the Court’s repeated favorable citations to its earlier *Cipollone* decision. *Id.* at 1799, 1800. *Cipollone* had held that imposition of liability under many of the common law tort claims raised in that case would constitute “requirements” within the meaning of the FCLAA, and thus that those tort claims were preempted by the FCLAA. *Bates*’s repeated favorable citations to *Cipollone* indicates that the Court did not intend to undercut the earlier decision’s holding that the FCLAA broadly preempts tort claims raised

against cigarette manufacturers based on their advertising.

**D. *Reilly's* Inchoate Offense Exception to FCLAA
Preemption Is Inapplicable to Appellants' Claims**

While broadly interpreting § 1334(b)'s preemption of State efforts to regulate tobacco advertising based on concerns that the advertising might be viewed by minors, *Reilly* articulated one limitation on preemption:

In Massachusetts, it is illegal to sell or distribute tobacco products to persons under the age of 18. *Mass. Gen. Laws, ch. 270 § 6* (2000). Having prohibited the sale and distribution of tobacco products to minors, the State may prohibit common inchoate offenses that attach to criminal conduct, such as solicitation, conspiracy, and attempt.

Reilly, 533 U.S. at 552. The Court reasoned that because State prohibitions on sales to minors are not preempted (because they do not involve “the advertising or promotion” of cigarettes), Congress did not intend to preempt inchoate criminal offenses that are closely associated with such sales prohibitions.

For all the reasons articulated by Respondents in their brief, *Reilly's* narrow “common inchoate offenses” exception is inapplicable to Appellants' UCL claim. Resp. Br. 30-44. In particular, in the absence of any allegation or evidence that Respondents shared the criminal purpose of some specific person in a specific context, Appellants have failed to

present evidence sufficient to establish under California Penal Code § 31 that Respondents are guilty of aiding and abetting prohibited cigarette sales. *Id.* 33-37. Rather than repeating all of Respondents' arguments, we wish to stress several additional points.

First, Appellants complain that Respondents' interpretation of *Reilly's* "common inchoate offenses" exception amounts to a "crimes-only exception to FCLAA preemption" that leaves the "courthouse doors . . . closed" to private litigants and provides cigarette companies with free rein to say virtually whatever they want in their advertising. Appellants Reply Br. 1. Appellants are mischaracterizing Respondents' argument.

Although Respondents rightly point out just how narrow the "common inchoate offenses" exception really is, they do not contend that *Reilly* forecloses all other State efforts to regulate cigarette companies. Thus, § 1334(b) does not preempt State requirements or prohibitions that are not "based on smoking and health," or are not imposed "with respect to the advertising or promotion" of cigarettes, or are imposed on cigarettes whose packages are not "labeled in conformity with the provisions of" the FCLAA. For example, *Reilly* recognized that the FCLAA does not restrict "a State or locality's ability to enact generally applicable zoning restrictions," including restrictions on outdoor advertising – even if

cigarette advertising ends up being affected by those generally applicable restrictions. *Reilly*, 533 U.S. at 551. The Court reasoned that such restrictions are not preempted by § 1334(b) because they are not “based on smoking and health.” *Id.* at 552. But Appellants are not seeking to regulate Respondents’ advertising based on some generally applicable zoning regulation; rather, they seek to do so based on a law (Penal Code § 308) that is applicable only to tobacco products and that (per *Reilly*) must be deemed to be “intertwined with the concern about cigarette smoking and health.” *Id.* at 548.

Similarly, the U.S. Supreme Court has recognized that FCLAA preemption does not apply to State-law tort suits claiming intentional fraud and misrepresentation, because the common-law duty underlying that claim is not “a duty ‘based on smoking and health’ but rather on a more general obligation – the duty not to deceive.” *Cipollone*, 505 U.S. at 528-29.¹⁰ But Appellants have not raised an intentional fraud claim,

¹⁰ *Cipollone* explained that there is little danger that allowing state-law fraud claims against cigarette manufacturers would lead to nonuniform state regulation of cigarette advertising, because all “state-law proscriptions on intentional fraud rely only on a single, uniform standard: falsity.” *Cipollone*, 505 U.S. at 529. In contrast, allowing suits to proceed based on a cigarette manufacturer’s alleged subjective (but unexpressed) intent to “target” youth is highly likely to lead to

and they have introduced no evidence that any advertising claims made by Respondents during the class period were false and made with the intention to deceive.

Second, while noting that direct solicitation of juvenile customers (*e.g.*, “Kids, be the first in your fourth grade class cool enough to smoke”) falls within the “common inchoate offenses” exception and thus is not protected from State regulation by the FCLAA, Appellants complain that they are unlikely to find evidence of that sort because “Respondents will never advertise with express words of incitement.” Appellants Reply Br. 7. Thus, Appellants complain, “the narrow criminal act exception that Respondents advocate is purely illusory.” *Id.* But the U.S. Supreme Court did not articulate the “common inchoate offenses” exception to FCLAA preemption in order to provide plaintiffs’ lawyers with a sporting chance of winning large awards against cigarette manufacturers. Rather, the Court was simply attempting to spell out the limits of FCLAA preemption. It explained that one narrow avenue for State regulation was enforcement of laws criminalizing common inchoate

nonuniform regulation, because there is no uniformly accepted standard by which to measure whether one harbors an unexpressed intent to “target” youth.

offenses closely associated with the offense of distributing tobacco products to minors. *Reilly*, 533 U.S. at 552. If Appellants are unable to produce evidence that the tobacco industry is directly soliciting juvenile customers, the proper response is to invoke the FCLAA to dismiss their suit, not to broaden the “common inchoate offenses” exception to provide Appellants with a better chance for success.

As noted above, both California and the FTC have available to them powerful tools with which to police cigarette advertising. Public health will not suffer if admitted lawbreakers like Appellants are denied their day in court because the “common inchoate offenses” exception is not interpreted as broadly as they would like.

II. THE FIRST AMENDMENT PROVIDES AN INDEPENDENT BASIS FOR AFFIRMING THE COURT OF APPEAL

The trial court granted summary judgment to Respondents on both preemption and First Amendment grounds. The Court of Appeal affirmed on the basis of preemption alone and did not reach the First Amendment issue. *Amicus curiae* agrees with Respondents that the First Amendment provides the Court with an independent basis for affirming the judgment of the Court of Appeal.

Amicus curiae will not repeat Respondents’ arguments but rather

limits itself to responding to several points made in Appellants' Reply Brief. First, Appellants cite this Court's decision in *Aguilar v. Avis Rent A Car Sys., Inc.* (1999) 21 Cal. 4th 121, for the proposition that "a pattern of speech which has been judicially determined to violate a statute is not entitled to any First Amendment protection." Appellants Reply Br. 16. *Aguilar* did not so hold.

Aguilar addressed the circumstances under which injunctive relief against *future* speech is permissible under the First Amendment; the speech at issue in *Aguilar* involved racial epithets. The Court held that such an injunction is not an improper "prior restraint" of speech if it is issued after a determination that "the injunction is based upon a continuing course of repetitive speech that has been judicially determined to violate" state law *and* after a determination that the speech is not constitutionally protected. *Aguilar*, 21 Cal. 4th at 140-41 (plurality opinion). Because Appellants do not seek injunctive relief, *Aguilar* has no application to this case.

Aguilar most certainly did *not* adopt the rule of law that Appellants ascribe to it: that commercial speech loses its constitutional protection the moment it is determined that the speech violates State law. Any such rule would, of course, provide States with an easy roadmap for avoiding all

First Amendment constraints: simply pass a law prohibiting all commercial speech. The *Aguilar* plurality eschewed that approach by making clear that for purposes of reviewing an injunction against speech, the determination that speech (whether commercial or noncommercial) is not entitled to constitutional protection must be made independently of the determination that the speech violates State law. *Id.* Any doubt on the meaning of *Aguilar* is removed by Justice Werdegar’s concurring opinion.¹¹ She dismissed as “unfounded” any assumption that “a legislative body can validly pass a statute having the effect of removing constitutional protection from speech.” *Aguilar*, 21 Cal. 4th at 150. She explained:

For example, the mere fact Congress has decreed (by enacting title VII) that the creation of an abusive or hostile work environment violates federal law does not necessarily mean racial speech creating such a work atmosphere is unprotected by the First Amendment. Congress cannot, by legislation, change the scope of one’s First Amendment rights. [Citations omitted.] Likewise, the mere fact the jury found defendant Lawrence was in violation [of California law] does not necessarily mean his speech was unprotected by the First Amendment.

Id. at 150-51.

¹¹ Justice Werdegar’s concurring opinion is of controlling significance, because *Aguilar* was decided by a 4-3 vote, and Justice Werdegar provided the crucial fourth vote to uphold the injunction.

Second, Appellants insist that the proper formulation of the “*Central Hudson* test”¹² denies all First Amendment protection to commercial speech that “relates to” unlawful conduct. Appellants Reply Br. 17. In the numerous U.S. Supreme Court decisions that have followed *Central Hudson*, we are aware of *not a single instance* in which the first prong of the *Central Hudson* test was expressed using Appellants’ “relates to” phrasing. Rather, the first prong of the test is uniformly expressed as follows: “For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading.” *Reilly*, 533 U.S. at 554 (quoting *Central Hudson*, 447 U.S. at 566).

It is not surprising that Appellants prefer to use the “relates to unlawful activity” phrasing. The phrase “relates to” sweeps more broadly than the alternatives, and thus its use serves to encourage imposition of significant new limits on First Amendment protections for

¹² See *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y.*, (1980) 447 U.S. 557, 566. *Central Hudson* established a widely-followed four-part test for determining whether government restrictions on commercial speech violate the First Amendment. See, e.g., *Reilly*, 533 U.S. at 554.

commercial speech.¹³ But that is a phrasing that has never been used in connection with the four-part *Central Hudson* test.

Moreover, when it has been called upon to apply the *Central Hudson* test, the U.S. Supreme Court has deemed commercial speech to “concern lawful activity” so long as the commercial activity objectively being proposed thereby is not itself illegal. *See* Respondents Br. 42-43. The first prong of the *Central Hudson* test provides a justification for a government prohibition of commercial speech only if the commercial speech is “proposing unlawful activities.” *City of Cincinnati v. Discovery Network, Inc.* (1993) 507 U.S. 410, 432 (Blackmun, J., concurring).

Finally, Appellants have failed to demonstrate that they can meet the third and fourth prongs of the *Central Hudson* test (the speech

¹³ Large quantities of commercial speech routinely deemed entitled to substantial First Amendment protection nonetheless qualify as speech “related to” unlawful activity. For example, books describing life in the Mafia are undoubtedly “related to” unlawful activity. Yet, the Supreme Court has rejected the notion that the sale of such books, or advertisements promoting the sale of such books, could be banned. Indeed, the Supreme Court has explicitly held that States violate the First Amendment when they merely seek to confiscate royalties from the sale of a tell-all book written by a career criminal – for the purpose of ensuring that victims of the author’s crimes will be adequately compensated. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board* (1991) 502 U.S. 105.

regulation *directly advances* the asserted governmental interest, and it is not more extensive than is necessary to serve that interest). In particular, we fail to see how permitting acknowledged lawbreakers to proceed with this lawsuit directly advances California's interest in reducing youth smoking. The message that would be sent to California adolescents if Appellants were to prevail in this suit would be loud and clear: smoke all you want up until age 18; and regardless that you were fully aware that you were violating the law, we will refund to you all the money you spent in buying cigarettes. That sort of message would run directly counter to California's asserted interest; it would encourage additional smoking by those under 18, and would teach youth that the State is not serious about enforcing the prohibition against the purchase or receipt of tobacco products by minors.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the judgment of the Court of Appeal be affirmed.

Respectfully submitted,

Susan Liebeler
P. O. Box 4362
Malibu, CA 90264
(310) 589-5546

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: September 14, 2005

Counsel for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

I, Richard Samp, hereby certify that pursuant to Rule 29.1(c)(1), (c)(4) of the California Rules of Court, the enclosed Brief of Washington Legal Foundation as *amicus curiae* in support of Respondents is produced using 13-point Roman type including footnotes and contains approximately 5,867 words. I rely on the word count of the computer program used to prepare this brief.

Richard A. Samp

Dated: September 13, 2005

PROOF OF SERVICE

I am employed in Washington, District of Columbia. I am over the age of 18 and not a party to the within action. My business address is 2009 Massachusetts Ave., NW, Washington, DC 20036.

On September 13, 2005, I served the foregoing document described as

BRIEF OF WASHINGTON LEGAL FOUND. AS *AMICUS CURIAE*
on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED SERVICE LIST

I am “readily familiar” with the firm’s practice of collection and processing of correspondence for delivery to the U.S. Postal Service. Under that practice, I personally brought the envelopes to a branch of the Postal Service located in Arlington, Virginia and personally handed them to a Postal Service clerk.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2005, at Washington, District of Columbia.

Richard A. Samp

SERVICE LIST

Daniels v. Philip Morris Incorporated

Administrative Office of the Courts
Attn: Carlotta Tillman
455 Golden Gate Ave., 6th Floor
San Francisco, CA 94102

Hon. Ronald S. Prager
c/o Clerk of the Court
San Diego County Superior Court
330 West Broadway
San Diego, CA 92101

Clerk of the Court
California Court of Appeal
Fourth District, Division One
750 "B" Street, Suite 300
San Diego, CA 92101-8189

Mark Chavez
Chavez & Gertler
42 Miller Avenue
Mill Valley, CA 94941

H. Joseph Escher
Howard Rice Nemerovski
Three Embarcadero Center, 7th Fl.
San Francisco, CA 94111

Thomas E. Sharkey
501 West Broadway, Suite 540
San Diego, CA 92101-7910

Norman B. Blumenthal
Blumenthal & Markham
2255 Calle Clara
La Jolla, CA 92037-2431

Robert C. Wright
Wright & L'Estrange
701 B Street, Suite 1550
Imperial Bank Bldg.
San Diego, CA 92101

State Attorney General's Office
Attn: Consumer Law Section
1300 "I" Street
Sacramento, CA 95814

Office of District Attorney
Hall of Justice
330 West Broadway
San Diego, CA 92101

William S. Boggs
DLA Piper Rudnick Gray Cary
401 "B" Street, Suite 1700
San Diego, CA 92101

Gerald L. McMahon
Seltzer Caplan McMahon & Vitek
750 B St., Suite 2100
San Diego, CA 92101-8177

Steven D. Di Saia
Sedgwick Detert Moran & Arnold
801 S. Figueroa St., 18th Floor
Los Angeles, CA 90017

Lawrence W. Schonbrun
86 Eucalyptus Road
Berkeley, CA 94705

William T. Plesac
Jones Day
North Point, 901 Lakeside Ave.
Cleveland, OH 44114-1190

John F. McGuire, Jr.
Thorsnes, Bartolotta, McGuire
2550 Fifth Ave., Suite 1100
San Diego, CA 92103

Daniel P. Collins
Munger, Tolles &OLON LLP
355 S. Grand Ave. 35th Floor
Los Angeles, CA 90071-1560