

No. A-03-2020

STATE OF MINNESOTA
IN SUPREME COURT

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS
OF AMERICA, CAROLINA TOBACCO COMPANY,
AND WINNER TOBACCO WHOLESALE, INC.,

Appellants,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE,
IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF
THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

BRIEF OF *AMICUS CURIAE* R.J. REYNOLDS TOBACCO COMPANY IN
SUPPORT OF RESPONDENTS

Thomas H. Boyd,
No. 200517
Karl E. Robinson,
No. 274045
Winthrop & Weinstine, P.A.
Suite 3500
225 S. Sixth St.
Minneapolis, MN
55402-4629
Phone: (612) 604-6400

Mike Hatch
Attorney General
State of Minnesota
Bradford S. Delapena,
No. 219046
Asst. Attorney General
Office of the Minnesota
Attorney General
Suite 1100
445 Minnesota St.
St. Paul, MN 55101-2128
Phone: (651) 296-0987

Walter A. Pickhardt,
No. 0086782
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh St.
Minneapolis, MN 55402
Phone: (612) 766-7000

Stephen R. Patton, P.C.
Jonathan E. Moore
Kirkland & Ellis LLP
200 East Randolph Dr.
Chicago, IL 60601
Phone: (312) 861-2000

Counsel for Appellants

Counsel for Respondents

Counsel for Amicus Curiae

TABLE OF CONTENTS

STATEMENT OF *AMICUS CURIAE*1
STATEMENT OF ISSUE.....2
INTRODUCTION.....3
STATEMENT OF THE CASE.....3
STATEMENT OF FACTS.....3

 I. THE MINNESOTA AGREEMENT.....3

 II. THE EFFECTS OF THE MINNESOTA AGREEMENT4

 III. THE MINNESOTA CIGARETTE FEE ACT6

 IV. THE ABSENCE OF ANY SHOWING THAT APPELLANTS HAVE
 ATTEMPTED TO EXERCISE THE LIMITED FIRST AMENDMENT
 RIGHTS THAT THEY CLAIM ARE AFFECTED BY THE
 MINNESOTA AGREEMENT8

ARGUMENT9
CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

<i>Chapman v. Comm’r</i> , 651 N.W.2d 825 (Minn. 2002).....	18
<i>Council of Independent Tobacco Mfrs. of Am. v. State</i> , 685 N.W. 2d 467 (Minn. Ct. App. 2004).....	9, 12, 13
<i>FCC v. League of Women Voters</i> , 468 U.S. 364 (1988).....	10, 13, 14, 15
<i>Follett v. Town of McCormick</i> , 321 U.S. 573 (1944).....	15
<i>Freedom Holdings, Inc. v. Spitzer</i> , 357 F.3d 205 (2d Cir. 2004)	7
<i>Grosjean v. Am. Press Co.</i> , 297 U.S. 233 (1936).....	15
<i>Mariana v. Fisher</i> , 226 F. Supp. 2d 575 (M.D. Pa. 2002)	5
<i>Murdock v. Pennsylvania</i> , 319 U.S. 105 (1943).....	15
<i>R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.</i> , 199 F.Supp. 2d 362 (M.D.N.C. 2002).....	5
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	10, 11, 12, 13
<i>State v. Kolla</i> , 672 N.W.2d 1 (Minn. Ct. App. 2003).....	18

Statutes

Minn. Stat. § 297F.24	7, 13
Minn. Stat. § 645.17.....	18
Minn. Stat. § 645.20.....	18

STATEMENT OF *AMICUS CURIAE*¹

Amicus Curiae R.J. Reynolds Tobacco Company (“Amicus”) is the second largest cigarette manufacturer in the United States and one of the original parties to the settlement agreement in the lawsuit styled *State of Minnesota v. Philip Morris, Inc.*, No. C1-9r-8465, filed in the Second Judicial District of Ramsey County, Minnesota (“Minnesota Agreement”). Amicus submits this brief in support of the constitutionality of the Minnesota Cigarette Fee Act, Minn. Stat. § 297 F.24.

¹ No counsel for any party had any involvement whatsoever in the authoring of this brief, and no persons other than Amicus or its counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF ISSUE

This brief addresses only appellants' first issue (Appellants' Br. at 1) and respondents' second issue (Resps.' Br. at 1), which Amicus respectfully submits are properly stated as follows:

Whether a tax on the sale, use, and storage of cigarettes in Minnesota imposes an "unconstitutional condition" on cigarette manufacturers' First Amendment rights where the tax does not target or prohibit speech and any effect on a manufacturer's exercise of First Amendment rights occurs only if it elects to avoid the tax by entering into a voluntary settlement agreement with the State.

- The District Court and the Court of Appeals both ruled that the Act does not impose an "unconstitutional condition" or violate the First Amendment.

Speiser v. Randall, 357 U.S. 513 (1958)

FCC v. League of Women Voters, 468 U.S. 364 (1984)

Minneapolis Star & Tribune Co. v. Minn. Comm'r, 460 U.S.
575 (1983)

INTRODUCTION

Amicus agrees with and adopts the arguments set forth in the brief of Respondents the State of Minnesota and Dan Salomone in his capacity as Commissioner of the Minnesota Department of Revenue (collectively, “the State”) and will not repeat those arguments here. Instead, Amicus presents below additional arguments and authority in support of the State’s position that the Act does not impose an “unconstitutional condition” and thus does not violate the First Amendment. As a result, this brief responds only to Part I of appellants’ brief.

STATEMENT OF THE CASE

Amicus adopts the State’s Statement of the Case.

STATEMENT OF FACTS

Amicus adopts the State’s Statement of Facts and supplements that statement as follows.

I. THE MINNESOTA AGREEMENT

The May 1998 Settlement Agreement between the State and Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris, Inc., and Amicus R.J. Reynolds Tobacco Company (collectively, the “Major Manufacturers”) included both economic and non-economic terms.

The Minnesota Agreement’s economic terms included the Major Manufacturers’ agreement to make “Initial Payments” totaling more than \$1.3 billion in six annual installments from 1998 through 2003. (App. 131.) In addition, the Major Manufacturers agreed to make ongoing “Annual Payments” in perpetuity that were estimated to total

more than \$4.8 billion over the first 25 years of the settlement, before adjustment for inflation and changes in volume. (App. 73-74, 133-34.)

The Agreement's non-economic terms include an agreement to refrain from certain marketing and advertising practices that might promote youth smoking. This included an agreement (1) to discontinue billboard and transit advertisements in the State (App. 142), (2) not to pay for product placements in movies (App. 143), and (3) to cease marketing or licensing non-tobacco merchandise (such as t-shirts and caps) with the brand name or symbol of any cigarette (App. 142-43).

The Major Manufacturers also agreed that they would not oppose potential future legislation "to reduce tobacco use by children" concerning six specifically-described subject matters, including "[l]egislation providing enhanced or coordinated funding for enforcement efforts" of statutes imposing limits on youth access and "[l]egislation to create or stiffen non-monetary incentives for youth not to smoke, such as expansion of youth community service programs." (App. 139, 153.)

Finally, the Major Manufacturers agreed not to "[f]acially challenge the enforceability or constitutionality of [then-]existing Minnesota laws or rules relating to tobacco control," including "Minnesota Statutes Sections 461.12, et seq., and 609.685 regarding the sale of tobacco to minors." (App. 139.)

II. THE EFFECTS OF THE MINNESOTA AGREEMENT

The Minnesota Agreement, as well as similar settlement agreements entered into with other states, have put the Major Manufacturers at a significant cost disadvantage compared to appellants and other non-settling manufacturers. This competitive

disadvantage has led to a loss of market share by the Major Manufacturers to appellants and other new entrants, which have flooded the market with low-priced cigarettes. These non-settling manufacturers now account for more than 12% of all cigarette sales. (App. 78-79.)

When the Minnesota Agreement was entered into in 1998, the Major Manufacturers produced approximately 98% of all cigarettes sold in the U.S. (App. 78-79.) By May 2003, when the State Legislature passed the Cigarette Fee Act, the competitive landscape had changed dramatically. As the Major Manufacturers entered into settlement agreements with Minnesota and the remaining 49 states in 1997 and 1998 calling for up to \$9 billion in payments annually, they greatly increased their cigarette prices. *See Mariana v. Fisher*, 226 F. Supp. 2d 575, 578 (M.D. Pa. 2002), *aff'd*, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 72 U.S.L.W. 3407, 3522, 3535 (Feb. 23, 2004) (No. 03-806). This led to the entry into the market of scores of new entrants and discount brands, selling at prices far below those of the Major Manufacturers. *See, e.g., R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.*, 199 F. Supp. 2d 362, 366-67, 378-79 (M.D.N.C. 2002), *aff'd*, 67 Fed. Appx. 810 (4th Cir. 2003) (unpublished); “Pack of Renegades; Tobacco Deal Has Unintended Effect: New Discount Smokes,” *Wall Street Journal*, May 1, 2001, at A1; “Cheap Smokes Are Squeezing Big Tobacco,” *Wall Street Journal*, Nov. 14, 2002, at C1.² By 2003, these non-settling manufacturers had increased

² As the *Wall Street Journal* concluded in a front-page article in May 2001:

(Continued...)

their share of the market to 12% or more. (App. 78-79.) The Major Manufacturers' market share had dropped by a corresponding amount, to less than 88%. (App. 79.)

III. THE MINNESOTA CIGARETTE FEE ACT

The November 23, 1998 Master Settlement Agreement between the Major Manufacturers and 46 states ("MSA") anticipated the effect of these competitive disadvantages. It sought to "level the playing field" through so-called "Qualifying

The rise of Patriot and other small makers of low-price cigarettes is an unintended consequence of the legal settlement reached between the major manufacturers and 46 state governments in November 1998. In that landmark deal, the states sought to recoup the cost of caring for sick smokers. The states and public-health advocates also expected the sheer size of the settlement -- a combined \$206 billion over 25 years -- to discourage smoking by forcing the large tobacco companies to raise prices. The big manufacturers have done just that: Wholesale list prices, excluding taxes, have risen early 80% since the settlement.

In response, upstart cigarette makers have swarmed into the market, reversing a century-long trend of industry consolidation. They are selling cigarettes at or below prices available before the settlement. Some cut-rate smokes are selling for as little as \$1 a pack, compared with an average retail price of more than \$3 for big-name brands, such as Marlboro.

"Pack of Renegades: Tobacco Deal Has Unintended Effect," *Wall Street Journal*, May 1, 2001, at A1. See also, "Cheap Smokes Are Squeezing Big Tobacco," *Wall Street Journal*, November 14, 2002, at C1:

Cigarette prices have skyrocketed as a result of the \$206 billion multistate tobacco settlement in 1998, an unprecedented spate of state excise-tax increases and the tobacco companies' own desire for higher profits. The average retail price of a pack of premium cigarettes is \$3.58, up about 90% since 1997.

The result: More and more smokers are quitting or trading down to bargain-basement cigarettes with names such as Rave, Hi-Val and Double Diamond, sold by a bevy of small companies, many of which didn't even exist a decade ago. Cut-rate cigarette makers command nearly 10% of the market, compared with 3% in 1998, and they are growing fast.

Statutes” that would require non-settling manufacturers to either join the MSA or pay a fee into escrow for each pack that they sold equal to the per-pack payment under the MSA. (App. 76-77; MSA § IX(d), Ex. T.³) However, due to non-settling manufacturers’ non-compliance with these statutes and a loophole that allowed non-settling manufacturers to limit their liability for escrow payments by concentrating initial sales of their products in a few states, these statutes have been largely ineffective. *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 213 (2d Cir. 2004).

Minnesota adopted a different approach that was not subject to these defects -- a 35-cent-per-pack fee to be collected from *distributors* on the sale, use, and storage of “nonsettlement cigarettes” within the State. Minn. Stat. § 297F.24 (2003). (App. 80.) Under the Cigarette Fee Act, cigarettes are subject to the fee unless their manufacturer either (a) is currently making annual payments to the State under the Minnesota Agreement; or (b) has entered an agreement on “terms similar” to the Minnesota Agreement, “including making annual payments to the State. . . equal to at least 75 percent” of the amount that the manufacturer would pay under the Minnesota Agreement. § 297F.24, subd. 2.

The Cigarette Fee Act does not define what is meant by “terms similar” to those in the Minnesota Agreement except to require that the manufacturer make annual payments of at least 75% of the amount it would have paid if it were a party to the Minnesota Agreement. *See* § 297F.24, subd. 2. However, shortly after the Act was enacted, the

³ Available at http://www.naag.org/upload/1032468605_cigmsa.pdf.

Minnesota Commissioner of Revenue construed “terms similar” to include both the economic and the noneconomic terms of the Minnesota Agreement, including its restrictions on certain advertising and lobbying. (App. 81.)

IV. THE ABSENCE OF ANY SHOWING THAT APPELLANTS HAVE ATTEMPTED TO EXERCISE THE LIMITED FIRST AMENDMENT RIGHTS THAT THEY CLAIM ARE AFFECTED BY THE MINNESOTA AGREEMENT

Although appellants claim that they have brought this challenge to the Cigarette Fee Act because they “do not want to relinquish their First Amendment rights” (Appellants’ Br. at 13), appellants do not claim -- and have submitted absolutely no evidence -- that they have ever attempted to exercise any of the advertising and lobbying rights they would give up if they elected to enter into a voluntary settlement with the State.

In particular, appellants do not claim (and have not submitted any evidence) that they have ever (1) purchased billboard or transit advertisements in the State, (2) paid for product placements in movies, or (3) marketed or licensed non-tobacco merchandise with their brand names or logos in the State. (*See* App. 142, 143.) To the contrary, appellants concede that they sell unadvertised, discount brands that “compete[] primarily on price.” (Appellants’ Br. at 14; *see* App. 289-90, 293-95.)

Nor do appellants claim that they have ever lobbied against the “potential future legislation to reduce tobacco use by children” concerning the six specifically identified subjects that are set forth in the State’s May 1998 Settlement Agreement with the Major

Manufacturers, or even that such legislation has been introduced in the six years since that settlement was entered into. (*See* App. 139, 153.)

Finally, appellants do not claim (and have not submitted any evidence) that they have ever attempted to “[f]acially challenge the enforceability or constitutionality” of those “Minnesota laws or rules relating to tobacco control” that existed as of May 1998, when the State entered into the Settlement Agreement with the Major Manufacturers. (*See* App. 139, 72.)

What appellants do claim, however, is that the 35-cent-per-pack fee imposed by the Act has reduced the competitive advantage they previously enjoyed over the Major Manufacturers due to the cost of the Minnesota Agreement. (App. 289-90, 293-94; Appellants’ Br. at 13-15.) It was undisputed below that this competitive advantage was equal to 64 cents per pack. (App. 299, 245.) Accordingly, the Cigarette Fee Act has reduced by approximately one-half the 64-cent-per-pack competitive disadvantage that the Major Manufacturers suffer as a result of the Minnesota Agreement.

ARGUMENT

Appellants’ constitutional challenge to the Cigarette Fee Act hinges upon their theory that the Act imposes an “unconstitutional condition” on their First Amendment rights. As appellants acknowledge, without an unconstitutional condition, the Act does not raise any First Amendment issue. (Appellants’ Br. at 15, 17, 20.) And as the Court of Appeals held, without any First Amendment issue, the Act is entitled to a presumption of constitutionality and need only satisfy the rational basis test. *Council of Independent Tobacco Mfrs. of Am. v. State*, 685 N.W. 2d 467, 473 (Minn. Ct. App. 2004); *see also*

Appellants' Br. at 19, 35; Resps.' Br. at 23-25. Moreover, the alleged abridgement of appellants' First Amendment rights is the basis both for their equal protection and bill of attainder challenges to the Act. (See Appellants' Br. at 34-35.) Accordingly, appellants' constitutional challenge to the Act depends on proving that the Act imposes an unconstitutional condition.

But the "unconstitutional conditions" doctrine simply does not apply here. The Cigarette Fee Act is a tax on cigarettes, not speech. Specifically, it is a tax "imposed upon the sale of nonsettlement cigarettes" by cigarette distributors. Minn. Stat. § 297 F.24, subd.1. Further, because it is levied at 1.75 cents per cigarette, the tax is directly correlated to cigarette sales. *Id.* There is no explicit or even implicit tax on speech. The Act does not target, prohibit, or restrict speech in any way. Any effect on speech can only occur through a manufacturer's election to avoid the tax by entering into a voluntary settlement with the State. Appellants do not cite a case -- nor has Amicus discovered any -- that has struck down a statute under circumstances even remotely similar to those here.

Appellants base their "unconstitutional condition" argument on two cases -- *Speiser v. Randall*, 357 U.S. 513 (1958), and *FCC v. League of Women Voters*, 468 U.S. 364 (1988). (Appellants Br. at 18-20.) Neither case supports appellants' argument. In each, the statute that was struck down contained an express prohibition or restriction on speech. See *Speiser v. Randall*, 357 U.S. 513, 516 (1958) ("The present legislation. . . purports to deal directly with speech and the expression of political ideas."); *FCC v. League of Women Voters*, 468 U.S. 364, 365, 366 (1984) (statute expressly prohibited

“editorializing” and was “specifically directed” at “. . . expression of editorial opinions”). The Cigarette Fee Act does not contain any such express prohibition or restriction. Indeed, it does not even reference speech at all. Instead, it imposes a fee on the sale, use and storage of cigarettes.

As a threshold matter, appellants misstate the holding in *Speiser v. Randall*. The Supreme Court did *not* hold “that, just as the State could not constitutionally require veterans to take the loyalty oath, the State likewise could not tax only those veterans who refused to take the loyalty oath.” (Appellants’ Br. at 20-21.) In fact, the Court assumed that the State *could* constitutionally condition the tax exemption on the veterans’ willingness to take the loyalty oath. *See* 357 U.S. at 519-20. What made the statute unconstitutional was not that it required a loyalty oath, but rather that it improperly shifted the burden of proof to the taxpayer to establish his or her loyalty. *See id.* at 521-22, 529. The Court did *not* hold that the statute imposed an “unconstitutional condition.” The Court held only that the State had violated the Due Process Clause by shifting the burden of proof from the State to the taxpayer regarding the taxpayer’s loyalty to the government. *Id.* at 529. What troubled the Court was the presumption that the taxpayer was guilty until proven innocent. *See id.* at 526; *see also id.* at 532-33 (Douglas, J., concurring).

The Cigarette Fee Act does not raise any of the due process concerns underlying the holding in *Speiser*. Furthermore, appellants have not made any procedural due process claim on appeal (Appellants’ Br. at 3, n.2) and thus could not rely on *Speiser*’s due process holding, even if it were applicable (which it is not).

Accordingly, appellants do not rely on *Speiser*'s actual holding, but rather a discussion within the Court's decision where it rejected California's preliminary argument that due process requirements did not apply because the statute in question did not abridge any constitutional right -- viz. that since "a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech." *Id.* at 518. But in rejecting this argument the Court made clear that First Amendment concerns were only implicated because the challenged provision directly targeted speech. *Speiser*, 357 U.S. at 527 (distinguishing prior cases upholding restrictions where "there was no attempt *directly* to control speech" and where effect on exercise of First Amendment rights "was *only indirect*"; in contrast, tax-form loyalty-oath requirement at bar "purports to deal *directly* with speech and the expression of political ideas"). The California tax statute in *Speiser*, on its face, expressly required that a taxpayer refrain from engaging in political speech (*i.e.*, "advocat[ing] the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means"), in order to qualify for a tax exemption. *Id.* at 517, 517 n.2. The only purpose of this provision was to restrain speech: "The present legislation . . . purports to deal directly with speech and the expression of political ideas." *Id.* at 527. Moreover, the statute was "frankly aimed at the suppression of dangerous ideas." *Id.* at 519.

As the Court of Appeals correctly found, the Cigarette Fee Act "is *not* a direct attempt to regulate speech" and is plainly *not* "aimed at the suppression of dangerous ideas." *Council of Independent Tobacco Mfrs.*, 685 N.W. 2d at 472-73 (emphasis added); *see Speiser*, 357 U.S. at 519, 527. The Act does not even reference speech at all, let

alone expressly and directly restrict manufacturers' First Amendment rights. Indeed, under the Act, the tax is not even imposed on manufacturers, but rather on distributors. And First Amendment rights only come into play in the event the manufacturer (who does not pay the tax) elects to avoid the tax on its product by entering a settlement with the State. Moreover, as the Court of Appeals recognized, the Act "has a legitimate purpose that is not a direct attempt to stifle speech." *Council of Independent Tobacco Mfrs.*, 685 N.W. 2d at 473; *see also Speiser*, 357 U.S. at 527 (distinguishing statute properly upheld where its purpose was "to achieve . . . objective[s] other than the restraint on speech"). As the Act makes clear on its face, these purposes are (1) to "ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes"; and (2) to "prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers." Minn. Stat. § 297F.24, subd.1(b).

In short, *Speiser* is completely inapplicable, both legally and factually. Its only relevance here is that it makes clear that concerns about "constitutional conditions" do not apply -- and First Amendment rights are not infringed -- unless, unlike here, the statute on its face *directly* restrains speech.

The other case appellants primarily rely, *FCC v. League of Women Voters*, 468 U.S. 364 (1984), likewise involved a statute that directly targeted speech, by expressly barring any public broadcasting station which received a grant from the Corporation for Public Broadcasting from "engag[ing] in editorializing." *Id.* at 365, 381 ("[T]he

restriction imposed by § 399 is *specifically directed* at a form of speech -- namely, the expression of editorial opinion -- that lies at the heart of First Amendment protection.”) (emphasis added). The statute in *League of Women Voters* expressly on its face forbade speech; there was nothing indirect or voluntary about its applicability. *Id.* at 366; Public Broadcasting Act of 1967, 81 Stat. 365 (“No noncommercial educational broadcasting station *may engage in editorializing* or may support or oppose any candidate for political office.”) (emphasis added). The sole purpose of the statute was to restrain speech. Moreover, the form of speech that the statute forbade was editorializing by the press, which the Court emphasized was at the core of the First Amendment. *Id.* at 381 (“[T]he restriction imposed by § 399 is specifically directed at a form of speech -- namely, the expression of editorial opinion -- that lies at the heart of First Amendment protection.”). As the Court explained, the fact that the statute was aimed at the press raised unique concerns:

[T]he special place of the editorial in our First Amendment jurisprudence simply reflects the fact that the press, of which the broadcasting industry is indisputably a part, carries out a historic, dual responsibility in our society of reporting information and of bringing critical judgment to bear on public affairs.

Id. at 382 (citations omitted).

The Cigarette Fee Act contains none of these features. The Act imposes a tax on the sale of cigarettes; it does not prohibit or restrict speech of any kind. Moreover, unlike the ban on “editorializing” in *League of Women Voters*, the Act is not imposed exclusively on the press and thus does not raise the unique concerns that underlay the decision in *League of Women Voters*.

The third case appellants principally rely on -- *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) -- is not even an unconstitutional conditions case. In *Minneapolis Star*, the Court struck down a tax imposed on the use of paper and ink in the production of newspapers. *Id.* at 578, 592-93. Like *League of Women Voters*, the statute in *Minneapolis Star* imposed restrictions aimed specifically at the press. The Court pointed out the unique dangers arising from a tax that applies exclusively to the press. *Id.* at 585; *see also Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) (“[T]his is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.”). Thus, “[a] tax that singles out *the press*, or that targets individual publications within the press, places a heavy burden on the State to justify its action.” *Minneapolis Star*, 460 U.S. at 592-93 (emphasis added). Of course, the Cigarette Fee Act has nothing to do with the press, and cases like *Minneapolis Star* are completely inapplicable here. Appellants sell cigarettes, not newspapers.⁴

⁴ Equally misplaced is appellants’ reliance on *Follett v. Town of McCormick*, 321 U.S. 573 (1944). (See Appellants’ Br. at 20.) *Follett* involved a challenge to ordinances imposing license fees on solicitation as applied to the distribution of religious literature by door-to-door evangelists. *See* 321 U.S. at 574. The Court held unconstitutional the requirement that evangelists obtain a license or be banned from proselytizing. 321 U.S. at 577. The Court reasoned that a flat license tax on the privilege of preaching and evangelizing was a form of prior restraint that mandated an implied exemption for such persons from an otherwise generally applicable tax. *See Follett*, 321 U.S. at 577-78; *see also Murdock v. Pennsylvania*, 319 U.S. 105, 106, 110, 112-14 (1943) (holding similar provision unconstitutional as applied to evangelists for the same reasons). *Follett* is completely inapplicable here. The Cigarette Fee Act does not impose any restraint on speech, let alone the requirement of a license or some other form of prior restraint. The
(Continued...)

In sum, none of the cases appellants cite support their “unconstitutional condition” argument. Each is both factually and legally distinguishable. By contrast, courts have rejected “unconstitutional condition” challenges where the statute, like the Cigarette Fee Act, does not refer to speech, does not directly affect speech, and is not aimed at the suppression of “dangerous ideas” and/or the press. *See Regan*, 461 U.S. at 548 (“The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ‘aim[] at the suppression of dangerous ideas.’”) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)); *id.* (“We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect.”); *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179, 1206 (rejecting unconstitutional condition challenge to MSA Qualifying Statute where the statute was “wholly unlike the situation in *Speiser*, where ‘[t]he denial [of a tax exemption] is frankly aimed at the suppression of dangerous ideas.’”) (C.D. Cal. 2000) (quoting *Speiser*, 357 U.S. at 518) (alterations in original). Indeed, the Cigarette Fee Act contains none of the characteristics courts have found objectionable.

At bottom, what appellants are complaining about here is not a loss of First Amendment rights. Rather, it is the assessment of a fee in connection with the sale of their cigarettes, and the corresponding reduction in the unfair competitive advantage they previously enjoyed over Amicus and other cigarette manufacturers who are parties to the

Act simply imposes a tax on cigarettes. Manufacturers’ free speech rights are affected only if they seek to *avoid* the tax by voluntarily entering into a settlement with the State.

Minnesota Agreement. This is established by the fact that appellants would be in exactly the same position if the Act did not include the provision on which their “unconstitutional condition” argument is grounded -- Subdivision 2(2), which provides that a fee is not owed on cigarettes manufactured by a manufacturer that “has voluntarily entered into an agreement with the State of Minnesota . . . agreeing to terms similar to those contained in the [Minnesota Agreement]” Minn. Stat. § 297F.24, subd.2(2). In that event, appellants’ cigarettes would still be subject to a fee of 35 cents per pack, yet there could be no claim of any “unconstitutional condition.” All that the challenged provision does is provide appellants an option to avoid the tax by “voluntarily enter[ing] into” a settlement with the State. *Id.* Moreover, the “benefit” to be obtained from this voluntary settlement option is *not* avoiding a payment with respect to the manufacturer’s cigarettes. As the State points out, that payment will be required in any event and, indeed, is 25% *greater* under the settlement option (48 cents instead of 35 cents). (Respondents’ Br. at 11-12.) Rather, the benefit from the settlement option is a release from future claims by the State, and the settlement tradeoff from the manufacturer’s perspective is whether that release is worth an additional payment of 13 cents per pack and the sacrifice of certain marketing and lobbying rights. In short, appellants’ complaint is *not* that they can only avoid a payment with respect to their cigarettes if they elect to give up their First Amendment rights. It is that such a payment has to be paid, no matter which option they elect. Yet, appellants do not -- because they cannot -- cite any authority holding that such a payment is unconstitutional.

In sum, the Cigarette Fee Act is a tax on cigarettes, not speech. It does not impose an unconstitutional condition on the exercise of any First Amendment right. It targets appellants' pocketbooks, not their ideas. Accordingly, appellants' First Amendment challenge to the Act fails.⁵ Furthermore, because appellants' Equal Protection argument is premised on infringement of a fundamental right, that challenge also fails.

CONCLUSION

For the foregoing reasons, Amicus R.J. Reynolds Tobacco Company respectfully requests that the Court affirm the decision of the Court of Appeals and the judgment of the District Court.

⁵ Amicus fully supports the State's position that the Cigarette Fee Act is constitutional, even if "terms similar" is construed to include the noneconomic terms of the Minnesota Agreement as well as its economic terms. However, the only settlement term that the statute explicitly requires is that annual payments be equal to at least 75 percent of the payments that would apply if the manufacturer were one of the original parties to the Minnesota Agreement. Accordingly, any concern that the Attorney General's construction of "terms similar" to include marketing and lobbying restrictions renders the Act unconstitutional as applied would be completely addressed simply by limiting application of the "terms similar" provision to the economic terms of the Minnesota Agreement. See Minn. Stat. § 645.17(1)-(3) (1947). Moreover, even if the Court were to conclude that the Act was unconstitutional and that such a limiting construction could not be adopted, the proper remedy would be to sever the "terms similar" provision rather than striking the entire statute. Minn. Stat. § 645.20 (2000); *Chapman v. Comm'r*, 651 N.W.2d 825, 835-36 (Minn. 2002); *State v. Kolla*, 672 N.W.2d 1, 12 (Minn. Ct. App. 2003).

Dated: January 25, 2005

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Walter A. Pickhardt", written over a horizontal line.

Walter A. Pickhardt (0086782)
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
Phone: (612) 766-7000
Fax: (612) 766-1600

Stephen R. Patton, P.C.
Jonathan E. Moore
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, IL 60601
Phone: (312) 861-2000
Fax: (312) 861-2200

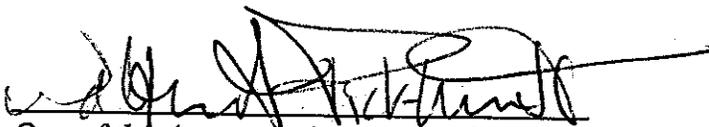
*Attorneys for Amicus Curiae R.J. Reynolds
Tobacco Company*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Amicus Curiae R.J. Reynolds Tobacco Company in Support of Respondents complies with the word-count limitation and typeface requirements provided in Rule 132 of the Minnesota Rules of Civil Appellate Procedure. Microsoft Word 1997 was used to prepare the brief, which contains 4,831 words.

Dated: January 25, 2005

Respectfully submitted,


*One of the Attorneys for Amicus Curiae R.J.
Reynolds Tobacco Company*