

No. A-03-2020

**STATE OF MINNESOTA  
IN SUPREME COURT**

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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.

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**APPELLANTS' REPLY BRIEF**

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## ARGUMENT

The Cigarette Fee Act imposes a tax on Appellants' and other non-settling cigarette manufacturers' products that is tantamount to forcing a litigation settlement onto parties that have never been sued. If the State has a cause of action against Appellants or any other non-settling manufacturer, it can file suit. Of course, in a lawsuit, Appellants would have a chance to defend themselves through the judicial process. The Cigarette Fee Act affords them no such process, is unconstitutional and is unfair. The Tax imposed by the Act punishes cigarette makers who, unlike the Major Cigarette Manufactures, have never been accused of lying to the American people about the health effects of smoking. The Majors had their chance to defend themselves in court and they voluntarily chose to settle with the State. Basic fairness dictates that Appellants be afforded the same opportunity before they are punished in the same manner.

The State of Minnesota's ("State") and *amicus curiae* R.J. Reynolds Tobacco Company's ("R.J. Reynolds") arguments fail to establish that the Cigarette Fee Act is constitutional. First, the State and R.J. Reynolds claim that the Cigarette Fee Act does not violate the First Amendment because it does not expressly target speech and is not a direct attempt to suppress speech. However, the United States Supreme Court has long since "resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax [such as the Cigarette Fee Act] on First Amendment grounds: 'Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.'" Leathers v. Medlock, 499 U.S. 439, 445 (1991) (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592

(1983)). Indeed, the Supreme Court explained more than four decades ago that the legislative purpose underlying a statute like the Cigarette Fee Act is irrelevant to determining if it violates the First Amendment. “In Speiser v. Randall, 357 U.S. 513 [1958], we emphasized that conditions upon public benefits cannot be sustained if they so operate, *whatever their purpose*, as to inhibit or deter the exercise of First Amendment freedoms.” Sherbert v. Verner, 374 U.S. 398, 405 (1963) (emphasis added).

Second, the Cigarette Fee Act is subject to strict scrutiny under the Equal Protection Clause because it taxes products based upon whether the manufacturer has surrendered its First Amendment rights. However, neither the State nor R.J. Reynolds has even attempted to establish that the Act satisfies strict scrutiny. Indeed, they cannot because, when subjected to strict scrutiny, the Cigarette Fee Act is unconstitutional.

Finally, the State’s argument that the Cigarette Fee Act is not a bill of attainder because the Tax is based solely on Appellants’ “future conduct” is simply wrong. The Tax is not imposed because of the prospective sale of cigarettes in Minnesota; if it were, the Majors’ products would be subject to the Tax. Instead, the Tax is imposed based on a party’s past conduct, namely, whether the manufacturer was part of the settlement of the State Tobacco Lawsuit or whether the manufacturer has entered into a similar, “voluntary” settlement. Of course, the only manufacturers who were part of the State Tobacco Lawsuit settlement are those who were accused of fraud, false advertising and anti-trust violations. The Cigarette Fee Act is an unconstitutional bill of attainder because it requires the payment of the Tax which the State concedes is meant to

approximate the “retribution payments” made by the Majors to settle the State Tobacco Lawsuit—a lawsuit based on the Majors “decades long deceit” of the American people.

**I. THE CIGARETTE FEE ACT IS UNCONSTITUTIONAL BECAUSE IT IMPOSES A TAX BASED ON WHETHER A TOBACCO MANUFACTURER HAS WAIVED ITS FIRST AMENDMENT RIGHTS.**

It is undisputed that, until and unless a cigarette manufacturer relinquishes its fundamental First Amendment rights to lobby, advertise, and access the courts, its products are subject to the Tax imposed by the Cigarette Fee Act. It is also undisputed that, once a cigarette manufacturer surrenders its First Amendment rights to lobby and advertise, its products are exempt from the Tax imposed by the Cigarette Fee Act. Thus, the Cigarette Fee Act denies a tax exemption to Appellants based on their failure to relinquish their First Amendment rights. As such, the Cigarette Fee Act is unconstitutional. “To deny [a tax] exemption to [parties] who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech,” and it is therefore unconstitutional. Speiser v. Randall, 357 U.S. 513, 518 (1958).<sup>1</sup>

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<sup>1</sup> R.J. Reynolds apparently suggests that Appellants lack standing to raise their First Amendment claims because Appellants have not shown “that they have ever attempted to exercise” the First Amendment rights prohibited by the Minnesota Settlement Agreement. Amicus Br. at 8. However, whether Appellants actually exercise the rights prohibited by the Minnesota Agreement is irrelevant. See NAACP v. Button, 371 U.S. 415, 432 (1963) (“The instant decree may be invalid if it prohibits privileged exercises of First Amendment rights *whether or not* the record discloses that the petitioner engaged in privileged conduct”) (emphasis added). In any event, this argument has never been raised by the State, and therefore cannot be raised by R.J. Reynolds. See Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 687 n.7 (Minn. 1997) (refusing to review issue that was “neither reached by the district court nor raised by a party before” the Supreme Court).

**A. Whether the Cigarette Fee Act Directly References Speech is Irrelevant to Determining Whether it is Constitutional.**

The State argues throughout its brief that the Cigarette Fee Act does not violate the First Amendment because it “is not framed in terms of speech.” See, e.g., Resp. Br. at 26, 32. Similarly, R.J. Reynolds claims that the Act’s failure to “reference speech” somehow saves it from violating the First Amendment. Amicus Br. at 12-13. The fact that the Cigarette Fee Act does not contain the word “speech” is irrelevant to determining whether the Cigarette Fee Act violates the First Amendment. The United States Supreme Court has long held that statutes which do not explicitly reference speech may violate the First Amendment. See, e.g., NAACP v. Alabama, 357 U.S. 449, 461 (1958) (although “unintended,” abridgement of free speech rights “may inevitably flow from varied forms of government action”); Sherbert v. Verner, 374 U.S. 398, 404 (statute violated First Amendment as an unconstitutional condition on government benefits “even though the burden may be characterized as being only indirect”).

Contrary to the State’s and R.J. Reynolds’ misguided arguments, the only material issue is whether the Cigarette Fee Act has the effect of interfering with or burdening First Amendment rights. See, e.g., Minneapolis Star & Tribune, 460 U.S. at 592 (“We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.”).

Non-settling manufacturers suffer the burden of the statute’s Tax—only their products are taxed—while the Cigarette Fee Act withholds from them a Tax exemption, which applies only to products made by companies that have surrendered their First

Amendment rights. Thus, the Cigarette Fee Act burdens Appellants' First Amendment rights because it requires Appellants' products to be taxed as a condition to Appellants' retention of their rights. Therefore, the Act is unconstitutional.

Of course, even if the State and R.J. Reynolds were correct that a statute had to be "framed in terms of speech" or "reference speech" to violate the First Amendment, the Cigarette Fee Act would still be unconstitutional. The Cigarette Fee Act is framed in terms of speech and references speech. In its definition of non-settlement cigarettes, the Act expressly exempts from taxation products made by manufacturers that have surrendered their First Amendment rights by specifically identifying the Minnesota Settlement in which the Majors relinquished such rights. In turn, the Cigarette Fee Act also explicitly taxes only those products made by manufacturers that have refused to surrender their First Amendment rights.<sup>2</sup>

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<sup>2</sup> R.J. Reynolds' argument that the Cigarette Fee Act imposes "a tax on cigarettes, not speech," Amicus Br. at 10, is misleading because the Act only taxes cigarettes manufactured by companies who refuse to relinquish their First Amendment rights, thus making it a tax on Appellants' speech. Under R.J. Reynolds' mistaken theory, the tax on ink and paper at issue in Minneapolis Star & Tribune was not a tax on speech, but on paper and ink. The Supreme Court, however, correctly rejected this flawed logic and held that because the tax targeted select companies based on their First Amendment activities, it violated the First Amendment. 460 U.S. at 591-92; see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) ("Characterization of an entity as a member of the 'media' is irrelevant" under First Amendment analysis of a statute that places a financial burden on exercising such rights); Leathers, 499 U.S. at 447 ("A tax is also suspect if it targets a small group of speakers.").

R.J. Reynolds' argument is also disingenuous because R.J. Reynolds itself has raised First Amendment challenges to state cigarette taxes. See R.J. Reynolds Tobacco Co. v. Shewry, 384 F.3d 1126 (9th Cir. 2004). Apparently, cigarette taxes implicate the First Amendment when R.J. Reynolds has to pay them, but do not when they are imposed only on its competitors' products.

**B. Whether the Cigarette Fee Act Is Expressly Aimed at the Suppression of Speech is Irrelevant to Determining Whether it is Constitutional.**

The State argues that the Cigarette Fee Act is constitutional because it “is not aimed at the suppression of speech.” Resp. Br. at 31. Similarly, R.J. Reynolds claims the Act is constitutional because it is not a direct attempt to regulate or suppress speech. Amicus Br. at 12-13. However, it is well established that a statute can violate the First Amendment regardless of the Legislature’s intent, motives or purposes. See, e.g., Sherbert, 374 U.S. at 405 (statutes that “operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms” are unconstitutional); Leathers, 499 U.S. at 445 (no requirement that legislature have “censorial motive”); Minneapolis Star & Tribune, 460 U.S. at 592 (no requirement that legislature have illicit intent). Indeed, in Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991), the Court expressly *rejected* the government’s argument that “discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.” 502 U.S. at 117. The Court explained that the government’s assertion was “incorrect,” and that a party challenging a statute under the First Amendment “need adduce ‘no evidence of improper censorial motive’” to succeed. Id. (quoting Arkansas Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987)). Thus, contrary to the State’s and R.J. Reynolds’ arguments, Appellants are not required to show an “improper censorial motive” to prevail on their First Amendment claims challenging the Cigarette Fee Act. Id.

It is also well settled that a statute may impermissibly restrict speech even when those burdens are unintended or incidental. In NAACP v. Alabama, 357 U.S. 449 (1958), the United States Supreme Court recognized that the abridgement of free speech rights, “even though unintended, may inevitably follow from varied forms of governmental action.” Id. at 461. Thus, government action “that may appear to be totally unrelated to protected liberties” may nevertheless be unconstitutional if it has “the practical effect of discouraging the exercise of constitutionally protected political rights.” Id.

In fact, statutes can violate the First Amendment’s free speech guarantees even when they “appear to be totally unrelated to protected liberties.” Id.; see also Sherbert v. Verner, 374 U.S. 398, 404 (1963) (statute violated First Amendment “even though the burden may be characterized as being only indirect”). Accordingly, inadvertent or unintended infringements of First Amendment rights are just as unconstitutional as purposeful abridgements of such freedoms.

Indeed, in the context of challenges to state tax laws that discriminate among similarly situated parties based on their First Amendment rights (as the Cigarette Fee Act does), the United States Supreme Court has specifically held that “improper censorial motive” is *not* required. Leathers, 499 U.S. at 445 (citing Minneapolis Star & Tribune, 460 U.S. at 592). As the Court explained in a subsequent case, it held the Minnesota tax law in Minneapolis Star & Tribune violated the First Amendment despite the fact that there was “no evidence of impermissible legislative motive in the case apart from the structure of the tax itself.” Leathers, 499 U.S. at 445. Instead, the structure of the Act

and its improper burden on Appellants' First Amendment rights is more than sufficient to establish that the statute is unconstitutional. Id.

In any event, the Cigarette Fee Act, in fact, *does* suppress and burden speech by requiring a manufacturer to either surrender its First Amendment rights or subject its products to the Tax. Unless it surrenders its First Amendment rights, its products are subject to the Tax. This structure clearly suppresses and burdens free speech. See also Thompson v. W. States Med. Ctr., 535 U.S. 357 (2002) (statute that exempted certain drugs from FDA approval process, so long as drug providers agreed to surrender their right to advertise the drugs, violated First Amendment).

R.J. Reynolds suggests in a footnote that this Court should rewrite the Cigarette Fee Act to save it from violating the First Amendment. Amicus Br. at 18, n.5. Because the State has never raised this issue, this Court should not address this argument. See Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 687 n.7 (Minn. 1997) (refusing to review issue that was “neither reached by the district court nor raised by a party before” the Supreme Court). Moreover, the revision proposed by R.J. Reynolds—striking the “terms similar” language from the statute—does not remedy the statute’s constitutional infirmities. Even after striking this language, or construing this language to include only the economic terms of the Minnesota Agreement, the statute would still draw a facial distinction between companies that have waived their free speech rights and those that have not. Specifically, the Cigarette Fee Act expressly exempts all companies “making annual payments” to the State under the Minnesota Agreement; i.e., companies that have waived their First Amendment rights, and the statute expressly applies to all nonparties to

the Minnesota Agreement; i.e., companies that have not waived their First Amendment rights. Therefore, striking the “terms similar” language from the Cigarette Fee Act would not remedy the statute’s constitutional defects.

Likewise, R.J. Reynolds’ claim that the Cigarette Fee Act is meant to remedy Appellants’ alleged “unfair competitive advantage over” the Majors is irrelevant to this Court’s First Amendment analysis. Amicus Br. at 16-17. Initially, any claimed “competitive advantage” Appellants have over the Majors is not “unfair.” The Majors are making settlement payments to the State to avoid liability for fraud, false advertising and anti-trust violations based on their decades long deceit of the American people. Appellants are not making any such settlement payments because no one has ever accused them of such conduct, let alone proven it in court. Thus, any “advantage” held by Appellants is not “unfair.” More importantly, even if Appellants’ alleged “advantage” was “unfair”—which it is not—the State cannot remedy such “unfairness” by violating the First Amendment.<sup>3</sup>

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<sup>3</sup> It appears that the Majors, including R.J. Reynolds, still engage in the same type of reprehensible conduct that led the State to sue them in 1994. R.J. Reynolds recently launched a series of candy-flavored cigarettes clearly aimed at children. See Campaign For Tobacco Free Kids, Cuddle Up With Cancer: RJR’s Candy Flavored “Winter Blend” Cigarettes Show Big Tobacco Hasn’t Changed (Nov. 16, 2004), at <http://tobaccofreekids.org/Script/DisplayPressRelease.php3?Display=798> (visited Feb. 3, 2005). In the words of one watchdog group, these actions “are the latest evidence that [the Majors] have not changed and continue to market in ways that appeal to kids.” Id.; see also Patrick Howington, Cigarettes’ Ads Target Black Teens, Critics Say; Brown & Williamson Defends Hip-Hop’s Use, *The Courier-Journal* (Louisville, KY), April 1, 2004. In addition, after the Minnesota Tobacco Settlement and the nationwide Master Settlement Agreement, the Majors raised the price of the cigarettes well beyond that necessary to recoup the costs of their settlement payments, resulting in windfall profits. See Federal Trade Commission, Competition and Financial Impact of the Proposed Tobacco Industry Settlement, (Sept. 1997) at ii (staff report detailing anti-competitive design and effect of settlement proposal); A.D. Bedell Wholesale Co. v. Philip Morris, Inc., 263 F.3d 239, 246 (3d Cir. 2001) (citing evidence that price

**C. Whether Appellants would be Subject to a “Similar” Financial Burden under a “Voluntary” Waiver of Rights is Irrelevant to Determining Whether the Cigarette Fee Act is Constitutional.**

The State attempts to distinguish the holding in Minneapolis Star by stating that Appellants’ First Amendment claim “does not require this Court to evaluate ‘the relative burdens of various methods of taxation.’” Resp. Br. at 34 (quoting Minneapolis Star & Tribune, 460 U.S. at 589). Although Appellants agree that such an inquiry is inappropriate, that is precisely what the State asks this Court to do. The State urges this Court to compare the 35-cent per pack Tax levied by the Cigarette Fee Act with the 48-cent per pack payment under the “voluntary” agreement authorized by the Cigarette Fee Act. Thus, the State is asking this Court to evaluate “the relative burdens” of the Cigarette Fee Act, on the one hand, and the payments under the “voluntary” agreement authorized by the statute, on the other hand. However, such an inquiry is expressly prohibited by the holding in Minneapolis Star & Tribune.

Instead of evaluating “the relative burdens” of the respective payments, the only relevant question for this Court is whether the Tax imposed by the Cigarette Fee Act applies based on whether a company has waived its First Amendment-protected rights to advertise and lobby the government. See Minneapolis Star & Tribune, 460 U.S. at 586 n.9 (unconstitutional to impose a tax “as a condition of engaging in protected” First

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increases by the Majors were more than triple the cost of the companies’ settlement payments); Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1294 (11th Cir. 2003) (citing allegations that the Majors raised prices higher than necessary to cover costs of settlement); Philip Morris Raises Costs Of Its Cigarettes By 4.5%, Wall Street Journal, Mar. 29, 2002, at A2 (explaining the price increase was not necessary to fund settlement payments); Gordon Fairclough, Losing Control: Four Biggest Cigarette Makers Can’t Raise Prices As They Did, Wall Street Journal, Oct. 25, 2002, at A1 (identifying a “dizzying series of price increases . . . driven by the companies’ hunger for ever-larger profits.”).

Amendment activities). Here, there can be no dispute that the Tax's initial application is unconstitutional. Before one ever reaches the issue of whether a non-settling manufacturer would wish to enter into a "voluntary" agreement authorized by the Act, the non-settling manufacturer's products are subject to the Tax because the manufacturer has refused to surrender its First Amendment rights. Thus, irrespective of whatever "choices" Appellants have concerning "voluntary" agreements with the State, their products are unconstitutionally taxed based on their refusal to surrender their First Amendment rights. Moreover, nothing in the "voluntary" agreements changes the fact that parties that have waived their First Amendment rights are exempt from the Tax and parties that have refused to waive their First Amendment rights are not exempt. Accordingly, as in Minneapolis Star & Tribune, the Cigarette Fee Act violates the First Amendment.

**D. Cases Addressing Challenges to Qualifying Statutes are Irrelevant to Determining Whether the Cigarette Fee Act is Constitutional.**

The State relies on cases upholding Qualifying Statutes requiring escrow payments in seeking to uphold the Cigarette Fee Act. (Resp. Br. at 35-37.) However, the State fails to address the fundamental differences between these Qualifying Statutes which require escrow payments and the Cigarette Fee Act which imposes a Tax. Specifically, the State simply ignores the fact that the payments to the government under the Qualifying Statutes are made into an escrow account, and are returned after 25 years (with interest) unless the state recovers a judgment or settlement against the company for claims similar to those brought against the Majors. The taxes under the Cigarette Fee Act, by contrast, are made directly to the State and are non-refundable, irrespective of whether the company is guilty

of unlawful conduct regarding its products. Thus, decisions such as Star Scientific, Inc. v. Beales, 278 F.3d 339 (4th Cir. 2002) and PTI, Inc. v. Philip Morris, Inc., 100 F. Supp. 2d 1179 (C.D. Cal. 2000), which upheld Qualifying Statutes requiring escrow payments, are inapplicable to evaluating the constitutionality of the Cigarette Fee Act.<sup>4</sup>

**II. THE CIGARETTE FEE ACT VIOLATES THE EQUAL PROTECTION CLAUSE AND THE UNIFORMITY CLAUSE BECAUSE IT DISCRIMINATES AGAINST CERTAIN CIGARETTE MANUFACTURERS BASED ON WHETHER THEY HAVE WAIVED FUNDAMENTAL CONSTITUTIONAL RIGHTS.**

Appellants' initial brief demonstrates that the Cigarette Fee Act is subject to strict scrutiny because it applies the Tax based on whether a cigarette manufacturer has surrendered its First Amendment rights. The State does not even attempt to argue that the Cigarette Fee Act satisfies strict scrutiny, relying instead on its argument that rational basis review applies. However, because the Cigarette Fee Act is subject to strict scrutiny and the State has failed to articulate any compelling government interest which would satisfy the strict scrutiny test, the Act must be held unconstitutional.

**III. THE CIGARETTE FEE ACT IS AN UNCONSTITUTIONAL BILL OF ATTAINDER.**

The State argues that the Cigarette Fee Act is not an unconstitutional bill of attainder because it applies only to "future activity," the prospective sale of cigarettes in

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<sup>4</sup> The State's reliance on dicta from Star Scientific to uphold the Cigarette Fee Act, *see* Resp. Br. at 19, is particularly misplaced. The Fourth Circuit's actual holding in Star Scientific does not control because the court was addressing a challenge to an escrow statute, not a tax. The dicta cited by the State is simply gratuitous and non-precedential commentary by the two-judge panel that issued the decision, and the court cites no authority in support of this dicta. Indeed, the dicta is contrary to United States Supreme Court authority, as explained in Appellants' briefs. Obviously, dicta from a decision of Fourth Circuit that conflicts with United States Supreme Court precedent can hardly be persuasive, much less binding, on this Court.

Minnesota. This argument is simply wrong. The Tax in the Cigarette Fee Act is not based on the prospective sale of cigarettes in Minnesota; if it were, the Majors' cigarettes would be subject to the Tax. Instead, the Tax is based on a party's past conduct, namely, whether the cigarette manufacturer was part of the settlement of the State tobacco lawsuit or whether the manufacturer has entered into a similar "voluntary" settlement.

Further, even if the Tax was based on future conduct, which it is not, that does not save it from being an unconstitutional bill of attainder. The United States Supreme Court has repeatedly held that a statute burdening prospective conduct that a party could voluntarily cease can be an unconstitutional bill of attainder. See, e.g., United States v. Brown, 381 U.S. 437, 449-52, 458-59 (1965) (holding unconstitutional as a bill of attainder federal law that prospectively denied members of communist party from holding a leadership position in a union even though the individuals could have voluntarily sought a different position); United States v. Lovett, 328 U.S. 303, 315-16 (1946) (holding unconstitutional as a bill of attainder federal law that prospectively denied certain government employment to certain individuals even though the individuals could have voluntarily sought different employment); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (holding unconstitutional as a bill of attainder state law requiring persons to take a loyalty oath as a prerequisite to continuing to practice a profession, even though the individuals could have voluntarily ceased practicing their profession in Missouri); Nixon v. Adm'r of Gen. Serv., 433 U.S. 425, 476 n.40 (1977) ("[P]unishment is not restricted purely to retribution for past events, but may include inflicting

deprivations on some blameworthy or tainted individual in order to prevent his future misconduct.”) (citing United States v. Brown, 381 U.S. at 458-59).

The State also argues that the Tax does not “fall within the historical meaning of legislative punishment” because Appellants could avoid the Tax by ceasing to sell cigarettes in Minnesota. (Resp. Br. at 40) (quoting Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984)). However, as the State acknowledges, historical punishments include “banishment” and “the punitive confiscation of property by the sovereign.” Nixon, 433 U.S. at 474. Requiring Appellants to either pay the Tax—the functional equivalent of “punitive confiscation of property by the sovereign”—or terminate their sales in the State—the functional equivalent of legislative “banishment”—falls squarely within the historical meaning of legislative punishment. Id.

As other courts have acknowledged, “[t]he requirement of punishment is most clearly satisfied when a punitive purpose is conjoined with a characteristically punitive sanction, such as a fine.” Club Misty, Inc. v. Laski, 208 F.3d 615, 617 (7th Cir. 2002). In this case, the punitive sanction is the Tax itself, which is nothing more than a fine intended to roughly approximate the “retribution payments” being made by the Majors pursuant to the settlement of the State Tobacco Lawsuit.

Finally, the State’s reliance on case law upholding Qualifying Statutes against Bill of Attainder challenges is misplaced. As noted, the Qualifying Statutes merely require payments into an escrow fund which must be returned to the manufacturer (with interest) unless the manufacturer is found liable for its conduct, whereas the Cigarette Fee Act requires the payment of a non-refundable Tax, irrespective of the manufacturer’s conduct

or any liability determination. Thus, the Qualifying Statutes do not confiscate property nor do they seek to banish manufacturers from the state. Put another way, in contrast to the power to escrow, the State's "power to tax involves the power to destroy." McCulloch v. Maryland, 17 U.S. (Wheat) 316, 431 (1819).<sup>5</sup>

### CONCLUSION

For the foregoing reasons, and those stated in Appellants' initial brief, Appellants respectfully request that this Court reverse the order and judgment entered by the District Court and affirmed by the Court of Appeals and order the District Court to enter summary judgment in favor of Appellants declaring the Cigarette Fee Act unconstitutional.

Respectfully submitted,

Dated: February 7, 2005

WINTHROP & WEINSTINE, P.A.

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<sup>5</sup> R.J. Reynolds' claim that "the alleged abridgement of Appellants' First Amendment rights is the basis for their . . . bill of attainder challenge" is wrong. Amicus Br. at 10. Appellants' bill of attainder challenge is not dependent on their First Amendment arguments; it is based on the undisputed facts establishing that the Cigarette Fee Act is intended to inflict punishment on Appellants equivalent to the punishment the State inflicted on the Majors through the settlement of the State Tobacco Lawsuit.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01 subd. 3, the undersigned hereby certifies, as counsel for Appellants, that this brief complies with the type-volume limitation as there are 4,579 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2000.

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