No. A123891

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 3

WALGREEN CO.,

Plaintiff and Appellant,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants and Respondents.

On Appeal From the Superior Court of the State of California
For the County of San Francisco
Case No. CGC-08-479553
The Honorable Peter J. Busch, presiding

APPELLANT'S OPENING BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A123891 Division: 3

Case Name: *Walgreen Co. v. The City and County of San Francisco, et al.*

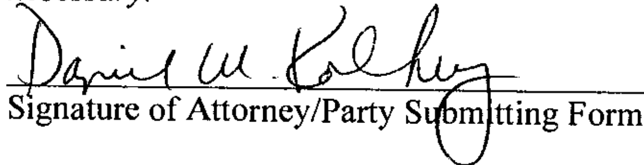
Please check the applicable box:

☐ There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☒ Interested Entities or Parties are Listed Below:

Name of Interested Entity or Person	Nature of Interest
1. Philip Morris USA Inc.	Provided an advertising display for tobacco products sold at Walgreens stores pursuant to contract.
2.	

Please attach additional sheets with Entity or Person Information if necessary.



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QUESTIONS PRESENTED

1. Does San Francisco Ordinance No. 194-08 – which prohibits retail establishments that have a pharmacy from selling tobacco products, but which *exempts* grocery stores and big box stores with pharmacies – violate the constitutional guarantee of equal protection, where the ordinance's express purpose is to avoid an *implied* message purportedly conveyed by pharmacies regarding smoking?

2. Does the failure to comply with voter-approved Proposition I – which requires San Francisco's Office of Economic Analysis to submit an economic impact report to the San Francisco Board of Supervisors "prior to the legislation being heard in committee" – invalidate Ordinance No. 194-08?

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal asks whether the equal protection clause's rational basis test is only rational in theory, but never "fatal in fact,"[1] even where the challenged commercial legislation *expressly* imposes unequal treatment in the hopes of avoiding an *implied* message that may not exist and that is purportedly conveyed by a characteristic shared by both the covered and uncovered parties.

Specifically, San Francisco Ordinance No. 194-08 (the "Ordinance") prohibits retail establishments with pharmacies from selling tobacco products, but exempts grocery stores and big box stores with pharmacies. (S.F. Health Code, § 1009.92.) The Ordinance is premised on the implausible legislative finding that "[t]hrough the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products" (Ordinance, § 1, Finding No. 7), even though the pharmacies themselves do not sell any tobacco and any implied message is counteracted by the well advertised risks of smoking. But by prohibiting only *some* establishments with pharmacies from selling tobacco, the Ordinance merely shifts the sale of tobacco products – and the ancillary sales made at the time of the tobacco purchase – from appellant Walgreen

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1 *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 237.

Co. ("Walgreens"), which is covered by the Ordinance, to its primary competitors in San Francisco: Safeway, Lucky Stores, and to a lesser degree, Costco, which the Ordinance exempts. (First Amended Complaint ("FAC") ¶¶ 24, 39, found at 3JA727, 3JA730.)[2] This will cost Walgreens nearly 9% of its non-pharmacy sales and millions of dollars in annual lost profits. (3JA730 [FAC ¶ 39].)

In short, the Ordinance harms *some* pharmacies and favors others, all in pursuit of a *speculative* legislative objective (to avoid an implied message) that is supposedly conveyed by a characteristic shared by both covered and uncovered establishments – the presence of a *pharmacy* in the retail establishment that sells tobacco elsewhere. Yet, the Ordinance was rushed through the legislative process over roughly 90 days, receiving but a single hearing at which it was referred *without* recommendation to the San Francisco Board of Supervisors and *without* the required economic impact report. (3JA724-725 [FAC ¶ 12-19].)

Walgreens brought this action against the City and County of San Francisco, its Board of Supervisors, and the Mayor (collectively, the "City") to invalidate the Ordinance on the grounds that it violated the equal

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[2] References to the Joint Appendix ("JA") are cited by volume and page number. For example, "3JA727" refers to volume 3 of the Joint Appendix at page 727.

protection clauses of the U.S. and California Constitutions and that it was enacted in violation of voter-approved Proposition I, which requires that an economic impact report be submitted before the legislation is heard in committee if it "might have a material economic impact." (S.F. Admin. Code, § 10.32.) But the trial court sustained the City's demurrer to Walgreens' complaint without leave to amend.

The judgment should be reversed and the Ordinance found to violate the equal protection clauses of the federal and state constitutions for at least the following reasons:

1. The equal protection clause requires, not merely that a legislative classification be rational, but that the "classification bear a rational relationship to an independent and legitimate legislative end." (*Romer v. Evans* (1996) 517 U.S. 620, 633.) Indeed, "[t]he search for the *link between classification and objective* gives substance to the Equal Protection Clause." (*Id.* at p. 632, italics added.) However, a classification limited to *some* pharmacies is not rationally related to a legislative objective premised on the implied message purportedly conveyed by the mere presence of *any pharmacy.* The City argued in the trial court that "drug stores like Walgreens send[] [the] implicit message of acceptability more strongly than . . . big box stores or grocery stores" with pharmacies. (3JA784.) But the rationality of a legislative classification "must be 'plausible' [citation] and the factual basis for that rationale must be

reasonably conceivable [citation].” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201 (*Hofsheier*).) Here, there is no *factual* basis for distinguishing between the supposed implied message generated by a pharmacy in a drugstore like Walgreens (which is covered by the Ordinance) and a pharmacy in a grocery store like Safeway (which is not): Pharmacy signage is displayed on the outside of *both* Walgreens and Safeway stores; in each case, the pharmacist does not sell tobacco products; in each case, the pharmacy is located in the back of the store; and in each case, tobacco products are or were located in front. (3JA727-729 [FAC ¶¶ 26, 28, 29, 32].)

2. The legislative objective, to which the classification must be rationally related, must also be legitimate to withstand a challenge under the equal protection clause. (*Romer v. Evans, supra,* 517 U.S. at p. 633.) Yet, the objective here – the avoidance of an implied message that smoking is acceptable conveyed by pharmacies “[t]hrough the sale of tobacco products” – is preposterous given that the pharmacy itself does not sell any tobacco and given the decades of media campaigns and government

warnings over the dangers of tobacco that counteract any such implied message approving smoking.[3]

3. The unequal treatment here is accentuated by the fact that the Ordinance effectively singles out Walgreens. Walgreens' name was singled out 52 times at the sole committee hearing addressing the Ordinance. (4JA855-878.) And Walgreens' full-service stores with pharmacies in San Francisco constitute 52 of the approximately 63 pharmacy establishments covered by the Ordinance. Further, Rite Aid agreed to sell its six San Francisco stores with pharmacies to Walgreens following the Ordinance's enactment,[4] meaning that Walgreens will have 58 of the approximately 63 pharmacy establishments covered by the Ordinance. In contrast, the Ordinance exempts the ten Safeway stores with pharmacies, the two Lucky Supermarkets with pharmacies in San Francisco, and the single Costco. (3JA727 [FAC ¶ 25, 27]; 4JA860.) As our Supreme Court has so presciently observed, "'[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose

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[3] E.g., 15 U.S.C. § 1333 [setting out Surgeon General's warnings that appear on cigarettes]; Cal. Health & Saf. Code, § 104375 [Proposition 99].

[4] See "Walgreens Agrees to Purchase 12 Rite Aid Locations in San Francisco and Eastern Idaho," found at http://news.walgreens.com/article_print.cfm?article_id=5152 (as of April 14, 2009).

only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.'" (*Hays v. Wood* (1979) 25 Cal.3d 772, 787 (*Hays*), quoting *Railway Express Agency, Inc. v. New York* (1949) 336 U.S. 106, 112-113 (conc. opn. of Jackson, J.).)

4. The lower court sustained the City's demurrer to Walgreens' equal protection claim on the sole ground that the Board of Supervisors found that the *percentage* of prescription drug sales to total sales was substantially greater for drugstores than for grocery stores and big box stores. (Sept. 30, 2008 RT, p. 5.) However, the *percentage* of a store's pharmacy sales is not relevant to whether the *presence of a pharmacy* in the store conveys an "implied" message to the customer. Indeed, a customer is unlikely to be aware of the percentage of sales attributable to prescription drugs at any particular store. Instead, at best, the customer will observe that most transactions at Walgreens (roughly 90%) do not include pharmacy items and that only a small portion of Walgreens' stores (approximately 9%) is dedicated to the pharmacy. (3JA729 [FAC ¶¶ 33-34].)

This appeal also raises the issue whether the City's failure to comply with voter-approved Proposition I invalidates the Ordinance. Proposition I requires the submission of a economic impact report "prior to the

legislation being heard in committee" whenever the proposed legislation "might have a material economic impact." (S.F. Admin. Code, § 10.32)

The trial court ruled that the failure here did not invalidate the ordinance. But this is contrary to the "general rule" that "an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not *substantially* observed." (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 931.) And only invalidation of an ordinance enacted without the benefit of the required economic analysis will ensure that the legislation is the product of the informed process that the City's voters demanded in enacting Proposition I.

Accordingly, this Court should reverse the lower court's judgment and should further find that as a matter of law, the Ordinance violates the equal protection clauses of the U.S. and California Constitutions.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural History of the Ordinance

On April 29, 2008, San Francisco Mayor Gavin Newsom introduced to the San Francisco Board of Supervisors the proposed law that became Ordinance No. 194-08. (3JA724 [FAC ¶ 12].)

On May 21, 2008, the proposed Ordinance was referred to the Small Business Commission for comment and recommendation. (3JA724, 1JA288.) On June 10, 2008, the Commission, although supportive, recommended that implementation be delayed a year "for the four

independent pharmacies" in San Francisco, and that the Mayor's Office consider including big box and grocery stores in the legislation. Neither recommendation was adopted. (3JA724, 1JA289.)

On July 17, 2008, the City Operations and Neighborhood Services Committee held a public hearing on the proposed ordinance. (3JA724 [FAC ¶ 14].) At the hearing, Mitchell H. Katz, Director of Health for the City and County of San Francisco and a primary author of the legislation, argued that the sale of tobacco at pharmacies sends a "mixed message" because "when we think pharmacy, we think health." (4JA855-856.) Significantly, Walgreens' name permeated his testimony. (4JA855-858, 4JA875.) Displaying a photo of his local Walgreens, Dr. Katz said,

> But it's not a trivial picture, because it speaks of what my issue is, about what I want, if you will be quite personal, my children to see and not see. . . . And right at the front is Rx, the Latin symbol for medication treatment. There is the name, Walgreens . . . . Their logo, 'The Pharmacy America Trusts,' another Rx sign in red, and under it, 'Pharmacy.' So that's why, when people say, "Hey, these stores are just like any retail store,' to me it's not convincing, because I don't want my children to see the word 'Pharmacy,' to meet my great pharmacist, and then to see tobacco.

(4JA856-857.)

But Dr. Katz deliberately proposed not to cover all pharmacies, exempting pharmacies in supermarkets and big box stores, because he allegedly viewed them differently: "You say a pharmacy is a place you go to get medications. When we go into Costco it's a completely different

answer. And I don't accept this idea that [the pharmacy section of Walgreens is] . . . just in the back because frankly, the pharmacy name is all over. . . . There is a reason why the name is Walgreens Pharmacy." (4JA875, 4JA881.)

Near the conclusion of the hearing, Supervisors Chu and Elsbernd expressed concern with the proposed ordinance's arbitrary distinctions. (4JA877-878; 3JA724.) Following the hearing, the committee referred the proposed ordinance to the Board of Supervisors *without* recommendation; two of the three members of the committee expressed concerns over the legislation. (4JA877-878.)

On July 29, 2008, by a vote of 8 to 3, the Board of Supervisors passed the proposed ordinance on a first reading. (3JA745.) But at that meeting, three spoke in favor of expanding the Ordinance to other businesses (Supervisors Sandoval, Maxwell, and Mirkarimi), two of whom indicated concern with its arbitrary distinctions (Sandoval and Maxwell); and three Supervisors (Supervisors Chu, Elsbernd, and Dufty) voted against the proposed Ordinance. (3JA724-725; 4JA881-882, 4JA884.)

On August 5, 2008, the Board of Supervisors passed the Ordinance in a second reading by a vote of 8 to 3. (3JA725, 3JA745.)

On August 7, 2008, the Mayor approved the Ordinance. (3JA725.)

The Ordinance took effect on October 1, 2008.

B. The Ordinance's Relevant Provisions.

The Ordinance prohibits retail establishments with pharmacies (except grocery stores and big box stores) from selling tobacco products as follows[5]:

> "Sec. 1009.92. Prohibition Against Tobacco Product Sales At Pharmacies.
>
> No person shall sell tobacco products[6] in a pharmacy[7], except as provided in Sec. 1009.93.
>
> Sec. 1009.93. Exceptions.
>
> The prohibition against tobacco sales at pharmacies in Section 1009.92 shall not apply to:
>
> (a) General Grocery Stores.[8]

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5 A copy of the Ordinance is attached to this brief.

6 "Tobacco Product" is defined as "any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco." (S.F. Health Code, § 1009.91, subd. (f).)

7 "Pharmacy" is defined as "a retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals. For purposes of this Article, 'pharmacy' includes retail stores commonly known as drugstores." (S.F. Health Code, § 1009.91, subd. (e).)

8 "General Grocery Store" is defined to have "the same meaning as set forth in Planning Code Section 790.102(a) or any successor provisions." (S.F. Health Code, § 1009.91, subd. (c).) In turn, section 790.102, subdivision (a)(1) of the San Francisco Planning Code, as amended on October 30, 2008, defines "General groceries"

[Footnote continued on next page]

(b) Big Box Stores.[9]

. . . .

Sec. 1009.95. Expiration of Permit to Sell Tobacco.

Any permit to sell tobacco issued to a pharmacy pursuant to Article 19H shall expire on September 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are prohibited under this Article."

The principal legislative finding, upon which the Ordinance is premised, provides: "Through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize pharmacies for health care services[.]" (Ordinance, § 1, Finding No. 7.)

The Ordinance supports this finding of a "mixed message" on the grounds that "[p]harmacies and drugstores are among the most accessible and trusted sources of health information among the public" and that

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[Footnote continued from previous page]
as "An individual retail food establishment that: [¶] (A) Offers a diverse variety of unrelated, non-complementary food and non-food commodities, such as beverages, dairy, dry goods, fresh produce and other perishable items, frozen foods, household products, and paper goods; [¶] (B) May provide beer, wine, and/or liquor sales for consumption off the premises . . . ; [¶] (C) Prepares minor amounts or no food on-site for immediate consumption; and [¶] (D) Markets the majority of its merchandise at retail prices."

9 "Big Box Store" is defined as "a single retail establishment occupying an area in excess of 100,000 gross square feet." (S.F. Health Code, § 1009.91, subd. (a).)

"[c]linicians can have a significant effect on smokers' probability of quitting smoking[.]" (Ordinance, § 1, Finding Nos. 16-17.)

However, the Ordinance does not *expressly* set forth any reason for treating the implied message conveyed from the sale of tobacco products at grocery stores and big box stores with pharmacies any differently from the message conveyed by drugstores with pharmacies. Instead, many of the Ordinance's "findings" merely recite the negative health effects of tobacco or the seeming inconsistency between the presence of a pharmacy and the sale of tobacco. (Ordinance, § 1, Finding Nos. 1-9, 15-18.) Most of the others simply catalogue the percentage of pharmacies that sell tobacco, or recite opinion polls regarding the sale of tobacco at pharmacies. (*Id.*, Finding Nos. 10, 12-14, 19-20.)

The only finding that attempts to distinguish drugstores from grocery and big box stores does so on the basis of the *percentage* of their total sales derived from prescription drugs on a national basis:

> Prescription drug sales for chain drugstores represent a significantly higher percentage of total sales than for grocery stores and big box stores that contain pharmacies. According to the 2007 Rite Aide Annual Report, prescription drugs sales represented 63.7% of total sales in fiscal 2007. Walgreen's 2007 Annual Report documented prescription sales as approximately 65% of net sales that year. Pharmacy sales at Safeway have been estimated at 7.5% of annual volume. Costco's prescription sales generated 1.5% of total revenue in 2002.

(Ordinance, § 1, Finding No. 21.)

However, these statistics are not specific to San Francisco. Indeed, in San Francisco, approximately 90% of transactions tendered by customers at Walgreens' stores do not include a pharmacy item, and *non-pharmacy* purchases account for nearly half of the sales revenues at Walgreens' San Francisco stores. (3JA729, 1JA143.)

C. The Pharmacies At Exempt And Non-Exempt Stores Are Similarly Situated.

1. Walgreens and Its Competitors in San Francisco.

Walgreens operates licensed pharmacies at 52 of its 54 full-service stores in San Francisco. The other two stores do not operate pharmacies and thus are not prohibited from selling tobacco under the Ordinance. (3JA727 [FAC ¶ 27], 1JA145.)

According to Walgreens' first amended complaint,[10] Walgreens' primary competitors in San Francisco are Rite Aid, a single Longs Drug Store, Safeway Stores, Lucky Stores, and to a lesser extent, the single San Francisco Costco big box store. (3JA727 [FAC ¶¶ 24], 1JA147.)

The Ordinance covers Walgreens' 52 stores, the 6 Rite Aid stores with licensed pharmacies (which Rite Aid decided to sell to Walgreens after

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[10] Except for some photographs, the first amended complaint's allegations are supported by declarations submitted as part of Walgreens' earlier application for a preliminary injunction. Those factual allegations were not contested by the City at the preliminary injunction hearing.

the Ordinance took effect[11]), the single Longs Drug Store, and the 4 independent pharmacies that sold tobacco in San Francisco. (3JA727 [FAC ¶¶ 25, 27]; 4JA860.) On the other hand, the Ordinance exempts the 10 San Francisco Safeway Stores with pharmacies, 2 San Francisco Lucky Supermarket stores, and the single San Francisco Costco big box store. (*Id.*)

2. Exempt and Non-Exempt Stores Are Similarly Situated With Respect to the Implied Message.

The exempt and non-exempt stores with pharmacies are similarly situated in all relevant respects, including their pharmacy signage, store layout, the separate location of their tobacco products, and their promotion of healthy living. Accordingly, there is no reason to distinguish the "implied" message emanating from the presence of a pharmacy among these retail establishments. (3JA727-729 [FAC ¶¶ 23-35].)

a) In Each Case, "Pharmacy" Signage Appears on the Storefront.

As illustrated below, the storefronts of the covered Walgreens stores and many of the exempt Safeway supermarkets advertise themselves as having a pharmacy. The pharmacy signage is prominently displayed on the storefront. (3JA728-729, 3JA756-772 [FAC ¶ 32 and exhs. E and F thereto].)

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11 See footnote 4, *ante*.

b) In Each Case, the Pharmacy Is Located Away From the Tobacco Products.

Moreover, at those Walgreens with pharmacies, the pharmacy is located in the *back* of the store. Before the Ordinance's effective date, tobacco products were located at the *front* of the store behind the main checkout area and near the exit. As such, the pharmacy and tobacco products were at completely opposite ends of the store. (3JA727-728 [FAC ¶ 28]; 1JA146.)

Likewise, at exempt Safeway Stores and Lucky Stores in San Francisco, the pharmacy is located in the *back* of each store, and tobacco

products are kept in a customer service area in the *front* of the store. At the exempt Costco store in San Francisco, the pharmacy is located at the front of the store but at the end of the checkout area furthest from the entrance, whereas the tobacco products are in a locked cage at the entrance side of the checkout area. (3JA728 [FAC ¶ 29]; 1JA147.)

c) In Each Case, Only Limited Store Space Is Devoted to the Pharmacy.

The Walgreens stores in San Francisco devote relatively little space to their pharmacies. The square footage for pharmacies in these stores is approximately 9% of the stores' total front area. (3JA729 [FAC ¶ 33]; 1JA142.)

Similarly, none of Walgreens' primary competitors that are exempted from the Ordinance devote a significant percentage of their floor space to their pharmacies. (3JA729 [FAC ¶ 33].)

d) In Each Case, Pharmacies Do Not Sell Tobacco.

Significantly, the pharmacies themselves do not sell tobacco. For instance, Walgreens pharmacists did not sell tobacco products before the Ordinance's effective date. Rather, tobacco products were "clerk served" in another part of the store, meaning that a customer had to ask a store clerk or checkout attendant to access any tobacco products. (3JA727-728, 3JA747-749 [FAC ¶ 28 & exh. B]; 1JA146.) The same appears to be true

at Safeway and Lucky Stores. (3JA728, 3JA750-755 [FAC ¶ 29 & exhs. C, D].)

e) Exempt and Non-Exempt Stores Advertise Themselves as Health-Promoting.

Both Walgreens and the exempt stores have advertised their stores impliedly or expressly as "health-promoting." For example, Safeway – which is exempted from the Ordinance – has the motto "Ingredients for Life" and promotes its supermarkets as places where consumers can purchase products designed to promote "Healthy Living." (3JA728 [FAC ¶ 31]; 2JA507, 2JA519-522.)

f) Both Exempt and Non-Exempt Stores Sell a Diverse Array of Food and Non-Food Commodities.

Like the grocery stores exempted from the Ordinance, Walgreens offers a mix of products, including beverages, dairy, dry goods, fresh produce and other perishable products, frozen foods, household products, personal care items, over-the-counter drugs, and prescription drugs. (3JA729 [FAC ¶ 35], 1JA146.) In fact, as such, the majority of the 54 full-service Walgreens stores in San Francisco meet the primary criteria of "General Grocery Store" as defined and exempted by the Ordinance: They "offer[] a diverse variety of unrelated, non-complementary food and non-food commodities"; they "prepare[] minor amounts or no food on-site for immediate consumption"; and they "market[] the majority of . . .

merchandise at retail prices." (S.F. Planning Code, § 790.102, subd. (a)(1); see footnote 8, *ante*.)

D. Procedural Background Of This Action.

On September 8, 2008, one month after the approval of the Ordinance, Walgreens brought this action against the City, seeking injunctive and declaratory relief. (1JA1-24.) The following day, Walgreens filed an application for a preliminary injunction to enjoin the City from enforcing the Ordinance. (1JA28-34.)

On September 30, 2008, the superior court heard Walgreens' preliminary injunction application. The court noted that the City had conceded that all retail establishments with pharmacies (whether exempt or not) sent the same purported mixed message. (Sept. 30, 2008 RT, p. 5.) But in upholding the Ordinance against Walgreens' equal protection challenge, the court relied on legislative finding no. 21 that "nearly two-thirds of the retail sales revenue in drug stores such as the ones we're talking about, including the plaintiff's, derive from the pharmacy business, whereas less than 10 percent of the grocery sales . . . and less than 2 percent of the big box sales" do. (*Id.*)

In reaching this conclusion, the court acknowledged:

> I understand that those numbers, even as they're presented by the board of supervisors, are general numbers. They're derived apparently from some kind of national database; they're not specific to San Francisco. They may not be specific to, for example, Safeway stores that include a

pharmacy as opposed to Safeway stores that don't. I don't know. But that's the fact as determined by the legislature . . . . [¶] . . . [¶] . . . I also recognize that that does not reflect sales transactions, and I recognize that it doesn't tell us very much about individuals who are not buying drugs from any particular kind of store . . . (*Id.*, pp. 5-6.)

Although the court also acknowledged that "the city's case would be much stronger" if the Ordinance distinguished between establishments with pharmacies and other kinds of retail establishments (Sept. 30, 2008 RT, p. 9), it concluded that "the strength of messages certainly could be measured in dollars." (*Id.*, p. 12.) The superior court therefore denied Walgreen's application for a preliminary injunction.[12]

On October 22, 2008, Walgreens filed its first amended complaint, which added new factual allegations and exhibits, further illustrating the irrationality of the classification drawn by the Ordinance.

The next month, the City demurred to the first amended complaint, which was heard on December 19, 2008. Based on its previous conclusion at the preliminary injunction hearing, the superior court sustained the demurrer without leave to amend, noting that "the legislative body is entitled to have its classification upheld if there is any basis on which it

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[12] Walgreens appealed from that order, but dismissed the appeal (no. A123044) as moot after final judgment was entered based on the City's demurrer.

could be upheld. I have already concluded, rightly or wrongly, that there is such a basis." (Dec. 19, 2008 RT, pp. 34-35.)

III. STATEMENT OF APPEALABILITY

The judgment dismissing Walgreens' complaint with prejudice was entered on December 19, 2008, and was timely appealed on December 23, 2008 pursuant to Code of Civil Procedure section 904.1, subd. (a)(1).

IV. STANDARD OF REVIEW

In reviewing the sufficiency of a complaint against a general demurrer, the appellate court assumes the truth of "'all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law'" and also considers "'matters which may be judicially noticed.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"The trial court commits reversible error when it sustains a demurrer without leave to amend where the [complaint] has alleged facts showing entitlement to relief under any possible legal theory." (*Platt v. Coldwell Banker Residential Real Estate Services* (1990) 217 Cal.App.3d 1439, 1444.)

Finally, where the facts are largely undisputed (as they are here since they are based on uncontested facts submitted by declaration at Walgreens' application for preliminary injunction), the Court may conserve judicial resources by also proceeding to decide the merits of the case. (See *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769 [reversing the trial court's

order sustaining defendant's demurrer and directing entry of judgment in favor of plaintiff]; cf. *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299 [issue "'becomes a question of law . . . when "the facts are undisputed and no conflicting inferences are possible"'"].)

V. ARGUMENT

A. The Ordinance Denies Walgreens' Right To Equal Protection.

1. To Survive an Equal Protection Challenge, the Legislation's Classification Must Be Rationally Related to a Realistically Conceivable Legislative Goal.

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Likewise, Article I, section 7, subdivision (a) of the California Constitution prohibits the denial of equal protection.

This equal protection guarantee extends to corporations. (*Gulf, Colorado & Santa Fe Ry. Co. v. Ellis* (1897) 165 U.S. 150, 154; see *Johnson v. Goodyear Mining Co.* (1899) 127 Cal. 4, 9.)

Of course, the "promise that no person shall be denied equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another . . . . " (*Romer v. Evans, supra*, 517 U.S. at p. 631.) Thus, "if a law neither burdens a fundamental right nor targets a suspect class, [the courts] will uphold the legislative

classification so long as it bears a rational relationship to some legitimate end." (*Ibid.*)

But "even in the ordinary equal protection case calling for the most deferential of standards, [the courts] insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature . . . ." (*Romer v. Evans, supra,* 517 U.S. 620, 632.) "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purposes of disadvantaging the group burdened by the law." (*Id.* at p. 633.)

Under the California Constitution, the "rational basis" test requires courts to """conduct '*a serious and genuine judicial inquiry* into the correspondence between the classification and the legislative goals.'""" (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 163 (*Fein*), quoted approvingly in *Warden v. State Bar* (1999) 21 Cal.4th 628, 648 (*Warden*).)[13]

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[13] Although Walgreens will rely on the equal protection clauses of both the U.S. and California Constitutions, it will largely cite to case law under the California Constitution, given that California's equal protection clause is at least as protective as the Fourteenth Amendment, and indeed in Witkin's view, more stringent. (8

[Footnote continued on next page]

As Professor Cass Sunstein has observed, the equal protection clause acts as a constraint on "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want. . . . [¶] . . . The equal protection clause allows a state to distinguish between one person and another only if there is a *plausible connection* between the distinction and a legitimate public purpose." (Sunstein, *Naked Preferences and the Constitution* (1984) 84 Colum. L. Rev. 1689, 1689, italics added.)

Accordingly, to withstand a constitutional challenge, the classification """"must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."""" (*Cossack v. City of Los Angeles* (1974) 11 Cal.3d 726, 734 (*Cossack*), citations and italics omitted; accord, *Hays, supra,* 25 Cal.3d 772, 788.) This is because "'nothing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that

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[Footnote continued from previous page]

Witkin, Summary of Cal. Law (10th ed. 2005) Const. Law, § 705, p. 81 [stating that the California Constitution "go[es] further than the Fourteenth Amendment, particularly in invalidating legislation where the basis for the classification is wholly unreasonable . . . ."].)

laws will be just than to require that laws be equal in operation.'" (*Hays, supra,* 25 Cal.3d at p. 787, quoting *Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 112-113 (conc. opn. of Jackson, J.).)

Yet, picking and choosing only *some* pharmacy establishments to fall within the tobacco ban – thereby avoiding the lobbying power of the excluded supermarkets and big box stores – is precisely what occurred here.

2. The Ordinance's Distinction Between Pharmacies Has No Rational Relationship to its Legislative Goal.

The Ordinance's goal is to avoid the implied message purportedly conveyed by the presence of a pharmacy in a retail establishment that sells tobacco products. Finding number 7 of the Ordinance states: "Through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize pharmacies for health care services." (Ordinance, § 1, Finding No. 7.)

But since the pharmacies themselves do not sell tobacco (3JA727-728), the implied message necessarily arises from the mere presence of a pharmacy in a retail establishment that sells tobacco elsewhere. Indeed, under the Ordinance, "pharmacy" is broadly defined as the entire "retail establishment *in which* the profession of pharmacy . . . is practiced." (S.F. Health Code, § 1009.91, subd. (e), italics added.)

But although the legislative objective is premised on the implied message arising from the presence of a pharmacy at the retail establishment, the Ordinance's classification only covers some "pharmacies." It exempts grocery stores and big box stores containing pharmacies. Accordingly, the Ordinance's classification rests on a distinction – a subclass of "pharmacies" – that does not bear "“““a fair and substantial relation'"”" with a legislative objective premised on the mere presence of *any* pharmacy. (*Cossack, supra,* 11 Cal.3d 726, 734.)

Moreover, based on any objective comparison, there is no difference between the implied message conveyed by a pharmacy in the exempt grocery stores and in the non-exempt Walgreens stores: Pharmacy signage is displayed on the storefront of both the covered Walgreens stores and exempt Safeway stores; both have pharmacies located in the back of the store; in each case, the pharmacist does not assist in the tobacco sales, which take place in the front of the store; and in both cases, the pharmacy section constitutes but a small portion of the store. (3JA727-729, 3JA747-755.) The chart on the next page illustrates that the exempt and non-exempt retail establishments are similarly situated with respect to their pharmacies:

Characteristic of Retail Establishment With Pharmacy	Non-Exempted Walgreens	Exempted Safeway
Storefront displays word and/or symbol for pharmacy[14]	✓	✓
Pharmacy located in the back of the store; tobacco products are sold in the front of the store[15]	✓	✓
Pharmacist does not assist with tobacco purchases[16]	✓	✓
Pharmacy is a relatively small amount of store's overall square footage[17]	✓	✓
Store advertises itself as "health-promoting"[18]	✓	✓
Store offers a mix of products, including food, prescription drugs, over-the-counter drugs, household products, and personal care items[19]	✓	✓

Significantly, the City does not identify any material differences between a Walgreens store and a Safeway store which would establish

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14 See 3JA728-729, 3JA756-772.

15 See 3JA727-728, 3JA747-749, 3JA753-755.

16 See 3JA727-728.

17 See 3JA729.

18 See 3JA728.

19 See 3JA727.

some difference in the purported "mixed message" communicated to the consumer. Indeed, the City has conceded that *all* stores with pharmacies (including those exempted from the Ordinance's coverage) convey the purported mixed message; it only claims that the implied message is "less strong" at grocery and big box stores. (3JA785.)

However, to survive an equal protection challenge, the rationality of the legislative distinction "must be 'plausible' [citation] and the factual basis for that rationale must be *reasonably* conceivable [citation]." (*Hofsheier, supra*, 37 Cal.4th at p. 1201.) Yet, there is no *factual* basis – let alone *a reasonably conceivable* factual basis – for finding that the purported implied message approving tobacco is less strong because the tobacco is sold in a grocery store with a pharmacy at the back of the store than at a Walgreens with a pharmacy at the back of the store. Distinctions cannot be justified by a speculative possibility. (*Id.* at p. 1204.)

Thus, in *Hofsheier, supra*, 37 Cal.4th 1185, our state high court found that the mandatory sex offender registration requirement of Penal Code section 290, subdivision (a)(1)(A), denied the defendant equal protection because it required the defendant to register for life based on a conviction of oral copulation with a minor, whereas a person convicted of unlawful sexual intercourse with a minor was not subject to mandatory (only discretionary) registration. Although the Attorney General argued that it was reasonably conceivable that adults who engage in voluntary oral

copulation with minors are more likely to repeat their offense than adults who engage in voluntary sexual intercourse with minors (*id.* at p. 1203), our high court ruled that "[r]equiring *all* persons convicted of voluntary oral copulation with minors . . . to register for life as sex offenders, while leaving registration to the discretion of the trial court for those convicted of sexual intercourse with minors of the same ages, cannot be justified by the speculative possibility that members of the former group are more likely to reoffend than those in the latter group. To sustain the distinction, there must be some plausible reason, based on reasonably conceivable facts, why judicial discretion is a sufficient safeguard to protect against repeat offenders who engage in sexual intercourse but not with offenders who engage in oral copulation." (*Id.* at pp. 1203-1204.)

Here, too, the City's claim that the implied message is "less strong" when the tobacco is purchased in the front of an exempt Safeway store than in the front of a non-exempt Walgreens is simply speculative and cannot serve to sustain the Ordinance's anticompetitive distinction.

Numerous other California cases illustrate that in order to survive an equal protection challenge, the *correspondence* between the particular classification and the legislative goal must be "fair and reasonable" – "i.e. that, in the words of Justice Jackson, the classification be found to rest upon 'some reasonable differentiation fairly related to the object of regulation.'" (*Hays, supra*, 25 Cal.3d at p. 787.)

Thus, in *Carlin v. City of Palm Springs* (1971) 14 Cal.App.3d 706, the Court of Appeal invalidated on equal protection grounds an ordinance that prohibited the use of outside business signs that made reference to prices or rates. The City of Palm Springs argued that such signs were detrimental to community aesthetics and smacked of overcommercialization. (*Id.* at pp. 709, 714.) But the court ruled that "a sign advertising rates is not aesthetically distinguishable from a sign advertising various aspects of a motel's services or conveniences," that "[t]here is no natural, intrinsic, or constitutional distinction permitting the classification of rate and nonrate signs" (*id.* at p. 714), and that "[i]n the event the ordinance tends to favor one class of businessmen over another, it is discriminatory." (*Id.* at p. 715.) In short, the distinction between rate and non-rate signs did not reasonably correspond with the objective of protecting community aesthetics.

Likewise, in *Justesen's Food Stores, Inc. v. City of Tulare* (1938) 12 Cal.2d 324, the California Supreme Court found unconstitutional a city ordinance that restricted the operating hours of stores and other establishments dealing in food, but exempted from its restrictions several such businesses, including restaurants, hotels, and drugstores. (*Id.* at pp. 327-328.) In finding that the ordinance "arbitrarily" imposed "burdensome conditions upon a selected class of merchants," while exempting others in violation of equal protection, our high court relied on the fact that the food

products sold in grocery stores (which were covered) did not represent a greater health hazard than food products sold in restaurants or hotels (which were exempted). (*Id.* at pp. 329-330.) The Court asked, "From the standpoint of health, what distinction is there between selling food to customers for consumption on the premises and selling it to customers to be taken to their homes?" (*Id.* at p. 330.) In short, while a distinction could be made between grocery stores and restaurants (just as a distinction can be made here between grocery stores and drugstores), the distinction did not *rationally correspond* to the ordinance's purpose.

Again, in *College Area Renters & Landlord Association v. City of San Diego* (1996) 43 Cal.App.4th 677, 686, the California Court of Appeal affirmed the invalidation of an anti-overcrowding ordinance that regulated the number of adults who could live in *non-owner-occupied* residences because the ordinance "[made] an irrational distinction between tenant-occupants and owner-occupants." The court explained: "Under the traditional, rational relationship test, the court conducts an inquiry into the correspondence between the classification and the legislative goals. [Citation.] A zoning ordinance may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. [Citation.] [¶] Here the purpose of the law is to address problems associated with excessive occupancy of detached homes in a single-family residence zone. Owners and tenants are similarly

situated with respect to the overcrowding problem – i.e., both groups can overcrowd a neighborhood. . . . [W]e are not persuaded that there is a sufficient relationship between the non-owner-occupied classification and the overcrowding problem, so as to justify imposing occupancy restrictions on tenant residents that do not apply to neighboring owner residents." (*Ibid.*)

Here, too, there is not a sufficient relationship between the *covered* pharmacies and their implied message to justify applying the sales restriction on Walgreens pharmacies, but not on Safeway or Lucky Store pharmacies. After all, the Ordinance's sole justification for banning tobacco is the presence of a pharmacy in the retail establishment, which purportedly communicates tacit approval of the use of the tobacco products sold elsewhere in the store. To premise a sales prohibition based solely on the presence of a pharmacy, but to only apply it to a subset of pharmacies (leaving another powerful subclass outside the legislation's coverage) is the essence of an equal protection violation.

As Justice Robert Jackson explained, "I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary

and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." (*Railway Express Agency, Inc. v. New York, supra,* 336 U.S. 106, 112-113 (conc. opn. of Jackson, J.), approvingly cited in *Hays, supra*, 25 Cal.3d at pp. 786-787.)

Other cases also invalidate arbitrary distinctions within a classification even if the larger classification reasonably corresponds to the legislative objective. (E.g., *Coalition Advocating Legal Housing Options v. City of Santa Monica* (2001) 88 Cal.App.4th 451 [invalidating ordinance where classification, based on whether the renter was related to the dwelling owner, bore no relationship to legislative goal of avoiding undue concentrations of population or traffic]; *Gawzner Corp. v. Minier* (1975) 45 Cal.App.3d 903 [invalidating ordinance where legislative goal of protecting the motoring public from misleading representations regarding rates had no rational relationship to the distinction between hotels and motels]; *Looff v. City of Long Beach* (1957) 153 Cal.App.2d 174, 183 [classification used in ordinance regulating games was invalid because the games excepted from the class were "fundamentally . . . the same" as those included within the class]; *Deese v. City of Lodi* (1937) 21 Cal.App.2d 631 [invalidating Sunday closing law that was applied to some retail establishments but not others because classification was not rationally related to the legislative

goals of promoting public health]; *People v. Wong* (1958) 165 Cal.App.2d Supp. 821.)

3. Even the Ordinance's Legislative Goal Is Of Questionable Legitimacy.

Not only is the distinction made by the legislative classification here not reasonably related to the legislative object, but the legislative objective itself is questionable. After all, it is "to an independent and legitimate legislative end" that "the classification [must] bear a rational relationship." (*Romer v. Evans, supra*, 517 U.S. at p. 633.)

But the legislative objective here – the avoidance of an implied message that smoking is acceptable by virtue of the presence of a pharmacy in the same retail establishment that sells tobacco products elsewhere – is questionable because the existence of such an implied message is preposterous. It is simply not credible that "pharmacies convey tacit approval of the purchase and use of tobacco products" simply because the tobacco products are sold in the same retail establishment in which a pharmacy is present, given that the pharmacy section itself does not sell the tobacco products and given the decades of anti-smoking media campaigns and warnings that would counteract any such implied message. (See 15 U.S.C. § 1333 [the Surgeon General's warnings for cigarettes]; 15 U.S.C. § 1341 [setting out federal mandate for smoking research, education and information dissemination]; Cal. Health & Saf. Code § 104375

[California's Tobacco Control Program's requirement of a media campaign to raise public awareness of the effects of smoking].)

In short, no one who buys cigarettes at a retail store could reasonably conclude that the pharmacist in another part of the store is endorsing the habit. Accordingly, the lack of a rational relationship between the Ordinance's distinction among pharmacies and its legislative objective of avoiding an implied message is compounded by the irrational premise underlying the legislative objective itself, namely, that a pharmacist in one part of the store is tacitly conveying any message relating to tobacco products sold elsewhere in the store.

4. The Justifications Offered for the Ordinance's Classification Fail.

a) The Superior Court's Justification.

Relying on finding no. 21 of the Ordinance, the superior court found that the percentage differences in prescription drug sales between chain drugstores, on the one hand, and grocery and big box stores, on the other, were sufficient to establish a rational basis for the Ordinance's distinction among pharmacy establishments because "the strength of messages certainly could be measured in dollars." (Sept. 30, 2008 RT, p. 12.) Finding no. 21 provides:

> Prescription drug sales for chain drugstores represent a significantly higher percentage of total sales than for grocery stores and big box stores that contain pharmacies. . . . Walgreen's 2007 Annual Report documented prescription

> sales as approximately 65% of net sales that year. Pharmacy sales at Safeway have been estimated at 7.5% of annual volume. Costco's prescription sales generated 1.5% of total revenue in 2002.

However, the difference in the *percentage* of prescription drug sales drawn *nationally* from drugstore and grocery store chains does not translate into a difference in the "strength" of the purported mixed message arising from the presence of a pharmacy in a *San Francisco* retail establishment that also sells tobacco.

First, the *percentage* of pharmacy sales at an establishment has no relationship to the "strength" of the implied message arising from the *presence* of the pharmacy at the establishment. Indeed, a customer would normally not even be aware of the percentage of pharmacy sales made at the store. Instead, at most, the customer would simply observe that (i) tobacco was sold at the opposite end of the store in both the non-exempt and exempt stores, (ii) the pharmacy constituted only a small portion of the store's area (in Walgreens' case, 9% of the total front area), and (iii) the vast majority of transactions entail non-pharmacy items (90% of the transactions at Walgreens' San Francisco stores are for non-pharmacy products). (3JA727-729.) In short, the percentage of pharmacy sales does not measure the strength of the implied message that arises from the pharmacy's presence in the store.

Second, the aggregate, national percentages set forth in finding no. 21 are misleading and irrelevant. They aggregate all stores together, despite the fact that not all Walgreens or Safeway stores have pharmacies; thus, the percentage figures for pharmacy sales are not calculated from only stores *with* pharmacies. And as a national statistic, the misleading percentages are not directly relevant to San Francisco.

Third, under the Ordinance, it is the presence of the pharmacy (regardless of the nature of the establishment in which it is located) that gives rise to the purported implied message that smoking is acceptable. The percentage of prescription sales out of total sales does not alter the genesis of the implied message: a pharmacy.

In short, the statistics contained in finding no. 21 cannot justify the classification drawn by the Ordinance because they provide no information relevant to the implied message that the Legislature sought to avoid.

b) The City's Justifications.

In its demurrer, the City offered four other justifications for treating some pharmacies differently than others. The trial court did not adopt any of them. And none have merit.

Justification No. 1: Drugstores Are Marketed as "Health-Promoting." The City argued in its demurrer that "the Board rationally concluded that society is far more likely to view drug stores as health-

promoting businesses, as compared to big box stores or grocery stores." (3JA779.)

But the Ordinance does not prohibit "health-promoting" stores from selling tobacco, only pharmacies. The application of the ban to "health-promoting" establishments would require a different classification.

Secondly, there is no rational basis for the contention that "society" views drugstores as more "health-promoting" than grocery stores. It is inappropriate to accord blind deference to a hypothetical legislative choice based on "rational speculation." (*F.C.C. v. Beach Communications, Inc.* (1993) 508 U.S. 307, 315, relying on *Vance v. Bradley* (1979) 440 U.S. 93, 111.) If a drugstore is perceived as health-promoting, it is because it has a pharmacy. In that case, any store with a pharmacy – and certainly one which states in big bold letters on its storefront, "Pharmacy," as Safeway does – should be covered. (*See* 3JA728-729, 3JA756-766.)

Third, Walgreens has two drugstores in San Francisco, which do not have pharmacies. If drugstores are more health-promoting, then those stores, too, would be prohibited from selling tobacco. But under the terms of the Ordinance, those drugstores can still sell tobacco. (3JA727 [FAC ¶ 27].)

Finally, Safeway markets its products as designed to promote "Healthy Living" and uses the slogan, "Ingredients for Life." (3JA728 [FAC ¶ 31]; 2JA519-522.) Thus, there is no "reasonably conceivable"

factual basis for the distinction regarding which store is more "health-promoting." (*Hofsheier, supra*, 37 Cal.4th at p. 1201.)

Justification No. 2: Opinions of Industry Groups. The City contended that the Ordinance's distinction between drugstores and grocery stores "is based on the opinions of groups like the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association that drug stores should not be selling tobacco, because . . . it sends an implicit message that smoking is acceptable." (3JA780.)

To the contrary, these organizations did not draw a distinction between drugstores and other establishments with pharmacies. As reflected in the Ordinance's legislative findings, these organizations called for the adoption of a ban on tobacco sales by "drugstores *and* pharmacies" without distinguishing between the two. (Ordinance, § 1, Finding No. 9.)

Justification No. 3: The Proportion of Sick People Drawn To "Drugstores." Citing the "testimony" of Dr. Katz, the City claimed that "the Board could rationally have concluded that a ban on sales in drug stores like Walgreens and Rite Aid was more important than a ban on sales in big box and grocery stores, given that the former type of store draws a larger proportion of sick people – people who may once have been addicted to cigarettes and whose illnesses would be worsened by a relapse." (3JA784.)

But Dr. Katz never said that *drugstore s* draw more people with chronic diseases; he said *pharmacies* do. (4JA857.) Second, there is no evidence that more sick people visit a Walgreens pharmacy than a Safeway pharmacy. Moreover, even if *more sick people* visit a pharmacy at Walgreens than at Safeway, this has little to do with the strength of the mixed message that the Ordinance seeks to avoid. Indeed, Dr. Katz conceded elsewhere in his testimony that "[t]hat mixed message may not matter to the person who made a decision to smoke" since "[t]hat person is addicted to nicotine" but "what about the teenager?" (4JA856.) But the teenager is distinct from the sick person entering the pharmacy.

In sum, even assuming that a proportionately greater number of sick people visit Walgreens than Safeway, this has little to do with the implied message that the Ordinance seeks to avoid. The Ordinance targets not the sick who visit the pharmacy (and who are unlikely to simultaneously purchase tobacco), but those customers who are aware that a pharmacy is present in the same retail establishment that sells tobacco at the other end of the store. There is no distinction in implied messages for that customer.

Justification No. 4: Economic Reasons. Finally, citing a San Francisco Chronicle article, the City argued that "the Board could also rationally have excluded big box stores and grocery stores for economic reasons." (3JA786.)

But the newspaper article relied upon by the City to make this contention – which article postdated the Ordinance's passage – does not suggest that an economic reason exists to exclude grocery stores from the ban: It suggests instead that the primary reason for the decrease in supermarkets in San Francisco is that "[e]ager developers are making such generous offers that store owners would be crazy to turn them down." (C.W. Nevius, *Supermarkets an endangered species in S.F.*, S.F. Chronicle (Sept. 18, 2008) p. B1.)

Further, none of the Ordinance's 21 findings of fact mention any economic basis for the exemptions. In applying the rational basis test, a court should "declin[e] to 'invent[] fictitious purposes that could not have been within the contemplation of the Legislature . . . .'" (*Warden, supra,* 21 Cal.4th at p. 648, quoting *Fein, supra*, 38 Cal.3d at p. 163.)

Finally, if economic issues enter the equal protection analysis at all, it is that the Ordinance's prohibition merely serves to shift tobacco sales from Walgreens to its exempted competitors (3JA722), all in pursuit of the elusive goal of avoiding an implied message, which message will continue at the exempt pharmacies. Courts have considered anticompetitive consequences in determining that an otherwise questionable classification is arbitrary. For instance, in *Carlin v. City of Palm Springs, supra*, 14 Cal.App.3d 706, 715, described earlier, in finding that the city's distinction between rate and nonrate signs violated equal protection, the Court of

Appeal rejected the city's justification that the display of rate signs made the higher-paying patrons at luxury hotels disgruntled: "In the event the ordinance tends to favor one class of businessmen over another, it is discriminatory."

Likewise, in *Merrifield v. Lockyer* (9th Cir. 2008) 547 F.3d 978, the Ninth Circuit considered economic favoritism another reason to invalidate on equal protection grounds California's structural pest control licensing requirements, which covered "vertebrate pest" controllers of mice, rats or pigeons, but excluded pest controllers of other vertebrate animals, like bats, raccoons, skunks, and squirrels: "[T]he record highlights that the irrational singling out of three types of vertebrate pests from all other vertebrate animals [for regulation] was designed to favor economically certain constituents at the expense of others similarly situated . . . ." (*Id.* at p. 991.) The Ninth Circuit added, "We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review." (*Id.* at p. 991, fn. 15.)

5. The Ordinance's Severability Clause Cannot Remedy Its Fatal Constitutional Flaw.

The City has suggested that even if the Ordinance violates the equal protection clause, "the only relief sought by Walgreens – invalidation of the entire ordinance – is unavailable" because the Ordinance can be saved by

striking the exemptions for grocery stores and big box stores. (3JA786-787.)

Of course, the fact that the relief requested in Walgreens' complaint sought invalidation of the entire Ordinance, rather than only the section specifying the exceptions, does not support the City's demurrer. A demurrer may not be sustained without leave where the complaint alleges facts showing "entitlement to relief under any possible legal theory." (*Platt, supra*, 217 Cal.App.3d at p. 1444.)

In any event, the City's claim of severability fails.

Admittedly, the Ordinance contains a severability clause. (S.F. Health Code, § 1009.99.) But the presence of a severability clause "is not determinative of the issue of severability." (*People v. Mirmirani* (1981) 30 Cal.3d 375, 387, fn. 9.)

Instead, to sever a portion of legislation requires that the invalid portion be "'grammatically, functionally, and volitionally separable'" from the rest of the measure. (*Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 613, citation omitted.) "'The test [of severability] is whether it can be said *with confidence* that the [legislative body's] attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.'" (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714-715; certain italics omitted, citation omitted.)

Here, the exemptions made in the Ordinance are not volitionally separable for four reasons. First, it cannot be said *with confidence* that the Board of Supervisors would have adopted the broader prohibition. Only three of eleven supervisors spoke in favor of expanding the ordinance (Sandoval, Maxwell, and Mirkarimi). (4JA880-884.) Three voted against the Ordinance (Chu, Elsbernd, Dufty), and Chu and Elsbernd questioned not only the artificial distinction among pharmacies, but also the underlying premise of the legislation. (4JA877-878, 880-884; 3JA724-725.) Thus, only three of the eight in favor of the Ordinance expressed an interest in broadening it.

Second, the excluded grocery and big box stores never participated in the legislative hearings regarding the Ordinance because they were exempted from the start. (See 4JA855-878.) They should have an opportunity to participate in the legislative process if they are to be covered. Otherwise, the court, not the legislative branch, would be deciding to expand an ordinance to cover additional entities specifically *excluded* by the legislative body. (Cf. *People v. Mirmirani, supra,* 30 Cal.3d at p. 387.)

Third, Dr. Katz himself – who helped fashion the legislation (4JA881) – was not prepared to propose the inclusion of grocery stores and big box stores at this time. Instead, he told the Board "in the future if we

have success . . . then broaden the legislation." (4JA882.) The Board never voted on broadened coverage.

Fourth and fundamentally, when California courts have severed invalidated portions of legislation from the valid sections, volitional severability has ordinarily been found on the ground that the legislative body would have approved a more *narrow* statute "had [it] foreseen the invalidity." (See, e.g., *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 822; *Hays, supra,* 25 Cal.3d at p. 795; *People's Advocate, Inc. v. Superior Court* (1986) 181 Cal.App.3d 316, 333.) But there is no California precedent for using severance, following an equal protection challenge, to *expand* legislative constraints on *new* parties.

For example, in *Justesen's Food Stores, Inc. v. City of Tulare, supra,* 12 Cal.2d 324, 333-334, discussed earlier, in finding that an ordinance violated equal protection and due process by restricting the hours of establishments dealing in foods, while exempting some such businesses (like hotels, restaurants, and drug stores), the Supreme Court severed *both* the general restriction and the exemptions thereto, even though they were in different sections of the Ordinance. Notably, it did not simply strike the section containing the exemptions, which would have expanded the general prohibition to cover all businesses dealing in foods. (*Id.*)

In short, the Court can determine that a more narrow law would have been adopted if an otherwise severable portion is invalid. But the same

cannot be said of an invalidation that extends the coverage to *new parties*. Indeed, severance of a statute that results in a "retroactive judicial expansion of narrow and precise statutory language" – as here – would deprive those new parties of the right to fair warning from the language of the statute (see *Bouie v. City of Columbia* (1964) 378 U.S. 347, 352) as well as the right to petition the government prior to enactment.

B. The Ordinance Was Enacted In Violation Of Proposition I.

1. The Trial Court's Ruling and Summary of Argument.

Walgreens' third cause of action alleges that the Ordinance was enacted in violation of Proposition I because the City failed to issue a report on the Ordinance's likely economic impact on the City. (3JA733-734.) Significantly, the Office of Economic Analysis ("OEA") had originally expressed its intent to issue a report, but reversed itself seven days before the first legislative committee hearing. (1JA280-281, 1JA286.) In deciding not to issue a report, it wholly failed to consider the Ordinance's impact on business attraction and retention, job creation, or the total loss of tax and fee revenues to the City, despite the fact that Walgreens alone would lose nearly 9% of its non-pharmacy sales by reason of the Ordinance. (3JA730, 3JA734.)

In ruling on the City's demurrer, the trial court properly accepted as true Walgreens' allegation that the OEA "abused its discretion by failing to prepare an economic report on Ordinance No. 194-08 . . . ." (4JA989.) But

the lower court ruled that this abuse of discretion "does not render the ordinance invalid" because "[t]he proper remedy for failure of the OEA to prepare a report required by Proposition I is not invalidation of legislation enacted in the absence of a report. Rather, it is a writ of mandate directing OEA to prepare a report." (4JA989.)

As shown below, the lower court erred. First, "as a general rule, an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not *substantially* observed." (*City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 931.) Second, a plain reading of Proposition I demonstrates that submission of an economic impact report before the first legislative hearing is a mandatory prerequisite for consideration of legislation having a potentially material economic impact. And third, the lower court's ruling that the exclusive remedy was a mandamus action against OEA would create an unjustified exception to the general rule requiring invalidation where the prerequisites for enactment are not met. Moreover, in this case, mandamus was an inadequate remedy. Not only did the OEA's last-minute reversal of its decision to issue a report make a mandamus action impracticable, but invalidation is the only way to remedy the Board's continued failure to observe Proposition I, which is reflected by the fact that only 24 reports have been issued for the roughly 960 ordinances enacted since 2006. (Appellant's Motion for Judicial Notice, filed concurrently herewith.)

2. Proposition I Requires the Board of Supervisors to Receive an Economic Impact Report Prior to the First Hearing.

In November of 2004, San Francisco voters passed Proposition I. It required that San Francisco create the OEA to "identify and report on all legislation introduced at the Board of Supervisors that might have a material economic impact on the City, as determined by the Office." (S.F. Admin. Code, § 10.32.)

The OEA was required to "analyze the likely impacts of the legislation on business attraction and retention, job creation, tax and fee revenues to the City, and other matters relating to the overall economic health of the City." (S.F. Admin. Code, § 10.32.) It was also required to "address whether the proposed legislation would promote or impede the policies contained in the most recent versions of the [City's] Economic Development Plan or Survey on Barriers to Employment Retention and Attraction . . . ." (*Ibid.*) The OEA was then required to "submit its analysis to the Board of Supervisors within 30 days of receiving the subject legislation from the Clerk of the Board, unless the President of the Board grant[ed] an extension for legislation of unusual scope or complexity. The Office's analysis *shall be submitted* to the Board of Supervisors *prior* to the legislation being heard in committee." (*Ibid.*, italics added.)

The ballot argument in favor of Proposition I, which was prepared by Supervisor Alioto-Pier (one of its four supervisorial sponsors) and which

argument was authorized by the Board of Supervisors, promised voters that "Professional economists will analyze *each* proposed law against the [City's] economic plan *before* the Board of Supervisors considers the law. Supervisors and San Franciscans will know the full impact of each law before it is adopted." (4JA953, italics added.) Supervisor Alioto-Pier cautioned, "We can't afford to pass legislation that creates hidden costs, drives away jobs, or hurts our economy." (*Ibid.*) In her rebuttal ballot argument, she asserted, "Proposition I requires that city politicians study the costs and consequences of their best ideas before adopting new legislation." (4JA954.)

The City, however, argued in its demurrer that "[t]he requirement that the OEA prepare economic impact reports for selected legislation is directed at the OEA, not the Board" and that Proposition I "does not bar the Board from considering legislation absent an economic impact report." (3JA788.)

As shown below, any reasonable reading of Proposition I demonstrates that its intent was to require an economic impact report as a prerequisite for considering legislation that might have a material economic impact.

"Pursuant to established principles, our first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to

the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) In the case of an initiative measure, the task is to ascertain the intent of the voters, but the same principles of construction apply. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798; *In re Lance W.* (1985) 37 Cal.3d 873, 889.)

However, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

When these principles of statutory construction are applied, it is clear that the intent of Proposition I, as expressed in the ballot arguments and a reasonable reading of its entire text, was to require an economic

impact report prior to the consideration of legislation that *might* have a material economic impact. First, the measure expressly requires that the OEA's report "be submitted to the Board of Supervisors prior to the legislation being heard in committee." (S.F. Admin. Code, § 10.32.) There are no exceptions. It is true that the measure requires the report be submitted by the OEA, not received by the Board of Supervisors. But the average voter, reading the proposed statutory language, would conclude that the Board is required to receive the economic impact report before it considers the proposed law, not as the City argues, that the Board is free to act without the benefit of the required report simply because the OEA has the responsibility to prepare the report.

Second, if any ambiguity exists in the measure, "'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself,'" and "[s]uch indicia include the analysis and arguments contained in the official ballot pamphlet." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 504.) Here, the proponent's ballot arguments made it clear to voters that the Board is not supposed to consider legislation without the benefit of the economic impact report: "Professional economists will analyze each proposed law against the [City's] economic plan *before* the Board of Supervisors considers the law. Supervisors and San Franciscans will know the full impact of each law before it is adopted." (4JA953, italics added.) Likewise, the San Francisco Chamber of Commerce's ballot

argument in favor of Proposition I stated, "Prop I will also force the city to consider the real costs – and the impact on jobs – of every law that comes before the Board of Supervisors." (4JA955.)

Third, uncodified section 2 of Proposition I provides, "The voters urge the Board of Supervisors, upon the adoption of this measure, to adopt all necessary rules and procedures for its full implementation, including, but not limited to, a Rule of Order providing *that the Board shall not consider or hold hearings on any proposed legislation until it has received the Office of Economic Analysis' report* on the impact of the legislation, if any, on the San Francisco economy, and that the Board may waive this requirement by a two-thirds' vote if it finds that the public interest requires the immediate consideration of the measure." (4JA957, italics added.) The City argued in its demurrer that "[i]f Proposition I's drafters and voters had intended to *force* the Board to refrain from adopting legislation until the OEA submitted a report, they would not have merely 'urged' the Board to voluntarily restrain its legislative activities." (3JA788-789.) But this exhortation to the Board to adopt "all necessary rules and procedures for [the] full implementation" of Proposition I did not authorize the Board to ignore Proposition I by not adopting any such internal rules. The failure to adopt "all necessary rules and procedures for its full implementation" merely means that Proposition I must be implemented through all remaining mechanisms. Further, the voters' exhortation to the Board that it

adopt a rule of order that would prevent a hearing from being held in the absence of a report says nothing about the legal effect of proceeding without the required report. The voters simply recognized as a matter of comity that the Board, not the voters, should be the body that adopts its rules of order. But the rule of order would have only ensured that the Board did not proceed without the report, not that proceeding without the required report would have no legal consequence.

In sum, the purpose of Proposition I is to require the submission of economic impact reports with respect to any legislation that may have a material economic impact prior to that legislation being heard in committee. Any contention that Proposition I should not be construed to require this prerequisite to legislative enactment is inconsistent with its purpose. "[W]here possible the language [of a statute] should be read so as to conform to the spirit of the enactment." (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917, citation and alterations omitted.)

3. Proposition I Binds the Board of Supervisors, Absent a Conflict With the City Charter.

The City argued in its demurrer that "even if the voters had intended to force the Board to await an OEA report before adopting legislation, they could not have done so through Proposition I, an initiative ordinance" because voters can only limit the Board's power by amending the Charter of the City and County of San Francisco (hereinafter "Charter"). (3JA789.)

But because the courts must give deference to the people's exercise of their initiative power to the full extent authorized by the city charter (*Rossi v. Brown* (1995) 9 Cal.4th 688, 695 (*Rossi*)), there must be a conflict between an initiative measure and the city charter before the initiative can be ignored. Proposition I does not conflict with San Francisco's Charter because it simply specifies information that must be made available to the Board of Supervisors before it enacts ordinances. It is therefore a valid exercise of the people's initiative power.

"[T]he people through their charter have a right to vest in the voters of the city the right and power to deal through initiative action with any matter within the realm of local affairs or municipal business, whether strictly legislative or not, as that term is generally used." (*Rossi, supra,* 9 Cal.4th 688, 696.)

And "[t]he reserved initiative power of the San Francisco electorate is . . . extremely broad." (*Rossi, supra*, 9 Cal.4th at p. 697.) Article XVII of San Francisco's Charter defines "Initiative," in relevant part, as "a proposal by the voters with respect to *any ordinance, act or other measure* which is within the powers conferred upon the Board of Supervisors to enact . . . ." (S.F. Charter, art. XVII, italics added.) Accordingly, the initiative power is not limited to the enactment of ordinances, but to any "act or other measure" that the Board of Supervisors could enact. And because the Board of Supervisors is empowered to enact a measure that

requires the submission of an economic impact report before legislation is heard in committee, so, too, are the voters.

In fact, the scope of the initiative power in San Francisco is even greater than that of the Board of Supervisors: Under the Charter, "[n]o initiative . . . approved by the voters shall be subject to veto, or to amendment or repeal except by the voters, unless such initiative . . . shall otherwise provide." (S.F. Charter, art. XIV, § 14.101.) Consistent with this provision, "[t]he people's reserved power of initiative *is* greater than the power of the legislative body" in the sense that "through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Rossi, supra,* 9 Cal.4th at pp. 715-716.)

Admittedly, when an initiative ordinance "directly *conflict[s]* with authority vested in [a] legislative body by the paramount organic law[,]" it is invalid. (*Cal. Common Cause v. Fair Political Practices Com.* (1990) 221 Cal.App.3d 647, 650; italics added.) Moreover, "[i]t may . . . be the case that initiative ordinances *broadly limiting* the power of future legislative bodies to carry out their duties pursuant to either a governing charter or their own inherent police power, are, as it were, 'constitutional' rather than legislative measures[,]" and may thus constitute impermissible charter amendments. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 798, italics added.)

But Proposition I is very modest in scope. It simply requires that the Board of Supervisors receive (and not even read) an economic analysis prior to legislation being heard. This minimal requirement to receive information does not broadly limit the power of future legislative bodies. Nor does it conflict with any procedure found in the Charter. Section 2.105 of the Charter describes the process by which an ordinance is introduced, referred to committee, reported to the full Board for action, and approved: It requires no more than that ordinances (except emergency ordinances) receive two readings at separate meetings at least five days apart. (S.F. Charter, art. II, § 2.105.) Proposition I does not displace or impair these general processes.

Proposition I's binding effect on the Board is bolstered by the courts' policy that the constitutional right to initiative "must be construed liberally in favor of the people's right to exercise the reserved powers of initiative and referendum" because these "are not rights 'granted the people, but . . . power[s] reserved by them.'" (*Rossi*, *supra*, 9 Cal.4th at p. 695; *Duran v. Cassidy* (1972) 28 Cal.App.3d 574, 585 [reconciling city charter provisions so as to give "both the people and the council . . . the power to amend a general plan"].)

Based on these principles, courts have regularly upheld initiative ordinances, even though they constrain the legislative body's authority, as long as they do not conflict with the charter. For example, in *DeVita v.*

County of Napa, supra, 9 Cal.4th 763, the California Supreme Court upheld the validity of an initiative that amended a county general plan, fixing land use designations for a period of 30 years, and providing for re-designation *only upon a vote of the people* after the board of supervisors made certain specified findings. (*Id.* at pp. 770-771.) Observing that "*all* initiatives place limits on a governing body's capacity to legislate in areas that are otherwise statutorily authorized" (*id.* at p. 788), our state high court held that such a "grant of discretionary legislative authority [to the board] to amend general plans" could not be read as "an implied limitation on the right of initiative." (*Id.* at p. 789.) Observing that the board retained its ability "to amend the general plan in ways that do not conflict with the provisions of [the initiative]" and that it could always submit an inconsistent amendment to the voters for approval, the Court ruled, "We should not presume – nor, given the rule that doubts should be resolved in favor of the initiative and referendum power, should we assume the Legislature presumed – that the electorate will fail to do the legally proper thing." (*Id.* at pp. 792-793.)

Likewise, in *Rossi, supra*, 9 Cal.4th 688, 694, the people passed an initiative, repealing a utility tax on residential users and prohibiting the San Francisco Board of Supervisors from levying a tax on residential utility services in the future. In upholding the initiative, the Supreme Court observed that in previous cases invalidating initiatives, "the power sought

to be exercised by the voters in the initiative measure was one *expressly delegated* and *limited* to the governing body of the city." (*Id.* at p. 708, italics added.) In contrast, "[t]he San Francisco Charter contains no bar on use of the initiative to repeal a tax and thus presumably it was intended that it be used for that purpose . . . ." (*Id.* at p. 712.) The Court added, "Nor is [the initiative] a measure that is beyond the scope of the initiative or referendum because its '"inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential . . . ."' [Citation.]" (*Id.* at p. 713.)

If an initiative requiring voter approval of future amendments to the county general plan (which was otherwise within the board's authority), or a measure preventing the board from levying future residential utility taxes does not impermissibly limit the board's authority, then Proposition I surely does not: After all, after receiving the OEA's report, the Board of Supervisors is free to utterly disregard it. As such, any theoretical burden on the board's lawmaking authority is *de minimis* and not an invalid limit on the board's authority under the Charter.

City and County of San Francisco v. Patterson (1988) 202 Cal.App.3d 95, is easily distinguished. First, the initiative measure there would have conflicted with the Charter: It would have prohibited the San Francisco Board of Supervisors from leasing any real property for a period longer than five years or selling real property for less than 90 percent of its

fair market value, despite Charter provisions expressly granting the board authority to sell property for less than 90 percent of fair market value in the case of public purpose property and to provide a longer term for leases. (*Id.* at pp. 98, 103-104.) Thus, the court held that the proposed change could only be accomplished through a charter amendment. (*Id.* at p. 104; see *DeVita, supra*, 9 Cal.4th at p. 798 [distinguishing *Patterson* as a broad limitation on the power of future legislative bodies].)

Second, *Patterson* was decided in 1988 before the California Supreme Court's decisions in *Rossi* and *DeVita* made clear that the initiative power could constrain board authority.

Finally, the reasoning in *Patterson* has since been repudiated in part. *Patterson* had accepted the City's contention that the "people cannot employ the initiative process to bind future boards which the board itself could not do." (*Patterson*, *supra*, 202 Cal.App.3d at p. 105.) The California Supreme Court subsequently rejected that argument in *Rossi*, *supra*, 9 Cal.4th 688: "The people's reserved power of initiative is greater than the power of the legislative body. . . . [T]hrough exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Id.* at pp. 715-716.)

Accordingly, Proposition I validly requires the submission of an economic impact report before the legislation subject to such a report may be heard.

4. Invalidation of the Ordinance Is the Proper Remedy for the Failure to Comply With Proposition I.

"As a general rule, an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not *substantially* observed." (*City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 931; accord, *Walker v. County of Los Angeles* (1961) 55 Cal.2d 626.)

Thus, in *City and County of San Francisco v. Cooper, supra,* 13 Cal.3d 898, 923-924, where the San Francisco Charter required a health service board to adopt new medical care plans for city employees *before* transmittal to the Board of Supervisors for enactment, the court invalidated the portion of an ordinance that established a city-financed dental plan that was not first adopted by the health service board.

Similarly, in *Walker v. County of Los Angeles, supra,* 55 Cal.2d 626, 639, our state high court ruled that an ordinance that reenacted the existing wage scale for civil servants violated the Los Angeles County Charter's requirement that the board of supervisors enact a salary or wage "at least equal to the prevailing salary or wage for the same quality of service rendered to private persons" because the board declined to first adopt a survey specifying the prevailing wages of private industry. The court ruled that although the charter did "not expressly provide that [the board] shall first make a finding on the prevailing wage question or hold hearings in aid thereof before passing an ordinance fixing compensation for civil service

employees, the clear implication is that such a determination must be made in some fashion either before or at the time of adoption of the salary ordinance." (*Id.* at p. 635.)

Accordingly, it does not matter who was responsible for the failure to observe a mandatory prerequisite (e.g., the health service board in *City and County of San Francisco v. Cooper*) or whether the mandatory requirement was merely a "clear implication" (*Walker v. County of Los Angeles*). It is enough that the requirement was not observed. Here, a plain reading of Proposition I demonstrates that an economic impact report must be submitted before the board considers legislation potentially having a material economic impact. The failure to comply with this requirement invalidates the Ordinance.

5. The Remedy for the Failure to Issue an Economic Impact Report Is Not Limited to Mandamus.

Instead of invalidating the Ordinance, the lower court ruled that the proper remedy "is a writ of mandate directing OEA to prepare a report." (4JA989.) This ruling is in error for several reasons.

First, the availability of a writ of mandate against the OEA does not preclude the separate remedy of invalidating the ordinance.

Second, there was no meaningful opportunity to pursue a mandamus action here, given the OEA's last-minute reversal of its decision to prepare the required economic impact report. After all, the proposed ordinance was

introduced to the Board on April 29, 2008 (3JA724, 1JA234), and on May 5, 2008, the OEA issued a report stating its intention to file an economic impact report regarding the proposed ordinance. (1JA102.) But two months later, on July 10, 2008 – just seven days before the July 17, 2008, hearing before the City Operations and Neighborhood Services Committee – the OEA announced its decision not to submit a report. (1JA286, 1JA234.) Under the lower court's approach, a party seeking to challenge the OEA's failure to prepare the required report would have had only seven days within which to *prepare, petition, and obtain* relief from the court.

Third, an ordinance enacted without the benefit of the requisite economic impact report has been deprived of the informed decision-making process envisioned by Proposition I. Invalidation is the only effective remedy for such an ordinance.

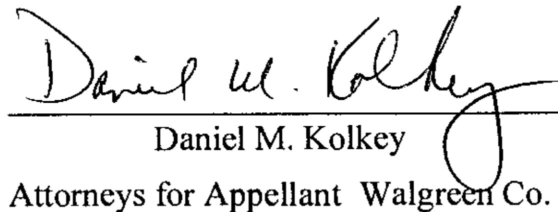
Fourth, invalidation of ordinances enacted without the benefit of the required report is the only means of enforcing the informed decision-making demanded by Proposition I. Since 2006, out of the roughly 960 ordinances enacted in San Francisco, only 24 economic impact reports were prepared. It is highly doubtful that the Board of Supervisors' actions over the past three years have had a potentially material economic impact in only 2.5% of the cases. Relying on interested citizens to seek mandamus against OEA in every case in which a report is not properly issued would leave Proposition I a dead letter.

Proposition I was drafted in mandatory, not directory, terms. It should not be limited to an ineffective remedy in contravention of the general rule requiring invalidation of legislation that fails to observe the mandatory prerequisites for enactment. The lower court's ruling regarding Walgreens' third cause of action must be reversed.

CONCLUSION

For all of the foregoing reasons, Walgreens requests that the judgment be reversed with directions to find that the Ordinance violates the equal protection clause.

GIBSON, DUNN & CRUTCHER LLP



Dated: April 17, 2009

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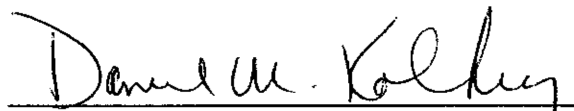
Attorneys for Appellant Walgreen Co.

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that the Appellant's Opening Brief contains 13,975 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

April 17, 2009



Daniel M. Kolkey

Attorney for Plaintiff and Appellant
Walgreen Co.

FILE NO. 080594 ORDINANCE NO. 194-08

1 [Prohibiting Pharmacies From Selling Tobacco Products.]

2

3 **Ordinance amending the San Francisco Health Code by amending Section 1009.53 and**
4 **adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco**
5 **products.**

6 Note: Additions are *single-underline italics Times New Roman*;
7 deletions are ~~*strikethrough italics Times New Roman*~~.
Board amendment additions are double underlined.
8 Board amendment deletions are ~~strikethrough normal~~.

9 Be it ordained by the People of the City and County of San Francisco:

10 Section 1. Findings.

11 The Board of Supervisors hereby finds and declares as follows:

12 1. Tobacco is the leading cause of preventable death in the United States and the
13 leading risk factor contributing to the burden of disease in the world's high-income countries;

14 2. In addition to its health impact, tobacco related death and disease has an
15 economic impact. In 1999, the economic costs of smoking in California were estimated to be
16 $475 per resident or $3,331 per smoker, for a total of nearly $15.8 billion in smoking-related
17 costs (1999 dollars). Those same costs in 2008 dollars would be $614 per resident or $4,310
18 per smoker for a total of nearly $20.4 billion dollars;

19 3. Twenty-three percent of San Franciscans have been diagnosed with high blood
20 pressure. The National Heart Lung and Blood Institute's guidelines for the use of prescription
21 drugs in the treatment of high blood pressure call for smoking cessation;

22 4. Twenty percent of San Franciscans have been diagnosed with high cholesterol.
23 The National Heart Lung and Blood Institute's guidelines for the use of prescription drugs in
24 the treatment of high cholesterol call for smoking cessation;

25

5. The American Diabetes Association's standards of medical care in diabetes call for smoking cessation as well as prescription drug therapy;

6. Thirteen percent of San Franciscans have asthma. The National Heart Lung and Blood Institute's guidelines for the use of prescription drugs in the treatment of asthma call for avoidance of tobacco smoke;

7. Through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize pharmacies for health care services;

8. In 1970, The American Pharmaceutical Association stated that mass display of cigarettes in pharmacies is in direct contradiction to the role of a pharmacy as a public health facility;

9. The Tobacco Education and Research Oversight Committee for California, as well as the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for the adoption of state and local prohibitions of tobacco sales in drugstores and pharmacies;

10. A majority (78%) of independently owned pharmacies in California have become tobacco free; however, tobacco products are still sold by 94% of chain drugstores;

11. Of the independently owned pharmacies that are tobacco-free, 88% report they have experienced either no loss or an increase in business since removing tobacco from their shelves;

12. An overwhelming percentage of California consumers (96.8%) indicate that they would continue to patronize their pharmacy or drugstore as often or more often if it stopped selling tobacco products;

1 13. A large majority (72.3%) of Califomia consumers are opposed to the sale of
2 tobacco products in drugstores and nearly one-half of California smokers (49.7%) disagree or
3 strongly disagree that tobacco products should be sold through drugstores;
4 14. Only 13.2% of chain drugstore pharmacists are in favor of the sale of tobacco
5 products in drugstores;
6 15. In a 2003-2004 national survey of pharmacy students, nearly three-quarters
7 (71%) of those surveyed were against tobacco sales in pharmacies. These findings were
8 aligned with the 2003 resolution of the American Association of Colleges of Pharmacy that
9 encourages pharmacy schools to use only training sites that do not sell tobacco products;
10 16. Pharmacies and drugstores are among the most accessible and trusted sources
11 of health information among the public;
12 17. Clinicians can have a significant effect on smokers' probability of quitting
13 smoking;
14 18. Most health care institutions have adopted policies that have banned tobacco
15 sales and created smoke-free environments. In spite of numerous resolutions and
16 recommendations by state and national pharmacy organizations calling for pharmacies to stop
17 selling tobacco, some community pharmacies In the United States continue to sell tobacco
18 products.
19 19. A study of 100 randomly selected San Francisco pharmacies found that in 2003,
20 61% of pharmacies sold cigarettes, significantly less compared to 89% of pharmacies in 1976.
21 Most of this decrease was among independently owned pharmacies.
22 20. In a 2003 study of San Francisco pharmacies' merchandising of cigarettes, 84%
23 of pharmacies selling cigarettes displayed tobacco advertising.
24
25

1 21. Prescription drug sales for chain drugstores represent a significantly higher
2 percentage of total sales than for grocery stores and big box stores that contain pharmacies.
3 According to the 2007 Rite Aide Annual Report, prescription drugs sales represented 63.7%
4 of total sales in fiscal 2007. Walgreen's 2007 Annual Report documented prescription sales as
5 approximately 65% of net sales that year. Pharmacy sales at Safeway have been estimated
6 at 7.5% of annual volume. Costco's prescription sales generated 1.5% of total revenue in
7 2002.
8 Section 2. The San Francisco Health Code is hereby amended by amending Section
9 1009.53 and adding Section 1009.60 and Article 19J, to read as follows:
10 **SEC. 1009.53. APPLICATION PROCEDURE: INSPECTION OF PREMISES;**
11 **ISSUANCE AND DISPLAY OF PERMIT.**
12 (a) Application. An application for a tobacco sales permit shall be submitted in the
13 name of the person(s) proposing to engage in the sale of tobacco products and shall be
14 signed by each person or an authorized agent thereof. The application shall be accompanied
15 by the appropriate fees as described in section 35 of the San Francisco Business and Tax
16 Regulations Code. A separate application is required for each location where tobacco sales
17 are to be conducted. All applications shall be submitted on a form supplied by the Department
18 and shall contain the following information:
19 1. The name, address, and telephone number of the applicant;
20 2. The establishment name, address, and telephone number for each location for
21 which a tobacco sales permit is sought;
22 3. Such other information as the Director deems appropriate, including the applicant's.
23 type of business, and whether the applicant has previously been issued a permit under this
24 Article that is, or was at any time, suspended or revoked.
25

(b) Inspection by Director. Upon receipt of a completed application and fees, the Director may inspect the location at which tobacco sales are to be permitted. The Director may also ask the applicant to provide additional information that is reasonably related to the determination whether a permit may issue.

(c) Issuance of Permit. If the Director is satisfied that the applicant has met the requirements of this Article and that issuance of the permit will not violate any law, the Department shall issue the permit. No permit shall issue if the Director finds that the applicant is in violation of San Francisco Health Code section 1009.1 (regulating cigarette vending machines), ~~or~~ San Francisco Police Code section 4600.3 (regulating the self-service merchandising of tobacco products)*, or if the applicant is a pharmacy prohibited from selling tobacco products under Article 19J*. No permit shall issue if the application is incomplete or inaccurate.

(d) Display of Permit. Each permittee shall display the permit prominently at each location where tobacco sales occur. No permit that has been suspended shall be displayed during the period of suspension. A permit that has been revoked is void and may not be displayed.

SEC. 1009.60. CONDUCT VIOLATING TOBACCO CONTROL LAWS

(a) Upon a decision by the Director that the permittee or the permittee's agent or employee has engaged in any conduct that violates local, state, or federal law applicable to tobacco products or tobacco sales, the Director may suspend a tobacco sales permit as set forth in section 1009.66, impose administrative penalties as set forth in section 1009.67, or both suspend the permit and impose administrative penalties.

(b) The Director shall commence enforcement of this section by serving either a notice of correction under section 1009.68 of this Article or a notice of initial determination under section 1009.69 of this Article.

ARTICLE 19J: PROHIBITING PHARMACIES FROM SELLING TOBACCO PRODUCTS

SEC. 1009.91. DEFINITIONS.

(a) "Big Box Store" shall mean a single retail establishment occupying an area in excess of 100,000 gross square feet.

(b) "Director" shall mean the Director of the Department of Public Health or his or her designee.

(c) "General Grocery Store" shall have the same meaning as set forth in Planning Code Section 790.102(a) or any successor provisions.

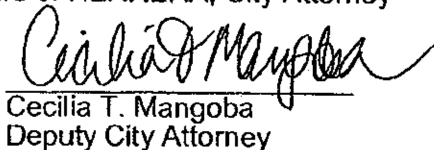
(d) "Person" shall mean any individual person, firm, partnership, association, corporation, company, organization, or legal entity of any kind.

(e) "Pharmacy" shall mean a retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals. For purposes of this Article, "pharmacy" includes retail stores commonly known as drugstores.

(f) "Tobacco Product" shall mean any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe, tobacco, snuff, chewing tobacco, and dipping tobacco.

Sec. 1009.92. PROHIBITION AGAINST TOBACCO PRODUCT SALES AT PHARMACIES.

1 *No person shall sell tobacco products in a pharmacy, except as provided in Sec. 1009.93.*
2
3 *Sec. 1009.93. EXCEPTIONS.*
4 *The prohibition against tobacco sales at pharmacies in Section 1009.92 shall not apply to:*
5 *(a) General Grocery Stores.*
6 *(b) Big Box Stores.*
7
8 *Sec. 1009.94. PENALTIES AND ENFORCEMENT.*
9 *Administrative penalties shall be assessed and collected by the Director in accordance with San*
10 *Francisco Administrative Code Chapter 100, a copy of which is on file in Board of Supervisors File No.*
11 _______ *and which is hereby incorporated by reference.*
12
13 *SEC. 1009.95. EXPIRATION OF PERMIT TO SELL TOBACCO.*
14 *Any permit to sell tobacco issued to a pharmacy pursuant to Article 19H shall expire on*
15 *September 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are prohibited*
16 *under this Article.*
17
18 *SEC. 1009.96. AUTHORITY TO ADOPT RULES AND REGULATIONS.*
19 *The Director may issue and amend rules, regulations, standards, guidelines, or conditions to*
20 *implement and enforce this Article.*
21
22 *SEC. 1009.97. PREEMPTION.*
23 *In adopting this Article, the Board of Supervisors does not intend to regulate or affect the rights*
24 *or authority of the State to do those things that are required, directed, or expressly authorized by*
25

1 federal or state law. Further, in adopting this Article, the Board of Supervisors does not intend to
2 prohibit that which is prohibited by federal or state law.
3
4 SEC. 1009.98. CITY UNDERTAKING LIMITED TO PROMOTION OF GENERAL
5 WELFARE.
6 In undertaking the adoption and enforcement of this Article, the City and County is assuming an
7 undertaking only to promote the general welfare. The City does not intend to impose the type of
8 obligation that would allow a person to sue for money damages for an injury that the person claims to
9 suffer as a result of a City officer or employee taking or failing to take an action with respect to any
10 matter covered by this Article.
11
12 SEC. 1009.99. SEVERABILITY.
13 If any of the provisions of this Article or the application thereof to any person or circumstance
14 is held invalid, the remainder of this Article, including the application of such part or provisions to
15 persons or circumstances other than those to which it is held invalid, shall not be affected thereby and
16 shall continue in full force and effect. To this end, the provisions of this Article are severable.
17
18 APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney
19
20 By:

Cecilia T. Mangoba
21 Deputy City Attorney
22
23
24
25

City and County of San Francisco

Tails

Ordinance

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 080594 **Date Passed:**

Ordinance amending the San Francisco Health Code by amending Section 1009.53 and adding Section 1009.60 and Article 19J, to prohibit pharmacies from selling tobacco products.

July 29, 2008 Board of Supervisors — PASSED ON FIRST READING

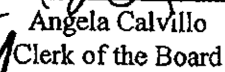
Ayes: 8 - Alioto-Pier, Ammiano, Daly, Maxwell, McGoldrick, Mirkarimi, Peskin, Sandoval
Noes: 3 - Chu, Dufty, Elsbernd

August 5, 2008 Board of Supervisors — FINALLY PASSED

Ayes: 8 - Alioto-Pier, Ammiano, Daly, Maxwell, McGoldrick, Mirkarimi, Peskin, Sandoval
Noes: 3 - Chu, Dufty, Elsbernd

File No. 080594

I hereby certify that the foregoing Ordinance was FINALLY PASSED on August 5, 2008 by the Board of Supervisors of the City and County of San Francisco.



Angela Calvillo
Clerk of the Board

8·7·08

Date Approved

Mayor Gavin Newsom

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of San Francisco. My business address is 555 Mission St., Ste. 3000, San Francisco, CA 94105. On April 20, 2009, I caused to be served the following document:

**** Appellant's Opening Brief ****

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

SEE SERVICE LIST BELOW

☑ **BY MAIL**: I placed a true copy in a sealed envelope for deposit in the U.S. Postal Service through the regular mail collection process at Gibson, Dunn & Crutcher LLP on the date indicated below. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the declaration.

Service on the Courts Below	**Service on the Courts Below**
Clerk of the Court San Francisco Superior Court 400 McAllister St. San Francisco, CA 94102	1 Copy
Hon. Peter J. Busch Department 301 San Francisco Superior Court 400 McAllister St. San Francisco, CA 94102	1 Copy
Clerk of the Court California Supreme Court 350 McAllister St. San Francisco, CA 94102	4 Copies

Counsel	**Attorneys For**
Vince Chhabria Office of the City Attorney for The City and County of San Francisco City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Telephone: (415) 554-4674 Facsimile: (415) 554-4699 E-Mail: vince.chhabria@sfgov.org	*Defendants & Respondents* City & County of San Francisco; The Board of Supervisors for the City & County of San Francisco; and Gavin Newsom, in his capacity as Mayor of the City & County of San Francisco 1 Copy

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on April 20, 2009, at San Francisco, California.

Robin McBain