



# CITY ATTORNEY DENNIS HERRERA

# NEWS RELEASE

FOR IMMEDIATE RELEASE  
FRIDAY, APRIL 15, 2011

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## Medical association backs Herrera's bid to extinguish tobacco ban suit by Safeway

***California Medical Association strongly supports City's law as 'consistent with the conclusions of the medical and public health community'***

SAN FRANCISCO (April 15, 2011)—City Attorney Dennis Herrera has moved to dismiss a lawsuit by the Safeway supermarket chain that challenges the validity of a City ordinance banning tobacco sales in stores that include pharmacies. Herrera's motion filed in federal district court today was joined by a brief from the California Medical Association, the professional organization representing some 35,000 physicians statewide, which offered forceful testimony for the sound policy basis of San Francisco's law.

"Tobacco use is our leading cause of preventable death, and it's impossible to argue that protecting public health doesn't include fighting tobacco use—especially among young people," said Herrera. "Pharmacies exist to serve our health needs. When people in the pharmacy business sell cigarettes, it undermines the medical profession's enormous efforts to warn of the dangers of smoking. I am very grateful for the strong support of the California Medical Association for San Francisco's groundbreaking law. Physicians and the public health community have made great progress in changing social norms about smoking, and their brief today will help us protect the progress we've made to fight tobacco use here in San Francisco. I'm also very appreciative for Sup. Eric Mar's leadership in working to craft this important law."

The amicus brief by the California Medical Association, or CMA, read in part: "CMA strongly supports the San Francisco Ordinance because it is squarely in line with decades of official CMA policy, including recent policy specifically supporting a prohibition on the sale of tobacco products in stores that provide pharmacy services. Such policy mirrors that of the American Medical Association and is based upon sound medical and public health research. In short, the Ordinance is consistent with the conclusions of the medical and public health community that an integral component of the overall campaign against smoking and tobacco addiction must include efforts to address the social norms and messages associated with smoking and to limit the availability, visibility and accessibility of tobacco."

San Francisco's groundbreaking ordinance, which has served as a model for similar laws in a number of cities including Boston and Richmond, Calif., originally contained an exemption for grocery stores and big box stores that contain pharmacies. Last year, however, a California appellate court held that while it found no constitutional problem with the City's general decision to such ban tobacco sales, the exemption for grocery and big box stores violated constitutional equal protection guarantees. Soon after, the Board of Supervisors enacted an amendment, sponsored by Supervisor Eric Mar, removing the exemption, to apply the tobacco sales ban to all stores with pharmacies. That ruling in the California Court of Appeal

[MORE]

came in a lawsuit by the Walgreens drugstore chain. Another lawsuit to invalidate the tobacco sales ban was filed by Philip-Morris, which claimed in federal court that the City's ordinance violated the tobacco giant's right to free speech. That suit was dismissed in October 2009.

The current lawsuit is: *Safeway Inc. v. City and County of San Francisco, et al.*, United States District Court for the Northern District of California Case No. CV 11-0761 CW. The hearing on Herrera's motion to dismiss is currently set for June 2, 2011, at 2:00 P.M., before Judge Claudia Wilken in the Oakland Courthouse, 1301 Clay Street in Oakland, Courtroom 2, 4th Floor. Additional information on the cases is available on the City Attorney's Web site at <http://www.sfcityattorney.org/>.

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10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA

12 SAFEWAY INC., a Delaware Corporation,

13 Plaintiff,

14 vs.

15 CITY AND COUNTY OF SAN  
16 FRANCISCO; THE BOARD OF  
SUPERVISORS FOR THE CITY AND  
17 COUNTY OF SAN FRANCISCO; EDWIN  
M. LEE, in his official capacity as Mayor of  
18 the City and County of San Francisco

19 Defendant.  
20  
21  
22

Case No. CV 11-0761 CW

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
COMPLAINT FOR FAILURE TO STATE A  
CLAIM**  
[Fed. R. Civ. P. 12(b)(6)]

Hearing Date: June 2, 2011  
Time: 2:00 p.m.  
Judge: Judge Claudia Wilken  
Place: Oakland Courthouse,  
Courtroom 2 - 4th Floor

Trial Date: None set

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1 **INTRODUCTION**

2 San Francisco has an ordinance banning tobacco sales by any store that contains a pharmacy.  
3 Originally the ordinance included an exemption for grocery stores and big box stores that contain  
4 pharmacies. In August 2010, however, the City's Board of Supervisors removed the exemption,  
5 meaning all stores with pharmacies are treated equally, and precluded from selling cigarettes.

6 Some Safeway stores have pharmacies. Accordingly, Safeway has sued. The store whose  
7 slogan is "Ingredients for Life" wants one of those ingredients to be cigarettes. The legal arguments  
8 Safeway makes in support of its effort to have cigarettes on the shelves are: (i) San Francisco has  
9 violated the "unconstitutional conditions" doctrine by making stores choose between having  
10 pharmacies and selling cigarettes; (ii) San Francisco has violated equal protection by treating stores  
11 with pharmacies differently from stores without pharmacies; (iii) San Francisco should have used  
12 different words to effectuate its ban on the sale of tobacco products in stores with pharmacies; and (iv)  
13 California law prevents local governments from doing more than the state in the fight against tobacco  
14 addiction. These arguments speak for themselves. The Court should dismiss the complaint with  
15 prejudice.

16 **BACKGROUND**

17 **A. The Original Ordinance.**

18 In 2008 the San Francisco Board of Supervisors passed, and the Mayor signed into law, an  
19 ordinance banning the sale of tobacco products in stores that contain pharmacies. *See* Compl., Ex. A  
20 (Ordinance No. 194-08). The ordinance was based on the opinions of groups like the American  
21 Pharmacists Association, the California Pharmacists Association, and the California Medical  
22 Association that local governments should take measures to: (i) prevent people (particularly young  
23 people) from getting the wrong idea when a store that participates in the health care delivery system is  
24 also willing to sell tobacco; and (ii) eliminate the conflict of interest created when the same store that  
25 profits from selling pharmaceutical products also profits from deadly tobacco products. Compl., Ex. A  
26 (Ordinance No. 194-08, Findings 1, 7, 8, 9).

1 At the outset, it bears noting that the City made a peculiar choice of words in crafting the  
2 ordinance. The City could have effectuated a ban on the sale of tobacco products in stores that contain  
3 pharmacies by stating simply, "no store that contains a pharmacy shall sell tobacco products." Instead,  
4 it took more of a verbally circuitous route by: (i) stating that "no person shall sell tobacco products in a  
5 pharmacy"; (ii) defining "pharmacy" as "a retail establishment" which has a practicing "pharmacist";  
6 and (iii) specifying that this definition includes retail establishments that offer other retail goods.  
7 Compl., Ex. A (S.F. Admin. Code §§ 1009.92, 1009.91(e)). There is no practical difference between  
8 the two wording choices – in each instance it is clear that a store containing a pharmacy is prevented  
9 from selling tobacco, even if it sells many other things.

10 Another wrinkle is that the original ordinance, while purporting to ban the sale of tobacco in  
11 stores that contain pharmacies, included an exemption for grocery stores and big box stores. Compl.,  
12 Ex. A (S.F. Admin. Code § 1009.93). As a practical matter, this meant that large drug stores (like  
13 Walgreens) were precluded from selling cigarettes but grocery stores (like Safeway) could continue  
14 selling cigarettes, even if those stores also had pharmacies in them.

15 The policy goals of the health organizations that supported the ordinance were not merely  
16 reflected in the findings to the ordinance; they were also set forth in legislative testimony by Dr. Mitch  
17 Katz, then San Francisco's Director of Public Health. Although Dr. Katz primarily geared his  
18 presentation towards justifying the exemption for grocery stores and big box stores (because that  
19 aspect of the ordinance gave rise to the most questions), he also made clear that a ban on tobacco sales  
20 by all stores with pharmacies would even more effectively advance the City's policy goals:

21 What I was trying to do in our work in fashioning the legislation was focusing  
22 on that group where I thought the case was strongest . . . . Certainly in the future  
23 if we have success and I believe we would, just like San Francisco was the  
24 leader [*sic.*] and then broaden the legislation.

25 RJN Ex. A at 32 (Testimony of Dr. Katz to Full Board of Supervisors). *See also id.* at 5, 7 (Testimony  
26 of Dr. Katz to Committee on City Operations and Neighborhood Services) (lamenting the "inherent  
27 conflict of interest" present when a store makes money on both pharmaceutical products and tobacco  
28 products).

1 The Board approved the legislation, and then-Mayor Gavin Newsom signed it into law.  
2 Compl., Ex. A at 12. Although the ordinance was the first of its kind in the nation, many local  
3 jurisdictions (particularly in Massachusetts) have since followed suit. *See, e.g.*, RJN Exs. B-G  
4 (Boston, MA; Richmond, CA; Newton, MA; Everett, MA; Southborough, MA; Oxford, MA; ).

5 **B. The Lawsuits By Philip Morris And Walgreens.**

6 The original ordinance prompted two lawsuits, one by Philip Morris and another by Walgreens.  
7 The Philip Morris action, filed in this Court, alleged the ordinance violated the First Amendment by  
8 punishing tobacco companies and drug stores for "sending a message" about tobacco. This Court  
9 denied Philip Morris's application for a temporary restraining order, and later declined to preliminarily  
10 enjoin the ordinance. *See Philip Morris USA v. City and County of San Francisco*, 2008 WL 5130460  
11 (N.D. Cal.). Philip Morris appealed, and the Ninth Circuit affirmed in an unpublished decision. *See*  
12 *Philip Morris USA v. City and County of San Francisco*, 345 Fed.Appx. 276 (9th Cir. 2009). On  
13 remand, Philip Morris stipulated to a dismissal of its complaint.

14 The City did not fare as well in the Walgreens action, which was filed in state court.  
15 Walgreens argued that the ordinance violated the equal protection provisions of the federal and state  
16 constitutions. The company contended that the City's decision to distinguish between drug stores and  
17 grocery stores was not rationally related to a legitimate governmental purpose, because there is no  
18 practical difference between a Walgreens store (which has a pharmacy in the back, sells cigarettes in  
19 the front, and sells numerous other products) and a Safeway store (which has a pharmacy in the back,  
20 sells cigarettes in the front, and sells numerous other products). Although the trial court sustained the  
21 City's demurrer, the California Court of Appeal reversed, holding that Walgreens' complaint pleaded  
22 an equal protection violation. The court held that given the similarities between the modern-day drug  
23 store and the modern-day grocery store, there was no basis for concluding people would be more  
24 likely to get the wrong message from the sale of tobacco by a Walgreens than by a Safeway.  
25 *Walgreen Co. v. City and County of San Francisco*, 185 Cal.App.4th 424, 437-42 (2010).<sup>1</sup> In reaching

26  
27 <sup>1</sup> The slip opinion of the court is attached to the complaint as Exhibit D, but this brief cites to  
28 the published version.

1 its conclusion, however, the Court made clear it found no constitutional problem with the City's  
2 general decision to ban tobacco sales in stores that contain pharmacies:

3 Walgreens attacks not only the exemption for general grocery stores and  
4 big box stores but also claims the very premise of the legislation is questionable.  
5 According to Walgreens, "It is simply not credible that 'pharmacies convey tacit  
6 approval of the purchase and use of tobacco products' . . . given the decades of  
7 anti-smoking media campaigns and warnings that would counteract any such  
8 implied message." The premise underlying the prohibition on sales of tobacco  
9 products in pharmacies may not be universally accepted. Nonetheless, the  
10 government unquestionably has a legitimate interest in discouraging tobacco  
11 use. Here, the City made a determination that prohibiting sales of tobacco  
12 products in pharmacies furthers that legitimate interest, a determination  
13 supported by numerous professional medical and pharmaceutical organizations.  
14 While that assessment may be subject to debate – and indeed was debated by  
15 members of the Board of Supervisors – it does not violate any constitutional  
16 principle.

17 *Id.* at 439. *See also id.* at 441 ("That perception may justify the prohibition against sales of tobacco  
18 products by pharmacies *in general*, but it does not justify treating stores such as Walgreens different  
19 from general grocery stores and big box stores) (emphasis in original).<sup>2</sup>

### 20 **C. The Revised Ordinance.**

21 On remand, the question remained whether the trial court should remedy the equal protection  
22 violation by striking down the ordinance entirely (thereby allowing Walgreens and other covered  
23 stores to resume selling cigarettes), or by striking down the exemption for grocery stores and big box  
24 stores (thereby extending the ban to stores like Safeway and Costco). However, the Board took  
25 legislative action which mooted this interesting legal question. It amended the ordinance to remove  
26 the exemption for grocery stores and big box stores, thereby equalizing its treatment of all stores that  
27 contain pharmacies. Compl., Ex. E. This lawsuit by Safeway followed.

### 28 **LEGAL STANDARD**

When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim,  
dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally  
cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555

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<sup>2</sup> It is clear from this language that the Court of Appeal was using the nomenclature of the ordinance – that is, the court referred to stores with pharmacies in the shorthand as "pharmacies," including stores like Walgreens and Safeway.

1 (2007). In considering whether the complaint is sufficient to state a claim, the Court will take all  
2 material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus.,*  
3 *Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal  
4 conclusions; "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
5 statements," are not taken as true. *Ashcroft v. Iqbal*, *U.S.*, 129 S. Ct. 1937, 1949 (2009) (citing  
6 *Twombly*, 550 U.S. at 555).

## 7 ARGUMENT

### 8 I. THE ORDINANCE DOES NOT IMPLICATE THE "UNCONSTITUTIONAL 9 CONDITIONS" DOCTRINE.

10 The second cause of action alleges that the ordinance imposes an "unconstitutional condition"  
11 on Safeway under both federal and state law.<sup>3</sup> The allegation appears to be that Safeway has some  
12 constitutional right to engage in the pharmacy business or the tobacco business, and that San Francisco  
13 may not force Safeway to choose between the exercise of these two alleged constitutional rights.  
14 Compl. at ¶¶ 76-80.

15 The unconstitutional conditions doctrine is only implicated when a plaintiff can show it was  
16 required to relinquish an actual constitutional right. *See Sanchez v. County of San Diego*, 464 F.3d  
17 916, 930-31 (9th Cir. 2006) (state law); *Vance v. Barrett*, 345 F.3d 1083, 1088 (9th Cir. 2003) (federal  
18 law).<sup>4</sup> Safeway cannot make that showing, because it has no right under the state constitution (and  
19 certainly not under the federal constitution) to operate a pharmacy or to sell cigarettes. To be sure, the  
20 government may not deprive an individual business of a license to operate a pharmacy or sell tobacco  
21 without following proper procedures. But it is indisputable that the government may restrict the

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22 <sup>3</sup> The first cause of action seeks declaratory and injunctive relief but does not appear to assert  
23 an actual legal theory. Thus it stands or falls with the second, third, fourth and fifth causes of action,  
24 each of which raises a substantive claim.

25 <sup>4</sup> Unconstitutional conditions cases traditionally involve the relinquishment of such  
26 fundamental constitutional rights as the right to free speech, *see, e.g., Rumsfeld v. Forum for Academic*  
27 *and Institutional Rights, Inc.*, 574 U.S. 47 (2006), the right to abortion, *see Rust v. Sullivan*, 500 U.S.  
28 173 (1991); *Comm. to Defend Reprod. Rights*, 29 Cal. 3d 252, the privilege against self-incrimination,  
*see Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), the right to be free from unreasonable  
searches and seizures, *see Sanchez*, 464 F.3d 916, and the right to just compensation when the  
government takes real property, *see, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Vance*, 345  
F.3d 1083.

1 ability of companies to obtain or retain a license in the exercise of its police power to promote the  
2 health and welfare. "The general right to engage in a trade, profession or business is subject to the  
3 power inherent in the state to make necessary rules and regulations . . . . No person can acquire a  
4 vested right to continue, when once licensed, in a business, trade or occupation which is subject to  
5 legislative control under the police powers." *Hughes v. Bd. of Architectural Examiners*, 17 Cal.4th  
6 763, 790 (1998) (citations and internal quotations omitted). *See also Davidson v. County of San*  
7 *Diego*, 49 Cal.App.4th 639, 642 (1996) ("vested rights may be impaired by subsequent police power  
8 enactments reasonably necessary to protect the public's health and safety.").

9       Indeed, the California Court of Appeal made this point more than 60 years ago in the specific  
10 context of pharmacies – a point that may have been novel at the tail end of the *Lochner* era but is  
11 obvious now:

12           It is conceded that every citizen has a right to follow any lawful business or  
13 profession which is not injurious to the public or a menace to the health, safety  
14 or welfare of society, free from regulation by the exercise of the police power of  
15 the state except in cases of necessity for such health, safety or welfare, and  
16 when its authority is so interposed in behalf of the public it must be by means  
17 reasonably necessary for the accomplishment of that purpose. A determination  
18 of what is reasonably necessary for the public health, safety or welfare is a  
19 legislative function and should not be interfered with, only in case of clear  
20 abuse. Where a statute is clearly such a measure, the fact that rights may be  
21 affected does not invalidate the act . . . . A license obtained by compliance with  
22 the statutes relating to any one of the many businesses and professions set forth  
23 in said code may become of great value to the possessor and cannot be  
24 arbitrarily taken from him any more than his real or personal property can thus  
25 be taken. But there is no arbitrary deprivation of such right where its exercise is  
26 not permitted because of a failure to comply with conditions imposed by the  
27 state for the protection of society . . . . If, then, the Legislature had the right  
28 under the police power of the state to impose restrictions upon assistant  
pharmacists to practice in the first instance, and it cannot be denied that such a  
subject is a proper one for legislative regulation . . . it necessarily must follow  
that the correlative right to impose further restrictions for the same purpose is a  
necessary consequence of the initial power . . . . A license has none of the  
elements of a contract and does not confer an absolute right but a personal  
privilege to be exercised under existing restrictions and such as may thereafter  
be reasonably imposed . . . . The license received by petitioner as an assistant  
pharmacist was not for the benefit of himself but for the protection of the public,  
and was so accepted by him subject at all times to the paramount right of the  
state at any time that the public good demanded, to further restrict his activities  
thereunder. If such restrictions and regulations were reasonably adopted for  
those purposes, they will be upheld even though they actually may prohibit him  
from further engaging in an occupation or profession under a license previously  
granted.

1 *Rosenblatt v. California State Bd. of Pharmacy*, 69 Cal. App. 2d 69, 72-75 (1945) (quotations,  
2 citations and footnotes omitted).

3 Because Safeway does not have a substantive constitutional right either to operate a pharmacy  
4 or to sell tobacco products, the unconstitutional conditions doctrine is not implicated by the City's  
5 requirement that it choose between the two.

## 6 **II. THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION.**

7 The third cause of action alleges that the ordinance violates the equal protection provisions of  
8 the state and federal constitutions because it treats stores with pharmacies differently from those  
9 without pharmacies. An equal protection challenge of this kind raises two questions. First, the Court  
10 must determine whether the challenged law treats similarly situated groups differently. If the groups  
11 are not similarly situated, equal protection simply is not implicated. *See Fraley v. U.S. Bureau of*  
12 *Prisons*, 1 F.3d 924, 926 (9th Cir. 1993) (stating that the court "must first determine whether [the  
13 plaintiff] is 'similarly situated' to post-sentence prisoners," and ending the equal protection analysis  
14 after finding she was not); *Cooley v. Super. Ct. of Los Angeles Cnty.*, 29 Cal. 4th 228, 254 (2002)  
15 (holding that because the plaintiff was not similarly situated to the relevant class, he failed to satisfy  
16 this "preliminary requirement" and therefore his equal protection argument "must fail"); *see also U.S.*  
17 *v. Woods*, 888 F.2d 653, 656 (10th Cir. 1989) ("If the groups are not similarly situated, there is no  
18 equal protection violation.").

19 Second, if the two groups are similarly situated, the Court must apply the appropriate level of  
20 equal protection scrutiny. *See People v. Hofsheier*, 37 Cal. 4th 1185, 1200 (2006); *see also U.S. v.*  
21 *Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995) ("[I]f it is demonstrated that a cognizable class is  
22 treated differently, the court must analyze under the appropriate level of scrutiny whether the  
23 distinction made between the groups is justified.").

### 24 **A. There Is No Cognizable Equal Protection Claim Because The Ordinance Does Not** 25 **Treat Similarly Situated Groups Differently.**

26 On the question whether groups are similarly situated for equal protection purposes, courts  
27 must not merely inquire whether the groups are similarly situated in the abstract, but rather whether  
28 they are similarly situated with respect to the goals of the law being challenged. *Cooley*, 29 Cal. 4th at

1 253; *see Williams v. Field*, 416 F.2d 483,486 (9th Cir. 1969). As set forth at pages 1-2, there are two  
2 basic goals of the ordinance, as articulated both in the legislative proceedings and by the health  
3 organizations that have advocated for the measure. First, it sets out to prevent the public, especially  
4 young people, from getting the wrong idea when a store that acts as a healthcare provider is also  
5 willing to sell cigarettes (much as people would get the wrong idea if a doctor's office or hospital sold  
6 cigarettes). Second, it aims to eliminate the inherent conflict of interest created when the same store  
7 that profits from selling pharmaceutical products also profits from deadly tobacco products. Both  
8 purposes are premised on the basic notion that when a store contains a pharmacy, it is participating in  
9 the health care delivery system, not unlike doctors and hospitals. Simply put, the ordinance posits that  
10 participants in our health care delivery system should not be selling deadly tobacco products.

11 Stores without pharmacies are not participants in our health care delivery system. It is  
12 therefore clear that they are not similarly situated to stores that contain pharmacies with respect to the  
13 purposes of this ordinance. Accordingly, equal protection is not implicated, and Safeway's claim must  
14 fail.

15 **B. Even If Stores With Pharmacies Were Similarly Situated To Stores Without**  
16 **Pharmacies, The City's Differential Treatment Of The Two Is Rationally Related**  
17 **To The Legitimate Purposes Of The Ordinance.**

18 Even if stores with pharmacies and stores without pharmacies could be deemed similarly  
19 situated, that would not ultimately help Safeway. Equal protection does not require that the  
20 government treat similarly situated parties in precisely the same manner. Rather, it allows for  
21 differential treatment so long as it satisfies the relevant level of scrutiny. *See Engquist v. Oregon*  
22 *Dep't of Agric.*, 553 U.S. 591, 602 (2008) ("When those who appear similarly situated are nevertheless  
23 treated differently, the Equal Protection Clause requires at least a rational reason for the difference.");  
24 *In re Ricky H.*, 2 Cal. 3d 513, 522 (1970) ("Although statutes which affect a particular class must be  
25 based upon rational distinctions or classifications, there is no constitutional requirement of uniform  
26 treatment.") (citations omitted).

1 Here, there is no question the ordinance is economic legislation subject only to rational basis  
2 review. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1031(9th Cir. 2010);  
3 *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298-99 (2007). This level of scrutiny  
4 manifests restraint by the judiciary in relation to the discretionary act of a co-  
5 equal branch of government; in so doing it invests legislation involving such  
6 differentiated treatment with a presumption of constitutionality and "requir[es]  
7 merely that distinctions drawn by a challenged statute bear some rational  
8 relationship to a conceivable legitimate state purpose."  
9 *Hernandez*, 41 Cal. 4th at 298-99 (quoting *Warden v. State Bar of California*, 21 Cal.4th 628, 640-  
10 41) (citations omitted in original); *see also Berger v. City of Seattle*, 512 F.3d 582, 607 (9th Cir.  
11 2008) ("[T]he general rule is that legislation is presumed to be valid and will be sustained if the  
12 classification drawn by the statute is rationally related to a legitimate state interest.") (quoting *City of*  
13 *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).<sup>5</sup>

14 "[T]he burden of demonstrating the invalidity of a classification under this standard rests  
15 squarely upon the party who assails it." *Warden*, 21 Cal.4th at 641. The legislation "must be upheld  
16 against equal protection challenge *if there is any reasonably conceivable state of facts that could*  
17 *provide a rational basis for the classification*. Where there are plausible reasons for the  
18 classification, our inquiry is at an end." *Warden* 21 Cal.4th at 644 (quoting *FCC v. Beach Commc'ns,*  
19 *Inc.*, 508 U.S. 307, 313 (1993) (emphasis in original)).

20 Safeway contends the ordinance violates equal protection because it discriminates between  
21 stores "based solely on whether or not there is a licensed pharmacy somewhere on their premises."  
22 Compl. ¶ 84. However, this differential treatment is rationally related to the legitimate purposes of the  
23 ordinance. The ordinance's basic purpose is to prevent people from becoming addicted to tobacco and  
24 to help those already addicted to stop smoking. This is not merely a legitimate purpose; it is a  
25 compelling one. The measure accomplishes this goal by helping to prevent people (particularly young  
26 people) from getting the wrong idea about cigarettes when a key participant in the health care delivery  
27 system sells deadly tobacco products. It also ensures that when patients go to a pharmacy to obtain a

28 <sup>5</sup> The test for rational basis review is the same under both state and federal law. *See Kasler v. Lockyer*, 23 Cal. 4th 472, 481-82 (2000).

1 prescription given by their doctors (say, a prescription for a heart or lung problem), they will not be  
2 tempted to purchase a product that is at cross-purposes with the treatment they are receiving.  
3 Furthermore, it is also entirely legitimate for the government to want to protect entities that participate  
4 in the health care delivery system from the conflict of interest inherent in simultaneously treating  
5 people's health problems and selling them tobacco.

6 The rationality of San Francisco's measure is underscored by its support from major health care  
7 organizations. In 2007, the AMA passed a resolution which opposes "the sale and marketing of  
8 tobacco products, including cigarettes, in a pharmacy," and expresses commitment to "work to pass  
9 legislation at the local, state and federal levels to accomplish the goal of banning tobacco sales in  
10 pharmacies nationwide."<sup>6</sup> This resolution did not merely apply to actual pharmacies within stores,  
11 but to "any facility where health services are provided."<sup>7</sup> In its findings, the AMA provided reasons  
12 similar to those provided by the Board for its ban, stating: "[t]hose pharmacies that sell cigarettes and  
13 other tobacco products, do so to generate additional profits, while making it convenient and  
14 sometimes subtly enticing their customers to use a product which can only harm the health of the user  
15 and those around him/her."<sup>8</sup>

16 Similar sentiments have also been expressed by the California Medical Association,<sup>9</sup> the  
17 National Community Pharmacists Association,<sup>10</sup> the San Francisco Medical Society,<sup>11</sup> the  
18

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19 <sup>6</sup> AMA, 2009 Annual Meeting, 552-53 (available at [http://www.ama-](http://www.ama-assn.org/resources/doc/hod/a-09-resolutions.pdf)  
20 [assn.org/resources/doc/hod/a-09-resolutions.pdf](http://www.ama-assn.org/resources/doc/hod/a-09-resolutions.pdf)).

21 <sup>7</sup> Memorandum from Jeremy A. Lazarus, M.D., Speaker, House of Delegates, to Delegates at  
22 Resolution 419 (June 2, 2009) (available at [http://www.ama-assn.org/ama1/pub/upload/](http://www.ama-assn.org/ama1/pub/upload/mm/475/handbookaddendum.pdf)  
23 [mm/475/handbookaddendum.pdf](http://www.ama-assn.org/ama1/pub/upload/mm/475/handbookaddendum.pdf)).

24 <sup>8</sup> *Id.*

25 <sup>9</sup> Resolution 719-08 (supporting a prohibition on the sale of tobacco products "in any store that  
26 contains a pharmacy") (available at <http://www.calphys.org/html/alert101308.asp>).

27 <sup>10</sup> Resolution #2 (2008) ("any law or regulation prohibiting the sale of tobacco products should  
28 apply to all entities operating a pharmacy") (available at [http://www.ncpanet.org/pdf/](http://www.ncpanet.org/pdf/2008ncpa_resolutions20081014.pdf)  
29 [2008ncpa\\_resolutions20081014.pdf](http://www.ncpanet.org/pdf/2008ncpa_resolutions20081014.pdf))

30 <sup>11</sup> *San Francisco Expands Tobacco Ban, Nullifies Walgreens Lawsuit*, 83 S.F. Med., Nov.  
31 2010 at 5, (SFMS "has supported [San Francisco's ordinance] from the outset, including filing legal  
32 briefs in support") (available at [http://www.sfms.org/AM/Template.cfm?Section=Home&](http://www.sfms.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3186)  
33 [TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3186](http://www.sfms.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=3186)).

1 International Pharmaceutical Federation,<sup>12</sup> the Medical Faculty Associates of George Washington  
2 University,<sup>13</sup> and the Metropolitan DC Thoracic Society.<sup>14</sup> It cannot be that so many of the major  
3 public health organizations in the nation are irrational. And that is why the California Court of  
4 Appeal acknowledged in the Walgreens litigation that even if it were debatable that a ban on tobacco  
5 sales in stores with pharmacies would reduce tobacco addiction, such a ban – so long as it did not  
6 distinguish between different kinds of stores with pharmacies – "does not violate any constitutional  
7 principle." *Walgreen*, 185 Cal. App. 4th at 439. *See also* discussion of Court of Appeal decision at  
8 pp. 3-4, *supra*. Because the California Court of Appeal was not wrong on this point, this Court  
9 should dismiss Safeway's equal protection claim.

10 **III. THE CITY'S CHOICE OF LANGUAGE TO EFFECTUATE A BAN ON TOBACCO**  
11 **SALES IN STORES WITH PHARMACIES DOES NOT RENDER IT INVALID.**

12 Safeway's fourth cause of action alleges the ordinance violates due process. It argues that the  
13 City's decision to define a "pharmacy," for purposes of the ordinance, as any store that contains a  
14 licensed pharmacy is "arbitrary and capricious." Compl. at ¶ 91. In other words, Safeway contends  
15 the City's decision to classify grocery stores like Safeway as "pharmacies" for purposes of the  
16 ordinance constitutes a constitutional violation.

17 A legislature's choice of nomenclature, in and of itself, cannot possibly violate due process. To  
18 be sure, an ordinance must not be unconstitutionally vague, but Safeway cannot possibly mean to  
19 argue that the ordinance fails to put a reasonable person on notice of the conduct prohibited and the  
20

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21 <sup>12</sup> Press Release, International Pharmaceutical Federation, FIP Calls for Ban on Tobacco Sales  
22 and Smoking in Pharmacies (Sep. 8, 2004) ("pharmaceutical organizations [should] diligently pursue  
23 policies that tobacco products are not sold in pharmacies, and that licensing bodies should not license  
24 pharmacies that are located in premises in which such products are sold") (available at  
25 <http://www.fip.org/projectsfip/pharmacistsagainsttobacco/20040908PressReleaseFIP.pdf>).

26 <sup>13</sup> Letter from Alan G. Wasserman, M.D., Chairman, George Washington Univ. Dep't of Med.,  
27 to the Council of the District of Columbia (July 15, 2010) (urging the Council of the District of  
28 Columbia to "promptly pass legislation that eliminates tobacco sales in any establishment in  
Washington, D.C. that operates a pharmacy") (available at [http://www.tobaccofreerx.org/images/GW\\_University\\_Medical\\_Faculty\\_Associates\\_endorsement.pdf](http://www.tobaccofreerx.org/images/GW_University_Medical_Faculty_Associates_endorsement.pdf)).

<sup>14</sup> Letter from Robin L. Gross, M.D., President, Metropolitan D.C. Thoracic Soc'y, to the  
Council of the District of Columbia (June 14, 2010) (same) (available at  
[http://www.tobaccofreerx.org/images/Metropolitan\\_DC\\_Thoracic\\_Society\\_endorsement.pdf](http://www.tobaccofreerx.org/images/Metropolitan_DC_Thoracic_Society_endorsement.pdf)).

1 entities covered. It is quite clear that any store containing a pharmacy may not sell tobacco; there is no  
2 confusion about which stores the ordinance covers and which it does not.

3 Safeway's due process cause of action appears to assume there would be no due process issue  
4 had the ordinance stated it was banning tobacco sales in "stores with pharmacies." But that is exactly  
5 what the ordinance does. It uses language that takes a bit longer to read, but accomplishes exactly the  
6 same thing. Safeway demeans the Constitution by arguing that this word choice, which is utterly  
7 inconsequential from a practical standpoint, creates a due process problem.

#### 8 **IV. THE ORDINANCE IS NOT PREEMPTED.**

##### 9 **A. State Tobacco Control Laws Do Not Preempt The Ordinance.**

10 Safeway's fifth cause of action asserts that an unidentified provision of the California Business  
11 and Professions Code, relating to tobacco permits, preempts local governments from enacting  
12 measures like San Francisco's. Compl. at ¶ 99.

13 Article XI, section 7 of the California Constitution provides: "A county or city may make and  
14 enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict  
15 with general laws." A local measure is "in conflict with general laws" if it "duplicates, contradicts, or  
16 enters an area fully occupied by general law, either expressly or by legislative implication." *O'Connell*  
17 *v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007) (citations and internal quotations omitted).

18 San Francisco's ordinance does not fall within these preemption categories. To the contrary,  
19 the pertinent statutes show that the California legislature has authorized local governments to go  
20 beyond state law, to further protect their citizens from the health threat posed by tobacco products.

21 The Cigarette and Tobacco Products Licensing Act, which is presumably the Business and  
22 Professions Code provision Safeway means to invoke, creates a licensing scheme and uses local  
23 governments to help administer it. However, far from preventing local governments from doing more,  
24 this provision states, "[n]othing in this division preempts or supersedes any local tobacco control law  
25 other than those related to the *collection of state taxes*." Cal. Bus. & Prof. Code § 22971.3 (emphasis  
26 added).

1 California Health and Safety Code Section 118950(b) makes it unlawful for those who sell  
2 tobacco to distribute free tobacco products to people in specified areas. However, that statute also  
3 provides: "An ordinance that imposes greater restrictions on the sale or distribution of tobacco than  
4 this section shall govern, to the extent of any inconsistency between it and this section." Cal. Health &  
5 Safety Code § 118950(e).

6 Finally, the Stop Tobacco Access To Kids Enforcement Act ("STAKE Act") contains  
7 numerous provisions designed to ensure local governments have supplemental power to regulate  
8 tobacco sales and promotion. *See* Cal. Bus. & Prof. Code § 22950 *et. seq.* For example, the STAKE  
9 Act restricts cigarette vending machines, but specifies that "[a] local standard that further restricts or  
10 imposes a complete ban on the sale of cigarettes or tobacco products from vending machines or  
11 devices shall control in the event of an inconsistency between this section and a local standard." Cal.  
12 Bus. & Prof. Code § 22960(c). The Act restricts tobacco advertising on billboards, but states that "[a]  
13 local standard that imposes a more restrictive or complete ban on billboard advertising or on tobacco-  
14 related billboard advertising shall control in the event of any inconsistency between this section and a  
15 local standard." Cal. Bus. & Prof. Code § 22961(b). And the Act restricts self-service displays of  
16 tobacco products, but makes clear that when a local standard "imposes greater restrictions on the  
17 access to tobacco products, the greater restriction on the access to tobacco products in the local  
18 standard shall prevail." Cal. Bus. & Prof. Code § 22962(e).

19 None of this could possibly lead to the conclusion that San Francisco is prohibited from  
20 banning tobacco sales in stores with pharmacies. To the contrary, at every turn the Legislature has  
21 made clear that local governments have broad authority to take action, over and above what the State  
22 has already done, in furtherance of the battle against tobacco addiction.

23 **B. State Laws Governing Pharmacies Do Not Preempt The Ordinance.**

24 Safeway's fifth cause of action also asserts that state statutes regulating pharmacies preempt the  
25 ordinance. Again, Safeway has chosen not to identify the specific provisions it believes have this  
26 preemptive effect. In any event, this preemption claim appears to depend on Safeway's argument that  
27 San Francisco may not use a verbally circuitous route to effectuate its ban on tobacco sales in stores  
28

1 with pharmacies. *See* Compl. at ¶ 98 ("The Business and Professions Code does not permit the City to  
2 define a "pharmacy" as any place in the same building where general retail goods are sold outside the  
3 physical premises of a pharmacy where prescriptions are filled by licensed pharmacists"). As  
4 discussed in Section III above, Safeway's contention about the City's choice of words is preposterous.

5 To the extent this cause of action argues something more, it is baseless. To be sure, California  
6 law extensively regulates actual pharmacies. *See* Cal. Bus. & Prof. Code § 4000 *et seq.* Had San  
7 Francisco enacted an ordinance regulating, say, the manner in which actual pharmacies store their  
8 medicine, or the manner in which they sell their pharmaceutical products, that would present a serious  
9 preemption question. This ordinance, however, does not, because it in no way operates in the area  
10 covered by the state statutes regulating actual pharmacies.

11 **CONCLUSION**

12 Because the complaint fails to state a claim, and because no amendment could cure its legal  
13 deficiencies, the Court should dismiss it with prejudice.

14  
15 Dated: April 15, 2011

16 DENNIS J. HERRERA  
17 City Attorney  
18 WAYNE SNODGRASS  
19 VINCE CHHABRIA  
20 Deputy City Attorneys

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26 in his official capacity as Mayor of the CCSF

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9 IN THE UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA  
11 OAKLAND DIVISION  
12

13 SAFEWAY INC.,  
14

15 Plaintiff,

16 v.

17 CITY AND COUNTY OF SAN  
FRANCISCO, *et al.*,

18 Defendants.  
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Case No. CV-11-0761 (CW)

**APPLICATION OF THE CALIFORNIA  
MEDICAL ASSOCIATION FOR  
LEAVE TO FILE *AMICUS CURIAE*  
BRIEF; *AMICUS CURIAE* BRIEF IN  
SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS**

Date: June 2, 2011  
Time: 2:00 p.m.  
Judge: Hon. Claudia Wilken  
Court: Courtroom 2 – 4th Floor

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

1           The California Medical Association (“CMA”) hereby requests permission to file the  
2 attached *amicus curiae* brief in support of the City and County of San Francisco’s (“San  
3 Francisco”) motion to dismiss the complaint in this action, filed by Safeway Inc. (“Safeway”).  
4 Counsel for CMA has reviewed Safeway’s complaint in this action to challenge the  
5 constitutionality and legality of San Francisco’s ordinance prohibiting the sale of tobacco in retail  
6 stores with pharmacies, S.F. Ordinance Nos. 194-08 and 245-10 (the “Ordinance”). CMA  
7 believes it can assist the Court in resolving a key issue raised by Safeway’s complaint: whether  
8 San Francisco treats similarly situated entities differently under the Ordinance and whether any  
9 such distinction is rationally related to a legitimate public health interest.

10           CMA is a not-for-profit professional association for physicians with approximately 35,000  
11 members throughout California. For more than 150 years, CMA has promoted the science and art  
12 of medicine, the care and well-being of patients, the protection of the public health and the  
13 betterment of the medical profession. CMA’s physician members practice medicine in all  
14 specialties and settings. CMA carries out this mission through advocacy on behalf of organized  
15 medicine in the courts and before legislatures and regulators.

16           CMA strongly supports the San Francisco Ordinance because it is squarely in line with  
17 decades of official CMA policy, including recent policy specifically supporting a prohibition on  
18 the sale of tobacco products in stores that provide pharmacy services. Such policy mirrors that of  
19 the American Medical Association and is based upon sound medical and public health research.  
20 In short, the Ordinance is consistent with the conclusions of the medical and public health  
21 community that an integral component of the overall campaign against smoking and tobacco  
22 addiction must include efforts to address the social norms and messages associated with smoking  
23 and to limit the availability, visibility and accessibility of tobacco.

24           Unlike other retail outlets that sell cigarettes, stores that provide pharmacy services pose a  
25 unique problem if they also sell tobacco products. Stores such as Safeway that contain a  
26 pharmacy are an integral part of the health care delivery system. Selling tobacco products in such  
27 institutions creates a conflict of interest and sends a mixed message that can undermine the  
28



1 **AMICUS CURIAE BRIEF OF**  
2 **THE CALIFORNIA MEDICAL ASSOCIATION**

3  
4 **INTRODUCTION**

5 Cigarettes are the only consumable product that, when used as intended, will contribute to  
6 the death of at least one half of all users.<sup>1</sup> For this reason, physicians and public health  
7 organizations have sought for decades to reduce, and ultimately to eliminate, tobacco  
8 consumption. Furthering this critical public health goal, San Francisco’s Ordinance states that  
9 “[n]o person shall sell tobacco products in a pharmacy.” San Francisco Health Code §1009.92.  
10 A “pharmacy” under this Ordinance means “a retail establishment in which the profession of  
11 pharmacy . . . is practiced and where prescriptions are offered for sale.” *Id.* at §1009.91. The  
12 Ordinance recognizes that “[a] pharmacy may also offer other retail goods in addition to  
13 prescription pharmaceuticals.” *Id.* Thus, grocery stores, big box stores and drugstores that  
14 contain pharmacies fall within the reach of the Ordinance.

15 CMA disputes the principal premise underlying Safeway’s lawsuit challenging the  
16 Ordinance – that the Ordinance treats similarly situated stores differently and that there is no  
17 rational basis for prohibiting the sale of tobacco products in stores with pharmacies but not other  
18 stores that sell tobacco products. This *amicus* brief explains why.

19 There is a long and ongoing campaign by health care professionals and public health  
20 officials to reduce, and ultimately to eliminate, tobacco use and addiction. Most recently,  
21 organized medicine has called for a ban on the sale of tobacco products in stores with pharmacies.  
22 Public health and medical researchers have established that social norms and perceptions about  
23 smoking, as well as the ubiquity of smokers and tobacco products, have an impact on the rates at  
24 which people start or quit smoking. Unlike stores that do not offer pharmacy services, stores that  
25 contain pharmacies pose a unique problem in the context of the anti-smoking campaign when  
26 they also sell cigarettes. Stores that offer pharmacy services, such as Safeway stores, are health

27 <sup>1</sup>See, e.g., R. Doll, *et al.*, *Mortality in Relation to Smoking: 50 Years’ Observations on*  
28 *Male British Doctors*, 328 BRIT. MED. J. 1519 (2004).

1 care delivery outlets where patients go to receive health care services and prescription drugs. The  
2 sale of cigarettes in such health care delivery outlets creates a conflict of interest and sends a  
3 mixed message about the harmful effects of smoking. It also could frustrate the ability of  
4 physicians to treat patients who may have access to cigarettes in the same location that fills their  
5 drug prescriptions and offers medical advice.

6 By focusing on stores that contain a pharmacy, San Francisco does not treat similarly  
7 situated stores differently and, in any event, has made a sound policy decision that is based on  
8 medical and public health research. The Ordinance is consistent with the official policy of  
9 organized medicine at the state and federal levels. Accordingly, CMA urges the Court to grant  
10 San Francisco's motion to dismiss Safeway's complaint.

## 11 **BACKGROUND**

12 The public health community has waged a long campaign against smoking and tobacco  
13 products. Smoking is the leading preventable cause of death. An average of 36,687 Californians  
14 died each year between 2000 and 2004 due to smoking.<sup>2</sup> Between 2004 and 2006 the rate of  
15 smoking among California high school students increased by 17 percent.<sup>3</sup>

16 In 1988 California voters passed Proposition 99, a health protection act that created the  
17 nation's first statewide tobacco control program.<sup>4</sup> Proposition 99 promotes the health of  
18 Californians by employing comprehensive public health strategies that work "1) to protect  
19 nonsmokers by reducing exposure to environmental tobacco smoke...; and 2) to reduce smoking  
20 prevalence by discouraging adolescents from taking up smoking and encouraging smokers to  
21

22  
23 <sup>2</sup>*State Specific Smoking Attributable Mortality and Years of Potential Life Lost – United*  
24 *States 2000-2004*, Centers for Disease Control and Prevention, CDC Pub. No. 58(02), at 29-33  
(January 2009) [online at <<http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5802a2.htm>>].

25 <sup>3</sup>*Youth Smoking*, California Dep't of Public Health, California Tobacco Control Program  
26 (July 2008).

27 <sup>4</sup>*See Toward a Tobacco-Free California 2006-2008: Confronting A Relentless Adversary:*  
28 *A Plan for Success (Executive Summary)*, Tobacco Education and Research Oversight Committee  
for California (March 2006) [online at [http://www.cdph.ca.gov/services/boards/teroc/](http://www.cdph.ca.gov/services/boards/teroc/Documents/TEROCMasterPlan06-08ExecSum.pdf)  
[Documents/TEROCMasterPlan06-08ExecSum.pdf](http://www.cdph.ca.gov/services/boards/teroc/Documents/TEROCMasterPlan06-08ExecSum.pdf)].

1 quit.”<sup>5</sup>

2 Part of California’s response to Proposition 99 is the promulgation of regulations and  
3 restrictions on the use and sale of tobacco products. These sorts of governmental interventions  
4 are central because they serve the twin purposes of decreasing harmful exposure to secondhand  
5 smoke<sup>6</sup> and potentially reducing future addiction rates of current non-smokers.<sup>7</sup>

6 In 1976, the Legislature enacted the Indoor Clean Air Act, Health & Safety Code  
7 §§118885 *et seq.*, which requires that publicly-owned buildings, health facilities and retail food  
8 establishments dedicate significant portions of indoor space open to the general public as non-  
9 smoking areas. In 1995, California’s comprehensive smoke-free workplace law took effect to  
10 prohibit smoking in virtually all enclosed workplaces, including offices, restaurants and shops.  
11 *See* Labor Code §6404.5. In 1998, bars in California became smoke-free. *See id.* at §6404.5(f).  
12 In 2003, California prohibited smoking within 20 feet of a main entrance, exit or operable  
13 window of a public building owned or leased by the state, a county, city, city and county, or a  
14 California community college district. *See* Gov. Code §§7596-98. The sale of tobacco products  
15 to minors is prohibited. *See* Penal Code §308; Bus. & Prof. Code §22952. Over twenty  
16 campuses of the University of California, California State University and California Community  
17 College system have prohibited the sale of tobacco products.<sup>8</sup>

18 Evidence-based studies by medical and public health researchers have shown that these  
19 sorts of governmental tobacco control policies work. As noted in *R.J. Reynolds Tobacco Co. v.*  
20 *Shewry*, 423 F.3d 906, 913 (9th Cir. 2005), “[t]here is substantial evidence, including published  
21

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22 <sup>5</sup>Novotny & Siegel, *California’s Tobacco Control Saga*, 15 HEALTH AFFAIRS 59, 59  
23 (1996).

24 <sup>6</sup>*Toward A Tobacco-Free California 2006-2008*, *supra* n.4, at 4.

25 <sup>7</sup>*See* Siegel, Michael, *et al.*, *Local Restaurant Smoking Regulations and the Adolescent*  
26 *Smoking Initiation Process*, 162 ARCH. PEDIATR. ADOLESC. MED. 477, 477 (2008); Alamar,  
27 Benjamin and Glantz, Stanton, *Effect of Increased Social Unacceptability of Cigarette Smoking*  
28 *on Reduction in Cigarette Consumption*, 96 AMER. J. PUB. HEALTH: HEALTH POLICY & ETHICS  
1359 (2006).

<sup>8</sup>These prohibitions in California’s universities and colleges are documented online at  
<http://www.cyanonline.org/College/CollegePolicies/CaliforniaPolicies>.

1 medical studies indicating that the [state’s tobacco control] programs, and the media campaign in  
2 particular have been successful in achieving their goals of ‘preventing tobacco use by children  
3 and young adults.’” (quoting *R.J Reynolds v. Bonta*, 272 F. Supp. 2d 1085, 1088 n.5 (E.D. Cal.  
4 2003)). See also Hamilton, W., et al., *Do Local Tobacco Regulations Influence Perceived*  
5 *Smoking Norms? Evidence from Adult and Youth Surveys in Massachusetts*, 23 HEALTH EDUC.  
6 RES. 709 (2008) (“There is good evidence that tobacco control policies are associated with  
7 reductions in smoking prevalence among both youth and adults”).

8 Given the successes of these anti-tobacco campaigns, public health officials and health  
9 professionals have begun to focus on new arenas and institutions where the harms of smoking and  
10 tobacco addiction can be implicated. Their trajectory has landed on health promoting businesses,  
11 such as pharmacies. Indeed, organized medicine has recently adopted formal positions to extend  
12 tobacco control efforts to these types of businesses. Pharmacy associations have long been  
13 opposed to the sale of tobacco products in pharmacies. In 1970, the American Pharmaceutical  
14 Association (“APhA”) stated, “[m]ass display of cigarettes is in direct contradiction to the role of  
15 the pharmacy as a public health facility.”<sup>9</sup> The next year, the APhA House of Delegates  
16 recommended that tobacco products not be sold in pharmacies.<sup>10</sup> In 1973 and 1977, the  
17 California Pharmacists Association recommended that pharmacists discourage the sale of tobacco  
18 products in the pharmacies in which they practice “in the interest of raising the standards for  
19 public health and social welfare in the community.”<sup>11</sup> A study published in 2006 found that 81.7  
20 percent of licensed pharmacists are opposed to the sale of tobacco products in pharmacies and  
21 only 1.6% of licensed pharmacists favored such sales.<sup>12</sup>

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24 <sup>9</sup>See Hudmon, Karen S., et al., *Pharmacy Students’ Perceptions of Tobacco Sales in*  
25 *Pharmacies and Suggested Strategies for Promoting Tobacco-Free Experiential Sites*, 70 AM. J.  
PHARM. EDUC. 75 (2006).

26 <sup>10</sup>See *id.*

27 <sup>11</sup>*Id.*

28 <sup>12</sup>*Id.*

**DISCUSSION****A. San Francisco's Ordinance Is Squarely in Line with Official Policies of the California Medical Association and the American Medical Association.**

Organized medicine has long advanced policies and efforts to reduce the prevalence of smoking and tobacco. Each year CMA delegates — representing the approximately 35,000 CMA members and county and specialty medical societies — convene to debate and pass resolutions dictating official positions and policies of California's House of Medicine. There are more than fifty CMA resolutions since 1984 that broadly support prohibitions or strict restrictions on tobacco advertising, sales and use in public places. A sample of these policies includes:

- Res. 717a-06 (2006), to advance prohibitions on the sale of tobacco use and sale in state hospitals;
- Res. 105-98 (1998), to develop and implement an anti-tobacco program for young women;
- Res. 113-96 (1996), to study and implement better protection of children from tobacco products;
- Res. 121-95 (1995), to advocate for strong restrictions on tobacco advertising to teenagers;
- Res. 108a-93 (1993), to encourage education of the harmful effects of smoking in automobiles;
- Res. 102-92 (1992), to support broad licensing of businesses that wish to sell tobacco products;
- Res. 101a-92 (1992), to advocate for a ban on smoking on airlines;
- Res. 103-87 (1987), to advocate for the prohibition of smoking in the workplace; and
- Res. 101a-85 (1985), to encourage public and private school authorities to incorporate health maintenance with a heavy emphasis on non-smoking in junior high and high school curricula.

These resolutions have had a real impact on public health campaigns and legislation. Carrying out the 1987 resolution to prohibit smoking in the workplace, in 1994 CMA led a

1 coalition of health, labor and business interests to sponsor A.B. 13, known as the California  
2 Smoke-Free Workplace Law and signed by the Governor on July 21, 1994. The law is the first in  
3 the nation to establish a statewide prohibition of smoking in places of employment, including  
4 virtually all bars and restaurants. Similar laws have been passed throughout the nation. It is  
5 notable that the effort was started at the local level in San Francisco. The San Francisco Medical  
6 Society (a CMA affiliate) was prominent among anti-tobacco advocates who successfully  
7 instituted a ban on smoking in restaurants in San Francisco in the early 1990s, years ahead the  
8 rest of the state.

9 CMA's House of Delegates recently passed a resolution that has direct bearing on this  
10 case. In 2008 CMA delegates passed Resolution No. 719-08 to resolve "[t]hat CMA support  
11 prohibitions on the sale of tobacco products in pharmacies." The resolution also called for CMA  
12 to bring a similar measure before the American Medical Association ("AMA"), which has a  
13 similar policymaking process. Consequently, AMA Resolution 419 was passed at the 2009  
14 annual meeting of AMA delegates, which commands the AMA to "[s]pecifically and publicly  
15 oppose the sale and marketing of tobacco products, including cigarettes, in a pharmacy" and  
16 "[c]ommunicate with appropriate federal agencies, including the Bureau of Alcohol, Tobacco,  
17 and Firearms, public health groups, various pharmacy trade groups, and media outlets to seek  
18 their help in removing tobacco products from pharmacy shelves."

19 These resolutions apply not only to stand-alone pharmacies but also to any business that  
20 provides pharmacy services to the public. This is because stand-alone pharmacies are rare and  
21 most, if not all, pharmacies are located within stores or businesses that offer other merchandise or  
22 services. Given this, a ban of tobacco sales just from the pharmacy units within stores would be  
23 too narrow and ineffective. As explained in the next section, the sale of tobacco products in  
24 stores with pharmacies could undermine efforts to control social norms and perceptions about  
25 smoking and a healthy lifestyle as well as interfere with the treatment protocols of physicians  
26 whose patients may go to stores with pharmacies to fill drug prescriptions.

1 **B. The Experience and Research of Physicians and Public Health Officials Support San**  
 2 **Francisco's Ordinance.**

3 Organized medicine's call for a ban of the sale of tobacco products in stores with  
 4 pharmacies reflects decades of research finding that altering social norms about smoking and  
 5 lessening the ubiquity of smoking and tobacco products are vital in the public health campaign  
 6 against smoking. San Francisco's Ordinance does just that.

7 **1. The Research Behind the Campaign to Eliminate Smoking.**

8 Empirical research has repeatedly confirmed the public health community's view that  
 9 negative social perceptions about smoking, as well as reduced access to and visibility of smoking  
 10 and cigarettes, can lower the rate at which current non-smokers experiment with and ultimately  
 11 become addicted to smoking. Public health professionals identify "the key to a successful  
 12 tobacco control effort is the contiguous delivery of anti-tobacco messages by many different  
 13 sources, consistently and over an extended period of time."<sup>13</sup>

14 Studies have found that strong governmental regulation of smoking corresponds and may  
 15 contribute to anti-smoking community norms.<sup>14</sup> Social norms about smoking influences smoking  
 16 rates, particularly among those not yet addicted.<sup>15</sup> Surveys of adolescent smoking behavior

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 18 <sup>13</sup>Novotny & Siegel, *California's Tobacco Control Saga*, *supra* n.5, at 68.

19 <sup>14</sup>See Hamilton, W., *et al.*, *Do Local Tobacco Regulations Influence Perceived Smoking*  
 20 *Norms? Evidence from Adult and Youth Surveys in Massachusetts*, 23 HEALTH EDUC. RES. 709  
 21 (2008) at 709 ("[L]ocal communities can influence adults and youths' perceptions of community  
 22 smoking norms by adopting a broad array of strong tobacco control regulations"); Macy,  
 23 Jonathan T., *et al.*, *Smoke-Free Air Laws and Perceived Norms About Smoking in Four Texas*  
*Cities*, 136th American Public Health Association Annual Meeting and Exposition (Oct. 27,  
 2008); Albers, A.B., *et al.*, *Relation Between Restaurant Smoking Regulations and Attitudes*  
*Towards the Prevalence and Social Acceptability of Smoking*, 13 TOBACCO CONTROL 347 (2004).

24 <sup>15</sup>See, *e.g.*, Christakis, Nicholas and Fowler, James, *The Collective Dynamics of Smoking*  
 25 *in a Large Social Network*, 358 NEW ENGL. J. MED. 2249 (2008); Katz, Mitchell, *Banning*  
 26 *Tobacco Sales in Pharmacies: The Right Prescription*, 300 J. AM. MED. ASS'N 1451 (2008);  
 27 Alesci, Nina, *et al.*, *Smoking Visibility, Perceived Acceptability, and Frequency in Various*  
 28 *Locations Among Youth and Adults*, 36 PREV. MED. 272 (2003); Alamar & Glantz, *Effect of*  
*Increased Social Unacceptability of Cigarette Smoking*, *supra* n.7, at 1359 ("Social  
 unacceptability has been repeatedly shown to be an important influence on both initiation and  
 quitting.") (citing *Preventing Tobacco Use Among Young People: A Report of the Surgeon*

1 “suggest that smoke-free workplaces and homes are associated with significantly lower rates of  
2 adolescent smoking.”<sup>16</sup> This demonstrates that the “adoption of a smoke-free home policy sends  
3 a message to family members that smoking is not condoned, while the lack of such a policy may  
4 send the opposite message.”<sup>17</sup> Furthermore, empirical research connects lower densities of retail  
5 outlets with lower consumption, particularly among youth.<sup>18</sup>

6 A recent study analyzing Chinese and Korean immigrants in California (large ethnic  
7 populations in San Francisco) found that “immigrant smokers in California have stopped smoking  
8 at a dramatically higher rate than their counterparts in their native countries not because their  
9 personal propensity for success at quitting suddenly changes after moving to a new country, but  
10 because the social norm in California makes them more likely to try.”<sup>19</sup> Thus, immigrants reacted  
11 to living in an environment promoting the social norm that smoking is unacceptable by trying to  
12 quit more than those who stay in their native countries where smoking is more acceptable. The  
13 more they try to quit the more they succeed.<sup>20</sup>

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17 *General*, U.S. Dept. of Health & Hum. Servs. (1994); *Reducing Tobacco Use: A Report of the*  
18 *Surgeon General*, U.S. Dept. of Health & Hum. Servs. (2000)).

19 <sup>16</sup>Farkas *et al.*, *Association Between Household and Workplace Smoking Restrictions and*  
*Adolescent Smoking*, 284 J. AMER. MED. ASS’N 717, 720 (2000).

20 <sup>17</sup>*Id.* at 721.

21 <sup>18</sup>*See, e.g.,* Pearce, J., *et al.*, *The Neighbourhood Effects of Geographical Access to*  
22 *Tobacco Retailers on Individual Smoking Behavior*, 63 J. EPIDEMIOL. CMTY. HEALTH 69 (2009)  
23 (finding individuals living in neighborhoods with best access to supermarkets and convenience  
24 stores where tobacco sold higher odds of smoking); Leatherdale, S.T. and Strath, J.M., *Tobacco*  
*Retailer Density Surrounding Schools and Cigarette Access Behaviors Among Underage Smoking*  
25 *Students*, 33 ANN. BEHAV. MED. 105 (2007) (finding tobacco retailer density surrounding school  
26 is related to student access behaviors); Novak, Scott, *et al.*, *Retailer Tobacco Outlet Density and*  
*Youth Cigarette Smoking: A Propensity-Modeling Approach*, 96 AM. J. PUB. HEALTH 670 (2006)  
(reductions in retail tobacco outlet density may reduce rates of youth smoking).

27 <sup>19</sup>Zhu *et al.*, *High Quit Ratio Among Asian Immigrants in California: Implications for*  
*Population Tobacco Cessation*, 9 NICOTINE & TOBACCO RESEARCH, S505, S513 (2007).

28 <sup>20</sup>*Id.* at S512.

1           **2. Applying the Lessons of the Public Health Campaign Against Smoking and**  
2           **Tobacco Products to Stores with Pharmacies.**

3           Since studies have found that “increasing the social unacceptability of smoking is a highly  
4 effective policy tool in reducing consumption,” restricting tobacco access by prohibiting its sale  
5 in stores with pharmacies would increase the perception of social unacceptability in the  
6 community, especially in places that also provide health care services. The experience of the  
7 anti-tobacco campaign is that such efforts are likely to result in reduced consumption of  
8 tobacco.<sup>21</sup>

9           By offering pharmacy services, a store becomes an access point within the health care  
10 delivery system. The store is perceived by the public to be, and in fact is, an institution where  
11 customers can receive trustworthy healthcare advice and receive prescription drugs as part of  
12 medical treatment for all sorts of diseases and ailments. Indeed, the public perceives community  
13 pharmacists as among the most trusted health care professionals, according to the drugstore  
14 industry’s trade organization.<sup>22</sup> It is thus antithetical to the health promoting functions and  
15 perceptions associated with stores that offer pharmacy services to also offer tobacco products.  
16 Public health officials and researchers have concluded that “[s]elling tobacco products sends  
17 misleading messages that conflict with a pharmacy’s purpose of promoting health.”<sup>23</sup>  
18 Accordingly, organized medicine believes that providing access to tobacco in places that provide  
19 pharmacy services could undermine anti-tobacco efforts.

20           Physicians have an additional, more practical reason to strongly oppose the sale of  
21 tobacco products in stores where pharmacists operate. Smoking and tobacco addiction are known  
22 to cause or be associated with innumerable medical ailments and maladies. Avoiding tobacco  
23 products is important, and often critical, in the treatment of these various medical issues. When

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25           <sup>21</sup>Alamar & Glantz, *Effect of Increased Social Unacceptability of Cigarette Smoking*,  
*supra* n.7, at 1362.

26           <sup>22</sup>See National Association of Chain Drug Stores, Chain Pharmacy Industry Profile at 61  
(2008-09).

27           <sup>23</sup>*Toward A Tobacco-Free California 2009-2011*, Tobacco Education and Research  
28 Oversight Committee for California, at 21.

1 physicians prescribe drugs as part of their treatment protocol, they do not want their patients to  
2 have access to tobacco products in the same place where they go to get their prescription  
3 medications. In other words, selling tobacco in Safeway stores where patients go to fill drug  
4 prescriptions could undermine physicians' efforts to treat their patients.

5 San Francisco's Ordinance applies the research and experience of the public health  
6 community. It is in line with the trajectory of tobacco control efforts and is expected to yield  
7 benefits in the continuing public health campaign against smoking and tobacco products.

8 **C. The San Francisco Ordinance Does Not Violate Equal Protection.**

9 In spite of the public health benefits to be achieved by San Francisco's Ordinance,  
10 Safeway apparently wishes to see the whole Ordinance stricken because it distinguishes between  
11 retail stores that do or do not contain pharmacies. Safeway alleges that the Ordinance  
12 "differentiates arbitrarily and capriciously between similarly situated retailers solely on the  
13 ground that some have, and some do not have, somewhere on their premises, a lawful pharmacy."  
14 Complaint ¶66. Organized medicine disagrees.

15 *First*, as evident from the foregoing discussion, stores that contain pharmacies and also  
16 sell cigarettes, such as Safeway stores, are not similarly situated to stores that sell cigarettes but  
17 do not contain pharmacies. Unlike with the latter type of stores, the problems with a conflict of  
18 interest, mixed message about the harmful effects of smoking and frustration of physicians'  
19 efforts at treating their patients arise when a store that offers pharmacy services also sells  
20 cigarettes. These problems may not arise in general retail outlets that sell cigarettes but do not  
21 serve as an access point in the health care delivery system, like stores with pharmacies.  
22 Organized medicine's call for a prohibition on cigarette sales in stores with pharmacies is  
23 consistent with calls for such anti-tobacco controls in all other health care delivery institutions,  
24 such as hospitals.

25 *Second*, regardless whether San Francisco has made a distinction between similarly  
26 situated stores, there is a rational basis for banning the sale of tobacco products in stores with  
27 pharmacies. As explained, the official policy of CMA (as well as the AMA) calling for such a  
28 ban relies on the research and experience of physicians and public health officials. The



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**PROOF OF SERVICE**

I, Long X. Do, certify that on this 15th day of April, 2011, a copy of the foregoing **Application of the California Medical Association for Leave to File *Amicus Curiae* Brief; *Amicus Curiae* Brief in Support of Defendants’ Motion Dismiss** was served on all counsel of record by electronically filing it with the Clerk of the Court for the United States District Court, Northern District of California, Oakland Division, by using the official Electronic Case File (ECF) Internet Site of the Northern District of California system, which automatically provides electronic notification to the following persons:

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