CITY ATTORNEY DENNIS HERRERA

NEWS RELEASE

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CONTACT: MATT DORSEY
(415) 554-4662

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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DENNIS J. HERRERA, State Bar #139669
City Attorney
WAYNE SNODGRASS, State Bar #148137
VINCE CHHABRIA, State Bar #208557
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4674
Facsimile: (415) 554-4699
E-Mail: vince.chhabria@sfgov.org

Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO;
THE BOARD OF SUPERVISORS
FOR THE CCSF; EDWIN M. LEE,
in his official capacity as Mayor of the CCSF

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAFEWAY INC., a Delaware Corporation,

Plaintiff,

vs.

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

Defendant.

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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INTRODUCTION

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

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

BACKGROUND

A. The Original Ordinance.

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

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

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

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

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

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

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

B. The Lawsuits By Philip Morris And Walgreens.

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

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

[1] The slip opinion of the court is attached to the complaint as Exhibit D, but this brief cites to the published version.

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

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

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

C. The Revised Ordinance.

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

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

[2] 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.

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

ARGUMENT

I. THE ORDINANCE DOES NOT IMPLICATE THE "UNCONSTITUTIONAL CONDITIONS" DOCTRINE.

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

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

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

[4] Unconstitutional conditions cases traditionally involve the relinquishment of such fundamental constitutional rights as the right to free speech, *see, e.g., Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 574 U.S. 47 (2006), the right to abortion, *see Rust v. Sullivan*, 500 U.S. 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.

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

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

> It is conceded that every citizen has a right to follow any lawful business or profession which is not injurious to the public or a menace to the health, safety or welfare of society, free from regulation by the exercise of the police power of the state except in cases of necessity for such health, safety or welfare, and when its authority is so interposed in behalf of the public it must be by means reasonably necessary for the accomplishment of that purpose. A determination of what is reasonably necessary for the public health, safety or welfare is a legislative function and should not be interfered with, only in case of clear abuse. Where a statute is clearly such a measure, the fact that rights may be affected does not invalidate the act . . . . A license obtained by compliance with the statutes relating to any one of the many businesses and professions set forth in said code may become of great value to the possessor and cannot be arbitrarily taken from him any more than his real or personal property can thus be taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society . . . . If, then, the Legislature had the right 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.

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

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

II. THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION.

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

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

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

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

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

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

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

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

Here, there is no question the ordinance is economic legislation subject only to rational basis review. *See Johnson v. Rancho Santiago Cmty. Coll. Dist.*, 623 F.3d 1011, 1031(9th Cir. 2010); *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298-99 (2007). This level of scrutiny

> manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving such differentiated treatment with a presumption of constitutionality and "requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose."

Hernandez, 41 Cal. 4th at 298-99 (quoting *Warden v. State Bar of California*, 21 Cal.4th 628, 640-41) (citations omitted in original); *see also Berger v. City of Seattle*, 512 F.3d 582, 607 (9th Cir. 2008) ("[T]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.") (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).[5]

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

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

[5] 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).

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

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

Similar sentiments have also been expressed by the California Medical Association,[9] the National Community Pharmacists Association,[10] the San Francisco Medical Society,[11] the

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

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

[8] *Id*.

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

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

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

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

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

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

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

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

[13] Letter from Alan G. Wasserman, M.D., Chairman, George Washington Univ. Dep't of Med., to the Council of the District of Columbia (July 15, 2010) (urging the Council of the District of 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).

[14] 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).

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

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

IV. THE ORDINANCE IS NOT PREEMPTED.

A. State Tobacco Control Laws Do Not Preempt The Ordinance.

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: April 15, 2011

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Deputy City Attorneys

By: s/*Vince Chhabria*
VINCE CHHABRIA

Attorney for Defendants
CITY AND COUNTY OF SAN FRANCISCO;
THE BOARD OF SUPERVISORS
FOR THE CCSF; EDWIN M. LEE,
in his official capacity as Mayor of the CCSF

FRANCISCO J. SILVA (SBN 214773)
e-mail: fsilva@cmanet.org
LONG X. DO (SBN 211439)
e-mail: ldo@cmanet.org
LISA MATSUBARA (SBN 264062)
e-mail: lmatsubara@cmanet.org
CALIFORNIA MEDICAL ASSOCIATION
1201 J Street, Suite 200
Sacramento, California 95814-2906
Telephone: (916) 444-5532
Facsimile: (916) 551-2027

Attorneys for CALIFORNIA MEDICAL ASSOCIATION

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

SAFEWAY INC.,

Plaintiff,

v.

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

Defendants.

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

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

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

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.

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

campaign against smoking. Furthermore, as a practical matter, making cigarettes available where patients go to fill drug prescriptions can frustrate the treatment protocols of physicians.

CMA's *amicus* brief elaborates on these medical and public health reasons why banning the sale of tobacco products in retail stores with pharmacies is crucial in the public health fight against smoking. In so doing, the *amicus* brief presents organized medicine's perspective in supporting San Francisco's Ordinance and directly refutes Safeway's contention that the Ordinance is unconstitutional. The *amicus* brief could supplement the parties' briefs and aid the Court in reaching its decision on San Francisco's motion to dismiss.

Accordingly, CMA requests leave to file the attached *amicus* brief.

DATED: April 15, 2011

Respectfully,

FRANCISCO J. SILVA
LONG X. DO
LISA MATSUBARA
CALIFORNIA MEDICAL ASSOCIATION

By: /s/ Long X. Do
LONG X. DO
Attorneys for California Medical Association

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION

INTRODUCTION

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

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

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

[1] *See, e.g.*, R. Doll, *et al.*, *Mortality in Relation to Smoking: 50 Years' Observations on Male British Doctors*, 328 BRIT. MED. J. 1519 (2004).

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

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

BACKGROUND

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

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

[2] *State Specific Smoking Attributable Mortality and Years of Potential Life Lost – United 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>].

[3] *Youth Smoking*, California Dep't of Public Health, California Tobacco Control Program (July 2008).

[4] *See Toward a Tobacco-Free California 2006-2008: Confronting A Relentless Adversary: 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/Documents/TEROCMasterPlan06-08ExecSum.pdf].

quit."[5]

Part of California's response to Proposition 99 is the promulgation of regulations and restrictions on the use and sale of tobacco products. These sorts of governmental interventions are central because they serve the twin purposes of decreasing harmful exposure to secondhand smoke[6] and potentially reducing future addiction rates of current non-smokers.[7]

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

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

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[5]Novotny & Siegel, *California's Tobacco Control Saga*, 15 HEALTH AFFAIRS 59, 59 (1996).

[6]*Toward A Tobacco-Free California 2006-2008*, *supra* n.4, at 4.

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

[8]These prohibitions in California's universities and colleges are documented online at http://www.cyanonline.org/College/CollegePolicies/CaliforniaPolicies.

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

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

[9] *See* Hudmon, Karen S., *et al.*, *Pharmacy Students' Perceptions of Tobacco Sales in Pharmacies and Suggested Strategies for Promoting Tobacco-Free Experiential Sites*, 70 AM. J. PHARM. EDUC. 75 (2006).

[10] *See id.*

[11] *Id.*

[12] *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

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

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

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

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

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

1. The Research Behind the Campaign to Eliminate Smoking.

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

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

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[13]Novotny & Siegel, *California's Tobacco Control Saga*, *supra* n.5, at 68.

[14]*See* Hamilton, W., *et al.*, *Do Local Tobacco Regulations Influence Perceived Smoking Norms? Evidence from Adult and Youth Surveys in Massachusetts*, 23 HEALTH EDUC. RES. 709 (2008) at 709 ("[L]ocal communities can influence adults and youths' perceptions of community smoking norms by adopting a broad array of strong tobacco control regulations"); Macy, 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).

[15]*See, e.g.*, Christakis, Nicholas and Fowler, James, *The Collective Dynamics of Smoking in a Large Social Network*, 358 NEW ENGL. J. MED. 2249 (2008); Katz, Mitchell, *Banning Tobacco Sales in Pharmacies: The Right Prescription*, 300 J. AM. MED. ASS'N 1451 (2008); Alesci, Nina, *et al.*, *Smoking Visibility, Perceived Acceptability, and Frequency in Various 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*

"suggest that smoke-free workplaces and homes are associated with significantly lower rates of adolescent smoking."[16] This demonstrates that the "adoption of a smoke-free home policy sends a message to family members that smoking is not condoned, while the lack of such a policy may send the opposite message."[17] Furthermore, empirical research connects lower densities of retail outlets with lower consumption, particularly among youth.[18]

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

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

[16]Farkas *et al.*, *Association Between Household and Workplace Smoking Restrictions and Adolescent Smoking*, 284 J. AMER. MED. ASS'N 717, 720 (2000).

[17]*Id.* at 721.

[18]*See, e.g.*, Pearce, J., *et al.*, *The Neighbourhood Effects of Geographical Access to Tobacco Retailers on Individual Smoking Behavior*, 63 J. EPIDEMIOL. CMTY. HEALTH 69 (2009) (finding individuals living in neighborhoods with best access to supermarkets and convenience 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 Students*, 33 ANN. BEHAV. MED. 105 (2007) (finding tobacco retailer density surrounding school 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).

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

[20]*Id.* at S512.

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

Since studies have found that "increasing the social unacceptability of smoking is a highly effective policy tool in reducing consumption," restricting tobacco access by prohibiting its sale in stores with pharmacies would increase the perception of social unacceptability in the community, especially in places that also provide health care services. The experience of the anti-tobacco campaign is that such efforts are likely to result in reduced consumption of tobacco.[21]

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

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

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[21] Alamar & Glantz, *Effect of Increased Social Unacceptability of Cigarette Smoking*, *supra* n.7, at 1362.

[22] *See* National Association of Chain Drug Stores, Chain Pharmacy Industry Profile at 61 (2008-09).

[23] *Toward A Tobacco-Free California 2009-2011*, Tobacco Education and Research Oversight Committee for California, at 21.

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

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

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

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

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

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

underlying clinical and scientific evidence that informs such policy also supports the distinction that San Francisco's Ordinance makes between stores that contain a pharmacy and stores that do not. Not only is the distinction rational, it is one that organized medicine has considered and fully endorses.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in San Francisco's memorandum of points and authorities in support of its motion, Safeway's complaint should be dismissed.

DATED: April 15, 2011.

Respectfully,

FRANCISCO J. SILVA
LONG X. DO
LISA MATSUBARA
CALIFORNIA MEDICAL ASSOCIATION

By: /s/ Long X. Do
LONG X. DO

Attorneys for Amicus Curiae California Medical Association

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:

Vince Chhabria (vince.chhabria@sfgov.org)
San Francisco City Attorney's Office
City Hall, Room 324
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
(415) 554-4674
(415) 554-4699 (fax)

Barbara Lynne Harris Chiang (bhc@dillinghammurphy.com)
John Norman Dahlberg (jnd@dillinghammurphy.com)
Thomas John Klitgaard (tjk@dillinghammurphy.com)
William Francis Murphy (wfm@dillinghammurphy.com)
Dillingham & Murphy, LLP
225 Bush Street, 6th Floor
San Francisco, CA 94104-4207
(415) 397-2700
(415) 397-3300 (fax)

/s/ Long X. Do
Long X. Do
Attorney for *Amicus Curiae* California Medical Association