No. 08-17649

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP MORRIS USA INC.,
Plaintiff-Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO; BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; and **GAVIN NEWSOM,** in his official capacity as **MAYOR OF THE CITY AND COUNTY OF SAN FRANCISCO,**
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, Case No. C-08-4482-CW
The Honorable Claudia Wilken, United States District Judge

REPLY BRIEF OF PLAINTIFF-APPELLANT PHILIP MORRIS USA INC.

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INTRODUCTION

Contrary to what the City suggests in its Answering Brief ("A.B."), the Court is not faced with a broad, speech-neutral sales ban that was enacted without a censorial motive. Rather, it is faced with an Ordinance whose own sponsors admit is designed not to reduce sales but to restrict the *message* associated with sales, whose own findings express hostility to cigarette advertising, and whose inevitable (and intended) effect has been to eliminate such advertising in drugstores. The question in this case, therefore, is not whether the City has the power to ban the sale of cigarettes, nor whether PM USA has a generalized "First Amendment right to sell cigarettes in pharmacies." (A.B. 1.) Rather, the question is whether the City may, in order to eliminate the communication of disfavored messages, ban cigarette sales based on hostility to the advertising and product displays that accompany such sales. The City has it exactly backwards when it accuses PM USA as having dressed up non-expressive conduct in a First Amendment suit; it is the City that has tried to pass off a law about speech as a law about sales. Under well-established constitutional law, however, the City cannot evade First Amendment scrutiny so easily.

The speech-suppressing intent and effect of the Ordinance require that it be subjected to First Amendment scrutiny, and as PM USA has set forth in its Opening Brief ("O.B."), the Ordinance cannot survive under any applicable test.

For that reason, and because the Ordinance is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b) ("FCLAA"), the district court erred in denying PM USA's request for a preliminary injunction.

ARGUMENT

I. The Ordinance Is Subject to, and Fails, First Amendment Scrutiny

The City does not dispute that, in order satisfy both the merits prong and the irreparable-injury prong of the test for a preliminary injunction, all PM USA was required to show is the "'existence of a *colorable* First Amendment claim'"—*i.e.*, it was only required to show that the Ordinance raises "serious First Amendment questions." *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 973 (9th Cir. 2002) (emphasis added) (citation omitted).[1] The City is wrong in asserting that the Ordinance does not even raise a colorable First Amendment issue.

A. First Amendment Scrutiny Applies to a Law Targeting Non-Expressive Conduct if that Law Inevitably Burdens Speech and Presents the Danger of Censorship

The City contends that because the Ordinance, on its face, bans only the "non-expressive conduct" of selling cigarettes, it cannot possibly violate the First Amendment, which protects only speech and expressive conduct. (A.B. 15-24.) As set forth below, this argument fails.

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[1] The City does contend, however, that the additional requirement to consider the "public interest" does not favor preliminary injunctive relief. (A.B. 43.) This latter argument fails for reasons discussed below. *See infra* at 26-28.

1. The City Is Wrong in Contending That Only Laws Directly Regulating Speech or Expressive Conduct Implicate the First Amendment

As PM USA has explained (O.B. 27-30), the fact that the First Amendment only protects speech and expressive conduct does *not* mean that only laws *directly* regulating such activities are subject to First Amendment scrutiny. Both this Court and the Supreme Court have recognized that there are two distinct circumstances in which regulations of conduct may implicate the First Amendment:

> [G]enerally applicable regulations of conduct implicate the First Amendment only if they (1) *impose a disproportionate burden on those engaged in First Amendment activities*; or (2) constitute governmental regulation of conduct with an expressive element.

Nuñez v. City of San Diego, 114 F.3d 935, 950 (9th Cir. 1997) (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 703-04 (1986)) (emphasis added); *see also United States v. Kaczynski*, 551 F.3d 1120, 1126 (9th Cir. 2009) (First Amendment scrutiny "is applied to generally applicable statutes only when they regulate conduct that has a 'significant expressive element' *or when the statutes have 'the inevitable effect of singling out those engaged in expressive activity*'") (quoting *Arcara*, 478 U.S. at 706-07) (emphasis added); *Talk of the Town v. Department of Fin. & Bus. Servs.*, 343 F.3d 1063, 1069 (9th Cir. 2003) (same).

In this case, PM USA's First Amendment claim is *not* based on the theory that the Ordinance, on its face, directly regulates "conduct with an expressive element." *Nuñez*, 114 F.3d at 950. On the contrary, PM USA conceded in its

Opening Brief that the conduct that "'dr[aws] the legal remedy'" under the Ordinance—sales of tobacco—is not, by itself, sufficiently expressive to trigger the First Amendment. (O.B. 29, quoting *Arcara*, 478 U.S. at 706.) But as *Arcara* and its progeny make clear, that fact does not end the inquiry; it merely establishes the inapplicability of *one* of the two circumstances in which "generally applicable regulations of conduct implicate the First Amendment." *Nuñez*, 114 F.3d at 950. Here, it is the *other* circumstance that is invoked: PM USA's argument is that, even though the Ordinance, on its face, regulates activity "with no expressive component," it is still subject to First Amendment scrutiny because it "imposes a disproportionate burden upon those engaged in protected First Amendment activities." *Id.*

In *Leathers v. Medlock*, 499 U.S. 439 (1991), the Supreme Court added a further clarification to this second test for triggering First Amendment scrutiny. There, the Court held that "a differential burden on speakers is insufficient *by itself* to raise First Amendment concerns"; rather, it must *also* be shown that the law imposing this differential burden "is directed at, or presents the danger of suppressing, particular ideas." *Id.* at 452-53 (emphasis added). This qualification, made explicit in *Leathers*, was already implicit in all of the Court's differential-burden cases. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983) (noting the "potential for abuse" and

censorship presented by the differential taxation of newspaper ink); *see also Arcara*, 478 U.S. at 707 n.4 (noting the lack of "a speech suppressive motivation or policy" in rejecting the First Amendment claim on the facts of that case). The City is therefore quite wrong in suggesting that PM USA has improperly combined two distinct lines of cases. (A.B. 39.) On the contrary, PM USA has faithfully acknowledged the important limitations that the Supreme Court in *Leathers* placed on the "differential burdens" line of authority that PM USA has invoked here.

Accordingly, a law that, on its face, does not regulate expressive conduct will nonetheless be subject to First Amendment scrutiny if (1) it has "the inevitable effect of singling out those engaged in expressive activity," *Arcara*, 478 U.S. at 706-07; *and* (2) it "is directed at, or presents the danger of suppressing, particular ideas." *Leathers*, 499 U.S. at 453. In addition to being firmly grounded in precedent, this test makes perfect sense as well. On the one hand, *Leathers*' gloss on the differential-burden cases refutes the parade of horribles set forth in the City's brief: under *Leathers*, the hypotheticals conjured by the City (*e.g.*, banning certain forms of gambling at casinos or banning beer sales at sports arenas, *see* A.B. 37) do not trigger First Amendment scrutiny at all in the absence of evidence showing that the prohibitions are "directed at, or present[] the danger of suppressing, particular ideas." *Leathers*, 499 U.S. at 453. On the other hand, there is no reason why a law that does impose differential burdens on First Amendment

activities should escape constitutional scrutiny when it *can* be shown that the law was either intended to burden particular ideas or presents an objective risk that such a purpose is at play.

2. The Indirect-Burden Cases Cannot be Confined, as the City Would Have It, to Their Specific Facts

Despite the numerous indirect-burden cases that repeatedly recite these principles, the City remarkably contends that the rule PM USA invokes "does not exist." (A.B. 34.) According to the City, the courts' recitation of these general principles cannot be taken literally, but must be strictly limited to the specific factual contexts presented in those cases. The City's crabbed reading of the case law is plainly wrong.

As an initial matter, the City's suggestion that no case has ever invoked these principles to *invalidate* a law of First Amendment grounds (A.B. 36) is both irrelevant and wrong. It is irrelevant because the key question at this stage of the proceedings is whether First Amendment scrutiny applies at all; if it does, PM USA has raised "substantial questions" sufficient to warrant an injunction on both First Amendment and federal preemption grounds. *See infra* at 23-26. That is especially true where, as here, the City below made no effort to defend the Ordinance on the ground that it *satisfied* First Amendment scrutiny. (O.B. 39.)

In any event, the City overlooks several cases that have invalidated conduct-regulating laws that imposed substantial collateral burdens on expression. *See*,

e.g., *Vincenty v. Bloomberg*, 476 F.3d 74, 84-89 (2d Cir. 2007) (applying intermediate First Amendment scrutiny in invalidating a law that banned the *sale* of spray paint to minors and that generally prohibited the possession of spray paint by minors)[2]; *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 799-800 (9th Cir. 2006) (holding that a municipal ban on the *use of tables* in certain public areas implicated First Amendment rights as applied to plaintiffs, notwithstanding the fact that, "[o]n its face, the ordinance does not regulate expressive activity")[3]; *Nuñez*, 114 F.3d at 950-51 (invalidating curfew law under intermediate scrutiny).

Thus, for example, in holding that a curfew law was subject to intermediate First Amendment scrutiny in *Nuñez*, this Court emphasized that the law had "an *integral effect* on the ability of minors to express themselves" and therefore

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[2] The City purports to distinguish *Vincenty* on its facts, arguing that, unlike with cans of spray paint, "people do not use cigarettes to express themselves." (A.B. 41.) This argument overlooks the fact that the prohibited conduct—sales of cigarettes in drugstores—*was* the vehicle for substantial commercial speech associated with the product displays used to facilitate those sales. Moreover, *Vincenty*'s emphasis on the practical realities cannot be reconciled with the City's restrictive view that all that matters is what the law prohibits *on its face*. *See Vincenty*, 476 F.3d at 88 (invalidating ban on sales to minors notwithstanding the city's argument that the law technically did not prohibit "older relatives" or friends from purchasing spray paint and giving it to minors).

[3] Although PM USA's Opening Brief only cited the portion of the *ACLU* opinion invalidating the ban on "the use of portable tables" (O.B. 29, emphasis omitted), the City's Answering Brief does not respond to the point at all. Instead, the City makes the irrelevant argument that a *different* portion of the *ACLU* opinion not cited by PM USA (addressing a separate ban on certain forms of solicitation) is distinguishable. (A.B. 40-41.)

substantially burdened conduct "'*commonly associated* with' expression." 114 F.3d at 950-51 (emphasis added) (citation omitted). And applying the requisite intermediate scrutiny, the Court held that the law failed to satisfy First Amendment standards. *Id.* at 951. The City purports to distinguish *Nuñez* on the ground that the Ordinance here does not regulate conduct "commonly associated with expression" (A.B. 40), but that is wrong: the uncontested record here demonstrates that the regulated conduct (tobacco sales in drugstores) was *perfectly* correlated with (disfavored) First Amendment activities, namely, large product displays and prominent cigarette advertising. *See infra* at 13.

The City also claims (A.B. 40) that *Nuñez* did not in fact apply the *Arcara* test that it quotes, but that, too, is wrong. *Nuñez* simply noted that the challenged law *on its face* did not "disproportionately burden" First Amendment activities, because it banned *all* activities during the curfew. 114 F.3d at 950. The Court nonetheless went on to hold that, in light of its *practical effect*, the ordinance was "'directed narrowly and specifically at expression or conduct commonly associated with expression.'" *Id.* at 951 (citation omitted). *Nuñez* thus illustrates the very error the City makes in looking only at the facial language of the Ordinance, while ignoring its practical effect.

The City is likewise wrong in suggesting that the broad phrasing of the First Amendment principles in *Minneapolis Star*, *Arcara*, and *Leathers* should be

understood as strictly confined to cases involving the media. (A.B. 36, 39-40.) In fact, the cases makes clear that their principles are not so limited. Surveying a body of case law, the *Leathers* Court explained that a differential burden on "*speakers*, even *members of the press*, does not implicate the First Amendment unless [it] is directed at, or presents the danger of suppressing, particular ideas." 499 U.S. at 453 (emphases added). The test extends not just to "members of the press," then, but to all "speakers."

In the same vein, *Arcara* states that First Amendment scrutiny applies to "statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities." 478 U.S. at 704. Such scrutiny applies to *any* "protected First Amendment activities" (*id.*)—not just those "at [the] zenith" of First Amendment protection, as the City would have (A.B. 37). And there can be no question that cigarette advertising is protected First Amendment activity. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).

The City is also wrong in attempting to limit *Minneapolis Star* to its specific factual context of taxes paid by newspapers. (A.B. 37-38.) Although the opinion in *Minneapolis Star* included a discussion of the importance of the press, 460 U.S. at 583-87, the Supreme Court itself has not read the principles recognized in that case as applying only in that context, *see Arcara*, 478 U.S. at 706-07. Moreover,

the City has it exactly backwards in contending that *Minneapolis Star* requires a showing that the government "*intentionally* single[d] out a group engaged in speech." (A.B. 37, emphasis added.) On the contrary, *Minneapolis Star* held that a showing of "[i]llicit legislative intent" was *not* required and that it was sufficient that the law's differential effects produced an objective "potential for abuse." 460 U.S. at 592; *see also id.* at 588 (differential treatment creates the risk that the government could indirectly achieve "censorial effects").

3. The Ordinance's Censorial Purpose Is Relevant to *Both* Whether the Law Is Subject to First Amendment Scrutiny *and* Whether It Survives Such Scrutiny

The City also argues that a censorial purpose is relevant to whether the law *survives* First Amendment scrutiny, but not to whether the Court should *apply* such scrutiny. (A.B. 31-32.) This argument ignores the plain language of the *Arcara/Leathers* line of cases, and overlooks the circumstances under which *Arcara* itself arose.

Although a showing of censorial purpose is not *required* to trigger First Amendment scrutiny, *Minneapolis Star*, 460 U.S. at 592, that does not mean that such a purpose is *irrelevant*. On the contrary, the *Leathers* Court makes clear that the threshold question whether a law "*implicates* the First Amendment" may depend on purpose: an indirect burden on speech "does not implicate the First Amendment" unless it "is [1] directed at, or [2] presents the danger of suppressing,

particular ideas." 499 U.S. at 453. Thus, while the "*danger* of suppressing" ideas is sufficient, *id.* (emphasis added), a law that is *in fact* directed against disfavored ideas will also trigger First Amendment scrutiny. *See also id.* (noting, in applying these principles, that "[n]othing about [the law] has ever suggested an interest in censoring the expressive activities of cable television") (emphasis added). Likewise, the concurring justices in *Arcara* explained that if "a city were to use a nuisance statute as a *pretext* for closing down a bookstore because it sold indecent books ... the case would clearly *implicate* First Amendment concerns and require analysis under the appropriate First Amendment standard of review." 478 U.S. at 708 (O'Connor, J., concurring) (emphases added). Intent matters as to both whether a law "implicates" the First Amendment and to whether it violates it. *See also id.* at 707 n.4 (noting lack of evidence that the city's actions were "a pretext for the suppression of First Amendment protected material").

The City nonetheless contends that, even assuming that a censorial intent *could* trigger First Amendment scrutiny, it could only do so in "some extreme circumstance," such as where a "committee report expressly state[s]" an intent to "snuff out expression." (A.B. 32.) The City argues that, to satisfy this "extreme" standard here, PM USA would have to show, for example, that Board members "stated in hearings or legislative findings that the purpose of the legislation was to try to prevent tobacco advertising in pharmacies, *and* the proposed sales ban was

their attempt to circumvent First Amendment restrictions." (A.B. 32, emphasis added.) The City's effort to create an *ad hoc* rule that applies only in "extreme" cases cannot withstand scrutiny.

As an initial matter, the City's hypothetical "extreme circumstance" is much closer to the facts of this case than the City is willing to admit. As explained below, this case presents the unusual circumstance of a municipal government openly acknowledging in the formal findings of an ordinance that the law is based on hostility to First-Amendment-protected advertising. *See infra* at 17-18. Moreover, there is no basis in law or logic for limiting the application of First Amendment scrutiny to only those cases in which a city is foolish enough to admit openly that it is trying to suppress speech and evade the First Amendment. Indeed, such a requirement cannot be reconciled with the Supreme Court's holding that an "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment," *Minneapolis Star*, 460 U.S. at 592, and that it is sufficient if a law's disproportionate burdens raise the "danger of censorship" by creating the "risk of affecting only a limited range of views," *Leathers*, 499 U.S. at 448.

B. The Ordinance Is Subject to First Amendment Scrutiny Because It Inevitably Burdens Those Engaged in Speech and Presents the Risk of Targeting a Disfavored Message

Under the standards set forth above, the Ordinance is plainly subject to First Amendment scrutiny.

1. The Ordinance Has the Inevitable Effect of Singling Out Those Engaged in Expressive Activity

There can be no doubt that the Ordinance has the "inevitable effect" of "singling out those engaged in expressive activity." *Arcara*, 478 U.S. at 706-07. *Every* drugstore that sold tobacco products, and was required by the Ordinance to cease doing so, was a member of PM USA's "Retail Leaders" program and therefore had a significant display of PM USA advertising and products behind the main counter. (ER 55-56.) Indeed, the City affirmatively concedes the latter point in its brief, noting that "there was apparently no such store" that contained a pharmacy, sold tobacco, and did *not* contain PM USA advertising. (A.B. 38.)

Although conceding a perfect correlation between the drugstores affected by the Ordinance and the presence of significant cigarette advertising in such stores, the City nonetheless contends that the Ordinance itself has *no* effect on the presence of advertising in drugstores and that the removal of such advertising was strictly the result of PM USA's "voluntary, market-based conduct." (A.B. 24.) For multiple reasons, this contention is legally and factually erroneous.

First, as the City concedes, its prohibition of tobacco sales in drugstores means that, as a result, the MSA affirmatively *prohibits* PM USA from displaying outdoor advertising at such stores. (A.B. 18.) Contrary to what the City suggests (A.B. 17-19), there is nothing untoward about PM USA's pointing out that, in light of the pre-existing backdrop of the MSA, the Ordinance's prohibition on sales at

drugstores indisputably produces the *de jure* legal consequence of a prohibition on outdoor advertising at drugstores in San Francisco. The validity of the net burdens imposed as a result of the Ordinance can only be assessed against the pre-existing legal framework that governs tobacco products, which includes the MSA. *See Lorillard*, 533 U.S. at 533 (expressly noting that the challenged regulations on point-of-sale advertising were added on top of the pre-existing restrictions of the MSA).[4] Nor is it relevant that the consent decree that enforces the MSA came about as the result of a settlement. (A.B. 18.) The language from the MSA on which the City relies waives "all claims that the provisions of *this Agreement* violate the state or federal constitutions"; it does not waive objections to *additional*

[4] The City contends that the MSA, by its own terms, is not admissible in this case (A.B. 19 n.3), but this objection has been waived by the City's failure to raise it below. *See, e.g., Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996) (failure to raise objection in the district court "waives the right to raise admissibility issues on appeal"). The objection is meritless in any event. The City, which is not a "Settling State" under the MSA, lacks the right to enforce the provisions of the MSA, including its non-admissibility. (MSA, § XVIII(p), ER 270.) Moreover, the City has cited no authority for the untenable view that the MSA should be construed as imposing an obligation on PM USA, in describing the factual context concerning the regulation of tobacco advertising, to conceal from the courts the significant restrictions imposed by that document. On the contrary, where the case involves an assessment of the need for, or validity of, *additional* restrictions beyond those in the MSA, such a suit is one "relating to" the MSA. (MSA § XVIII(f), ER 267.) The MSA has repeatedly been received into evidence for such purposes. *See, e.g., United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 841-51, 913-15 (D.D.C. 2006); *Boeken v. Philip Morris Inc.*, 127 Cal. App. 4th 1640, 1702-03 (2005).

restrictions, such as the Ordinance. (MSA, § XV, ER 263, emphasis added.)[5]

Second, the City overlooks the fact that, as PM USA specifically noted below, the San Francisco Police Code independently purports to impose a total prohibition on outdoor advertising at stores that do not sell tobacco products. (CR 25 at 8, citing S.F. Police Code § 674(c), (d)(4).) That underscores the undeniable *de jure* effect of the Ordinance on cigarette advertising.

Third, even as to indoor advertising, the City is wrong in contending that the Ordinance has no effect at all on such advertising. The City concedes that the Ordinance *has in fact* led to the removal of all advertising and product displays from the affected drugstores, but it asserts that this was entirely the product of PM USA's "voluntary" choice. (A.B. 19.) This argument is based on the novel theory that, at *some* price, PM USA could have persuaded Walgreens or Rite Aid to agree to tantalize (and annoy) their customers by actually displaying tobacco products (or carrying large advertisements for them), even though the store is forbidden to sell them. The City concedes that it introduced no evidence whatsoever in support of

[5] The City notes that the MSA contemplates the possibility of future, additional restrictions, but the cited provision merely addresses the extent to which such future restrictions might preempt or displace provisions of the MSA; it does not remotely suggest that the parties have waived constitutional objections to such future regulations. (MSA, § XVIII(a), ER 265.) On the contrary, the MSA expressly preserves the participating companies' right to challenge the constitutionality of any political subdivision's "statutes, ordinances and administrative rules relating to tobacco control" put in place after "June 1, 1998." (MSA § V, ER 223.)

this speculative theory (A.B. 19), which is contradicted by the undisputed evidence that *is* in the record. (O.B. 33-34.)

Moreover, the theory also fails as a legal matter. Consistent with general First Amendment principles, *Arcara* and its progeny only require "a *disproportionate burden* on those engaged in First Amendment activities." *Nuñez*, 114 F.3d at 950 (emphasis added). Even under the City's unsupported theory that the Ordinance only makes advertising more expensive in drugstores (as opposed to effectively eliminating it), *that* targeted and disproportionate *burden* would still trigger First Amendment review where, as here, the circumstances suggest that suppression of ideas is afoot. Indeed, the City's erroneous theory would overrule *Minneapolis Star* on its own facts, because there the practical effect of the law was merely to increase the relative cost of publishing newspapers.

The sole case cited by the City in support of its theory actually confirms its error. In *Wine and Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36 (1st Cir. 2005), the court held that the mere fact that a speech-neutral law has the collateral effect of making speech unprofitable does not necessarily violate the First Amendment. *Id.* at 47-48. (A.B. 22-24.) But *Wine and Spirits* expressly distinguished such attenuated effects on speech from "the State's direct imposition of financial burdens on the dissemination of particular kinds of speech." *Id.* at 48 n.3. The latter category, where *the State* creates "the financial disincentive to

speak," would be subject to First Amendment standards. *Id.* And it is exactly into this latter category that the Ordinance, by the City's own admission, falls.

2. The Ordinance Not Only Presents the Risk of Censorship But Plainly Shows a Censorial Purpose

In its Opening Brief, PM USA presented a lengthy account of statements from the City reflecting the Ordinance's censorial intent of suppressing any "message" that conveys "approval of the purchase and use of tobacco products." These included: (1) findings in the Ordinance itself that emphasized the relationship between tobacco sales and tobacco advertising in drugstores and expressed disapproval of the "mass display" of tobacco products; (2) numerous statements throughout the findings and legislative history of the need to prevent any "mixed message" or unfavorable "message" regarding whether tobacco use was socially acceptable; (3) statements from City officials and witnesses expressing concern about drugstore patrons seeing tobacco advertising and product displays; (4) legal arguments by the City emphasizing that the Ordinance's goal was suppressing a disfavored message; and (5) statements that the Ordinance's true purpose was not to reduce tobacco sales at all. (O.B. 10-12.) The City's characterization of these as "a few isolated statements" (A.B. 28) is refuted by the record itself. Indeed, what makes this case so unusual is that the City candidly included expressions of hostility to tobacco advertising in two of the formal legislative findings in the actual text of the Ordinance. Although the City now

seeks to downplay that extraordinary admission by making the irrelevant point that there were 19 other innocuous findings in the Ordinance (A.B. 28), the City cannot unring the bell.

Alternatively, the City argues that, because government officials have a First Amendment right to speak their minds, it is somehow unfair to attribute to the City the various purposes recited in the legislative record. (A.B. 29-30.) The argument is a *non sequitur*. There is nothing wrong with City officials speaking their minds and being clear, as they were here, about why they are passing laws; such candor helps courts such as this one assess whether those laws are constitutional. But the fact that officials have the right to speak does not mean that their speech cannot be used as evidence of legislative intent. A city council is not a debating society, it is a governmental body that exercises coercive power over others. In assessing whether such legislative power has been validly exercised, this Court has held that the expressed views of legislators *are* relevant to a law's purpose. *Colacurcio v. City of Kent*, 163 F.3d 545, 552 (9th Cir. 1998) (courts must "look to the full record to determine whether evidence indicates that the purpose of the ordinance is to suppress speech," and in doing so should consider, *inter alia*, "facts surrounding [the] enactment, the stated purpose, and the record of proceedings").[6]

[6] *Colacurcio* and the other legislative-purpose cases cited in PM USA's Opening Brief (O.B. 44) refute the City's out-of-context quotation (A.B. 30) of the Supreme Court's observation that "an *otherwise* constitutional statute" may not be

Even while attempting to discount its prior censorial statements, the City continues to add more evidence of the Ordinance's troubling purpose. First, it admits that the law reflects a hostility to drugstores' simultaneously "*promot*[*ing*] health and tobacco," thereby again confirming that it is not the act of selling *simpliciter* that troubles the City, but rather, drugstores' perceived "promotion" of tobacco. (A.B. 29, emphasis added.) Second, the City endorses the recently filed *amicus curiae* brief, and the studies cited therein, as providing further explanation of the rationales behind the Ordinance. (A.B. 25.) This second point bears elaboration, because it only underscores the City's hostility to tobacco advertising.

In explaining the rationale for banning tobacco sales in drugstores, *amici* rely heavily on the reports of the Tobacco Education and Research Oversight Committee for California ("TEROC"). (Brief of *Amici Curiae* Tobacco Control Legal Consortium, Public Health Institute, *et al.*, in Support of Appellees ("*Amici* Br.") 8, 12, 13.) The TEROC reports, however, confirm what is already apparent from the existing record, which is that the perceived problem with drugstore sales arises more from the *promotion* of such products in drugstores rather than from the

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invalidated "on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (emphasis added). The City's Ordinance has not passed, and cannot pass, the *O'Brien* intermediate scrutiny test, and is therefore not "otherwise constitutional." And in applying that intermediate scrutiny, the Supreme Court has squarely held that "[t]he government's *purpose* is the *controlling* consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphases added).

mere fact of sales by such stores. Thus, in calling for the passage of laws such as the Ordinance, TEROC explained that "[w]hen their pharmacies offer health-promoting products and advice just down the aisle from *displays of tobacco products*, chain drug stores send a misleading and hypocritical message that tobacco does not harm health and that it is socially acceptable." (TEROC, *Toward a Tobacco-Free California 2006-2008* 18 (Mar. 2006), *available at* <http://www.cdph.ca.gov/services/boards/teroc/Documents/TEROCMasterPlan06-08.pdf> (emphasis added).)

Subsequent to the Ordinance's passage, TEROC praised the law and placed its discussion of the pharmacy sales ban between two other restrictions on tobacco-related speech: "Limit[ing] Point-of-Sale Advertising" and "Restrict[ing] Exposure to Smoking in Movies." (TEROC, *Toward a Tobacco-Free California 2009-2011* 21-22 (Jan. 2009), *available at* <http://www.cdph.ca.gov/services/boards/teroc/Documents/TEROCMasterPlan09-11.pdf>.) And in describing the need for the ban, TEROC unfavorably commented on the presence of cigarette advertising in drugstores: "almost all chain drug stores continue to sell tobacco, many of which also display tobacco advertising." (*Id.* at 21.) Indeed, below this statement in TEROC's report is a large photograph of a Marlboro® product display case (*id.* at 22), quite similar to the one included in PM USA's Opening Brief. TEROC praises the Ordinance and calls for more "measures which prohibit

pharmacies and drug stores from continuing to perpetuate tobacco addiction, disease, and death by selling *or advertising* tobacco products." (*Id.* at 22, emphasis added.) As the TEROC materials show, the goal of suppressing tobacco advertising and promotion is not incidental to the drugstore sales ban, but integral to it.

Despite all of this, the City argues that its conceded purpose to suppress favorable "messages" about tobacco uses that term in a purely colloquial sense. According to the City, it is not targeting an actual speaker's communication, but merely the general social norms created by non-expressive behavior. (*See, e.g.*, A.B. 3.) This argument fails. Unlike in the City's steroids example (A.B. 3-4, 26-27), the City here is *not* prohibiting conduct (sales in drugstores) in order to prevent *that conduct* from being *emulated*: the City has not claimed that the Ordinance is intended to dissuade other stores from entering the cigarette-selling business. Rather, the City has prohibited that conduct (sales in drugstores) because it does not like the communicative impact of the entire cluster of activities (including prominent *advertising and displays* of cigarettes) that, as a factual matter, are associated with such conduct. The City cannot try to "send a message" by aiming to eliminate the communication of messages that it dislikes.

The City also argues that it could not have had a censorial purpose, because "if the Board's true intent was to suppress speech," the Ordinance was a "colossal

failure." (A.B. 30.) But the Ordinance has not failed in its censorial purpose—it has succeeded impressively. The uncontested factual record shows that the Ordinance has resulted in the removal of tobacco advertising from all 60 drugstores affected by the ban, stores that handled 20% of PM USA's business in San Francisco and no doubt an even greater share of its advertising visibility. (E.R. 42-43, 55-56.) In addition, the City has thus far managed to evade First Amendment scrutiny for this censorship. The Ordinance's censorial intent is demonstrated, not just by the legislative history, but by the law's actual effects.

3. The Alternative Purposes Proffered by the City Were Either Not Raised in the District Court or Are Unsupported by the Record or the Legislative History

As alternatives to its apparent purpose of suppressing cigarette advertising, the City notes that the Director of the San Francisco Department of Public Health, Dr. Katz, put forward three rationales for the Ordinance in his testimony before the Board of Supervisors: (1) protecting non-smokers, especially children, from confusion about the social desirability of smoking; (2) preventing sick people from being tempted by seeing tobacco; and (3) eliminating a financial conflict of interest for pharmacies that sell both tobacco and tobacco-cessation medication. (A.B. 7-8.) For several reasons, the City's reliance on Dr. Katz's testimony is unavailing.

In the district court proceedings below, the City did not rely on the second or third rationales, and they are therefore waived. *See, e.g., Moore v. Czerniak*, 534

F.3d 1128, 1152 (9th Cir. 2008) (factual and legal contentions not raised below are waived); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993) (First Amendment principles do "not permit us to supplant the precise interests put forward by the State with other suppositions"). Indeed, the City has *never* relied on the second rationale (presumably because it is not supported by any evidence at all): the Board of Supervisors did not include that rationale in its findings; the City never relied on it in defending the Ordinance below; and, beyond mentioning that Dr. Katz had suggested it, the City's appellate brief still does not actually endorse and defend that theory.

Although the City now belatedly endorses the "conflict of interest" rationale, that theory is *not* speech-neutral. As the City's own brief concedes, the supposed "conflict of interest" arises, not from the mere fact of sales, but from the fact that drugstores "*promote* ... tobacco." (A.B. 28-29, emphasis added.) The first theory—which is the only one the City has properly preserved—is likewise not speech-neutral, because the City's chosen means of purporting to influence public perceptions of the social desirability of smoking is through suppression of tobacco displays and advertising.

* * *

Accordingly, the Ordinance triggers First Amendment scrutiny, and the district court committed legal error in holding otherwise. Moreover, as explained

in PM USA's Opening Brief, there is little doubt that, if the Ordinance is subject to intermediate scrutiny, it cannot survive that scrutiny. (O.B. 39-46.)[7] At a minimum, PM USA has raised the requisite "serious First Amendment questions" to justify preliminary injunctive relief.

II. The Ordinance Is Preempted by FCLAA

The City below did *not* contest the common-sense proposition that any law with a sufficient impact on cigarette advertising and promotion to trigger First Amendment scrutiny imposes obligations "with respect to the advertising or promotion" of cigarettes and is therefore preempted by FCLAA. 15 U.S.C. § 1334(b). (O.B. 47-48.) Because, as explained above, the Ordinance triggers First Amendment scrutiny, it is a preempted regulation "with respect to the

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[7] Beyond asserting that its purpose was not censorial (an argument that fails for the reasons stated above), the City made no effort below to show that the Ordinance would *survive* intermediate First Amendment scrutiny; rather, the City rested its defense of the Ordinance on the view that the First Amendment did not apply at all. (CR 20 at 4-9.) As a result, the City waived any argument that the Ordinance otherwise satisfied intermediate scrutiny. *See, e.g., Moore*, 534 F.3d at 1152 (factual and legal contentions not raised below are waived). In any event, the Ordinance plainly does not meet First Amendment standards. The Ordinance is not content-neutral because (as explained above), it is not unrelated to the suppression of free expression. *O'Brien*, 391 U.S. at 377. The City also has utterly failed to show that the Ordinance will "in fact alleviate [the harms it recites] to a material degree," *Lorillard*, 533 U.S. at 555; on the contrary, the City openly relies on speculation that perhaps only a handful of people will be dissuaded from smoking as a result of the Ordinance. (A.B. 2.) And the City has not shown that the Ordinance's effort to shift cigarette advertising to smaller and less highly-trafficked retail establishments is a narrowly tailored means of accomplishing an important governmental interest. (O.B. 45-46.)

advertising or promotion" of cigarettes, regardless of whether the Ordinance survives First Amendment scrutiny.

In its Answering Brief, the City argues for the first time on appeal that the Ordinance is not preempted even if it is subject to First Amendment scrutiny. (A.B. 42-43.) The argument has been waived by the City's failure to raise it below. *Moore*, 534 F.3d at 1152. In any event, the argument is without merit. As PM USA has explained, the Supreme Court itself has construed the scope of the "with respect to ... advertising or promotion" clause of FCLAA by referring to the analogous line in First Amendment jurisprudence between regulation of conduct and regulation of speech. (O.B. 49-50, citing *Lorillard*, 533 U.S. at 552.) Indeed, the City's own brief effectively concedes that the Ordinance regulates "with respect to ... promotion" of cigarettes, because it candidly acknowledges that the Ordinance is intended to stop drugstores from "promot[ing]" cigarettes. (A.B. 29.)

The City's newly-raised contrary view rests on an analogy to ERISA (A.B. 43), but the argument fails. The courts have specifically cautioned against drawing analogies between very differently worded preemption provisions. *See, e.g., Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446-47 (2005) (rejecting analogy between FCLAA and a differently worded preemption provision); *Lindsey v. Tacoma-Pierce County Health Dept.*, 203 F.3d 1150, 1150 (9th Cir. 2000) (O'Scannlain, J., concurring) (noting that the Court must follow FCLAA case law,

"rather than collateral intervening cases addressing preemption in different areas of the law," such as ERISA). In any event, the analogy fails on its own terms. Even under ERISA, a generally applicable law is preempted when its effect on ERISA plans "implicates an area of core ERISA concern." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 147 (2001). Here, the Ordinance plainly implicates the purposes of FCLAA, one of which was to pre-empt state regulations from *targeting* cigarette advertising. *Lorillard*, 533 U.S. at 548.

III. The Public Interest Favors a Preliminary Injunction

The City argues that even if the Ordinance raises "serious First Amendment questions," a preliminary injunction still should not issue because the public interest in health outweighs PM USA's speech rights. (A.B. 43-45.) This argument rests on neither fact nor law, but rather pure speculation.

The City concedes that the Ordinance will not have a "material impact on cigarette sales" (A.B. 2)—that is, that it will neither prevent current smokers from buying cigarettes, nor dissuade a material number of non-smokers from buying cigarettes for the first time. Nevertheless, the City contends that the law is justified because the City "enacted the [O]rdinance with the *hope* that it would *diminish the likelihood* that teenagers will become addicted to cigarettes" (A.B. 44, emphasis added); in its view, the City's hope that preventing "just a few" (*id.*) or "even ten young people" (A.B. 2) from doing so outweighs PM USA's constitutional rights.

The sole authority the City cites for this theory is *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112 (9th Cir 2008) (cited at A.B. 10), but far from supporting the City's argument, *Golden Gate* highlights its weaknesses.

In *Golden Gate*, the City fended off a stay of an ordinance by presenting *evidence* that *20,000* workers, many with serious medical ailments, would lose access to necessary care. Here, by comparison, the City offers only the "*hope*" that the Ordinance might "diminish the likelihood" of 10 hypothetical youths from someday becoming addicted to cigarettes. In *Golden Gate*, the plaintiff's interest was "entirely economic" and entailed mere administrative costs; here, the sole evidence in the record demonstrates that the City has burdened PM USA's constitutionally protected right to advertise its products. The City's effort to characterize these speech rights as purely monetary is out of step with well-established First Amendment law. *See, e.g., Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005) ("Implicit in [the City's] argument is the notion that the value of commercial speech is limited to the pecuniary gain that can be secured through its exercise. This approach 'attaches more importance to the distinction between commercial and noncommercial speech than our cases warrant and seriously underestimates the value of commercial speech.'") (quoting *Cincinnati v. Discovery Network*, 507 U.S. 410, 419 (1993)).

The City argues that PM USA's interest in advertising in drugstores is *de minimis* because PM USA could always advertise in other stores that are still allowed to sell tobacco products. (A.B. 44.) The City did not raise this meritless argument below, presumably because it is aware that by eliminating substantial advertising displays in these 60 large, heavily-trafficked and attractive stores, the Ordinance has forced PM USA to rely more heavily on relatively less prominent advertising in smaller, less attractive venues.

CONCLUSION

For the foregoing reasons, and those stated in PM USA's Opening Brief, this Court should reverse the district court's orders denying PM USA's request for a preliminary injunction and remand the case with instructions to issue the requested injunction.

DATE: April 17, 2009

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached reply brief is proportionally spaced, has a typeface of 14 points, and contains 6,990 words.

Dated: April 17, 2009

/s/ Daniel P. Collins
Daniel P. Collins

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