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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

PHILIP MORRIS USA INC.,

Plaintiff,

vs.

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.

CASE NO. C-08-4482-CW

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

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I. INTRODUCTION

The City's Response ("Resp.") to this Court's September 26, 2008 Order to Show Cause ("OSC") fails to present any persuasive grounds for declining to issue a preliminary injunction enjoining enforcement of S.F. Ordinance No. 194-08 (the "Ordinance"). On the contrary, the record before the Court demonstrates *both* (1) that PM USA is likely to succeed in its claims that the Ordinance is inconsistent with the First Amendment and preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), 15 U.S.C. § 1334(b); *and* (2) that the balance of hardships tips sharply in PM USA's favor.

In addressing the merits of PM USA's claims, the City's primary, if not exclusive, argument is that the Ordinance does not have a sufficient impact on speech even to trigger First Amendment scrutiny. Resp. 4-9. This erroneous argument flatly ignores settled First Amendment principles. Both the Supreme Court and the Ninth Circuit have repeatedly held that "a statute based on a nonexpressive activity" will nonetheless be subject to intermediate scrutiny under the First Amendment when it has the "inevitable *effect* of singling out those engaged in expressive activity," *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (emphasis added), or "impose[s] a disproportionate burden on those engaged in expressive conduct," *Talk of the Town v. Department of Fin. & Bus. Servs.*, 343 F.3d 1063, 1069 (9th Cir. 2003), and the law does so in a manner that "is directed at, or presents the danger of suppressing, particular ideas," *Leathers v. Medlock*, 499 U.S. 439, 453 (1991). Here, the uncontested record establishes that the practical—and intended—effect of the Ordinance has been to eliminate from the 60 affected retail stores the "tobacco advertising" and "mass display[s] of cigarette advertising" that the Ordinance, on its face, finds so objectionable. S.F. Ordinance No. 194-08, § 1(8), (20). Moreover, the record shows that, at the very least, there is a "danger" that the City is thereby attempting to suppress the expression of disfavored views about tobacco; indeed, the Ordinance's own findings, and the City's own comments in this litigation and elsewhere, confirm that this is in fact the purpose of the Ordinance. These factors are sufficient to subject the Ordinance to intermediate scrutiny under the standards set forth in *United States v. O'Brien*, 391 U.S. 367 (1968).

The fact that the Ordinance sufficiently burdens speech so as to *trigger* First Amendment

scrutiny is alone sufficient to establish that PM USA is likely to succeed on the merits of its preemption claim. By its terms, FCLAA preempts *any* smoking-and-health-related requirement or prohibition "*with respect to* the advertising and promotion of any cigarettes." 15 U.S.C. § 1334(b) (emphasis added). The City here does not contest that the Ordinance's requirements and prohibitions are based on smoking and health, and the City explicitly agrees with PM USA that a law that imposes burdens on cigarette advertising that are sufficient to trigger First Amendment scrutiny is unquestionably one that operates "with respect to" cigarette advertising. Resp. 9. Because the Ordinance *does* trigger such scrutiny, the "with respect to … advertising or promotion" element of FCLAA is satisfied here, and the Ordinance is therefore preempted (regardless of whether the Ordinance does or does not *survive* First Amendment scrutiny).

In addition, PM USA is also likely to succeed on the merits of its First Amendment claim. The Ordinance fails the most basic requirement of intermediate scrutiny, which is that its purpose must be "*unrelated* to the suppression" of disfavored views. *O'Brien*, 391 U.S. at 377 (emphasis added). Here, the predominant purpose of the Ordinance—as reflected in its text, its legislative history, its effects, and in the City's comments in litigation—*is* to suppress favorable messages about tobacco. On top of that, the Ordinance does not further any legitimate and substantial governmental interest, and is not narrowly tailored to further any such interest. The City's Response to the OSC speculates that the Ordinance may perhaps help to prevent youth smoking, *see* Resp. 10-11, but the City has completely failed to demonstrate that "'its restriction[s] will in fact alleviate [such harms] to a material degree.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (citation omitted). Moreover, the suppression of cigarette advertising from specified areas is not a properly tailored means of preventing youth access to cigarettes. *Id*. at 564-66.

The record also makes clear that the balance of hardships tips sharply in PM USA's favor. Since going into effect, the Ordinance has in fact led to the elimination of tobacco advertising and product displays from the affected retail stores. *See* Supplemental Declaration of Peter Paoli ("Supp. Paoli Decl."), ¶ 3. The resulting adverse impact on PM USA's First Amendment rights unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction. *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 973 (9th Cir. 2002). By

contrast, the City can point to no substantial hardship that would result from granting the requested injunction. Although the City contends that an injunction would interfere with the public interest in "timely implementation" of the City's laws, Resp. 10, this argument overlooks the even greater public interest in the prompt enforcement of the First Amendment.

Accordingly, the Court should enter the requested preliminary injunction.

II. ARGUMENT

As PM USA has explained, a preliminary injunction is warranted when the Plaintiff has shown "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation marks, citations, and alterations omitted); *see also* Memorandum in Support of Ex Parte Motion for a TRO and an Order to Show Cause ("Motion") at 7. Here, PM USA is entitled to a preliminary injunction under either standard.

A. PM USA Is Likely to Succeed on the Merits and, at a Minimum, Has Raised "Serious Questions" Going to the Merits

In its Motion, PM USA explained why it was already clear that PM USA was likely to succeed on the merits of its claims that the Ordinance violates the First Amendment and is preempted by FCLAA. Motion 9-16. In its Response, the City argues that *both* claims necessarily will fail because, in its view, the Ordinance does not trigger First Amendment scrutiny at all. Resp. 4-10. Because this premise is wrong—that is, because the Ordinance *is* subject to First Amendment scrutiny—the City's only argument against the preemption claim fails. In addition, because the Ordinance also cannot satisfy the applicable requirements of the First Amendment, PM USA is likely to succeed on its First Amendment claim as well.

1. The Ordinance Is Subject to First Amendment Scrutiny

The City contends that the Ordinance is not subject to any First Amendment scrutiny at all, because (according to the City) the Ordinance only regulates the "conduct of selling tobacco" and that conduct is not itself sufficiently expressive to implicate the First Amendment. Resp. 4. Unfortunately for the City, this supposedly "very simple" argument, *id*. at 1, is directly contrary

to well-settled First Amendment law.

Both the Supreme Court and the Ninth Circuit have repeatedly held that a law will *not* escape First Amendment scrutiny merely because, according to its terms, it purports to regulate only conduct with no expressive element. Rather, a statute purporting to regulate only conduct is subject to First Amendment scrutiny in *either* of two situations: (1) "where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in *O'Brien*," or (2) "*where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity*." *Arcara*, 478 U.S. at 706-07 (emphases added); *see also id.* at 703-04 ("We have also applied First Amendment scrutiny to some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities."). The Ninth Circuit has likewise squarely held that "the First Amendment protections against generally applicable regulations set forth in *O'Brien* can be invoked" where "the government is *either* (1) regulating conduct with an expressive component, *or* (2) *imposing a disproportionate burden on those engaged in expressive conduct*." *Talk of the Town*, 343 F.3d at 1069 (emphasis added); *see also Nuñez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997) (same). Addressing this second category of cases involving incidental impacts on speech, the Supreme Court has clarified that, while not *every* "differential burden on speakers" is sufficient to "raise First Amendment concerns," a differential impact that "is directed at, or presents the danger of suppressing, particular ideas" *is* subject to First Amendment scrutiny. *Leathers*, 499 U.S. at 452-53; *see also id.* at 448-49 (risk presented by conduct-regulating laws that differentially affect a discrete number of speakers is "similar to that from content-based regulation," namely the "danger of censorship"); *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992) (content-based selectivity "creates the possibility that the city is seeking to handicap the expression of particular ideas").

Invoking these principles, the courts have applied First Amendment scrutiny to a wide variety of conduct-regulating statutes that, in the City's erroneous view, should not have merited any First Amendment inquiry at all—such as a law regulating the *sale* of spray paint cans, *Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2d Cir. 2007); a statute imposing taxes on "the *sale* of

large quantities of newsprint and ink," *Acara*, 478 U.S. at 704 (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983)) (emphasis added); an ordinance banning the *use* of portable tables in certain areas, *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 799 (9th Cir. 2006); and an ordinance imposing a curfew for minors, *Nuñez*, 114 F.3d at 950-51.

Accordingly, it is not dispositive that, under the Ordinance, the specific conduct that "dr[aws] the legal remedy" here—sales of tobacco—is not itself expressive conduct. *Arcara*, 478 U.S. at 706. Where a law has the "inevitable *effect* of singling out those engaged in expressive activity," *id*. at 707 (emphasis added), or "impose[s] a disproportionate burden on those engaged in expressive conduct," *Talk of the Town*, 343 F.3d at 1069, and the law does so in a manner that "is directed at, or presents the danger of suppressing, particular ideas," *Leathers*, 499 U.S. at 453, then First Amendment scrutiny will still be required.

There can be little doubt that, on the record before the Court, the Ordinance is subject to First Amendment scrutiny under this standard. Here, it is undisputed that the practical effect of the Ordinance is to require 60 retail stores in San Francisco that sold tobacco products to cease doing so, and it is also undisputed that *each and every one of these 60 stores is a participant in PM USA's "Retail Leaders" program and therefore carried noticeable displays of PM USA advertising* (at least until the Ordinance took effect). *See* Motion 5; *see also* Corrected (First) Declaration of Peter Paoli ("First Paoli Decl."), ¶ 22; *id*., Ex. F. Moreover, although the City dismisses as "speculation" the idea that the Ordinance will lead to the removal of PM USA's product displays and advertising from these stores, *see* Resp. 5, it is incontrovertible that, since going into effect, the Ordinance has *in fact* produced that very result. *See* Supp. Paoli Decl., ¶ 3. That the Ordinance imposes burdens that fall entirely on a subset of stores, *all* of whom carry PM USA advertising, and has led to the removal of that advertising from all of these stores, confirms that the "inevitable effect" of the Ordinance is to "singl[e] out those engaged in expressive activity." *Arcara*, 478 U.S. at 706-07; *see also id*. at 704 (First Amendment scrutiny properly applied in *Minneapolis Star* because the burden of the tax on large-volume ink purchases at issue there "inevitably fell disproportionately—in fact almost exclusively—upon the shoulders of

newspapers…"); *Vincenty*, 476 F.3d at 84-85 (although law regulating sales of spray paint did not regulate "conduct that was itself expressive," First Amendment scrutiny was warranted because of substantial incidental burden on speech).

Likewise, there can be no doubt that the Ordinance's "singling out" of tobacco sales in these 60 retail stores "is directed at, or presents the danger of suppressing, particular ideas." *Leathers*, 499 U.S. at 453-54. The Supreme Court has emphasized that, in the context of conduct regulations that have differential impacts on particular speakers, 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 the 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 (emphasis added). Here, it is undeniable that the Ordinance at the very least creates a serious *risk* that the conduct-regulation will adversely affect a single, disfavored message and could thereby serve as "a pretext for the suppression of protected expression." *Talk of the Town*, 343 F.3d at 1074. Because the uncontested record demonstrates that the conduct directly regulated by the law (here, tobacco sales in pharmacies) is *perfectly* correlated with the exercise of First Amendment rights (here, the presence of point-of-sale advertising), the objective opportunity for suppression of disfavored ideas is plain. The risk of censorship is all the greater where, as here, the Ordinance reflects on its face the City's *awareness* of the high correlation between the regulated activity and the exercise of First Amendment rights. *See* S.F. Ordinance No. 194-08, § 1(20) (noting that a 2003 study of San Francisco pharmacies found that "84% of pharmacies selling cigarettes displayed tobacco advertising"). Indeed, the City's asserted interest in avoiding the sending of inappropriate "messages" is unquestionably more strongly implicated by the *advertising* of cigarettes in such stores than it is by the mere fact of sales in such stores. Moreover, as explained further below, *see infra* at 11-12, the City's stated reasons for enacting the Ordinance and its statements in defending the Ordinance in litigation make clear that the motivation for the Ordinance *is* the suppression of a disfavored message. Although "the possibility that the city is seeking to handicap the expression of particular ideas" is alone sufficient to warrant First Amendment scrutiny, the City's own comments "elevate the possibility to a certainty." *R.A.V.*,

505 U.S. at 394 (making a similar point in the context of content-based discrimination); *see also Leathers*, 499 U.S. at 448-49 (analogizing risks of laws that impose unique burdens on particular speakers to risks presented by content discrimination).

In contrast to the Ordinance, which is "'directed narrowly and specifically at … conduct commonly associated with expression,'" *Nuñez*, 114 F.3d at 950 (citation omitted), the statutes that have been held *not* to trigger First Amendment scrutiny involve broadly applicable laws that involve no differential impact on those exercising First Amendment rights and no risk of censoring disfavored messages. *See, e.g., Talk of the Town*, 343 F.3d at 1070 (statute requiring a valid liquor license to serve alcohol applies to all businesses, not just ones engaged in First Amendment activities); *Nordyke v. King*, 319 F3d 1185, 1190 (9th Cir. 2003) (ordinance that "applies broadly to ban the possession of all guns for whatever reason on County property" did not operate to single out those engaged in expressive activity, because the vast majority of the ordinance's applications did not involve conduct associated with such activity). Notably, even in such cases, the courts have emphasized that the First Amendment would be violated if these broadly framed and generally applicable laws were invoked in a particular case as a pretext for suppressing a particular disfavored speaker. *See, e.g., Talk of the Town*, 343 F.3d at 1069 n.13.

This analysis demonstrates that the City is quite wrong in contending that the Ordinance escapes *any* First Amendment scrutiny merely because it does not formally prohibit a pharmacy from carrying advertisements that announce the availability of cigarettes for sale at competitor retail stores. Resp. 5-6. As explained above, the applicable test focuses on whether the "inevitable *effect*" of the Ordinance is to "singl[e] out" persons actually engaged in First Amendment activity, *Arcara*, 478 U.S. at 706-07 (emphasis added), or otherwise to "impose [a] disproportionate burden" on them, *Talk of the Town*, 343 F.3d at 1069, and on whether this differential treatment creates a risk that the City is seeking to handicap the expression of particular, disfavored ideas. *See supra* at 4-6. The focus is necessarily on the *practical effect* of the regulation, and the fact that a law does not itself directly and formally proscribe speech is of no moment. *Cf. Healy v. James*, 408 U.S. 169, 183 (1972) ("[T]he Constitution's protection is not limited to direct interference with fundamental rights…. We are not free to disregard the

practical realities."); *Pitt News v. Pappert*, 379 F.3d 96, 112 (3d Cir. 2004) (Alito, J.) ("[T]here is no principled reason to draw a distinction between laws that impose direct and indirect burdens of comparable practical significance."). Indeed, the whole point of this separate line of incidental-effects cases is to "appl[y] First Amendment scrutiny" to "statutes which, *although directed at activity with no expressive component*, impose a *disproportionate burden* upon those engaged in protected First Amendment activities." *Arcara*, 478 U.S. at 703-04 (emphasis added).

As set forth above, it is incontestable that the practical effect of the Ordinance has been to cause PM USA's product displays and advertising to be removed from the affected retail stores. *See supra* at 5-6. As the City well knows, the practical *realities* of the situation are that no retail store will advertise products that it does not sell, let alone direct customers to nearby competing retailers who sell those products. *See* Supp. Paoli Decl., ¶ 5. Moreover, both the MSA and an existing provision of the San Francisco municipal code generally *prohibit* outdoor cigarette advertising from being displayed in stores that do not *sell* cigarettes. *See* Rantanen Decl., Ex. E, §§ I(*ii*), III(d); *see also* S.F. Police Code § 674(c), (d)(4). Well aware of these practical realities, and of the perfect correlation between pharmacies' sales of tobacco and their display of tobacco advertising, the City here was able to bring about a full and effective elimination of such advertising from such stores simply by banning the sales, and it did so by means of an Ordinance that openly announced its antipathy to such advertising in pharmacies.

The City protests that this analysis would allow any entity to bring a First Amendment challenge to any law simply by combining the regulated conduct with speech. That is wrong. As an initial matter, there is *no* evidence, nor could the City present any, to suggest that PM USA artificially *created* a correlation between sales and advertising in order to cloak itself in the First Amendment here. On the contrary, PM USA's Retail Leaders contracts with the relevant pharmacies, and its use of onsite advertising generally, substantially predate the City's consideration of the Ordinance. *See* Supp. Paoli Decl., ¶ 4. As PM USA has explained, point-of-sale advertising is especially important in the tobacco industry in light of the substantial constraints on cigarette advertising generally, which significantly restrict the available alternatives to such advertising. *See* Motion 6-7. More broadly, the concern that the City raises

is entirely illusory. Any situation in which a regulated entity creates the sort of *artificial* correlation between regulated conduct and speech that the City posits is, by definition, one in which there is no realistic danger that the regulation is aimed at "suppressing[] particular ideas." *Leathers*, 499 U.S. at 453. As such, it would not trigger any First Amendment scrutiny. *Id*. Here, by contrast, the City openly acknowledged that the availability of cigarettes for sale in pharmacies has long been very highly correlated with point-of-sale advertising displays for cigarettes in pharmacies, *see* Ordinance § 1(20), and the City's stated interest in regulating the matter—to prevent the sending of inappropriate messages—is more closely tied to the advertising than it is to the sales. *See infra* at 11-12.

* * *

On the record before the Court, it is uncontested that, as a factual matter, the Ordinance's impact "inevitably [falls] disproportionately—in fact almost exclusively"—on retail locations that have noticeable displays of First-Amendment-protected PM USA advertising. *Arcara*, 478 U.S. at 704. And the Ordinance raises a substantial risk that the City is attempting to handicap the expression of a particular, disfavored idea. These factors are sufficient to warrant intermediate First Amendment scrutiny. *See Talk of the Town*, 343 F.3d at 1069 (*O'Brien* scrutiny extends to such regulations).

2. <u>The City Concedes that FCLAA Preempts the Ordinance if the Ordinance Triggers First Amendment Scrutiny</u>

As PM USA has explained, FCLAA preempts any state-law (1) "requirement or prohibition" (2) "with respect to the advertising or promotion of any cigarettes" (3) that is "based on smoking and health." 15 U.S.C. § 1334(b); *see* Motion 14. The City, of course, does not contest that the Ordinance imposes requirements or prohibitions, nor does it contest that the Ordinance's mandates are based on smoking and health. *See* Resp. 9-10; *see also* Motion 14-15. Rather, the City's sole argument against preemption is that the Ordinance does not impose obligations "with respect to … advertising or promotion" because (in its view) the Ordinance "does not regulate speech; it only regulates sales." Resp. 9. In making this argument, the City does *not* dispute PM USA's contention that "any regulation that would be consider[ed] a

regulation of *speech* for First Amendment purposes is one that imposes obligations 'with respect to … advertising or promotion' for purposes of FCLAA." Motion 15. On the contrary, the City quotes this very language with approval, and argues that the Ordinance does not impose obligations "with respect to" advertising or promotion only because (in the City's view) it does not trigger First Amendment scrutiny. Resp. 9-10. Because, as explained above, this latter argument fails, the City's sole argument against preemption likewise fails.

In this regard, it is important to note that because FCLAA preempts *all* smoking-and-health-related requirements "*with respect to*" cigarette advertising and promotion, 15 U.S.C. § 1334(b) (emphasis added), the Ordinance is preempted here if it has a sufficient impact on advertising to trigger First Amendment scrutiny. For preemption purposes, it therefore does not matter whether or not the Ordinance *survives* that scrutiny. As a result, the Court can (and should) hold that PM USA has demonstrated a likelihood of success on its preemption claim, without even having to reach the merits of the First Amendment claim. *See Lorillard*, 533 U.S. at 540 (addressing FCLAA preemption issues before addressing merits of First Amendment issues).

3. The Ordinance Violates the First Amendment

In any event, PM USA has also shown a likelihood of success on the merits of its First Amendment claim. Indeed, beyond asserting that the First Amendment has no threshold applicability here at all, the City makes little, if any, effort to defend the Ordinance against a First Amendment challenge.

To be sustained under the applicable intermediate scrutiny, *see supra* at 9, the Ordinance, and the governmental interests advanced in support of it, must be content-neutral, *i.e.*, they must be unrelated to the suppression of free expression. Motion 11. As the Supreme Court has made clear, "[t]he principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys…. *The government's purpose is the controlling consideration.*" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added); *see also Colacurcio v. City of Kent*, 163 F.3d 545, 551 (9th Cir. 1998) (test governing time, place, and manner regulations "is similar or identical to the *O'Brien* test"). Here, the

purpose of the Ordinance is not content-neutral, but is instead related to the suppression of a disfavored idea.

"The purpose, or justification, of a regulation will often be evident on its face," *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994), and this is indeed such a case. Here, the Ordinance makes specific findings that, in 2003, "84% of pharmacies selling cigarettes [in San Francisco] displayed *tobacco advertising*" and that the "*mass display of cigarettes* in pharmacies is in direct contradiction to the role of a pharmacy as a public health facility." *See* S.F. Ordinance No. 194-08, § 1(8), (20) (emphases added). Against this backdrop, the Ordinance expressly concludes that the sale of tobacco products in pharmacies "conveys tacit approval" of such products, thereby sending a "mixed message to consumers who generally patronize pharmacies for health care services." *Id*., § 1(7). On its face, the Ordinance's regulation of tobacco sales in pharmacies thus cannot possibly be said to be "*unrelated* to the suppression" of such tobacco advertising or to eliminating the communicative impact of such mass displays of cigarettes. *O'Brien*, 391 U.S. at 377 (emphasis added).

Even if the City's hostility to tobacco advertising and displays were not already clear from the face of the Ordinance, it is amply confirmed by the record as a whole. The Ninth Circuit has stated that the courts should "look to the full record to determine whether evidence indicates that the purpose of the ordinance is to suppress speech." *Colacurcio*, 163 F.3d at 552. "In so doing," the court should "rely on all objective indicators of intent, including the face of the statute, the effect of the statute, comparison to prior law, facts surrounding the enactment, the stated purpose, and the record of proceedings." *Id*. (internal quotation marks and citation omitted); *see also Turner Broadcasting*, 512 U.S. at 643-52 (considering similar factors in evaluating whether congressional purpose was content-based). Here, all of the factors set forth in *Colacurcio* confirm that the purpose of the Ordinance is to suppress speech: the face of the law shows that "tobacco advertising" and "mass display of cigarettes" in pharmacies were viewed as a problem to be solved, S.F. Ordinance No. 194-08, § 1(8), (20); the effect of the statute has been to end PM USA's advertising in drugstores, *see* Supp. Paoli Decl., ¶ 3; comparison to prior law confirms that the impact of the Ordinance is borne by 60 major retail stores and that there are few effective

alternatives for cigarette advertising other than point-of-sale displays, *see* Motion 5-7; the stated purpose of the law is to eliminate tobacco advertising and product displays in pharmacies, *see* S.F. Ordinance No. 194-08, § 1(8), (20), and to suppress a message, *see id*., § 1(7); Rantanen Decl., Ex. D at 7 (City's brief in opposition to preliminary injunction in *Walgreens* case); and the facts surrounding enactment and the record of proceedings show repeated statements about the need to suppress advertising and favorable messages about tobacco, *see, e.g.*, Martinez Decl., Ex. A at 16-17. The "objective indicators" of the Ordinance's censorial purpose could hardly be clearer.

The City nonetheless contends that its purpose was not censorial, and that even if it was, that illicit purpose is legally irrelevant here. Resp. 6-9. Both contentions are plainly wrong. The City asserts that the repeated references in the record to eliminating "mixed messages" of "tacit approval" merely reflect the opprobrium that is meant to attach to any prohibition of conduct, so that the banning of tobacco sales in pharmacies is akin to the banning of steroid use: both are intended to express nothing more than governmental disapproval of the underlying conduct, namely, "using steroids" and "smoking." Resp. 1-2, 8-9. This contention cannot be squared with the record. The City has not enacted a straight ban on smoking akin to the hypothetical ban on steroid use; consumers remain free to smoke in San Francisco, and the City affirmatively asserts that it does *not* expect the Ordinance to reduce cigarette sales. Resp. 10. The disapproval being expressed by *this* Ordinance is a disapproval of any "*promoting* [of] tobacco products" in pharmacies, Resp. 6 (emphasis added), including their use of "tobacco advertising" and "mass display of cigarettes." S.F. Ordinance No. 194-08, § 1(8), (20). The City cannot unring the bell and take back what it has already disclosed about the true purpose of the Ordinance.[1]

The City is equally wrong in contending that a purpose to suppress tobacco advertising is irrelevant here. Resp. 7-8. The City's argument on this score is that, because the Ordinance (in

[1] The City is wrong in asserting that any messages suppressed by the Ordinance are those of the affected retailers and that PM USA therefore somehow lacks standing. Resp. 9. The advertising, product displays, and promotion that are effectively eliminated by the Ordinance are PM USA products displays and PM USA advertising and promotion that PM USA carries out through its Retail Leaders contracts with the affected stores. *See* First Paoli Decl., ¶¶ 19-25; Supp. Paoli Decl., ¶ 5.

its view) does not "*actually* restrict advertising," it falls within the principle that the courts may "'not strike down an *otherwise* constitutional statute on the basis of an alleged illicit legislative motive.'" Resp. 7 (quoting *O'Brien*, 391 U.S. at 383) (second emphasis added). But the City's premise that the Ordinance does not "restrict advertising" simply repeats the City's erroneous argument that a regulation that purports to reach only conduct is not subject to First Amendment scrutiny, and that argument is wrong for all of the reasons discussed earlier. *See supra* at 3-9. The City does not dispute, nor could it dispute, that if the First Amendment *does* apply here, then censorial motivation is highly relevant. Resp. 7 (such a "regulation can only be upheld if it was enacted for a purpose other than suppressing" expression); *see also Ward*, 491 U.S. at 791 ("The government's purpose is the controlling consideration."); *Jacobs v. Clark County School Dist.*, 526 F.3d 419, 436 (9th Cir. 2008) (question is whether is whether the neutral goals proffered in litigation were "pretexts for its *true* purpose" of suppressing expression) (emphasis in original); *Colacurcio*, 163 F.3d at 551-52 (question is whether the "purpose of the ordinance is to suppress speech").

Moreover, even assuming *arguendo* that the Ordinance were content-neutral, it would nonetheless violate the First Amendment because it is not narrowly tailored so as to avoid "'burden[ing] substantially more speech than is necessary to further the government's legitimate interests.'" *Turner Broadcasting*, 512 U.S. at 662 (citation omitted). The City's desire to suppress favorable messages about cigarettes is, of course, not a "legitimate interest," much less "'an important or substantial governmental interest.'" *Id*. (citation omitted). But beyond that, the Ordinance seemingly serves no purpose at all. The City's asserted "interest in preventing underage tobacco use is substantial, and even compelling," *Lorillard*, 533 U.S. at 564, but the City has made no effort in its briefing, let alone in the legislative findings in support of the Ordinance, to show that the Ordinance is tailored in any way to achieve this end. *See* Resp. 4-9. Indeed, the belated assertion of this rationale for the Ordinance is highly suspect: although the City mentions "youth" or "teenagers" no less than 16 times in its 11-page Response, there is no mention of youth anywhere in the Ordinance's lengthy findings. Although the City speculates that the Ordinance may "prevent even just a few young people from taking up smoking," it is

well-settled that the First Amendment demands more than "'mere speculation or conjecture'"; rather, the City "'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Lorillard*, 533 U.S. at 555 (citation omitted). The City has made no effort at all to satisfy this standard; indeed, what evidence there was on the point before the Board of Supervisors indicated that the Ordinance either would *not* further this interest, *see* Martinez Decl., Ex. A at 21 (testimony of S.F. Pub. Health Director) (asserting that sufficient controls were already in place to prevent youth access in all stores), or might even work against it, *id*. at 11 (testimony of Walgreens employee asserting that pharmacies were more likely to vigorously and strictly enforce policies against youth access than smaller stores). In addition, as the Supreme Court held in *Lorillard*, the suppression of tobacco advertising from particular locations is *not* a narrowly tailored means of accomplishing the objective of reducing illegal youth access. 533 U.S. at 564-66 (invalidating ban on outdoor tobacco advertising near schools).

B. The Balance of Hardships Tips Sharply in PM USA's Favor

As PM USA has shown, the purpose and effect of the Ordinance has been to deny PM USA one of the most effective venues for advertising its products to adult smokers: the five dozen high-traffic stores at issue here accounted for a disproportionate one fifth of PM USA's sales in San Francisco, meaning that the advertising displayed there reached a very large number of smokers. *See Motion* 3, 6-7; First Paoli Decl., ¶¶ 9-13, 22-23; Supp. Paoli Decl., ¶ 3. The resulting "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary injunction." *Sammartano*, 303 F.3d at 973 (citation omitted). The City's *sole* response to this suppression-of-advertising point is again to rely on its erroneous argument that the Ordinance does not implicate the First Amendment at all. Resp. 10-11. Because that argument is wrong, and because PM USA is likely to succeed on its First Amendment claims, *see supra* at 3-13, irreparable injury is established under *Sammartano*.

On the other side of the balance, the City presents no evidence of any material harm that will come from temporarily enjoining the Ordinance. Instead, all that the City points to is the same speculative and unsubstantiated "hope" that the Ordinance might reduce youth access to

tobacco. Resp. 10. Beyond that, the City relies only on the asserted public interest in seeing City ordinances enforced. Resp. 3, 10. But that generalized interest—which is, by definition, present in *every* challenge to a law—cannot outweigh the irreparable harm of losing First Amendment rights. *See, e.g., Brown v. California Dept. of Transp.*, 321 F.3d 1217, 1225-26 (9th Cir. 2003) (affirming preliminary injunction in First Amendment case without discussing public interest); *Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (reversing denial of preliminary injunction, again without discussing public interest); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). Indeed, the public interest in timely enforcement of the United States Constitution is undoubtedly greater. *Sammartano*, 303 F.3d at 974 ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.") (collecting cases).[2]

III. CONCLUSION

For all the foregoing reasons, PM USA respectfully requests that the Court enter a preliminary injunction.[3]

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[2] Although this Court held that PM USA's delay in bringing its application for an *immediate temporary restraining order* justified denial of that extraordinary relief, the Court at the same time did order the City to show cause why a *preliminary injunction* should not issue. In its response, the City has not contended that the timing of PM USA's actions provides any basis for declining to issue a preliminary injunction. *See Vincenty*, 476 F.3d at 89 (city's failure to raise issue of timing in opposition to preliminary injunction motion waived issue).

[3] At the time of its initial application for a TRO and OSC, PM USA submitted a proposed order describing that requested relief. Because that prior proposed order was not specifically cast in the form of a grant of a preliminary injunction, PM USA has herewith submitted a revised proposed order granting a preliminary injunction.