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NORTHERN DISTRICT OF CALIFORNIA

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CW

13 UNITED STATES DISTRICT COURT  
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

15  
16 PHILIP MORRIS USA INC.,  
17 Plaintiff,  
18 vs.  
19 CITY AND COUNTY OF SAN  
20 FRANCISCO; BOARD OF  
21 SUPERVISORS OF THE CITY AND  
22 COUNTY OF SAN FRANCISCO; and  
23 GAVIN NEWSOM, in his official capacity  
24 as MAYOR of the City and County of San  
25 Francisco,  
26 Defendants.

27  
28  
CASE NO. C-\_\_\_\_\_  
**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF PHILIP MORRIS USA INC.'S  
EX PARTE MOTION FOR A  
TEMPORARY RESTRAINING ORDER**  
[Local Civ. R. 65-1(a)(2)]

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiff Philip Morris USA Inc. (“PM USA”) respectfully moves *ex parte* for a temporary  
4 restraining order (“TRO”), enjoining enforcement of City Ordinance No. 194-08 (“the  
5 Ordinance”) pending a hearing and ruling on whether to issue a preliminary injunction.<sup>1</sup> By  
6 enacting and threatening to enforce the Ordinance, Defendant City and County of San Francisco,  
7 through its Board of Supervisors and its Mayor (collectively “the City”), seek to ban cigarette  
8 sales in drugstores based on the City’s conceded antipathy *towards the point-of-sale cigarette*  
9 *advertising that accompanies such sales*. Absent a TRO from this Court, PM USA will suffer  
10 irreparable injury to its First Amendment and federal rights by being forced to dismantle its  
11 product displays and their accompanying advertising from the 60 San Francisco drugstores  
12 (mostly Walgreens and Rite Aid stores) that currently sell cigarettes (among innumerable other  
13 consumer items) at their main retail counters—*not* at the separate pharmacy counter located at the  
14 rear of the store these stores. *See* Declaration of Kent Zerangue, ¶¶ 5-7; *id.*, Ex. A-B. Because  
15 the balance of equities tips sharply in PM USA’s favor, and PM USA is likely to succeed on the  
16 merits of its claims, a TRO should issue *before* the Ordinance takes effect on October 1.

17 PM USA does not contest that the City possesses power to adopt appropriate regulations  
18 of cigarette sales for reasons that are unrelated to the suppression of communication (*e.g.*, to  
19 prevent access by youth, etc.). But at the same time, it is axiomatic that the government “may not  
20 proscribe particular conduct *because* it has expressive elements.” *Texas v. Johnson*, 491 U.S.  
21 397, 406 (1989) (emphasis in original). “[T]he more generalized guarantee of freedom of  
22 expression makes the communicative nature of conduct an inadequate *basis* for singling out that  
23 conduct for proscription.” *Id.* (emphasis in original) (citation omitted). The City has violated  
24 that bedrock principle here by seeking to ban cigarette sales in drugstores based on the City’s  
25 conceded hostility towards the cigarette advertising that goes with those sales.

26 All 60 of the retail stores that will be affected by the Ordinance are participants in PM

27 \_\_\_\_\_  
28 <sup>1</sup> A copy of the Ordinance is attached as Exhibit A to the Declaration of Jason Rantanen  
 (“Rantanen Decl.”), filed concurrently herewith.

1 USA's "Retail Leaders" program, meaning that each of them has a prominent display of PM USA  
2 cigarettes and advertising directly behind the retail counter. *See infra* at 5-6. If the Ordinance  
3 goes into effect on October 1, all of these displays and advertising will necessarily be removed  
4 from these stores. And that is exactly what the City wants. As stated in the Ordinance itself, the  
5 City's announced purpose in prohibiting cigarette sales in such stores is that the overwhelming  
6 majority of San Francisco "pharmacies selling cigarettes *display[] tobacco advertising,*" and the  
7 visible presence of tobacco for sale in pharmacies "convey[s] tacit approval of the purchase and  
8 use of tobacco products" and "sends a mixed message to consumers who generally patronize  
9 pharmacies for health care services." *See* S.F. Ordinance No. 194-08, § 1(7), (20). The City's  
10 effort to ban sales based on the advertising that accompanies those sales violates established First  
11 Amendment principles. A regulation (such as the Ordinance) that purports to regulate only  
12 conduct, but that imposes substantial incidental burdens on speech, may only be sustained if, *inter*  
13 *alia*, the government seeks to regulate "for reasons unrelated to the communication of ideas."  
14 *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001). The Ordinance clearly fails this test,  
15 because its announced purpose is to limit and suppress "message[s]" of "tacit approval" of  
16 tobacco products that comes from the display of cigarettes and cigarette advertising. Likewise,  
17 the Ordinance cannot be sustained as a "time, place, and manner" restriction, because the First  
18 Amendment requires that such restrictions be *content-neutral* and unrelated to the suppression of  
19 communication. *See infra* at 11-12.

20 The Ordinance is invalid for the additional reason that it is expressly preempted by federal  
21 law. The Federal Cigarette Labeling and Advertising Act ("FCLAA") establishes "a  
22 comprehensive federal scheme governing the advertising and promotion of cigarettes." *Lorillard*,  
23 533 U.S. at 541. FCLAA contains a "sweeping" preemption provision, *id.* at 542, which  
24 preempts any "requirement or prohibition based on smoking and health" that is "imposed under  
25 State law with respect to the advertising or promotion of any cigarettes ...." 15 U.S.C. § 1334(b).  
26 Here, the Ordinance indisputably imposes "requirements or prohibitions" that are "based on  
27 smoking and health." And although styled as only a regulation of "sales," the Ordinance plainly  
28 imposes prohibitions "*with respect to ... advertising or promotion*" of cigarettes. In assessing the

1 line between nonpreempted regulation of “conduct” concerning cigarettes and preempted  
2 regulation of cigarette advertising, the Supreme Court in *Lorillard* relied on the well-developed  
3 body of First Amendment law that addresses the directly analogous question of classifying a law  
4 as a regulation of conduct or a regulation of speech. 533 U.S. at 552. Because, as explained  
5 above, the Ordinance would be treated as a regulation of speech for purposes of the First  
6 Amendment, under *Lorillard* it should therefore be deemed to be a regulation “with respect to ...  
7 advertising and promotion” for purposes of FCLAA. As such, all of the requirements of  
8 § 1334(b) are met, and the Ordinance is preempted.

9       There can also be little doubt that the balance of hardships tips sharply in PM USA’s  
10 favor. “‘The loss of First Amendment freedoms, for even minimal periods of time,  
11 unquestionably constitutes irreparable injury’ for purposes of the issuance of a preliminary  
12 injunction.” *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303  
13 F.3d 959, 973 (9th Cir. 2002) (citation omitted). In addition, PM USA will be irreparably injured  
14 by the loss of prime advertising space in retail stores that currently account for a disproportionate  
15 share of PM USA’s sales in San Francisco—over 20%— and PM USA may well be unable to  
16 regain that space if the Ordinance goes into effect only to be invalidated later. *See infra* at 8. The  
17 City, by comparison, will not be harmed by a brief delay in the enforcement of the Ordinance—  
18 sufficient to permit full briefing on an order to show cause concerning a preliminary injunction.  
19 Indeed, the City itself delayed the effective date of the Ordinance by a few weeks when it was  
20 enacted. For that reason, the balance of harms strongly favors issuance of a TRO.

## 21 **II. BACKGROUND**

### 22 **A. The Challenged Ordinance**

23       San Francisco’s recently enacted Ordinance 194-08 amends the City’s Health Code by  
24 adding a new Article 19J that generally bans the sale of tobacco products in any “pharmacy.” *See*  
25 S.F. Health Code § 1009.91, *et seq.* Specifically, the Ordinance makes it “unlawful to sell  
26 tobacco products in a pharmacy,” subject to certain exceptions. *Id.*, § 1009.92. The Ordinance,  
27 in turn, broadly defines a “pharmacy” to include any retail store that offers pharmaceutical  
28 services, even if the sale of pharmaceuticals is only a fraction of the store’s overall business:

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

7 *Id.*, § 1009.91(e). The Ordinance, however, contains an exemption for “General Grocery Stores”  
8 (such as supermarkets) and “Big Box Stores” (such as Costco). *Id.*, § 1009.93.<sup>2</sup> The Ordinance’s  
9 prohibition does not take effect immediately, and retail stores covered by it may continue to sell  
10 tobacco products through September 30, 2008. *Id.*, § 1009.95.

11 The Board of Supervisors made several express “[f]indings” that explained the rationale  
12 for the Ordinance. Specifically, the Ordinance found that, “[t]hrough the sale of tobacco  
13 products, pharmacies convey tacit approval of the purchase and use of tobacco products,” and  
14 “[t]his approval sends a mixed message to consumers who generally patronize pharmacies for  
15 health care services.” *See* S.F. Ordinance No. 194-08, § 1(7). The Ordinance left no doubt that  
16 the source of this “mixed message” was not the mere physical presence of cigarettes for sale in  
17 the affected retail stores, but rather the *display* of cigarettes and of the *advertising* that invariably  
18 accompanies the offering of cigarettes for sale. Thus, the Ordinance specifically found that, “[i]n  
19 a 2003 study of San Francisco pharmacies’ merchandising of cigarettes, 84% of pharmacies  
20 selling cigarettes displayed tobacco advertising.” *Id.*, § 1(20). At the various hearings held by  
21 the Board of Supervisors in connection with the adoption of the Ordinance, witnesses similarly  
22 and repeatedly confirmed that the Ordinance was aimed at the cigarette advertising and displays  
23 that occur in such retail stores. *See infra* at 9-10. For example, witnesses complained about the  
24 attractive “colors and imagery” used in cigarette advertising, when in their view such stores  
25 should be conveying “the message that the pharmacy is here to support you in your attempt to

25 <sup>2</sup> The Ordinance defines a “General Grocery Store” by reference to Section 790.102(a) of the San  
26 Francisco Planning Code, which in turn defines the phrase as referring to an “individual retail  
27 food establishment” that exceeds 5,000 square feet, “[o]ffers a diverse variety of unrelated non-  
28 complementary food and non-food commodities,” prepares no more than minor amounts of food  
for immediate on-site consumption, and markets most of its merchandize at retail prices. *See* S.F.  
Health Code § 1009.91(c) (defining “General Grocery Store”); S.F. Planning Code § 790.102(a).  
The Ordinance defines a “Big Box Store” as a “single retail establishment occupying an area in  
excess of 100,000 gross square feet.” *See* S.F. Health Code § 1009.91(a).



1 quit smoking.” See Declaration of Emily Martinez (“Martinez Decl.”), Ex. A, at 16.

2 The City has further confirmed, in related state-court litigation, that the purpose of the  
3 Ordinance is to limit and suppress “implicit message[s] that smoking is acceptable.” In a pending  
4 suit brought by Walgreen Co. (“Walgreens”) against the City in San Francisco Superior Court,  
5 Walgreens alleges that the exemption for big box stores and general grocery stores lacks any  
6 rational basis and therefore violates the Equal Protection Clause. See Rantanen Decl., Ex. B. In  
7 its written opposition to Walgreens’ motion for a preliminary injunction, filed on September 18,  
8 2008, the City stated that the rationale of the Ordinance is that “drug stores should not be selling  
9 tobacco, because when health-promoting businesses sell tobacco, it sends an implicit message  
10 that smoking is acceptable” and that the exception for Big Box Stores and General Grocery Stores  
11 was rational because the retail stores covered by the Ordinance “send[] that implicit message of  
12 acceptability more strongly than the sale of cigarettes by big box stores or grocery stores, even if  
13 those stores too have pharmacies in them.” See Rantanen Decl., Ex. D at 7.

14 **B. The Substantial Impact of the Ordinance on PM USA’s Advertising and**  
15 **Promotional Activities**

16 When the prohibitions of the Ordinance take effect on October 1, 2008, some 60 retail  
17 stores in San Francisco that currently sell PM USA cigarettes and that are covered by the  
18 Ordinance (59 of which are either Walgreens or Rite Aid stores) will be required to cease selling  
19 tobacco products. See Declaration of Peter Paoli (“Paoli Decl.”), ¶ 22. They will remove their  
20 displays of PM USA products and, importantly, they will remove the advertising and promotional  
21 materials that accompany these displays. *Id.*, ¶¶ 22, 23.

22 All 60 of these stores are participants in PM USA’s “Retail Leaders” program, which  
23 generally requires them to display specified amounts of PM USA advertising. See Paoli Decl.,  
24 ¶ 22; see also *id.*, Ex. F. Under this program, PM USA requires retailers to display tobacco  
25 products in various types of non-self-service displays (*i.e.*, behind the counter), even in States  
26 where this is not legally required.<sup>3</sup> *Id.*, ¶ 20. The program also specifies parameters for the

27 \_\_\_\_\_  
28 <sup>3</sup> California law bans self-service displays of tobacco products. See Cal. Bus. & Prof. Code  
§ 22962(b).

1 placement, size, and nature of PM USA advertising on the displays. *Id.*, ¶ 19.

2 By effectively eliminating PM USA's products and their accompanying advertising from  
3 these 60 stores, the Ordinance will significantly reduce the amount of physical retail space in San  
4 Francisco that is available for the display of PM USA advertising and promotional materials.  
5 Moreover, because the affected 60 stores account for a disproportionately large share of PM  
6 USA's entire sales volume in San Francisco—over 20%—the effect of the Ordinance will be to  
7 eliminate PM USA advertising and promotional materials from what has proved to be one of the  
8 most convenient and effective venues for reaching adult smokers. *See Paoli Decl.*, ¶¶ 22-23.

9 The impact of this substantial reduction in the number of retail locations that will carry  
10 PM USA point-of-sale advertising and promotional materials is magnified by the lack of equally  
11 effective alternatives for PM USA to communicate with adult smokers, especially smokers of  
12 competing brands of cigarettes. *See Paoli Decl.*, ¶¶ 9-13. For example, PM USA and other  
13 tobacco manufacturers have not advertised in radio or television since 1971, when a federal  
14 statute took effect making it “unlawful to advertise cigarettes and little cigars on any medium of  
15 electronic communication subject to the jurisdiction of the Federal Communications  
16 Commission.” *See* 15 U.S.C. § 1335; *see also Paoli Decl.*, ¶ 11. Moreover, the Consent Decrees  
17 implementing the 1998 Master Settlement Agreement (“MSA”) with the Attorneys General of 46  
18 States (including California) impose wide-ranging restrictions on the advertising, promotion, and  
19 marketing of cigarettes and smokeless tobacco products. In particular, the MSA:

- 20 • prohibits virtually all forms of outdoor advertising, including billboards, stadiums,  
21 shopping malls, video game arcades, transit ads, and any exterior signage except on the  
22 premises of retail stores that sell cigarettes;
- 23 • prohibits merchandise bearing cigarette brand names (so-called “branded items”);
- 24 • prohibits brand name sponsorship of concerts;
- 25 • places restrictions on brand name team sponsorships;
- 26 • places restrictions on marketing practices such as free product sampling; and
- 27 • prohibits paid product placement in movies or television.

28 *See Paoli Decl.*, ¶ 10; *Rantanen Decl.*, Ex. E.

1 PM USA's tobacco product advertising is also limited in other ways. In 2000, PM USA  
2 significantly limited the number of magazines in which it placed advertisements, so as to avoid  
3 placing advertisements in magazines that had substantial youth readership. *See* Paoli Decl., ¶ 12;  
4 *see also People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253, 1281-83  
5 (2004) (favorably discussing PM USA's 2000 magazine policy).<sup>4</sup> Notably, the California  
6 Attorney General brought suit in March 2001 against a competing cigarette manufacturer that  
7 initially declined to adopt restrictions on its print advertising that were similar to those adopted by  
8 PM USA in 2000. *Id.* at 1260. The California Attorney General's suit contended that the  
9 competing cigarette manufacturer's continued advertising in certain magazines constituted  
10 "targeting" of youth in violation of the MSA. The trial court ultimately enjoined the  
11 manufacturer, and the injunction was affirmed on appeal. *Id.* at 1291.

12 As a result of the limited avenues of communication left open to PM USA, in-store  
13 advertising and promotion is an important means of developing brand awareness in adult  
14 smokers. *See* Paoli Decl., ¶ 13.

### 15 **III. ARGUMENT**

#### 16 **A. Standard For Issuance of Temporary Restraining Order**

17 "The standard for issuing a temporary restraining order is identical to the standard for  
18 issuing a preliminary injunction." *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*,  
19 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). In the Ninth Circuit, such interim injunctive relief  
20 is appropriate when a plaintiff demonstrates either: (1) a likelihood of success on  
21 the merits and the possibility of irreparable injury; or (2) that serious questions  
22 going to the merits were raised and the balance of hardships tips sharply in the  
23 plaintiff's favor. These two options represent extremes on a single continuum: the  
24 less certain the district court is of the likelihood of success on the merits, the more  
25 plaintiffs must convince the district court that the public interest and balance of  
26 hardships tip in their favor.

27 *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (internal quotation  
28 marks, citations, and alterations omitted).

<sup>4</sup> PM USA subsequently stopped running magazine advertisements for any of its brands. *See* Paoli Decl., ¶ 12.

1           **B. The Balance of Hardships Tips Sharply in PM USA’s Favor**

2           Because PM USA faces an imminent threat to both its First Amendment rights and  
3 important channels of business and communication—whereas the City has elaborated no urgent  
4 need for the Ordinance to take immediate effect—it is clear that the balance of harm tips sharply  
5 in PM USA’s favor. It is well settled that “[t]he loss of First Amendment freedoms, for even  
6 minimal periods of time, unquestionably constitutes irreparable injury for purposes of the  
7 issuance of a preliminary injunction.” *Sammartano*, 303 F.3d at 973 (citation omitted). Because  
8 the Ordinance’s purpose and effect is the removal of constitutionally protected advertising, PM  
9 USA has plainly established that it will suffer irreparable harm if the Ordinance goes into effect.

10           Additional considerations further establish that the balance of hardships tips sharply in  
11 PM USA’s favor. Absent a TRO from this Court, PM USA product displays and advertising will  
12 be *physically removed* from 60 major retail stores in San Francisco. *See Paoli Decl.*, ¶¶ 16-17,  
13 22-23. Moreover, these stores are among the most effective venues for reaching adult smokers:  
14 as noted above, these five dozen stores alone yield over 20% of the sales volume of PM USA  
15 products in San Francisco. *Id.*, ¶ 22. Once these PM USA products displays and advertising are  
16 removed, there is no guarantee that, if the Ordinance is later invalidated, PM USA will be able to  
17 regain the valuable slots it currently has in these highly trafficked stores. *Id.*, ¶ 24. In addition,  
18 allowing the ban to go into effect, only later to have it invalidated, would cause significant  
19 confusion and disruption to San Francisco adult smokers who wish to find and purchase their  
20 preferred brands.

21           The City, for its part, faces no imminent harm if the Ordinance is temporarily prevented  
22 from going into effect. The City has stated that it does not expect the Ordinance to reduce  
23 tobacco sales, *see infra* at 10, and so it cannot claim that the Ordinance will produce that result if  
24 allowed to go into effect. Most importantly, the City has already delayed the effective date of the  
25 Ordinance on its own, *see S.F. Health Code § 1009.95*, and it is difficult to see what harm the  
26 City would suffer (much less irreparable harm) if the Ordinance’s effective date is temporarily  
27 deferred for the short additional period of time necessary to allow this Court to hear and decide a  
28 motion for a preliminary injunction.

1           **C. PM USA Is Likely to Succeed on the Merits and, at a Minimum, Has Raised**  
2           **“Serious Questions” Going to the Merits**

3           Because the balance of hardships tips sharply in PM USA’s favor, PM USA need only  
4 show at this stage that it has raised “serious questions” going to the merits. *McNair*, 537 F.3d at  
5 987. That standard is unquestionably satisfied here. Indeed, even if PM USA were required to  
6 show a likelihood of success on the merits, it has done so.

7                   **1. The Ordinance Violates the First Amendment**

8           The Supreme Court has held that the “First Amendment ... constrains state efforts to limit  
9 advertising of tobacco products, because so long as the sale and use of tobacco is lawful for  
10 adults, the tobacco industry has a protected interest in communicating information about its  
11 products and adult consumers have an interest in receiving that information.” *Lorillard Tobacco*  
12 *Co. v. Reilly*, 533 U.S. 525, 571 (2001). Here, the City has plainly violated the First Amendment  
13 by proscribing sales of tobacco based on antipathy to the advertising that accompanies the  
14 offering of tobacco for sale. Indeed, the City has made unambiguously clear that the purpose and  
15 intended effect of the Ordinance is to limit and suppress what it calls “mixed message[s]”  
16 concerning the acceptability of tobacco use. *See* S.F. Ordinance No. 194-08, § 1(7). Given this  
17 impermissible purpose and effect, and given that the communication at issue does not fall into  
18 any exception to the First Amendment’s protection, the Ordinance must be struck down.

19                   **a. The Ordinance’s Explicit Purpose is to Suppress Speech**

20           The City has candidly and repeatedly acknowledged that the predominate purpose and  
21 intended effect of the Ordinance is to limit and suppress disfavored messages concerning tobacco.

22           First, the Ordinance itself states in its findings that “[t]hrough the sale of tobacco  
23 products, pharmacies convey tacit approval of the purchase and use of tobacco products.” S.F.  
24 Ordinance No. 194-08, § 1(7). This, in turn, sends a “mixed message” to consumers. *Id.*  
25 Nothing in the Ordinance’s findings suggests that the City believed this measure would reduce  
26 the number of cigarette sales or directly combat smoking in the City. On the contrary, as one City  
27 Supervisor summarized the comments made at a July 17, 2008 hearing on the proposed  
28 ordinance: “This was originally presented to me as something that was going to decrease

1 smoking and I think we are hearing now that *that's not really the true intent, it's more to prevent*  
2 *... folks from thinking that maybe smoking is healthy* by it being sold in a healthy place or  
3 something to that effect.” See Martinez Decl., Ex. A at 23-24 (emphasis added). No evidence  
4 was ever presented at that hearing, however, that even remotely demonstrated that the mere  
5 availability of cigarettes for sale at Walgreens and Rite Aid causes anyone to believe that  
6 smoking is “healthy.”

7 Second, the legislative history contains numerous statements by proponents of the  
8 Ordinance and by the Board of Supervisors that reinforce what the text of the law already makes  
9 clear: suppressing the message that smoking is acceptable is the Ordinance’s *raison d’etre*. In  
10 explaining why the Ordinance should be enacted, Dr. Mitchell Katz, the City’s Director of Public  
11 Health, insisted that “selling tobacco at pharmacies influences social acceptability of smoking”  
12 and that “when we see tobacco being sold [at a pharmacy], that’s a mixed message.” See  
13 Martinez Decl., Ex. A at 1-2. The decision to enact the Ordinance “just comes down to ... what  
14 the message is to people who are not yet smoking.” *Id.* at 22. Other proponents agreed: “The  
15 sale of [cigarettes] side by side with the sale of medicine used to treat addiction to tobacco  
16 conveys a very disturbing message.” *Id.* at 13. “[Customers] are not getting the message that the  
17 pharmacy is here to support you in your attempt to quit smoking. No, they’re getting the message  
18 that the pharmacy doesn’t care where its profits are coming from.... [Cigarette sales in  
19 pharmacies] send a subtle message to the public ... that tobacco products can’t be all that bad.”  
20 *Id.* at 17. As one witness put it, preventing cigarettes from being sold in pharmacies would  
21 eliminate “their brightly colored displays” whose “colors and imagery”—particularly “iconic  
22 images such as the red triangles on the Marlboro pack”—“are triggers themselves for smoker[s]  
23 to want their next cigarette.” *Id.* at 16-17. Indeed, even opponents accepted that the goal of the  
24 Ordinance was to discourage “sending messages to consumers approving the use of tobacco.”  
25 *Id.* at 8.

26 Finally, when faced with a challenge from Walgreens that the Ordinance lacked any  
27 rational purpose, the City argued that the Ordinance did have a purpose, namely to limit “mixed  
28 messages” about the acceptability of tobacco use. “The sale of tobacco by health-promoting

1 businesses like Walgreens sends an implicit message that smoking is acceptable.... Cigarette  
2 addiction ...has declined ... due to governmental efforts, *like this one*, to undercut the message  
3 that smoking is acceptable.” *See Rantanen Decl., Ex. D at 1*. The elimination of this “implicit  
4 message” was the law’s purpose, the City insisted, repeatedly. *Id.* at 4, 7. According to the City,  
5 even if the Ordinance did not target stores that sold the most cigarettes, that did not show  
6 irrationality because the goal was not to prevent sales but to prevent a message; accordingly, the  
7 Ordinance targeted those stores that “send[] that implicit message of acceptability more strongly.”  
8 *Id.* at 7.

9 It is difficult to conceive of a record that more clearly establishes an “improper censorial  
10 motive.” *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1023 (9th Cir.  
11 2008) (citation omitted).

12 **b. The Ordinance Cannot Be Justified Under Any Conceivably**  
13 **Applicable First Amendment Standard**

14 The Ordinance’s substantial burdens on PM USA’s speech cannot be justified under the  
15 First Amendment.

16 First, the Ordinance cannot be recast as a regulation of conduct with only an incidental  
17 burden on expressive activity. For a regulation to be sustained on such grounds, the regulation,  
18 and the governmental interests advanced in support of it, must be unrelated to the suppression of  
19 free expression. *United States v. O’Brien*, 391 U.S. 367 (1968); *Lorillard*, 533 U.S. at 567; *see*  
20 *also Long Beach Area Peace Network*, 522 F.3d at 1022-23 (“A law is content-based rather than  
21 content-neutral if ‘the main purpose in enacting it was to suppress or exalt speech of a certain  
22 content, or it differentiates based on the content of speech on its face.’”) (quoting *ACLU of*  
23 *Nevada v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006)). But as the record makes clear,  
24 the Ordinance is deliberately designed to relate to expression and to suppress a particular  
25 message. *See supra* at 9-11. It thus cannot be deemed a content-neutral restriction on conduct.

26 Neither can the Ordinance be defended as a time, place, or manner restriction: such  
27 restrictions must be content-neutral, which the Ordinance plainly is not. *See Ward v. Rock*  
28 *Against Racism*, 491 U.S. 781, 791 (1989) (“[The] principal inquiry in determining content

1 neutrality ... is whether the government has adopted a regulation of speech because of  
2 disagreement with the message it conveys.”); *Long Beach Area Peace Network*, 522 F.3d at 1022-  
3 23. Far from being “justified without reference to the content of the regulated speech,” *Clark v.*  
4 *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), the Ordinance’s restriction is  
5 justified precisely on the basis of the message sent by tobacco sales in pharmacies. *See Linmark*  
6 *Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85, 94 (1977).

7 Nor can the Ordinance be justified as attacking the “secondary effects” of pharmacies’  
8 alleged implicit endorsement of tobacco products, because the consequences of speech’s  
9 persuasive effects are *primary*, not secondary effects. The City “has proscribed particular types  
10 of [sales] ... because it fears [the implicit message’s] ‘primary’ effect—that [it] will cause those  
11 receiving the information to act upon it.” *Linmark*, 431 U.S. at 94. *See also Boos v. Barry*, 485  
12 U.S. 312, 321 (1988) (holding that “[l]isteners’ reactions to speech are not the type of ‘secondary  
13 effects’” the government may permissibly regulate). Only where the government’s predominate  
14 motive is unrelated to the expressive content of the speech will a secondary effect justification  
15 suffice. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (“The District  
16 Court’s finding as to ‘predominate’ intent, left undisturbed by the Court of Appeals, is more than  
17 adequate to establish that the city’s pursuit of its zoning interests here was unrelated to the  
18 suppression of free expression.”). Here, the evidence is clear that the predominate motive was  
19 not merely *related* to the suppression of free expression, but *was* such suppression.

20 Finally, the Ordinance cannot be sustained as a valid regulation of commercial speech.  
21 Restrictions on commercial speech are governed by the four-part test set forth in *Central Hudson*  
22 *Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980):

23 [1] At the outset, we must determine whether the expression is protected by the  
24 First Amendment. For commercial speech to come within that provision, it at least  
25 must concern lawful activity and not be misleading. [2] Next, we ask whether the  
26 asserted governmental interest is substantial. If both inquiries yield positive  
27 answers, we must determine [3] whether the regulation directly advances the  
28 governmental interest asserted, and [4] whether it is not more extensive than is  
necessary to serve that interest.

*Id.* at 566. As to the first prong, PM USA’s advertising and promotional activities in the affected



1 stores are truthful and nonmisleading. Indeed, the legislative record leading up to the enacting of  
2 the Ordinance contains no evidence to establish that consumers are misled by the targeted  
3 cigarette advertising. Accordingly, as the Supreme Court has held, PM USA's cigarette  
4 advertising is protected by the First Amendment, and any restrictions on that speech must satisfy  
5 the remaining three prongs of the *Central Hudson* test. "[S]o long as the sale and use of tobacco  
6 is lawful for adults, the tobacco industry has a protected interest in communicating information  
7 about its products and adult consumers have an interest in receiving that information." *Lorillard*,  
8 533 U.S. at 571.

9 The Ordinance fails to satisfy the second prong of *Central Hudson* because, far from  
10 asserting a "substantial" governmental interest, the City has invoked an invalid one: it is well-  
11 established that regulation the expression of a particular viewpoint based on hostility to its  
12 message is not a legitimate, let alone a substantial, government interest. *See, e.g., Gerritsen v.*  
13 *City of Los Angeles*, 994 F.2d 570, 577-78 (9th Cir. 1993).

14 To the extent that the City were now to try to invoke some other interest that is less  
15 facially illegitimate and insubstantial, the legislative record contains no evidence that could  
16 justify the Ordinance's restrictions on such a basis. As a result, any attempt to sustain the  
17 Ordinance on such an alternative basis—as opposed to the illegitimate ground that actually  
18 motivated enactment of the Ordinance—would necessarily rest on speculative inferences. The  
19 third prong of *Central Hudson* plainly requires more. It requires that:

20 the speech restriction direct and materially advance the asserted governmental  
21 interest. "*This burden is not satisfied by mere speculation or conjecture; rather, a*  
22 *governmental body seeking to sustain a restriction on commercial speech must*  
*demonstrate that the harm it recites are real and that its restriction will in fact*  
*alleviate them to a material degree."*

23 *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1999)  
24 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)) (emphasis added).

25 And even if the City could satisfy these requirements, it would still fail at the fourth prong  
26 of *Central Hudson* because the Ordinance is plainly overbroad. There is simply no evidence that  
27 the City "carefully calculat[ed] the costs and benefits associated with the burdens imposed" by  
28 the Ordinance, as the fourth prong requires. *Lorillard*, 533 U.S. at 561 (internal quotation marks

1 omitted). Likewise, there is simply no evidence that the City considered more properly tailored  
2 restrictions that would avoid burdening PM USA’s speech. Moreover, because cigarette  
3 manufacturers “use few avenues of communications”—because of other, already existing  
4 restrictions—the burdens imposed by the Ordinance are more substantial and require more careful  
5 tailoring so as to leave available adequate means of communication. *Id.* at 564-65.

6 Because the Ordinance thus fails any conceivable First Amendment test that the City  
7 might invoke, it is plainly unconstitutional. At a minimum, PM USA has shown “serious  
8 questions” going to the merits of its First Amendment claim, and thus has satisfied the standard  
9 for a temporary restraining order.

10 **2. FCLAA Preempts the Ordinance As Applied to Cigarettes**

11 The Ordinance is also invalid for the additional reason that it is expressly preempted by  
12 federal law. FCLAA creates “a comprehensive federal scheme governing the advertising and  
13 promotion of cigarettes.” *Lorillard*, 533 U.S. at 541. That federal regulatory scheme includes  
14 labeling requirements, a ban on television and radio advertising, and a preemption provision that  
15 prohibits, *inter alia*, state “regulations targeting cigarette advertising.” *Id.* at 550; *see also id.* at  
16 548 (“[T]o the extent that Congress contemplated additional targeted regulation of cigarette  
17 advertising, it vested that authority in the FTC,” not in the States). Specifically, FCLAA’s  
18 express preemption provision states that “[n]o requirement or prohibition *based on smoking and*  
19 *health* shall be imposed under State law *with respect to the advertising or promotion of any*  
20 *cigarettes* the packages of which are labeled in conformity with the provisions of this chapter.”  
21 15 U.S.C. § 1344(b) (emphasis added). The text and history of the Ordinance, along with the  
22 City’s concessions as to its purpose, make clear that the Ordinance’s prohibitions are (a) “based  
23 on smoking and health” and (b) “with respect to ... the advertising or promotion of ... cigarettes.”  
24 Accordingly, under basic principles of statute construction and Federal supremacy, the Ordinance  
25 is preempted.

26 **a. The Ordinance Is “Based on Smoking and Health”**

27 The Ordinance is unquestionably “based on smoking and health.” As the Supreme Court  
28 held in *Lorillard*, “regulations targeting cigarette advertising” are “inevitably motivated by

1 concerns about smoking and health” and are therefore “based on smoking and health” within the  
2 meaning of FCLAA. 533 U.S. at 550. The legislative record also overwhelmingly confirms the  
3 point. The first six findings of the Ordinance elaborate health concerns with tobacco and  
4 financial burdens allegedly incurred by California as a result. *See* S.F. Ordinance No. 194-08,  
5 § 1(1)-(6). The Ordinance’s lead proponent, Dr. Katz, began his first presentation in support of  
6 the Ordinance by stating, “I don’t have to tell you what an impact tobacco has on health.” *See*  
7 Martinez Decl., Ex. A at 1. Finally, in its opposition to Walgreens’ effort to obtain a temporary  
8 restraining order, the City argued that “[t]obacco addiction is still a major public health crisis, and  
9 governments continue to struggle to find ways to prevent people from becoming addicted.” *See*  
10 Rantanen Decl., Ex. D at 3.

11  
12 **b. The Ordinance Imposes Prohibitions “With Respect to ... the Advertising or Promotion of ... Cigarettes”**

13 On its face, FCLAA not only preempts state laws that explicitly regulate advertising, but  
14 also extends to those regulations that operate “*with respect to ... advertising or promotion*” of  
15 cigarettes. 15 U.S.C. § 1344(b) (emphasis added). As the Supreme Court has noted, the insertion  
16 of this italicized phrase when FCLAA was amended in 1970 represented a substantial broadening  
17 of the sweep of the preemption provision: “although the former statute reached only statements  
18 ‘*in the advertising,*’ the current provision governs ‘*with respect to the advertising or promotion*’  
19 of cigarettes.” *Lorillard*, 533 U.S. at 545 (emphasis added). Because the regulations at issue in  
20 *Lorillard* expressly targeted and regulated cigarette advertising, the Court there had no occasion  
21 to examine fully what types of indirect regulations of cigarette advertising are preempted. *Id.* at  
22 547 (“Here, ... there is no question about an indirect relationship between the regulations and  
23 cigarette advertising because the regulations expressly target cigarette advertising.”).

24 *Lorillard*’s analysis of FCLAA is nonetheless highly instructive, and makes clear that any  
25 regulation that would be consider a regulation of *speech* for First Amendment purposes is one that  
26 imposes obligations “with respect to ... advertising or promotion” for purposes of FCLAA. In  
27 examining the areas of state regulation that FCLAA did *not* preempt, the Court articulated the line  
28 between non-preempted “sales” regulations and preempted advertising regulations, and in doing

1 so, the Court sensibly looked to the First Amendment's directly analogous line between the  
2 regulation of conduct and the regulation of speech. 533 U.S. at 552 (citing cases holding that  
3 *advertising* that solicits illegal sales is "*conduct*" not entitled to any First Amendment protection,  
4 and that prohibitions of such "conduct" are not preempted) (emphasis added). Accordingly,  
5 *Lorillard* confirms that, at a minimum, a law should be considered to operate "with respect to ...  
6 advertising or promotion" if, for First Amendment purposes, it would be treated as regulation of  
7 speech rather than conduct.

8 That standard is satisfied here. As explained above, *see supra* at 11, for a regulation to be  
9 deemed to a regulation of "conduct" with only an incidental burden on speech, the government's  
10 interest must not be "related to the suppression of free expression." *Texas v. Johnson*, 491 U.S. at  
11 403; *see also Lorillard*, 533 U.S. at 567, 569. Likewise, a regulation cannot be treated as a "time,  
12 place, and manner" restriction unless is it "justified" without reference to the content of the  
13 regulated speech. *Ward v. Rock Against Racism*, 491 U.S. at 791-92. *Lorillard* itself reaffirms  
14 this point in its First Amendment discussion upholding Massachusetts' restrictions on self-service  
15 display of tobacco products. 533 U.S. at 569 (applying intermediate scrutiny of *O'Brien* because  
16 "Massachusetts seeks to regulate the placement of tobacco products for reasons unrelated to the  
17 communication of ideas"). Here, although cast only in terms of a prohibitions on "sales" in  
18 certain retail establishments, the Ordinance's intended effect and predominate purpose is to  
19 remove the advertising and promotion that go hand-in-hand with retail-level tobacco sales.  
20 Because the Ordinance's professed justification is related to the suppression of communication  
21 and is based on the content of communications, it would be treated as a regulation of speech for  
22 purposes of the First Amendment. *See supra* at 11-12. Under *Lorillard*, it therefore imposes  
23 prohibitions "with respect to ... advertising and promotion" for purposes of FCLAA. *See also*  
24 *Jones v. Vilasck*, 272 F.3d 1030, 1036 (8th Cir. 2001) (broadly construing "promotion" includes  
25 "the furtherance of the acceptance and sale of merchandise through advertising[ or] publicity").


26 The Ordinance is thus clearly preempted by FCLAA. At the very least, PM USA has  
27 demonstrated that there are "serious questions" going to the merits of its preemption claim, and  
28 thus has justified the issuing of a temporary restraining order.

1 **IV. CONCLUSION**

2 For all the foregoing reasons, PM USA respectfully requests that the Court grant this  
3 motion and enter a temporary restraining order in the form of the proposed order submitted  
4 herewith.

5 DATED: September 24, 2008

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