COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

WALGREEN CO., Plaintiff/Appellant, vs. THE CITY AND COUNTY OF SAN FRANCISCO, ET. AL., Defendants/Respondents.	Case No. A123891 San Francisco Superior Court No. 479-553

BRIEF OF APPELLEES

On Appeal From the Superior Court of the State of California
The Honorable Peter J. Busch, Presiding

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208.

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: June 9, 2009

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional Provisions

San Francisco Statutes, Codes & Ordinances

Other References

INTRODUCTION

San Francisco Ordinance No. 194-08 bans the sale of tobacco products in drug stores. It does so by providing that no store which contains a pharmacy may sell tobacco products, with an exception for big box stores or grocery stores that have pharmacies in them. By generally prohibiting stores that contain pharmacies from selling tobacco products, while exempting big box and grocery stores from that prohibition, Ordinance No. 194-08 effectively prohibits tobacco sales only at drug stores.

Walgreens contends this classification violates equal protection. However, the distinction between drug stores on the one hand, and big box stores or grocery stores on the other, is rationally related to a legitimate governmental purpose. The Board rationally concluded that the sale of tobacco by health-promoting businesses sends the wrong message about the acceptability of cigarettes, particularly to young people. Further, the Board rationally concluded that society is far more likely to view drug stores as health-promoting institutions, as compared to big box stores or grocery stores. And that is true even if some big box stores and grocery stores happen to contain pharmacies also.

By way of illustration, nobody would dispute that if doctor's offices sold cigarettes, this would send the wrong message about smoking, because doctors are widely understood to be in the business of promoting health. By comparison, the sale of cigarettes by big box stores and grocery stores does not create nearly the same problem, because those stores are not viewed as health-promoting institutions in nearly the same way. The Board could rationally conclude that drug stores (which, after all, we often refer to colloquially as "pharmacies") fall somewhere in between doctor's offices

and big box stores or grocery stores. And this justifies the focus on drug stores. Because legislatures are permitted to tackle problems incrementally by focusing regulation on the area where its need is perceived to be greatest, the Board's decision to ban tobacco sales in drug stores, rather than all stores with pharmacies in them, easily satisfies rational basis review.

Walgreens also contends the ordinance is void because the City's Office of Economic Analysis ("OEA") – a division within the San Francisco Controller's Office – allegedly failed to comply with Proposition I, an initiative ordinance which requires the OEA to prepare an economic impact report on legislation that might have a material economic impact on the City. But even if, as alleged inaccurately by Walgreens, the OEA had abused its discretion in failing to prepare an economic impact report on the tobacco ordinance, the abuse of discretion would provide no ground for striking down that ordinance. Proposition I imposes requirements on the OEA; it does not impose restrictions on the Board. It was not intended to, and does not purport to, preclude the Board from enacting legislation if the OEA fails to prepare a report. The remedy for a failure of the OEA to prepare an economic impact report is a writ of mandate ordering it to do so, not an after-the-fact invalidation of legislation duly enacted by the Board.

Also relevant is the fact that Proposition I was placed on the ballot by four members of the Board of Supervisors. It is absurd to think that the Supervisors who placed this measure on the ballot intended to allow an unelected and largely anonymous employee in the Controller's Office to hold legislation hostage – or render it invalid – by failing to prepare a report. Further, Walgreens' proposed construction of Proposition I would create constitutional problems. Proposition I did not amend the City Charter; it was merely an initiative ordinance. And an initiative ordinance

may not impose procedural restrictions on the legislative powers granted the Board by the City Charter. That is presumably why the sponsors of Proposition I chose to place the measure on the ballot as a mere ordinance, rather than satisfying the more rigorous requirements for submitting a charter amendment to the voters.

For these reasons, the trial court's decision to sustain the demurrer was correct.

BACKGROUND

A. The Government's Fight To Prevent Tobacco Addiction

Over the years, substantial progress has been made in reducing the number of adolescents who take up smoking. JA2 at 321. This stems in no small part from governmental efforts to undercut the message that smoking is acceptable. For example, government has banned television advertisements for cigarettes. *Id*. It has funded anti-smoking campaigns. JA2 at 322. It has sued the tobacco industry for committing fraud upon its customers, and has insisted that the companies promote anti-smoking programs as part of the remedy. *Id*. Government officials have even sought to educate Hollywood about the harmful effects of portraying smoking in a positive light. *Id*.

However, efforts to prevent adolescents and others from becoming nicotine addicts have been far from an unqualified success, in no small part due to campaigns by the tobacco industry to mislead consumers about their products. For example, the United States Justice Department ("DOJ") has demonstrated in federal court that the key players in the tobacco industry joined "together in a decades-long conspiracy to deceive the American public about the health effects and addictiveness of smoking cigarettes." *United States v. Philip Morris USA, Inc.*, __ F.3d __, Nos. 06-5267, 06-5268, 2009 WL 1423964, at *1 (D.C. Cir. May 22, 2009). Among other

things, DOJ proved that the industry violated the federal Racketeer Influenced and Corrupt Organizations Act by:

- Falsely denying the adverse effects of smoking
- Falsely denying that nicotine and smoking are addictive
- Manipulating cigarette design and composition to assure nicotine delivery levels that would create and sustain addiction and falsely denying doing so
- Marketing their products to youth and falsely denying doing so
- Suppressing documents, information and research to prevent the public from learning the truth about these subjects

Id. at *4. Notably, the federal district court found a likelihood that these conspirators would commit future acts of racketeering – a finding upheld by the D.C. Circuit. *Id*. at *28-32.

Accordingly, despite the anti-smoking campaigns, tobacco remains the leading cause of preventable death in the United States – an estimated 440,000 Americans die each year from diseases caused by smoking. JA2 at 322. Approximately 90 percent of smokers begin smoking before the age of 21, and it is estimated that at least 4.5 million U.S. adolescents are cigarette smokers. *Id*. These adolescents are not just casual smokers; they are already addicted to nicotine. Of adolescents who have smoked at least 100 cigarettes in their lifetime, most of them report that they would like to quit, but are not able to do so. *Id*.

In short, tobacco addiction is still a major public health crisis, governments continue to struggle to find ways to prevent people from becoming addicted, and the government still has enemies in that fight.

B. Ordinance No. 194-08

San Francisco's ordinance banning the sale of tobacco in drug stores is yet another governmental effort to prevent young people from becoming addicted to cigarettes. It is based on the opinions of groups like the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association that drug stores should not be selling tobacco, because when health-promoting businesses sell tobacco, it sends an implicit message that smoking is acceptable. JA1 at 220 (Ordinance No. 194-08, Finding No. 9).[1]

The City's focus on drug stores, as opposed to big box stores or grocery stores that happen to have pharmacies in them, stems from this concern that it is particularly harmful when health-promoting businesses make tobacco available. As Dr. Mitchell Katz, San Francisco's Director of Public Health, explained to the Board of Supervisors' Committee on City Operations and Neighborhood Services, drug stores (which he referred to in shorthand as "pharmacies") are viewed by society much more as health-promoting businesses than are big box stores or grocery stores:

> The fact is, that selling tobacco at pharmacies influences social acceptability of smoking . . . When we think pharmacy, we think health. And so when we see tobacco being sold, that's a mixed message. That mixed message may not matter to the person who has made a decision to smoke. That person is addicted to nicotine. But what about the teenager? What about the child? For the person who sees the pharmacy as part of their health team, what does it mean to see that the pharmacy sells tobacco? We know for a fact that if you decrease the social acceptability of smoking it results in lower rates of smoking. That's why we have lower rates of smoking now among teenagers than we had 10 years ago. 'Cause we have done an effective job of saying that, no, smoking unlike ads you saw once on TV and still now on billboards, is not cool. It's not sexy. It's going to be something that could kill you. So social acceptability is vitally important.

[1] *See also* JA2 at 341-44 (Legislative Digest to Ordinance No. 194-08, citing numerous trade and journal articles for the proposition that tobacco sales by stores with pharmacies sends an implicit message that smoking is acceptable).

JA4 at 855-56. *See also* JA4 at 934-48 (Power Point presentation to the Board by Dr. Katz explaining why society perceives stores like Walgreens as health-promoting businesses).

Dr. Katz provided another reason why drug stores like Walgreens are different from typical retail stores: they are more likely to draw former smokers with illnesses – people who are more tempted by, and vulnerable to, the harmful effects of tobacco and who should not be exposed to it:

> Pharmacies don't draw the, the cross-section of people. They draw [more] people who have chronic diseases. So people with asthma, people with chronic obstructive pulmonary disease, cardiovascular disease. So they're going to get their medicine, but they also can see right where they're paying, there are, you know, tobacco being sold. So people whose diseases are made worse by tobacco are now actually being brought into a store that sells it . . . . At 12-step alcohol meetings you don't have an alcohol place where you can buy. And that's for a specific reason.

JA4 at 857.

Dr. Katz made a similar presentation to the full Board. In explaining the exclusion for big box stores and grocery stores, he captured the principle that when it comes to economic and social welfare legislation, policymakers are free to address policy problems one step at a time. Again referring to drug stores in shorthand as "pharmacies," he explained why the need to ban the sale of tobacco in drug stores was more pressing than in big box stores or grocery stores:

> As health director, of course, I'm not in favor of anybody smoking or anybody selling tobacco. What I was trying to do in our work in fashioning the legislation was *focusing on that group where I thought the case was the strongest*. We all go to supermarkets. We all go to warehouse stores. They get a cross section of people. We teach our children that supermarkets, wholesale stores, they're places you go to buy everything. When it comes to pharmacies, I feel that our children, our teenagers get a different message. My son, even at six, knows that the Walgreens we go to is where we go to pick up [my daughter] Roxy's asthma medicine. He knows that it's a pharmacy . . . . What we're trying to say is these places market themselves as health-promoting

> businesses. They're not Walgreens General Store. They're not Rite Aid. They're Walgreens Pharmacy. They're Rite Aid Pharmacy. The pharmacy America trusts. And so it sends a very different message. *Certainly in the future if we have success and I believe we would, just like San Francisco was the leader [in the ban on smoking in restaurants] . . . that you will want to take on a broadening of this legislation at some future date. What we focus on [is] that group we thought was most compelling*.

JA4 at 881-82 (emphasis added).[2]

The Board of Supervisors' findings in the ordinance elaborate on the position taken by Dr. Katz that drug stores serve a societal function that is different from grocery stores or big box stores. The findings note that Rite Aid and Walgreens derive 63.7 percent and 65 percent of their revenue from pharmacy sales, respectively, whereas Safeway and Costco derive only 7.5 percent and 1.5 percent of their revenue from pharmacy sales, respectively. JA1 at 222. (Finding No. 21). Although the First Amended Complaint ("FAC") alleges that Walgreens stores in San Francisco derive a slightly smaller percentage of their revenue from pharmacy sales than what is reflected in these national figures, the FAC does not dispute (and cannot dispute) that drug stores derive a much larger portion of their revenue from pharmacy sales than grocery stores or big box stores.

C. The Lawsuit

On September 8, 2008, Walgreens filed suit against the City, contending that Ordinance No. 194-08 violated its federal and state equal protection rights and was void for failure to comply with Proposition I. Walgreens moved for a preliminary injunction to prevent the ordinance

[2] Of course, neither Dr. Katz nor the legislators harbored any illusion that the legislation would, on its own, accomplish a major diminishment in rates of teen smoking addiction. Dr. Katz emphasized that the ordinance must be viewed as one small part of the larger governmental effort to prevent people from taking up smoking, and its success must be measured in that manner. JA4 at 858.

from taking effect, which the trial court denied, ruling that Walgreens had failed to show a likelihood of success on either claim. JA3 at 719-20; RT, Sept. 30, 2008 at 30-31.

The City subsequently filed a demurrer in the trial court, and the court sustained the demurrer. JA4 at 988-89. The trial court held as follows:

> With respect to the first and second causes of action, alleging violations of the federal and state equal protection clauses, respectively: (i) the San Francisco Board of Supervisors could rationally conclude that the sale of tobacco by health-promoting businesses sends the wrong message to the public about the acceptability of smoking; (ii) the Board could rationally conclude that the public views drug stores as health-promoting businesses more so than it does big box stores or grocery stores; and (iii) therefore, the Board could, consistent with equal protection, ban the sale of tobacco in drug stores while excluding big box stores and grocery stores, focusing its regulatory efforts on the area reasonably perceived to present the most pressing need.
>
> With respect to the third cause of action, even if, as alleged in the First Amended Complaint, the Office of Economic Analysis ("OEA") of the San Francisco Controller's office abused its discretion by failing to prepare an economic impact report on Ordinance No. 194-08, that failure does not render the ordinance invalid. The proper remedy for failure of the OEA to prepare a report required by Proposition I is not invalidation of legislation enacted in the absence of a report. Rather, it is a writ of mandate directing OEA to prepare a report.

JA4 at 989.

The trial court accordingly entered judgment for the City, and Walgreens timely appealed from that judgment. JA4 at 992-96. Although Walgreens had previously filed a notice of appeal from the trial court's refusal to issue a preliminary injunction, that appeal was mooted by the present one.

STANDARD OF REVIEW

"[T]he decision to sustain or overrule a demurrer is a legal ruling subject to *de novo* review on appeal." *Traders Sports, Inc. v. City of San Leandro*, 93 Cal. App. 4th 37, 43 (2001). This Court is "not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale." *Mendoza v. Town of Ross*, 128 Cal. App. 4th 625, 631 (2005). "[The Court's] review of the ruling must address whether the order sustaining the demurrer and dismissing the complaint is supportable on any grounds, including those stated, as it is the validity of the court's action and not its reasons for its action that is reviewable." *Kirkpatrick v. City of Oceanside*, 232 Cal. App. 3d 267, 274 (1991).

DISCUSSION

I. THE ORDINANCE DOES NOT VIOLATE EQUAL PROTECTION.

A. Walgreens' Discussion Of The Applicable Equal Protection Standard Is Incomplete And Misleading.

Judicial review of laws challenged under the federal or state equal protection clauses involves two steps. First, courts must inquire whether a classification created by a law is subject to equal protection scrutiny at all. "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." *People v. Hofsheier*, 37 Cal. 4th 1185, 1199 (2006) (quoting *In re Eric J.*, 25 Cal. 3d 522, 530 (1979)). "If persons are not similarly situated for purposes of the law, an equal protection claim fails at the threshold." *In re Brian J.*, 150 Cal. App. 4th 97, 125 (2007) (quoting *People v. Buffington*, 74 Cal. App. 4th 1149, 1155 (1999)).

The City concedes that drug stores with pharmacies are, with respect to the purposes of this ordinance, similarly situated to grocery stores and

big box stores that also contain pharmacies. In contrast, if Walgreens were to claim that the ordinance violated its equal protection rights by distinguishing between stores with pharmacies and stores without pharmacies, the two groups arguably would not be 'similarly situated' for equal protection purposes.

In any event, a finding that two groups are "similarly situated" is only the first step in the process – it means only that the groups are "sufficiently similar to merit application of some level of scrutiny to determine whether distinctions between the two groups justify the unequal treatment." *Hofsheier*, 37 Cal. 4th at 1200 (quoting *People v. Nguyen*, 54 Cal. App. 4th 705, 715 (1997)). And here, because the ordinance is an exercise of the police power that does not involve a suspect classification or interference with the exercise of a fundamental right, it is subject only to rational basis review.[3]

[3] In its papers below and in its opening brief here, Walgreens sometimes appears to suggest that it should automatically win its equal protection challenge if the Court determines that drug stores are similarly situated to grocery stores and big box stores with pharmacies. *See, e.g.*, OB at 24 (quoting case law out of context and asserting that, to avoid running afoul of equal protection, a law must treat "similarly circumstanced" persons "alike"). It is true that judicial opinions frequently intone the statement, originally written by the United States Supreme Court in *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), that "similarly circumstanced" persons should be treated "alike." However, this is best understood – and, as a legal matter, must be understood – as a principle that animates equal protection – a state of affairs to which the equal protection clause aspires in the abstract. *Cf.* U.S. Const., Amd. 1 ("Congress shall make no law . . . abridging the freedom of speech"). Notwithstanding this aspirational language, the actual legal test courts use for determining a violation of equal protection is, as discussed herein, far more deferential to the judgment of legislators than the Lochnerian approach Walgreens appears to hope the Court will apply. In today's equal protection jurisprudence, when economic legislation is involved, legislators may indeed treat similarly situated persons differently, whenever there is any conceivable rational basis for doing so.

Rational basis review "manifests restraint by the judiciary in relation to the discretionary act of a co-equal branch of government; in so doing it invests legislation involving . . . differentiated treatment with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.'" *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298-99 (2007) (quoting *Warden v. State Bar*, 21 Cal. 4th 628, 640-41 (1999). "[T]he burden of demonstrating the invalidity of a classification under this standard rests squarely upon the party who assails it." *Warden*, 21 Cal. 4th at 641. The legislation "must be upheld against equal protection challenge *if there is any reasonably conceivable state of facts that could provide a rational basis for the classification*. Where there are 'plausible reasons' for the classification, 'our inquiry is at an end.'" *Warden* 21 Cal.4th at 644 (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (emphasis in original).

Walgreens' brief frequently asserts that the City lacked "evidence" to conclude that the sale of cigarettes by health-promoting institutions sends the wrong message about smoking, and that the City's justifications for treating drug stores differently from big box stores and grocery stores are merely "speculative." *See, e.g.*, OB at 3, 28, 40. This glosses over a central tenet of rational basis review: the legislative record need not contain any evidence for a law to pass muster under this test, and the government need present no such evidence in court. Simply put, "a legislative choice is not subject to courtroom fact-finding and may be based on *rational speculation unsupported by evidence or empirical data*." *Beach Communications*, 508 U.S. at 315 (emphasis added); *Warden*, 21 Cal. 4th at 650; *City and County of San Francisco v. Flying Dutchman Park*, 122 Cal. App. 4th 74, 83

(2004). Thus, the burden is entirely on the plaintiff to demonstrate that there is no "reasonably conceivable state of facts" that could justify the classification. *Warden*, 41 Cal. 4th at 644. And it is therefore grossly insufficient for Walgreens simply to assert that the ordinance is based on speculation or inference about the harm caused when a health-promoting business also sells deadly tobacco products, or speculation about the fact that society perceives drug stores as health-promoting businesses in a way it does not perceive big box stores or grocery stores. To win this equal protection challenge, Walgreens must show that the City's rationale is utterly inconceivable.[4]

Finally, it bears emphasis that courts do not force policymakers to tackle an entire problem at one time. "[U]nder the rational relationship test, the state may recognize that different categories or classes of persons within a larger classification *may pose varying degrees of risk of harm*, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative." *Warden*,

[4] Walgreens also tepidly suggests that the rational basis test should be applied more rigorously for claims brought under the California Constitution than for claims brought under the United States Constitution. OB at 23-24 n. 13. Although it is true that the California Constitution and its equal protection provisions "are possessed of an independent vitality," *Serrano v. Priest*, 18 Cal. 3d 728, 764 (1976), the California Supreme Court has rejected the contention that the rational basis test is more rigorous under California law than under federal law. *See, e.g.*, *Kasler v. Lockyer*, 23 Cal. 4th 472, 481-82 (2000). Because Walgreens can cite no case to support its suggestion that "California rational basis" is different from "federal rational basis," it instead provides a partial quotation from Witkin, and claims that "Witkin's view" is that the rational basis test is more stringent under California law. However, the full quotation shows that Witkin's assertion is far less remarkable, namely, that California's equal protection provisions "go farther" than the Fourteenth Amendment in the sense that, in contrast to federal law, "the person raising the challenge does not [need to] show direct denial of equal protection as to himself or herself." Witkin, Summary of Cal. Law (10th ed. 2005) Const. Law, § 705, p. 81. In other words, Witkin is discussing the people who can bring equal protection claims, not the substantive nature of the inquiry.

21 Cal. 4th at 644 (emphasis added). "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (internal citations omitted). *See also Kasler*, 23 Cal. 4th at 489 ("a legislature may implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations") (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (alteration in original)).

B. Ordinance No. 194-08 Serves The Legitimate Governmental Interest Of Promoting The Public Health By Preventing Health-Promoting Businesses From Selling Deadly Tobacco Products.

The purpose of the tobacco ordinance is to protect the public health. Specifically, the goals articulated by Dr. Katz, the ordinance's chief proponent, were to help prevent nonsmokers – particularly young people – from getting the impression that smoking is acceptable, and to prevent sick people who may be recovering nicotine addicts from being tempted by cigarettes. It is difficult to imagine how anyone could argue that these are not legitimate governmental objectives.

Yet Walgreens asserts that "the legislative objective *itself* is questionable." OB at 34 (emphasis added). "It is simply not credible," Walgreens argues, to conclude that young people could get the wrong idea from the sale of tobacco by a health-promoting business, "given the decades of anti-smoking media campaigns and warnings that would counteract any such implied message." *Id.* In other words, the legislative goal of preventing people from getting the wrong idea about cigarettes is no longer

a legitimate one (or at least it has become "questionable") because the government has already spent enough time trying to prevent people from smoking.

If this theory were accepted, the government would be prohibited from barring *anyone* from selling cigarettes if the purpose of the bar was to prevent people from getting the wrong idea about smoking. If doctors' offices began selling cigarettes, for example, the doctors could shield themselves from government regulation by claiming – as Walgreens does here – that nobody could possibly get the wrong idea "given the decades of anti-smoking media campaigns." And if the history of anti-smoking campaigns were enough to undermine the validity of prohibitions against cigarette sales, this history would presumably also undermine the validity of other new measures – beyond sales restrictions – that have the same goal. This line of attack by Walgreens simply makes no sense.

Further, as discussed at page 3-4, the unfortunate reality is that the "decades of anti-smoking campaigns" have had a powerful enemy in the tobacco industry, whose racketeering conduct was, only weeks prior to the date of this filing, adjudicated by the D.C. Circuit to necessitate injunctive relief because of the likelihood it would continue. Although this fact is hardly necessary to deem San Francisco's efforts to prevent young people from getting the wrong message about cigarettes a legitimate public purpose, it underscores the wild nature of Walgreens' contention that the objective behind the ordinance is questionable or illegitimate.

In short, the goal of preventing young people from getting the wrong message about cigarettes is legitimate; indeed it is compelling. The real question is whether the *classification* drawn by the ordinance – between

drug stores on the one hand, and big box stores and grocery stores on the other – is rationally related to this unassailable public health objective.

C. The Classification Is Rationally Related To The Board's Goal Of Helping To Prevent Nonsmokers From Getting The Wrong Message About Cigarettes.

1. The Board could rationally conclude that drug stores play a different role in society, and are perceived differently by society, than big box stores or grocery stores.

As Dr. Katz explained, when cigarettes are sold by an institution that is in the business of, and is primarily known for, promoting health, this risks sending a message that smoking is healthy or acceptable. This risk is particularly great for impressionable young people – the people who do not yet smoke, but who most commonly become addicted to cigarettes. *See* p. 5, *supra*. Even if Walgreens disagrees that the sale of cigarettes by a health-promoting institution could send the wrong message, certainly the Board could rationally have drawn this conclusion.

Further, the Board rationally could have concluded that the sale of cigarettes by drug stores like Walgreens sends the wrong message about cigarettes more strongly than does the sale of cigarettes by big box stores or grocery stores, even if those stores too have pharmacies in them. Simply put, if a doctor's office sold cigarettes, nobody would dispute that this would send the wrong message to the doctor's patients about the health risks of cigarettes. Similarly, nobody would dispute that when a big box store or a grocery store sells cigarettes, the risk of people getting the wrong message is less strong than when a doctor's office does so. The Board could rationally conclude that drug stores, given their health-promoting mission and society's perception of them, come closer to a doctor's office in this regard than do big box stores or grocery stores.

The differences between the two kinds of stores is exemplified by the fact that stores like Walgreens and Rite Aid derive a much larger percentage of their revenue from pharmacy sales than do grocery stores or big box stores. Walgreens protests that the Board's findings reference nationwide figures, and that the percentage of revenue derived from pharmaceutical sales in its San Francisco stores is slightly smaller. Walgreens does not dispute, however, that its stores nonetheless derive a much higher percentage of revenue from pharmaceutical sales than do big box stores or grocery stores. And the difference is meaningful – it shows that drug stores serve different societal functions from big box stores or grocery stores. This, in turn, makes it entirely reasonable to assume that society *views* drug stores differently from big box stores or grocery stores, and therefore the sale of tobacco by those stores sends a different message. In short, although no evidence is necessary to bolster the Board's common-sense assumption that drug stores are viewed as health-promoting businesses in a way that big box and grocery stores are not, the evidence cited by the Board in Finding No. 21 does just that.[5]

Walgreens focuses on the fact that drug stores – like big box stores and grocery stores with pharmacies – sell products other than pharmaceuticals. And it spends a great deal of time emphasizing that cigarettes are located in a different part of its stores from pharmaceuticals –

[5] Walgreens protests that a person buying cigarettes at a drug store would not be aware that the drug store derives a greater percentage of revenue from its pharmaceutical sales. OB at 36. This misses the point entirely. Nobody contends that percentage of pharmacy revenue *causes* a customer to perceive the stores differently. Rather, this is just one example of why drug stores *in fact* are different from grocery stores – the difference in revenues reflects the fact that drug stores and grocery stores serve different purposes in our society. And because they serve different purposes, it is eminently reasonable to assume that society perceives them differently.

again like grocery stores and big box stores. *See, e.g.,* OB at 25-27. These similarities do exist to an extent, but that is not the point. Regardless of any similarities, as the findings of the Board and the testimony of Dr. Katz established, there are also differences between drug stores and more general stores – differences that the legislators could rationally find significant.

2. The ordinance classifies between different types of stores, not between different pharmacies.

Walgreens' equal protection argument is largely based on the faulty premise that the ordinance classifies between different types of "pharmacies." In other words, Walgreens is asking the Court to compare a "pharmacy" inside Walgreens with a "pharmacy" inside Costco or Safeway. If that comparison is made, Walgreens contends it should win because in neither case does the pharmacy *itself* sell cigarettes, and because there is no difference between the "message" emanating from the actual pharmacies at either type of store.

However, the text of the ordinance does not draw a distinction between pharmacies. It distinguishes between *kinds of stores* that have pharmacies in them – drug stores on the one hand, and big box stores or grocery stores on the other.[6] And even the most cursory glance at the legislative history shows that the policymakers were concerned with the message being sent *by the store* that makes tobacco available, not some message being send by the pharmacy inside the store. The real question is

[6] The central provision of the ordinance – codified at Section 1009.92 of the San Francisco Health Code – states, "[n]o person shall sell tobacco products in a pharmacy, except as provided in Sec. 1009.93." JA1 at 225. In turn, Section 1009.93 provides that big box stores and grocery stores may sell tobacco even if they do have pharmacies. *Id.* As the parties agree, *see, e.g.*, JA3 at 727, this means the ordinance applies only to drug stores. And therefore, the ordinance singles out drug stores, not pharmacies within drug stores.

whether the Board could rationally perceive Walgreens *itself* as different from a store like Safeway or Costco in the extent to which they are perceived as health-promoting businesses, not whether the pharmacy within Walgreens is different from the pharmacy within Safeway or Costco. Thus, Walgreens spends most of its brief confusing matters by addressing a question not presented by this ordinance.[7]

It is true, as Walgreens seems fond of pointing out, that Dr. Katz and others regularly referred to drug stores as "pharmacies." However, this does not support Walgreens' attempt to frame the case as involving a comparison between pharmacies within different stores, rather than a comparison between the stores themselves. On the contrary, the interchangeable use of the terms "drug store" and "pharmacy" further proves our point by confirming the common sense assumption, adopted by the Board, that society views drug stores differently from big box stores or grocery stores. Nobody would describe Safeway or Costco as a "pharmacy." But people describe drug stores like Walgreens as pharmacies all the time, as reflected in the legislative history, and as reflected in Walgreens' slogan, "the Pharmacy America Trusts." JA4 at 857. *See also* JA4 at 858 ("But I ask you, in your own experience, if we stop people going into a Walgreens, going into a Rite-Aid, going into one of those independent pharmacies and said, What kind of store are you going into? They would say, Pharmacy"). The use of this descriptor shows that people

[7] *See, e.g.*, OB at 3 ("the Ordinance harms some pharmacies and favors others . . . "); 26 ("there is no difference between the implied message *conveyed by a pharmacy* in the exempt grocery stores and in the non-exempt Walgreens stores") (emphasis added); 35 ("In short, no one who buys cigarettes at a retail store could reasonably conclude that *the pharmacist* in another part of the store is endorsing the habit") (emphasis added); 40 ("there is no evidence that more sick people visit a Walgreens *pharmacy* than a Safeway *pharmacy*") (emphasis added).

view drug stores as health-promoters in a way that they do not view big box stores or grocery stores, which justifies the distinction drawn by the ordinance.

3. The fact that two Walgreens stores in San Francisco do not have pharmacies is irrelevant.

Walgreens points out that two of its San Francisco stores do not contain pharmacies and are therefore allowed to continue selling tobacco. Walgreens contends that if its stores are viewed as health-promoting institutions, the rationale underlying the ban should apply equally to the two stores without pharmacies, and the failure to ban tobacco sales in those stores shows that the ordinance is irrational. This ignores that with legislation subject to rational basis review, policymakers are not required to draw distinctions with "razorlike precision." *See, e.g., Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000). *See also City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) ("rational distinctions may be made with substantially less than mathematical exactitude").

In any event, many would no doubt be surprised to walk into a Walgreens store only to learn it has no pharmacy, given that Walgreens is the "pharmacy" America trusts. In contrast, few would be surprised not to find a pharmacy in a grocery store. This further underscores that the policymakers drew a rational, common-sense distinction between drug stores like Walgreens and more general stores. And while the City may well be justified in banning the sale of tobacco in those two Walgreens stores that do not contain pharmacies for the reasons discussed above, the fact that the ordinance *allows* those two stores to sell tobacco does not render it irrational.

4. It was entirely appropriate for the Board to "speculate" about an "implied" message.

Walgreens makes much of the fact that the "message" young people could receive when health-promoting businesses sell tobacco is not an "express" message but an "implied" message. The point Walgreens apparently tries to make is this: perhaps if drug stores explicitly told their customers that cigarette smoking is acceptable while grocery stores did not, then the City could ban the sale of tobacco in drug stores, but because the message is only "implied," the City may not attempt to prevent this message from being sent, because in this context it would be too "speculative" to compare the risk of tobacco sales by different types of stores.

This argument is contrary to both common sense and the law. Consider the following example: we often state that the use of steroids by baseball players "sends the wrong message" to children. Of course, baseball players are not expressly telling young people to use steroids. Rather, their conduct threatens to give young people the wrong idea. The message sent by the conduct of the baseball players is, to use Walgreens' word, "implied." Yet the government would be perfectly justified in banning the use of steroids by baseball players solely for the purpose of helping to prevent young people from getting the wrong idea about steroids. The fact that the message the government seeks to combat is "implied" rather than "express" is irrelevant.

Nor would government be required to present *evidence* that the use of steroids by major league baseball players poses a greater risk of sending the wrong message to young people than, say, professional bowlers. The government often must legislate against problems that are not amenable to quantification or evidentiary proof. Legislators are allowed to exercise

common sense, and their constituents elect them to do so. That is why "a legislative choice is not subject to courtroom fact-finding," but rather can be based on "rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315. *See also supra* at 11-12.

Just as it would be perfectly rational to conclude, without hard evidence, that use of steroids by baseball players risks sending an implied message more strongly than the use of steroids by bowlers because of the way society perceives those athletes, it is perfectly rational to believe, for all the reasons discussed above, that the problem created by the sale of tobacco by drug stores is more pressing because of the way society perceives those stores. Walgreens' dogged focus on the fact that the message is "implied" rather than "express" is nothing but a straw man.

Nor does *Hofsheier* support Walgreens' argument that the City is prohibited from relying on speculation that the sale of cigarettes by drug stores implies that smoking is acceptable, and that it does so more strongly than the sale of cigarettes by big box stores or grocery stores. In *Hofsheier*, there was no rational reason to believe those convicted of oral copulation with a minor were more likely to reoffend than those convicted of sexual intercourse with a minor. The State failed to provide one, and the Court could not conceive of one on its own. 37 Cal. 4th at 1206-07. Here, as discussed above, there is a rational reason to believe the sale of tobacco by drug stores is more likely to give people the wrong idea than the sale of tobacco by other stores: society views drug stores differently, and understandably so given their focus on health promotion compared to big box stores or grocery stores. Walgreens' attempt to use *Hofsheier* for the

proposition that a legislature may not speculate about the message sent by particular conduct is unavailing.[8]

D. The Ordinance Is Rationally Related To The Legitimate Goal Of Diminishing Tobacco Exposure For Sick People.

Dr. Katz provided a separate reason for the distinction between drug stores and more general stores. As he explained to the Board, drug stores' customers are more likely to be sick than are customers of big box stores or grocery stores. *See* p. 6, *supra*. Accordingly, the Board could rationally have concluded that a ban on tobacco sales in drug stores like Walgreens and Rite Aid was more important than a ban on sales in big box and grocery stores for the purpose of limiting the exposure of sick people to cigarettes – particularly chronically ill people who might be former smokers, and who might suffer particularly acute harm from a relapse. *Id*.

Walgreens again objects that this rationale is based on speculation rather than "evidence," OB at 40. But Finding No. 21, about the comparative percentages of revenues derived from pharmacies, supports the rationale. And much more importantly, as discussed above, the Board is permitted to speculate without any evidence – particularly where, as here, the speculation is grounded in basic common sense.

Walgreens further argues: "even assuming that a proportionately greater number of sick people visit Walgreens than Safeway, this has little to do with the implied message that the Ordinance seeks to avoid." *Id*. This statement reflects a failure to understand that the second rationale asserted by Dr. Katz – limiting the exposure of sick people to cigarettes –

[8] The string of additional cases cited by Walgreens at pages 30-34 of its Opening Brief are, similarly, nothing more than examples of legislation that could not satisfy rational basis review. Those cases say nothing about the constitutionality of this ordinance.

was distinct from the rationale of preventing young people from getting the wrong message from the sale of cigarettes by health promoting institutions.

E. The Ordinance Represents A Classic Example Of A Legislature Approaching A Problem One Step At A Time.

Under Walgreens' theory, the Board apparently must choose between banning tobacco sales by all stores with pharmacies or none at all. This is perhaps the biggest flaw in Walgreens' lawsuit – its failure to acknowledge the principle that legislatures need not tackle an entire problem at once. Legislatures may "recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative." *Warden*, 21 Cal. 4th at 644 (emphasis added). *See also supra* at 12-13.

Although no evidence is needed to show that the ordinance embodies this approach, the evidence is there in spades. In explaining why he proposed the ban for drug stores but not big box stores or grocery stores, Dr. Katz stated that he certainly did not oppose a broader ban, but was presently "focusing on that group where I thought the case was the strongest." JA4 at 881. And he predicted that if the ordinance was successful, the Board "will want to take on a broadening of this legislation at some future date." JA4 at 882. *See also* p. 6-7 , *supra*. Walgreens is effectively attempting to penalize San Francisco's policymakers for exercising legislative restraint, an approach countenanced time and again by the equal protection doctrine.

Walgreens may not like the economic consequences of San Francisco's decision to proceed incrementally. It is clearly displeased that it

will lose profits, and other stores will gain profits, as a result of the Board's decision to draw this line. *See* OB at 3. However, "[d]efining the class of persons subject to a regulatory requirement . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Beach Communications*, 508 U.S. at 315-16 (internal quotation marks and brackets omitted). When legislatures exercise their power incrementally, it will inevitably make someone unhappy, but that is a far cry from an equal protection violation.[9]

F. Walgreens' Allegation That The Classification Was Based On Political Considerations Is Legally Irrelevant And Factually Baseless.

Walgreens baldly claims that the City decided to exclude big box stores and grocery stores, not for the detailed reasons given by Dr. Katz, but for purely political reasons. This contention appears to take two forms: (i) San Francisco's policymakers sought to single out a politically unpopular group, *i.e.*, Walgreens; and/or (ii) San Francisco's policymakers sought to avoid the wrath of Safeway and Costco by excluding them from the ban. As a legal matter, it would not be appropriate for the Court to go down this road of inquiry. And in any event, as a factual matter Walgreens' allegations are utterly baseless.

[9] In the trial court, Walgreens argued that the ordinance violated equal protection because it had anticompetitive effects. It appears to have backed away from that argument here, and understandably so, because the California Supreme Court has made clear that the anticompetitive effects of legislation do not render it violative of equal protection. *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 298-99 (2007). Indeed, *Hernandez* involved an ordinance that banned the sale of furniture in a particular commercial district, but *exempted big box stores from the ban*. *Id*. at 302.

To be sure, one key purpose of rational basis review is to ensure that "classifications are not drawn for the purposes of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996). However, the appropriate safeguard against that risk is *not* an inquiry by courts into the actual motives of legislators. The judiciary "must judge by results, not by the varied factors which may have determined legislators' votes." *County of Los Angeles v. Superior Court*, 13 Cal. 3d 721, 727 (1975) (quoting *Wilke & Holzheiser, Inc. v. Dep't of Alcoholic Bev. Control*, 65 Cal. 2d 349, 364 (1966)). "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. . . . The decisions of this Court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *Id.* (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968) (internal quotations omitted).

Rather than inquiring into the motives of legislators, courts safeguard against the risk of arbitrary discrimination simply by applying rational basis review. If the law is rationally related to a legitimate governmental purpose, the risk is greatly diminished, and that is the end of the inquiry. If the law is not rationally related to a legitimate governmental purpose, it must be struck down because the likely remaining conclusion is that it constitutes improper discrimination. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer*, 517 U.S. at 633.

But as the Supreme Court made clear in *Romer*, most laws that place one group at a disadvantage compared to another *do not* constitute improper discrimination:

> In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, *even if* the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous. *See New Orleans v. Dukes*, 427 U.S. 297 (1976) (tourism benefits justified classification favoring pushcart vendors of certain longevity); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (assumed health concerns justified law favoring optometrists over opticians); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (potential traffic hazards justified exemption of vehicles advertising the owner's products from general advertising ban); *Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans*, 330 U.S. 552 (1947) (licensing scheme that disfavored persons unrelated to current river boat pilots justified by possible efficiency and safety benefits of a closely knit pilotage system). The laws challenged in the cases just cited were narrow enough in scope and grounded in a sufficient factual context for us to ascertain some relation between the classification and the purpose it served.

517 U.S. at 632-33 (emphasis added, parallel citations omitted). In short, Walgreens' allegations about the "true" purpose of the ordinance are irrelevant. If the ordinance satisfies rational basis review, that is the end of the inquiry. And the ordinance easily passes that test – far more easily than the above cases cited by the *Romer* Court.

In any event, Walgreens' allegations about the purposes of the ordinance have no factual basis. Walgreens makes much of the fact that its name was mentioned frequently during the legislative debate, but the reason for that is both benign and obvious – Dr. Katz used a well-known drug store as an example when explaining the difference between drug stores and more general stores. (He also sometimes referred to Rite Aid, *e.g.* JA4 at 858, but his family's pharmacy is, after all, Walgreens.)

Walgreens also suggests the City was playing favorites with Safeway and Costco, but again, there is not a hint of that in the legislative history. In short, there is nothing to suggest that the legislature was motivated by anything other than the reasons provided in the record, nor would it be appropriate for the Court's decision to be influenced by Walgreens' bald speculation in that regard.

G. The Remedy Of Invalidation Is Not Available.

The City initially argued below that even if the classification between drug stores and more general stores violated equal protection, Walgreens was not entitled to the relief it sought – namely, invalidation of the ordinance – because the exemption for grocery stores and big box stores is severable. Walgreens responded that the FAC also sought "such other and further relief as the court deems just and proper," which could include an order striking down only the exemption. JA4 at 976. Thus, according to Walgreens, a conclusion that the exemption is severable would not justify an order sustaining the City's demurrer; rather, the question of remedy would be subject to further proceedings. *Id*. Walgreens was correct on this point, and the City did not dispute it on reply below. And because Walgreens filed no cross-motion for summary judgment below, there is no occasion here for the Court to consider the appropriate remedy in the event of an equal protection violation.

However, we note briefly that the exemption for big box stores and grocery stores is clearly severable. The ordinance has a severability section, JA1 at 226, and "the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part." *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal. 3d 315, 330 (1975). Indeed,

an invalid portion of an ordinance *must* be severed if it is "grammatically, functionally, and volitionally separable" from the rest of the measure. *Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 613 (1999). An invalid provision is volitionally severable where it "was not of *critical importance* to the measure's enactment." *Id*. (emphasis added).

Walgreens does not dispute that the exemption is grammatically and functionally severable. But it suggests the Board may not have enacted the ordinance if it had included big box stores and grocery stores. This is belied by the legislative history. As Walgreens notes, far from being of critical importance, the exemption caused some members of the Board to express concerns about the ordinance. In response, Dr. Katz assured Board members that he did not oppose extending the ban to big box stores and grocery stores with pharmacies, and that this could very well be something the Board accomplishes in the future. *See* p. 5, *supra*. With that, the ordinance passed by a vote of 8-3. The legislators obviously focused a great deal on the exemption, yet not one of the eight Board members who voted for the ordinance so much as hinted that he or she would have voted against it if the ban were extended to grocery stores and big box stores.[10]

II. WALGREENS HAS NOT STATED A CLAIM FOR RELIEF UNDER PROPOSITION I.

Proposition I is an initiative ordinance, codified at San Francisco Administrative Code Sections 10.31-10.33, that requires the Office of Economic Analysis ("OEA") in the San Francisco Controller's office to

[10] Although Walgreens suggests it would be inappropriate to remedy an equal protection violation by broadening the reach of the legislative restriction, there is indeed precedent for that. *See, e.g., Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 153 (1980), *Stanton v. Stanton*, 421 U.S. 7, 17-18 (1975); *Kopp v. Fair Political Practices Commission*, 11 Cal. 4th 607, 625 (1995) (citing *Wengler* and *Stanton* with approval).

prepare an economic impact report if it concludes that proposed legislation "might have a material economic impact on the City." JA1 at 291 (S.F. Admin. Code § 10.32). The measure further provides that, if the OEA determines an economic impact report is necessary, it must prepare one prior to the legislation being heard in committee. *Id.* Walgreens contends in its lawsuit that: (i) the OEA abused its discretion in determining that no report was needed; and (ii) the remedy for this abuse of discretion is invalidation of the ordinance.

As a preliminary matter, the OEA clearly did not abuse its discretion. The mandate that Proposition I imposes on the OEA is not to prepare reports for legislation that would have *any* economic impact; it is to prepare reports only for legislation that, in the OEA's judgment, could have a *material* economic impact *on the City as a whole*. JA1 at 291. Consistent with the testimony of Dr. Katz, OEA recognized that the purpose and effect of the tobacco ordinance was to help prevent young people from taking up smoking, not to cause those already addicted to nicotine to stop smoking. JA2 at 332. Therefore, those who already smoked would simply purchase cigarettes at other stores, meaning there would be no material economic impact in the City, even if the ordinance would prevent some young people from becoming smokers. In light of this, the trial court properly ruled that Walgreens failed to demonstrate a likelihood of success on its claim that OEA abused its discretion. RT, Sept. 30, 2008 at 31.

Subsequently, at the demurrer stage, the trial court did not have occasion to reiterate its preliminary determination that the OEA acted within its discretion, because the City's demurrer assumed the truth of Walgreens' allegations in this regard. Instead, the trial court held that in any event, invalidation of an ordinance is not a proper remedy for any such

abuse of discretion as a matter of law. This was correct for several reasons. First, the plain language of Proposition I does not preclude the Board from enacting legislation if the OEA has abused its discretion by failing to prepare a report. Second, the legislative history to the measure confirms that. Third, even if Proposition I were ambiguous, reading it to require invalidation of legislation whenever the OEA abused its discretion would create constitutional problems, because a mere initiative ordinance like Proposition I (as opposed to a Charter amendment) cannot supersede the Board's Charter-based power to enact legislation. In short, the appropriate remedy for an abuse of discretion by the OEA is a writ requiring it to prepare a report, not after-the-fact invalidation of legislation duly enacted by the Board.

A. Plain Language

If Proposition I was meant to restrict Board action, it would have provided: "The Board of Supervisors shall enact no legislation having a material economic impact on the City before OEA prepares a report on that impact." But the measure contains no such language. All the language upon which Walgreens relies confirms that Proposition I imposes conduct requirements on the OEA, not conduct restrictions on the Board. It requires the OEA to take action by a certain time; it does not prohibit the Board from acting before a certain time.

This conclusion becomes even more obvious when one reads Proposition I in its entirety. The plain text shows that the voters recognized that it was up to the Board to set its own legislative calendar. Section 2 of Proposition I, as it appeared in the voter handbook, states that the voters "*urge* the Board . . . to adopt all necessary rules and procedures for [the measure's] full implementation including . . . a Rule of Order providing that

the Board shall not consider or hold hearings on any proposed legislation until it has received the [OEA]'s report on the impact of the legislation, if any." JA4 at 957 (emphasis added). This makes clear that Proposition I does not *force* the Board to refrain from passing legislation. Rather, it imposes a duty on OEA, and merely *urges* the Board not to act until OEA has satisfied that duty. It would have made no sense to urge the Board to impose a conduct requirement upon itself that was already imposed by the text of Proposition I.

B. Legislative History

It is not surprising that Proposition I contains no language restricting Board action, because this initiative was placed on the ballot by members of the Board themselves. JA4 at 952. This is a significant piece of legislative history, because it would be absurd to assume that these Board members wished to put themselves at the mercy of an unelected bureaucrat in the Controller's office, allowing him to hold up legislation (or render it invalid) by improperly failing to prepare an economic impact report. And it would be equally absurd to assume that the voters intended to give an unelected bureaucrat the power to paralyze the legislative process and prevent the people's business from being done.

Imagine, for example, a situation in which the Controller's office simply refuses to prepare an economic impact report for legislation that, in contrast to Ordinance No. 194-08, obviously *would* have a material economic impact on the City. Perhaps the Controller does this to protest budget cuts, or forced layoffs of members of his staff. Perhaps he does it through pure obstinance or simple neglect. Would the voters or the Board Members who placed Proposition I on the ballot truly have intended for the

Board to be *precluded* from enacting legislation while a conflict of this nature worked itself out?

Walgreens has requested judicial notice of the alleged fact that, since 2006, the OEA has prepared only 24 economic impact reports, in an attempt to suggest that the OEA is fails to comply with Proposition I as a matter of course. As a preliminary matter, Walgreens' figures are wrong – as of the date Walgreens filed its opening brief, the OEA had prepared 41 reports, not 24.[11] Moreover, the number of reports prepared by the OEA since 2006 says nothing about whether the office is doing its job properly, because the potential economic impact of other legislation for which reports were not prepared is simply not at issue in this case.

However, to the extent Walgreens' request for judicial notice is relevant, it is to underscore precisely why the electorate and the sponsors of Proposition I never intended for ordinances to be invalid whenever OEA abused its discretion in failing to prepare a report. If Walgreens were correct that OEA regularly fails to do its job, its proposed construction of Proposition I would bring the legislative process to a standstill, and potentially result in the invalidation of numerous pieces of critically important legislation enacted over the years. Those who placed Proposition I on the ballot did not intend to create a mechanism whereby an unelected bureaucrat could, through intransigence or incompetence, cause the accomplishments of the Board to be wiped away. Nor could they have possibly intended to create a mechanism whereby interested parties could

[11] *See* http://co.sfgov.org/oea/index.aspx?id=OEA-I (OEA website). As this list shows, two more reports have been prepared since Walgreens filed its brief.

"lie in the weeds" during the legislative process and then obtain invalidation of a measure based on an alleged procedural deficiency.

C. Constitutional Questions

Even if the language of Proposition I were ambiguous, and even if ambiguity remained upon realization that Board members who submitted the measure to the voters would never have intended to so severely disrupt the legislative process, there still would be strong reason to reject Walgreens' proposed construction of Proposition I. Courts should, whenever possible, interpret ambiguous legislation to avoid serious constitutional questions. *See, e.g., In re Smith*, 42 Cal. 4th 1251, 1269 (2008). Walgreens' proposed construction of Proposition I would create serious constitutional questions. That is because a mere ordinance cannot alter or supersede the provisions of a city charter, and under Walgreens' approach, Proposition I would be read to supersede the provisions of the City Charter that empower the Board of Supervisors to legislate and set forth the procedures the Board must follow to exercise that power. *See, e.g., City and County of San Francisco v. Patterson*, 202 Cal. App. 3d 95 (1988).

"It is well established that the charter of a municipality is its constitution." *Patterson*, 202 Cal. App. 3d at 102. Therefore, "an ordinance can no more change or limit the effect of a charter than a statute can modify or supersede a provision of the state Constitution." *Id*. (quoting *Lucchesi v. City of San Jose*, 104 Cal. App. 3d 323, 328 (1980)). This rule is of constitutional dimension. *See* Cal. Const. Art. 11, § 3(a) ("The provisions of a charter are the law of the State and have the force and effect of legislative enactments"); Art. 11, §5(a) (ordinances are "subject . . . to restrictions and limitations" in charters).

Thus, in *Patterson*, the Court held that where the Charter "specif[ied] the procedures and standards for the sale or exchange and lease of real property by the board," a proposed initiative ordinance prohibiting the City from selling any real property for less than 90% of its fair market value absent voter approval was "patently invalid" and had to be removed from the ballot, because it was an "an indirect attempt to accomplish what can only be done directly by amendment of the [C]harter." *Id*. at 103-05.

Similarly, in *McMahan v. City and County of San Francisco*, 127 Cal. App. 4th 1368 (2005), the Court considered San Francisco's "Care Not Cash" initiative ordinance, which provided that: (i) indigent persons shall receive in-kind benefits rather than cash payments under the County's Adult Assistance Program; and (ii) a fixed portion of the budget would be appropriated to these in-kind benefits each year. *Id*. at 1371. The Court recognized that the second portion of this measure was unenforceable, "because the power of the mayor and the board of supervisors to draft and enact a budget is set forth in San Francisco's City Charter, while the Care Not Cash initiative enacted an ordinance. Under well settled law, an ordinance cannot amend a city charter." *Id*. at 1372.

Here, similarly, the San Francisco City Charter specifies the power of the Board to enact legislation. *See* S.F. Charter, Section 1.101 ("All rights and powers of [the] City and County which are not vested in another officer or entity by this Charter shall be exercised by the Board of Supervisors"). And it identifies the prerequisites that must be satisfied for enactment of legislation. *See* San Francisco Charter, Section 2.105 (ordinances "shall be referred to and reported upon by an appropriate committee of the Board," "shall require the affirmative vote of a majority," and "shall require two readings at separate meetings of the Board . . . which

shall be held at least five days apart"). To construe Proposition I as establishing the additional prerequisite of a report by the OEA would, as discussed above, impose a significant limitation on the ability of the Board to legislate, in contravention of the legislative power conferred upon the Board by the Charter, and in violation of the constitutional principle that local ordinances may not amend city charters. If Proposition I purported to add procedures that the Board was bound to follow in enacting legislation, in addition to the procedures set forth in the Charter, it would be an impermissible attempt to amend the Charter by ordinance.

At this point, it bears recalling that legislators and voters are presumed to be aware of existing case law when they legislate. *See People v. Cruz,* 13 Cal. 4th 764, 775 (1996) (legislators); *Professional Engineers in California Government v. Kempton,* 40 Cal. 4th 1016, 1048 (2007) (voters). Accordingly, the sponsors of Proposition I and those who voted for it are presumed to have been aware of *Patterson* and *McMahan,* and of the constitutional problems that would be created had they attempted, by initiative ordinance, to impose this alleged procedural bar on the enactment of legislation. Furthermore, the requirements for submitting an initiative ordinance to the voters are different from, and significantly less stringent than, the requirements for placing a Charter amendment on the ballot. An initiative ordinance may be placed on the ballot by as few as four of the City's 11 Supervisors, without any formal action by the Board. In contrast, placing a Charter amendment on the ballot requires formal Board action, approved by at least six Supervisors. S.F. Charter, section 2.113. The sponsors of Proposition I made a deliberate choice to proceed with an ordinance rather than a Charter amendment. This choice has consequences. The choice is not surprising given the constitutional issues discussed above,

and it further proves that the sponsors of the measure had no intention to allow the legislative process to be held hostage by the OEA.

Walgreens repeatedly intones the statement from *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898, 931 (1975), that "an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not substantially observed." *See* OB at 8, 47, 60. As should now be clear, this is entirely question-begging. Proposition I's text does not make submission of an economic impact report by the OEA a "mandatory prerequisite" to the enactment of legislation, and the legislative history confirms this. And in any event, *Cooper* involved the alleged failure of the City to satisfy a mandatory prerequisite to enactment of legislation *contained in the Charter*. Thus, that case does not stand for the proposition that a mere ordinance can impose prerequisites to the exercise of legislative power not contained in the charter.

Walgreens also argues that the reasoning and holding of *Patterson* has been undercut by *DeVita v. County of Napa*, 9 Cal. 4th 763 (1995). However, that case did not deal with the question whether a mere initiative ordinance could add procedural requirements to a legislative body's ability to exercise a power given under a charter. Rather, the Court in *DeVita* simply applied the familiar, but inapposite, rule that when an ordinance is enacted by initiative (as opposed to being enacted by the Board), that ordinance may only be amended by initiative (and not by the Board), unless the initiative specifies otherwise. *Id*. at 798-99. *See also Rossi v. Brown*, 9 Cal. 4th 688, 714-15 (1995) ("unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate"). Far from allowing an ordinance to add a procedural hurdle to the enactment of all legislation beyond the procedures mandated

in a charter, *DeVita* recognizes that an initiative ordinance "binds the board" only in the narrow, subject-specific sense of not allowing the legislative body to repeal or amend that initiative ordinance after the voters have enacted it.

Thus, *DiVita* did not disapprove or undercut *Patterson*. Rather, the Court in *DeVita* simply recognized that *Patterson* presented a different question – whether an initiative ordinance may alter or supersede charter provisions that give the Board the power to legislate. And that is the issue here as well. If the Board of Supervisors had attempted to enact an ordinance that repealed or amended Administrative Code provisions that the voters had earlier enacted by initiative, *DeVita* could be relevant authority to defeat such an attempt. But as it is, *DeVita* is entirely off point. If the proponents of Proposition I had wished to add procedural requirements that the Board must satisfy in order to exercise its Charter-based legislative authority, they would have had to do so through the more rigorous process of amending the Charter.

Walgreens also cites *DeVita* for the proposition that the voters may accomplish anything by initiative that the Board may accomplish by ordinance. According to Walgreens, the Board could, by ordinance, pass a measure that prevents any future Board from enacting legislation prior to receiving an economic impact report, which means that the voters may enact such an ordinance as well. OB at 54-55. However, this hypothetical ordinance would *not* be binding on the Board, because a legislative body inherently possesses, and retains, the power to repeal its own enactments. Accordingly, if the Board enacted such an ordinance, it would have the power to repeal it in the future – either expressly or by implication, simply by enacting legislation without having received a report. *See, e.g.*,

Governing Board v. Mann, 18 Cal. 3d 819, 828 (1977); *Collier v. City and County of San Francisco*, 151 Cal. App. 4th 1326, 1350-51 (2007); *Santa Barbara County Taxpayers' Association v. Board of Supervisors for the County of Santa Barbara*, 209 Cal. App. 3d 940, 946 (1989). Thus, the principle that the voters have the power to enact by initiative any ordinance the Board may enact through legislation does not help Walgreens here. Only an amendment to the Charter could have bound the Board in the manner urged by Walgreens.

D. The Appropriate Remedy

Because Proposition I imposes obligations on the OEA, not restrictions on the Board, the appropriate remedy for an abuse of discretion by the OEA is a writ of mandate ordering it to prepare an economic impact report.

Walgreens contends that a mandamus action would have been "impracticable" here, because OEA determined only seven days before the committee hearing that no report was necessary. OB at 47. Walgreens does not explain how this is legally relevant, but in any event the company greatly exaggerates the "impracticability" of seeking a writ. Walgreens did not merely have seven days – it had a month to seek a writ. The OEA determined an economic impact report was not required on July 10, 2008, but the ordinance was not finally passed until August 5, 2008, and was not signed into law until August 7, 2008. See OB at 9; OB Appx. A at 9. Thus, even in this case, although the timeline was far tighter than normal given OEA's late determination that the measure would have no economic impact, Walgreens easily could have brought a writ action.

In short, everyone impacted by all legislation considered by the Board has an effective remedy for an alleged violation of Proposition I.

And as discussed previously, if the OEA were to abuse its discretion on an ongoing basis, an action could presumably be brought for a writ ordering the office to comply with its legal duties going forward. But the remedy Walgreens seeks is simply not available.

CONCLUSION

The Court should affirm the decision below.

Dated: June 9, 2009

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 12,000 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 10, 2009.

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PROOF OF SERVICE

I, DIANA QUAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102-4682.

On June 10, 2009, I served the following document(s):

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☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

The Honorable Peter J. Busch
Judge of the Superior Court
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CALIFORNIA SUPREME COURT
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☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed June 10, 2009, at San Francisco, California.

DIANA QUAN