No. A123891

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 3

WALGREEN CO.,

Plaintiff and Appellant,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants and Respondents.

On Appeal From the Superior Court of the State of California
For the County of San Francisco
Case No. CGC-08-479553
The Honorable Peter J. Busch, presiding

APPELLANT'S REPLY BRIEF

GIBSON, DUNN & CRUTCHER LLP
Daniel M. Kolkey, SBN 079102
Brett H. Oberst, SBN 196219
Rebecca Justice Lazarus, SBN 227330
555 Mission St., Ste. 3000
San Francisco, CA 94105
Telephone: (415) 393-8200
Facsimile: (415) 393-8306

Attorneys for Plaintiff and Appellant Walgreen Co.

TABLE OF CONTENTS

Table of Contents
(Continued)

Page

Table of Contents
(Continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Table of Authorities
(Continued)

Page(s)

Table of Authorities
(Continued)

Statutes and Ordinances

I. INTRODUCTION

The respondent City's defense against Walgreen Co.'s ("Walgreens") equal protection challenge to San Francisco Ordinance No. 194-08 (the "Ordinance") boils down to two indefensible arguments: (1) Rather than defending the classification specified in the Ordinance ("pharmacy"), the City reinvents the classification as "drugstore" and instead attempts to defend it; and (2) the City attempts to justify the Ordinance's distinction among retail establishments (whether denominated "pharmacy" or "drugstore") on the ground that the covered stores somehow send a stronger *implied* message approving smoking than the stores exempted from the Ordinance – even though the implied message may not even exist. In short, the *defense* mounted in the City's respondents' brief demonstrates why the Ordinance is *indefensible*.

First, the City argues that the Ordinance "effectively prohibits tobacco sales only at drug stores" (RB 1) and thus "classifies between different types of stores, not between pharmacies." (RB 17.) Relying on its new classification of "drugstore," it argues that "the Board [of Supervisors] 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." (RB 15.)

This argument is flawed for multiple reasons:

First, the Ordinance, on its face, does not classify drugstores: The Ordinance expressly provides: "No person shall sell tobacco products *in a pharmacy*" (S.F. Health Code, § 1009.92; italics added) and defines "pharmacy" as "a retail establishment in which the profession of *pharmacy* . . . is practiced." (*Id.*, § 1009.91, subd. (e); italics added.) It adds: "For purposes of this Article, 'pharmacy' *includes* retail stores commonly known as drugstores." (*Ibid.*; italics added.) The Ordinance then exempts "General Grocery Stores" and "Big Box Stores" from the covered pharmacy establishments. (*Id.*, § 1009.93.) Plainly, the classification in the Ordinance is "pharmacy," not drugstore.

Second, the City acknowledges that drugstores *without* pharmacies are *not* covered by the Ordinance and that two of Walgreens' drugstores do not operate pharmacies and can sell tobacco. (RB 19; AOB 14.) Thus, the Ordinance does not prohibit drugstores from selling tobacco, only retail establishments with pharmacies.

Third, it is the classification of "pharmacy" that gives the Ordinance its purpose because the Ordinance is premised on the legislative finding that "[t]hrough the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products." (Ordinance, § 1, Finding No. 7.) Without the pharmacy, there is no implied message.

Finally and fundamentally, the issue in this case is not whether drugstores are different from grocery stores, but whether *drugstores with*

pharmacies are different from *grocery stores with pharmacies* for purposes of avoiding the purported implied message conveyed by the presence of a pharmacy in a retail establishment. The City never articulates how the implied message (if any) conveyed by the sale of cigarettes at one pharmacy establishment is different from the implied message conveyed by the sale of cigarettes at another pharmacy establishment when the entire premise of the ordinance is that the mere presence of a pharmacy gives rise to the implied message. In short, the *strength* of an implied message that may not even exist is a wholly arbitrary basis for burdening some, but not all, pharmacy establishments with a tobacco sale ban.

With respect to Walgreens' challenge to the Ordinance based on Proposition I, the City simply ignores most of the arguments in Walgreens' opening brief. The City's primary argument is that even though Proposition I expressly provides that "[t]he [OEA's] analysis shall be submitted to the Board of Supervisors prior to the legislation being heard in committee (S.F. Admin. Code, § 10.32), the Board is free to hold hearings without the report. (RB 30.) This argument not only ignores the legislative history of Proposition I – and the City fails to address any of ballot materials noted by Walgreens – but it also would leave the mandatory reporting obligation in Proposition I a dead letter.

II. THE ORDINANCE DENIES WALGREENS' RIGHT TO EQUAL PROTECTION.

A. The Ordinance Classifies Retail Stores With Pharmacies, Not Drugstores.

1. The Plain Language of the Ordinance Seeks to Address the Implied Message Conveyed by the Presence of a *Pharmacy* in a Retail Establishment.

Walgreens has argued that the Ordinance violates the equal protection clauses of the federal and state constitutions because it covers only *some* retail establishments with pharmacies for purposes of avoiding an implied message purportedly conveyed by the presence of *any* pharmacy. (AOB 2-7, 22-35.)

The City's principal defense is that the Ordinance "effectively prohibits tobacco sales only at drug stores" (RB 1) and thus "the ordinance classifies between different types of stores, not between different pharmacies." (RB 17; accord, RB 1, 17, fn. 6.)

This mischaracterizes the text of the Ordinance.

First, the Ordinance does not prohibit tobacco sales at drugstores. The Ordinance expressly provides: "No person shall sell tobacco products *in a pharmacy*, except as provided in Sec. 1009.93," which, in turn, exempts "General Grocery Stores" and "Big Box Stores." (S.F. Health Code, §§ 1009.92, 1009.93; italics added.) "Pharmacy" is defined to "mean a retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California . . . is practiced and where prescriptions are offered for sale. For purposes of this Article, 'pharmacy'

includes retail stores commonly known as drugstores." (*Id.*, § 1009.91, subd. (e); italics added.) Plainly, the classification in the Ordinance is "pharmacy," not drugstore.

Second, the City acknowledges that drugstores *without* pharmacies are not covered by the Ordinance and that two of Walgreens' drugstores in San Francisco do not operate pharmacies and thus can sell tobacco. (RB 19; AOB 14.) Accordingly, by its own terms, the Ordinance does not prohibit drugstores from selling tobacco, only retail establishments with pharmacies.

Third, the Ordinance's objective is to avoid an implied message approving the use of tobacco, which is purportedly conveyed by the presence of a pharmacy at a retail establishment that sells tobacco: "Through the sale of tobacco products, *pharmacies* convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize *pharmacies* for health care services." (Ordinance, Finding no. 7; italics added.) Accordingly, the entire basis for the Ordinance is the implied message that purportedly arises from a "pharmacy."

In sum, the Ordinance expressly classifies (and defines) pharmacies, and its objective is premised on the implied message purportedly conveyed by

the presence of a pharmacy. Drugstores without pharmacies are not covered and do not convey the implied message that is the target of the Ordinance.[1]

The City responds that "[t]he fact that two Walgreens stores in San Francisco do not have pharmacies is irrelevant." (RB 19.) Citing *Kimel v. Florida Bd. of Regents* (2000) 528 U.S. 62, 83 (*Kimel*), the City contends that "with legislation subject to rational basis review, policymakers are not required to draw distinctions with 'razorlike precision.'" (RB 19.)

The City misapprehends the purpose of the proposition in *Kimel*. The Supreme Court in *Kimel, supra*, 528 U.S. 62, 83, held that Congress did not have authority under section 5 of the Fourteenth Amendment to abrogate states' immunity to suits based on the Age Discrimination in Employment Act ("ADEA"). In so ruling, the Court held that the ADEA goes beyond the prohibitions of the Fourteenth Amendment because "States may discriminate

---

1 In a footnote, the City appears to argue that Walgreens agrees with its position that the Ordinance only applies to drugstores, not pharmacies. This is nonsense. Specifically, the City alleges, "As the parties agree, *see, e.g.*, JA3 at 727, this [exception for grocery stores and big box stores] means the ordinance applies only to drug stores, not pharmacies within drug stores." (RB 17, fn. 6.) The City's cite, JA3 at page 727, is to Walgreens' first amended complaint, and the cited page nowhere states that the parties agree (or that Walgreens agrees) that the Ordinance applies only to drug stores. To the contrary, the cited page to the first amended complaint states that Walgreens stores without pharmacies are *not* prohibited from selling tobacco – that is, that the Ordinance does not apply to drugstores without pharmacies. (3JA727 [First Amended Complaint ¶ 28].)

on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." (*Id.* at p. 83.) The Court explained, invoking the proposition cited by the City, that "[t]he rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision." (*Ibid.*) But that merely means that under the rational basis test, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant." (*Id.* at p. 84.)

However, this does not mean that for purposes of applying the rational basis test, the relevant classification can be rewritten to no longer coincide with the actual statutory classification. Yet, that is what the City has done here. It has revised the Ordinance's classification and then argued that the fact that its revised classification (drugstores with or without pharmacies) covers entities that are not covered by the Ordinance's actual classification (pharmacies) is irrelevant because a classification need not be drawn with "razorlike precision." This misapplies the proposition in *Kimel*.

In addition, while *Kimel* allows the actual statutory classification to be imprecise (but still rational) in serving a legitimate state interest, the distinctions drawn by the classification can never be arbitrary: "[T]he

legislative body, when it chooses to address a particular area of concern in less than comprehensive fashion by merely 'striking the evil where it is felt most' [citation] may not do so wholly at its whim." (*Hays v. Wood* (1979) 25 Cal.3d 772, 790.) In other words, "when the legislative body proposes to address an area of concern in less than comprehensive fashion by 'striking the evil where it is felt most' [citation], its decision as to where to 'strike' must have a rational basis in light of the legislative objectives." (*Id.* at p. 791.)

As shown in section B, *post*, and Walgreens' opening brief, the Ordinance's ban on tobacco sales in establishments with pharmacies, unless the pharmacy is in a general grocery store or big box store, has no rational relationship to the goal of avoiding the implied message purportedly conveyed by a pharmacy.

2. The City's Argument that Stores, Not Pharmacies, Convey the Purported Implied Message Is Unsupported by the Record.

a) Policymakers were concerned about pharmacies.

Continuing its insistence that the Ordinance concerns drugstores, not pharmacies, the City argues that "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[sic] by the pharmacy inside the store." (RB 17) No citation to any legislative history is provided for this assertion.

Indeed, this assertion rewrites the ordinance, its findings, and the legislative history. Finding No. 7 of the Ordinance makes clear that the implied message that is targeted by the Ordinance is purportedly conveyed by the presence of a *pharmacy*, not the "type" of store in which the pharmacy is located: "Through the sale of tobacco products, *pharmacies* convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize *pharmacies for health care services*." (Ordinance, § 1, Finding No. 7; italics added.)

Likewise, the legislative history is replete with references by San Francisco Health Director Katz to the mixed message coming from a *pharmacy*. Dr. Katz talked about "the health focus of pharmacies," "the inherent conflict of interest on making money from selling cigarettes, and then making money from selling prescription medications . . . to treat the effect of tobacco" (4JA855), the purchase of "medicine" (4JA857), and "health information" from a "pharmacist" (4JA860.) All of these matters involve pharmacies.

The City tries to circumvent this by claiming that Dr. Katz used "pharmacy" as "shorthand" for drugstore. (RB 5, 18.) But Dr. Katz did not use the word "pharmacy" interchangeably with drugstore. His testimony about pharmacies largely dealt with the work of pharmacists (4JA855 ["my pharmacist . . . knows my children. I've asked her health questions"].) His reference to "health promotion was made in the context of the work of the

pharmacist. (4JA856, 857 ["I don't want my children to see the word 'Pharmacy,' to meet my great pharmacist, and then to see tobacco"].)

b) Association opinions relied on by policymakers concerned pharmacies.

The City also argues that "San Francisco's ordinance banning the sale of tobacco in *drug stores*" 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." (RB 5; italics added.)

But the American Pharmacists Association referred to *pharmacies*, not drugstores: "In 1970, the American Pharmaceutical Association stated that mass display of cigarettes in pharmacies is in direct contradiction to the role of a pharmacy as a public health facility." (Ordinance, § 1, Finding No. 8; 1JA220.) And both the California Pharmacists Associations and the California Medical Association called for prohibitions on the sale of tobacco at drugstores *and* pharmacies: "The Tobacco Education and Research Oversight Committee for California, as well as the American Pharmacists Association, the California Pharmacists Association, and the California Medical Association have called for the adoption of state and local prohibitions of tobacco sales in drugstores and pharmacies." (Ordinance, § 1,

Finding No. 9; 1JA220.) Thus, there is no support here for the City's revisionist history that the concern was not pharmacies, but only drugstores.

B. The City Misapplies The Rational Basis Test Under The Equal Protection Clause.

1. Under the Equal Protection Clause, the Classification Must Bear a Rational Relationship to a Legitimate Legislative End.

Once the Ordinance is analyzed in accordance with the classification specified in the Ordinance and not the one imagined by the City, the lack of a rational relationship between the classification (specified retail establishments with pharmacies) and the legislative objective (the implied message conveyed by the presence of a pharmacy) becomes clear.

As demonstrated in Walgreens' opening brief (AOB 2-7, 22-34), the equal protection clause requires, not merely that a legislative classification be rational, but that the "classification bear a rational relationship to an independent and legitimate legislative end." (*Romer v. Evans* (1996) 517 U.S. 620, 633.) Here, the classification is retail establishments in which the profession of pharmacy is practiced – except for grocery stores and big box stores with pharmacies. The legislative objective is the avoidance of the implied "approval of the purchase and use of tobacco products" that "pharmacies convey." (Ordinance, § 1, Finding No. 7.) Walgreens' opening brief pointed out that a classification limited to *some* pharmacies is not rationally related to a legislative objective premised on the implied

message purportedly conveyed by the mere presence of *any* pharmacy. (AOB 25-34.)

Moreover, as Walgreens pointed out, the California Supreme Court has recently reaffirmed that the rationality of a legislative classification "must be 'plausible' [citation] and the factual basis for that rationale must be *reasonably* conceivable [citation]." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1201 (*Hofsheier*); see AOB 28-34.) Yet, given the similar layouts of the pharmacies in both the covered Walgreens stores and the exempted supermarkets, there is no reasonably conceivable factual basis for finding that the purported implied message approving tobacco is less strong where the tobacco is sold in a grocery store with a pharmacy at the back of the store than at a Walgreens with its pharmacy at the back of the store. (See AOB 15-18, 25-34.)

The City acknowledges that both drug stores with pharmacies and grocery stores with pharmacies "sell products other than pharmaceuticals" (RB 16-17), that the "cigarettes are located in a different part of [Walgreens'] store[s] from the pharmaceuticals . . . again like grocery stores and big box stores" (*ibid.*), and 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." (RB 9-10.) But it argues that "there are also differences between drug stores and more general stores – differences that the legislators could rationally find significant." (RB 17.)

But under the rational basis test, the differences must be *rationally related to the legislative objective*. (*Romer v. Evans, supra,* 517 U.S. 620, 633.) And they are not here: Based on any objective comparison, there is no difference between the implied message (if any) conveyed by a pharmacy in the exempt grocery stores and in the covered Walgreens stores: Both display pharmacy signage on the storefront; in neither store does the pharmacy itself sell tobacco; and in both cases, tobacco is or was sold in the front of the store near the exit. (AOB 15-19.)

Finally, the City's statement that "society views drug stores differently from big box stores or grocery stores" (RB 18) is irrelevant. The issue is not whether society views drugstores differently from big box and grocery stores. Under the rational basis test, the issue is whether the implied message conveyed by a similarly situated pharmacy in one retail store is different from the implied message in another store such that the Ordinance's distinction between pharmacy establishments is rational for purposes of the legislative goal of avoiding an implied message. After all, it is "[t]he search for the link between classification and objective [that] gives substance to the Equal Protection Clause." (*Romer v. Evans, supra,* 517 U.S. 620, 632.)

2. The City's Attempt to Distinguish Among Pharmacy Establishments Based on Which Sends the Stronger Implied Message Is Inherently Arbitrary.

The City next attempts to justify the Ordinance's distinction among pharmacies on the ground that "society is far more likely to view drug

stores as health-promoting institutions, as compared to big box stores or grocery stores." (RB 1; accord, RB 18.) As a result, the City argues that "[t]he Board [of Supervisors] 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." (RB 15.)

First, there is no *rational* basis by which the Board could have concluded that an implied message (which may not even exist) purportedly conveyed by the presence of a pharmacy in one retail establishment is stronger than another. After all, the Board's key legislative finding made no such distinction: "Through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products. This approval sends a mixed message to consumers who generally patronize pharmacies for health care services." (Ordinance, § 1, Finding No. 7.)

Second, it is undisputed that the pharmacies in the covered and exempted stores do not themselves sell tobacco. Accordingly, it is questionable that a customer who "generally patronize[s] pharmacies for health care services" receives "tacit approval of the . . . use of tobacco products" (Ordinance, § 1, Finding No. 7) merely because the customer notices that tobacco products are sold at the opposite end of the store. A

fortiorari, it is inherently arbitrary to conclude that this unlikely message is stronger in a Walgreens than a Safeway store with a pharmacy.

Third, the City's distinction that drugstores are more health-promoting than the exempted grocery stores is itself subjective and arbitrary. It is clearly not based on any facts since, as the opening brief notes, the covered Walgreens stores and exempted Safeway stores are similarly situated with respect to pharmacy signage on the storefront. the location and operations of the pharmacies, the diverse array of products marketed, and even the promotion of healthy living. (AOB 15-19, 26-28.)

Fourth, the City's contention that society is "more likely to view drug stores as health-promoting institutions, as compared to big box stores or grocery stores" (RB 18) is irrelevant for two reasons. First, as noted earlier, the distinction here is not between drugstores and grocery/big box stores, but between drugstores *with pharmacies* and grocery/big box stores *with pharmacies*.[2] And secondly, distinguishing among health-promoting

---

2 The City notes that at the Board of Supervisors meeting, in responding to a question (from Supervisor Maxwell) why the Ordinance did not cover Safeway or Costco, Dr. Katz said he focused "where I thought the case was the strongest" because pharmacies "market themselves as health-promoting," but "we all go to supermarkets." (RB 6, citing 4JA881-882.) But the comparison between a "pharmacy" and a "supermarket" is a false one because many supermarkets do not have pharmacies. Again, the comparison

[Footnote continued on next page]

stores is not relevant because the Ordinance does not purport to distinguish among health-promoting establishments, such as athletic facilities, health food stores, or the health food sections of supermarkets. Instead, under the Ordinance, it is the presence of a pharmacy, not health promotion, that gives rise to the alleged implied message. In any event, there is no objective basis for distinguishing between the implied message (if any) purportedly conveyed by pharmacy establishments in the covered and exempted stores.

Finally, the City attempts to claim that drugstores with pharmacies are more health promoting than grocery stores with pharmacies for purposes of the implied message by making an analogy to doctor's offices: The City argues that "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," and that "[t]he Board [of Supervisors] could rationally conclude that drug stores (which, after all, we often refer to colloquially as 'pharmacies') fall somewhere between doctor's offices and big box stores or grocery stores," which "justifies the focus on drug stores." (RB 1-2; accord, RB 15.)

[Footnote continued from previous page]
should be between drugstores with pharmacies and grocery stores with pharmacies.

This analogy does not support the City's effort to rationally distinguish between the strength of implied messages purportedly conveyed by pharmacies.

First, as an initial matter, the City erroneously compares a doctor's office with drugstores and grocery stores. But the comparison must be between a doctor's office, a drugstore *with* a pharmacy, and a grocery store *with* a pharmacy in order to track the distinctions in the Ordinance.

Second and more importantly, even a comparison between a doctor's office and a drugstore with a pharmacy is flawed. A doctor's office is one-dimensional because a doctor's office offers *only* health-related services. In contrast, consumers who patronize Walgreens, grocery stores, or big box stores may do so for a host of reasons, both related and unrelated to "health."

A better analogy would be to a ban on the sale of tobacco by doctors and pharmacists (in which case, again, the City could not distinguish between pharmacists in grocery stores or drugstores).

Third, if the City is going to analogize the doctor's office to the distinctions made by the Ordinance, the hypothetical ordinance would prohibit the sale of tobacco at *some* doctors' offices but exempt *other* doctors' offices (such as eye doctors or dermatologists) on the purported ground that they are less "health-promoting" than other doctors.

3. The Case Law Requires A Reasonably Conceivable Factual Basis For Finding One Implied Message Stronger Than Another.

Walgreens' opening brief observed that there was no "reasonably conceivable" "factual basis" for finding that the implied message approving tobacco use is less strong because the tobacco is sold in a grocery store with a pharmacy in the back than at a Walgreens with a pharmacy at the back. (AOB 28, quoting *Hofsheier, supra*, 37 Cal.4th at p. 1201.)

The City argues that "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," but that "[t]his 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." (RB 11.) The City then argues that "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." (RB 12.)

There are several flaws with this argument. First, even if the legislative record need not contain evidence, the California Supreme Court in *Hofsheier, supra*, 37 Cal.4th at page 1201, ruled that the legislative

distinction "must be 'plausible' [citation] and the factual basis for that rationale must be *reasonably* conceivable [citation]."

Second, Walgreens never argued that the mere fact that the Ordinance "is based on speculation . . . about the [alleged] harm" caused from the sale of tobacco products at a pharmacy establishment is sufficient to run afoul of the equal protection clause. This point relates to the questionable legitimacy of the City's legislative objective. Walgreens argued that "the legislative objective here – the avoidance of an implied message that smoking is acceptable by virtue of the presence of a pharmacy – is questionable." (AOB 34.) But Walgreens merely used that point to argue that "the lack of a rational relationship between the Ordinance's distinction among pharmacies and its legislative objective of avoiding an implied message is compounded by the irrational premise underlying the legislative objective itself, namely, that a pharmacist in one part of the store is tacitly conveying any message relating to tobacco products sold elsewhere in the store." (AOB 35.) In other words, the City cannot rationally distinguish between implied messages that may not even exist.

Third, the City is squarely wrong to claim that it is "grossly insufficient for Walgreens simply to assert that the ordinance is based on . . . 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." (RB 12.) To the contrary, it is *sufficient* to point out that

the Ordinance's *distinction* among pharmacies is based on *pure speculation* that the purported implied message (if any) is somehow less strong where the tobacco is sold at a grocery store with a pharmacy rather than a Walgreens with a pharmacy. Again, the case law requires a "*reasonably* conceivable" "factual basis" for finding one implied message is less strong than the other. (*Hofsheier, supra,* 37 Cal.4th 1185, 1201.)

The City argues that *Hofsheier* does not "support Walgreens' argument that the City is prohibited from relying on speculation because "[i]n *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." (RB 21.) To the contrary, in *Hofsheier*, the State did provide a reason for the Penal Code's distinction between registration requirements for conviction of oral copulation with a minor compared to unlawful sexual intercourse with a minor. The Attorney General argued that adults who engaged in voluntary oral copulation with minors were more likely to repeat their offenses than adults who engaged in voluntary sexual intercourse with minors. (37 Cal.4th at p. 1203.) The Court rejected this because the distinction "cannot be justified by the *speculative* possibility that members of the former group are more likely to reoffend than those in the latter group. To sustain this distinction, there must be some *plausible reason*, based on *reasonably*

conceivable facts, why judicial discretion is a sufficient safeguard to protect against repeat offenders who engage in sexual intercourse but not with offenders who engage in oral copulation." (*Id.* at pp. 1203-1204, italics added; see AOB 28-29.)

The City also argues that "[t]o win this equal protection challenge, Walgreens must show that the City's rationale is utterly conceivable." (RB 12.) It cites no authority for this new "standard," which has not been enunciated by any court.

Revealingly, the City casually dismisses the eight cases cited by Walgreens at pages 30-34 of its Opening Brief as "nothing more than examples of legislation that could not satisfy rational basis review," which "say nothing about the constitutionality of the ordinance." (RB 22, fn. 8.)

To the contrary, as Walgreens explained in its Opening Brief, those cases illustrate that the fact that a rational distinction *can* be made between the covered and excluded categories does not also mean that the distinction *is rationally related* to the legislation's purpose. Thus, in *Justesen's Food Stores, Inc. v. City of Tulare* (1938) 12 Cal.2d 324, although the city's ordinance distinguished between grocery stores and restaurants – and certainly the two are distinguishable – the distinction did not rationally

correspond to the ordinance's purpose of protecting against health hazards in food. (See AOB 30-31.)[3]

C. The City's Alternative Justifications For The Ordinance's Distinction Among Pharmacies Fail.

1. The City's Justification Based on the Percentage of Pharmacy Revenues Is Unrelated to the Goal of Avoiding an Implied Message.

Citing legislative finding no. 21, which compared the percentage of national revenues derived from prescription drugs between specified chain drugstores and grocery/big box stores, the City argues that "[t]he 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

---

3 The City takes issue with Walgreens' statement that "California's equal protection clause is at least as protective as the Fourteenth Amendment, and indeed, in Witkin's view, more stringent." (AOB 23, fn. 13.) The City argues that Walgreens "provides a partial quotation from Witkin" and that "Witkin is discussing the people who can bring equal protection claims, not the substantive nature of the inquiry." (RB 12, fn. 4.) But as Walgreens accurately quotes in its Opening Brief (AOB 23, fn. 13), Witkin states "the California Constitution contains a number of provisions calling for uniformity in legislation. They go further than the Fourteenth Amendment, particularly in invalidating legislation where the basis for classification is wholly unreasonable, although the person raising the challenge does not show direct denial of equal protection as to himself or herself." Witkin's statement thus goes well beyond a mere statement regarding the standing of the parties that can bring equal protection challenges. However, this Court need not endorse Witkin's view in order to invalidate the Ordinance in this case. The Ordinance violates equal protection under the California Supreme Court's well-settled standard for applying the rational basis test.

revenue from pharmacy sales than do grocery stores or big box stores." (RB 16; see also AOB 35-37.)

But as noted in Walgreens' opening brief, the aggregate, national percentages cited in legislative finding no. 21 lump all grocery stores and big box stores together, regardless of whether the store has a pharmacy. Thus, the percentage figures for pharmacy sales are not calculated from only grocery or big box stores *with* pharmacies and thus cannot be compared to Walgreens stores with pharmacies. (See AOB 37.)

More importantly, the *percentage* of prescription drug sales to total sales at a retail establishment has no relationship to the "strength" of the implied message arising from the presence of the pharmacy at the establishment. Indeed, a customer would normally not even be aware of the percentage of pharmacy sales made at the store. (See AOB 36.)

Finally, as a national statistic, the percentages are not directly relevant to San Francisco. (See AOB 37.) Walgreens submits that a comparison of the number of prescriptions sold at individual Walgreens, Safeway, and Costco stores with pharmacies in San Francisco would tell a different story than the misleading national statistics – assuming that statistics derived from pharmacy sales has any relevance to the implied message conveyed by the presence of the pharmacy in a retail establishment.

The City then tries a variation of this argument. It claims that the difference in revenues "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." (RB 16; see RB 16, fn. 5.)

First, the national, aggregated percentages of prescription drug sales from stores (both with and without pharmacies) fail to suggest that materially more prescriptions are sold daily in a San Francisco Walgreens stores than in a San Francisco Safeway store or the San Francisco Costco store.

Second, the claim that "society *views* drug stores differently from big box stores or grocery stores" is misguided because the Ordinance does not cover all grocery stores or big box stores – or all drugstores. It only covers those stores containing pharmacies. As such, the question is (i) whether "society" views a pharmacy contained in a Safeway differently from one contained in a Walgreens, and (ii) if so, whether it views the implied message conveyed by one pharmacy as stronger than another in connection with the sale of tobacco products elsewhere.

In sum, the *percentage* of prescription drug sales on a national, aggregated basis is irrelevant to whether the presence of the pharmacy in a drugstore gives a stronger implied message than the pharmacy in a

supermarket in connection with the sale of tobacco elsewhere in the store, given that both stores have pharmacy signage, both stores place (or placed) tobacco in another part of the store, the pharmacies in both cases are of limited size, and the pharmacies themselves do not sell tobacco. (AOB 17-18, 26-27.)

2. Diminishing Tobacco Exposure for Sick People Cannot Rationally Justify The Ordinance's Distinction Among Pharmacies.

The City alternatively claims that the Ordinance "is rationally related to the legitimate goal of diminishing tobacco exposure for sick people." (RB 22.) It contends that Dr. Katz explained to the Board of Supervisors that "drug stores' customers are more likely to be sick than are customers of big box stores or grocery stores." (RB 22, citing 4JA857.)

As an initial matter, the City mischaracterizes Dr. Katz's testimony. Dr. Katz's testimony concerned customers at *pharmacies*, not drugstores:

> "The other reason that *pharmacies* are different is the vulnerability of who goes there. Right. *Pharmacies* don't draw the, the cross-section of the people. They draw people who have chronic diseases. . . . 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." (4JA857, italics added.)

Thus, Dr. Katz not only refers to pharmacy customers (not drugstore customers), but he was misinformed that as customers get their medicine, "they also can see right where they're paying, there are . . . tobacco being sold." As demonstrated in the opening brief, tobacco is sold in an entirely different part of the store. (AOB 17.)

Second, the City's new argument that the Ordinance's purpose was to prevent exposing sick people to tobacco is contradicted elsewhere in the City's brief, which states 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." (RB 29.) And no legislative finding specifically supports this new justification.

In any event, the Ordinance's distinction among pharmacies is not rationally related to this new objective of "diminishing tobacco exposure for sick people." (RB 22.) "Sick people" who go to a pharmacy at Safeway or Costco are just as likely to be exposed to tobacco as those who went to Walgreens.

The City argues that "Finding No. 21, about the comparative percentages of revenues derived from pharmacies, supports the rationale" of diminishing exposure to tobacco for only those who come to Walgreens

and the five other drugstores with pharmacies in San Francisco that sold tobacco. The City claims that "the Board is permitted to speculate without any evidence – particularly where, as here, the speculation is grounded in basic common sense." (RB 22.)

But as noted earlier, the national, aggregated statistics in finding no. 21 of the Ordinance are misleading and in no way compare the number of prescriptions sold at individual San Francisco drugstores with pharmacies with the pharmacies at Safeway, Lucky Stores, and Costco. (See AOB 14-15, regarding the pharmacies in San Francisco.) Further, if the number of prescriptions sold daily (that is, the exposure of "sick people" to tobacco) is to be the guide, then the four independent pharmacies in San Francisco should certainly not have been included in the Ordinance, and yet they were. In fact, this shows that the Ordinance's distinction among pharmacies has nothing to do with the number of prescriptions filled daily. Moreover, if the number of prescriptions sold daily by an individual San Francisco pharmacy is to be a guide, there is no plausible basis for claiming that significantly fewer people pick up prescriptions at any particular Safeway or Costco pharmacy in those crowded, well-traveled stores than they do at a Walgreens pharmacy.

Nor does the City explain how the Ordinance's distinction among pharmacy establishments is rationally related to the objective of avoiding the temptation of sick smokers who go to the pharmacy. If the exposure of

smokers to tobacco is a problem, the sale of tobacco should arguably be banned everywhere since smokers are everywhere. If the sale of tobacco to smokers is only a problem when they are sick and go to a pharmacy, then no establishment with a pharmacy should be permitted to sell tobacco. But there is no difference between the temptation to buy cigarettes sold at a Safeway, a Costco, or a Walgreens. If anything, such a temptation could more plausibly be said to be greater at Costco because in Safeway and Walgreens, the cigarettes are (or were) sold at opposite ends of the store, while at Costco they are sold at the same end of the store as the pharmacy. (AOB 16-17; 3JA727-728, 1JA147.)

Again, there is no rational relationship between the distinction among pharmacies in the Ordinance and the objective of avoiding the exposure of ill smokers to tobacco products.

D. The Challenged Distinction Is Not Excused By The Proposition That A Legislature May Address A Problem Incrementally.

A major theme in the City's brief is that "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." (RB 2; see also RB 6, 12, 23.)

But "the legislative body, when it chooses to address a particular area of concern in less than comprehensive fashion by merely 'striking the

evil where it is felt most' [citation] may not do so wholly at its whim." (*Hays v. Wood, supra*, 25 Cal.3d 772, 790.)

Indeed, the absurdity of the City's position that it is simply tackling a problem incrementally is illustrated by the fact that the Ordinance covers Walgreens, 6 Rite Aid stores, a single Longs Drug Store, and four independent pharmacies, while excluding the ten Safeway stores with pharmacies, two Lucky Supermarket stores, and a single Costco big box store. (See AOB 6, 14-15.) It is hardly an issue of incrementally implementing an ordinance when the one-sentence exemption could easily have been deleted to cover 13 more stores and make the "pharmacy" classification complete.

The city argues that Walgreens "is effectively attempting to penalize San Francisco's policymakers for exercising legislative restraint." (RB 23) But "legislative restraint" has never excused a violation of equal protection. Indeed, if every underinclusive classification could justify a violation of equal protection on the ground that it reflected "legislative restraint," there would be little left of the rational basis test.

The cases cited by the City to support its position that the Legislature may implement its goal incrementally do not support its arbitrary distinction between pharmacies for purposes of avoiding the implied message purportedly conveyed by a pharmacy. In *Kasler v. Lockyer* (2000) 23 Cal.4th 472, cited for the proposition that reform may

take one step at a time (RB 13), our state high court rejected an equal protection challenge to the Roberti-Roos Assault Weapons Control Act of 1989, which restricted only semiautomatic firearms that were listed as assault weapons and those additional firearms declared an assault weapon by a court upon petition by the Attorney General. (*Id.* at pp. 477-478.) Confronted with an equal protection claim that the restricted firearms were underinclusive, our state high court deferred to the legislature's decision to restrict those weapons on the list and those added by the court to "compensate for the inherent limitations of the list approach" because "[t]he Legislature was, in short, confronted with two conflicting societal interests, both of which it recognized as legitimate – the interest of all citizens in being protected against the use of semiautomatic weapons by criminals, and the interest of some citizens in using semiautomatic weapons for hunting, target practice, or other legitimate sports or recreational activities." ((*Id.* at p. 488.) In contrast, here, no competing societal interests exist to support the Ordinance's distinction among pharmacies.

Likewise, the City cites *Warden v. State Bar* (1999) 21 Cal.4th 628, 644, for the proposition that "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.'" (RB 23.) But this statement does not suggest

that a legislature can exempt categories without a "'reasonably conceivable state of facts that could provide a rational basis for the classification.'" (*Warden, supra*, 21 Cal.4th at p. 645.) To the contrary, in *Warden*, the California Supreme Court concluded that the state's mandatory continuing legal education program could exempt retired judges, state officers and elected officials, and full-time professors because the court did "not believe it fairly can be said that there is no 'reasonably conceivable state of facts that could provide a rational basis for the classification.'" (*Id.* at p. 645.)

That is precisely the problem with the exemption for some pharmacies in this case: There is no reasonably conceivable state of facts for finding that the implied message (if any) conveyed by pharmacies in grocery stores is less strong than that conveyed by pharmacies in the similarly situated drugstores such that the Ordinance should not have been written to reach 13 more retail establishments in San Francisco (ten Safeway stores, two Lucky Supermarkets, and one Costco).

E. The Attenuated Logic Underlying The Ordinance's Legislative Objective Further Demonstrates The Arbitrary Nature Of The Ordinance's Classification.

In its opening brief, Walgreens argued that the Ordinance's legislative objective – the avoidance of an implied message that smoking is acceptable by virtue of the presence of a pharmacy in the retail establishment – is questionable. (AOB 34) Walgreens pointed out that "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." (AOB 35.) Accordingly, the lack of the rational relationship between the Ordinance's distinction between pharmacies and its legislative objective is compounded by the attenuated logic underlying the objective.

The City interprets Walgreens' argument to mean that "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." (RB 13-14.)

But Walgreens has never argued that the legislative goal of preventing people from getting the wrong idea about cigarettes is not a legitimate goal. Rather, Walgreens has pointed out that in this case, 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, particularly given the extensive anti-smoking campaigns and warnings that would counteract any such implied message. (AOB 34.)

The City responds that "[i]f this [Walgreens'] 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." (RB 14) Untrue. The City's objective here is not generally to prevent people from getting the wrong idea about smoking,

but to quixotically fight an imagined message about smoking (virtually entirely at Walgreens' expense).

In short, the fact that it is a legitimate government objective to prevent people from getting the wrong idea about smoking does not mean that every governmental effort to prevent any imagined message, no matter how illogical, is a legitimate objective.

The City also argues that "it was entirely appropriate for the Board to 'speculate' about an 'implied' message" (RB 20) because "just as it would be perfectly rational to conclude . . . 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 . . . that the problem created by the sale of tobacco by drug stores is more pressing because of the way society perceives those stores." (RB 21) This analogy fails. The message sent by the use of steroids by a baseball player would be more analogous to the use of tobacco by a celebrity doctor. But it is likely that no one gets the wrong message if someone in the business office of a baseball team is using steroids or a clerk sells tobacco at the opposite end of the store from where the pharmacy is located.

Ultimately, this Court need not decide that the Ordinance's objective is not legitimate in order to invalidate it. Instead, it need only find that the Ordinance cannot make a rational distinction between pharmacies for

purposes of avoiding an implied message which may not even exist. The questionable logic underlying the existence of the implied message makes it hard to distinguish between the strength of the implied messages purportedly conveyed by the pharmacy establishments covered and exempted by the Ordinance so as to justify the Ordinance's distinction between them.

F. The Ordinance's Unequal Treatment Is Accentuated By The Fact That It Effectively Singles Out Walgreens.

In its opening brief, Walgreens noted that the Ordinance effectively singles out Walgreens, whose stores constitute 52 (58 if the acquisition of Rite Aid stores is counted) of the approximately 63 pharmacy establishments covered by the Ordinance. (AOB 6.) The Ordinance then exempts 13 competitor stores. (*Ibid.*)

The City complains that "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" (RB 24) and that "[r]ather than inquiring into the motives of legislators, courts safeguard against the risk of arbitrary discrimination simply by applying rational basis review." (RB 25.)

But Walgreens *never* proposed that this Court look into the motives of the legislature. Instead, it quoted the California Supreme Court's and Justice Jackson's admonition that the equal protection clause safeguards

against officials picking and choosing only a few to whom they will apply legislation. (AOB 6-7, 24-25.) Nor did Walgreens expressly state that Dr. Katz's decision to create the exemption was politically motivated. Walgreens only noted the obvious: The City's decision to only subject some pharmacy establishments to the City's ban, all in the service of avoiding an implied message (if any), avoided the lobbying power of the excluded supermarkets and big box stores. (AOB 25.)

G. The Ordinance's Severability Clause Cannot Remedy Its Fatal Constitutional Flaw.

The City had argued in its demurrer that even if the Ordinance violates the equal protection clause, it can be saved by striking the exemption. (AOB 42-43.) Walgreens' opening brief explained that the demurrer should not have been granted if the Ordinance violated equal protection because a demurrer cannot be sustained without leave to amend where the plaintiff is entitled to relief – here to at least invalidate the exemption. And it argued that in any event, the exemption cannot be severed from the remainder of the Ordinance. (AOB 43-46.)

The City now acknowledges that "Walgreens was correct" that "a conclusion that the exemption [for grocery stores and big box stores] is severable would not justify an order sustaining the City's demurrer." (RB 27.)

Having said that, the City claims that the exemption for big box stores and grocery stores can be severed from the remainder of the Ordinance because an invalid provision of a statute can be severed if it is volitionally severable. (RB 27-28.) The City argues that "[a]n invalid provision is volitionally severable where it 'was not of *critical importance* to the measure's enactment'" and that "far from being of critical importance, the exemption caused some members of the Board to express concerns about the ordinance." (RB 28.)

To the contrary, here, only three of eleven supervisors spoke in favor of expanding the Ordinance to include the exempted stores. (AOB 44.)

Moreover, as noted in the opening brief (AOB 43), the test of volitional severability is whether it can be said "with confidence" that the legislative body would have separately considered and adopted the law in the absence of the invalid provision. (*Gerken v. Fair Political Practices Com'n* (1993) 6 Cal.4th 707, 714-715; AOB 43.)

The "critical importance" language invoked by the City comes from *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 613, which stated that an invalid part of a statute is volitionally severable if it was "not of critical importance to the measure's enactment." In turn, the Court cited, and took that language from, *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 823, which held an invalid provision is volitionally severable because "the remainder of the initiative .

. . would likely have been adopted by the people had they foreseen the invalidity of the [invalidated] standard" and because "[t]here is no persuasive reason to suppose the [invalid standard] was so critical to the enactment of [the initiative] that the measure would not have been enacted in its absence." In short, the ultimate test is that the court must have confidence that the measure would have been adopted without the invalid section. (See *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 615 ["we are confident the enactors of Proposition 5 would have approved this portion of the measure even if they had know the remainder could not constitutionally be given effect"]; *Gerken v. Fair Political Practices Com'n, supra,* 6 Cal.4th 707, 714-715 [confidence].)

Here, it cannot be said that it is likely that the Ordinance would have been adopted without the exemption or that the exemption was not a critical part of its passage. First, the exemption was a topic of discussion at the committee and board hearings. (4JA 878, 881-882.) Second, three supervisors voted against the Ordinance, and only three spoke in favor of expanding the Ordinance. (See AOB 44.) Third, had the major supermarket chains and big box store been included, their lobbying regarding further lost sales, all in pursuit of avoiding an implied message, could very well have had a major impact.

In any event, Walgreens pointed out in its opening brief that when California courts have severed invalidated portions of legislation from the valid sections, volitional severability has ordinarily been found on the ground that the legislative body would have approved a more narrow statute had it foreseen the invalidity. There is no California precedent for using severance, following an equal protection challenge, to expand legislative constraints on new parties. (AOB 45-46.) Indeed, where severance expands a statute's reach, the newly covered parties have been deprived of the opportunity to lobby against the enactment of such legislation in the first instance.

The City claims that "there is precedent for" remedying an equal protection violation "by broadening the reach of the legislative restriction." (RB 28, fn. 10.) But the cases cited by the City do not support this proposition. Those cases discussed broadening the availability of a benefit, not a restriction. (*Wengler v. Druggists Mutual Insurance Co.* (1980) 446 U.S. 142, 152-153; *Stanton v. Stanton* (1975) 421 U.S. 7, 17-18; *Kopp v. Fair Political Practices Commission* (1995) 11 Cal.4th 607, 625.) Indeed, in both *Wengler* and *Stanton*, the court remanded the question of whether even a *benefit* could or should be extended to additional parties to the state courts for further consideration. In sum, there is no California precedent for using severance, following an equal protection challenge, to *expand* legislative constraints on *new* parties.

Finally, the City pleads that "there is no occasion here for the Court to consider the appropriate remedy [of severability] in the event of an equal protection violation." (RB 27.) But the issue has been briefed and is one of law. Walgreens submits that the Court can decide this legal issue in the interests of judicial economy.

III. THE ORDINANCE WAS ENACTED IN VIOLATION OF PROPOSITION I.

Walgreens' opening brief also demonstrated that the lower court erred in sustaining the City's demurrer to its third cause of action that the Ordinance was enacted in violation of Proposition I because the City failed to issue the report required by Proposition I on the Ordinance's likely economic impact on the City. (AOB 46-63.)

A. The Office of Economic Analysis Abused Its Discretion In Not Reporting On The Ordinance.

Walgreens' opening brief began with the observation that the trial court properly accepted as true Walgreens' allegation that the Office of Economic Analysis ("OEA") "abused its discretion by failing to prepare an economic report on Ordinance No. 194-08" (4JA989), but erred in ruling that the abuse of discretion "does not render the ordinance invalid." (4JA989; AOB 46-47.)

The City acknowledges that "the City's demurrer assumed the truth of Walgreens' allegations in this regard." (RB 29.) But it nonetheless argues that "[a]s a preliminary matter, the OEA did not abuse its discretion"

because "[c]onsistent with the testimony of Dr. Katz, OEA recognized that the purpose and effect of the tobacco ordinance was to help young people from taking up smoking, not to cause those already addicted to nicotine to stop smoking" and "[t]herefore, 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." (RB 29.)

This Court need not determine whether the OEA abused its discretion since an appellate court assumes "'all material facts properly pleaded'" in reviewing the sufficiency of a complaint against a general demurrer. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) But in light of the City's attempt to belittle the potential economic impact of the Ordinance and thus the OEA's abuse of discretion in not issuing a report, Walgreens will briefly respond.

The OEA was required to "identify and report on all legislation . . . that might have a material economic impact on the City" and in that connection, it was to "analyze the likely impacts of the legislation on business attraction and retention, job creation, tax and fee revenues to the City, and other matters relating to the overall economic health of the City." (S.F. Admin. Code, § 10.32.)

Despite these requirements, Walgreens' complaint alleges that the OEA "only considered the Ordinance's effect on the pricing of cigarettes

and *wholly failed to consider* the Ordinance's impact on business attraction and retention, job creation, or the total loss of tax and fee revenues to the City." (3JA734; italics added.) As such, the OEA overlooked that a select group of stores would lose not only tobacco sales but the ancillary sales made at the same time as the tobacco sale. In Walgreens' case, as alleged in the complaint, this constituted $9.3 million in revenue over a single year, or nearly 9% of Walgreens' non-pharmacy sales. (3JA730.) Such losses to Walgreens and other covered stores will necessarily have an impact on jobs, store expansion, and store retention. It will also have a deterrent effect on new pharmacies opening in San Francisco since they will be deprived of a material source of revenue just as they are trying to break into the market. (See 3JA734, 1JA147-148.) It may be no coincidence that after the Ordinance's enactment, Rite Aid sold its six San Francisco stores with pharmacies to Walgreens. (AOB 6 & fn. 4.) Moreover, while the impact of the sales ban is concentrated on particular pharmacy establishments, the shift in those tobacco sales to other outlets will be diffuse, thereby not compensating for the job losses and aborted store openings.

While the OEA may exercise its discretion in deciding what is a material impact, it cannot abuse that discretion by failing to consider the relevant factors." (See *Klajic v. Castaic Lake Water Agency* (2004) 121 Cal.App.4th 5, 11 ["Although mandate will not lie to control a public

agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion"].)

B. The Text And Legislative History Of Proposition I Requires The Submission Of An Economic Impact Report Prior To The First Hearing.

Walgreens' opening brief demonstrated that both the text and legislative history of Proposition I confirmed that it requires that an economic impact report be submitted to, and received by, the Board of Supervisors prior to any legislation with a potentially material economic impact being heard in committee. (AOB 48-53.)

The City responds that "Proposition I imposes requirements on the OEA" and "was not intended to, and does not purport to preclude the Board from enacting legislation if the OEA fails to prepare a report." (RB 2, 30.) In short, the City argues even though Proposition I expressly provides that "[t]he [OEA's] analysis shall be submitted to the Board of Supervisors prior to the legislation being heard in committee" (S.F. Admin. Code, § 10.32), the Board is free to hold hearings without the report.

This argument ignores the plain meaning of the text and the legislative history of Proposition I, as explained thoroughly in Walgreens' opening brief. (See AOB 48–53.)

First, as noted in the opening brief (AOB 49-51) "the words of a statute must be construed in context" and "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute."

(*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Proposition I expressly requires that "[t]he [OEA's] analysis shall be submitted to the Board of Supervisors prior to the legislation being heard in committee." (S.F. Admin. Code, § 10.32.) The City's argument that this provision should be construed to mean that the only obligation rests with the OEA and that the Board of Supervisors is free to hold hearings without receipt of the report ignores the clear legislative history: The proponents' ballot arguments (from a sponsoring supervisor herself) assured voters that "Professional economists will analyze *each* proposed law against the [City's] economic plan *before* the Board of Supervisors considers the law. Supervisors and San Franciscans will know the full impact of each law *before* it is adopted." (4JA953, italics added.) The measure's intent that the Board will not consider economically material legislation without an economic impact report could not be more clear. (See AOB 51-52.)

Further, where the law sets procedural requirements before the local legislative body can enact legislation, the case law has required that the requirement be observed under penalty of invalidation, regardless of the party responsible for complying with the requirement. Thus, in *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 923-924 (*Cooper*), where the San Francisco Charter required a health service board to adopt new medical care plans for city employees before transmittal of the plans to the Board of Supervisors for adoption – not dissimilar to the

OEA's responsibility of transmitting an economic impact report to the Board – the court invalidated the portion of an ordinance that established a city-financed dental plan that was not first adopted by the health service board. (See AOB 60-61.)

Finally, since there can be no dispute that Proposition I requires the transmittal of an economic impact report "prior to the legislation being heard in committee" (S.F. Admin. Code, § 10.32), the real issue regards the remedy for hearing the legislation without the required report. Proposition I does not expressly specify the remedy. In that case, the remedy must be based on the "general rule" that "an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not substantially observed." (*Cooper, supra*, 13 Cal.3d at p. 931.)

C. There is No Basis For A Different Interpretation of Proposition I.

The City offers several arguments in an effort to avoid the plain meaning of Proposition I, as elucidated by the legislative history.

The City first argues that "[i]f 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.'" (RB 30.)

But a law does not get interpreted differently simply because it could have been written more clearly. (See *Hernandez v. County of Los Angeles* (1986) 42 Cal.3d 1020, 1025 [holding that "[a]lthough the statutory

language could be clearer, we believe the county's suggested interpretation is the more reasonable reading of the statute"].)

In any event, Proposition I's requirement that "[t]he [OEA's] analysis shall be submitted to the Board of Supervisors prior to the legislation being heard in committee" is essentially the same as providing that the Board of Supervisors shall not consider any legislation that may have a material economic impact until it receives an economic impact report. Since the intent of the provision – i.e., that a report be received before legislative consideration – is the same whether Board of Supervisors is the object or the subject of the sentence, there can be no material difference in the interpretation, particularly once the legislative history is considered. (See AOB 51-52; 4JA952-956.)

The City next attempts to avoid the clear intent of Proposition I by focusing on uncodified section 2 of Proposition I. Section 2 provides that "[t]he voters urge the Board of Supervisors . . . to adopt all necessary rules and procedures for its full implementation, including, but not limited to, 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 . . . ." (4JA957.) The City claims that "[t]he plain text shows that the voters recognized that it was up to the Board to set its own legislative calendar." (RB 30)

Walgreens anticipated this argument in its Opening Brief. (See AOB 52–53.) First, an exhortation to the Board to adopt "all necessary rules and procedures for [the] full implementation" of Proposition I does not mean that voters intended that Proposition I not otherwise be implemented. To the contrary, the uncodified section merely suggests that the voters wanted the Board to adopt procedural rules to *ensure* that it did not consider legislation before it received the required report. The voters (and its supervisorial sponsors) presumably believed that it was the Board's prerogative to adopt its own internal rules and procedures to table a bill before the report arrived. Second, the Board's failure to adopt such rules and procedures to prevent a hearing from taking place before the report is transmitted does not mean that there is no remedy for hearing the legislation without the required report. As noted in the opening brief, "[a]s a general rule, an ordinance . . . is invalid if the mandatory prerequisites to its enactment are not substantially observed." (*Cooper, supra,* 13 Cal.3d 898, 931.) Third, an *uncodified* exhortation to *fully* implement the Proposition cannot reasonably be construed to negate the plain meaning of the *codified* provisions regarding submission of the report "prior to legislation being heard in committee." (S.F. Admin. Code, § 10.32.)

In sum, the plain intent of Proposition I, even taking into account the uncodified language, is to require the submission of an economic impact report with respect to any legislation that *may* have a material economic

impact prior to that legislation being heard in committee. (See AOB 48-53.)

The City claims that "[i]t would have made no sense to urge the Board to impose a conduct requirement upon itself [pursuant to uncodified section 2] that was already imposed by the text of Proposition I." (RB 31.) But this argument misses the difference between (1) the Board's implementation of rules and procedures for Proposition I's "full implementation" and (2) the underlying requirement under Proposition I that the report be submitted to the Board prior to legislation being heard in committee. The Board's adoption of rules and procedures would simply allow the legislation to be tabled before the first committee hearing if no report had been submitted. But the fact that no rules existed to block the hearing does not mean that no remedy exists for the violation. It merely means that legislation might be enacted without the requisite report, thereby requiring a lawsuit to invalidate the resulting ordinance, as here.

Finally, left with nothing else, the City resorts to arguing that Walgreens "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 . . . by failing to prepare a report." (RB 2, 31, 32.) But the specter of an employee in the Controller's Office holding legislation hostage is itself absurd, just as

are the City's specific examples of a Controller acting in civil disobedience to "protest budget cuts, or forced layoffs." (RB 31.)

In any event, the Board has substantial control over the Controller and his or her offices. In conjunction with the Mayor, the Board has authority over the appointment and removal of the Controller. (See S.F. Charter, art. III, § 3.105 ["The Mayor shall appoint or reappoint a Controller for a ten-year term, subject to confirmation by the Board of Supervisors. The Controller may only be removed by the Mayor for cause, with the concurrence of the Board of Supervisors by a two-thirds vote."].) Second, the Board has the power of the purse strings over the Controller such that it is unlikely that the Controller could take the Board hostage. Finally, the Board could always seek its own writ against the OEA if it refused to comply with its legal obligations, which would be far easier than having to rely on a member of the public to do so. (See, e.g., *San Diego County v. Hammond* (1936) 6 Cal.2d 709 [granting writ directed to county auditor and controller requiring him to attest certain bonds and to sign the coupons issued by the board of supervisors].)

Thus, the political-stalemate scenario suggested by the City does not provide any reason to ignore a plain intent of Proposition I, as reflected in its text and elucidated by the legislative history.

D. Requiring Invalidation Of Legislation For Failure To Comply With Proposition I Does Not Raise Constitutional Problems.

The City argues that "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 . . . cannot supersede the Board's Charter-based power to enact legislation." (RB 30, 33; see also RB 2-3.)

Walgreens also anticipated this argument in its Opening Brief and addressed it in great detail. (AOB 53–59.) Yet, the City largely fails to respond to Walgreens' authorities that an initiative binds the Board of Supervisors absent a conflict with the City Charter. (*Ibid.*) And without a conflict – which is absent here – Proposition I is binding on the Board.

The City does try to distinguish one of Walgreens' cases—*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 798 (*DeVita*) – arguing that "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." (RB 36.)

To the contrary, *DeVita* also rejected the argument that "initiatives imposing voter approval requirements on local legislative action [are] invalid." (*DeVita v. County of Napa*, *supra*, 9 Cal.4th at p. 798.) In *DeVita*, our state high court upheld an initiative amending a county general

plan in a way that limited the Board's power to legislate: It fixed land use designations for 30 years and provided for re-designation only upon a vote of the people. (*DeVita v. County of Napa*, *supra*, 9 Cal.4th at pp. 770–771.) Nonetheless, our state high court held that "if the electorate enacts a legislative measure the governing body could have itself enacted, then such measure *may* . . . circumscribe the power of future governing bodies." (*Id.* at p. 798–799, italics added.) In short, *DeVita* rejects the argument that the City makes here that an initiative cannot constrain the Board's Charter-based powers to legislate.

The City ignores Walgreens' other California Supreme Court authorities (AOB 54-58), and instead cites to the Court of Appeal decision in *City and County of San Francisco v. Patterson* (1988) 202 Cal.App.3d 95 (*Patterson*), for its ruling 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 was invalid. (RB 34.)

But the City's reliance on *Patterson* ignores several critical aspects of that decision. First, the initiative at issue in *Patterson* directly *conflicted* with the Charter. The initiative at issue would have prohibited the San Francisco Board of Supervisors from leasing any real property for a period longer than five years or selling real property for less than 90 percent of its fair market value, which directly conflicted with Charter provisions expressly granting the board authority to sell property for less than 90

percent of fair market value in the case of public purpose property and to provide a longer term for leases. (*Patterson, supra,* 202 Cal.App.3d 95, 98, 103–104.) Because of this conflict, the court held that the proposed change could only be accomplished through a charter amendment. (*Id.* at p. 104; see *DeVita, supra*, 9 Cal.4th at p. 798 [distinguishing *Patterson* as an example of "initiative ordinances *broadly* limiting the power of future legislative bodies to carry out their duties pursuant to either a governing charter or their own inherent police power"; italics added].)

Second, *Patterson* was decided in 1988, before the California Supreme Court's decisions in *DeVita*, and *Rossi v. Brown* (1995) 9 Cal.4th 688, 694 (*Rossi*), both of which made clear that the initiative power *may* constrain a board's legislative authority. (See AOB 56-58.)

Third, the City relies upon the reasoning in *Patterson* that the "people cannot employ the initiative process to bind future boards which the board itself could not do." (*Patterson, supra*, 202 Cal.App.3d at p. 105.) But this ignores the fact that the California Supreme Court subsequently rejected that argument in *Rossi, supra*, 9 Cal.4th 688: "The people's reserved power of initiative *is* greater than the power of the legislative body. . . . [T]hrough exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves." (*Id.* at pp. 715-716.)

The City also cites *McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368, 1372–1373, for the proposition that an initiative cannot constrain the power of the Board of Supervisors. There, the court addressed the "Care Not Cash" initiative measure that replaced the existing cash grants to the city's homeless with in-kind benefits and required San Francisco to allocate a fixed portion of its budget to services for the homeless. (*Id.* at pp. 1370-1371.) However, in that case, "San Francisco . . . concede[d] the funding mandate [was] mandatory" and as a result, "agree[d] that the funding mandate [was] not enforceable because it conflicts with the city charter." (*Id.* at p. 1373.) Thus, the Court of Appeal was not asked to decide that issue and stated that "the sole issue we must decide is whether the valid portion of the Care Not Cash law that requires a change from assistance through cash to assistance through services can be severed from the admittedly invalid funding mandate." (*Ibid.*) In short, San Francisco's concession that the funding mandate conflicted with the City Charter resolved the issue in accordance with Walgreens' position that an initiative ordinance may limit the board's legislative authority so long as it does not do so in a manner that directly conflicts with the city charter. (AOB 54.)

The City next argues, "To construe Proposition I as establishing the additional prerequisite of a report by the OEA would . . . impose a significant limitation on the ability of the Board to legislate." (RB 34–35.)

But the City never argues that Proposition I conflicts with any of the Charter's provisions regarding the Board of Supervisors' legislative authority. Nor does the City take issue with Walgreens' analysis that Proposition I's modest requirement that the Board receive (and not even read) an economic analysis does not displace or impair the Charter's procedures for adopting legislation. (See AOB 56.) The absence of any conflict means there is no "constitutional question" raised by a plain reading of Proposition I.

This foregoing discussion also resolves the City's argument that "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." (RB 35)

First, for the reasons just discussed, Proposition I does not present a constitutional problem because there is no conflict with the City Charter—the critical fact present or assumed in both *Patterson* and *McMahan.*

Second, the authorities cited at page 35 of the respondents' brief for the contention of what the voters are presumed to know (*People v. Cruz* (1996) 13 Cal.4th 764, and *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016) do not apply. These cases stand for the general proposition that legislators and voters may be deemed to be aware of existing statutory law and "judicial decisions interpreting the

language they chose to employ." (*People v. Cruz, supra,* 13 Cal.4th 764, 775; accord *People v. Weidert* (1985) 39 Cal.3d 836, 844.) However, that authority does not establish that voters are deemed aware of constitutional arguments against the enactment or interpretation of a measure, which is the City's argument here.

Moreover, even if the City's contention was correct, the voters would also be presumed to be aware of the California Supreme Court's decisions in *DeVita* and *Rossi* that initiative ordinances will be upheld as long as they do not conflict with the city charter.

Finally, the City argues that Proposition I cannot "be binding on the Board, because a legislative body inherently possesses, and retains, the power to repeal its own enactments." (RB 37.) But the City ignores that the California Supreme Court has previously held that the people's reserved power of initiative is greater than the power of a legislative body because the people may bind future legislative bodies. (*Rossi v. Brown, supra,* 9 Cal.4th at pp. 715–716; see AOB 59.)

E. Invalidation Is The Proper Remedy For The Failure To Comply With Proposition I.

As noted in Walgreens' opening brief, an ordinance is invalid if the mandatory prerequisites to its enactment are not substantially observed. (See AOB 60, citing *Cooper, supra,* 13 Cal.3d 898, 931.)

The City does not dispute this proposition. Rather, the City argues that "Proposition I's text does not make submission of an economic impact report by the OEA a 'mandatory prerequisite' to the enactment of legislation . . . ." (RB 36)

But Proposition I is mandatory: The OEA's analysis "shall be submitted to the Board . . . prior to legislation being heard in committee." (S.F. Admin. Code, § 10.32.) And the submission is clearly a prerequisite to the enactment of legislation since the ballot argument was clear that the purpose of the required submission to the Board was so that the Board would "know the full impact of each law before it is adopted." (4JA953 [Proponent's ballot argument].) Under *Cooper*, failure to comply with Proposition I should result in invalidation. (AOB 60-61.)[4]

The City also argues that "the appropriate remedy for an abuse of discretion by the OEA is a writ of mandate ordering it to prepare an economic impact report." (RB 38.) But Walgreens is not limited to only one remedy for the violation of Proposition I. To the contrary, courts have recognized that "mandate [citations], injunctive relief [citations], or

---

4 The City seeks to distinguish *Cooper* on the ground that "*Cooper* involved the alleged failure of the City to satisfy a mandatory prerequisite to enactment of legislation *contained in the Charter*." (RB 36) But *Cooper* never makes such a distinction in enunciating the rule that the mandatory prerequisites to enactment must be substantially observed.

declaratory relief [citation]" are all remedies available to challenge the validity of an ordinance. (*Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 326, fn. 2.)

In its opening brief, Walgreens also noted that limiting it to mandamus relief against OEA, instead of invalidating the Ordinance for failure to comply with Proposition I, is particularly inappropriate here since there was no meaningful opportunity to pursue mandamus relief, given OEA's last-minute reversal of its decision to prepare the required economic impact report just seven days before the first hearing. (AOB 61–63.)

While acknowledging OEA's tardy reversal in position (see AOB 61-62), the City suggests that Walgreens could have sought the writ during the 21-day period after the July 17, 2008, hearing, but before the Ordinance was signed into law on August 7, 2008. (RB 38.) This, of course, would have left Walgreens with 21 days to prepare, petition, and obtain relief from the superior court (omitting any time for the appellate courts) before the mayor signed it into law. And given the City's position that the Board is free to ignore Proposition I, it means that requiring a report *after* the first and only hearing, or only *after* passage but before the mayor signed the ordinance, would have been a futile act. Under those circumstances, mandamus to seek the preparation of the report after the sole committee hearing might have resulted in a defense of mootness. (*City of Los Angeles v. Offner* (1941) 18 Cal.2d 859, 859–860 [denying peremptory writ to

require posting of sealed bids for a proposed project, where deadline for receiving bids had expired, because "this matter has become moot"].)

Moreover, invalidating the ordinance for failure to comply with Proposition I will also not lead to the parade of horribles claimed by the City. The City suggests that "[i]f 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." (RB 32)

To the contrary, Proposition I only applies to legislation that might have a material economic impact (S.F. Admin. Code, § 10.32) and this Court can make its decision prospective (except for the instant case), giving the City notice that henceforth it must comply with Proposition I under penalty of invalidation of its ordinances if it does not. (See *People v. Watson* (2008) 43 Cal.4th 652, 688 [recognizing that a decision may not have retroactive effect where it "established new standards or a new rule of law"]; *Woods v. Young* (1991) 53 Cal.3d 315 [interpretation of statutes should not apply retroactively because of reliance by litigants on former rule and concern for administration of justice because of "many pending cases" that will be affected by the decision].)

Even if this decision does not qualify as a new standard or rule of law, "considerations of fairness and public policy" may nevertheless justify

prospective application. (See *Hoschler v. Sacramento City Unified School District* (2007) 149 Cal.App.4th 258, 270, 271 [interpretation of notice requirement would be given "limited retroactive effect" because "this disposition strikes the appropriate balance between avoiding undue administrative and financial hardship on school districts, while according probationary teachers the right to proper statutory notice in future cases"].)

The same factors justify prospective application of a decision that failure to comply with Proposition I requires invalidation of the resulting ordinance, which would avoid the City's concern that the court's ruling will result in the invalidation of previously enacted legislation. (RB 32.) At the same time, the ruling will put the Board of Supervisors on notice that it cannot continue to disregard Proposition I.

Finally, the City does not dispute that a remarkably small number of economic impact reports have been prepared by OEA since Proposition I was enacted in 2006. Admittedly, the City contends that "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." (RB 32.) While the potential economic impact of other legislation, for which reports were not prepared, is not before the court, the number of reports is too low to reflect that OEA is not regularly abusing its

discretion, particularly given the expansive types of legislation enacted by the Board of Supervisors since 2006.[5]

In sum, invalidation of the Ordinance enacted without the benefit of the required economic report is the only means of enforcing the informed decision-making promised and required by Proposition I. Without that outcome, the Board's practice of ignoring Proposition I will likely continue. Indeed, given the limited number of reports issued since 2006, invalidating the Ordinance is the only way to enforce the plain intent and meaning of Proposition I.

---

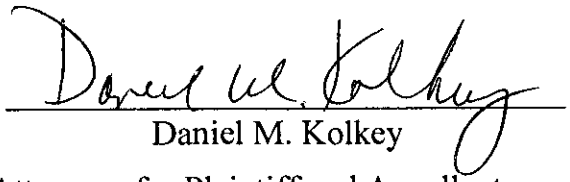
5 The City's count that "as of the date Walgreens filed its opening brief, the OEA had prepared 41 reports, not 24" (RB 32) does not support a different conclusion. Walgreens' count of 24 reports expressly and only included those for "ordinances *enacted* since 2006." (AOB 45, italics added.) The City's count includes *all* OEA's reports, which explains the difference in counts. (See RB 32, fn. 11 [website cited provides, "This table contains links to OEA published reports, including economic impact reports on proposed legislation, Monthly Economic Barometer reports, and special OEA reports"].)

IV. CONCLUSION

For all of the reasons set forth in the opening and reply briefs, Walgreens respectfully requests that the judgment be reversed with directions to find that the Ordinance violates the equal protection clause.

GIBSON, DUNN & CRUTCHER LLP

Dated: June 30, 2009



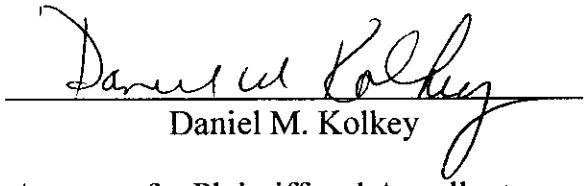
Daniel M. Kolkey

Attorneys for Plaintiff and Appellant Walgreen Co.

CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1), California Rules of Court, the undersigned hereby certifies that the Appellant's Reply Brief contains 13,888 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

June 30, 2009



Daniel M. Kolkey

Attorney for Plaintiff and Appellant
Walgreen Co.

DECLARATION OF SERVICE

I declare that I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of San Francisco. My business address is 555 Mission St., Ste. 3000, San Francisco, CA 94105. On June 30, 2009, I caused to be served the following document:

**** Appellant's Reply Brief ****

by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

SEE SERVICE LIST BELOW

☑ **BY MAIL**: I placed a true copy in a sealed envelope for deposit in the U.S. Postal Service through the regular mail collection process at Gibson, Dunn & Crutcher LLP on the date indicated below. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the declaration.

Service on the Courts Below	**Service on the Courts Below**
Clerk of the Court San Francisco Superior Court 400 McAllister St. San Francisco, CA 94102	1 Copy
Hon. Peter J. Busch Department 301 San Francisco Superior Court 400 McAllister St. San Francisco, CA 94102	1 Copy
Clerk of the Court California Supreme Court 350 McAllister St. San Francisco, CA 94102	4 Copies

Counsel	Attorneys For
Vince Chhabria Office of the City Attorney for The City and County of San Francisco City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Telephone: (415) 554-4674 Facsimile: (415) 554-4699 E-Mail: vince.chhabria@sfgov.org	*Defendants & Respondents* City & County of San Francisco; The Board of Supervisors for the City & County of San Francisco; and Gavin Newsom, in his capacity as Mayor of the City & County of San Francisco 1 Copy

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on June 30, 2009, at San Francisco, California.

Carol J. Dickerson