BEFORE THE SAN FRANCISCO BOARD OF SUPERVISORS

MOTION TO RECALL AND RECONSIDER THE VOTE IN PASSAGE OF ORDINANCE NO. 170441 BANNING SALE OF FLAVORED TOBACCO PRODUCTS, SAID VOTE BEING A UNANIMOUS VOTE CAST ON JUNE 20, 2017,

And

MOTION TO RESCIND THE VOTE IN PASSAGE OF SAID ORDINANCE NO. 170441 ONCE IT HAS BEEN RECALLED AND RECONSIDERED,

And

MOTION TO REJECT AND VOTE NO ON SAID ORDINANCE NO. 170441 ONCE IT HAS BEEN RECALLED, RECONSIDERED AND RESCINDED.

These Motions are presented to the San Francisco Board of Supervisors in a good faith effort to spare the SAN FRANCISCO taxpayers the cost of approving an ordinance clearly blocked by the doctrine of federal preemption, the cost of being sued and having to defend a defenseless action, and of damages awarded to the movants who will sue under the auspices of several statutes including the Civil Rights Act of 1866 as to which they will seek damages against the Supervisors as individuals because they knowingly and deliberately acted in conflict with federal preemption and the Constitution of the United States, and the cost of the movants' attorney fees should they be required to pursue their remedy in court.

MOVANTS, IDENTIFIED IN THE COVER MEMORANDUM TO WHICH THESE MOTIONS ARE ATTACHED, HEREBY RESPECTFULLY REQUEST THAT THE SUPERVISORS RECALL, RECONSIDER, AND RESCIND THEIR VOTE OF JUNE 20, 2917 AND THEN REJECT BY VOTING NO ON ORDINANCE NO. 170441 BANNING SALE OF FLAVORED TOBACCO PRODUCTS, AND FOR REASONS STATE:

1. SUPERVISORS voted unanimously in favor of Ordinance No. 170441 on June 20, 2017 banning the sale of flavored tobacco products and flavored liquid used in electronic cigarettes which are a proven alternative reduced harm product, reduced harm products being encouraged by Congress.

2. The ordinance was passed over the objections of hundreds of citizen witnesses, many of them store and business owners who testified these products are the profit margin for their small stores and that without the products they will go out of business. There is no doubt that this economic fact was heard, understood and acknowledged by the Supervisors because the chairperson made the public comment that it was too bad but the owners would find some other item to replace these products.

3. Many witnesses were users of the liquid and electronic devices who testified as to how their health had improved and their lives turned around after they started using these alternative reduced harm devices.

4. None of the testimony obviously was considered seriously by the chairperson who from the beginning voiced publicly her dislike for the products and her goal of getting the banning ordinance passed. None of the other Supervisors questioned her public remarks or expressed any indication that they disapproved of her rude remarks to some witnesses including a member of the clergy.

5. At no time during the hearings did the chairperson or any other Supervisor mention the issue of federal preemption and how the Supervisors planned to get around such a barrier to local or state legislation. At no time did any lawyer or legal assistant bring to the attention of the public the issue of federal preemption. It is a subject that should be on the minds of the Supervisors and their lawyers because San Francisco lost an equal protection of laws case involving a tobacco ordinance dispute brought by Walgreens against the City and County in 2010. See ***Walgreen Co. v. City and County of San Francisco et al***., 185 Cal. App. 4th 424 (2010)

6. Congress enacted the Family Smoking Prevention and Tobacco Control Act of 2009, and said, in effect "thanks but no thanks" to states and local governments who wanted to pass outlaw ordinances like 170441, and said plainly and simply, in effect, "this is a federal problem solvable by Congress on the basis of action based on the Supremacy Clause of Article VI of the United States Constitution:

   "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land; and the judges in every state shall be bound thereby,

any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

7. When an act of Congress is passed regarding a subject solely in the federal jurisdiction, or when Congress has so comprehensively handled the subject that it obviates need for state or local supplementation, or when Congress has passed an act and a state or local government passes an ordinance or statute in conflict with the federal, the state or local law must give way under the Supremacy Clause.

8. In Section 1331 of Title 36, Congress said to San Francisco and all other state and local governments:

"It is the policy of the Congress and the purpose of this chapter, to establish a comprehensive Federal Program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby:

(1) The public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notice on each package of cigarettes and in each advertisement of cigarettes, and
(2) Commerce and the national economy may be (A) protected to the maximum extent consistent with this detailed policy and (B) not impeded by diverse, nonuniform and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health."

9. How much clearer could Congress have made it? It said that it was enacting a national comprehensive uniform federal program which is necessary and is being created.

10. But Congress did not even stop there and leave it at that. In the necessary and proper clauses of the Act, Section 21 USC section 301 (b)(2) paragraphs 1-49, the message is delivered loud and clear: this is a problem that requires federal unified and comprehensive action.

11. Paragraphs 1 through 7 list the dangers of tobacco products to users and to new users who are "virtually" all "under the minimum legal age to purchase such products." They also point out that until passage of the Act, governments have not been authorized lawfully to "address comprehensively" the health and societal problems resulting from use of the tobacco products.

12. Then, after this very lengthy recitation, paragraph 9 states:

> "Under Article 1, Section 8 of the Constitution, the Congress is vested with the responsibility for regulating interstate commerce and commerce with Indian tribes."

13. Paragraph 10 is another set up paragraph pointing out that "sale, distribution, marketing, advertising and use of [tobacco] products are activities in and substantially effecting interstate commerce" which Congress controls.

14. Paragraph 12 then slams home the message:

> "It is in the public interest for Congress to enact legislation that provides the Food and Drug Administration with the authority to regulate tobacco products and the advertisement and promotion of such products. The benefits to the American people from enacting such legislation would be significant in human and economic terms."

15. Next, Congress devoted paragraphs 13 through 26 detailing how mass media and advertising spreads use to minors, and how comprehensive restriction on advertising are necessary. In paragraph 27 Congress says:

> "International experience shows that advertising regulations that are stringent and comprehensive have a greater impact on overall tobacco use and young people's use than weaker or less comprehensive ones."

16. The slam dunk again comes in paragraph 29:

> "It is in the public interest for Congress to adopt legislation to address the public health crisis created by actions of the tobacco industry."

17. The final twenty of the necessary and proper clauses detail the importance of the Food and Drug Administration and the Federal Trade Commission in developing comprehensive programs as to health, advertising and efficacy of alternative products. No state or local government could empower and authorize these federal agencies to act as Congress has mandated. These final twenty necessary and proper clauses finally frame the federal preemption that Congress has tried so hard to clarify throughout the Act.

18. Having set the necessity for legislation to establish federal preemption, Congress then set forth the purpose for passing the Act:

(1) To provide authority to Food and Drug as the priority Federal regulatory authority as to manufacture, marketing and distribution of tobacco products.
(2) To ensure that FDA has authority to address public health issues.
(3) Authorize FDA to set "national standards" controlling the manufacture of tobacco products and controlling the public disclosure of and amount of ingredients used in such products.
(4) Provide and promote new and flexible law enforcement authority to ensure effective oversight of the tobacco industry's efforts to develop and promote less harmful tobacco products.
(5) Vest FDA with authority to regulate levels of tar, nicotine and other harmful components of tobacco products.
(6) "**to continue to permit the sale of tobacco products to adults in conjunction with measures to ensure** that they are not sold or accessible to underage purchasers."
(7) To impose appropriate regulatory controls on the tobacco industry
(8) To promote cessation of use to reduce disease and social cost of disease
(9) To strengthen legislation against illicit trade in tobacco products."

19. Every one of the purpose clauses sets forth a purpose of the act which can only be accomplished through federal authority and unified, comprehensive procedures.

20. The Federal Preemption doctrine stems directly from the Supremacy Clause (See paragraph 6 hereinabove, and Article VI of the United States Constitution). When the Preemption is present any federal law, even a regulation that is within the parameters of a valid statute or the Constitution, is superior to and "trumps" any conflicting state or local law.

21. Congress can make preemption express or implied. If Congress says specifically and expressly that it is establishing preemption, then the only question for a judge is whether the state or local law is within the area preempted. If so, it is void. In this case, if Congress has expressly made the

Act preemptive, the ordinance is immediately null and void because it attempts to legislate an area covered by the Federal Act.

22. Movants contend that Congress has made the Act preemptive expressly. Congress cites the Supremacy Clause in the Act itself, it also sets the tobacco product issues within the parameters of the interstate commerce clause and points out that the Constitution places on Congress the responsibility to govern interstate commerce. (see paragraphs 12-14 supra.)

23. Congress also goes to great lengths to point out that it had to establish authority necessary to deal with the tobacco problems through a comprehensive plan of nationally consistent regulations. All these positive assertions establish an express state of preemption.

24. Implied preemption occurs when Congress has made such a comprehensive "occupation of the field" that there is no room left for state or local regulation. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). In *Nelson*, the Supreme Court struck down a Pennsylvania statute that made it a state crime to plot to overthrow the federal government. The Court held that the Congress had acted with such dominance in the law of treason and sedition that the state law was not to be seen as a help when it went further than Congress saw fit to do.

25. In the instant case, the Ordinance makes it unlawful to sell a flavored tobacco product even to an adult, and the federal act provides for allowing adults to continue using such product. (see paragraph 18 (6) hereinabove). That is a specific conflict that cannot stand.

26. The Ordinance bans flavoring. The movants say that ban will destroy their business because adults will not buy non-flavored cigarettes or non-flavored liquids. The Act does not ban either; rather it encourages continued use of reduced harm alternatives in several different ways. Such conflicts jeopardize the research and comprehensive process.

27. Throughout the Act, provisions are made to reduce use through regulated advertising and promotion and research as to alternatives of reduced harm. On the contrary, San Francisco simply bans sale of flavored products including the reduced harm e-cigarettes, and that is in direct conflict with the Act.

For all the reasons set forth hereinabove, movants contend that Ordinance 170441 is null and void ab initio because the federal government has preempted the field of regulation of tobacco products.

28. In Section 203 of the Act, Congress provides for preserving to state and local governments the authority to impose "specific bans or restrictions on the time, place and manner, but not content of advertising or promotion of any cigarettes." The limited manner of giving this authorization emphasizes strongly the preemptive nature of the Act.

WHEREFORE, MOVANTS RESPECTFULLY REQUEST THAT THE BOARD RECALL AND RECONSIDER ITS VOTE ON ORDINANCE 170441, AND THAT UPON RECALL AND RECONSIDERATION, MOVANTS URGE RESCISSION OF THE VOTE AND THEN REJECTION OF THE ORDINANCE.