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[SAN FRANCISCO DISTINCTION BETWEEN DRUGSTORES AND SUPERMARKETS GOES UP IN SMOKE](#)

[Walgreen Co. v. City and County of San Francisco](#) [Cal.App.4th](#) (2010)

By [Brenna Moorhead](#)

Walgreen Co. prevailed against the City and County of San Francisco in California court and can proceed with its challenge to San Francisco's ordinance banning the sale of tobacco products at certain retail establishments that contain a pharmacy. San Francisco defined "pharmacy" as "a retail establishment in which the profession of pharmacy by a [licensed] pharmacist is practiced and where prescription drugs are offered for sale." The prohibition applied to a store as a whole, even if the licensed pharmacy was situated within a larger store selling other merchandise. Thus, the ordinance would have included drugstores, grocery stores, chain stores, supermarkets, and big box stores that contain a pharmacy. However, San Francisco elected to exclude general grocery stores and big box stores.

Walgreens challenged this distinction on state and federal constitutional grounds, claiming violation of the equal protection clauses of the California and United States constitutions. The parties agreed that Walgreens and all other retail establishments containing licensed pharmacies are similarly situated for purposes of the challenged ordinance. The parties agreed also that rational basis review governed the equal protection claims. On this basis, the court considered whether a rational basis existed for exempting general grocery stores and big box stores that contain licensed pharmacies from the ban.

Rational basis review is deferential, "invest[ing] legislation involving such differential treatment with a presumption of constitutionality." Typically legislation survives such review, because the opponent is unable to "negative every conceivable basis" of support. In this instance, the court found that San Francisco's arguments lacked merit and, on remand, likely would not survive rational basis review.

San Francisco's principal premise for the ordinance was that: "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." San Francisco argued that the objectives of discouraging smoking and avoiding the suggestion that a health purveyor approves of cigarette smoking provide a rational justification for the distinction drawn by the ordinance. Drugstores are more likely to convey the tacit message that smoking is not harmful than a store that sells primarily food items. In essence, it is the supposed strength of the perception that justifies the distinction. However, San

Francisco was unable to explain why stores which derived sales revenues primarily from prescription drugs would imply greater approval of smoking. The court did not find this a rational basis for the distinction.

The court found no greater merit in San Francisco's other arguments. San Francisco argued that the distinction was appropriate to limit the greater exposure to cigarettes of sick people, who are more likely to go to Walgreens. San Francisco argued also that supermarkets are endangered species in the city and therefore the exemption was required to discourage supermarkets from leaving town. The court noted that this argument appeared nowhere in the record and appeared to be a post hoc rationalization of the exemption.

Accordingly, the court found that Walgreens adequately stated in its complaint causes of action for violation of the equal protection provisions of the United States and California constitutions. However it declined to resolve the question as to whether San Francisco had violated the equal protection clauses. Nor did it determine whether the appropriate remedy for a violation would be "to preclude enforcement of the entire ordinance" or to invalidate only the exception. It remanded the case back to the trial court to consider these questions.

Walgreens sought also to have the ordinance invalidated based on failure of San Francisco's Office of Economic Analysis to prepare a report on the economic impact of the legislation in violation of a voter-enacted proposition. The court affirmed the trial court's sustaining of the demurrer on violation of the proposition without leave to amend and addressed this cause of action in an unpublished portion of its opinion.

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