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VIA EMAIL

July 31, 2019

City Attorney Dennis Herrera, Esq.
Ms. Jenica Maldonado, Esq.
Mr. Andrew Shen, Esq.
1 Dr. Carlton B. Goodlett Place
City Hall Room 234
San Francisco, CA 94102-4635

Re: Ballot Digest for November 2019 Vapor Products Initiative

Dear City Attorney Herrera, Ms. Maldonado, and Mr. Shen:

We write on behalf of our client, the SF Kids vs. Big Tobacco Coalition, in response to the letter recently submitted by Mr. Jim Sutton on behalf of the tobacco industry funded committee called Coalition for Reasonable Vaping Regulation regarding the Ballot Digest for the November 2019 initiative entitled “An Act to Prevent Youth Use of Vapor Products” (hereinafter referred to as the Initiative”). The SF Kids vs. Big Tobacco Coalition is a group of health and youth advocates who supported upholding the candy-flavored tobacco ordinance in the City and County of San Francisco in 2018, and continue to advocate against the harmful impacts of tobacco and nicotine on youth. While the name of the measure suggests that the Initiative is intended to prevent youth access to vapor products, the actual provisions of the Initiative will have the opposite effect.

In drafting the initial Digest for consideration by the Ballot Simplification Committee, we believe that there are several critical pieces of information that must be conveyed to the voters in order to properly explain the main purposes and points of the measure. While we understand that the Digest will ultimately be determined by the Ballot Simplification Committee, we ask that you consider this information in completing the initial draft of the Digest.

I. The Initiative Will Repeal The City’s Current Ban on the Sale of Vapor Products

First, the voters must be informed that the Initiative will repeal an existing ban on the sale of vapor products until authorized by the FDA, including flavored products, in the City and County of San Francisco that was unanimously approved by the Board of Supervisors in June 2019.¹ As Mr. Sutton concedes in his letter, “What the Initiative was meant to supersede—what is irreconcilable with the Initiative—is the complete prohibition on the sale of vapor products adopted by the Board of Supervisors in June, found in Health Code Section 19R.2

¹ Ordinance No. 122-19

and 19S.2(b).” While the vapor products ban will not become operative until after the November 2019 election has passed, voters must understand that they will be voting to repeal an existing ban on the sale of vapor products unanimously approved by their local elected officials. Notably, the proponents of this Initiative had the option to refer the ordinance passed in June and opted instead to put forward this Initiative. The voters must be informed that this Initiative has the same impact on the existing vapor products ban as referring that ban itself. It is particularly important that this information be made clear because the Initiative language does not acknowledge this important fact and leaves the false impression that the Initiative only adds to existing law.

II. The Initiative Will Make It Easier to Sell Vapor Products to Kids By Only Prohibiting the “Knowing” Sale of Vapor Products to Persons Under 21 Years of Age

Second, the Digest must inform voters that the Initiative will make it easier to sell vapor products to kids. Section 19N.5-1 of the Initiative prohibits sellers from “knowingly” selling or distributing vapor products to persons under the age of 21. By imposing a legal standard that requires “knowledge,” the Initiative requires the City to prove that a retailer had actual knowledge that a buyer was under 21, a difficult standard to enforce. Current law requires no such actual knowledge requirement in order for a retailer to be found liable. Article 19P.3 of the Health Code simply provides: “The sale or distribution by an Establishment of any Tobacco Product to a Person aged 18, 19, or 20, is prohibited.” By requiring retailers to knowingly sell vapor products to individuals under the age of 21 in order to be found liable, the Initiative makes it extremely difficult for the City to hold retailers accountable for sales to underage buyers. This fact was not lost on the proponents. Again, it is essential that voters be clearly informed of this fact because the language of the Initiative is drafted in such a way as to make it appear that it tightens youth access laws. The addition of the “knowing” requirement does the opposite.

III. The Initiative Will Repeal the Existing Candy-Flavored Tobacco Ban As Applied to Vapor Products

Third, it is imperative that the Digest inform voters that the Initiative will repeal the existing ban on candy-flavored tobacco as applied to vapor products, despite the proponents’ claims that the ban will remain in place.

Current law prohibits the sale of flavored tobacco products in the City and County of San Francisco.² This law was unanimously passed by the Board of Supervisors in 2017 and upheld by 68 percent of the voters just over one-year ago in June 2018.³ Section 19N.5-6 of the Initiative provides: “This article is intended to comprehensively authorize and regulate the retail sale, availability, and marketing of vapor products in the City and County of San Francisco.” If,

² San Francisco Health Code Article 19Q.3(a)

³ <https://sfelections.sfgov.org/june-5-2018-election-results-summary>

as Section 19M.5-6 says, the Initiative is intended to comprehensively authorize and regulate the retail, sale, etc. of vapor products, such “comprehensive” regulation can only reasonably be read to mean that a seller of “vapor products” would not look beyond the restrictions contained in Article 19N of the Health Code and therefore would not be subject to the flavored tobacco prohibitions contained in Section 19Q of the Health Code. While courts generally disfavor repeal by implication, a court will find a repeal where two statutes cannot be harmonized and therefore not given the full effect simultaneously.⁴ Here, a flavored vapor product cannot simultaneously be comprehensively authorized and regulated under one section of the Health Code, while being prohibited by another. Just as with Section 19R, Section 19Q prohibits the sale of flavored tobacco products to adults as well as minors.

The proponents argue that the “comprehensive” language does not amount to a “repeal” of the flavor ban for two primary reasons.

First, the proponents argue that “the prohibitions against the sale or distribution of any “Flavored Tobacco Product” contained in Sections 19.Q and 19S.2(a), which include combustible tobacco products and electronic cigarettes, are not irreconcilable with the initiative’s intent to comprehensively authorize and regulate the sale of vapor products” (Emphasis added). On this point, we agree. Section 19Q of the Health Code is not fully repealed because the restrictions in that section would remain in place as applied to other flavored tobacco products that do not qualify as “vapor products,” such as menthol cigarettes. Instead, the ban is inapplicable as applied to “vapor products,” as defined in the Initiative.

Importantly, neither the language of the Initiative nor Mr. Sutton’s letter specifically say that the Initiative was intended to uphold the existing flavored tobacco ban as applied to vapor products. In addition, the letter carefully notes that “retailers will still not be able to sell flavored tobacco in San Francisco,” instead of directly addressing whether flavored “vapor products” would also remain prohibited. Mr. Sutton’s letter is carefully worded.

Second, Mr. Sutton argues the flavored tobacco ban is contained in a wholly separate section of the Health Code from the vapor products initiative. Mr. Sutton notes, “The flavor ban adopted in 2018 is contained in Article 19Q of the City’s Health Code and the extension of the flavor ban adopted in 2019 is contained in Section 19S.2(a). Except for adding certain enforcement provisions in Article 19H, the Initiative’s provisions are limited to amending Article 19N—a wholly separate section of the Health Code—and do not expressly repeal or reference the flavor ban.” However, that argument is inconsistent with the argument Mr. Sutton later makes with regard to Section 19R. Mr. Sutton goes on to argue that the Initiative was, however, meant to supersede the complete prohibition on the sale of vapor products not authorized by the FDA adopted by the Board of Supervisors in June, found in Health Code Sections 19R.2 and 19S.2(b).

⁴ See *Lopez v. Sony Electronics, Inc.* (2018) 5 Cal. 5th 627.

Like the flavored tobacco products ban, the total ban on vapor products until authorized by the FDA is contained in a wholly separate section of the Health Code and the Initiative does not expressly repeal or reference the vapor products ban. While the vapor products ban was not passed until after the Initiative was in circulation, Mr. Sutton's letter notes that the ban was pending in a Board committee before the vapor products initiative was submitted, and yet the Initiative makes no mention of expressly repealing any ban on vapor products. Instead, the Initiative provides for the "comprehensive regulation" of vapor products, which Mr. Sutton's letter tells us is intended to impliedly repeal the existing vapor products ban. The logic by which Mr. Sutton indicates that the vapor products initiative is repealed necessarily leads to the conclusion that the flavored tobacco ban is also repealed as applied to vapor products.

IV. If the Initiative Passes, the Board of Supervisors Will Not Have the Power to Impose Additional Regulations on Vapor Products. All Subsequent Regulation of Vapor Products Must Be Approved Via Initiative

Finally, the digest must inform voters that the Initiative will restrict future regulation of vapor products by the Board of Supervisors. Section 19N.5-6 of the Initiative provides that the article is intended to comprehensively authorize and regulate the retail, sale, availability and marking of vapor products in the City and County of San Francisco. The measure further provides that pursuant to Municipal Elections Code §390 and California Elections Code §9217 the provisions of the Initiative may only be amended by a vote of the People. Read together, these two provisions restrict any future action by the Board of Supervisors regarding the retail, sale, availability and marketing of vapor products in the City and County of San Francisco and require any subsequent regulation of vapor products to be imposed via Initiative. It is important that voters are informed that this initiative will remove the power of their local elected officials to impose future regulation on vapor products, essentially putting all local policy decisions related to vapor products into the hands of the measure's drafters—Big Tobacco.

We appreciate your consideration of our letter, and request that a copy of this letter be included in the formal file for the upcoming Ballot Simplification Committee hearing.

Respectfully,



Lance H. Olson



Emily A. Andrews

CC: Ms. Barbara Carr, Ballot Simplification Committee