



CITY OF SOUTH PASADENA
PUBLIC SAFETY COMMISSION SPECIAL MEETING AGENDA

AMEDEE O. "DICK" RICHARDS, JR. COUNCIL CHAMBER
1424 MISSION STREET, SOUTH PASADENA, CA 91030
TEL: (626) 403-7210 • FAX: (626) 403-7211
WWW.SOUTHPASADENACA.GOV

Monday, October 18, 2021 at 8:30 a.m.

South Pasadena Public Safety Commission Statement of Civility

As your appointed governing board we will treat each other, members of the public, and city employees with patience, civility and courtesy as a model of the same behavior we wish to reflect in South Pasadena for the conduct of all city business and community participation. The decisions made today will be for the benefit of the South Pasadena community and not for personal gain.

PUBLIC ADVISORY: THE CITY COUNCIL CHAMBERS WILL BE OPEN TO THE PUBLIC

Pursuant to Section 3 of Executive Order N-08-21, issued by Governor Newsom the Special Meeting of the Public Safety Commission for October 18, 2021 will be conducted in-person/ hybrid and held by video conference, beginning at 8:30 a.m.

Beginning in August, the City will resume in-person/hybrid public meetings. The in-person/virtual hybrid meetings will maintain transparency and public access while protecting the health and safety of the public. Members of the public have the option to participate in-person or via Zoom using the following link:

To maximize public safety while still maintaining transparency and public access, members of the public can observe the meeting via Zoom Webinar in one of the methods below.

**Public Safety Commission
Zoom Webinar Information
Meeting ID: 813 3815 5824**

1. Go to the Zoom website, <https://zoom.us/join> and enter the Zoom Webinar information accordingly; or

Click the following link to join the webinar: <https://us06web.zoom.us/j/81338155824>

2. You may listen to the meeting by calling: **+16699006833** and entering the Zoom Webinar ID when prompted to do so.

For additional Zoom assistance with telephone audio, you may find your local number at: <https://zoom.us/j/9201111111>

IMPORTANT NOTE: Members of the public may access the meeting to observe the meeting’s proceedings; however, at this time, there is no live, real-time participation by members of the public.

PUBLIC COMMENTS: If you would like to comment on an agenda item or make a general public comment, members of the public may submit their comments in writing, for Commission consideration, by emailing them to: pscpubliccomment@southpasadenaca.gov

Public Comments must be received by **6 p.m., October 17, 2021** to ensure adequate time to compile. Public Comment portion of the email is limited to 250 words. Please make sure to indicate: 1) your name; 2) what agenda item you are submitting public comment on or if it is a general public comment; and 3) clearly state if you wish for your comment to be read.

CALL TO ORDER Chair Amin Alsarraf

ROLL CALL Commission members Grace Liu Kung, Jeremy Ding, Ed Donnelly, Lisa Watson, Lindsey Angelats; Vice-Chair Stephanie Cao; and Chair Amin Alsarraf

COUNCIL LIAISON: Jon Primuth

PUBLIC COMMENTS AND SUGGESTIONS

The Public Safety Commission welcomes public input. Members of the public may address the Public Safety Commission by emailing: pscpubliccomment@southpasadenaca.gov

Public Comments must be received by **6 p.m., October 17, 2021** to ensure adequate time to compile. Public Comment portion of the email is limited to 250 words. Please make sure to indicate: 1) your name; 2) what agenda item you are submitting public comment on or if it is a general public comment; and 3) clearly state if you wish for your comment to be read.

Pursuant to state law, the Public Safety Commission may not discuss or take action on issues not on the meeting agenda, except that members of the Public Safety Commission or staff may briefly respond to statements made or questions posed by persons exercising public testimony rights (Government Code Section 54954.2). Staff may be asked to follow up on such items.

1. Public Comment – General

ACTION/DISCUSSION

2. Minutes of the Public Safety Commission Meeting of September 13, 2021

Recommendation

It is recommended that the Commission review and approve the September 13, 2021 Meeting Minutes.

3. Potential New Ordinance for the South Pasadena Municipal Code Regarding Prohibiting the Sale of All Tobacco Products

Recommendation

It is recommended that the Commission discuss the Potential New Ordinance Regarding Prohibiting the Sale of All Tobacco Products.

COMMUNICATIONS

4. City Council Liaison Communications

5. Staff Liaison Communications

6. Commissioner Communications

ADJOURNMENT

PUBLIC ACCESS TO AGENDA DOCUMENTS

The complete agenda packet may be viewed on the City's website at:

<https://www.southpasadenaca.gov/government/boards-commissions>

Meeting recordings will be available for public viewing after the meeting. Recordings will be uploaded to the City's YouTube Channel no later than the next business day after the meeting.

The City's YouTube Channel may be accessed at:

https://www.youtube.com/channel/UCnR169ohzi1AIewD_6sfwDA/featured

ACCOMMODATIONS

The City of South Pasadena wishes to make all of its public meetings accessible to the public. If special assistance is needed to participate in this meeting, please contact the City Clerk's Division via e-mail at CityClerk@southpasadenaca.gov or by calling (626) 403- 7230. Upon request, this agenda will be made available in appropriate alternative formats to persons with disabilities. Notification at least 48 hours prior to the meeting will assist staff in assuring that reasonable arrangements can be made to provide accessibility to the meeting (28 CFR 35.102-35.104 ADA Title II).

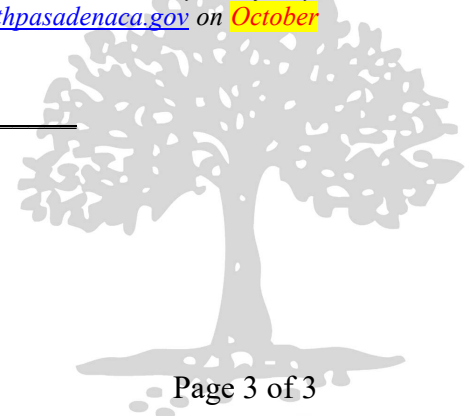
*I declare under penalty of perjury that I posted this notice of agenda on the bulletin board in the courtyard of City Hall at 1414 Mission Street, South Pasadena, CA, and the City's website at www.southpasadenaca.gov on **October 14, 2021** as required by law.*

10/14/2021

Date

/s/

Brian Solinsky, Police Chief





September 15, 2021

[Sent via email ccpubliccomment@southpasadenaca.gov](mailto:ccpubliccomment@southpasadenaca.gov)

General Public Comment Re: Audit of South Pasadena Police Department

Dear Mayor and Councilmembers,

It is time to audit the South Pasadena Police Department to ensure it is operating in a way that aligns with the values of the City’s electorate—free of all forms of bias, and focused on protecting the public safety of residents and visitors alike equitably and efficiently.

For over two decades, City leaders have failed to scrutinize SPPD’s policies and practices. City leaders have allowed SPPD’s budget to balloon in a way that demonstrably fails to align with our values. In this fiscal year, the City plans to spend over one-third of its General Funds (nearly \$10 million) on SPPD without question, at the expense of providing critical services and programs that could otherwise be supported by the City, such as environmental initiatives, affordable housing, and youth development.

SPPD’s unchecked presence in our City is underscored by the events of summer and fall 2020 which brought to light disturbing evidence of racial bias among all ranks of officers. SPPD failed to undertake basic policing to protect peaceful Black Lives Matter demonstrators from assault; revealed racial bias in police reports; and accepted an invitation from a homophobic religious group to hold a “Prayer Breakfast” at City Hall.¹ At the Trump Rally in November, police openly displayed signs of support for those rallying for the former president, including honks of approval and flashing thumbs up, while refusing to come to the assistance of counter protesters reporting assaults by the Trump supporters.

As a result, members of the community filed 53 complaints with the city, and the city retained retired law enforcement officer Garon Wyatt to conduct an investigation. The city will not reveal the full content of Wyatt’s investigations, or even the portions that reveal the methodology and standards he applied in arriving at his findings, citing Gov’t Code Section 6254(c) and Penal Code Section 832.7 (limited to protecting certain officer personnel records). The high-level summaries of the investigator’s findings identified critical deficiencies across all ranks in SPPD’s compliance with procedures for identifying and investigating hate crimes, thorough and accurate report writing, and required use of body cameras. Wyatt’s findings that all of the complaints about SPPD’s biased policing were “not sustained” are highly questionable in light of the mountain of evidence to the contrary.

¹ See Complaint to the California Office of the Attorney General at Care First South Pasadena’s website (www.carefirstsouthpasadena.com) for complete factual background.

The City would like to close the book on the community's concerns about biased policing in South Pasadena by pointing to the confidential investigations, the Diversity, Equity and Inclusion training it authorized for city staff in February 2021, and a host of trainings on investigating hate crimes and related topics. But the City cannot fashion any meaningful solution moving forward without fully and publicly accounting for SPPD's past failures.

A racial bias audit is timely, as many other cities are proactively working to root out extremists on their police forces in the aftermath of the January 6 insurrection.^{2,3} Membership in extremist organizations among law enforcement officers undermines their ability to police without prejudice.^{4,5}

For the reasons above, we ask the City to examine SPPD with two equally important and interrelated objectives in mind: 1) to determine the operational efficiencies and effectiveness of the department; and 2) to determine the extent that racial bias exists among individual officers and across the department, and whether SPPD has systems in place to identify and root them out on a continuing basis. The audit should be completed by a reputable auditor. There should be a stakeholder process in developing the scope of the audit. At minimum, the audit should examine and make public the information identified in Attachment A.

Thank you for your consideration of this critical objective.

Signed,⁶

Anti-Racism Committee of South Pasadena
Black Lives Matter South Pasadena
Care First South Pasadena

- | | | |
|----------------------|-----------------------|---------------------|
| 1. Afshin Ketabi | 5. Angel Gomez | 9. Brandon Yung |
| 2. Alexandra Ramirez | 6. Anna McCurdy | 10. Byron Sleugh |
| 3. Allie Schreiner | 7. Ayaka Nakaji | 11. Carla Obert |
| 4. Andrew Terhune | 8. Barbara Eisenstein | 12.Carolynn Ghiloni |

² Kimberly Kindy, Mark Berman and Kim Bellware, *The Washington Post*, January 24, 2021, "After Capitol riot, police chiefs work to root out officers with ties to extremist groups." Online at https://www.washingtonpost.com/politics/police-capitol-riot-extremists/2021/01/24/16fdb2bc-5a7b-11eb-b8bd-ee36b1cd18bf_story.html

³ Kevin Rector and Richard Winton, *The Los Angeles Times*, February 17, 2021, "Law enforcement confronts an old threat: far-right extremism in the ranks. 'Swift action must be taken.'" Online at <https://www.latimes.com/california/story/2021-02-17/lapd-other-police-agencies-struggle-with-where-to-draw-the-line-with-political-extremism-in-their-ranks>

⁴ Michael German. *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*. The Brennan Center for Justice, August 27, 2020. Online at <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>

⁵ Rashad Robinson, *The Guardian*, August 21, 2019, "We can't trust police to protect us from racist violence. They contribute to it." Online at <https://www.theguardian.com/commentisfree/2019/aug/21/police-white-nationalists-racist-violence>

⁶ Signatures with date and time stamps are on file with Care First South Pasadena: carefirstsouthpas@gmail.com.

13. Caitlin Lainoff
14. Cassandra Terhune
15. Che Hurley
16. Chris Patterson
17. Christine B.
18. Cole Patterson
19. Colin Burgess
20. Danny Le
21. Danyelle Atkins
22. Dennis
McCullough
23. Drew Tager
24. Elana Mann
25. Ella Hushagen
26. Fahren James
27. Frances jobs
28. Gayle Oswald
29. Gretchen Schulz
30. Helen Tran
31. harrums81@gmail.
com
32. Isabel Barbera
33. Ivan E Cabrera
34. Janet N McIntyre
35. Jessica Whittet
36. John Oswald
37. John Srebalus
38. Jonathan Ghiloni
39. Jonathan Lee
40. Julia Moreno Perri
41. Julie Kim
42. Katie Neuhof
43. Kimiko Elizondo
44. Laboni Hoq
45. Liana Derus
46. Matthew Barbato
47. Megan Adams
48. Morgan BeVard
49. Nancy Hurley
50. Oliver Wang
51. Pablo Marrero
52. Page Phillips
53. Paige Fillion
54. Phoenix Bekkedal
55. Phung Huynh
56. Remaya M.
Campbell
57. Richard Elbaum
58. Riko Enomoto
59. Rose McCullough
60. Ross McLain
61. Ry Patterson
62. Sandy Shannon
63. Sean Meyer
64. Shandor Garrison
65. Valorie Battle
Haddock
66. Victoria Patterson
67. Will Hoadley-Brill
68. William Kelly
69. Willie Wu

Attachment A

The audit should examine and make public its findings on the following topics as part of the Operational Audit:

- A breakdown of major categories for calls made to the police department, e.g., how many are related to mental illness and welfare checks, unhoused people, shoplifting, violent crimes, etc.
- An analysis of the time and resources spent by SPPD in responding to these call categories, including the cost of responding to various categories with recommendations on how costs can be reduced, such as by establishing a mobile crisis response team.
- An analysis of staffing levels in relation to work load, including use of overtime.
- An overall management analysis looking for inefficiencies and how operations can be made more efficient and streamlined.
- An analysis of SPPD expenditures, including for contracts, equipment, vehicle operation and maintenance, etc.
- An analysis of adherence to SPPD policy by officers and other department staffers, with recommendations for any needed improvements.
- An analysis of SPPD's role in traffic safety, including recommendations on options that can reduce SPPD expenditures, such as investments in engineered traffic controls and infrastructure modifications that improve traffic safety 24/7/365 year in and year out.
- An analysis of SPPD involvement and expenditures related to code enforcement, with recommendations on how enforcement could be shifted to administrative staff.
- An analysis of how services to the unhoused could be improved and how unhoused people can be successfully housed.

The audit should examine and make public its findings on the following topics as part of the Racial Bias Audit:

- Officers' compliance with the South Pasadena Police Department Policy Manual ethics provisions, among others: the Code of Ethics as a Law Enforcement Officer; Section 1033.4 (Prohibited Speech, Expression and Conduct); and Section 1033.4.1 (Unauthorized Endorsements and Advertisements).
- Officers' social media posts and electronic communications with one another, including but not limited to email, text message, direct message via social media applications, and other electronic messaging systems, for indicia of extremist and/or prejudiced viewpoints, as well as any partisan activity or views that may have been discussed using such media during work hours or using city accounts and equipment.
- Arrests and stops executed by SPPD as a whole and by individual officers, broken out by arrestee's age, race/ethnicity, gender, city where arrestee resides, type of offense (e.g., felony, misdemeanor, other), charge, and each officer involved in the arrest, including

supervisors, Watch Commanders and department leadership to the extent they were involved in any way.⁷

- Incidents or potential crimes motivated by hate or other bias reported to SPPD.
- Stops (including traffic stops and other brief stops) executed by SPPD, broken out by age, race/ethnicity, gender, city where arrestee resides, basis for reasonable suspicion, and outcome of the stop, and each officer involved in the arrest, including supervisors, Watch Commanders and department leadership to the extent they were involved in any way.⁸
- Data related to community-initiated calls, taken from computer-aided dispatch records, that resulted in a response from SPPD from January 1, 2019 to present, and further broken down by call type, activities involved, response time, and SPPD unit involved.
- All complaints against and investigations into SPPD officers at every rank related to bias, prejudice, and/or profiling, and internal communications and reports related to compliance with the South Pasadena Police Department Policy Manual's anti-bias provisions, including section 401 *et seq.*
- All training provided to SPPD officers at all levels, including and up to the Chief of Police, regarding their obligations to identify, investigate, report on, and supervise the handling of incidents and potential crimes motivated by hate or other bias, as required by Penal Code section 13519.6 and SPPD Policy Manual section 319.5. This review should include training regarding bias-based policing as well as any "refresher course" regarding "changing racial, identity and cultural trends," as referenced by Penal Code section 13519.4, and SPPD Policy Manual section 401.7.
- The Department's "periodic reviews" of potential bias-based policing which Supervisors are required to undertake and "document" pursuant to SPPD Policy Manual section 401.5.
- Data and reports that SPPD compiled for and/or submitted to the California Attorney General regarding potential incidents of bias-based policing pursuant to Penal Code sections 12525.5 and 13020, and SPPD Policy Manual section 401.8.

⁷ This information has been subject to several requests pursuant to the California Public Records Act (CPRA). In response to the South Pasadena Youth for Police Reform's request for such data, the city directed the group to the California Department of Justice's website. It is not possible to pull reports from the DOJ's website that provide the data sought. The city produced arrest reports in response to Care First South Pasadena's request. But the reports are missing arrestees' ethnicity (coding all Hispanic and non-Hispanic people as "white") and city of residence. Ethnicity and city of residence are reported in the Department's crime reports. There is no doubt the city possesses the information sought.

⁸ This information has been subject to at least one request pursuant to the CPRA. The city represented to members of the community that it does not maintain any data related to stops, and it will not adopt a new system to track stop data until 2023, under a recent change in state law. While it may be that stop data is not maintained in any centralized way, we ask the city to work with the auditor to identify data sources related to stops that may be available, even if it is incomplete and imperfect.

From: Michael Siegel
Sent: Wednesday, October 6, 2021 9:57 AM
To:
Subject: Safety Commission
Walk to School Day/Public Officials

CAUTION: This email originated from outside of the City of South Pasadena. Do not click links or open attachments unless you recognize the sender and know the content is safe.

This email is also to be entered into public comment for today's council meeting and the next Public Safety Commission meeting.

Today is Walk to School Day, an important reminder that something as simple as walking our children to school can help us positively impact health, environment and the livability of our great city.

I applaud the City for actively getting involved in this event, with city staff and fire and police representation and engagement.

However, I was troubled when walking my children into Marengo Elementary this morning to see the four firefighters posted at the gates not wearing masks and talking closely with the children that passed them.

Our small children do not have a choice currently on getting a vaccine, they are some of the most vulnerable citizens in our community. We must be extra vigilant to protect them. This is especially true of representatives of our city government.

To children this age, firefighters are to be looked up to and emulated. They are examples to our children - children will follow their lead, and yet these firefighters were the only ones near school today who were not wearing a mask. Firefighters and police officers are supposed to be the servants of our community, protecting and ensuring public health. And unfortunately, today the opposite was happening.

It's even more concerning knowing that firefighters and police officers in LA county are more likely to be unvaccinated. Additionally, firefighters in LA County are the most likely of all government employees to contract (and spread) COVID. Per the LA Times, fire stations in LA County reported the most outbreaks locally, combining for a whopping 119 outbreaks, contributing 764 cases out of just over 2,500 of all government employees in the county. That's over 30% of cases attributed to just firefighters! These are first responders who regularly have close contact with the public, particularly our unvaccinated children, which absolutely increases their risk of contracting coronavirus.

How are we supposed to feel safe when those in charge of public safety are flouting rules and posing a threat?

Not only should the city and fire department be ashamed of this conduct, it is also absolutely prohibited by South Pasadena's own RESOLUTION NO. 7713 (via the County of Los Angeles Public Health Dept). Within, Paragraph 5 requires all government employees must follow the "Social (Physical) Distancing Protocol" which is defined in Paragraph 19 as "Wearing a mask when whenever an individual leaves their home or place of residence, and when an individual is or can be in contact with or walking by or past others who are nonhousehold members in both public and private places, whether indoors or outdoors."

This resolution will be reauthorized at tonight's council meeting, and must be followed.

How are the Council, the City Manager, the Public Safety Commission and the Fire Chief going to ensure our safety? What enforcement and punishment will be meted out to employees who do not follow orders and are a risk to the public?

I ask all here to take action and ensure our safety.

Thank you,

Michael Siegel



**MONDAY, SEPTEMBER 13, 2021
MINUTES OF THE REGULAR MEETING OF THE
PUBLIC SAFETY COMMISSION
OF THE CITY OF SOUTH PASADENA**

CALL TO ORDER

A Regular Meeting of the Public Safety Commission was called to order by Chair Alsarraf on Monday, September 13, 2021, at 8:33 a.m., in the Amedee O. “Dick” Richards, Jr., Council Chamber, located at 1424 Mission Street, South Pasadena, California.

ROLL CALL

Present: Commissioners: Ed Donnelly, Grace Liu Kung, Jeremy Ding, Lisa Watson, Lindsay Angelats, Vice-Chair Cao and Chair Amin Alsarraf.

Absent: None
Officials

Present: City Council Liaison Jon Primuth, Police Chief/Staff Liaison Brian Solinsky, Fire Operations Division Chief/Staff Liaison Eric Zanteson, and Police Department Clerk/Recording Secretary Laura Mendez.

Absent: Fire Chief/Staff Liaison Paul Riddle

PUBLIC COMMENTS AND SUGGESTIONS

1. Kevin Bibayan the owner of the Arco gas station submitted a Public Comment that has been uploaded to the City Website under Public Safety Commission Agenda for September 13, 2021.

ACTION/DISCUSSION

2. Minutes of the Public Safety Commission Meeting of September 13, 2021

MOTION BY COMMISSIONER ANGELATS, AND SECOND BY COMMISSIONER

LIU KUNG, CARRIED 6-0, to approve the Minutes of the September 13, 2021 Public Safety Commission Regular Meeting.

Commissioner Cao Abstained

CITY MANAGER SPOKE TO THE COMMISSIONERS AND STATED HOW HAPPY SHE WAS TO BE THERE AND FINALLY ABLE TO MEET THEM AND SHE IS LOOKING FORWARD TO WORKING WITH THEM AND GETTING TO KNOW THE ISSUES AND CONDUCT ASSESMENTS OF THE POLICE DEPARTMENT TO BETTER UNDER STAND THE ORGANIZATION.

3. Firearms Safe and Storage Ordinance-Lieutenant Jacobs

Lieutenant Jacobs gave a presentation on the South Pasadena Ordinance for Safe Storage of Firearms inside a residence. There are several California State Laws that regulate storage and access to fire arms such as Penal Codes that define the crime of criminal storage of a firearm.

The South Pasadena Ordinance would require all firearms in a residence to be securely stored in a locked container or disabled with a fire lock. For detailed information about the Penal Codes please check under The Public Safety Agenda that was uploaded on the City website.

The Public Safety Commission should consider three alternatives 1. Accept the draft Ordinance and recommend the City Council review, 2. Modify the draft Ordinance, or 3. Choose not to move forward with the recommendation of the Council.

MOTION BY VICE-CHAIR CAO, AND SECOND BY COMMISSIONER DING, CARRIED 7-0, to direct staff to go back and look into the issues that were discussed today and come back to the Commission at a future date with revised language to the Ordinance.

4. Unarmed Traffic Enforcement-Ed Donnelly and Lisa Watson

Commissioner Ed Donnelly stated the possibility of using unarmed officers in the City of South Pasadena, he gave an overview of their findings. The goal of unarmed officers is to provide more equity and on the way officers are enforcing traffic laws, statistics show that during the day people of color are pulled over more in the State of California. Currently, the South Pasadena Police Department is implementing a new dispatch computer system program and it will allow for us to collect data after each traffic stop and we can use it locally for our own analysis.

We looked at different approaches to unarmed traffic enforcement, we looked at it nationally and could not find any formal program that is in place right now, however we found three that were proposed one in Berkeley CA, Cambridge MA, and one in Philadelphia. Berkeley and Cambridge ran into some issues with the Penal Codes because non-sworn officers could not issue citations so they have abandoned that

program. Data is provided on the attachment uploaded to the City Website under Public Safety Commission.

Recommendation made not to move forward with Unarmed Traffic Enforcement Program.

MOTION BY COMMISSIONER DING, AND SECOND BY COMMISSIONER LIU KUNG, CARRIED 7-0, to not move forward with implementing Unarmed Traffic Enforcement.

5. School Safety

Police Chief Solinsky stated this topic was to be discussed at the previous meeting in August, a lot of concerns for the beginning of the school year with a lot of kids returning back from the long Covid break. The Police Department from the beginning of the school year has provided extra patrol on all the schools, traffic enforcement, and heavy extra presence in and around the school during the time when kids walked to school and home from school. This is more of a discussion of what the commission thought, what they have seen over the last month or so, and with Commissioner Kung connection with the schools and have some information on how to approach this.

COMMUNICATIONS

1. City Counsel Liaison Communications

City Council Liaison Primuth stated that the Annual Audit was received, the City has really accelerated the ability to report and understand and get the audit in place on time to understand its financial situation. I wanted to give credit to the Interim Finance Director Elaine Aguilar, the Finance Team and the Fiancé Commission and Ad Hoc. Also an active Ordinance that will ban gas leaf blowers effective next year during the fall.

Staff Liaison Communications

Police Chief Solinsky informed on October 11th we will be starting out Citizens Police Academy and that is open to all South Pasadena Residents that are 18 and over. I also wanted to introduce out New Management Analyst Alison Wehrle.

Fire Operations Division Chief Eric Zanteson stated that Chief Riddle had nothing to report, Covid cases are going down and significant spikes in the City.

2. Commissioner Communications

Commissioner Angelats stated she appreciated the work Commissioner Donnelly and Watson did for the Unarmed Traffic Enforcement.

Commissioner Liu Kung informed that public schools have started up again as of August 12, it is in person, but an option for independent study was available, masks are required indoors and in all campuses. Kids are positive and excited to be attending

school, we have a school dashboard under the school website, no positive Covid cases as of yet and none transmitted at school. Schools provide weekly testing for their staff and their students, vaccination clinics are being considered like this summer. Social and emotional services have been given to families. School is trying to be as normal as possible and not many group activities or gathering have taken place.

Chair Alsarraf stated the uncertainty of the next meeting being in person or hybrid and he did appreciate the fact that this time they were able to have the meeting through hybrid.

ADJOURNMENT

Chair Alsarraf adjourned the meeting at 9:52 a.m.

Respectfully Submitted:

Approved By:

Laura Mendez /
Recording Secretary

Amin Alsarraf /
Chair



Public Safety Commission Agenda Report

ITEM NO. 3

DATE: October 18, 2021

FROM: Brian Solinsky, Chief of Police
Alison Wehrle, Management Analyst

SUBJECT: **Discussion on Potential New Ordinance for the South Pasadena Municipal Code Regarding Prohibiting the Sale of All Tobacco Products**

Recommendation

It is recommended that the Public Safety Commission:

1. Hold a discussion on a potential new ordinance for the South Pasadena Municipal Code regarding prohibiting the sale of all tobacco products; and
2. Provide a recommendation to the City Council regarding a new ordinance for the South Pasadena Municipal Code regarding prohibiting the sale of all tobacco products.

Discussion/Analysis

At the July 21, 2021 regularly scheduled meeting, City Council directed staff to study and recommend key policy provisions for an ordinance that would ban the sale of all tobacco products in South Pasadena.

After researching the issue, staff determined that these goals could be accomplished in an amendment to the existing tobacco regulations, South Pasadena Municipal Code (SPMC) Chapter 18, to ban the sale of tobacco products. The attached ordinance would repeal the existing Tobacco Retailer Permit Ordinance (SPMC 18.101, *et seq*) and replace such with a prohibition of tobacco sales citywide. The proposed ordinance is presented without redline and underscore of the existing code for legibility at this time.

While many cities have prohibited the sale of flavored tobacco products, only two other cities in the United States, Beverly Hills and Manhattan Beach, have passed similar bans on all tobacco products.

According to the Center for Disease Control and Prevention (Fast Facts, 2020), Cigarette smoking causes more than 480,000 deaths each year in the United States. Smoking is associated with more deaths than the following causes combined:

- o Human immunodeficiency virus (HIV)
- o Illegal drug use
- o Alcohol use

Discussion on Prohibiting the Sale Of All Tobacco Products

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- Motor vehicle injuries
- Firearm-related incidents

Tobacco use is linked to several chronic diseases, including cancer, cardiovascular disease, emphysema, chronic obstructive pulmonary disease, pneumonia, diabetes, and arthritis. Exposure to secondhand tobacco smoke also poses a risk for chronic disease, coronary heart disease, stroke, and lung cancer.

According to the California Department of Public Health, California Tobacco Control Program (CTCP), nearly 12,000 young people try their first cigarette every day, with approximately 68% of adult smokers in California starting to smoke before the age of 18. It is estimated that more than 440,600 Californian children living today will die prematurely because they will become smokers.

The University of California at San Francisco conducted a study (Findings from the California Tobacco Program Media Campaign Evaluation Endgame Questions, September 2021) and found that residents in Los Angeles County between the ages of 18-55 years old overwhelmingly supported the phasing out of cigarette sales within the next five years. The survey was conducted between August 2019 and August 2021 with respondents from multiple ethnic and cultural backgrounds.

Background

Restricting the sale of tobacco products differs from restricting smoking activity. The following two paragraphs distinguish these two concepts.

Smoking Activity

To promote healthy living, the City has long supported no-smoking policies. In 2018, the City prohibited smoking on public sidewalks, walkways, parkways, curbs, and gutters. One of the primary goals of the City's aggressive approach with these policies is to protect the public from unwanted exposure to secondhand smoke.

Sale of Tobacco Products

While the City prohibits smoking in many locations, the City does allow the sale of tobacco products through a regulatory permit process. On February 18, 2009, the City Council formally adopted an ordinance (2184) requiring establishments selling tobacco products to obtain a Tobacco Retailer Permit, renewable every year.

The South Pasadena Municipal Code (SPMC) § 18.102(a) states: Tobacco Retailer Permit Required. It is unlawful for any person to act as a tobacco retailer in the city without first obtaining and maintaining a valid tobacco retailer permit ("permit") pursuant to this article for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer permit is a nuisance as a matter of law.

SPMC §18.101(g) defines a tobacco product as "Tobacco product" means any substance containing tobacco leaf, including, but not limited to, cigarettes, cigars, pipe tobacco, hookah

Discussion on Prohibiting the Sale Of All Tobacco Products

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tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

Legal Context

The City Attorney is evaluating the legal implications of implementing a tobacco sales prohibition ordinance. Initial indications are that cities have the authority to enact such local regulations. Given that only two other cities in Southern California have adopted a comprehensive ban on all tobacco products, there remains a possibility that the City could face legal challenges. The City should be willing to appropriately address these challenges, including litigation expenses with the tobacco industry. There is potential that some anti-smoking advocacy organizations would potentially collaborate with the City and provide assistance to address legal challenges. There is also the potential litigation for litigation by the businesses currently selling tobacco products within the City.

Policy Considerations

The proposed action is consistent with active living and mental well-being in the "Our Healthy Community" section of the 2020 General Plan Update. This action is also supported by promoting improved air quality referenced in the 2020 Climate Action Plan.

Business Impact Mitigation

Several of the tobacco retailers contacted, including gas stations, convenience stores, and the cigar lounge, have provided various figures as to the extent to which a ban on tobacco sales could impact or affect their businesses. Some have estimated between 15-20% of their revenue is from tobacco sales.

Staff has considered various options to assist small businesses in mitigating the impact of revenue lost from tobacco sales. Staff members met with a representative from the Small Business Development Center ("SBDC") at Pasadena City College and discussed options to support the small businesses within the City, including providing a presentation of local businesses' services at a Chamber of Commerce meeting. SBDC offers free one-on-one advising with small business experts to help them avoid many of the common problems faced by entrepreneurs. Other benefits include locating and applying for small business loans, including financing and educational workshops and events.

The representative also informed staff about the SCORE program, which is the nation's largest volunteer, expert business mentoring program. A resource partner for the Small Business Administration, the SCORE business mentorship program gives entrepreneurs a unique opportunity to receive personalized counseling from someone with more than 20 years of experience in their industry. Mentors retain accessibility with clients via email and schedule in-person appointments to meet with and mentor both existing and future business

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owners. There are also a large variety of hosted webinars, workshops, and interactive online training modules available for businesses to participate in.

Staff will look into scheduling a forum to connect business owners with these resources through its partnership with the Chamber of Commerce. The City already pays a membership fee to provide one-on-one advising services locally in South Pasadena. Consultants may meet business owners as often as necessary at their business or other available locations such as the Chamber of Commerce. Provided that a retailer is showing progress in meeting goals defined by SBDC and the retailer, the number of consultations a business may receive is unlimited.

Tobacco Retailers in South Pasadena

There are currently six establishments with active City-issued Tobacco Cigarette Retailer Permits. One retailer is a cigar lounge, Fair Oaks Cigar, which sells tobacco and liquor-related products and allows smoking inside. Two are grocery stores, two are gas stations, and one is a convenience and pharmacy store. There are an additional five retailers selling tobacco products that do not have permits. They consist of one grocery store, two convenience stores, and two gas stations.

Staff Composition of Existing Retailers

Category	Number of Retailers
Cigar lounges	1
Grocery stores	3
Gas stations	4
Associated with bed and breakfast	0
Convenience stores or pharmacies	3
Total	11

The magnitude to which a business relies on revenue generated from tobacco sales varies upon its category and business model. For a large grocery store selling a higher volume of various goods, tobacco-related products might represent a small or even insignificant portion of overall sales.

For small businesses such as gas stations or convenience stores, tobacco sales might represent a significant portion of revenue.

For a cigar lounge, an ordinance prohibiting tobacco sales would likely force the businesses to close down. A cigar lounge relies on tobacco sales as a primary source of revenue, while other businesses may have existing inventory and/or lease agreements. Therefore, a sufficient time for implementing such an ordinance should be evaluated.

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Staff has discussed options with experts in retail tobacco sales, who have indicated that a phased approach to prohibiting tobacco sales would be appropriate and worked well for both Beverly Hills and Manhattan Beach. Considering these issues, staff recommends adopting a provision to exempt the one existing cigar lounge, Fair Oaks Cigars, from the ban. Other businesses that do not rely solely on tobacco sales revenue would not be issued new or renewal permits (permits must be renewed annually or will expire). Under this approach, tobacco products would still be available for sale at one location in South Pasadena, yet others sell off their inventory and explore other products and business models.

Summary of Public Outreach and Engagement

Staff has notified retailers multiple times through in-person visits, mail, email, and telephone of upcoming meetings and discussions and have been in contact with several business owners who have participated in public discussions. The City's website has been continually updated with the latest information, and multiple notices were disseminated notifying retailers and interested parties of public meetings and Commission recommendations. Additionally, the following public meetings and outreach have taken place:

- August 3, 2021 – South Pasadena Chamber of Commerce Regular Meeting;
- August 18, 2021 – Outreach to Fair Oaks Cigar
- September 8-9, 2021 – Police Department staff conducted in-person outreach at all retail establishments that sell tobacco products in the City.
- September 27, 2021— Police Department staff mailed noticing to all retail establishments that sell tobacco products in the City, and emailed noticing to businesses with email addresses on file.
- October 7, 2021 – Police Department staff provided additional in-person outreach reminders
- October 18, 2021 – Public Safety Commission Regular Meeting
- Date TBD – Chamber of Commerce Presentation Meeting

Key Provisions of the Proposed Ordinance

The proposed ordinance includes two modifications to Article VI of Chapter 18 of the South Pasadena Municipal Code. The proposed ordinance:

1. States that it shall be unlawful for any Retailer to sell or offer for sale any Tobacco Product; and
2. Establishes a six-month delay from the tobacco ban for any retailer operating at the effective date of the Ordinance. This delay provides all existing tobacco retailers with six months to sell their remaining inventory of tobacco products. This provision is recommended to avoid any takings challenge (1). Allowing tobacco retailers a reasonable time to amortize the value of any investment in property, i.e., selling any remaining tobacco products that cannot be used after the prohibition takes effect.

1. *Metromedia, Inc. v. City of San Diego*, 28 Cal.3d 848, 882 (1980), reversed on other grounds, 453 U.S. 490 (1981); *Safeway Inc. v. City & Cty. of San Francisco*, 797 F. Supp. 2d 964 (N. D. Cal. 2011).

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Ordinances go into effect 31 days after adoption by City Council. The ordinance includes a six-month implementation period after the effective date of the ordinance. This allows the City to notify tobacco retailers in South Pasadena and time for tobacco retailers to sell their existing inventory of tobacco products and comply with the ban. Tobacco retailers have indicated that they could face a financial strain if an ordinance were to go into effect immediately. If City Council were to adopt the ordinance as presented, the implementation timeline would be as follows:

- December 1, 2021: First Reading of Ordinance
- December 15, 2021: Second Reading
- January 15, 2022: Ordinance Takes Effect
- July 15, 2022: Enforcement Takes Effect

Enforcement

SPMC 18.113 already sets forth the enforcement provisions of the existing City's Tobacco Retailer Permitting Regulations. The proposed ordinance would be subject to these same enforcement provisions. Additionally, the Municipal Code includes a provision for compliance monitoring that allows a "youth decoy" to participate in compliance checks supervised by a peace officer or code enforcement official of the City. The City intends to continue in this manner with already established enforcement mechanisms.

Fiscal Impact

Should City Council choose to adopt a ban on the sales of all tobacco products, the most direct fiscal impact to the City would be the elimination of revenue from issuing the Tobacco Retailer Permits. The 2021/22 fee for these permits is \$120, paid annually by each retailer. Since there are currently eleven retailers in the City, staff estimates the loss of permit revenue to be approximately \$1,320 using FY 2021/22 fee amounts. The permit revenue is a cost-recovery fee; therefore, staff time involved in the administration and enforcement of the permits could be reallocated to other activities.

Environmental Considerations

The action considered is exempt from the California Environmental Quality Act (CEQA), as it is not considered a "project" pursuant to Section 15378(b)(5) of CEQA Guidelines. The action involves an organizational or administrative activity of government that will not result in a direct or indirect physical change in the environment.

Public Notification of Agenda Item

The public was made aware that this item was to be considered this morning by virtue of its inclusion on the legally publicly noticed agenda, posting of the same agenda and reports on the City's website.

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Attachments:

- A. Draft ordinance regarding "Prohibition of Tobacco Sales."
- B. SPMC Article VI Chapter 18
- C. CDC Fast Facts
- D. Findings from the California Tobacco Program Media Campaign Evaluation Endgame Questions
- E. Ordinance 2184
- F. Not for Sale: The State Authority to End Cigarette Sales
- G. South Pasadena Climate Action Plan
- H. *Metromedia, Inc. v. City of San Diego*, 28 Cal.3d 848, 882 (1980)
- I. *Safeway Inc. v. City & Cty. of San Francisco*, 797 F. Supp. 2d 964 (N. D. Cal. 2011)
- J. Public notice provided to retailers
- K. Public comment received as of October 14, 2021 at 4:00pm

ATTACHMENT A
Draft ordinance regarding "Prohibition of Tobacco
Sales."

ORDINANCE NO. [_____]

AN ORDINANCE OF THE CITY OF SOUTH PASADENA AMENDING PASADENA MUNICIPAL CODE CHAPTER 18, ARTICLE VI TO PROHIBIT THE SALE OF ALL TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES.

WHEREAS, tobacco use causes disease and death and constitutes an urgent public health threat as it remains the leading cause of preventable death and disability in the United States, with 480,000 people dying prematurely in the United States from smoking-related diseases every year. In the United States, smoking is responsible for about one in every five deaths, more deaths each year than human immunodeficiency virus (HIV), illegal drug use, alcohol use, motor vehicle injuries, microbial agents, and toxic agents combined.

WHEREAS, cigarette smoking kills 40,000 Californians annually, and is the cause of more than one in four cancer deaths in California.

WHEREAS, tobacco use can affect nearly all organ systems and is responsible for 87 percent of lung cancer deaths, 79 percent of all chronic obstructive pulmonary disease deaths, and 32 percent of coronary heart disease deaths. According to the World Health Organization, tobacco use accounts for the greatest cause of death worldwide, responsible for nearly 6 million deaths per year. Over 16 million Americans have at least one disease caused by smoking.

WHEREAS, secondhand smoke, according to the Centers for Disease Control and Prevention, causes stroke, lung cancer, and coronary heart disease in adults. In addition, it increases risks for sudden infant death syndrome, respiratory symptoms, middle-ear disease, and slows lung growth in children.

WHEREAS, smoking costs California \$13.29 billion in annual health care expenses, \$3.58 billion in Medicaid costs caused by smoking, and \$10.35 billion in smoking-caused productivity losses.

WHEREAS, unless smoking rates decline, 441,000 of California youth alive today will die prematurely. California youth tobacco usage is increasing. The U.S. Surgeon General declared youth e-cigarette use an “epidemic,” and 1 in 10 Los Angeles County high school students say they are current e-cigarette users.

WHEREAS, the City of South Pasadena recognizes that the use of tobacco products has devastating health and economic consequences.

WHEREAS, cigarette butts are the most-littered object in the world and the item most often found in beach cleanups globally. Cigarette butts contribute nonbiodegradable plastic, nicotine, heavy metals, pesticides, and other toxic substances to land and marine environments, down to the bottom of the oceans. California’s Trash Amendments, a standard under the federal Clean Water Act, will soon require municipalities to prevent or capture trash such as cigarette butts and other tobacco product waste before it enters state waterways.

WHEREAS, it is the intent of the Council of the City of South Pasadena to provide for the public’s health, welfare, and safety by protecting its residents, especially young people, from the inherent dangers of tobacco use.

NOW THEREFORE, THE COUNCIL OF THE CITY OF SOUTH PASADENA DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council hereby amends the South Pasadena Municipal Code Chapter 18, Article VI to read as follows:

ARTICLE VI – PROHIBITION OF THE RETAIL SALE OF TOBACCO PRODUCTS AND ELECTRONIC SMOKING DEVICES

[18.101] – DEFINITIONS.

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

[(a) “Cigar” means any roll of tobacco other than a cigarette wrapped entirely in tobacco or any substance containing tobacco and weighing more than 4.5 pounds per thousand.]

[(b) “Cigar Lounge” means a tobacco retailer that (1) contains an enclosed area in or attached to the tobacco retailer that is dedicated to the use of cigars, (2) does not sell any tobacco products other than cigars, and (3) only permits patrons who are the state minimum age to purchase (currently 21 years of age or older) to enter the premises.]

(c) “Department” means the finance department and any agency or person designated by the department to enforce or administer the provisions of this article.

(d) “Electronic Smoking Device” means any device that may be used to deliver any aerosolized or vaporized substance to the person inhaling from the device, including, but not limited to, an e-cigarette, e-cigar, e-pipe, vape pen, or e-hookah. Electronic smoking device includes any component, part, or accessory of the device, and also includes any substance that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine and whether or not sold separately. Electronic Smoking Device does not include drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

(e) “Person” means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(f) “Sale” or “Sell” means any transfer, exchange, barter, gift, offer for sale, or distribution for a commercial purpose, in any manner or by any means whatsoever.

(g) “Tobacco Product” means: 1) any product containing, made of, or derived from tobacco or nicotine that is intended for human consumption or is likely to be consumed, whether inhaled, absorbed, or ingested by any other means, including but not limited to, a cigarette, a cigar, pipe tobacco, chewing tobacco, snuff, or snus; 2) any electronic smoking device as defined in this section and any substances that may be aerosolized or vaporized by such device, whether or not the substance contains nicotine and whether or not sold separately; or 3) any component, part, or accessory of 1) or 2), whether or not any of these contains tobacco or nicotine, including but not limited to filters, rolling papers, blunt or hemp wraps, hookahs, and pipes. “Tobacco Product” does not mean drugs, devices, or combination products authorized for sale by the U.S. Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act.

(h) “Tobacco Retailer” means any person who sells, exchanges, or offers to sell or exchange, for any form of consideration, tobacco products or electronic smoking devices. This definition is without regard to the quantity of tobacco products sold, offered for sale, exchanged, or offered for exchange.

(i) “Tobacco Retailing” means engaging in the activities of a tobacco retailer.

[18.102] – PROHIBITIONS.

(a) It shall be unlawful for any person to sell or offer for sale a tobacco product in the city.

[(b) This section shall not apply to a cigar lounge that:

- (1) is in compliance with State law;
- (2) does not allow the use of any tobacco products, except cigars, on the premises;
- (3) for all cigar sales, conducts them in-person in the location licensed as of [effective date];
- (4) holds a valid tobacco retailer permit in the city and is operating as a cigar lounge as of [effective date];
- (5) has not changed ownership after [effective date];
- (6) has not expanded in size or changed its location after [effective date]; and
- (7) does not close for more than [60 consecutive days] after [effective date].]

[18.XXX] – ENFORCEMENT.

(a) Compliance with this article shall be monitored by the department. The city may designate any number of additional persons to monitor compliance with this article.

(b) Violations of this article are subject to a civil action brought by the city prosecutor or the city attorney, punishable by a civil fine not less than two hundred fifty dollars and not exceeding one thousand dollars per violation.

(c) Violations of this article may, in the discretion of the city prosecutor, be prosecuted as infractions or misdemeanors when the interests of justice so require.

(d) Any violation of this article is hereby declared to be a public nuisance.

(e) The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity. In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by a civil action brought by the city attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief. (Ord. No. 2258, § 25, 2013.)

(f) For the purposes of the civil remedies permitted under this article and state law, each day on which a tobacco product or electronic smoking device is offered for sale in violation of this article, and each individual tobacco product or electronic smoking device that is sold, or offered for sale in violation of this article, shall constitute a separate violation of this article.

[18.XXX] – IMPLEMENTATION. The City shall not enforce this article until [effective date + 6 months].

[18.XXX] – HARDSHIP EXEMPTION.

(a) An application for a hardship exemption to extend the time to comply with this article may be filed pursuant to this section.

(b) The term of any hardship exemption granted under this article shall be no longer than 12 months beyond the effective date of this article.

(c) Any tobacco retailer [, other than a cigar lounge,] that wishes to sell tobacco products on or after [July 1, 2022], may apply for one hardship exemption. A tobacco retailer must submit a complete

application for a hardship exemption at any time between [January 1, 2022, and April 31, 2022]. Such application shall be made in writing on a form prescribed by the department and shall be accompanied by the filing fee established by resolution of the City Council. The tobacco retailer shall bear the burden of proof in establishing, by a preponderance of the evidence, that the application of this [Ordinance No.____], amending South Pasadena's Municipal Code Chapter 18, to the tobacco retailer's business is unreasonable, and will cause significant hardship to the tobacco retailer by not allowing the tobacco retailer to recover his or her investment backed expectations. The tobacco retailer applying for the exemption shall furthermore be required, in order to meet its burden of proof, to submit the documents set forth in this section.

(d) A complete application for a hardship exemption shall include the following:

- (1) The tobacco retailer's name and street address of business;
- (2) The address to which notice is to be mailed, at the tobacco retailer's option, a telephone number and email address;
- (3) The tobacco retailer's signature;
- (4) A declaration, under penalty of perjury, that all the information in the application is true and correct;
- (5) The term of the requested extension not to exceed the maximum length of time permissible under [subsection (b)] of this section;
- (6) Documentation relevant to the information requested in [subsection (e)] of this section; and
- (7) The required filing fee.

(e) In determining whether to grant a hardship exemption to the tobacco retailer, and in determining the appropriate length of time that the tobacco retailer will be authorized to continue retailing, the hearing officer, or City Council on appeal by the tobacco retailer, may consider, among other factors:

- (1) The percentage of the retail sales over the last three years that have been derived from tobacco products;
- (2) The amount of investment in the business;
- (3) The present actual and depreciated value of any business improvements dedicated to the retail sale of tobacco products;
- (4) The applicable Internal Revenue Service depreciation schedule or functional non-confidential equivalent;
- (5) The remaining useful life of the business improvements that are dedicated to the sale of tobacco products;
- (6) The remaining lease term of the business, if any;
- (7) The ability of the retailer to sell other products;
- (8) The opportunity for relocation of the business and the cost of relocation;

(9) A business plan demonstrating how long the business will need to sell tobacco products to recoup any investment backed expectations, and a plan for phasing out the sale of those products; and

(10) Information submitted by City staff, including but not limited to: information regarding the prevalence of tobacco use; opportunities for business assistance in finding alternatives to selling tobacco products; costs associated with tobacco use including healthcare and lost productivity costs; and the retailer's history of compliance with federal, state and local laws relating to tobacco control and other business regulations.

(f) The hardship exemption hearing shall be conducted by an Administrative Hearing Officer appointed by the City Council. Written notice of the time and place of the hearing shall be given at least 10 calendar days prior to the date of the hearing to the retailer by the City either by causing a copy of such notice to be delivered to the retailer personally or by mailing a copy thereof, postage prepaid, addressed to the retailer at the address shown on the hardship exemption application.

(g) Within 45 days after a completed application is filed, the hearing officer shall open the hearing on the hardship exemption. The hearing officer shall receive and consider evidence presented by the retailer and City staff, and shall determine whether to grant or deny the hardship exemption, and if granting the hardship exemption, the length of time that the retailer will be permitted to operate. The hearing officer shall make written findings in support of the decision. The decision of the hearing officer shall be final and conclusive, unless a timely and complete appeal is filed by the retailer with the City Clerk pursuant to subsection (h) of this Section.

(h) Any decision of the hearing officer may be appealed by the tobacco retailer by filing a complete notice of appeal with the City Clerk within 15 days after notice of the decision was mailed to the applicant. To be deemed complete, the notice of appeal shall be signed by the tobacco retailer, shall state the grounds for disagreement with the decision of the hearing officer, and shall be accompanied by the filing fee established by resolution of the City Council.

(i) Failure of any person to file a timely appeal in accordance with the provisions of this section shall constitute an irrevocable waiver of the right to an administrative hearing and a final adjudication of the hardship exemption.

(j) A tobacco retailer may continue to sell tobacco products while a hardship exemption application is pending before a hearing office or on appeal to the City Council.

(k) Only those matters or issues specifically raised by the appellant in the appeal notice shall be considered in the hearing of the appeal.

[18.XXX] – SEVERABILITY. If any portion or provision of this Ordinance or its application is deemed invalid by a court of competent jurisdiction, the City Council intends that such invalidity will not affect the validity of the remaining portions or provisions or their application and, to this end, the provisions of this Ordinance are severable.

[18.XXX] – CERTIFICATION AND PUBLICATION. The City Clerk shall certify to the passage and adoption of this Ordinance and shall cause this Ordinance to be published within 15 days after its passage, in accordance with Section 36933 of the Government Code.

[18.XXX] – EFFECTIVE DATE. This Ordinance shall go into effect and be in full force and effect at _____
on [_____].

ATTACHMENT B
SPMC Article VI Chapter 18

ARTICLE VI. TOBACCO RETAILER PERMIT

18.101 Definitions.Share

The following words and phrases, whenever used in this article, shall have the meanings defined in this section unless the context clearly requires otherwise:

(f) “Smoking” means possessing a lighted tobacco product, lighted tobacco paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind), and means the lighting of a tobacco product, tobacco paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

(g) “Tobacco product” means any substance containing tobacco leaf, including, but not limited to, cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

(h) “Tobacco retailer” means any person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, tobacco products or tobacco paraphernalia. “Tobacco retailing” means the doing of any of these things. This definition is without regard to the quantity of tobacco, tobacco products, or tobacco paraphernalia sold, offered for sale, exchanged, or offered for exchange. A tobacco retailer can be a primary or accessory land use (as defined in SPMC 36.700.020 or its successor). (Ord. No. 2258, § 23, 2013.)

18.102 Requirements and prohibitions.

(a) Tobacco Retailer Permit Required. It is unlawful for any person to act as a tobacco retailer in the city without first obtaining and maintaining a valid tobacco retailer permit (“permit”) pursuant to this article for each location at which that activity is to occur. Tobacco retailing without a valid tobacco retailer permit is a nuisance as a matter of law.

18.103 Limits on eligibility for a tobacco retailer permit.

(b) No tobacco retailer may be located within five hundred feet of any public school as measured from the closest point on the property line of the parcels containing the retailer’s establishment and the school. Such measurement shall be in a straight line without regard to intervening structures. No existing business within five hundred feet of a public school may begin operation as a tobacco retailer after the effective date of the ordinance codified in this section. (Ord. No. 2258, § 23, 2013.)

18.104 Application procedure.

(a) Application for a tobacco retailer permit shall be submitted in the name of each proprietor proposing to conduct retail tobacco sales and shall be signed by each proprietor or an authorized agent thereof.

(b) It is the responsibility of each proprietor to be informed regarding all laws applicable to tobacco retailing, including those laws affecting the issuance of a tobacco retailer permit. No proprietor may rely on the issuance of a permit as a determination by the city that the proprietor has complied with all state and federal laws applicable to tobacco retailing. A permit issued contrary to this article, contrary to any other law, or on the basis of false or misleading information supplied by a proprietor shall be revoked pursuant to Section 18.111(d) of this article. Nothing in this article shall be construed to vest in any person obtaining and maintaining a tobacco retailer permit any status or right to act as a tobacco retailer in contravention of any provision of law.

18.105 Issuance of permit.

Upon the receipt of a complete application for a tobacco retailer permit and the permit fee required by this article, the department shall issue a permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:

18.106 Permit renewal and expiration.

(a) Renewal of Permit. A tobacco retailer permit is invalid if the appropriate fee has not been timely paid in full or if the term of the permit has expired. The term of a tobacco retailer permit is one year. Each tobacco retailer shall apply for the renewal of his or her tobacco retailer permit and submit the permit fee no later than thirty days prior to expiration of the term.

(b) Expiration of Permit. A tobacco retailer permit that is not timely renewed shall expire at the end of its term. To renew a permit not timely renewed pursuant to subsection (a), the proprietor must:

18.109 Fee for permit.

The initial fee to issue or to renew a tobacco retailer permit is hereby established at one hundred twenty dollars or as set and amended from time to time by city council resolution. The fee shall be calculated so as to recover the cost of administration and enforcement of this article, including, for example, issuing a permit, administering the permit program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this article. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law. (Ord. No. 2258, § 24, 2013.)

18.110 Compliance monitoring.

(a) Compliance with this article shall be monitored by the finance department. In addition, any peace officer may enforce the penal provisions of this article. The city may designate any number of additional persons to monitor compliance with this article.

(b) The department or other person designated to enforce the provisions of this article shall check the compliance of each tobacco retailer at least one time per twelve-month period. The department may check the compliance of new permit and tobacco retailers previously found in violation of the licensing law more frequently. Nothing in this subsection shall create a right of action in any permittee or other person against the city or its agents.

(d) The city shall not enforce any law establishing a minimum age for tobacco purchases or possession against a person who otherwise might be in violation of such law because of the person's age (hereinafter "youth decoy") if the potential violation occurs when:

(1) The youth decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the city of South Pasadena;

18.113 Enforcement.

(a) Violations of this article are subject to a civil action brought by the city prosecutor or the city attorney, punishable by a civil fine not less than two hundred fifty dollars and not exceeding one thousand dollars per violation.

(b) Violations of this article may, in the discretion of the city prosecutor, be prosecuted as infractions or misdemeanors when the interests of justice so require.

(c) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this article shall also constitute a violation of this article.

(d) Any violation of this article is hereby declared to be public nuisances.

(e) The remedies provided by this article are cumulative and in addition to any other remedies available at law or in equity. In addition to other remedies provided by this article or by other law, any violation of this article may be remedied by a civil action brought by the city attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief. (Ord. No. 2258, § 25, 2013.)

ATTACHMENT C
CDC Fast Facts

Fast Facts

Diseases and Death

Smoking leads to disease and disability and harms nearly every organ of the body.¹

- More than 16 million Americans are living with a disease caused by smoking.
- For every person who dies because of smoking, at least 30 people live with a serious smoking-related illness.
- Smoking causes cancer, heart disease, stroke, lung diseases, diabetes, and chronic obstructive pulmonary disease (COPD), which includes emphysema and chronic bronchitis.
- Smoking also increases risk for tuberculosis, certain eye diseases, and problems of the immune system, including rheumatoid arthritis.
- Smoking is a known cause of erectile dysfunction in males.

Smoking is the leading cause of preventable death.

- Worldwide, tobacco use causes more than 7 million deaths per year.² If the pattern of smoking all over the globe doesn't change, more than 8 million people a year will die from diseases related to tobacco use by 2030.³
- Cigarette smoking is responsible for more than 480,000 deaths per year in the United States, including more than 41,000 deaths resulting from secondhand smoke exposure. This is about one in five deaths annually, or 1,300 deaths every day.¹
- On average, smokers die 10 years earlier than nonsmokers.⁴
- If smoking continues at the current rate among U.S. youth, 5.6 million of today's Americans younger than 18 years of age are expected to die prematurely from a smoking-related illness. This represents about one in every 13 Americans aged 17 years or younger who are alive today.¹

Costs and Expenditures

Smoking costs the United States billions of dollars each year.^{1,7}

- Total economic cost of smoking is more than \$300 billion a year, including
 - More than \$225 billion in direct medical care for adults⁵
 - More than \$156 billion in lost productivity due to premature death and exposure to secondhand smoke¹

The tobacco industry spends billions of dollars each year on cigarette and smokeless tobacco advertising and promotions.^{6,7}

- \$8.2 billion was spent on advertising and promotion of cigarettes and smokeless tobacco combined—about \$22.5 million every day, and nearly \$1 million every hour. Smokeless tobacco products include dry snuff, moist snuff, plug/twist, loose-leaf chewing tobacco, snus, and dissolvable products.
- Price discounts to retailers account for 74.7% of all cigarette marketing (about \$5.7 billion). These are discounts paid in order to reduce the price of cigarettes to consumers.

State spending on tobacco prevention and control does not meet CDC-recommended levels.^{1,8,9}

- States have billions of dollars from the taxes they put on tobacco products and money from lawsuits against cigarette companies that they can use to prevent smoking and help smokers quit. Right now, though, the states only use a very small amount of that money to prevent and control tobacco use.
- In fiscal year 2020, states will collect \$27.2 billion from tobacco taxes and settlements in court, but will only spend \$740 million in the same year. That's only 2.7% of it spent on programs that can stop young people from becoming smokers and help current smokers quit.⁸
- Right now, not a single state out of 50 funds these programs at CDC's "recommended" level. Only three states (Alaska, California, and Maine) give even 70% of the full recommended amount. Twenty-eight states and the District of Columbia spend less than 20 percent of what the CDC recommends. One state, Connecticut, gives no state funds for prevention and quit-smoking programs.⁸
- Spending 12% (about \$3.3 billion) of the \$27.2 billion would fund every state's tobacco control program at CDC-recommended levels.⁸

Cigarette Smoking in the US

Percentage of U.S. adults aged 18 years or older who were current cigarette smokers in 2018:¹⁰

- 13.7% of all adults (34.2 million people): 15.6% of men, 12.0% of women
 - About 19 of every 100 people with mixed-race heritage (non-Hispanic) (19.1%)
 - Nearly 23 of every 100 non-Hispanic American Indians/Alaska Natives (22.6%)
 - Nearly 15 of every 100 non-Hispanic Blacks (14.6%)
 - About 15 of every 100 non-Hispanic Whites (15.0%)
 - Nearly 10 of every 100 Hispanics (9.8%)
 - About 7 of every 100 non-Hispanic Asians (7.1%)

Note: Current cigarette smokers are defined as people who reported smoking at least 100 cigarettes during their lifetime and who, at the time they participated in a survey about this topic, reported smoking every day or some days.

Thousands of young people start smoking cigarettes every day.¹¹


- Each day, about 2000 people younger than 18 years smoke their first cigarette.
- Each day, over 300 people younger than 18 years become daily cigarette smokers.

Many adult cigarette smokers want to quit smoking.

- In 2015, nearly 7 in 10 (68.0%) adult cigarette smokers wanted to stop smoking.
- In 2018, more than half (55.1%) adult cigarette smokers had made a quit attempt in the past year.
- In 2018, more than 7 out of every 100 (7.5%) people who tried to quit succeeded.
- From 2012–2018, the *Tips From Former Smokers*[®] campaign has motivated approximately one million tobacco smokers to quit for good.¹³

Note: "Made a quit attempt" refers to smokers who reported that they stopped smoking for more than 1 day in the past 12 months because they were trying to quit smoking. See CDC's *Smoking Cessation: Fast Facts* fact sheet for more information.

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Page last reviewed: June 2, 2021

ATTACHMENT D
Findings from the California Tobacco Program
Media Campaign Evaluation Endgame Questions

Findings from the
California Tobacco Control Program
Media Campaign Evaluation
Endgame Questions

Data request for South Pasadena

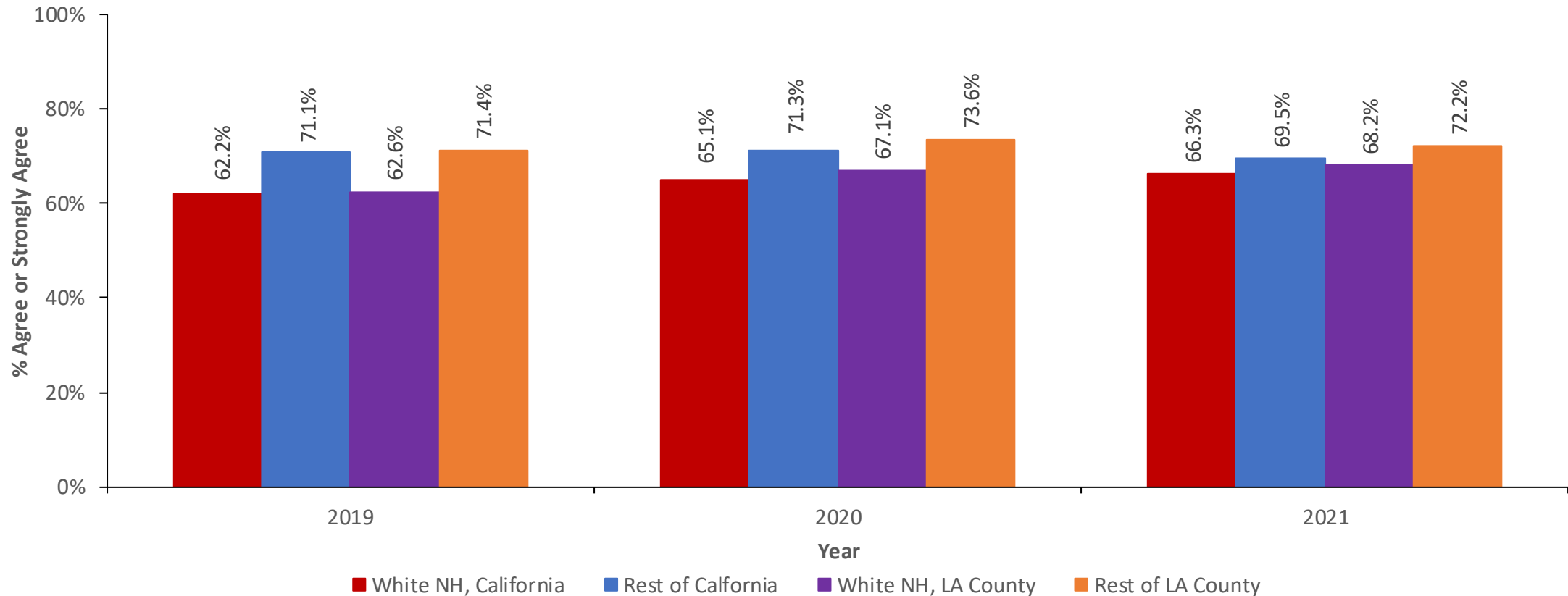
9/10/2021

Methods

- The California Tobacco Control Program's (CTCP) Media Campaign Evaluation Survey is a panel, non-probability-based online survey conducted monthly
- Monthly sample sizes include about 3,000 Californians and 1,500 people in the rest of the United States (US), to compare Californians who are exposed to CTCP's campaigns with those living outside of California, who have not been exposed
 - Data presented in these slides are for California residents only
 - Sample size was sufficient enough to provide breakouts for Los Angeles County residents
- Respondents are between 18-55 years old
- The survey asks respondents about their attitudes, beliefs, and knowledge related to tobacco use and policies, and awareness, recall, and opinions of California's tobacco media campaigns
- Results presented in subsequent slides contain percentages pooled by year and weighted to be representative of both the California and Los Angeles County residents between ages 18 and 55
- Data were collected between August 14, 2019 and April 23, 2021
- All slides with significant trend over time include p-values (p-value considered significant if $p < .05$)
- Due to small sample size, data on Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and multiracial (two or more races) respondents are combined in the presentation as "other"
- Since the sample was sufficient, we also provide data on ethnic Chinese respondents

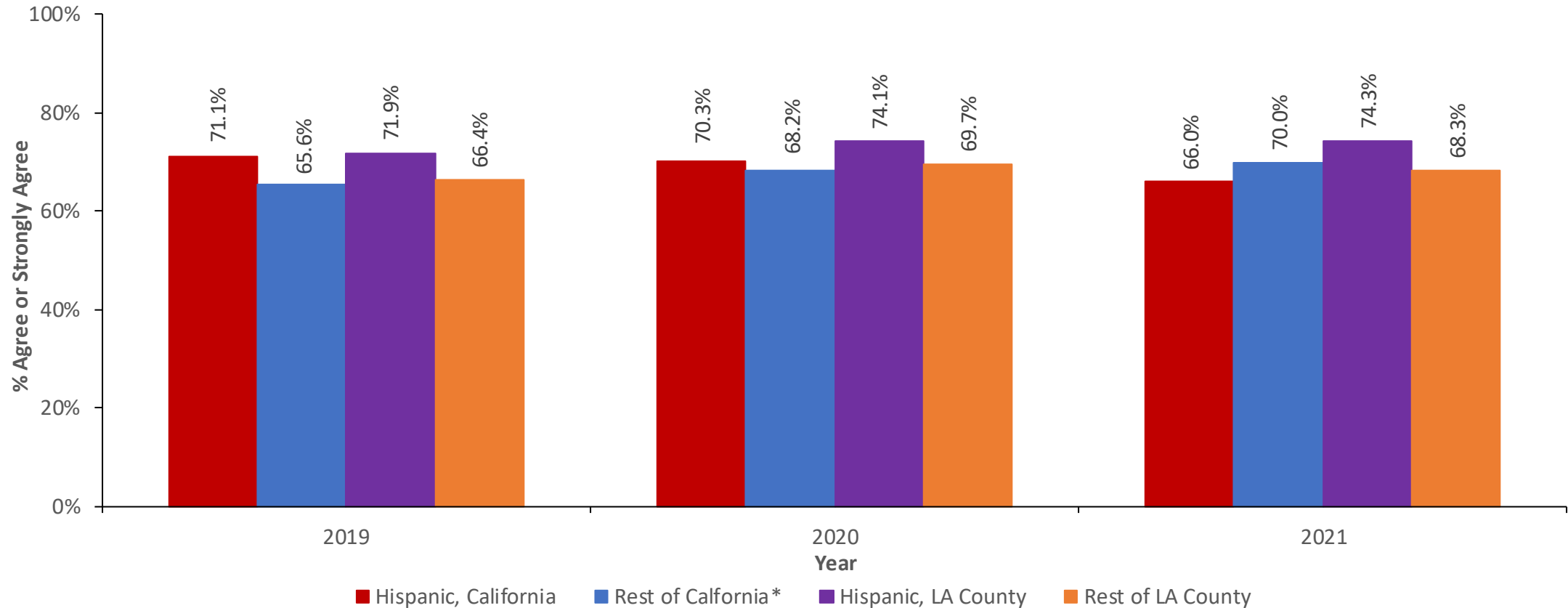
Percentage of respondents who agreed/strongly agreed with the following statement: “Cigarette sales should be phased out completely over the next 5 years.”

Support for Cigarette Sales to be Phased Out Completely Over the Next 5 Years among non-Hispanic Whites by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



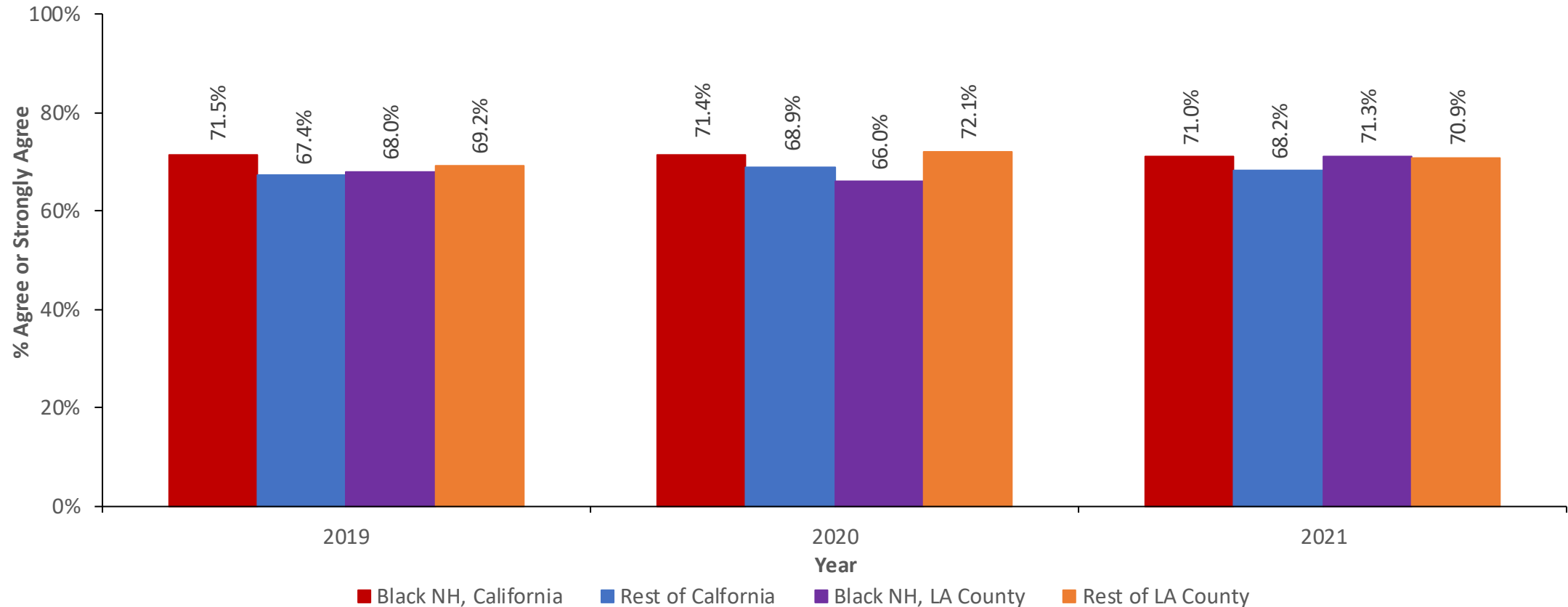
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "Cigarette sales should be phased out completely over the next 5 years." Rest-of-California respondents include non-Los Angeles County residents. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Cigarette Sales to be Phased Out Completely Over the Next 5 Years among Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



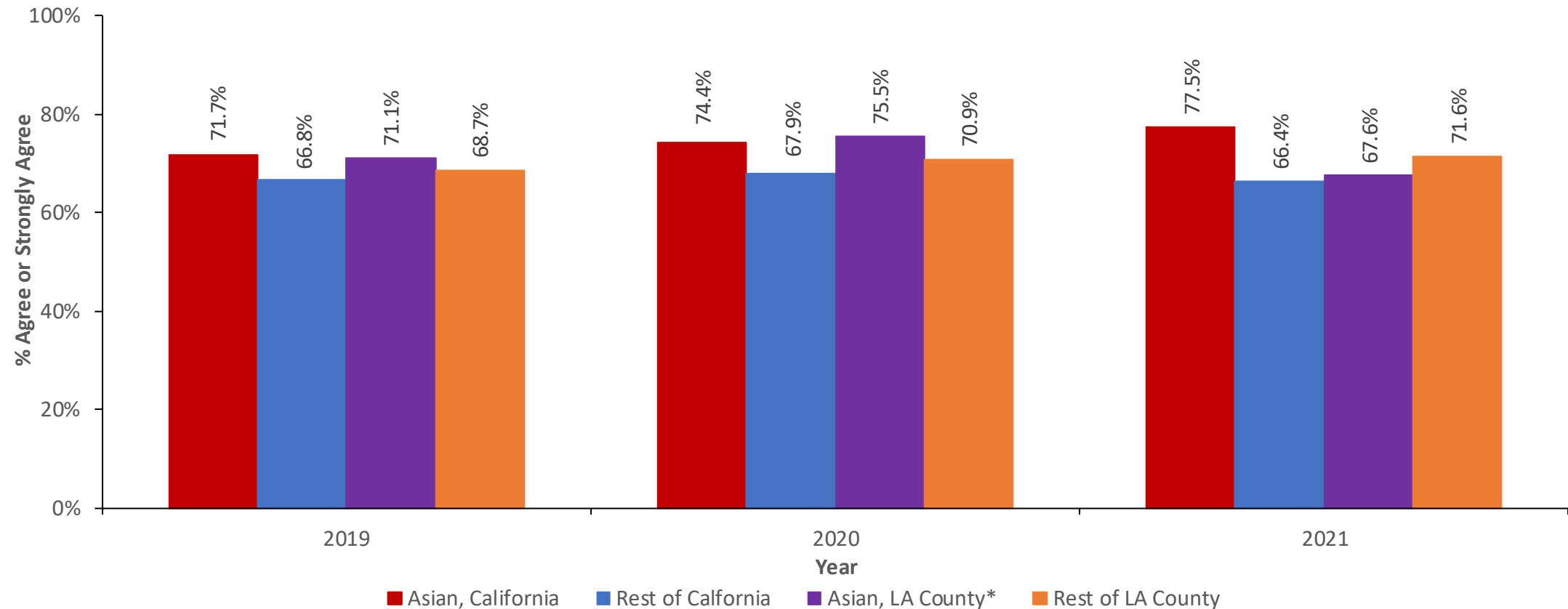
Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "Cigarette sales should be phased out completely over the next 5 years." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Cigarette Sales to be Phased Out Completely Over the Next 5 Years among Black non-Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



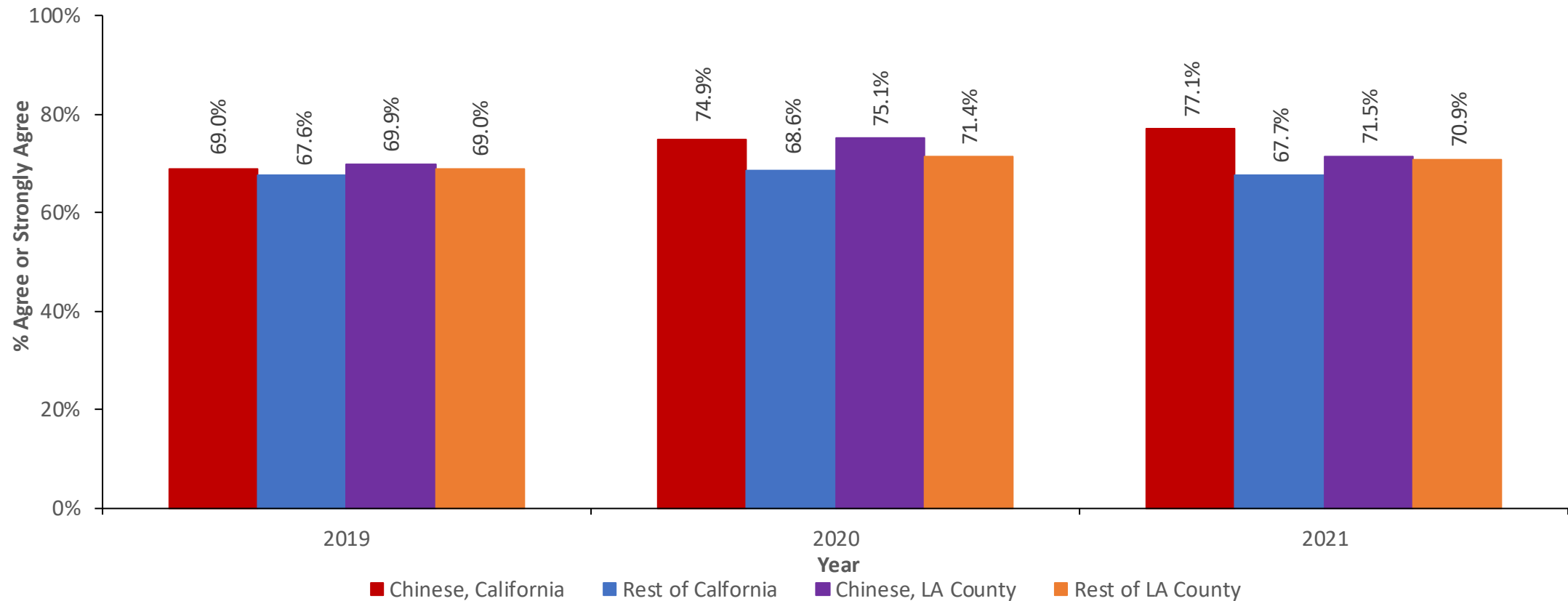
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "Cigarette sales should be phased out completely over the next 5 years." Rest-of-California respondents include non-Los Angeles County residents. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Cigarette Sales to be Phased Out Completely Over the Next 5 Years among Asians by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



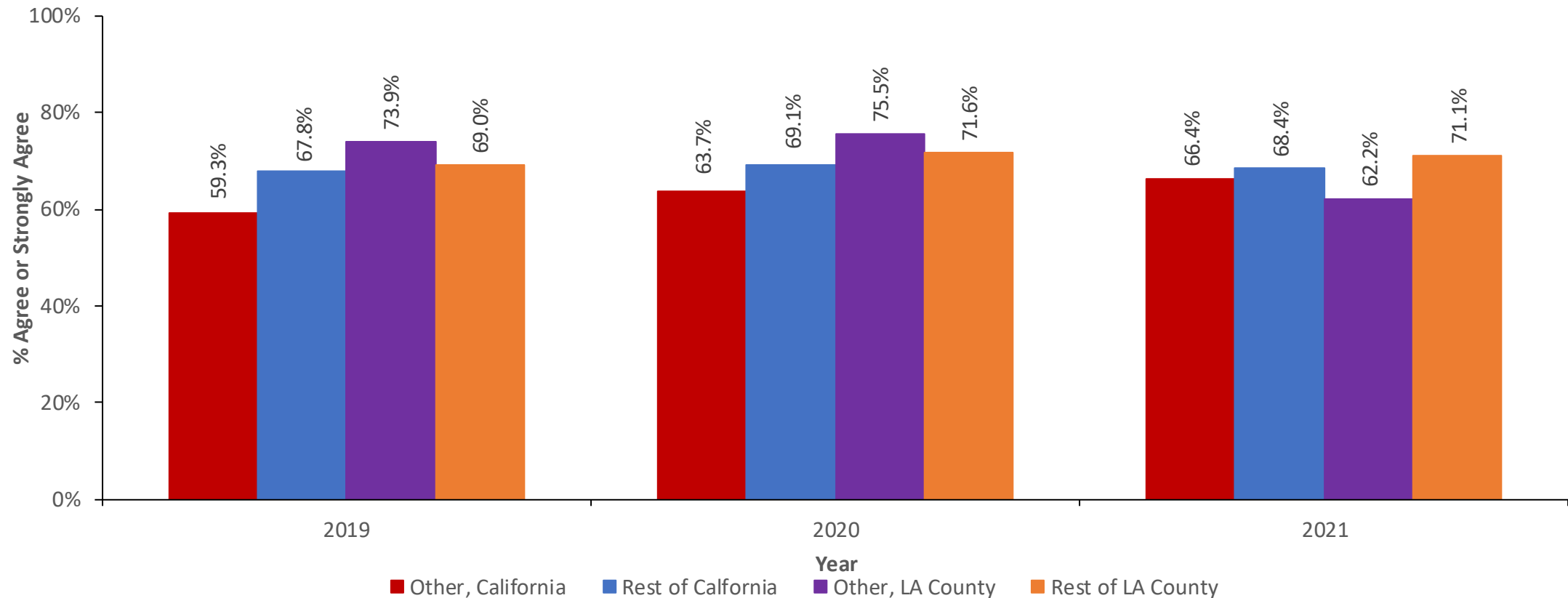
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Support for Cigarette Sales to be Phased Out Completely Over the Next 5 Years among Chinese California Residents and Chinese Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "Cigarette sales should be phased out completely over the next 5 years." Rest-of-California respondents include non-Los Angeles County residents. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

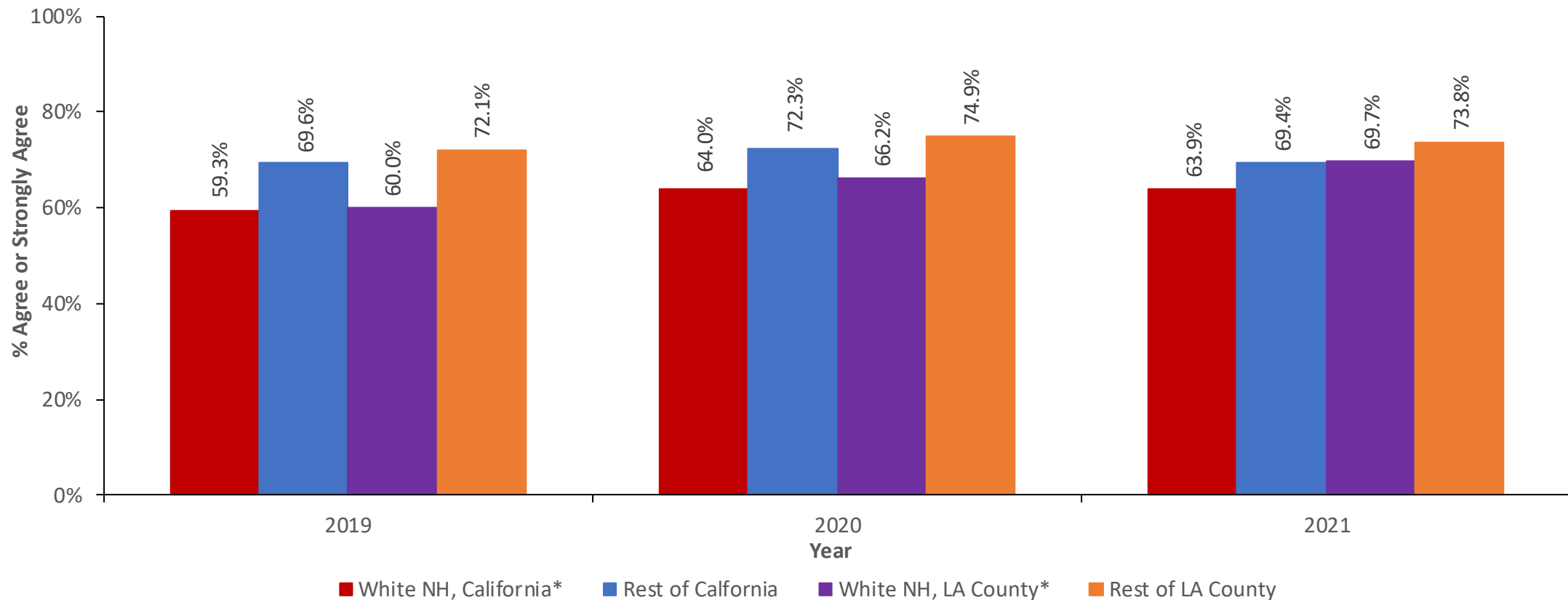
Support for Cigarette Sales to be Phased Out Completely Over the Next 5 Years among Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and Multiracial (Other) California and Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. "Other" combines Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and multiracial (two or more races) respondents due small sample sizes. Percentage of respondents who agreed/strongly agreed with the following statement: "Cigarette sales should be phased out completely over the next 5 years." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

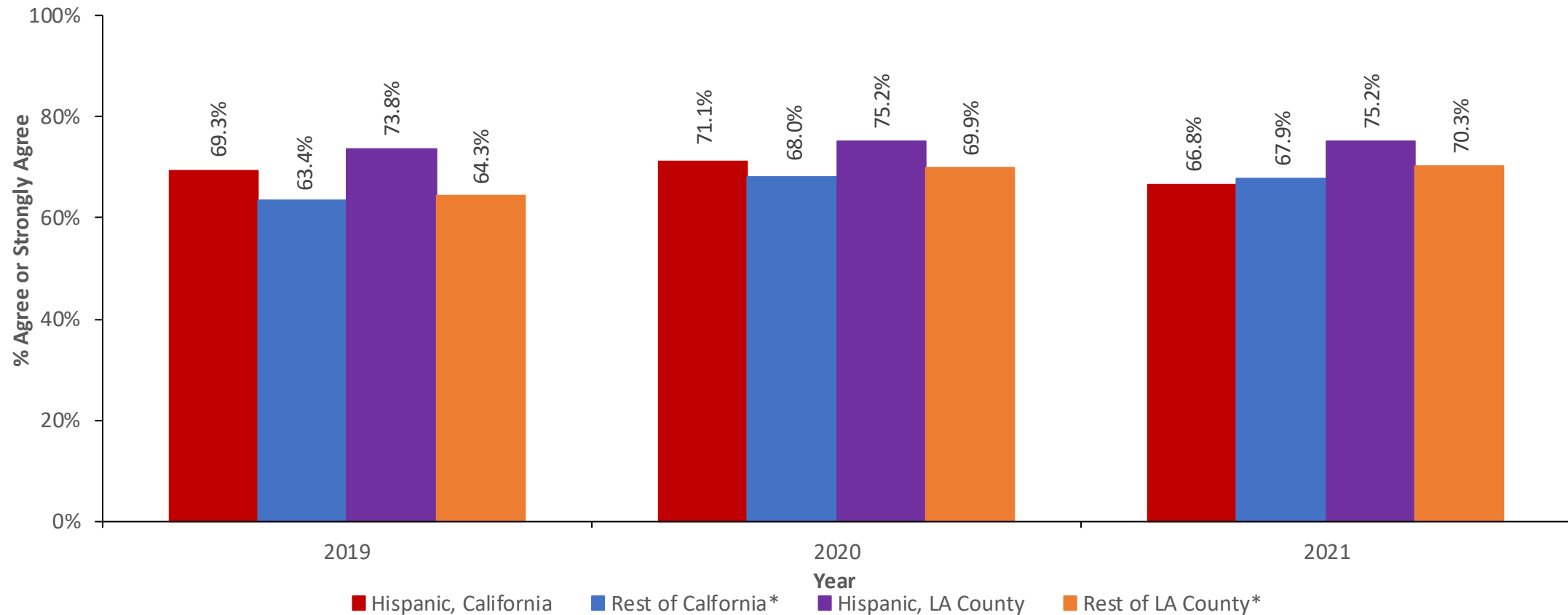
Percentage of respondents who agreed/strongly agreed with the following statement: “The sale of products that contain nicotine should not be allowed, except for aids that help smokers quit, such as nicotine gum and patches.”

Support for Restriction of Sale of Nicotine Products (Except Nicotine Replacement Therapy) among non-Hispanic Whites by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



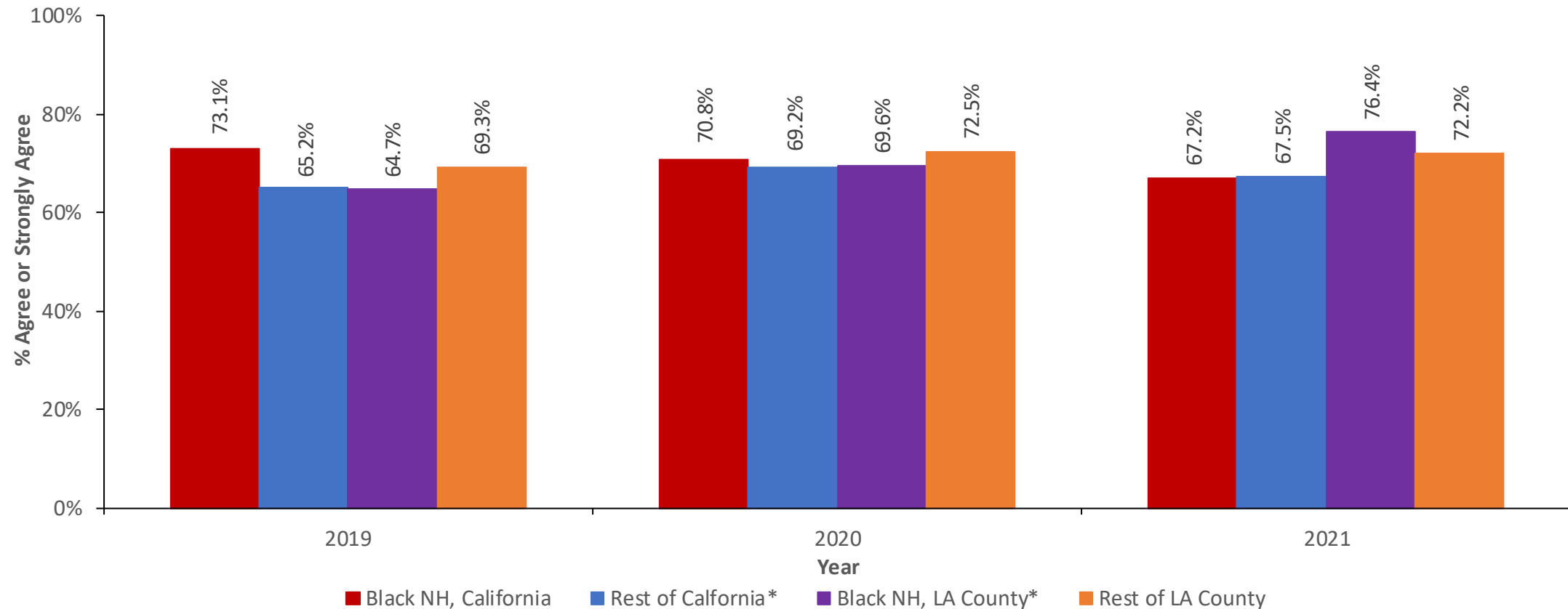
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of products that contain nicotine should not be allowed, except for aids that help smokers quit, such as nicotine gum and patches." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Restriction of Sale of Nicotine Products (Except Nicotine Replacement Therapy) among Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



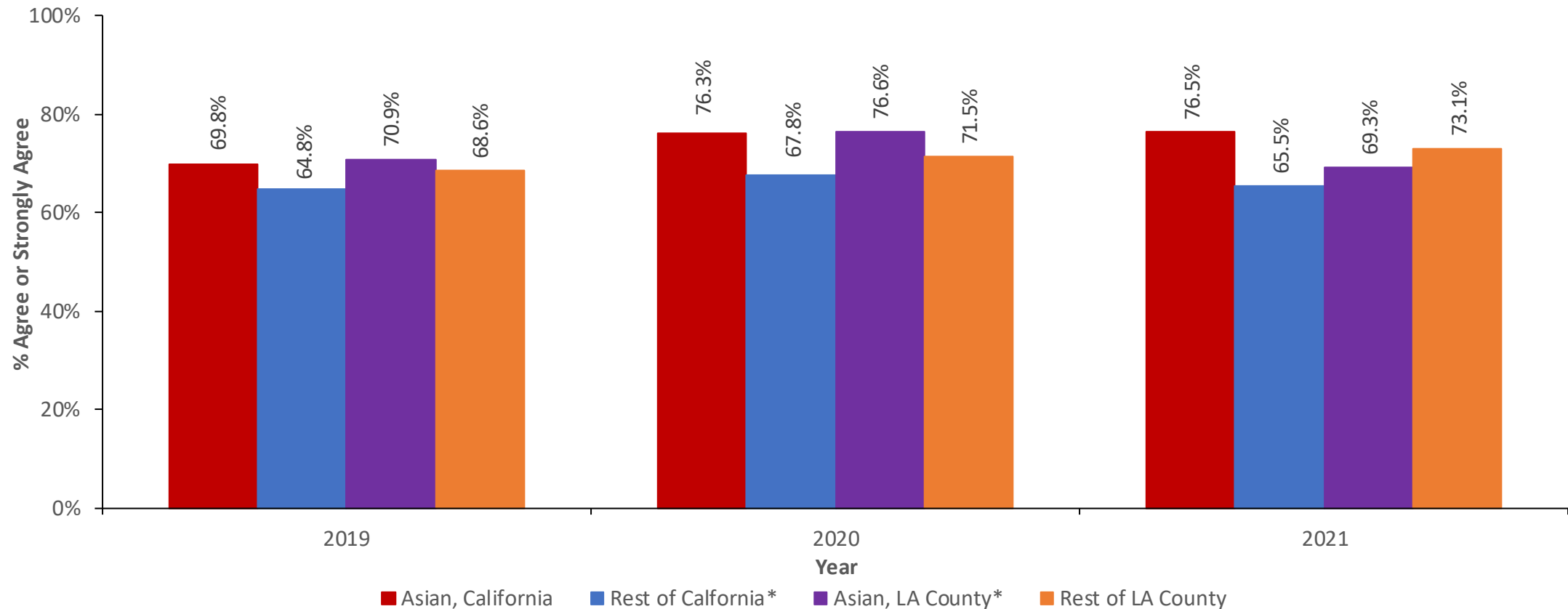
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Support for Restriction of Sale of Nicotine Products (Except Nicotine Replacement Therapy) among Black non-Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



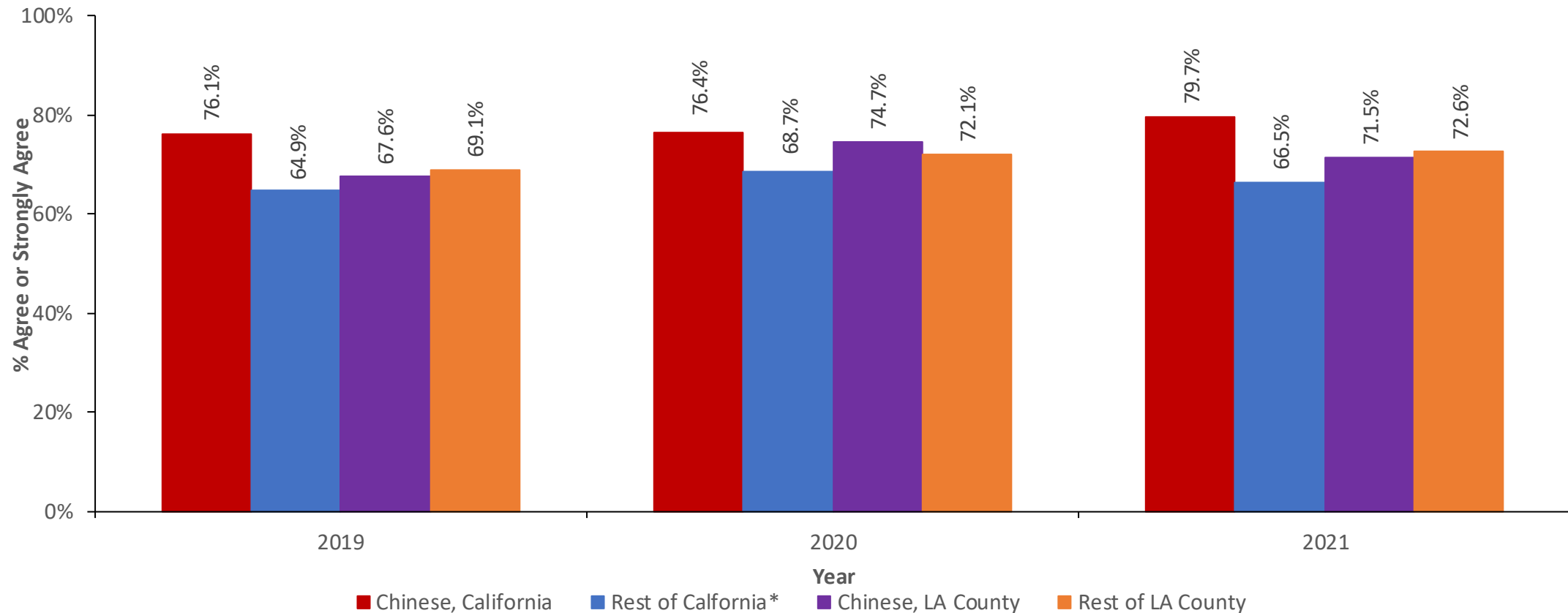
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of products that contain nicotine should not be allowed, except for aids that help smokers quit, such as nicotine gum and patches." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Restriction of Sale of Nicotine Products (Except Nicotine Replacement Therapy) among Asians by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



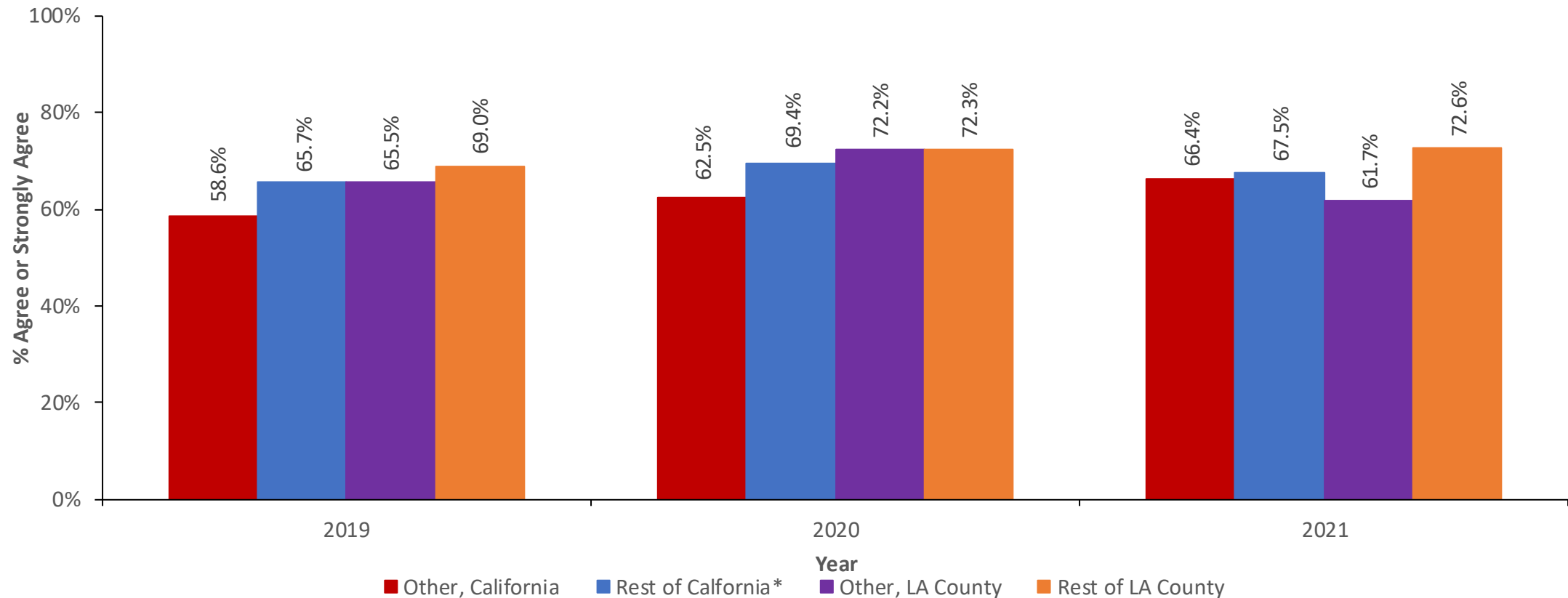
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of products that contain nicotine should not be allowed, except for aids that help smokers quit, such as nicotine gum and patches." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Restriction of Sale of Nicotine Products (Except Nicotine Replacement Therapy) among Chinese California Residents and Chinese Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of products that contain nicotine should not be allowed, except for aids that help smokers quit, such as nicotine gum and patches." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

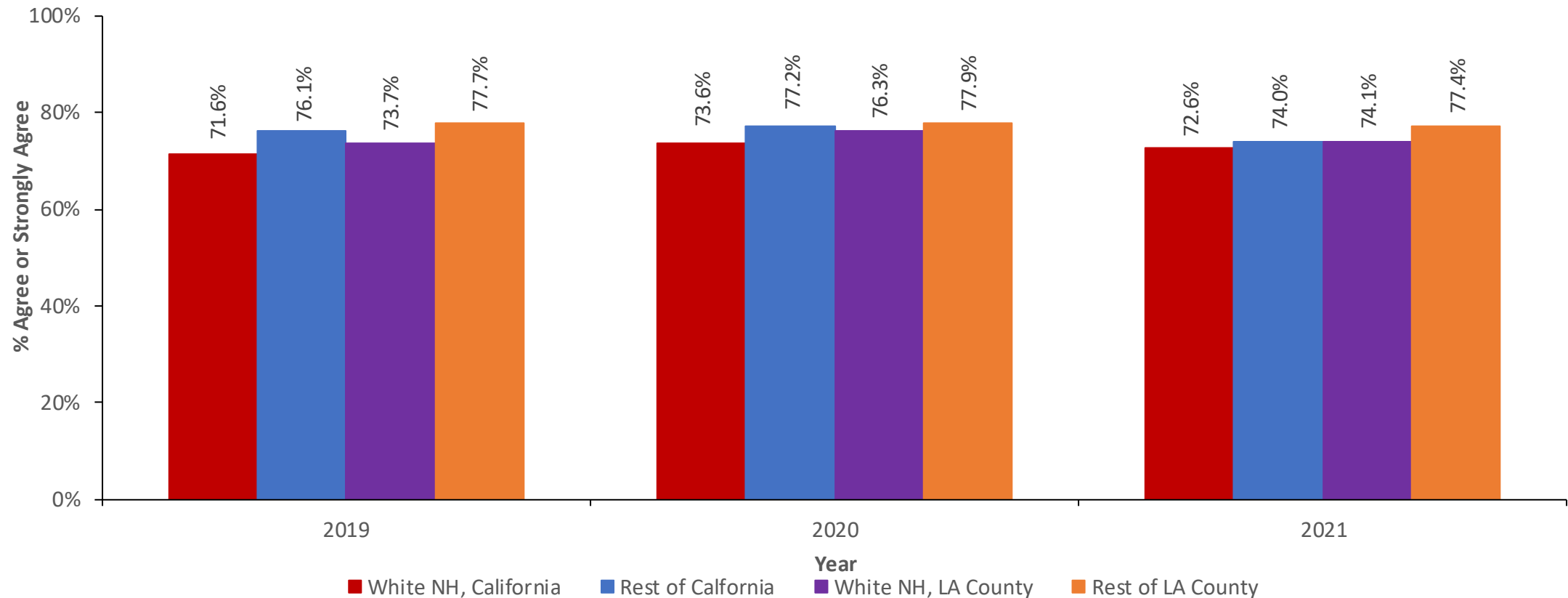
Support for Restriction of Sale of Nicotine Products (Except Nicotine Replacement Therapy) among Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and Multiracial (Other) California and Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. "Other" combines Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and multiracial (two or more races) respondents due small sample sizes. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of products that contain nicotine should not be allowed, except for aids that help smokers quit, such as nicotine gum and patches." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

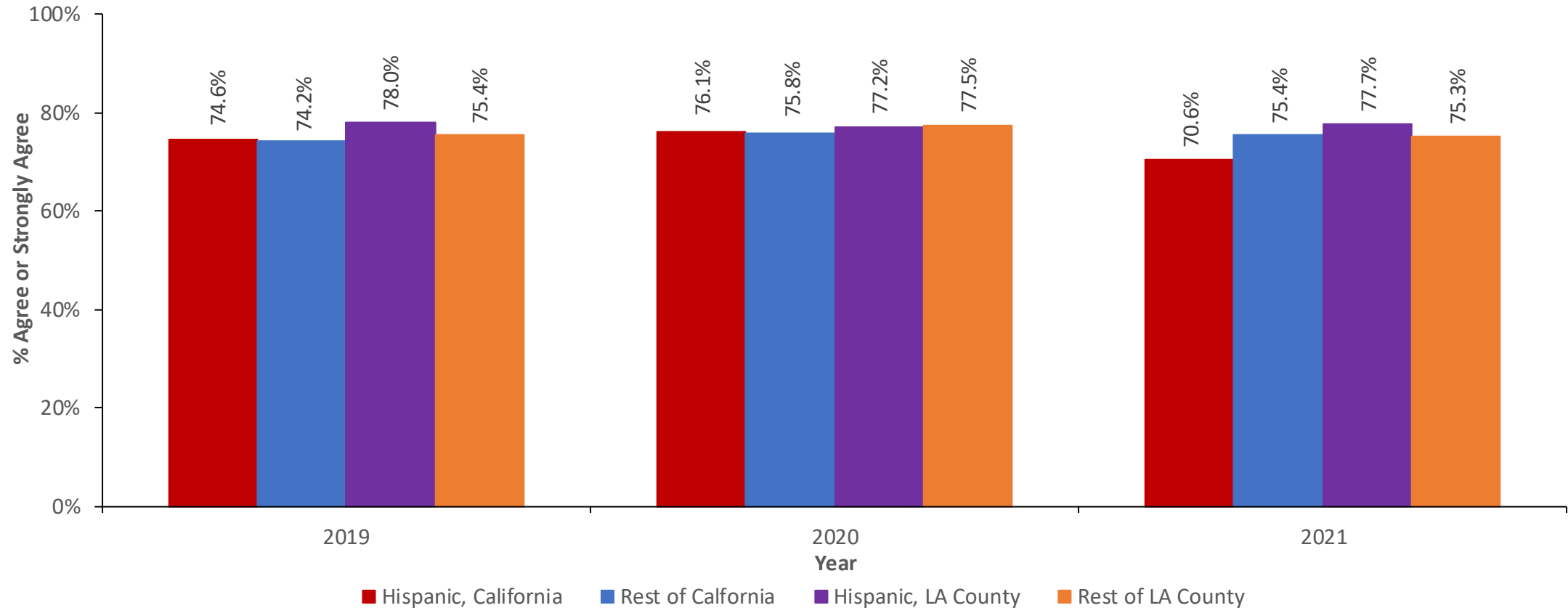
Percentage of respondents who agreed/strongly agreed with the following statement: “I’d support regulation to ban or restrict sale of flavored tobacco products, including e-cigarette and vape products.”

Support for Regulation to Ban or Restrict Sale of Flavored Tobacco Products among non-Hispanic Whites by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



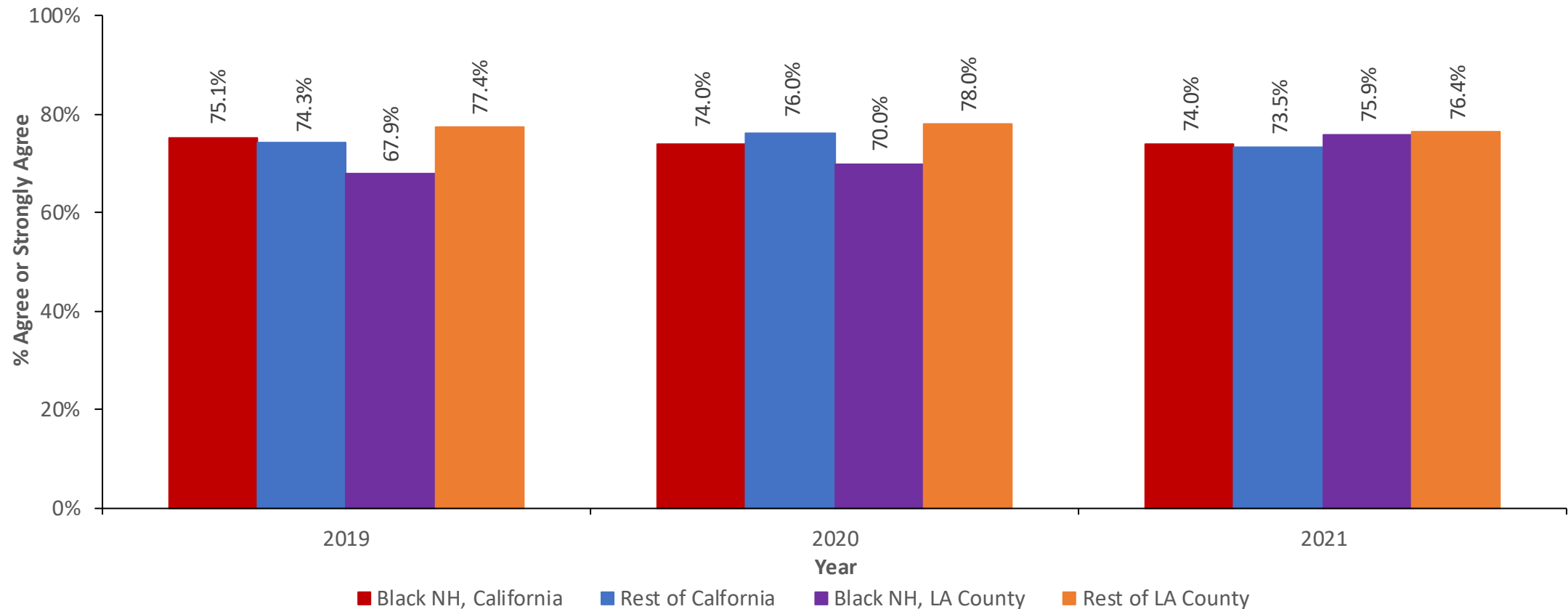
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "I'd support regulation to ban or restrict sale of flavored tobacco products, including e-cigarette and vape products." Rest-of-California respondents include non-Los Angeles County residents. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Regulation to Ban or Restrict Sale of Flavored Tobacco Products among Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



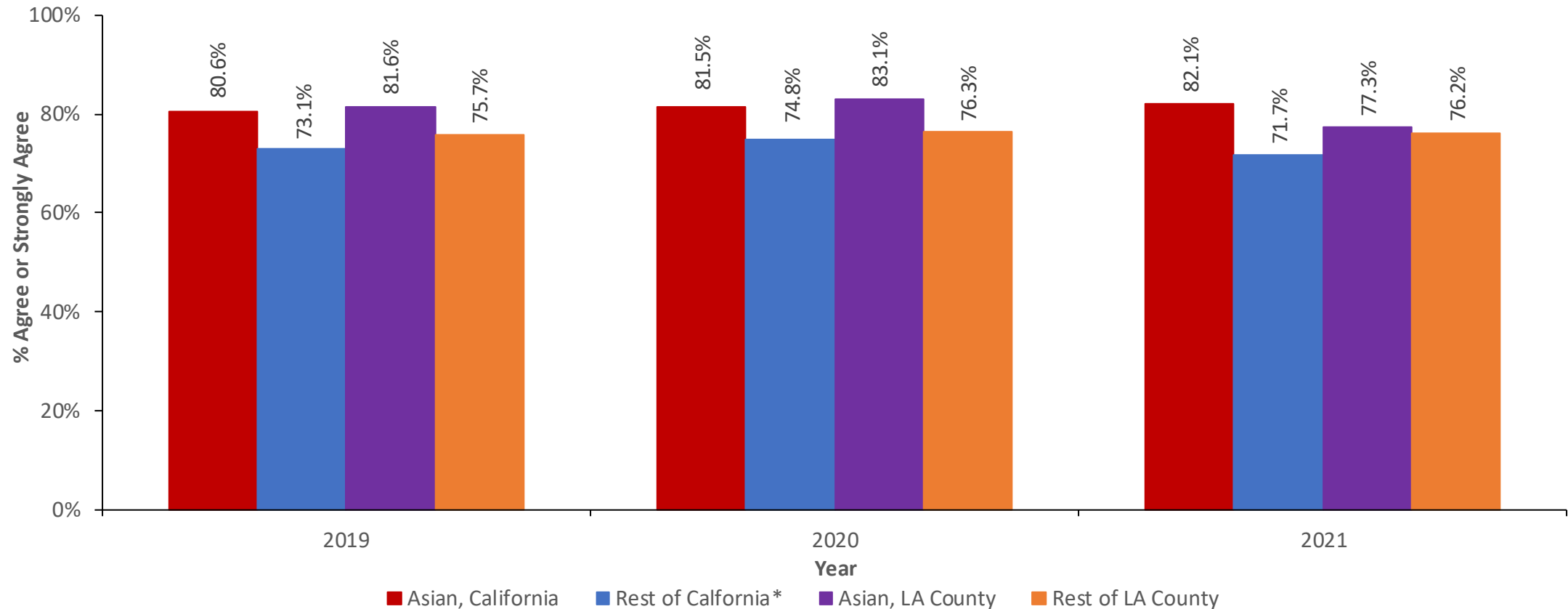
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Support for Regulation to Ban or Restrict Sale of Flavored Tobacco Products among Black non-Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



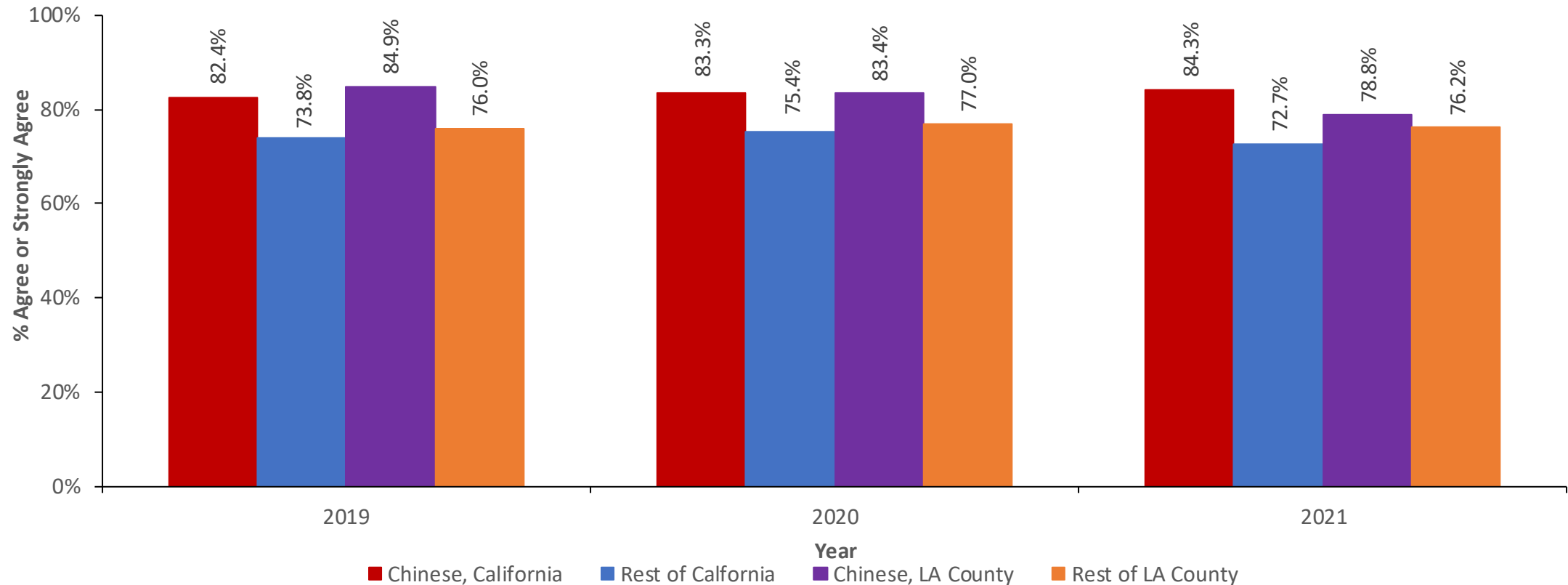
Notes. NH = Non-Hispanic. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "I'd support regulation to ban or restrict sale of flavored tobacco products, including e-cigarette and vape products." Rest-of-California respondents include non-Los Angeles County residents. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Regulation to Ban or Restrict Sale of Flavored Tobacco Products among Asians by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



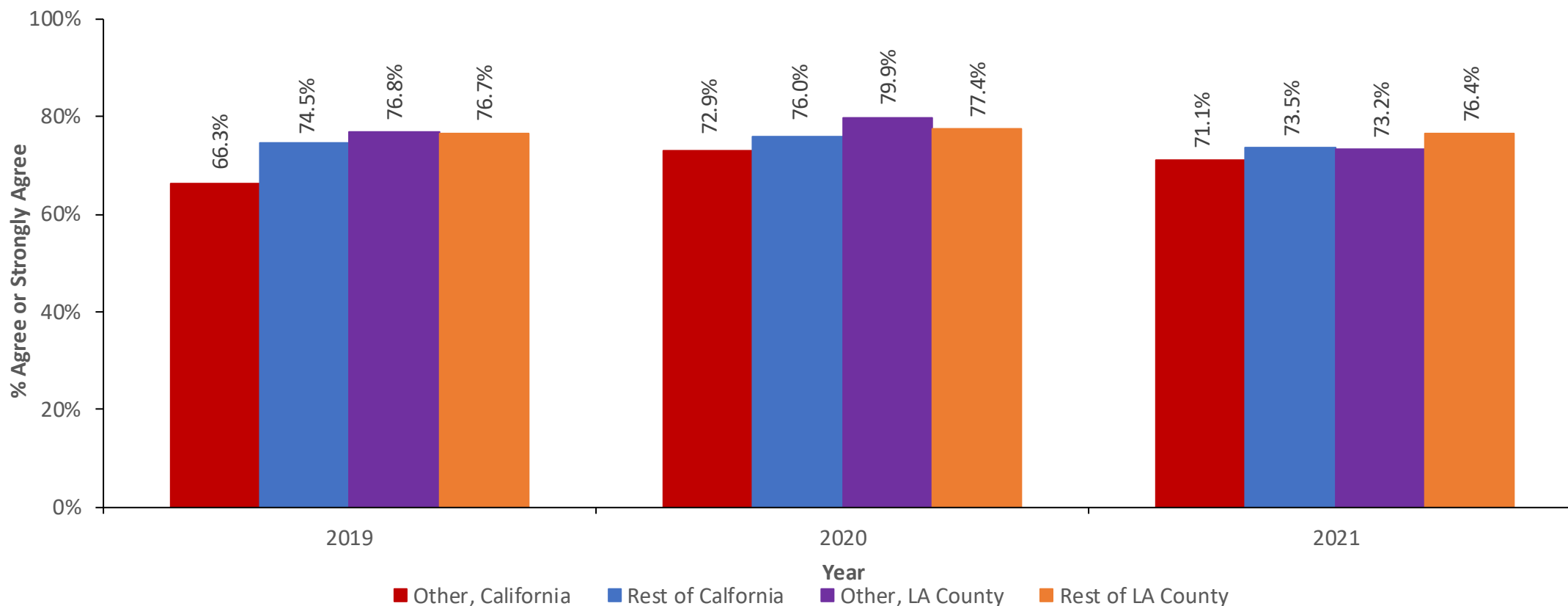
Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "I'd support regulation to ban or restrict sale of flavored tobacco products, including e-cigarette and vape products." Rest-of-California respondents include non-Los Angeles County residents.
 *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Regulation to Ban or Restrict Sale of Flavored Tobacco Products among Chinese California Residents and Chinese Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "I'd support regulation to ban or restrict sale of flavored tobacco products, including e-cigarette and vape products." Rest-of-California respondents include non-Los Angeles County residents. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Regulation to Ban or Restrict Sale of Flavored Tobacco Products among Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and Multiracial (Other) California and Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021

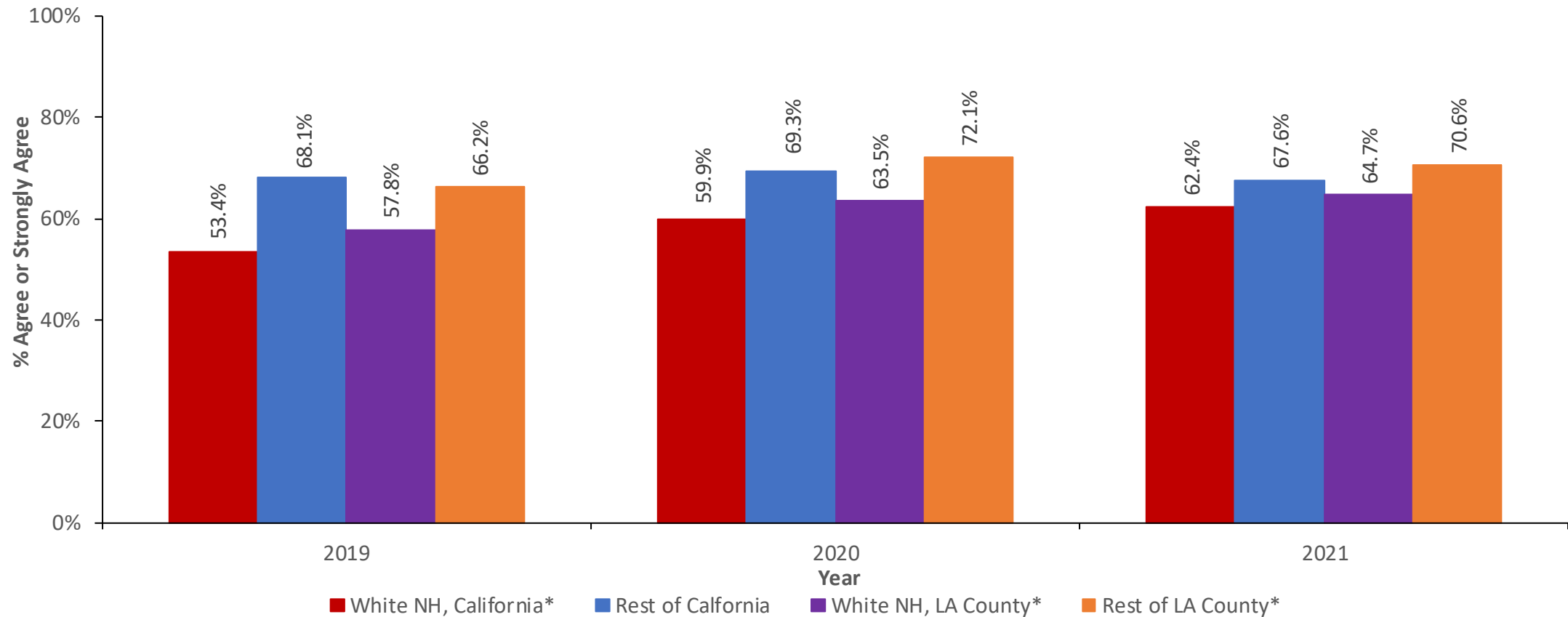


Notes. LA = Los Angeles. "Other" combines Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and multiracial (two or more races) respondents due small sample sizes. Percentage of respondents who agreed/strongly agreed with the following statement: "I'd support regulation to ban or restrict sale of flavored tobacco products, including e-cigarette and vape products." Rest-of-California respondents include non-Los Angeles County residents.

*p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

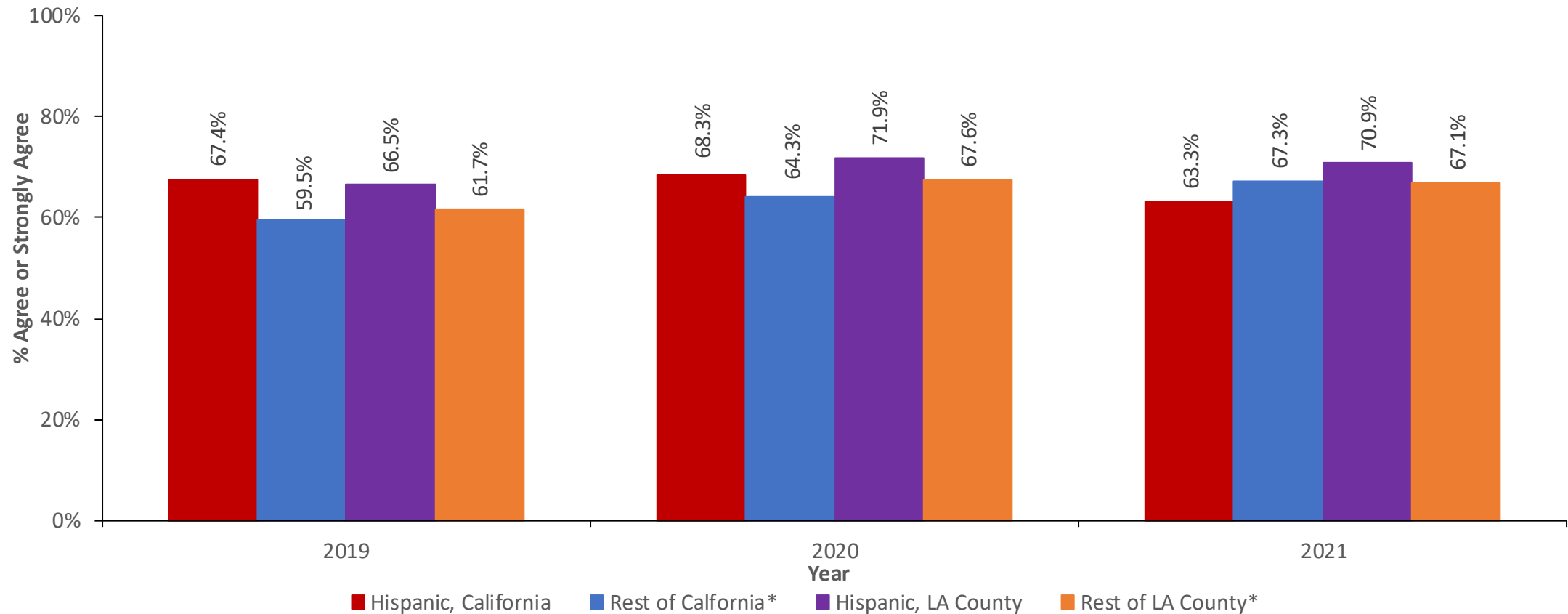
Percentage of respondents who agreed/strongly agreed with the following statement: “The sale of menthol cigarettes should not be allowed.”

Support for Ending the Sale of Menthol Cigarettes among non-Hispanic Whites by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



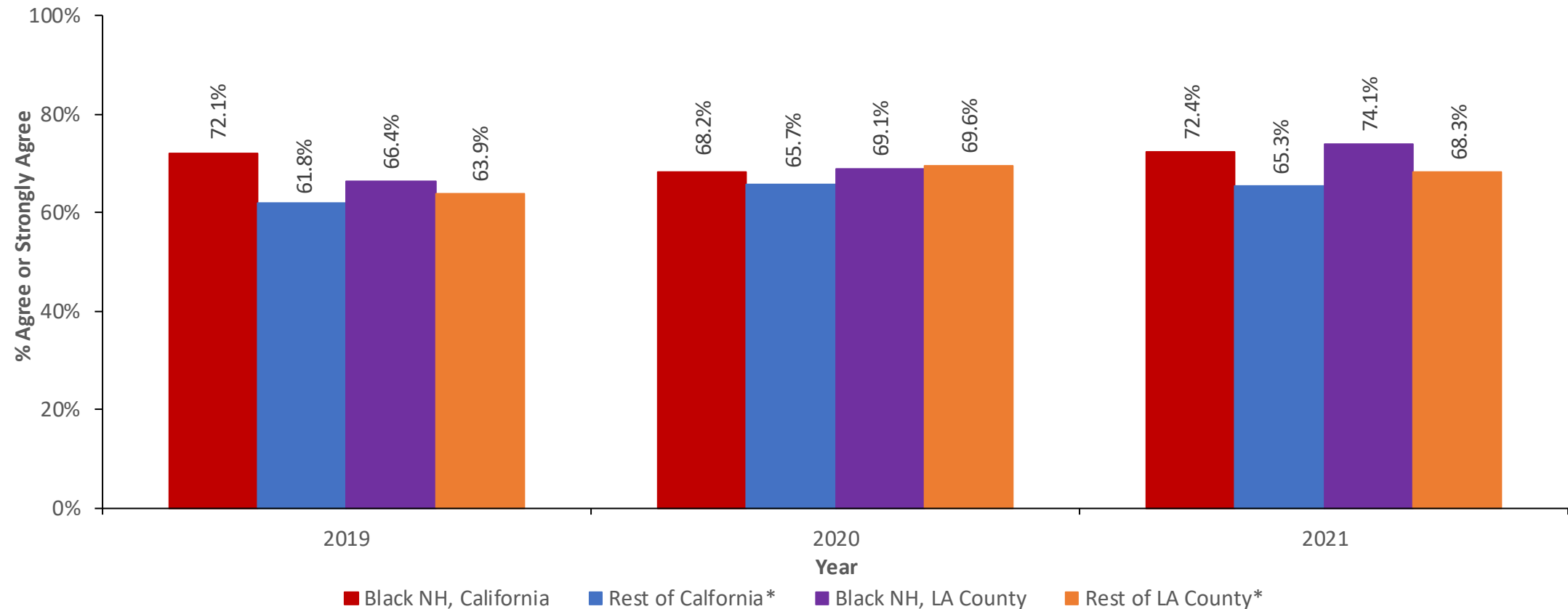
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Support for Ending the Sale of Menthol Cigarettes among Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



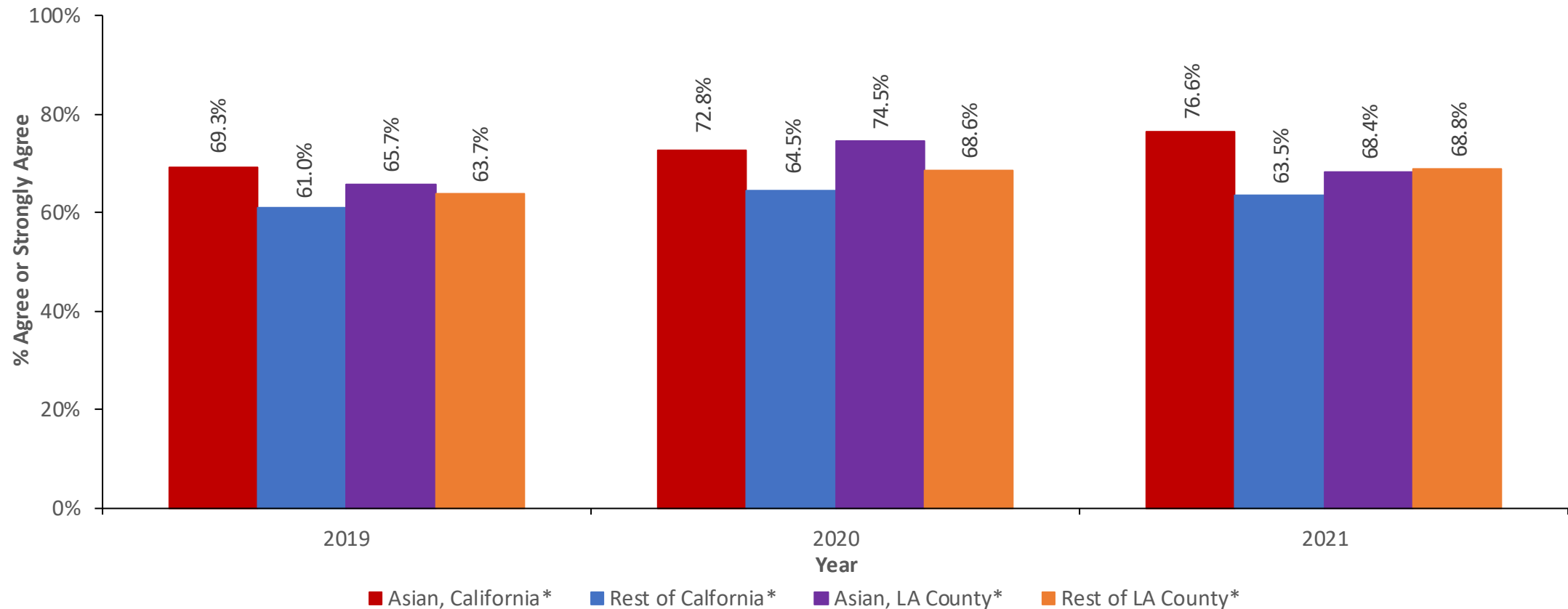
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Support for Ending the Sale of Menthol Cigarettes among Black non-Hispanics by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



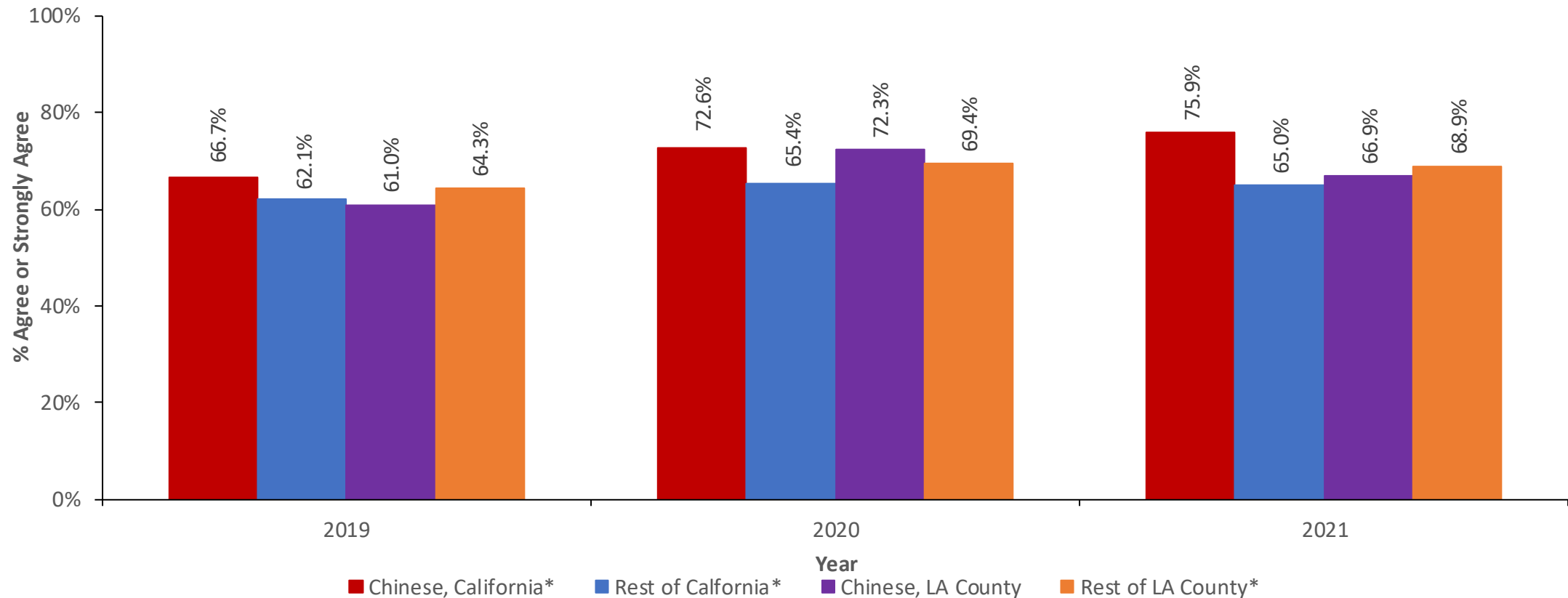
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Support for Ending the Sale of Menthol Cigarettes among Asians by California and Los Angeles County Residency vs. Remaining Racial/Ethnic Groups, 2019-2021



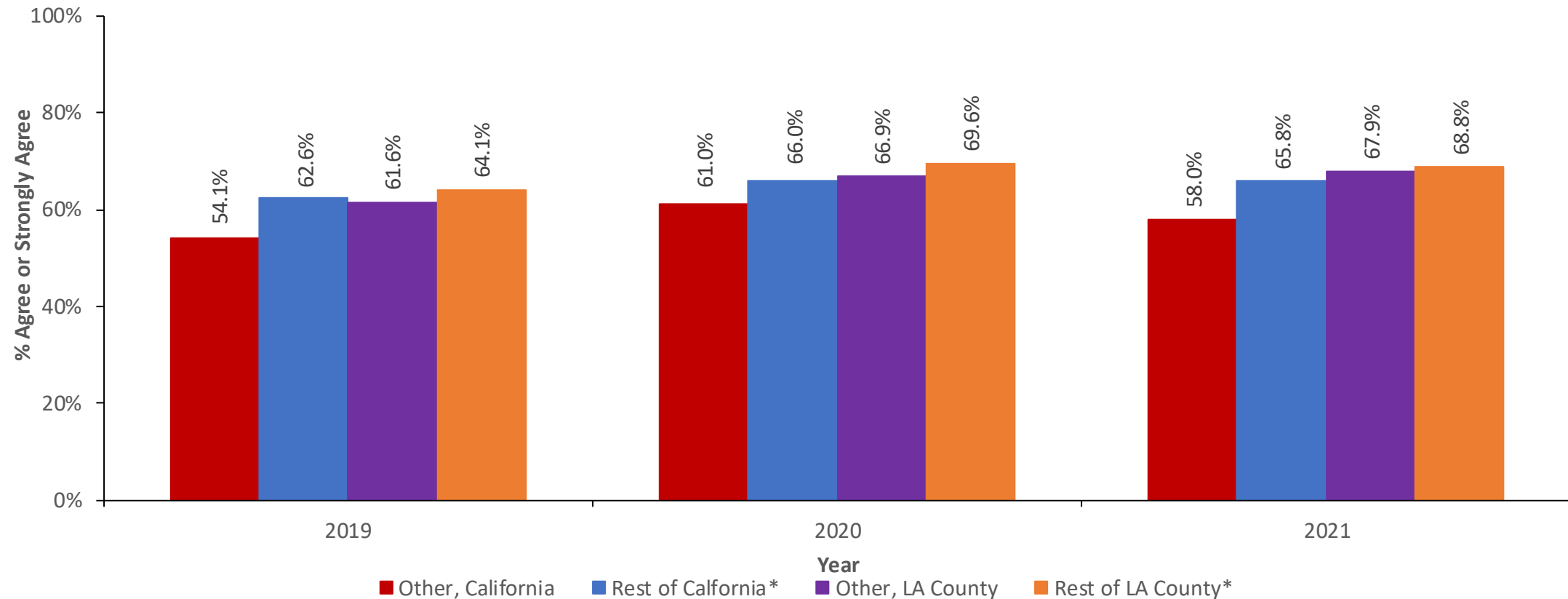
Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of menthol cigarettes should not be allowed." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Ending the Sale of Menthol Cigarettes among Chinese California Residents and Chinese Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of menthol cigarettes should not be allowed." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

Support for Ending the Sale of Menthol Cigarettes among Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and Multiracial (Other) California and Los Angeles County Residents vs. Remaining Racial/Ethnic Groups, 2019-2021



Notes. LA = Los Angeles. "Other" combines Native Hawaiian/Pacific Islander, American Indian/Alaska Native, and multiracial (two or more races) respondents due small sample sizes. Percentage of respondents who agreed/strongly agreed with the following statement: "The sale of menthol cigarettes should not be allowed." Rest-of-California respondents include non-Los Angeles County residents. *p for trend < .05. Source: California Tobacco Control Program Media Evaluation Survey, conducted by Research Triangle Institute (RTI) International, Waves 1-23. Data collected from 8/14/2019-4/23/2021.

ATTACHMENT E
Ordinance 2184

ORDINANCE NO. 2184**AN ORDINANCE OF THE CITY COUNCIL
OF THE CITY OF SOUTH PASADENA, CALIFORNIA,
AMENDING CHAPTER 18 (BUSINESS, PROFESSIONS AND TRADES)
WITH THE ADDITION OF PART 6 – (TOBACCO RETAILER PERMIT),
OF THE SOUTH PASADENA MUNICIPAL CODE AND
ESTABLISHING A TOBACCO RETAIL PERMIT FEE**

WHEREAS, based in part on the information contained in this section, the City Council finds that the failure of tobacco retailers to comply with all tobacco control laws, particularly laws prohibiting the sale of tobacco products to minors, presents an imminent threat to the public health, safety, and welfare of the residents of the City; and

WHEREAS, the City Council finds that a local permitting system for tobacco retailers is appropriate to ensure that retailers comply with tobacco control laws and business standards of the City, to protect the health, safety, and welfare of our residents; and

WHEREAS, approximately 438,000 people die in the United States from tobacco-related diseases every year, making it the nation's leading cause of preventable death; and

WHEREAS, the World Health Organization (WHO) estimates that by 2030, tobacco will account for 8.3 million deaths per year, killing 50% more people in 2015 than HIV/AIDS, and will be responsible for 10% of all deaths worldwide; and

WHEREAS, the California Legislature has recognized the danger of tobacco use and has made reducing youth access to tobacco products a high priority, as evidenced by the fact that:

- The Legislature has declared that smoking is the single most important source of preventable disease and premature death in California (Cal. Health & Safety Code § 118950);
- State law prohibits the sale or furnishing of cigarettes, tobacco products, and smoking paraphernalia to minors, as well as the purchase, receipt, or possession of tobacco products by minors (Cal. Pen. Code § 308);
- State law requires that tobacco retailers check the identification of tobacco purchasers who reasonably appear to be under 18 years of age (Cal. Bus. & Prof. Code § 22956) and provides procedures for using minors to conduct

onsite compliance checks of tobacco retailers (Cal. Bus. & Prof. Code § 22952);

- State law prohibits the sale of tobacco products and paraphernalia through self-services displays with limited exceptions for tobacco stores (Cal. Bus. & Prof. Code § 22960, 22962);
- State law prohibits the sale of “bidis” (hand-rolled filter-less cigarettes imported primarily from India and Southeast Asian countries) except in adult-only establishments (Cal. Pen. Code § 308.1);
- State law prohibits the manufacture, distribution, or sale of cigarettes in packages of less than 20 and prohibits the manufacture, distribution, or sale of “roll-your-own” tobacco in packages containing less than 0.60 ounces of tobacco (Cal. Pen. Code § 308.3);

WHEREAS, state law requires all tobacco retailers to be licensed by the Board of Equalization primarily to curb the illegal sale and distribution of cigarettes due to tax evasion and counterfeiting (Cal. Bus. & Prof. Code §§ 22970.1, 22972); and

WHEREAS, state law explicitly permits cities and counties to enact local tobacco retail permitting ordinances, and allows for the suspension or revocation of a local permit for a violation of any state tobacco control law (Cal. Bus. & Prof. Code § 22971.3); and

WHEREAS, California courts in such cases as *Cohen v. Board of Supervisors*, 40 Cal. 3d 277 (1985), and *Bravo Vending v. City of Rancho Mirage*, 16 Cal. App. 4th 383 (1993), have affirmed the power of the city to regulate business activity in order to discourage violations of law; and

WHEREAS, despite the state’s efforts to limit youth access to tobacco, minors are still able to access cigarettes, as evidenced by the fact that:

- Each day, nearly 4,000 children under 18 years of age smoke their first cigarette, and almost 1,500 children under 18 years of age begin smoking daily;
- More than 75% of all current smokers in 2001 began smoking before the age of 18;
- Among middle school students who were current cigarette users in 2004, 70.6% were not asked to show proof of age when they purchased or attempted to purchase cigarettes from a store, and 66.4% were not refused purchase because of their age;
- In 2002, youth smoked approximately 540 million packs of cigarettes, generating nearly \$1.2 billion in tobacco industry revenue;

WHEREAS, research demonstrates that local tobacco retail ordinances dramatically reduce youth access to cigarettes, as evidenced by the following:

- A review of thirteen California communities with strong tobacco retailer licensing/permitting ordinances shows that the youth sales rate declined in twelve of the thirteen communities, with an average decrease of 68% in the youth sales rate;
- A study of the effect of licensing and enforcement methods used in the Philadelphia area revealed a decrease in sales to minors from 85% in 1994 to 43% in 1998;
- A study of several Minnesota cities found that an increased licensing fee in conjunction with strict enforcement of youth access laws led to a decrease from 39.8% to 4.9% in the number of youth able to purchase tobacco;

WHEREAS, the implementation of tobacco retailer licensing/permitting requirements is supported by most Californians, as evidenced by the following:

- Statewide, over 80% of California adults think tobacco retailers should be licensed;
- Similarly, in rural areas in California, 78% of adults think tobacco retailers should be licensed, and 91% agree that a store owner who repeatedly sells cigarettes to minors should no longer have the right to sell cigarettes;
- 65% of California's key opinion leaders surveyed support implementation of tobacco-licensing requirements;
- Over 90% of enforcement agencies surveyed in 2000 rated license suspension or revocation after repeated violations as an effective strategy to reduce youth access to tobacco;

WHEREAS, seventy-eight cities and counties in California have passed tobacco retailer licensing/permitting ordinances in an effort to stop minors from smoking; and

WHEREAS, California retailers continue to sell tobacco to underage consumers, evidenced by the following:

- Nearly 11% of all tobacco retailers unlawfully sold to minors in 2007;
- Non-traditional tobacco retailers such as deli, meat, and donut shops sold to minors in 2007 at a much higher rate than the statewide average, as high as 16%;
- Teens surveyed in 2002 say they bought their cigarettes at: gas stations (58%), liquor stores (45%), and supermarkets and small grocery stores (29% combined);

WHEREAS, a requirement for a tobacco retailer permit will not unduly burden legitimate business activities of retailers who sell or distribute cigarettes or other tobacco products to adults. It will, however, allow the City to regulate the operation of lawful businesses to discourage violations of federal, state, and local tobacco-related laws; and

WHEREAS, City has a substantial interest in promoting compliance with federal, state, and local laws intended to regulate tobacco sales and use; in discouraging the illegal purchase of tobacco products by minors; in promoting compliance with laws prohibiting sales of cigarettes and tobacco products to minors; and finally, and most importantly, in protecting children from being lured into illegal activity through the misconduct of adults.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SOUTH PASADENA DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. The City Council is enacting this ordinance, to ensure compliance with the business standards and practices of the City and to encourage responsible tobacco retailing and to discourage violations of tobacco-related laws, especially those which prohibit or discourage the sale or distribution of tobacco and nicotine products to minors, but not to expand or reduce the degree to which the acts regulated by federal or state law are criminally proscribed or to alter the penalties provided therein.

SECTION 2. Chapter 18 (Business, Professions and Trades) of the South Pasadena Municipal Code is hereby amended with the addition of Part 6 (Tobacco Retailer Permit) to read as follows:

PART 6 -TOBACCO RETAILER PERMIT

18.101 Definitions.

The following words and phrases, whenever used in this Part, shall have the meanings defined in this section unless the context clearly requires otherwise:

(a) "Arm's Length Transaction" means a sale in good faith and for valuable consideration that reflects the fair market value in the open market between two informed and willing parties, neither of which is under any compulsion to participate in the transaction. A sale between relatives, related companies or partners, or a sale for which a significant purpose is avoiding the effect of the violations of this Part is not an Arm's Length Transaction.

(b) "Department" means Finance Department and any agency or Person designated by the Department to enforce or administer the provisions of this Part.

(c) "Person" means any natural person, partnership, cooperative association, corporation, personal representative, receiver, trustee, assignee, or any other legal entity.

(d) "Proprietor" means a Person with an ownership or managerial interest in a business. An ownership interest shall be deemed to exist when a Person has a ten percent (10%) or greater interest in the stock, assets, or income of a business other than the sole interest of security for debt. A managerial interest shall be deemed to exist when a Person can or does have or share ultimate control over the day-to-day operations of a business.

(e) "Self-Service Display" means the open display or storage of Tobacco Products or Tobacco Paraphernalia in a manner that is physically accessible in any way to the general public without the assistance of the retailer or employee of the retailer and a direct person-to-person transfer between the purchaser and the retailer or employee of the retailer. A vending machine is a form of Self-Service Display.

(f) "Smoking" means possessing a lighted Tobacco Product, lighted Tobacco Paraphernalia, or any other lighted weed or plant (including a lighted pipe, cigar, hookah pipe, or cigarette of any kind) and means the lighting of a Tobacco Product, Tobacco Paraphernalia, or any other weed or plant (including a pipe, cigar, hookah pipe, or cigarette of any kind).

(h) "Tobacco Product" means any substance containing tobacco leaf, including but not limited to cigarettes, cigars, pipe tobacco, hookah tobacco, snuff, chewing tobacco, dipping tobacco, snus, bidis, or any other preparation of tobacco; and any product or formulation of matter containing biologically active amounts of nicotine that is manufactured, sold, offered for sale, or otherwise distributed with the expectation that the product or matter will be introduced into the human body, but does not include any cessation product specifically approved by the United States Food and Drug Administration for use in treating nicotine or tobacco dependence.

(i) "Tobacco Retailer" means any Person who sells, offers for sale, or does or offers to exchange for any form of consideration, tobacco, Tobacco Products or Tobacco Paraphernalia. "Tobacco Retailing" shall mean the doing of any of these things. This definition is without regard to the quantity of tobacco, Tobacco Products, or Tobacco Paraphernalia sold, offered for sale, exchanged, or offered for exchange.

18.102 Requirements and Prohibitions.

(a) TOBACCO RETAILER PERMIT REQUIRED. It shall be unlawful for any Person to act as a Tobacco Retailer in the City without first obtaining and maintaining a valid Tobacco Retailer Permit ("Permit") pursuant to this Part for each location at which

that activity is to occur. Tobacco Retailing without a valid Tobacco Retailer Permit is a nuisance as a matter of law.

(b) **LAWFUL BUSINESS OPERATION.** In the course of Tobacco Retailing or in the operation of the business or maintenance of the location for which a permit issued, it shall be a violation of this Part for a Permittee, or any of the Permittee's agents or employees, to violate any local, state, or federal law applicable to Tobacco Products or Tobacco Retailing.

(c) **DISPLAY OF PERMIT.** Each Tobacco Retailer Permit shall be prominently displayed in a publicly visible location at the Permitted location.

(d) **POSITIVE IDENTIFICATION REQUIRED.** No Person engaged in Tobacco Retailing shall sell or transfer a Tobacco Product to another Person who appears to be under the age of twenty-seven (27) years without first examining the identification of the recipient to confirm that the recipient is at least the minimum age under state law to purchase and possess the Tobacco Product.

(e) **MINIMUM AGE FOR PERSONS SELLING TOBACCO.** No Person who is younger than the minimum age established by state law for the purchase or possession of Tobacco Products shall engage in Tobacco Retailing.

(f) **SELF-SERVICE DISPLAYS PROHIBITED.** Tobacco Retailing by means of a Self-Service Display is prohibited.

(g) **FALSE AND MISLEADING ADVERTISING PROHIBITED.** A Tobacco Retailer or Proprietor without a valid Tobacco Retailer Permit, including, for example, a person who's Permit has been suspended or revoked:

(1) Shall keep all Tobacco Products out of public view. The public display of Tobacco Products or Tobacco Paraphernalia in violation of this provision shall constitute Tobacco Retailing without a Permit under Section 18.112; and

(2) Shall not display any advertisement relating to Tobacco Products or Tobacco Paraphernalia that promotes the sale or distribution of such products from the Tobacco Retailer's location or that could lead a reasonable consumer to believe that such products can be obtained at that location.

18.103. Limits on Eligibility For a Tobacco Retailer Permit.

No Permit may issue to authorize Tobacco Retailing at other than a fixed location. For example, Tobacco Retailing by Persons on foot or from vehicles is prohibited.

18.104. Application Procedure.

(a) Application for a Tobacco Retailer Permit shall be submitted in the name of each Proprietor proposing to conduct retail tobacco sales and shall be signed by each Proprietor or an authorized agent thereof.

It is the responsibility of each Proprietor to be informed regarding all laws applicable to Tobacco Retailing, including those laws affecting the issuance of a Tobacco Retailer Permit. No Proprietor may rely on the issuance of a Permit as a determination by the City that the Proprietor has complied with all laws applicable to Tobacco Retailing. A permit issued contrary to this Part, contrary to any other law, or on the basis of false or misleading information supplied by a Proprietor shall be revoked pursuant to Section 18.111 (d) of this Part. Nothing in this Part shall be construed to vest in any Person obtaining and maintaining a Tobacco Retailer Permit any status or right to act as a Tobacco Retailer in contravention of any provision of law.

All applications shall be submitted on a form supplied by the Department and shall contain the following information:

(1) The name, address, and telephone number of each Proprietor of the business seeking a Permit.

(2) The business name, address, and telephone number of the single fixed location for which a Permit is sought.

(3) A single name and mailing address authorized by each Proprietor to receive all communications and notices (the "Authorized Address") required by, authorized by, or convenient to the enforcement of this Part. If an Authorized Address is not supplied, each Proprietor shall be understood to consent to the provision of notice at the business address specified in subparagraph (2) above.

(4) Proof that the location for which a Tobacco Retailer permit is sought has been issued a valid state tobacco retailer permit by the California Board of Equalization.

(5) Whether or not any Proprietor or any agent of the Proprietor has admitted violating, or has been found to have violated, this Part and, if so, the dates and locations of all such violations within the previous five years.

(6) Such other information as the Department deems necessary for the administration or enforcement of this Part as specified on the application form required by this section.

(b) A Permitted Tobacco Retailer shall inform the Department in writing of any change in the information submitted on an application for a Tobacco Retailer Permit within ten (10) business days of a change.

(c) All information specified in an application pursuant to this section shall be subject to disclosure under the California Public Records Act (California Government Code section 6250 *et seq.*) or any other applicable law, subject to the laws' exemptions.

18.105 Issuance of Permit.

Upon the receipt of a complete application for a Tobacco Retailer Permit and the Permit fee required by this Part, the Department shall issue a Permit unless substantial evidence demonstrates that one or more of the following bases for denial exists:

(a) The information presented in the application is inaccurate or false. Intentionally supplying inaccurate or false information shall be a violation of this Part.

(b) The application seeks authorization for Tobacco Retailing at a location for which this Part prohibits issuance of Tobacco Retailer Permits. However, this subparagraph shall not constitute a basis for denial of a Permit if the applicant provides the City with documentation demonstrating by clear and convincing evidence that the applicant has acquired or is acquiring the location or business in an Arm's Length Transaction.

(c) The application seeks authorization for Tobacco Retailing for a Proprietor to whom this Part prohibits a Permit to be issued.

(d) The application seeks authorization for Tobacco Retailing that is prohibited pursuant to this Part (e.g., mobile vending)], that is unlawful pursuant to this Code including without limitation the zoning code, building code, and business license tax code, or that is unlawful pursuant to any other law.

18.106 Permit Renewal and Expiration.

(a) RENEWAL OF PERMIT. A Tobacco Retailer Permit is invalid if the appropriate fee has not been timely paid in full or if the term of the Permit has expired. The term of a Tobacco Retailer Permit is one year. Each Tobacco Retailer shall apply for the renewal of his or her Tobacco Retailer Permit and submit the permit fee no later than thirty (30) days prior to expiration of the term.

(b) EXPIRATION OF PERMIT. A Tobacco Retailer Permit that is not timely renewed shall expire at the end of its term. To renew a Permit not timely renewed pursuant to subparagraph (a), the Proprietor must:

(1) Submit the permit fee and application renewal form; and

(2) Submit a signed affidavit affirming that the Proprietor:

(i) has not sold and will not sell any Tobacco Product or Tobacco Paraphernalia after the permit expiration date and before the permit is renewed; or

(ii) has waited the appropriate ineligibility period established for Tobacco Retailing without a Permit, as set forth in Section 18.112 (a) of this Part, before seeking renewal of the permit.

18.107 Permits Nontransferable.

(a) A Tobacco Retailer Permit may not be transferred from one Person to another or from one location to another. A new Tobacco Retailer Permit is required whenever a Tobacco Retailing location has a change in Proprietor(s).

(b) Notwithstanding any other provision of this Part, prior violations at a location shall continue to be counted against a location and permit ineligibility periods shall continue to apply to a location unless:

(1) the location has been fully transferred to a new Proprietor or fully transferred to entirely new Proprietors; and

(2) the new Proprietor(s) provide the City with clear and convincing evidence that the new Proprietor(s) have acquired or is acquiring the location in an Arm's Length Transaction.

18.108 Permit Conveys a Limited, Conditional Privilege.

Nothing in this Part shall be construed to grant any Person obtaining and maintaining a Tobacco Retailer Permit any status or right other than the limited conditional privilege to act as a Tobacco Retailer at the location in the City identified on the face of the Permit. For example, nothing in this Part shall be construed to render inapplicable, supercede, or apply in lieu of, any other provision of applicable law, including but not limited to, any provision of this Code including without limitation the zoning code, building codes, and business license tax code, or any condition or limitation on smoking in an enclosed place of employment pursuant to California Labor Code section 6404.5. For example, obtaining a Tobacco Retailer Permit does not make the

retailer a "retail or wholesale tobacco shop" for the purposes of California Labor Code section 6404.5.

18.109 Fee For Permit.

The initial fee to issue or to renew a Tobacco Retailer permit is hereby established at one hundred and twenty dollars (\$120.00). The fee shall be calculated so as to recover the cost of administration and enforcement of this Part, including, for example, issuing a Permit, administering the Permit program, retailer education, retailer inspection and compliance checks, documentation of violations, and prosecution of violators, but shall not exceed the cost of the regulatory program authorized by this Part. All fees and interest upon proceeds of fees shall be used exclusively to fund the program. Fees are nonrefundable except as may be required by law.

18.110 Compliance Monitoring.

(a) Compliance with this Part shall be monitored by the Finance Department. In addition, any peace officer may enforce the penal provisions of this Part. The City may designate any number of additional Persons to monitor compliance with this Part.

(b) The Department or other Person designated to enforce the provisions of this Part shall check the compliance of each Tobacco Retailer at least one (1) time per twelve (12) month period. The Department may check the compliance of new Permit and Tobacco Retailers previously found in violation of the licensing law more frequently. Nothing in this paragraph shall create a right of action in any Permittee or other Person against the City or its agents.

(c) Compliance checks shall be conducted so as to allow the Department to determine, at a minimum, if the Tobacco Retailer is conducting business in a manner that complies with laws regulating youth access to Tobacco. When the Department deems appropriate, the compliance checks shall determine compliance with other laws applicable to Tobacco Retailing.

(d) The City shall not enforce any law establishing a minimum age for Tobacco purchases or possession against a Person who otherwise might be in violation of such law because of the Person's age (hereinafter "Youth Decoy") if the potential violation occurs when:

(1) the Youth Decoy is participating in a compliance check supervised by a peace officer or a code enforcement official of the City of South Pasadena;

(2) the Youth Decoy is acting as an agent of a Person designated by the City to monitor compliance with this Part;

(3) the Youth Decoy is participating in a compliance check funded in part, either directly or indirectly through subcontracting, by the Los Angeles County Department of Health Departments and/or Pasadena Health Department; or

(4) the Youth Decoy has an immunity letter from the District Attorney's Office.

18.111 Suspension/Revocation of Permit.

(a) **SUSPENSION OF PERMIT FOR VIOLATION.** In addition to any other penalty authorized by law, a Tobacco Retailer Permit shall be suspended or revoked if any court of competent jurisdiction determines, or the Department finds based on a preponderance of the evidence, after the Permittee is afforded notice and an opportunity to be heard, that the Permit, or any of the Permittee's agents or employees, has violated any of the requirements, conditions, or prohibitions of this Part or has pleaded guilty, "no contest" or its equivalent, or admitted to a violation of any law designated in Section 18.102 above. A Tobacco Retailer or Proprietor whose Permit has been suspended is deemed not to have a valid Tobacco Retailer Permit during the suspension period for purposes of this Part.

(b) TOBACCO RETAILER PERMIT SUSPENSION/REVOCATION

(1) After suspension for a first violation of this Part at a location within any twelve-month (12) period, no Person may engage in Tobacco Retailing at the location until Fifteen (15) days have passed from the date of suspension.

(2) After suspension for a second violation of this Part at a location within any twenty-four (24) month, no Person may engage in Tobacco Retailing at the location until thirty (30) days have passed from the date of suspension.

(3) After suspension for a third violation of this Part at a location within any thirty-six (36) month period, no Person may engage in Tobacco Retailing at the location until ninety (90) days have passed from the date of suspension.

(4) After revocation for four or more violations of this Part at a location within any forty-eight (48) month period, no new Permit may issue for the location until one year (1) has passed from the date of revocation.

(c) **APPEAL OF SUSPENSION/REVOCATION.** A decision of the Department to suspend or revoke a permit is appealable to City Manager and/or his/her designee and must be filed with the City Clerk or within ten days of mailing of the Department's decision. If such an appeal is made, it shall stay enforcement of the appealed action. An

appeal to the City Manager or designee is not available for a suspension or revocation made pursuant to subsection (d) below.

(d) **REVOCATION OF PERMIT WRONGLY ISSUED.** A Tobacco Retailer Permit shall be revoked if the Department finds, after the Permit is afforded notice and an opportunity to be heard, that one or more of the bases for denial of a Permit under Section 18.105 existed at the time application was made or at any time before the Permit issued. The decision by the Department shall be the final decision of the City. Such a revocation shall be without prejudice to the filing of a new Permit application.

18.112 Tobacco Retailing Without a Permit.

(a) In addition to any other penalty authorized by law, if a court of competent jurisdiction determines, or the Department finds based on a preponderance of evidence, after notice and an opportunity to be heard, that any Person has engaged in Tobacco Retailing at a location without a valid Tobacco Retailer Permit, either directly or through the Person's agents or employees, the Person shall be ineligible to apply for, or to be issued, a Tobacco Retailing permit as follows:

(1) After a first violation of this section at a location within any sixty-month (60) period, no new permit may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until thirty (30) days have passed from the date of the violation.

(2) After a second violation of this section at a location within any sixty-month (60) period, no new permit may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until ninety (90) days have passed from the date of the violation.

(3) After a third or subsequent violation of this section at a location within any sixty-month (60) period, no new permit may issue for the Person or the location (unless ownership of the business at the location has been transferred in an Arm's Length Transaction), until five (5) years have passed from the date of the violation.

(b) Tobacco Products and Tobacco Paraphernalia offered for sale or exchange in violation of this section are subject to seizure by the Department or any peace officer and shall be forfeited after the Permittee and any other owner of the Tobacco Products and Tobacco Paraphernalia seized is given reasonable notice and an opportunity to demonstrate that the Tobacco Products and Tobacco Paraphernalia were not offered for sale or exchange in violation of this Part. The decision by the Department may be appealed pursuant to the procedures set forth in Section 18.111(c). Forfeited Tobacco Products and Tobacco Paraphernalia shall be destroyed after all internal appeals have been exhausted and the time in which to seek judicial review pursuant to California Code

of Civil Procedure section 1094.6 or other applicable law has expired without the filing of a lawsuit or, if such a suit is filed, after judgment in that suit becomes final.

(c) For the purposes of the civil remedies provided in this Part:

(1) each day on which a Tobacco Product or Tobacco Paraphernalia is offered for sale in violation of this Part; or

(2) each individual retail Tobacco Product and each individual retail item of Tobacco Paraphernalia that is distributed, sold, or offered for sale in violation of this Part;

shall constitute a separate violation of this Part.

18.113 Enforcement.

(a) The remedies provided by this Part are cumulative and in addition to any other remedies available at law or in equity.

(b) Whenever evidence of a violation of this Part is obtained in any part through the participation of a Person under the age of eighteen (18) years old, such a Person shall not be required to appear or give testimony in any civil or administrative process brought to enforce this Part and the alleged violation shall be adjudicated based upon the sufficiency and persuasiveness of the evidence presented.

(c) Violations of this Part are subject to a civil action brought by the City Prosecutor or the City Attorney, punishable by a civil fine not less than two hundred fifty dollars (\$250) and not exceeding one thousand dollars (\$1,000) per violation.

(d) Violations of this Part may, in the discretion of the City Prosecutor be prosecuted as infractions or misdemeanors when the interests of justice so require.

(e) Causing, permitting, aiding, abetting, or concealing a violation of any provision of this Part shall also constitute a violation of this Part.

(f) Violations of this Part are hereby declared to be public nuisances.

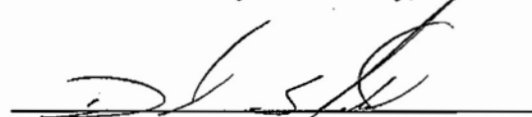
(g) In addition to other remedies provided by this Part or by other law, any violation of this Part may be remedied by a civil action brought by the City Attorney, including, for example, administrative or judicial nuisance abatement proceedings, civil or criminal code enforcement proceedings, and suits for injunctive relief.

SECTION 3. SEVERABILITY. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or

circumstance, is for any reason held to be invalid or unenforceable, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases of this Ordinance, or its application to any other person or circumstance. The City Council of the City of South Pasadena hereby declares that it would have adopted each section, subsection, subdivision, paragraph, sentence, clause or phrase hereof, irrespective of the fact that any one or more other sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases hereof be declared invalid or unenforceable.

SECTION 4. This ordinance shall take effect thirty (30) days after its final passage and within (15) days after its passage, the City Clerk of the City of South Pasadena shall certify to the passage and adoption of this ordinance and to its approval by the Mayor and City Council and shall cause the same to be published in a newspaper in the manner required by law.

PASSED, APPROVED AND ADOPTED ON this 18th day of February, 2009.



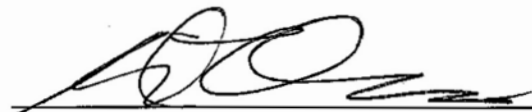
David Sifuentes, Mayor

ATTEST:



Sally Kilby, City Clerk

APPROVED AS TO FORM:



Richard L. Adams II, City Attorney


I HEREBY CERTIFY the foregoing ordinance was duly adopted by the City Council of the City of South Pasadena at a regular meeting held on the 18th day of February, 2009, by the following vote:

AYES: Cacciotti, Putnam, Schneider, Ten and Mayor Sifuentes

NOES: None

ABSENT: None

ABSTAINED: Noe



Sally Kilby, City Clerk

ATTACHMENT F

Not for Sale: The State Authority to End Cigarette
Sales

**NOT FOR SALE: STATE AUTHORITY TO END
CIGARETTE SALES**

Joelle Lester[†] & Mark Meaney^{††}

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I. INTRODUCTION

Cigarette smoking continues to be a public health problem of staggering dimensions, killing more than 480,000 Americans each year and leaving millions more to suffer from chronic disease.¹ Through multiple biochemical mechanisms, tobacco smoke damages every organ in the body and causes a wide array of devastating illnesses, including cardiovascular disease, multiple

[†] Joelle M. Lester is the Director of Tobacco Control Legal Consortium, a program of the Public Health Law Center.

^{††} Mark Meaney is the Lead Senior Staff Attorney for Technical Assistance at the Tobacco Control Legal Consortium, a program of the Public Health Law Center. The authors wish to thank Leslie Zellers and Maggie Mahoney for their research contributions and Michael Freiberg for his editorial assistance.

1. See *Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [https://perma.cc/7NRE-GEAB] (last updated May 15, 2017).

forms of cancer, and reproductive issues.² Additionally, the economic impact of smoking is enormous, approaching \$300 billion annually.³ Smoking causes \$150 billion per year in lost productivity and at least \$130 billion per year in healthcare costs.⁴ While policy interventions such as smoke-free laws and cigarette taxes have reduced the prevalence of smoking, the risk of dying from cigarette smoking has increased over the last fifty years in the United States.⁵

One concern is the continuing problem of underage and young adult smoking. Each day 3,200 adolescents try smoking for the first time.⁶ An additional 2,100 adolescents will become daily smokers.⁷ While adolescent smoking rates declined from 1997-2003, the decline has subsequently slowed, stalling among certain sub-populations.⁸

Also alarming is the phenomenon of disproportionate tobacco-related health effects among minority subpopulations.⁹ While overall smoking rates have declined in recent years, health disparities related to tobacco use have increased.¹⁰ Racial and ethnic minorities, particularly African Americans and certain Native American populations, bear a disproportionate burden of tobacco-related disease.¹¹ For example, African American men have higher rates of

2. *See id.*

3. *See The Health Consequences of Smoking-50 Years of Progress: A Report of the Surgeon General*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/fact-sheet.html> [<https://perma.cc/M47K-GHBT>] (last visited June 21, 2018).

4. *See id.*

5. *See id.*

6. *See Youth and Tobacco Use*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/youth_data/tobacco_use/index.htm [<https://perma.cc/3V2Y-2G5E>] (last updated Sept. 20, 2017).

7. *See id.*

8. *See Cigarette Use Among High School Students-United States 1991-2009*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5926a1.htm> [<https://perma.cc/3DQ9-9MNR>] (last updated July 9, 2010) (noting that after declines from the late 1990s to 2003, current cigarette use remained stable from 2003--2009 among male students overall, white students overall, white male students, Hispanic female students, Hispanic male students, and eleventh and twelfth grade students).

9. *See Tobacco-Related Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/tobacco/disparities/index.htm> [<https://perma.cc/S38R-B3CK>] (last updated Dec. 1, 2016).

10. *See id.*

11. *See Wendy Max et al., The Disproportionate Cost of Smoking for African Americans in California*, AM. J. PUB. HEALTH, Jan. 2010, at 152-58.

smoking-attributable lung cancer than any other group.¹² In addition, multiple studies have found that lesbian, gay, bisexual, and transgender (LGBT) individuals are 1.5 to 2.5 times more likely to smoke than their non-LGBT counterparts.¹³ Such statistics are especially disturbing given that racial and sexual minorities are generally less likely to access tobacco cessation treatments and health care services.¹⁴

Strikingly, this death and disease along with the associated economic costs are preventable. In fact, the U.S. Centers for Disease Control and Prevention has characterized the reduction of tobacco use as a public health priority, or "Winnable Battle." In other words, a significant progress can be made in a relatively short time, thus meriting continued investment in innovative policy interventions by national, state, and local governments.¹⁵ While the federal government has enacted legislation in recent years,¹⁶ most of the regulation of tobacco products occurs at the state and local levels.¹⁷ With congressional paralysis and recent executive actions,¹⁸ it seems likely that state and local governments will continue to drive most tobacco control policy.¹⁹

12. *See id.*

13. *See* TRUTH INITIATIVE ET AL., *ACHIEVING HEALTH EQUITY IN TOBACCO CONTROL* 1, 12 (2015), <https://truthinitiative.org/sites/default/files/Achieving%20Health%20Equity%20in%20Tobacco%20Control%20-%20Version%201.pdf> [<https://perma.cc/9NYA-GDMR>].

14. *See id.* at 5.

15. *See Winnable Battles*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/winnablebattles/report/tobacco.html> [<https://perma.cc/A9L-HH6B>] (last updated Dec. 14, 2017).

16. *See id.*

17. *See, e.g.*, Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387a (2012)).

18. *See, e.g.*, Sam Schaust, *Plymouth Becomes Fourth MN City to Raise Tobacco Sales Age to 21*, TWIN CITIES BUS. (Nov. 30, 2017), <http://tcbmag.com/news/articles/2017/november/plymouth-becomes-fourth-mn-city-to-raise-tobacco-s> [<https://perma.cc/GYF5-D8J1>].

19. *See, e.g.*, Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017) (establishing a federal policy requiring that two regulations be identified for elimination for each new regulation issued).

20. *See* Scott Gottlieb, *Remarks by Dr. Gottlieb on New Strategies for Tobacco Policy and Therapeutic Nicotine & Placement*, U.S. FOOD & DRUG ADMIN. (Dec. 12, 2017), <https://www.fda.gov/NewsEvents/Speeches/ucm588661.htm> [<https://perma.cc/JV7U-LGC7>].

Given the overwhelming evidence of harm to individual health caused by tobacco use, as well as the impact on health care costs and the economy, public health advocates are looking for additional policy interventions to further reduce the toll of disease and death from smoking.²¹ The biggest public health gains may be realized by focusing policy interventions on reducing access to the most harmful tobacco products.²²

Cigarettes are the most harmful tobacco product.²³ The 2014 Surgeon General's report, *The Health Consequences of Smoking-50 Years of Progress*,²⁴ includes two key conclusions related to combusted tobacco products, their role in the tobacco epidemic, and the potential for greater restrictions on the sale of these products on improving public health. First, "[t]he burden of death and disease from tobacco use in the United States is overwhelmingly caused by cigarettes and other combusted tobacco products; rapid elimination of their use will dramatically reduce this burden."²⁵ Second, "[n]ew 'end game' strategies have been proposed with the goal of eliminating tobacco smoking. Some of these strategies may prove useful for the United States, particularly reduction of the nicotine content of tobacco products and greater restrictions on sales (including bans on entire categories of tobacco products)."²⁶

Preventing youth from smoking is critical to reducing tobacco-related death and disease, given the vast majority of smokers start before the age of eight years,²⁷ and the lifetime risk of many tobacco-related diseases is linked to the duration of smoking.²⁸ Policies to

21. See, e.g., OFFICE OF THE SURGEON GEN., U.S. DEPT OF HEALTH & HUMAN SERVICES., *THE HEALTH CONSEQUENCES OF SMOKING 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* (2014), <https://www.surgeongeneral.gov/library/reports/50-years-of-progress/full-report.pdf> [<https://perma.cc/XG-JSGC>]; *Institute for Global Tobacco Control*, JOHNS HOPKINS UNIV., <https://www.jhsph.edu/research/centers-and-institutes/institute-for-global-tobacco-control/index.html> [<https://perma.cc/7BSB-CKT3>] (last visited June 21, 2018).

22. See, e.g., Gottlieb, *supra* note 20.

23. See Scott Gottlieb, & marks by Dr. Gottlieb, U.S. FOOD & DRUG ADMIN. July 28, 2017), <https://www.fda.gov/NewsEvents/Speeches/ucm569024.htm> [<https://perma.cc/D8Y6-ALGY>].

24. OFFICE OF THE SURGEON GEN., *supra* note 21.

25. *Id.* at 7.

26. *Id.* at 13.

27. See *Youth and Tobacco Use*, *supra* note 6.

28. See Niloufar Taghizadeh, *Lifetime Smoking History and Cause-Specific Mortality in a Cohort Study with 43 Years of Follow-Up*, PLOS (Apr. 7, 2016), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0153310>

reduce youth access to tobacco products, especially cigarettes, may be one of the most effective means to decrease the long-term health effects of tobacco use.²⁹

There are many existing policy interventions from all levels of government focused on reducing youth access to tobacco products.³⁰ These efforts include establishing a minimum legal age to purchase tobacco products, restricting sales locations, increasing the minimum price, and confining the sale of certain product classes by location or type of retailer.³¹

To date, however, no jurisdiction in the United States has taken the next step and prohibited the sale of an entire class of tobacco products. This inaction is mainly due to the political challenges of adopting, implementing, and enforcing such a bold policy option.³² Any jurisdiction pursuing such bold sales restrictions on tobacco products will need to marshal significant community education and advocacy resources, conduct careful drafting to address the legal issues laid out in this Article, and should expect vocal opposition to their efforts.³³

A prohibition against the sale of the most harmful tobacco products would have the greatest potential for a significant public health impact.³⁴ This is due to the fact that cigarettes and other combustible tobacco products cause the vast majority of illness and

[<https://perma.cc/BJ5R-KT4P>].

29. See OFFICE OF THE SURGEON GEN., *supra* note 21.

30. See, e.g., Paula M. Lantz, *Youth Smoking Prevention Policy: Lessons Learned and Continuing Challenges*, NCBI (2004), <https://www.ncbi.nlm.nih.gov/books/NBK37608/> [<https://perma.cc/AGL5-7HDQ>].

31. See *id.*

32. See, e.g., Lisa Kroon, *Characterization of Public Opinion on the Ban of Tobacco Sales in San Francisco Pharmacies*, UCSF CTR. FOR TOBACCO CONTROL RES. & EDUC., <https://tobacco.ucsf.edu/research/characterization-public-opinion-ban-tobacco-sales--san-francisco-pharmacies> [<https://perma.cc/83V5-TS94>] (last visited June 21, 2018).

33. An example of the need for community education and outreach as well as vocal opposition to prohibiting the sale of all tobacco products can be found in the story of Westminister, Massachusetts. See Katharine Q. Seelye, *Massachusetts Town Votes to End Bid for Tobacco Ban*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/20/us/westminster-votes-to-end-bid-for-tobacco-ban.html> [<https://perma.cc/3HKA-R4AB>].

34. See OFFICE OF THE SURGEON GEN., note 21, at 853 (citing ROBERT N. PROCTOR, *GOLDEN HOLOCAUST: ORIGINS OF THE CIGARETTE CATASTROPHE AND THE CASE FOR ABOLITION* 556 (2012)); then citing Richard A. Daynard, *Doing the Unthinkable (and Saving Millions of Lives)*, 18 TOBACCO CONTROL 1, 2-3 (2009).

death associated with tobacco products.³⁵ A less dramatic variation on this policy would be to prohibit the sale of all flavored tobacco products, including menthol flavored products.³⁶ This approach would address the youth appeal of flavors,³⁷ especially with regard to electronic cigarettes;³⁸ and the disproportionate harm that menthol cigarettes inflict on African Americans,³⁹ women, youth, and the LGBT community.⁴⁰ San Francisco, California, is moving in this direction: the Board of Supervisors for the city adopted a ban on the sale of flavored tobacco products that will be subject to a voter referendum in June 2018.⁴¹ Either approach could face a legal challenge, most likely under the theory that such a policy is preempted by federal law.⁴² However, we conclude that a well-drafted policy prohibiting the sale of a class of tobacco products would probably survive a federal preemption challenge in court.

This Article begins with an overview of general preemption principles.⁴³ The focus of this Article is on the scope, and limitations, of federal preemption of state and local tobacco control laws

35. See OFFICE OF THE SURGEON GEN., *supra* note 21, at 7.

36. See Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1799 (2009) (codified at 21 U.S.C. § 387g (2012)) (banning certain flavors from cigarettes).

37. See Charles Courtemanche et al., *Influence of the Flavored Cigarette Ban on Adolescent Tobacco Use*, 52 AM. J. OF PREVENTIVE MEDICINE 139 (2017).

38. See GINNA KOSTYGINA ET AL., UCSF CTR. FOR TOBACCO CONTROL RES. & EDUC., FDA SHOULD PROHIBIT FLAVORS IN ALL TOBACCO PRODUCTS IN THE CURRENT RULE MAKING (2014), <https://tobacco.ucsf.edu/sites/tobacco.ucsf.edu/files/u9/FDA-comment-deeming%20rule%20flavor%20comment%20June3AAA-ljy-8c-hl-vs81.pdf> [https://perma.cc/U74R-UQCD].

39. See LaTrisha Vetaw, *Why We Have to Curb the Targeting of Menthol Tobacco Products to African-Americans*, MINNPOST (Aug. 14, 2015), <https://www.minnpost.com/community-voices/2015/08/why-we-have-curb-targeting-menthol-tobacco-products-african-americans> [https://perma.cc/QH4A-FDPP].

40. See TOBACCO CONTROL LEGAL CONSORTIUM, CHICAGO'S REGULATION OF MENTHOL FLAVORED TOBACCO PRODUCTS: A CASE STUDY 1 (2016), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-Chicago-Regulation-of-Menthhol-Case-Study-Update-2016.pdf> [https://perma.cc/W9X8-2T6E].

41. See, e.g., Angelica LaVito, *San Francisco, Big Tobacco Set for a Showdown over Flavored Products*, CNBC (Sept. 6, 2017), <https://www.cnbc.com/2017/09/06/san-francisco-big-tobacco-set-for-a-showdown-over-flavored-products.html> [https://perma.cc/TN8S-47S4].

42. See, e.g., U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 430 (2d Cir. 2013) (holding the local ordinance governing flavored tobacco products is not preempted by federal law).

43. See *infra*-a Part II.

through a review of existing federal law.⁴⁴ Specifically, the analysis reviews arguments for preemption that the tobacco industry is likely to use against state and local efforts to restrict or prohibit the sale of a class of tobacco products.⁴⁵ The analysis also surveys the federal case law to assess the relative strength of any arguments the tobacco industry may advance.⁴⁶ Next, this Article considers other federal laws and legislation that could add to the preemption threat.⁴⁷ Lastly, this Article considers some additional obstacles local governments may face when attempting to restrict the sale of tobacco products.⁴⁸

II. GENERAL PREEMPTION PRINCIPLES

Preemption is a legal principle in which a higher level of government can restrict or eliminate the authority of a lower level of government to regulate a certain issue.⁴⁹ Article VI of the U.S. Constitution provides that the laws of the United States "shall be the supreme Law of the Land."⁵⁰ Thus, federal law prevails if there is a conflict with a state or local law.⁵¹ Preempted laws have no force or effect.⁵² Because local control is so integral to tobacco control, the tobacco industry and its allies have long used preemptive strategies to thwart local smoke-free laws, youth access restrictions, tobacco retailer licensing systems, advertising and promotion regulations, and similar policies.⁵³

For decades, the strongest and most innovative tobacco control policies have emerged at the local level—often after long and hard-fought grassroots community efforts—before ultimately being adopted at the state or federal level.⁵⁴ These grassroots campaigns

44. See *infra* Part III.

45. See *id.*

46. See *id.*

47. See *infra* Parts IV, V.

48. See *infra* Part VI.

49. See *Cipollone v. Liggett Grp.*, 505 U.S. 504, 516 (1992) ("[I]t has been settled that state law that conflicts with federal law is 'without effect.'"); NAT'L POLICY AND LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY (NPLAN) & PUB. HEALTH LAW CTR., THE CONSEQUENCES OF PREEMPTION FOR PUBLIC HEALTH ADVOCACY, (2010), <http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf> [<https://perma.cc/FS9A-W62N>].

50. U.S. CONST. art. VI, cl. 2.

51. See *Cipollone*, 505 U.S. at 516.

52. See *id.*

53. See NPLAN & PUB. HEALTH LAW CTR., *supra* note 49, at 2-3.

54. See, e.g., Andrew Hyland et al., *Smoke-free Air Policies: Past, Present and Future*,

increase local awareness of tobacco control issues, build community readiness and support, and foster public debate about the need for policy change and healthy social norms." A preemptive state or federal law can invalidate many local tobacco control policies that represent years of efforts at the local level."⁶

When determining whether a federal law preempts a state or local law, courts examine a variety of factors, including the plain language of the law and Congressional intent.⁷ As the United States Supreme Court explained, "the purpose of Congress is the ultimate touchstone" in every pre-emption analysis."⁸

The Supreme Court has held that an analysis to determine the scope of federal preemption begins with "the assumption that the historic police powers of the States were not to be superseded by the Federal [law] unless that was the clear and manifest purpose of Congress."⁹ Indeed, this presumption against preemption is heightened when a state or locality seeks to exercise its police powers to protect the health and safety of its citizens, as is the case with laws restricting access to tobacco products.^{6°}

Analyzing the scope of a preemptive statute begins with the text of the law.⁶¹ When Congress includes a legislative provision explicitly addressing preemption, there is no need to infer congressional intent.⁶² With no explicit statement of preemptive intent, courts must consider the statute as a whole to determine whether Congress intended the federal law "to occupy the legislative field, or if there is an actual conflict between state and federal law."⁶³ "[I]f there is any ambiguity as to whether the local and federal laws can coexist, [a court] must uphold the ordinance."⁶⁴

TOBACCO CONTROL 154, 154-61 (2012).

55. See NPIAN & PUB. HEALTH LAW CTR., *supra* note 49.

56. See *id.*

57. See *id.* at 521.

58. *Id.* at 542 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

59. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

60. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

61. See *Cipollone v. Liggett Grp.*, 505 U.S. 504, 517 (1992).

62. See *id.*

63. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76-77 (2008).

64. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 433 (2d Cir. 2013) (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *N.Y. St. Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 123 (2d Cir. 2009)).

Similar principles apply with respect to state preemption of local laws, although in some states there may be different presumptions based on the type of locality involved or how the state delegates policy power authority.⁶⁵ This Article will not review the scope of local authority, which varies significantly from state to state. It will also not consider state preemption of local tobacco control laws. Instead, the focus is whether federal law preempts state or local governments from prohibiting the sale of classes of tobacco products.

III. TOBACCO CONTROL STATUTES

The Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act)⁶⁶ and the Federal Cigarette Labeling and Advertising Act⁶⁷ are the two main federal tobacco laws relevant to this Article's analysis. Understanding the reach of each of these federal statutes is an essential starting point for determining the scope of state and local regulatory authority.

A. *Family Smoking Prevention and Tobacco Control Act*

The Tobacco Control Act provides the primary federal regulatory system for tobacco products.⁶⁸ It explicitly delineates the regulatory roles of federal, state, and local governments.⁶⁹ The Tobacco Control Act contains requirements related to the distribution, manufacturing, and marketing of tobacco products.⁷⁰ Some of the restrictions include requiring the buyer to show identification prior to the sale of tobacco products,⁷¹ limiting tobacco sponsorship of events,⁷² prohibiting the use of flavors other

65. See, e.g., *Mangold Midwest Co. v. Richfield*, 274 Minn. 347, 356, 143 N.W.2d 813, 819 (1966) ("[A] state law may fully occupy a particular field of legislation so that there is no room for local regulation).

66. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C. § 387 (2012)).

67. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-1340 (2012)).

68. See 21 U.S.C. § 387 (2012).

69. *Id.* §§ 387c, e, f-1, h, p.

70. *Id.* § 387.

71. *Id.* § 387e(e).

72. *Id.* § 387a-1.

than menthol or tobacco in cigarettes,⁷³ and requiring larger and more graphic warning labels.⁷⁴ The law also grants the United States Food and Drug Administration (FDA) authority to regulate tobacco products, including the power to set product standards, such as tar and nicotine levels, as deemed appropriate to protect the public health.⁷⁵

However, the FDA's power is not limitless. The law's tobacco product standards section notes that the FDA is prohibited from banning certain classes of tobacco products, such as all cigarettes; all smokeless tobacco products; all cigars, excepting little cigars; all pipe tobacco; and all roll-your-own tobacco products.⁷⁶ Furthermore, the FDA may neither prohibit face-to-face sales of any tobacco products in a specific category of retail outlets nor establish a minimum age over eighteen for the sale of these products.⁷⁷

Although the FDA's authority may be limited in some respects, state and local governments do not have the same restrictions. The Tobacco Control Act contains a specific section relating to the authority of state and local governments,⁷⁸ which is divided into three provisions: the preservation clause,⁷⁹ a preemption provision,⁸⁰ and a saving clause.⁸¹

The preservation clause explicitly preserves state and local authority for laws and regulations that are "in addition to, or more stringent than, requirements under this subchapter."⁸² Examples include laws and regulations "relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products."⁸³ The preemption provision reserves power to the federal government for state and local requirements "relating to tobacco product standards, premarket

73. *Id.* § 387g(a) (1) (A).

74. *Id.* § 387c(a); Federal Food, Drug, and Cosmetics Act, 21 U.S.C. § 301 (2012).

75. 21 U.S.C. § 387g (2012).

76. *Id.*

77. *Id.* § 387f(d) (3) (A).

78. *Id.* § 387p(a).

79. *Id.* § 387p(a)(1).

80. *Id.* § 387p(a)(2).

81. *Id.* § 387p(a)(2)(B).

82. *Id.* § 387p(a)(1).

83. *Id.* § 387p(a) (1) (emphasis added).

review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products."⁸⁴ Lastly, the saving clause explicitly allows state and local governments to establish requirements "*relating to the sale, distribution, possession, information reporting to the State, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or relating to fire safety standards for tobacco products.*"⁸⁵ Collectively, these three provisions of the Tobacco Control Act give state and local governments broad authority to enact a wide range of tobacco product sales restrictions, including prohibiting the sale of a class of tobacco products.⁸⁶

The tobacco industry is likely to use three main arguments to support its assertion that the Tobacco Control Act preempts a state or local law prohibiting the sale of a class of tobacco products. First, banning a class of tobacco products "constitutes a 'tobacco product standard,' authority expressly reserved to the FDA."⁸⁷ Second, states and local governments cannot ban classes of tobacco products with sales regulations because the FDA is prohibited from banning classes of products.⁸⁸ Third, even if states and local governments have the power to *restrict* the sale of a certain class of tobacco products, they are barred from completely *prohibiting* the sale of such products.⁸⁹

Based on two recent court decisions upholding local laws that restrict the sale of flavored tobacco products,⁹⁰ the first two arguments can be overcome with little difficulty. Both cases support the conclusion that a state or local government sales restriction prohibiting the sale of a class of tobacco products is *not* a regulation of "tobacco product standards" under the Tobacco Control Act.⁹¹

84. *Id.* § 387p(a)(2)(A).

85. *Id.* § 387p(a)(2)(B) (emphasis added).

86. This issue was also discussed in two law review articles by Michael Freiberg. See Michael Freiberg, *The Minty Taste of Death: State and Local Options to Regulate Menthol in Tobacco Products*, 64 CATH. U. L. REV. 949 (2015); see also Michael Freiberg, *Options for State and Local Governments to Regulate Non-Cigarette Tobacco Products*, 21 ANNALSHEALTHL. 407 (2012).

87. Joelle M. Lester & Stacey Younger Gagosian, *Finished With Menthol: An Evidence-Based Policy Option That Will Save Lives*, 45 J. L. MED. & ETHICS 41, 43 (2017).

88. See *id.*

89. See *id.*

90. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 428 (2d Cir. 2013); *Nat'l Ass'n of Tobacco Outlets v. City of Providence*, C.A. No. 12-96-ML, 2012 vVL 6128707, at *13 (D.R.I. Dec. 10, 2012).

91. See *U.S. Smokeless Tobacco*, 708 F.3d at 428; *Nat'l Ass'n of Tobacco Outlets*, 2012

The third argument will be the most challenging. Nevertheless, there is a strong argument that the Tobacco Control Act allows a state or local law to completely prohibit the sale of a class of tobacco products.

1. Tobacco Product Standards

In *U.S. Smokeless Tobacco Manufacturing Co. v. City of New York*, the United States Court of Appeals for the Second Circuit found that the Tobacco Control Act does not preempt New York City's ordinance prohibiting the sale of any flavored, non-cigarette tobacco product (except in tobacco bars).⁹² The court reasoned that the ordinance regulated the sale of a finished product rather than establishing a product standard.⁹³ The ordinance governed tobacco products based only on their characteristics as an end product,⁹⁴ not on whether the product was manufactured in a particular way or with particular ingredients.⁹⁵ The court of appeals further found that even if the ordinance was construed as establishing a tobacco product standard under the Tobacco Control Act, "it would not be preempted, because it also falls within that section's saving clause. The saving clause excepts from preemption local laws that establish 'requirements relating to the sale ... of ... tobacco products.'⁹⁶ The district court opinion in this case also stated that the tobacco companies' "theory-that a sales ban amounts to a manufacturing standard-is specious. How a thing is made and whether and where it can be sold are entirely different issues, in theory and as a matter of fact."⁹⁷

Similarly, in *National Ass'n of Tobacco Outlets v. City of Providence*,⁹⁸ a Rhode Island federal district court upheld the Providence ordinance prohibiting the sale of flavored non-cigarette tobacco products (except in smoking bars).⁹⁹ The court held that the Tobacco Control Act's preemption provision "relates to tobacco

WL 6128707, at *13.

92. See 708 F.3d 428,428.

93. See *id.*

94. N.Y.C., N.Y., AOMIN. CODE § 17-715 (2013).

95. *U.S. Smokeless Tobacco*, 708 F.3d at 434-35.

96. *Id.* at 435.

97. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511(CM), 2011 WL 5569431, at *5 (S.D.N.Y. Nov. 15, 2011).

98. See No. 12-96--ML, 2012 vVL 6128707, at *1 (D.R.I. Dec. 10, 2012).

99. See *id.*

product standards, not the sale and/or distribution of tobacco products."¹⁰⁰ The court also noted that the additional saving clause of the Tobacco Control Act "reaffirms that state or local regulations related to the sale and/or distribution of tobacco products are not preempted" by the Tobacco Control Act.¹⁰¹ On appeal, the First Circuit Court of Appeals ultimately ruled that neither federal nor state law preempted the ordinance.¹⁰²

Both the New York City and Providence decisions support the conclusion that restricting, and even prohibiting, the sale of tobacco products does not implicate tobacco product standards and therefore should not be preempted by the Tobacco Control Act. The tobacco industry, however, is likely to rely on a recent Supreme Court case to assert that a sales prohibition is an impermissible evasion of the Tobacco Control Act's preemption provisions. Even so, the facts in that case are distinguishable from the question at hand.

In *National Meat Association v. Harris*,¹⁰¹ the Supreme Court held the Federal Meat Inspection Act ("FMIA")¹⁰⁴ expressly preempted a California law prohibiting slaughterhouses from buying or selling meat from a "nonambulatory" animal.¹⁰⁵ The FMIA contains a broad preemption clause prohibiting states from imposing any "additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations."¹⁰⁶ The Court found that the California law was preempted because it imposed "additional or different requirements on swine slaughterhouses" "at every turn."¹⁰⁷

The tobacco industry relied on *National Meat Association in U.S. Smokeless Tobacco*. There, the Second Circuit distinguished *National Meat Association* by stating that "to constitute a product standard subject to preemption, a local sales regulation must be 'something more than an incentive or motivator,' it must require manufacturers

100. *Id.* at *13.

101. *See id.*

102. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, 731 F.3d 71, 85 (1st Cir. 2013).

103. 565 U.S. 452 (2012).

104. Federal Meat Inspection Act, 21 U.S.C. § 601 (2012).

105. *Nat'l Meat Ass'n*, 565 U.S. at 468. A "nonambulatory" animal is unable to walk on its own. *Id.* at 457.

106. 21 U.S.C. § 678 (2012); *Nat'l Meat Ass'n*, 565 U.S. at 459-60.

107. *National Meat Ass'n*, 565 U.S. at 460.

to alter 'the construction, components, ingredients, additives, constituents ... and properties' of their products."¹⁰⁸ In contrast, the New York City ordinance restricting the sale of flavored tobacco products regulated only the sale of finished products based on characteristics such as flavor.¹⁰⁹ The court further distinguished the *National Meat Association* decision:

The City's regulation is therefore easily distinguishable from the California statute invalidated as a manufacturing standard in *National Meat Association*. That law expressly prohibited the sale of meat that was not produced in accordance with specific rules to be applied at the slaughterhouse with respect to the kinds of animals that were, according to the state, fit for butchering-rules that were in conflict with more forgiving federal standards. To be sold in the state, meat would have to be processed in a particular way. The ordinance at issue here does not concern itself with the mode of manufacturing, or with the ingredients that may be included in tobacco products. Rather, it prohibits the sale of a recognized category of tobacco products, characterized by their flavor and marketed as a distinct product. Plaintiffs' effort to characterize the ordinance as a manufacturing standard is tantamount to describing a ban on cigarettes as a manufacturing standard mandating that cigars be manufactured in minimum sizes and with tobacco-leaf rather than paper wrap pins.¹¹⁰

Despite this holding, tobacco companies will likely argue that the *National Meat Association* decision supports their view—a state or local tobacco sales restriction is merely a way to undermine the Tobacco Control Act's preemption provision. As the Court noted in *National Meat Association*: "[I]f the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved. That would make a mockery of the FMIA's preemption provision."¹¹¹

However, the *National Meat Association* decision is distinguishable from a regulation of a class of tobacco products for

108. U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 434 (2d Cir. 2013) (internal citations omitted).

109. See *id.*

110. *Id.* at 435 n.2 (citation omitted).

111. *National Meat Ass'n*, 565 U.S. at 464.

several reasons. Foremost, the FMIA's preemption provision prohibits the imposition of an "additional or different requirement," which is a far broader restriction than the language of the Tobacco Control Act.¹¹² In contrast, the Tobacco Control Act's preservation clause explicitly allows for state or local laws that are "in addition to, or more stringent than, requirements under this subchapter," including laws and regulations "relating to or prohibiting the sale" of tobacco products.^m While the preemption provision in 21 U.S.C. § 387p(a) (2) (A) limits this clause, a prohibition on the sale of a type of tobacco product should not be considered a tobacco product standard. Further, the Tobacco Control Act contains the additional saving clause that explicitly allows state and local requirements "relating to the sale" of tobacco products.¹¹⁴

In sum, the decisions in *U.S. Smokeless Tobacco* and *National Meat Ass'n* support the argument that a state or local law prohibiting the sale of a class of tobacco products should not be deemed a "tobacco product standard" preempted by the Tobacco Control Act. Rather, like the flavored tobacco ordinances in New York and Providence, such a law regulates the sale of a particular *type* of tobacco product, rather than the manner in which the product is manufactured. To make it more likely that courts will reach this conclusion, laws regulating a class of tobacco products should prohibit only the products' end sale rather than specifying how such products are created.

While the New York City and Providence decisions are not binding outside of their federal circuits, they serve as persuasive authority to other courts ruling on related issues.¹¹⁵

112. 21 U.S.C. § 678 (2012).

113. *Id.* § 387p(a)(1).

114. *Id.* § 387p(a)(2)(B).

115. Although the courts in *U.S. Smokeless Tobacco* and *National Association of Tobacco Outlets* were unpersuaded by the tobacco companies' preemption arguments, these arguments are likely to recur if a state or local government restricts the sale of a class of tobacco products. These arguments include:

- (1) Preemption of tobacco product standards in the Tobacco Control Act is designed to create uniformity. Brief & Special Appendix of Plaintiffs-Appellants at 1, *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428 (2d Cir. 2013) (**No.** 11-5167-cv). Characterizing an ordinance as a sales ban is just a way to undermine this uniformity and a clever drafting technique to hide the regulation of tobacco product standards. *Id.* at 2-3.
- (2) The distinction between sales and manufacturing is inconsistent with the language and structure of the Tobacco Control Act. *Id.* at 19.

2. *Eliminating Certain Tobacco Products*

The industry will likely raise a second argument to challenge a state or local sales prohibition: the Tobacco Control Act provision prohibiting the FDA from eliminating the sale of certain tobacco products also applies to state and local governments attempting to do the same.

As noted above, the Tobacco Control Act explicitly prohibits the **FDA** from "banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco, or all roll-your-own tobacco products."¹¹⁶ Furthermore, one of the Tobacco Control Act's stated purposes is "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."¹¹⁷

In *U.S. Smokeless Tobacco*, tobacco companies claimed that under the Tobacco Control Act "local governments 'may not make it impossible or impracticable for adults to purchase tobacco products whose contents comply with the federal standards.'"¹¹⁸ They further argued that such action "would undermine another express purpose of the Act—namely, 'to continue to permit the sale of tobacco products to adults.'"¹¹⁹ The Second Circuit disagreed, finding that while the Tobacco Control Act prohibits an FDA ban against entire categories of tobacco products, the law "nowhere extend[ed] that prohibition to state and local governments."¹²⁰ The court noted instead that the preservation clause of the Tobacco Control Act:

expressly *preserves* localities' traditional power to adopt any "measure relating to or prohibiting the sale" of tobacco products. That authority is limited only to the extent that a state or local regulation contravenes one of the specific

(3) Under the saving clause, state and local governments may regulate when, where, how, and to whom tobacco products may be sold, but they may not make it impossible or impracticable for adults to purchase tobacco products whose contents comply with the federal standards. *Id.* at 37.

116. 21 U.S.C. § 387g(d) (3) (A).

117. Family Smoking Prevention and Tobacco Control and Federal Retirement Reform, Pub. L. No. 111-31, § 3(7), 123 Stat. 1776, 1782 (2009).

118. *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428 at 433 (2d Cir. 2013) (citing Brief & Special Appendix of Plaintiffs-Appellants at 37).

119. Brief and Special Appendix of Plaintiffs-Appellants at 27, *U.S. Smokeless Tobacco Mfg. Co.*, 708 F.3d 428 (2d Cir. 2013) (No. 11-5167--cv) (citing 21 U.S.C. § 387 (2009)).

120. *U.S. Smokeless Tobacco*, 708 F.3d at 433.

prohibitions of the preemption clause. The only prohibition relevant here forbids local governments to impose "any requirement ... relating to tobacco product standards." Even then, pursuant to the saving clause, local laws that would otherwise fall within the preemption clause are exempted if they constitute "requirements relating to the sale ... of ... tobacco products." In other words, [the preservation clause] . . . reserves regulation at the manufacturing stage exclusively to the federal government, but allows states and localities to continue to regulate sales and other consumer-related aspects of the industry in the absence of conflicting federal regulation.¹²¹

Similarly, the district court in *U.S. Smokeless Tobacco* held that because the preemption clause is "silent regarding sales prohibitions, it seems far more likely that prohibitions are preserved and never preempted, and therefore need never be saved."¹²² Based on the decision in *U.S. Smokeless Tobacco* and the language of the Tobacco Control Act, while the FDA is statutorily barred from banning a class of tobacco products, the limitation likely does not extend to a state or local government prohibiting the sale of cigarettes or flavored tobacco products.

3. *Laws that Prohibit versus Laws that Restrict*

If a court holds that a tobacco product prohibition is a restriction on the *sale* of tobacco products rather than a regulation of their *standards*, tobacco companies will still likely assert that a complete prohibition on a class of tobacco products is preempted. This distinction arises because the preservation clause of the Tobacco Control Act applies to laws and regulations "relating to or prohibiting the sale" of tobacco products.¹²¹ However, the saving clause refers only to laws "relating to the sale" of tobacco products—the word "prohibiting" is not used again.¹²⁴

The tobacco industry raised this argument in *U.S. Smokeless Tobacco*, but the appellate court did not resolve the issue for purposes

121. *Id.* at 433-34 (citations omitted) (citing 21 U.S.C. §§ 387p(a)(1), p(a)(2)(A)-(B) (2009)).

122. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, No. 09 Civ. 10511 (CM), 2011 WL 5569431, at *7 (S.D.N.Y. Nov. 15, 2011).

123. 21 U.S.C. § 387p(a) (1) (2012).

124. *Id.* § 387p(a)(2)(B).

of its decision.¹²⁵ This is in part because the New York City ordinance allows the sale of flavored tobacco products in "a tobacco bar."¹²⁶ At the time of the lawsuit, there were only eight tobacco bars in New York City, none of which sold flavored smokeless tobacco products.¹²⁷ Tobacco companies claimed that the ordinance constituted an "outright ban on the sale of flavored tobacco products"¹²⁸ and could not be rescued by the Tobacco Control Act's saving clause.

The appellate court refused to consider whether the tobacco companies' interpretation of the saving clause was correct, stating that "[w]hile the sales restriction imposed by the City's ordinance is severe, it does not constitute a complete ban, as it permits the limited sale of flavored tobacco products within New York City."¹²⁹ Further, the tobacco bar owners made a commercial decision not to sell flavored tobacco on their own.¹³⁰

However, the appellate court also stated that the flavored tobacco ordinance "regulates a niche product, not a broad category of products such as cigarettes or smokeless tobacco, and it allows that product to be sold within New York City, although to a limited extent."¹³¹ The court thus found New York City's ordinance advances the Tobacco Control Act's goal of reducing the use of harmful tobacco products, especially among young people, without impeding Congress' competing goal of keeping tobacco products generally available to adults.¹³²

The district court's decision to deny the tobacco companies' request for a preliminary injunction presents a more favorable analysis. The Southern District of New York held that the preservation clause "plainly contemplates local regulations restricting and/or banning the sale of subclasses of tobacco products (such as flavored tobacco products)-it explicitly refers broadly to all 'tobacco products.'"¹³³ The court found that the preservation

125. *U.S. Smokeless Tobacco*, 708 F.3d at 435.

126. See N.Y.C., N.Y., A.O. MIN. CODE § 17-715 (2013).

127. *U.S. Smokeless Tobacco*, 708 F.3d at 432.

128. *Id.* at 435.

129. *U.S. Smokeless Tobacco*, 708 F.3d at 435-36 (internal citation omitted).

130. *Id.* at 436 n.3.

131. *Id.* at 436; see also Freiberg, *The Minty Taste of Death*, *supra* note 86 (noting courts distinguish niche product regulation from category-wide regulation).

132. *U.S. Smokeless Tobacco*, 708 F.3d at 436.

133. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 703 F. Supp. 2d 329, 343-44 (S.D.N.Y. 2010) (internal citation omitted).

clause barred any interpretation of the Act's provisions "as preventing a city from 'prohibiting' (or otherwise restricting) the 'sale' of tobacco products."¹³⁴

This distinction between laws "relating to" tobacco products and laws "relating to or prohibiting" the sale of tobacco products is likely to be raised again if jurisdictions prohibit the sale of a class of tobacco products.¹³⁵ In response, the jurisdiction can assert that

134. *Id.* at 344 (internal citation omitted).

135. In appealing the district court's decision, the parties each provided their own interpretation of the language of the saving clause. These arguments may be instructive in a future case. For example, the tobacco companies made the following arguments:

- (1) A saving clause should not be interpreted broadly. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (stating courts may *not* "give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law"); Brief and Special Appendix of Plaintiffs-Appellants at 25, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv).
- (2) The saving clause makes clear that state or local requirements "relating to," but *not prohibiting*, sales of tobacco products are saved. The saving clause thus comes into play where a state or locality establishes a requirement that does not prohibit altogether the sale of a tobacco product complying with federal standards, but merely regulates where, when, or to whom such products may be sold. Reply Brief and Addendum of Plaintiffs-Appellants at 3-5, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv), 2012 WL 2953441, at *3--5.
- (3) "[U]nder noscitur a sociis [a rule of statutory construction under which the questionable meaning of a doubtful word can be derived from its association with other words], the word 'sale' should be construed consistently with the rest of the series to refer to where, when, and to whom finished tobacco products may be sold, not whether they may be sold at all." *Id.* at 19.

In contrast, the City of New York dissected the language of the saving clause and argued that Congress intended the phrase "related to" to include a prohibition on the sale thereof. Appellee's Brief at 28, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv), 2012 WL 2366520, at *28. The city further argued that:

- (1) Failing to give meaning to the word "prohibiting" in the preservation clause would violate the canons of statutory construction to give effect to every clause and word of a statute. *Id.* at 25--26.
- (2) The entire preemption clause relates to tobacco product standards and the saving clause specifies the exceptions to the preemption clause. *See id.* at 26--27. Thus, the exceptions in the saving clause relate only to tobacco product standards. *Id.* Any law that does not relate to tobacco product standards is not preempted to begin with and is expressly authorized by the preservation clause. *Id.*
- (3) Congress understood that a "requirement relating to the sale" of tobacco

there is a general presumption against preemption, particularly if the police powers to protect health and safety are implicated.¹³⁶ The state or locality can also avail itself to the sweeping Tobacco Control Act provision that explicitly preserves state and local governments' authority to regulate tobacco sales.¹³⁷ Although the Tobacco Control Act provides some limits on the FDA's authority, this limitation does not extend to state or local governments.

Finally, state or local governments could parse both the structure and wording of the preservation and saving clauses to argue that the saving clause refers only to tobacco product *standards*, whereas the preservation clause applies more broadly to any state or local law "relating to or prohibiting the *sale*' of tobacco products.¹³⁸ Under this reading, state or local laws prohibiting the sale of a type of tobacco product are not preempted because they do not relate to tobacco product standards, and the laws are expressly authorized by the preservation clause.

B. *Federal Cigarette Labeling and Advertising Act*

The second key federal law that relates to tobacco control is the Federal Cigarette Labeling and Advertising Act (FCLAA), which requires warning labels on tobacco products and advertising.¹³⁹ The FCLAA should not present a barrier to a state or local law prohibiting the sale of cigarettes or flavored tobacco products. The law, however, contains a preemption provision that historically has been problematic for certain state and local activities, and therefore, it

products could potentially include a total ban. As evidence of this, the city points to the limitations on FDA authority (e.g., that the FDA may not prohibit the sale of tobacco products in face-to-face transactions in a specific category of retail outlet). 21 U.S.C.A. 387f(d); *id.* at 35.

- (4) These limitations on FDA authority demonstrate that "Congress considered and understood the ramifications of unqualified authority to restrict the sale and distribution of tobacco products, yet intentionally chose not to limit the powers of states and localities in those very same areas." *Id.*

136. *See* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 485 (1996) ("In all preemption cases ... we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (internal quotations and citations omitted)).

137. 21 U.S.C. § 387p(a) (1) (2012).

138. *Id.* § 387p(a) (1) (emphasis added).

139. *See* Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, § 4, 79 Stat. 282,283 (codified as amended at 15 U.S.C. § 1331-41 (2012)).

warrants a review of potential legal implications.¹⁴⁰ While the FCLAA regulates the advertising and marketing of tobacco products, it is relevant in this context because the tobacco industry could argue that a sales prohibition is a de facto restriction on its ability to market its products. Thus far, courts have consistently distinguished allowable sales restrictions from preempted advertising and marketing restrictions.¹⁴¹

The FCLAA's preemption language, which was amended by the Tobacco Control Act, prohibits state and local governments from imposing any "requirement or prohibition based on smoking and health ... with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of [the] chapter."¹⁴² But in 2009, after the passage in Tobacco Control Act, the restrictions were amended to allow state and local governments to impose "specific bans or restrictions on the time, place, and manner, but not the content, of the advertising or promotion of any cigarettes."¹⁴¹

The amended preemption provision of the FCLAA¹⁴⁴ was analyzed in two recent cases. While the decisions reinforce the distinction between advertising and marketing restrictions versus sales restrictions, the industry may still argue that a sales restriction impacts its promotional activities.

In *23-34 94th St. Grocery Corp. v. New York City Board of Health*,¹⁴⁵ the court found that New York City's resolution that requires graphic images at the point of sale to show the adverse effects of smoking was "preempted by the Labeling Act because it is a requirement 'with respect to the advertising or promotion' of cigarettes."¹⁴⁶ Due to the narrow scope of this decision, which reviewed local warning

140. See 15 U.S.C. § 1334. See generally TOBACCO CONTROL LEGAL CONSORTIUM, PREEMPTION: THE BIGGEST CHALLENGE TO TOBACCO CONTROL, <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-preemption-tobacco-control-challenge-2014.pdf> [<https://perma.cc/EQA5-1.:0GN>] (last visited June 21, 2018).

141. See, e.g., *23-34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174 (2d Cir. 2012) (distinguishing advertising and marketing restrictions versus sales restrictions).

142. 15 U.S.C. § 1334(b).

143. *Id.* § 1334(c).

144. *Id.*

145. 685 F.3d 174 (2d Cir. 2012).

146. *Id.* at 182.

requirements in light of the federal warning requirements, it seems unlikely to pose a barrier.

*National Association of Tobacco Outlets v. City of Providence*⁴⁷ involved a Providence ordinance that prohibited the redemption of tobacco coupons and multi-pack discounts.¹⁴⁸ The federal district court in Rhode Island found that Providence's pricing ordinance was not preempted by FCLAA because it regulates the "time, place, and manner" of how cigarettes may be purchased in the City of Providence, rather than controlling the content of promotional or advertising materials.¹⁴⁹ The court did focus on the time, place, and manner of how products may be purchased, versus the time, place, and manner of how products are advertised or promoted (the actual focus of the FCLAA).¹⁵⁰ Nevertheless, this decision makes clear that the FCLAA does not pose a barrier to sales restrictions.¹⁵¹

IV. OTHER FEDERAL LAWS

A state or local law prohibiting the sale of a class of tobacco products is designed to regulate the distribution of such products but has no effect on the communicative impact. Nevertheless, tobacco companies may attempt to argue that such a law violates their First Amendment rights. A handful of cases decided after the adoption of the Tobacco Control Act have addressed whether various tobacco control laws violate the First Amendment.^{1, 2} Although none of these cases specifically addressed preemption arguments, they are included here for reference.

In *Rf Reynolds Tobacco Co. v. Food & Drug Administration*,¹⁵² the United States Court of Appeals for the District of Columbia Circuit struck down the FDA's proposed graphic warning labels (as required

147. C.A. No. 12-96--ML, 2012 vVL 6128707, at *1 (D.R.I. Dec. 10, 2012).

148. *Id.* at *4.

149. *Id.* at *11.

150. *Id.*

151. The First Circuit agreed that a price regulation concerns the manner of promotion and is not preempted. *Nat'l Ass'n of Tobacco Outlets v. Providence*, 731 F.3d 71, 81 (1st Cir. 2013).

152. This Article does not address tobacco cases decided prior to the adoption of the 2009 Tobacco Control Act, such as *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) or *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

153. 696 F.3d 1205 (D.C. Cir. 2012).

by the Tobacco Control Act).¹⁵⁴ The court held that the warnings violate the First Amendment because the FDA could not prove that the labels directly advanced the government's goal of reducing smoking rates under the standards in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.¹⁵⁵ Although the industry successfully argued that its speech rights were violated, this case involved requirements concerning packaging, not requirements related to the sale of products.¹⁵⁶

In *Discount Tobacco City & Lottery, Inc. v. United States*,¹⁵⁷ tobacco companies and retailers challenged the constitutionality of numerous Tobacco Control Act provisions.¹⁵⁸ The United States Court of Appeals for the Sixth Circuit upheld most elements of the Tobacco Control Act.¹⁵⁹ The court also found a few elements of the Tobacco Control Act unconstitutionally overbroad, such as the requirement for black and white textual advertising.¹⁶⁰ The opinion did not discuss a state or local government's authority to adopt laws that supplement or complement the Tobacco Control Act, and the opinion therefore should not have any bearing on a state or local tobacco product sales restriction.¹⁶¹

In addition to the FCLAA challenge, the plaintiffs in *National Association of Tobacco Outlets v. City of Providence*¹⁶² also argued that Providence's ordinance prohibiting the redemption of tobacco coupons and multi-pack discounts impermissibly restricted its ability to communicate with customers.¹⁶¹ The court found that this "pricing" ordinance did not violate the First Amendment because it did not prohibit the *distribution* of coupons nor the *dissemination* of

154. *Id.* at 1221-22; Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified as amended in scattered sections of 21 U.S.C.).

155. *See RJ. Reynolds*, 696 F.3d at 1222 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)).

156. *See id.* at 1208.

157. 674 F.3d 509 (6th Cir. 2012).

158. *See id.* at 518.

159. *See id.* (affirming "the district court's decision to uphold the constitutionality of the color graphic and non-graphic warning label requirement, with Judge Clay dissenting on this issue").

160. *See id.* at 548.

161. *See id.* at 509.

162. C.A. No. 12-96-ML, 2012 vVL 6128707, at *1 (D.R.I. Dec. 10, 2012).

163. *See id.* at *1-2.

pncmg information.¹⁶⁴ Instead, the ordinance prohibits the "redemption of such coupons and the sale of cigarettes or tobacco products through multi-pack discounts. Therefore, the prohibited activity constitutes neither commercial speech nor expressive conduct and is not subject to First Amendment protection"¹⁶⁵ Like a restriction on the sale of products at a discounted rate, a restriction on the sale of a class of tobacco products should not be subject to First Amendment protections.¹⁶⁶

The tobacco industry might argue a tobacco product sales restriction imposed by state or local law violates the First Amendment because it limits information conveyed through product packaging. This type of argument was unsuccessful in a lawsuit challenging a prohibition on the sale of tobacco products at pharmacies in San Francisco.¹⁶⁷ The United States Court of Appeals for the Ninth Circuit stated that selling cigarettes "doesn't involve conduct with a significant expressive element. It doesn't even have an expressive component."¹⁶⁸ However, it is possible that the tobacco industry will raise it again. Such an argument was raised in *National Association of Tobacco Outlets*, where the tobacco industry argued that laws prohibiting the sale of flavored tobacco products will by necessity limit the companies' First Amendment rights to communicate the information normally conveyed on product packaging.¹⁶⁹ Like the San Francisco case, the Rhode Island court was not persuaded and found that the economic conduct regulated was neither commercial speech nor expressive conduct.¹⁷⁰

164. *Id.* at *5.

165. *Id.* at *6.

166. *See* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) ("[T]he State retains less regulatory authority when its commercial speech restrictions strike at 'the substance of the information communicated' rather than the 'commercial aspect of [it]-with offerors communicating offers to offerees.'" (quoting *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 96-97 (1977))).

167. *Philip Morris USA, Inc. v. City & Cty. of S.F.*, 345 F. App'x 276, 277 (9th Cir. 2009) (upholding a city ordinance that limited where cigarettes may be sold but did not prevent the tobacco company from advertising in the city).

168. *Id.* (internal quotations and citations omitted). In *National Association of Tobacco Outlets*, the court found that "the prohibited activity [coupon redemption] constitutes neither commercial speech nor expressive conduct and is not subject to First Amendment protection under either the *Central Hudson* or the *O'Brien* standard." 2012 WL 6128707, at *6.

169. *Nat'l Ass'n of Tobacco Outlets*, 2012 vVL 6128707, at *4.

170. *Id.* at *7.

Though other federal laws also regulate tobacco products, none of those laws should preempt a state or local law from prohibiting the sale of a class of tobacco products because those laws primarily address different aspects of tobacco control. Examples of such statutes include: the federal tobacco tax;¹⁷¹ federal laws requiring smoke-free areas, such as airplanes and federally funded daycare;¹⁷² federal laws requiring the carrier to confirm the age and identity of the buyer upon delivery of cigarettes or smokeless tobacco, and requiring the recipient to be of the minimum legal age;¹⁷³ and the Affordable Care Act requirements regarding cessation coverage.¹⁷⁴

V.

ADDITIONAL PREEMPTION THREATS ON THE HORIZON

Existing federal law should not prevent a state from prohibiting the sale of a class of tobacco products, but new preemption threats loom. There has been a proliferation of recent state laws preempting local activity in a wide variety of policy areas.¹⁷⁵ While many focus on issues like employment and gun control, other state laws restrict local authority to regulate the sales of consumer goods, which could affect tobacco sales restrictions.¹⁷⁶

In addition to the efforts to preempt local tobacco control policy in statehouses around the country, threats also appear at the federal level on occasion. For example, in 2016, federal legislation was introduced that would have preempted local regulation of e-cigarettes.¹⁷⁷ New preemptive legislation at the state and federal level

171. 26 U.S.C. §§ 5701-04 (2012).

172. 49 U.S.C. § 41706 (2012); 20 U.S.C. § 6083 (2012).

173. 15 U.S.C. §§ 375, 376a (2012).

174. 42 U.S.C. §§ 300gg-13, 1396d (2012).

175. See, e.g., *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Local Minimum Wage Laws*, NAT'L EMP. L. PROJECT (July 6, 2017), <http://www.nelp.org/publication/fighting-preemption-local-minimum-wage-laws/> [<https://perma.cc/GJ8P-9S2Y>] (discussing state preemption of minimum wage laws); Kriston Capps, *The Cities That Are Fighting Back Against State Intervention*, CrTYLAB.COM (Oct. 3, 2016), <https://www.citylab.com/equity/2016/10/cities-fighting-back-against-state-intervention/502232/> [<https://perma.cc/T9PG-Q49P>] (discussing the issue of state preemption laws for guns and employment); *Preemption of Local Laws*, GIFFORDS L. CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/> (last visited June 21, 2018) [<https://perma.cc/9AVS-vVF4W>] (discussing state preemption of gun laws).

176. See, e.g., IOWA CODE § 331.301 (6) (a) (2018) (preventing counties from enacting less stringent regulations than those already imposed by state law).

177. See 21 C.F.R. §§ 1100, 1140, 1143 (2012); see also PUB. HEALTH LAW CTR.,

may be a threat to any jurisdiction that is considering a prohibition on the sale of a class of tobacco products.

VI. LOCAL AUTHORITY TO RESTRICT SALES IN MINNESOTA

Local authority to regulate tobacco products varies from state to state.¹⁷⁸ In some states, local jurisdictions have extensive authority to regulate and restrict the sale and use of tobacco products.¹⁷⁹ In others, state law prevents local jurisdictions from adopting smoke free laws,¹⁸⁰ youth access restrictions,¹⁸¹ or local retail licensure.¹⁸²

As demonstrated above, federal law does not preempt a sales restriction on a class of tobacco products.¹⁸¹ However, any local jurisdiction pursuing such a prohibition must consider authority issues arising under state law. This Article does not address what, if any, authority issues may present themselves in each state. But interested jurisdictions can generally expect the challenge to appear in one of two ways: (1) authority may be an issue where a local body has insufficient power to adopt a sales restriction on a class of

TOBACCO CONTROL LEGAL CONSORTIUM, REGULATING ELECTRONIC CIGARETTES & SIMILAR DEVICES 1-2 (2017), <http://www.publichealthlawcenter.org/sites/default/files/resources/tlc-guide-reg-ecigarettes--2016.pdf> [<https://perma.cc/X2H2-GESL>].

178. *See State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access-United States, 2000-2010*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 26, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6033a2.htm> [<https://perma.cc/K4P5--vVRCY>].

179. *See id.*

180. As of September 30, 2017, twelve states have laws in effect that explicitly preempt local ordinances from restricting smoking in government worksites, private worksites, restaurants, and/or bars. *STATE System Preemption Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 21, 2017), <https://chronicdata.cdc.gov/Legislation/STATE-System-Preemption-Fact-Sheet/uu8y-j6ga> [<https://perma.cc/694H-C2C9>].

181. As of September 30, 2017, twenty-two states have laws preempting local ordinances related to youth access to tobacco. *See id.* Twenty states preempt local restrictions on selling tobacco products to young people, and nineteen states preempt local restriction on distributing tobacco products to youth. *See id.*

182. As of September 30, 2017, ten states have laws preempting localities from passing ordinances related to licensure of tobacco products-including both over-the-counter and vending machine sales of tobacco, while eight states preempt local restrictions on retail licenses for the over-the-counter sale of tobacco products only. *See id.*

183. *Supra* Parts III, IV.

tobacco products,¹⁸⁴ or (2) a state has prohibited a municipal body from regulating tobacco sales or from regulating certain types of tobacco products, and has reserved that power to the state.¹⁸⁵

The first scenario can arise if a body, such as a city council or local board of health, has insufficient authority to adopt a law or regulation prohibiting the sale of a particular type of product. For example, some local legislative bodies only have the power to address issues expressly provided for in a state statute under what is known as "Dillon's Rule."¹⁸⁶ In many states, local legislative bodies have broad authority, whereas administrative bodies, such as a local board of health, may have limited authority. As a recent example, the New York City Board of Health adopted a rule restricting the sale of large sugary sodas, known as the "Sugary Drinks Portion Cap Rule."¹⁸⁷ A recent appellate decision held that the Board of Health exceeded its authority to regulate public health and usurped the policy-making role of the New York City Council.¹⁸⁸ A local body considering a sales restriction on a class of tobacco products should ensure that it has the authority to adopt such a restriction and should be prepared to defend legal challenges to its authority.

In the second scenario, a preemption issue may arise if a state law or regulation prohibits a municipal body from regulating tobacco sales or types of tobacco products.¹⁸⁹ This preemption may

184. See *State Preemption of Local Tobacco Control Policies Restricting Smoking, Advertising, and Youth Access—United States, 2000-2010*, *supra* note 178 (recognizing the states that restrict local authority).

185. See *id.*

186. Dillon's Rule is the doctrine that a unit of local government may exercise only those powers that the state expressly grants to it, the powers necessarily and fairly implied from that grant, and the powers that are indispensable to the existence of the unit of local government. *Dillon's Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014); see also NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 5 (2017), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/KGR2-ULBQ>] ("Dillon's Rule, which is derived from an 1868 court ruling, states that if there is a reasonable doubt whether a power has been conferred to a local government, then the power has not been conferred.").

187. N.Y.C. DEPT OF HEALTH & MENTAL HYGIENE, NOTICE OF ADOPTION OF AN AMENDMENT (§81.53) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE, <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2012/notice-adoption-amend-article81.pdf> [<https://perma.cc/27AN-SFEH>] (last visited June 21, 2018).

188. *N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene*, 970 N.Y.S.2d 200, 213 (N.Y. App. Div. 2013).

189. Cf. Freiberg, *Options for State and Local Governments*, *supra* note 86, at

be express or implied.¹⁹⁰ An expressly preemptive state law may specifically reserve the authority to regulate tobacco sales or products to the state.¹⁹¹ An impliedly preemptive state law may fully regulate the topic, leaving no room for local regulation.¹⁹²

In Minnesota, there is currently no preemption of local authority to regulate the sale of tobacco products. Many communities in Minnesota have enacted a wide range of tobacco control sales restrictions, including increasing the minimum legal sale age to twenty-one,¹⁹³ restricting the sale of flavored tobacco products to adult-only retail stores,¹⁹⁴ and implementing minimum pricing policies.¹⁹⁵ Like many other states, however, legislators have introduced preemption bills in recent sessions.¹⁹⁶ In 2017, the Minnesota legislature passed a bill that would have preempted local governments from establishing certain worker protections.¹⁹⁷ However, Governor Mark Dayton vetoed this bill.¹⁹⁸ While this particular law would not have preempted local tobacco sales restrictions, it seems likely that the Minnesota legislature will consider more preemptive laws in the future given the increase in broader preemptive laws around the country.¹⁹⁹ Currently, however, as long as a Minnesota community has sufficient statutory or home

424-26 (discussing various state-level efforts to regulate non-cigarette tobacco products and the role of local governments in these efforts).

190. See *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813,820 (Cal. 2005).

191. See *id.*

192. For example, state law preempted an anti-predatory lending ordinance in Oakland, CA, because the state legislature "impliedly fully occupied the field of regulation of predatory practices in home mortgage lending." See *id.*

193. See, e.g., EDINA, MINN., MUN. CODE § 12-247 (2017).

194. See Jessie Van Berke!, *St. Paul Prohibits Flavored Tobacco at Most Stores*, STAR TRIB. (Jan. 6, 2016, 10:05 PM), <http://www.startribune.com/st-paul-prohibits-flavored-tobacco-at-most-stores/364455011/> [<https://perma.cc/8J-8V4P>].

195. See, e.g., MINNEAPOLIS, MINN., MUN. CODE § 281.45(g) (2017).

196. See generally Michael Freiberg, *(Don't) See More Butts: Preemption and Local Regulation of Cigarette Litter*, 37 HAMLIN L. REV. 205, 206--08 (2014) (giving an overview of various states' efforts to regulate various tobacco products).

197. See HF 180, 90th Leg., Reg. Sess. (Minn. 2017).

198. See *Veto Details, Minnesota Legislature*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.state.mn.us/lrl/vetoes/vetodetails?years=all> [<https://perma.cc/9BJK-97T8>] (last visited June 21, 2018).

199. Cf. Lynn M. Mueller, *MN's E-Cigarette Ban a Reminder to Review Smoking/Tobacco Policies*, MINN. EMP. L. LETTER, Sept. 2014, at 1 (discussing the Minnesota Legislature's recent efforts to regulate a new form of tobacco products: e-cigarettes).

rule authority to prohibit the sale of a class of tobacco products, such laws are not preempted by state or federal law.²⁰⁰

VII. CONCLUSION

A state law that prohibits the sale of a class of tobacco products would likely survive a litigation challenge on federal preemption grounds.²⁰¹ A local law of this nature would likely face federal, and possibly state, preemption challenges.²⁰² In addition, local laws often face challenges based on whether or not the jurisdiction has adequate authority.²⁰¹ Should such a challenge turn on federal law, the sales prohibition likely will be upheld. Challenges based on state law will have varying results depending on the relevant language in each state's constitution and statutes.²⁰⁴

The Tobacco Control Act is the most relevant federal statute, and its preservation, preemption, and saving provisions clearly allow state and local governments to adopt laws "relating to the sale of tobacco products."²⁰⁵ The tobacco industry may argue that such a prohibition is actually a regulation of tobacco product standards. This argument relies on the Tobacco Control Act's language that preempts state and local laws relating to tobacco product standards.²⁰⁶ However, *U.S. Smokeless Tobacco*²⁰⁷ and *National Association of Tobacco Outlets*²⁰⁸ support a finding that a restriction on the sale of a tobacco product is *not* a regulation of tobacco product standards. Opponents may also argue that state and local governments are barred from eliminating a particular class of tobacco products.²⁰⁹ Again, public health advocates can rely on *U.S. Smokeless Tobacco* to support the conclusion that the Tobacco Control

200. See Freiberg, *Options for State and Local Governments*, *supra* note 86, at 443.

201. See discussion *supra* Parts II, III.

202. See *supra* Parts I, II.

203. See *Dillon's Rule*, BLACK'S LAW DICTIONARY (10th ed. 2014).

204. See discussion *supra* Part II.

205. 21 U.S.C. § 387p(a) (1) (2012).

206. *Id.* § 387p(a) (2)(A).

207. *U.S. Smokeless Tobacco Mfg. Co. v. City of New York*, 708 F.3d 428, 433 (2d Cir. 2013).

208. *Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence*, No. C.A. No. 12-96--ML, 2012 vVL 6128707 (D.R.I. Dec. 10, 2012).

209. See Freiberg, *Options for State and Local Governments*, *supra* note 86, at 444.

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Act's limits on the FDA's power to eliminate tobacco products does not extend to state and local governments.²¹⁰

The most challenging argument in favor of tobacco product restrictions will likely be that, although state and local governments are free to limit the sale of certain tobacco products, the restrictions are barred from completely prohibiting the sale of those products. This reasoning relies on the Tobacco Control Act's conflicting language in its preemption provision and saving clause.²¹¹ State and local governments can support a sales restriction via the general presumption against preemption, and the broad language of the preservation clause that explicitly allows laws "prohibiting" the sale of tobacco products. Proponents can make a strong case that failure to give effect to the word "prohibiting"²¹² would violate congressional intent, but an absence of precedent makes it unclear whether this would convince a court to rule in favor of a sales restriction on these grounds.

In sum, the tobacco industry will likely level preemption challenges against any jurisdiction that proposes to restrict the sale of a class of tobacco products. Although federal preemption claims would probably fail, public health advocates will have to investigate potential state preemption or general authority issues for a sales restriction at the local level.

210. *U.S. Smokeless Tobacco*, 708 F.3d at 433.

211. *See* 21 U.S.C. §§ 387p(a)(2), p(a)(2)(B) (2012).

212. Brief for Appellee at 26, *U.S. Smokeless Tobacco*, 780 F.3d 428 (No. 11-5167-cv).

ATTACHMENT G

South Pasadena Climate Action Plan

Due to file size, the Executive Summary is attached in this report, and the full South Pasadena Climate Action Plan can be viewed here: <http://southpasadenacap.rinconconsultants.com>

South Pasadena CAP Executive Summary

Climate Action Vision

The effects of climate change are already felt and are projected to worsen over the next century without a concerted global effort to address the sources of greenhouse gas (GHG) emissions. South Pasadena's Climate Action Plan (CAP) details a set of strategies for South Pasadena to reduce its emissions, prepare for and mitigate approaching risks, and chart the course towards a sustainable future. Key components of that future include:

- ✓ **Vibrant Communities**
- ✓ **Engaged Citizens**
- ✓ **Social Equity**
- ✓ **Resilient Economy**
- ✓ **Environmental Stewardship**
- ✓ **Regional Leader in Sustainability**

Background

The CAP is a long-range planning document that guides the City towards long-term

emissions reductions in accordance with State of California goals. The CAP analyzes emission sources within the City, forecasts future emissions, and establishes emission reduction targets (See The Playing Field and Appendix C). This CAP is the City of South Pasadena's roadmap to achieving the City's 2030 target and state mandated goal of 40% below 1990 levels by 2030 and demonstrates substantial progress towards achieving carbon neutrality by 2045. The CAP also establishes a framework for implementation and monitoring of reduction activities, and further promotes adaptation and preparedness actions. This CAP has been developed as a qualified GHG Reduction Plan and meets the requirements of CEQA 15183.5(b).

Potential Impacts to the Community

The City of South Pasadena may experience a variety of impacts due to climate change including an increase in average temperature and changes in precipitation, as outlined in Figure 1

Figure 1 Impacts of Climate Change in the City of South Pasadena (~2100)

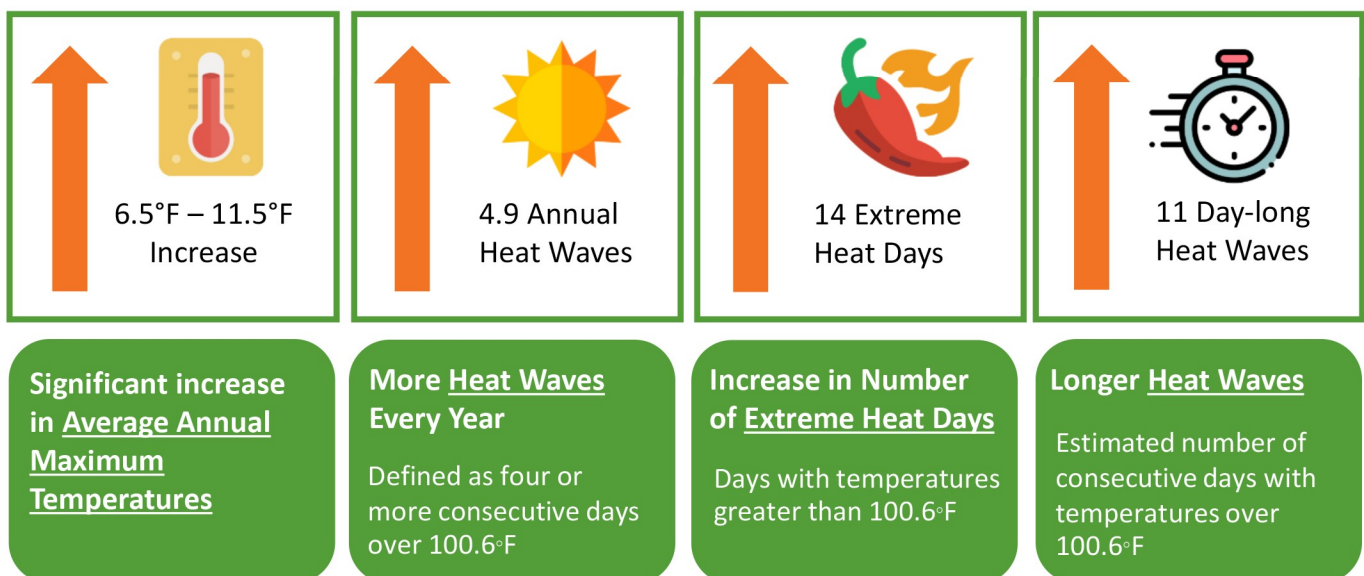
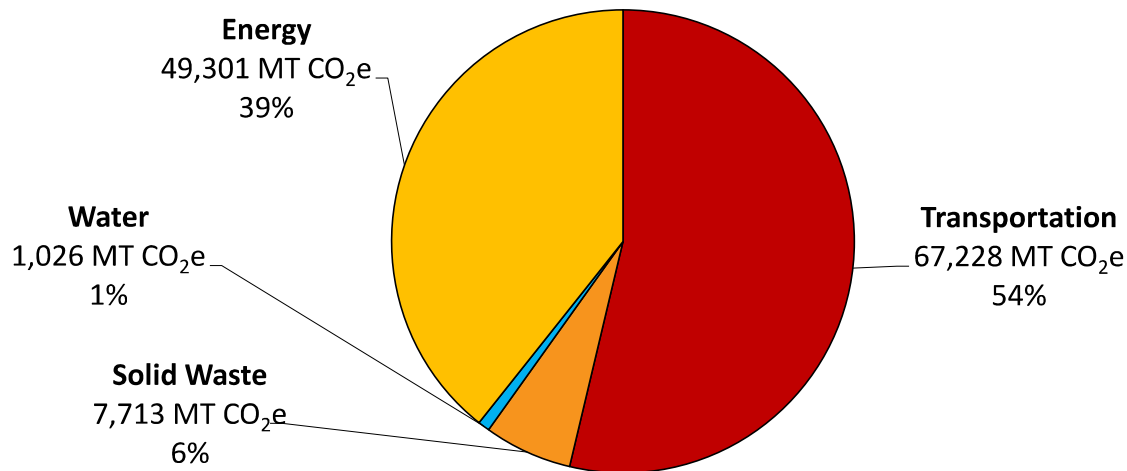


Figure 2 2016 Community-wide Emissions Summary by Sector



Baseline GHG Emissions

This CAP includes a 2016 baseline inventory of GHG emissions from municipal operations and community-wide activities within the City. It is important to note that the municipal operations inventory is a subset of the community inventory, meaning that the municipal emissions are included within the community-wide inventory. See Figure 2 for a per sector community emissions summary.

Emissions Forecast

Emissions forecasts (what we predict GHG emissions to be in the future) are generated from the 2016 baseline inventory to help identify actions that must be taken now in order to meet future targets. This CAP identifies GHG emissions reduction targets for the years 2020 (AB 32 target year), 2030 (SB 32 target year), 2040 (City of South Pasadena’s General Plan horizon year), and 2045 (EO B-55-18 target year).

Emissions Targets

After analyzing the City’s baseline inventory and forecast scenarios, emission targets were set to create quantitative goals that will further the City’s ability to measure emission reduction progress from the baseline scenarios. The 2016 baseline emissions were reduced by 40 percent to establish a 2030 target of 75,161 MT CO₂e for the City. In

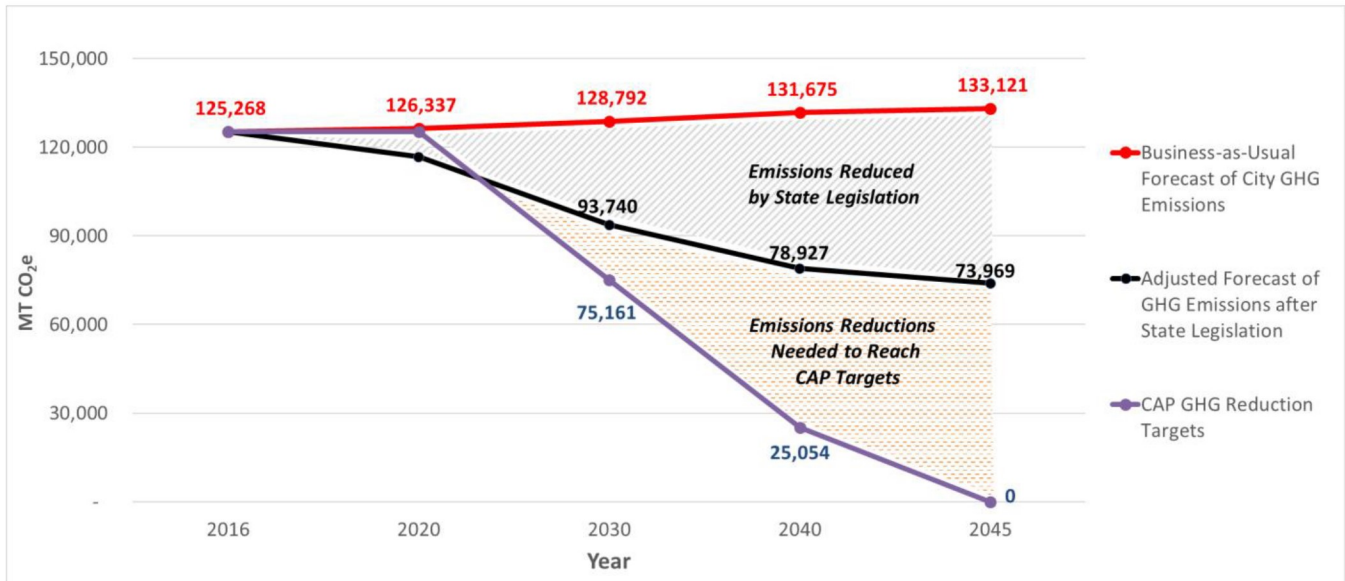
accordance with the new California Air Resource Board (CARB) methodology and the statewide goal established in SB 32, this absolute emissions target was then translated into a 2030 per capita emission target of 2.9 MT CO₂e per year by dividing the 2030 absolute target by South Pasadena’s projected population in 2030.

As shown in Figure 3, South Pasadena would require implementing local reduction measures to meet the state targets established for 2030 and 2045 even after accounting for reductions that will result from state regulations.

Reducing Emissions in South Pasadena

At its core, the CAP aims to reduce GHG emissions in the City through equitable, achievable, and implementable actions that benefit all South Pasadenans. The Plays (measures) and Moves (actions) included in the CAP were established and refined to meet the City’s GHG emission reduction target for 2030 and provide substantial progress towards meeting the longer-term target of carbon neutrality by 2045, which align with the state’s goals and is the City’s fair share towards achieving the state’s overall climate goals (see Table 1 for a summary of the Plays included in the CAP).

Figure 3 Community Emissions, Targets, and Reductions Needed to Meet Targets



Cornerstones of Climate Action Planning

The City of South Pasadena acknowledges that long-term sustainable change must occur to reduce our GHG emissions and limit our impact on climate change. This change will come from a collective commitment to reduce emissions through implementation of effective and equitable emission reduction strategies, such as the Plays and Moves outlined in this CAP. High-quality climate action planning is built on six essential components that result in implementable and effective GHG emission reduction strategies.

These six essential components, **education, structural change, GHG reductions, equity, connectivity, and economical design**, are the cornerstones that lay the foundation for transformational change and are essential to engage the community and fulfill the emissions reductions goals laid out in the Plan.

South Pasadena’s CAP includes 15 specific Plays designed to reduce GHG emissions associated with Energy, Transportation, Water, Waste, Sequestration, and Municipal Operations. Each Play is supported by Moves that were designed to incorporate the cornerstone components of climate action planning and create unique solutions to climate change, which are summarized in Table 1.

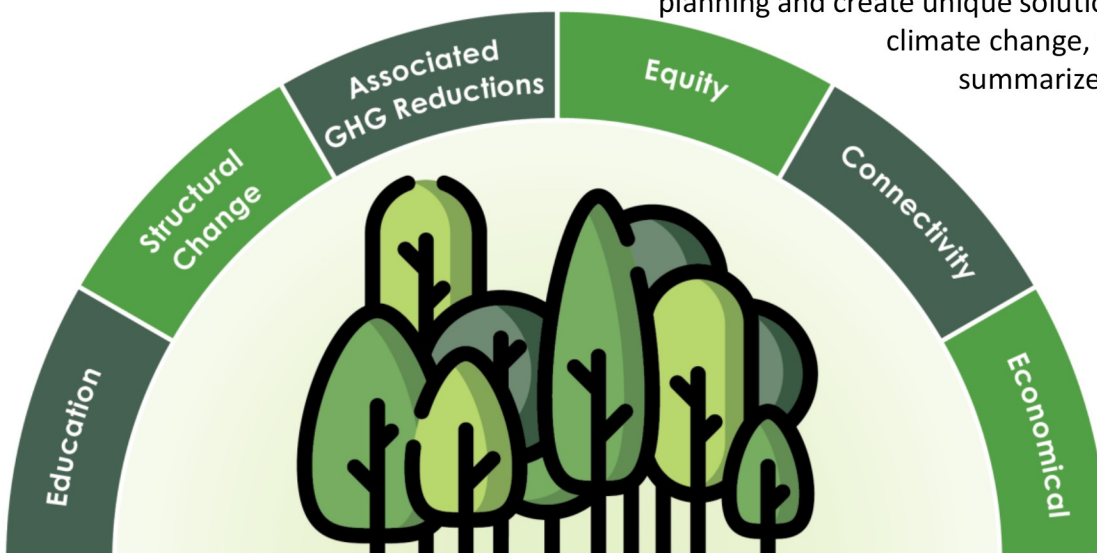


Table 1 Emission Reduction Plays and Moves Summary

Sector	Play	GHG Emissions Reduction Contribution
Cornerstone	C.1	Engage South Pasadena youth in climate change action and provide education on ways to live a sustainable lifestyle. 2030: 25 MT CO ₂ e 2045: 78 MT CO ₂ e
Energy	E.1	Maximize the usage of renewable power within the community, by continuing to achieve an opt-out rate lower than 4% for the Clean Power Alliance. 2030: 13,408 MT CO ₂ e 2045: 0 MT CO ₂ e
	E.2	Require electrification of 100% of newly constructed buildings. 2030: 240 MT CO ₂ e 2045: 984 MT CO ₂ e
	E.3	Electrify 5% of existing buildings by 2030 and 80% by 2045. 2030: 1,184 MT CO ₂ e 2045: 19,355 MT CO ₂ e
	E.4	Develop and promote reduced reliance on natural gas through increased clean energy systems that build off of renewable energy development, production, and storage. Supportive of 2030 and 2045 Goals
Transportation	T.1	Increase use of zero-emission vehicle and equipment 13% by 2030 and 25% by 2045. 2030: 3,774 MT CO ₂ e 2045: 6,629 MT CO ₂ e
	T.2	Implement programs for public and shared transit that decrease passenger car vehicle miles traveled 2% by 2030 and 4% by 2045. 2030: 807 MT CO ₂ e 2045: 1,399 MT CO ₂ e
	T.3	Develop and implement an Active Transportation Plan to shift 3% of passenger car vehicle miles traveled to active transportation by 2030, and 6% by 2045. 2030: 1,186 MT CO ₂ e 2045: 2,015 MT CO ₂ e
Water and Wastewater	W.1	Reduce per capita water consumption by 10% by 2030 and 35% by 2045. 2030: 414 MT CO ₂ e 2045: 0 MT CO ₂ e
Solid Waste	SW.1	Implement and enforce SB 1383 organics and recycling requirements to reduce landfilled organics waste emissions 50% by 2022 and 75% by 2025. 2030: 1,702 MT CO ₂ e 2045: 1,764 MT CO ₂ e
	SW.2	Reduce residential and commercial waste sent to landfills by 50% by 2030 and 100% by 2045. 2030: 415 MT CO ₂ e 2045: 859 MT CO ₂ e
Carbon Sequestration	CS.1	Increase carbon sequestration through increased tree planting and green space. 2030: 19 MT CO ₂ e 2045: 39 MT CO ₂ e
Municipal	M.1	Reduce carbon intensity of City operations. 2030: 188 MT CO ₂ e 2045: 188 MT CO ₂ e
	M.2	Electrify the municipal vehicle fleet and mobile equipment. 2030: 23 MT CO ₂ e 2045: 23 MT CO ₂ e
	M.3	Increase City's renewable energy production and energy resilience. Supportive of 2030 and 2045 Goals
Total		2030: 23,386 MT CO₂e 2045: 33,333 MT CO₂e

Note: South Pasadena would be required to reduce 18,578 MT CO₂e by 2030, 53,874 MT CO₂e by 2040, and 73,969 MT CO₂e by 2045 to meet the City's targets and state goals.

ATTACHMENT H
Metromedia, Inc. v. City of San Diego, 28 Cal.3d
848, 882 (1980)

Metromedia, Inc. v. City of San Diego

32 Cal.3d 180 (Cal. 1982) · 185 Cal. Rptr. 260 · 649 P.2d 902
Decided Aug 30, 1982

Docket No. L.A. 30782.

August 30, 1982.

Appeal from Superior Court of San Diego County,
Nos. 332881 and 333292, Jack R. Levitt, Judge.

181 *181

COUNSEL

John W. Witt, City Attorney, and C. Alan Sumption, Deputy City Attorney, for Defendants and Appellants.

Walter Wencke, Carter J. Stroud, City Attorney (Alameda), John W. Scanlon, City Attorney (Hayward), Dan Curtin, City Attorney (Walnut Creek), Roy E. June and R.R. Campagna, City Attorneys (Costa Mesa), Harry S. Fenton, Emerson Ryhner and Ronald W. Beals as Amici Curiae on behalf of Defendants and Appellants.

Gibson, Dunn Crutcher, Theodore B. Olson, Wayne W. Smith, Hillyer Irwin, Oscar F. Irwin, Snell Wilmer, John J. Bouma, Guy G. Gelbron, Higgs, Fletcher Mack, Joe N. Turner, Cahill, Gordon Reundel and Floyd Abrams for Plaintiffs
182 and Respondents. *182 Donovan, Leisure, Newton Irvine, Mahlon F. Perkins, Jr., Weil, Guttman Davis, Gilbert H. Weil, Phillip Tocker, Richman Garrett, Lionel Richman, Fadem, Berger Norton, Michael M. Berger, Brundage, Beeson Pappy, Joseph J. Kaplon, Alex Kozinski, Ronald A. Zumbrun, Thomas E. Hookano and Elleene A. Kirkland as Amici Curiae on behalf of Plaintiffs and Respondents.

OPINION

BROUSSARD, J.

The City of San Diego enacted an ordinance which, with certain exceptions, bans erection of off-site billboards¹ within the city limits; the ordinance also requires removal of existing off-site billboards after expiration of an amortization period. (San Diego Ord. No. 10795 (New Series).) On motion for summary judgment, the superior court adjudged the ordinance unconstitutional, and issued an injunction barring its enforcement. In our 1980 decision, we reversed the superior court judgment and upheld the ordinance against claims that it violated the First Amendment and exceeded the scope of the city's police power. (*Metromedia, Inc. v. City of San Diego* (1980) 26 Cal.3d 848 [164 Cal.Rptr. 510, 610 P.2d 407].) The United States Supreme Court in turn reversed our decision, holding that the ordinance's prohibition on noncommercial billboards violated the First Amendment. (*Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490 [69 L.Ed.2d 800, 101 S.Ct. 2882].)² The court then remanded the case to us to determine whether the constitutionality of the ordinance could be saved by a limiting judicial construction of its terms or by severance of unconstitutional provisions from the balance of the enactment.

¹ The ordinance permits on-site billboards, which it describes as "either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services

rendered on the premises upon which such signs are placed. . . ." (Ord. No. 10795 (New Series), section B.)

- ² Subsequent to the filing of the Supreme Court opinion, the City of San Diego enacted an interim ordinance which limits and regulates off-site advertising displays, but does not totally prohibit such signs. (San Diego Ord. No. 15551 (New Series.) The interim ordinance provides that if Ordinance No. 10795, the enactment at issue in this case, is "held valid and constitutional in whole or in part then the provisions of Ordinance No. 10795 shall prevail." (*Id.*, § 101.0760, subd. C.) Thus, the enactment of the interim ordinance does not moot the present case.

As we will explain, we can salvage the constitutionality of the ordinance only by limiting its scope to prohibit only commercial signs. Such
 183 *183 a construction would be inconsistent with the language of the ordinance and the original intent of the city council at the time of enacting the ordinance. The resulting legislation would compel the city to distinguish between commercial and noncommercial speech, a task rife with constitutional enigmas, and might not effectively achieve the city's objective of promoting traffic safety and improving community appearance. We therefore conclude that the ordinance cannot fairly and reasonably be construed in a manner that would preserve its constitutionality.

The United States Supreme Court decision was based on the specific terms of the San Diego ordinance. Section B, the crucial prohibitory language of the ordinance, bans all outdoor advertising display signs except for signs identifying the premises where the sign is located or advertising a product or service sold on those premises. The ordinance thus impartially bans commercial or noncommercial off-site signs, but while it permits an owner or lessee to erect a sign to advertise his business, it does not permit him to erect a sign to state his political or social views.

Section F of the ordinance then provides 12 specific and narrow exceptions, of which the most important excepts political campaign signs maintained for no longer than 90 days. Many of the exceptions relate to noncommercial signs, but even taking into account all the exceptions the ordinance still appears to enact a substantial prohibition on noncommercial signs.

The plurality opinion of the United States Supreme Court (Justice White, for himself and Justices Stewart, Marshall and Powell), stated that considerations of community aesthetics and traffic safety justified San Diego's ban on off-site commercial billboards. The plurality stated, however, that the ordinance's ban on noncommercial billboards was facially

184 unconstitutional.³ *184

- ³ Our opinion had upheld the San Diego ordinance on its face, but noted that the ordinance might be unconstitutional if applied to ban a noncommercial billboard when there was no reasonable alternative means of communication. (26 Cal.3d 848, 869, fn. 14.) Amicus the City of Alameda asserts that the United States Supreme Court misunderstood our footnote when it characterized it as imposing a standing requirement (see 453 U.S. 490, 504, fn. 11 [69 L.Ed.2d 800, 812]); Alameda argues that our footnote 14 supplies the limiting construction required to render the ordinance constitutional.

Our footnote 14 did not construe the ordinance, but noted only that it might be unconstitutional as applied to cases in which the advertiser can show he has no other reasonable means of communication. The Supreme Court plurality opinion suggests that the ordinance can only be saved by a facial construction which excludes noncommercial signs, and nothing in that opinion suggests the exclusion can be limited to cases in which no other reasonable means of communication exists. Thus regardless of whether the Supreme Court misunderstood

footnote 14, the doctrine of unconstitutionality as applied set out in that footnote is insufficient to save the validity of the ordinance.

First, the plurality stated, by permitting on-site commercial billboards but prohibiting the on-site owner from displaying a noncommercial message, the ordinance unconstitutionally discriminates against noncommercial speech. "Insofar as the city tolerates billboards at all, it cannot choose to limit their content to commercial messages; the city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." (453 U.S. 490, 513 [69 L.Ed.2d 800, 818].)

Second, the plurality indicated that the 12 exceptions for noncommercial speech in section F of the ordinance were too narrow. "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse. . . . Because some noncommercial messages may be conveyed on billboards . . . , San Diego must similarly allow billboards conveying other noncommercial messages. . . ." (453 U.S. at p. 515 [69 L.Ed.2d at p. 819].)⁴

⁴ Justice Brennan, joined by Justice Blackmun, concurred in the plurality's views concerning noncommercial speech, but argued that the ordinance's prohibition on commercial billboards was also unconstitutional. Justice Brennan noted the difficulty in distinguishing between commercial and noncommercial speech. Chief Justice Burger, Justice Stevens, and Justice Rhenquist each wrote dissenting opinions supporting the San Diego ordinance.

In a footnote at the conclusion of the plurality opinion, the Supreme Court explained the task of this court following remand of the case: "Although the ordinance contains a severability clause, determining the meaning and application of that

clause is properly the responsibility of the state courts. . . . *Since our judgment is based essentially on the inclusion of noncommercial speech within the prohibitions of the ordinance, the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the ordinance is susceptible to this treatment.*" (453 U.S. 490, 521-522, fn. 26 [69 L.Ed.2d 800, 823-824]; italics added.)⁵ *185 (1) In accord with this statement of the United States Supreme Court, we turn to the specific language of the ordinance to determine if it is susceptible of a limiting construction that will avoid unconstitutionality. The critical language is that of section B, which reads as follows: "Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

⁵ Metromedia points to footnote 25 of the plurality opinion, which states in part that "[a]ppellants [the billboard companies] contend that the ordinance will effectively eliminate their businesses and that this violates the Due Process clause. We do not know, however, what kind of ordinance, if any, San Diego will seek to enforce in place of that *which we invalidate today.*" (Italics added.) (453 U.S. 490, 521, fn. 25 [69 L.Ed.2d 800, 823].) Metromedia contends that the italicized language indicates that the Supreme Court plurality considers the ordinance dead, and beyond saving by any limiting construction. But while the language of footnote 25 could be read as Metromedia claims, that reading is dispelled by the unequivocal statement in footnote 26 that "the California courts may sustain the ordinance by limiting its reach to commercial speech, assuming the

ordinance is susceptible to this treatment." (453 U.S. at p. 522, fn. 26 [69 L.Ed.2d at p. 824].)

"1. Any sign identifying a use, facility or service which is not located on the premises.

"2. Any sign identifying a product which is not produced, sold or manufactured on the premises.

"3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located."

The city suggests two methods of saving the validity of the ordinance. First, we could construe the word "signs" and the phrase "outdoor advertising display signs" in section B as limited to those bearing a commercial message. This construction would avoid any prohibition or discrimination against noncommercial speech, thus avoiding the objections presented by the Supreme Court plurality opinion. Alternatively, we could sever and delete the indirect prohibition of the first sentence of section B (which states that only certain signs are permitted), and delete a portion of the direct prohibition of the second sentence of that section. Specifically, we would have to modify part 3 of that sentence which now prohibits "[a]ny sign which advertises or otherwise directs *186 attention to a product, service or *activity, event, person, institution or business*" (italics added) by deleting the italicized words, thereby limiting the prohibition to signs which advertise a "product, service or business." Such statutory surgery would remove any prohibition on noncommercial speech, and bring the San Diego ordinance into approximate alignment with the ordinance upheld by the United States Supreme Court in *Suffolk Outdoor Advertising Co. v. Hulse* (1978) 439 U.S. 808 [58 L.Ed.2d 101, 99 S.Ct. 66].⁶

⁶ The Supreme Court plurality opinion in *Metromedia* discussed *Suffolk Outdoor Advertising Co. v. Hulse*, explaining that that case, like *Metromedia*, "involved a municipal ordinance that distinguished between offsite and onsite billboard advertising prohibiting the former and permitting the latter. We summarily dismissed as not presenting a substantial federal question an appeal from a judgment sustaining the ordinance, thereby rejecting the submission, repeated in this case, that prohibiting off-site commercial advertising violates the First Amendment. The definition of 'billboard,' however, was considerably narrower in *Suffolk* than it is here: 'A sign which directs attention to a business, commodity, service, entertainment, or attraction sold, offered or existing elsewhere than upon the same lot where such sign is displayed.' This definition did not sweep within its scope the broad range of noncommercial speech admittedly prohibited by the San Diego ordinance. Furthermore, the New York ordinance, unlike that in San Diego, contained a provision permitting the establishment of public information centers in which approved directional signs for businesses could be located. This Court has repeatedly stated that although summary dispositions are decisions on the merits, the decisions extend only to the precise issues presented and necessarily decided by those actions." (453 U.S. 490, 498-499 [69 L.Ed.2d 800, 809].) From this language we conclude that the Supreme Court would probably approve a San Diego ordinance whose prohibition paralleled the prohibition in the *Suffolk* ordinance, even though the San Diego ordinance did not provide for public information centers, and extended its prohibition over a much larger, more populous, and more urbanized region than the *Suffolk* ordinance.

We first consider the question of interpreting the term "outdoor advertising display signs" to limit it to commercial signs. Judicial doctrine governing construction of a law to avoid unconstitutionality is well settled. If "the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution." (*County of Los Angeles v. Legg* (1936) 5 Cal.2d 349, 353 [55 P.2d 206]; *People v. Davis* (1968) 68 Cal.2d 481, 483-484 [67 Cal.Rptr. 547, 439 P.2d 651]; *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, 948 [92 Cal.Rptr. 309, 479 P.2d 669].) Consequently, "[i]f feasible within bounds set by their words and purposes, statutes should be construed to preserve their constitutionality." (*Conservatorship of Hofferber* (1980) 28 Cal.3d 187 161, 175 [167 Cal.Rptr. 854, 616 P.2d 836].) *187

There are limits, however, to the ability of a court to save a statute through judicial construction. As we explained in *Blair v. Pitchess* (1971) 5 Cal.3d 258 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206], "[t]his court cannot . . . in the exercise of its power to interpret, rewrite the statute. If this court were to insert in the statute all or any of the . . . qualifying provisions [required to render it constitutional], it would in no sense be interpreting the statute as written, but would be rewriting the statute in accord with the presumed legislative intent. That is a legislative and not a judicial function." (P. 282, quoting *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 369 [5 P.2d 882]; see *Flood v. Riggs* (1978) 80 Cal.App.3d 138, 156-157 [145 Cal.Rptr. 573].)

The issue before us, therefore, is whether a construction of section B to avoid any prohibition upon noncommercial signs would constitute a fair and reasonable interpretation of the language of the ordinance.⁷ We conclude that it is not a fair and reasonable interpretation, but would instead

constitute a judicial amendment of the ordinance to conform it to constitutional doctrine unanticipated by its drafters.

⁷ It is clear that none of the exceptions in section F of the ordinance can be construed to exempt all noncommercial signs.

Our primary task in construing any law is to ascertain the legislative intent. (See, e.g., *People v. Caudillo* (1978) 21 Cal.3d 562, 576 [146 Cal.Rptr. 859, 580 P.2d 274] and cases there cited.) In the present case, the city's intent, as we noted in our prior opinion, was "the prohibition of commercial billboards" or, more accurately stated, the prohibition of "permanent structures used predominantly for commercial advertising." (*Metromedia, Inc. v. City of San Diego*, *supra*, 26 Cal.3d 848, 856, fn. 2.) It does not appear, however, that the city intended to limit its ban to billboards which carried commercial messages. To the contrary, the city's concern was not with the message but with the structure. The purpose of the ordinance was to eliminate signs which distracted pedestrians and motorists and which blighted the aesthetic character of the city (see 26 Cal.3d at p. 858); the commercial or noncommercial character of the billboard's message is largely irrelevant to these goals. The whole tenor of the ordinance as written, as well as the extensive litigation that ensued, shows that although billboards with commercial messages represent the greater part of the problem giving rise to the enactment, the city did not limit its reach to such billboards. Instead, its ordinance sought to prohibit all structures 188 except on-site advertising displays. *188

This court, concerned by the absence of any definition of terms in the ordinance, itself attempted to define the scope of the ordinance's prohibition. In accord with our view of the legislative purpose, we adopted the definition of "outdoor advertising display" in Revenue and Taxation Code section 18090.2: "A rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure

constituting, or used for the display of, a commercial or other advertisement to the public." (26 Cal.3d at p. 856, fn. 2.)⁸ That definition narrowed substantially the scope of the ordinance, but by referring to the characteristics of the structure, not the message it bears, included noncommercial signs within its scope.

⁸ We note that San Diego adopted this definition of "outdoor advertising display" in its interim ordinance. (See San Diego Ord. No. 15551 (New Series), § 101.0762.1.)

Established rules of statutory construction, employed by the courts as guides to the ascertainment of legislative intent (see *People v. Caudillo, supra*, 21 Cal.3d 562, 576), further support our conclusion that the ordinance cannot reasonably be construed to avoid banning noncommercial signs.

First, ordinances are to be interpreted "according to the usual, ordinary import of the language employed in framing them." (*In re Alpine* (1928) 203 Cal. 731, 737 [265 P. 947, 58 A.L.R. 1500]; *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 43 [127 Cal.Rptr. 122, 544 P.2d 1322].) Although the term "advertising" may imply a commercial message, it is not, in ordinary usage, limited to such message. "Advertising" is simply "the action of calling something . . . to the attention of the public." (Webster's New Internat. Dict. (3d ed. 1961) p. 31.) We speak of "political advertising," and even of "personal advertising." Thus, in common usage a billboard bearing a political or even a personal message would be considered an "advertising display sign."

Second, the ordinance itself speaks as if the prohibition of section B is not limited to commercial billboards, and uses the word "signs" to refer to structures bearing noncommercial messages. In section F, for example, it exempts from regulation "[t]emporary political campaign signs . . . which are erected or maintained for no longer than 90 days and which are removed within

10 days after the election to which they pertain." This language clearly implies both that political signs are not exempt from the ordinance merely by virtue of their noncommercial *189 character, and that political signs maintained for longer than 90 days or which do not pertain to a particular election are prohibited by the ordinance.⁹ "It is a familiar principle of construction that a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute. . . ." (*Pitte v. Shipley* (1873) 46 Cal. 154, 160; see *Corey v. Knight* (1957) 150 Cal.App.2d 671, 680 [310 P.2d 673].)

⁹ Other exemptions in section F also indicate that the ordinance applies to noncommercial signs. The section states that "[t]he following types of signs shall be exempt from the provisions of these regulations:

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- "4. Commemorative plaques of recognized historical societies and organizations.
- "5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.
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- "8. Public service signs limited to the depiction of time, temperature or news. . . ."

For the foregoing reasons, we think it clear that the San Diego City Council, in enacting the ordinance in question, intended to include noncommercial billboards. That intention cannot be given effect, for under the decision of the United States Supreme Court an ordinance that prohibits noncommercial signs, but permits on-site commercial signs, is facially invalid. The city argues that under these circumstances, the legislative purpose will be better served by construing the ordinance to limit it to commercial off-site signs than by nullifying it altogether.

It is not entirely clear whether a court has the power to construe a law contrary to the legislative intent at the time it was enacted, even if that

construction is necessary to salvage what can be saved of the legislative purpose.¹⁰ Decisions relating to severability of partially unconstitutional legislation, however, envision a larger judicial role; even if the statute following severability is not what the enacting body originally intended, the courts can sustain the statute if severance is mechanically feasible and the legislative body would have preferred such an outcome to total invalidation. The city's argument based on the purpose of ordinance 10795 is therefore best considered in connection with its claim that the ordinance can be saved by severance and deletion of all language imposing a ban on noncommercial

190 signs. *190

¹⁰ We have found only one case which is even arguably on point. In *People v. Perry* (1889) 79 Cal. 105 [21 P. 423], a statute established a five-year term for members of the San Francisco Board of Health, contrary to a constitutional provision limiting such terms to four years. The official argued that a construction of the statute to provide a four-year term would better serve the legislative purpose than a holding that he served at the pleasure of the appointing authorities. The court rejected this argument, stating that "we know of no precedent for holding that a clause of a statute, which as enacted is unconstitutional, may be changed in meaning in order to give it some operation, when admittedly it cannot operate as the Legislature intended." (P. 115.)

The ordinance in question contains a severability clause. "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. [Citation.]' . . . Such a clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether 'the remainder . . . is complete in itself and would have been adopted by the legislative body had the latter

forseen the partial invalidation of the statute' (*In re Bell* 19 Cal.2d 488, 498 [122 P.2d 22]) or 'constitutes a completely operative expression of the legislative intent . . . [and] are [not] so connected with the rest of the statute as to be inseparable.' (*In re Portnoy* 21 Cal.2d [237] at p. 242 [131 P.2d 1].)" (*Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331 [118 Cal.Rptr. 637, 530 P.2d 605].)

The severance required to save ordinance 10795, although drastic surgery, is mechanically possible. The resulting ordinance, however, would take a strange form. The provisions for amortization and removal of billboards in sections C, D, and E would be difficult to apply, since the city's right to remove a billboard would depend on the message it presents, and billboard copy changes at frequent intervals. The exceptions in section F would also seem out of place, since many would be wholly or partially unnecessary in an ordinance limited to commercial speech.

The principal objection to severance, however, is that it is doubtful whether the purpose of the original ordinance is served by a truncated version limited to commercial signs. Since the effect of such an ordinance would depend on the extent to which persons were willing to purchase billboard space for noncommercial advertising, it would offer no assurance that a substantial number of billboards, or any particular billboard, would be removed, or that the erection of new billboards would be inhibited. Such an ordinance, moreover, would require the city to police the content of advertising messages, and would compel it to distinguish commercial from noncommercial speech — an extremely difficult task, and one which presents serious constitutional problems. (See *Metromedia, Inc. v. San Diego*, *supra*, 453 U.S. 490, 536-540 [69 L.Ed.2d 800, 832-835],

¹⁹¹ [conc. opn. of Brennan, J.]) *191

On the other hand, an alternative ordinance which regulated the location, size, and appearance of billboards but stopped short of a total ban could

severely limit the total number of billboards within the city, eliminate those signs which posed the greatest traffic hazard or aesthetic blight, and prevent the erection of new signs in undesirable locations. By qualifying as a "time, place, or manner" (*Cox v. New Hampshire* (1941) 312 U.S. 569, 575 [85 L.Ed. 1049, 1053, 61 S.Ct. 762, 133 A.L.R. 1396]) regulation of speech, such an alternative ordinance might avoid the problem of distinguishing commercial from noncommercial speech. In short, given the invalidity of a ban on all off-site billboards, the legislative purpose may be better served by an ordinance which bans most off-site billboards than by one which draws a distinction based on the content of the of the billboard's message.

In summary, the City of San Diego intended a comprehensive ban on off-site advertising signs, subject only to the exceptions set in section F of the ordinance. Its ordinance, enacted to achieve that goal, has been held facially unconstitutional by the United States Supreme Court. Although that court said that the ordinance could be saved by severance or a limiting construction, confining its prohibition to commercial signs, such a prohibition would be inconsistent with the language and original intent of the ordinance. It would, moreover, leave the city with an ordinance different than it intended, one less effective in achieving the city's goals, and one which would invite constitutional difficulties in distinguishing between commercial and noncommercial signs. We therefore reject the proposed construction or severance and hold San Diego Ordinance No. 10795 facially invalid.

The judgment of the superior court enjoining enforcement of San Diego Ordinance No. 10795 (New Series) is affirmed.

Bird, C.J., Mosk, J., Richardson, J., and Newman, J., concurred.

KAUS, J.

I respectfully dissent.

As the majority notes, in view of the United States Supreme Court decision in this case (*Metromedia, Inc. v. San Diego* (1981) 453 U.S. 490 [69 L.Ed.2d 800, 101 S.Ct. 2882]), the sole question before us is whether the San Diego billboard ordinance at issue should be invalidated in its entirety or should be construed — in order to preserve its constitutionality — as prohibiting only commercial off-site billboards. In choosing total invalidation, the majority airily dismisses in footnote 2 ¹⁹² the most important factor in the case: in July 1981 — after, and in direct response to, the United States Supreme Court decision — the City of San Diego enacted an ordinance making clear its intent that the billboard ordinance *be preserved insofar as constitutionally permissible*, even if that ordinance's ban on noncommercial as well as commercial off-site billboards cannot stand. It seems to me that proper deference to the city's legislative prerogative in choosing between alternative, constitutionally permissible billboard regulations requires that we give effect to this explicit, legislatively expressed choice.

The error in the majority's result is perhaps traceable to its statement that "[i]t is not entirely clear whether the court has the power to construe a law contrary to the legislative intent at the time it was enacted, even if that construction is necessary to salvage what can be saved of the legislative purpose." (*Ante*, p. 189.) In an accompanying footnote, the majority explains that it has "found only one case which is even arguably on point," an 1889 decision — *People v. Perry* (1889) 79 Cal. 105 [21 P. 423] — in which the court stated that "we know of no precedent for holding that a clause of a statute, which as enacted is unconstitutional, may be changed in meaning in order to give it some operation, when admittedly it cannot operate as the Legislature intended." (79 Cal. at p. 115.)

Whether or not there was such precedent at the time of the *Perry* decision, today there are literally dozens of cases that make it quite clear that courts

are fully authorized to undertake precisely this kind of constitutionally compelled editing and interpreting in order to uphold a legislative scheme insofar as is constitutionally permissible.

A few examples should illustrate the point. In *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr. 330, 599 P.2d 636], we addressed a constitutional challenge to Penal Code section 647, subdivision (a), which imposed penal sanctions against anyone who "solicits . . . or . . . engages in lewd or dissolute conduct in any public place. . . ." After a comprehensive analysis of the statutory language, legislative history and judicial application of the provision, we concluded that the statute as written was unconstitutionally vague, but then — in order to save its constitutionality — we undertook a substantial revision of the statutory language, "arriv[ing] at the following construction of section 647, subdivision (a): The terms 'lewd' and 'dissolute' in this section are synonymous, and refer to conduct which involves the touching of the genitals, buttocks or female
193 breast for the purpose of sexual arousal, *193 gratification, annoyance or offense, if the actor knows or should know of the presence of persons who may be offended by his conduct. The statute prohibits such conduct only if it occurs in any public place or in any place open to the public or exposed to public view; it further prohibits the solicitation of such conduct to be performed in any public place or in any place open to the public or exposed to public view." (25 Cal.3d at pp. 256-257.) In formulating this interpretation, we did not suggest that our detailed construction conformed precisely to the statute that the original legislators intended to enact, but instead we acted on our judgment that — given the relevant constitutional constraints — the Legislature would have preferred the more specific and narrowly drawn construction than no statute whatsoever.

In re Kay (1970) 1 Cal.3d 930 [83 Cal.Rptr. 686, 464 P.2d 142] similarly demonstrates the propriety of this type of judicial construction. The provision at issue in *Kay* was Penal Code section 403, which

provided that "[e]very person who, without authority of law, wilfully disturbs or breaks up any assembly or meeting . . . is guilty of a misdemeanor." In that case, the statute had been invoked against a group of vocal demonstrators at an outdoor political rally, and we pointed out that under the First Amendment if section 403 "were literally applied with the breadth of coverage that its terms could encompass, the statute would be constitutionally overbroad and could not stand." (1 Cal.3d at p. 941.) Rather than invalidate the statute, however, "[t]o effectuate section 403 within constitutional limits we interpret[ed] it to require the following showing to establish its transgression: that the defendant substantially impaired the conduct of the meeting by intentionally committing acts in violation of implicit customs or usages or of explicit rules for governance of the meeting, of which he knew, or as a reasonable man should have known." (*Id.*, at p. 943.) As in *Pryor*, we did not suggest that this construction precisely coincided with the original legislative intent, but nonetheless we adopted this interpretation because it was more in keeping with the legislative will than striking down the statute completely.

A final example makes the point in perhaps the clearest terms possible. In *In re Edgar M.* (1975) 14 Cal.3d 727 [122 Cal.Rptr. 574, 537 P.2d 406], we passed on a constitutional challenge to Welfare and Institutions Code section 558, which provided in part that if a juvenile defendant's application for rehearing from a referee's decision "is not granted within 20 days following the date of its receipt, it shall be deemed denied." In a unanimous decision
194 by former Chief Justice *194 Wright, the court concluded that by giving binding effect to a referee's decision without requiring some action by the trial court, this portion of the statute violated the constitutional restriction on a referee's powers. We then turned to the question of remedy, noting that the proper approach was to seek "a construction [of section 558] that will eliminate this invalid application and yet preserve the parts

and applications of the statute which do not violate the constitutional provisions *and which the Legislature would have intended to put into effect if it had foreseen the constitutional restriction.*" (Italics added; 14 Cal.3d at p. 736.) After considering the possibility of simply eliminating the offending sentences altogether, we rejected that solution, explaining: "We believe that the legislative intent will be more fully effectuated within the constitutional restraint by altering the operative effect of these sentences rather than striking them altogether. . . . [W]e conclude that we best harmonize the statutory purpose with the constitutional command *by requiring that applications which would be 'deemed denied' under the section's literal wording be instead granted as of right. . . .*" (Italics added; *id.*, at p. 737.) It is obvious, of course, that this interpretation did not conform to the legislative intent at the time the measure was enacted, but we adopted that reading because we felt that it was the interpretation "which the Legislature would have intended to put into effect if it had foreseen the constitutional restriction." (*Id.*, at p. 736.)

Ordinarily, when a court concludes that a legislative enactment may not be constitutionally applied in the form that it is enacted, it will have no direct evidence as to what the legislative body would have intended "if it had foreseen the constitutional restriction;" in those circumstances — as in *Pryor, Kay and Edgar M.* — a court has no alternative but to use its best judgment in assessing the probable legislative intent. In the present case, however, we have no need to guess as to the legislative body's probable intent. As the majority itself recognizes (*ante*, p. 182, fn. 2), in July 1981 — just a few weeks after, and in direct response to, the United States Supreme Court decision in this case — the City of San Diego enacted an emergency interim billboard ordinance which, *inter alia*, specifically provided that "[i]n the event that further court proceedings in *Metromedia et al. v. City of San Diego et al.*, . . . result in Ordinance No. 10795 (N.S.) [the

ordinance at issue here] being held valid and constitutional in whole *or in part then the provisions of Ordinance No. 10795 shall prevail and remain applicable unless and until the City Council expressly repeals Ordinance No. 10795 (N.S.).*" (Italics added.) Inasmuch as the United States Supreme Court decision which was before the San Diego City Council when it enacted this new ordinance made it clear that the earlier ordinance could be sustained only "by limiting its reach to commercial speech" (435 U.S. at pp. 521-522, fn. 26 [69 L.Ed.2d at p. 824]), the quoted portion of the July 1981 ordinance can only mean that the city prefers to preserve its old ordinance even in truncated form, rather than rely solely on its newly enacted interim time, place and manner regulations.

In declining to adopt the limiting construction suggested by the United States Supreme Court to preserve the ordinance's constitutionality, the majority surmises that a total ban of all off-site commercial billboards may not achieve the city's ultimate purpose of removal of billboard structures; it reasons that "[s]ince the effect of such an ordinance would depend on the extent to which persons were willing to purchase billboard space for noncommercial advertising, it would offer no assurance that a substantial number of billboards, or any particular billboard, would be removed, or that the erection of new billboards would be inhibited." (*Ante*, p. 190.) The city may well have concluded, however, that in light of its evaluation of the economics of the situation, a total ban on off-site commercial billboards will result in fewer billboard structures than a time, place or manner regulation; if off-site billboard space cannot generate income from commercial advertising, the owners of the billboard structures may well decide that it is not profitable to maintain them for the relatively few, noncommercial billboard messages. In any event, even if the majority is correct in its assessment that a time, place and manner regulation applicable to *all* off-site billboards would be more

effective than a citywide ban applicable only to *commercial* off-site billboards, the choice between alternative, constitutionally permissible regulatory schemes is, of course, a policy matter for the city, not this court.¹ *196

¹ Furthermore, the majority appears to overlook the fact that even if the city maintains a total ban on off-site commercial billboards, there is no reason why it could not *also* enact reasonable time, place and manner regulations applicable to off-site noncommercial billboards.

The majority additionally indicates that an interpretation which limits the ordinance's off-site ban to commercial billboards would make the amortization and removal provisions of the ordinance difficult to apply. (*Ante*, p. 190.) Although the question of the application of these provisions to particular billboard structures is premature, I do not see any insurmountable obstacle. If the ordinance

is construed to make off-site commercial use impermissible, the amortization provision could be applied by permitting a billboard owner to use a billboard structure for otherwise impermissible commercial messages for the length of the appropriate amortization period. Once the owner has exhausted that period, a particular structure could only be used for noncommercial purposes; if it is not so used, removal could be ordered.

Since the city has made it clear that it prefers to retain this ordinance to the extent constitutionally permissible, I believe that we should construe the ordinance's prohibition on off-site billboards as applicable only to commercial billboards. As so interpreted, the ordinance is constitutional and should be upheld.

Reynoso, J., concurred.

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ATTACHMENT I

Safeway Inc. v. City & Cty. of San Francisco, 797 F.
Supp. 2d 964 (N. D. Cal. 2011)

Safeway Inc. v. City and County of San Francisco

797 F. Supp. 2d 964 (N.D. Cal. 2011)
Decided Jul 15, 2011

No. 11-00761 CW.

2011-07-15

SAFEWAY INC., Plaintiff, v. CITY AND COUNTY OF SAN FRANCISCO; The Board of Supervisors for the City and County of San Francisco; and Edwin M. Lee, in his official capacity of Mayor of the City and County of San Francisco, Defendants.

CLAUDIA WILKEN

966 *966 Barbara Lynne Harris Chiang, John Norman Dahlberg, Thomas John Klitgaard, William Francis Murphy, Dillingham & Murphy, LLP, San Francisco, CA, for Plaintiff.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE

CLAUDIA WILKEN, District Judge.

This lawsuit arises from the enactment of San Francisco Ordinance No. 194-08 (the original ordinance), as amended by San Francisco Ordinance No. 245-10 (the amended ordinance), San Francisco Health Code § 1009.01, which prohibits the sale of tobacco by any store within the City and County of San Francisco that contains a pharmacy. Defendants City and County of San Francisco, the Board of Supervisors for the City and County of San Francisco and Mayor Edwin M. Lee move to dismiss all of Plaintiff's claims. Plaintiff filed an opposition. The California Medical Association filed an amicus curiae brief in support of Defendants' motion to

dismiss and Plaintiff filed an opposition to it.¹ The motion was heard on June 2, 2011. Having heard argument on the motion and considered all the papers filed by the parties, the Court grants the motion to dismiss, with prejudice.

¹ The amicus brief is based on evidence that the Court cannot consider on a motion to dismiss. Therefore, the Court does not address the arguments presented in it.

BACKGROUND

The following facts are taken from Plaintiff's complaint and the documents attached to it and the documents of which the Court has taken judicial notice.² *967

² Both parties submit requests for judicial notice of certain documents. Under Rule 201 of the Federal Rules of Evidence, a court may take judicial notice of facts that are not subject to reasonable dispute because they are either generally known or capable of accurate and ready determination. A court also may properly look beyond the complaint to matters of public record. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986), *abrogated on other grounds by Astoria Federal Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991). The Court takes judicial notice of the submitted documents because they are matters of public record.

Plaintiff operates fifteen general grocery stores located in San Francisco, ten of which include separate licensed pharmacies. Prior to November

7, 2010, when the amended ordinance became effective, Plaintiff sold tobacco products in the ten stores with pharmacies; after the amended ordinance went into effect, Plaintiff was barred from selling tobacco products in its ten stores with pharmacies.

Plaintiff staffs its pharmacies with pharmacists licensed by the State of California. In its pharmacies, Plaintiff fills and sells prescriptions drugs to its customers. The pharmacies are isolated from the rest of the store by side walls, back walls, front counters, and locked doors. Thus, the pharmacies are separate and distinguishable from the retail floor space displaying general groceries, household supplies, non-prescription health and beauty supplies and other products. Plaintiff's pharmacies did not sell tobacco products. Tobacco products were sold only through the stores' customer service booths and were only available to customers through staff who were not involved in pharmacy operations.

The Board enacted the original ordinance on August 5, 2008. It provided that “no person shall sell tobacco products in a pharmacy.” The word “pharmacy” was defined as “a retail establishment in which the profession of pharmacy by a pharmacist licensed by the State of California in accordance with the Business and Professions Code is practiced and where prescriptions are offered for sale. A pharmacy may also offer other retail goods in addition to prescription pharmaceuticals.” The original ordinance also provided that “the prohibition against tobacco sales at pharmacies ... shall not apply to (a) General Grocery Stores and (b) Big Box Stores.” The original ordinance was based on the findings that: (1) tobacco is the leading cause of preventable death in the United States and the leading risk factor contributing to the burden of disease in the world's high-income countries; (2) through the sale of tobacco products, pharmacies convey tacit approval of the purchase and use of tobacco products, which sends a mixed message to consumers who generally patronize pharmacies

for health care services; (3) 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; (4) various professional and health care organizations have called for the adoption of state and local prohibitions of tobacco sales in drugstores and pharmacies; and (5) prescription drug sales for chain drugstores represent a significantly higher percentage of total sales than for grocery stores and big box stores that contain pharmacies. Comp., Ex. A, Findings 1, 7, 8, 9, and 21.

In September 2008, Walgreen Co., a retail chain that sells prescription and non-prescription drugs and general merchandise, filed a lawsuit in state court against Defendants alleging that the original ordinance violated its constitutional right to equal protection. It argued that it was arbitrary and capricious to exempt general grocery stores and big box stores that had pharmacies from the ban against selling tobacco products, when the ban was applied to Walgreen and other pharmacies that sold general merchandise, including tobacco products. The superior court sustained a demurrer to Walgreen's complaint without leave to amend. The appellate court reversed, holding that granting an exemption to general grocery and big box stores, but not to Walgreen, was a denial of ⁹⁶⁸ Walgreen's right to equal protection. *See* ^{*968} *Walgreen Co. v. City and County of San Francisco, et al.*, 185 Cal.App.4th 424, 443–44, 110 Cal.Rptr.3d 498 (2010).

In September 2010, after the remand of *Walgreen* to the superior court, the Board repealed the provision in the original ordinance that exempted general grocery and big box stores. *See* Comp., Ex. E, the amended ordinance. In amending the original ordinance, the Board recited that its purpose was to “head off further litigation over the proper remedy in the *Walgreen* case and remove any cloud over ongoing enforcement of the Article.” Comp., Ex. E, at 1. On October 10, 2010, the amended ordinance became law.

As a result of the amended ordinance, Defendants revoked the permits to sell tobacco products that had been issued to Plaintiff's ten stores in San Francisco that operate pharmacies. Plaintiff competes with other grocery stores in San Francisco that do not contain pharmacies, but that offer products similar to those available in Plaintiff's non-pharmacy operations. Plaintiff's competitors without pharmacies remain eligible for a license to sell tobacco products. The ban on the sale of tobacco products in Plaintiff's ten stores that operate pharmacies has damaged Plaintiff's business.

Based on these allegations, Plaintiff asserts the following causes of action: (1) a request for an order declaring that the sale of tobacco products in the general merchandise area of Plaintiff's stores is not the equivalent of sale in a pharmacy and that Plaintiff is entitled to a permit to sell tobacco products in these areas; (2) violation of Plaintiff's federal and state constitutional right to sell tobacco products in the same stores in which it operates a pharmacy; (3) violation of Plaintiff's federal and state constitutional right to equal protection; (4) violation of Plaintiff's federal and state constitutional right to due process; and (5) preemption by state law.

LEGAL STANDARD

A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Fed.R.Civ.P. 8(a)*. On a motion under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). However, this principle is inapplicable to legal conclusions; “threadbare recitals of the elements

of a cause of action, supported by mere conclusory statements,” are not taken as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 246–47 (9th Cir.1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal “without contradicting any of the allegations of [the] original complaint.” *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir.1990).

Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.1987).

DISCUSSION

I. Declaratory and Injunctive Relief Construing Amended Ordinance

In this cause of action, Plaintiff asks the Court to construe the amended ordinance to prohibit the sale of tobacco products only “in a pharmacy,” and not, as Defendants interpret it, to prohibit the sale of tobacco products in any store in which a pharmacy is located. Plaintiff bases this request on the language of the amended ordinance: “No person shall sell tobacco products in a pharmacy.” Plaintiff argues that Defendants are impermissibly expanding this language to regulate entire grocery stores that have pharmacies located in them.

A district court has jurisdiction over a general constitutional challenge to a statute. *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th

Cir.1986). However, if a suit does not involve a dispute regarding an application of the Constitution or laws of the United States, federal jurisdiction is lacking. *Doby v. Brown*, 232 F.2d 504, 506 (4th Cir.1956).

Plaintiff asks the Court to construe the amended ordinance in such a way as to avoid the constitutional issues it asserts in its subsequent causes of action. However, as discussed below, Plaintiff fails to state any constitutional claims upon which relief may be granted. Therefore, this claim is dismissed without leave to amend as amendment would be futile.

II. Violation of Right to Operate Lawful Business

Plaintiff alleges that it has a constitutionally protected interest, under the substantive due process clause of the Fourteenth Amendment to the United States Constitution and Article I, § 7 of the California constitution,³ to operate a pharmacy business and a retail grocery business. It continues that the amended ordinance is unconstitutional because it denies Plaintiff permits to sell tobacco products unless it discontinues its pharmacy businesses. Comp. ¶¶ 76–81. Defendants respond that no constitutional right to do business is implicated when the government imposes generally applicable restrictions on business activities pursuant to its police power to promote public health, safety or welfare.

³ Article I, § 7 of the California Constitution provides that a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

“Where a [business] permit has been properly obtained and in reliance thereon the permittee has incurred material expense, he acquires a vested property right to the protection of which he is entitled.” *O’Hagen v. Board of Zoning Adjustment*, 19 Cal.App.3d 151, 158, 96 Cal.Rptr. 484 (1971). When a municipal ordinance regulates a useful business enterprise, it is subject to scrutiny by the

courts with a view to determining whether the ordinance is a lawful exercise of the police power, or whether it amounts to unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property. *Dobbins v. Los Angeles*, 195 U.S. 223, 235–36, 25 S.Ct. 18, 49 L.Ed. 169 (1904) (citing *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385 (1894) (legislature may not arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; citing cases where legislative acts were held invalid as involving unnecessary invasion of the rights of property or inhibition of lawful occupation)).*⁹⁷⁰

Plaintiff alleges that it has obtained permits to engage in the operation of a pharmacy and in the sale of tobacco products and it has incurred material expenses in reliance upon those permits. Thus, Plaintiff alleges a vested property right in those permits that is subject to judicial scrutiny.

However, the protection of a vested property right in a business permit generally must yield to the state's concern for the public health and safety and its authority to legislate for the protection of the public. See *O’Hagen*, 19 Cal.App.3d at 159, 96 Cal.Rptr. 484 (government may revoke use permit for lawful business where conduct of business constitutes a nuisance threatening public safety); *Dobbins*, 195 U.S. at 235, 25 S.Ct. 18 (“It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community”). A substantive due process claim cannot overturn a valid state statute unless it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir.2005).

Although Plaintiff may have property rights in its business permits, it has not alleged facts that would demonstrate that the amended ordinance is an unwarranted and arbitrary interference with those rights. As illustrated by the cases Plaintiff cites, when courts have found an unconstitutional interference with a permit or right to do business, the government has singled out a particular business owner for arbitrary treatment.⁴

⁴ Two of Plaintiff's cases, *Dobbins v. Los Angeles* and *Nollan v. California Coastal Commission*, address the constitutional prohibition against taking property without just compensation, not the substantive due process right that Plaintiff is asserting.

In *Dobbins*, 195 U.S. at 236–37, 25 S.Ct. 18, a local ordinance arbitrarily prevented the plaintiff from constructing a gas line on property she had bought for that very purpose. The Court found that the city council had enacted the ordinance after the plaintiff had begun construction, not in the furtherance of the public health or safety, but to provide an economic advantage to another business. *Id.* at 239, 25 S.Ct. 18. The Court stated that “the exercise of the police power is subject to judicial review [sic], and property rights cannot be wrongfully destroyed by arbitrary enactment.... No reasonable explanation for the arbitrary exercise of power in the case is suggested.... [W]here ... the exercise of the police power [is] in such manner as to oppress or discriminate against a class or an individual, the courts may consider and give weight to such purpose in considering the validity of the ordinance.” *Id.* at 239–40, 25 S.Ct. 18. Unlike the ordinance in *Dobbins*, the amended ordinance was not directed specifically at Plaintiff, and Defendants have a reasonable justification, based on public health and safety, for its enactment.

Similarly, in *O'Hagen*, 19 Cal.App.3d at 160, 96 Cal.Rptr. 484, the court held that the zoning board's revocation of a use permit for the operation of a drive-in restaurant without good cause or a compelling public necessity was not

constitutional. The zoning board revoked the permit because the manner in which the restaurant was being operated constituted a public nuisance. *Id.* at 161, 96 Cal.Rptr. 484. However, the court found that the nuisance would be eliminated by delineating conditions under which the restaurant
971 *971 could operate. *Id.* at 165, 96 Cal.Rptr. 484. There was no compelling necessity for the zoning board to revoke the use permit, which totally prohibited the plaintiff from operating his business. *Id.* Here, unlike in *O'Hagen*, Defendants have provided good cause and a compelling public necessity for the amended ordinance.

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 831–32, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the Court held that the defendant had taken private property without just compensation because it would grant a permit to build a house on the plaintiffs' beachfront property only on the condition that they allow the public an easement to pass across their property to the beach. Again, this case is inapplicable because the defendant's requirement for an easement was arbitrarily directed at these particular plaintiffs.

The final case on which Plaintiff relies, *Frost v. Railroad Commission of the State of California*, 271 U.S. 583, 592, 46 S.Ct. 605, 70 L.Ed. 1101 (1926), held that a state may not constitutionally force a company that operates as a private carrier, which transports its own goods, also to operate as a common carrier, which must accept transport of other companies' goods, in order to use the public highways. Key to the Court's analysis was the fact that the state did not possess the constitutional authority to compel a private carrier to assume, against its will, the duties and burdens of a common carrier. *Id.* The Court reasoned that the state could not impose an unconstitutional condition upon the privilege of using the public highways. *Id.* at 599. Plaintiff argues this case is applicable because Defendants are attempting to convert its retail grocery store into a pharmacy. However, Defendants are doing no such thing. The

amended ordinance merely regulates the sale of tobacco products; it does not force Plaintiff to engage in a certain type of business.

In sum, although Plaintiff has alleged it has a vested property right in its permits, it cannot overcome the fact that the enactment of the amended ordinance was a reasonable and permissible use of Defendants' police power. *See Spoklie*, 411 F.3d at 1059 (“If the legislature could have concluded rationally that certain facts supporting its decision were true, courts may not question its judgment.”). Defendants' motion to dismiss this cause of action is granted. It is granted without leave to amend because no additional allegations could remedy the deficiencies noted above.

III. Equal Protection Claim

The Fourteenth Amendment provides that no state may “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. The equal protection provision of the California constitution is substantially the same as the equal protection clause of the Fourteenth Amendment to the United States Constitution and, thus, may be analyzed under the same standard. *Walgreen*, 185 Cal.App.4th at 434 n. 7, 110 Cal.Rptr.3d 498 (citing *Manduley v. Sup. Ct.*, 27 Cal.4th 537, 571, 117 Cal.Rptr.2d 168, 41 P.3d 3 (2002)).

In addressing a claim that a statute or regulation violates a plaintiff's right to equal protection, the court must first determine whether the plaintiff is similarly situated to other entities not affected by the law at issue. *Fraleigh v. United States Bureau of Prisons*, 1 F.3d 924, 926 (9th Cir.1993); *Cooley v. Sup. Ct.*, 29 Cal.4th 228, 253, 127 Cal.Rptr.2d 177, 57 P.3d 654 (2002). In other words, the plaintiff must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. *Walgreen*, 185 Cal.App.4th at 434, 110 Cal.Rptr.3d 498. If the groups are not similarly situated for purposes

fails. *Id.* If the plaintiff establishes that the groups are similarly situated, the court then applies the appropriate level of scrutiny. *Id.* at 435, 110 Cal.Rptr.3d 498. The rational basis standard of review is applied to claims of discrimination caused by economic and social welfare legislation, such as that attacked here. *Id.* To pass rational basis scrutiny, the equal protection clause requires only that the classification rationally furthers a legitimate state interest. *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). There is no equal protection violation “so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 11, 112 S.Ct. 2326 (citations omitted).

Plaintiff's equal protection claim is based on the assertion that, for the purposes of the amended ordinance, the entities that are similarly situated to it are those businesses that are eligible to obtain a permit to sell tobacco products in San Francisco, including general grocery stores, big box stores and other retailers. Plaintiff argues that Defendants treat these similarly situated entities differently because they revoked the permits to sell tobacco products only for those retailers who have a licensed pharmacy somewhere within their premises. Defendants contend that the presence of a pharmacy is insufficient to justify treating different types of stores differently, and that this different treatment of the similarly situated entities has no rational basis. Defendants respond that the stores with and without pharmacies are not similarly situated because, when a store contains a pharmacy, it is participating in the health care delivery system, and participants in the health care delivery system should not be selling deadly tobacco products. Alternatively, Defendants argue that, even if the stores with pharmacies are similarly situated to stores without pharmacies,

972 of *972 the law at issue, an equal protection claim

Defendants' differential treatment of the two is rationally related to the legitimate purposes of the amended ordinance.

Plaintiff points out that in Defendants' brief in the *Walgreen* case, they made an argument similar to the one Plaintiff makes here. For instance, in their brief in the *Walgreen* case, Defendants stated that “the Board rationally concluded that society is far more likely to view drug stores as health-promoting institutions, as compared to big box stores or grocery stores. And that is true even if some big box stores and grocery stores happen to contain pharmacies.” *Walgreen*, 2009 WL 1933273, *1 (Respondent's Brief). Defendants also argued that drug stores like Walgreen's are different from grocery stores like Plaintiff's because drug stores are more likely to draw former smokers with illnesses and people who are more tempted by, and vulnerable to, the harmful effects of tobacco and who should not be exposed to it. *Id.* at *6.

Defendants explain that their original decision to focus on drug stores was an attempt to take one step at a time, addressing the phase of the problem that was most acute to the legislative mind. When the *Walgreen* court rejected this approach, they responded by addressing the entire problem, eliminating the differential treatment among types of stores with pharmacies. There is no inconsistency between Defendants' statements in the *Walgreen* case and their stance here that no stores with pharmacies should be selling tobacco products and that stores with and without pharmacies are situated differently. Even if Defendants' arguments were inconsistent, judicial estoppel does not apply because⁹⁷³ they lost the *Walgreen* case, and then conformed to the court's ruling. Defendants cannot be faulted for doing so.

Furthermore, even if Plaintiff is similarly situated to other retailers without pharmacies, the amended ordinance easily passes rational basis scrutiny. The purpose of the amended ordinance, to promote the public health by preventing people from becoming

addicted to tobacco and by helping those already addicted to stop smoking, is legitimate and even compelling. In prohibiting the sale of tobacco products in pharmacies, the amended ordinance accomplishes its purpose by ending any inference that tobacco products may not be harmful because they are sold by a major participant in the health care delivery system.

Defendants' motion to dismiss Plaintiff's equal protection claim is granted. Dismissal is without leave to amend because no additional allegations would cure the deficiency noted above.

IV. Substantive Due Process Claim Under Fourteenth Amendment

In this cause of action, Plaintiff alleges that: “The arbitrary and capricious classification of these other parts of Safeway's stores as ‘pharmacies’ is a denial of Safeway's due process rights under the 14th Amendment to the United States Constitution and Article I, § 7 of the California Constitution.” Comp. at ¶ 91. In its opposition to Defendants' motion, Plaintiff states that this claim is premised on: (1) the differential treatment of Plaintiff's stores and grocery stores without pharmacies and (2) the substantive due process right to be free from arbitrary, wrongful governmental actions that are not sufficiently linked to any legitimate state interest.

Plaintiff's first argument is a restatement of its equal protection claim, addressed above in section III. Plaintiff's second argument is a restatement of its substantive due process claim, addressed above in section II. In those sections, the Court analyzed these claims and dismissed them without leave to amend. Therefore, Plaintiff's fourth cause of action also is dismissed without leave to amend.

V. Preemption by State Regulation of Pharmacy Profession

In its complaint, Plaintiff alleges that the amended ordinance is preempted by state laws regulating the pharmacy profession and the sale of tobacco products. As Defendants note, in its opposition,

Plaintiff abandons its preemption claim based on the regulation of tobacco products. Therefore, this claim is dismissed.

Plaintiff argues that the amended ordinance is preempted by state regulation of the pharmacy profession in three ways: (1) it seeks to regulate pharmacies with another level of administrative control; (2) it is based on the irrational hypothesis that a state pharmacy license assures the public that tobacco products for sale in any store containing a pharmacy are safe; and (3) it creates an actual or potential hazard or confusion in the mind of the public about the meaning of a pharmacist's license. Plaintiff cites cases for the proposition that a municipality may not impose additional or more stringent requirements upon professionals licensed by the state. *See e.g., Verner, Hilby and Dunn v. City of Monte Sereno*, 245 Cal.App.2d 29, 33, 53 Cal.Rptr. 592 (1966) (local regulation of civil engineers and land surveyors preempted).

The amended ordinance does not regulate the pharmacy profession; it regulates retail stores by prohibiting those stores from selling tobacco if a pharmacy is located within them. This is proper because state law allows local governments to enact ordinances regulating the distribution and sale of tobacco products within their

boundaries. *See Cal. Bus. & Prof.Code § 22971.3* (nothing in this section regarding the licensing of cigarette and tobacco products preempts or supersedes any local tobacco control law other than those related to the collection of state taxes); *Cal. Health & Safety Code § 118950(e)* (ordinances imposing greater restrictions on sale or distribution of tobacco than this section governing the non-sale distribution of tobacco products shall control, if there are any inconsistencies between the two); *Cal. Bus. & Prof.Code §§ 22960(c), 22961(b) and 22962(e)* (same regarding local ordinances restricting sale of cigarettes or tobacco products in vending machines, tobacco advertising on billboards and self-service displays of tobacco products).

Therefore, Plaintiff's preemption claim must be dismissed. It is dismissed without leave to amend because amendment would be futile.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is granted. Dismissal is with prejudice, without leave to amend. The Clerk shall enter judgment in favor of Defendants. Each party shall bear its own costs.

IT IS SO ORDERED.

ATTACHMENT J
Public Notice Provided to Retailers



CITY OF SOUTH PASADENA

POLICE DEPARTMENT

1414 MISSION STREET, SOUTH PASADENA, CA 91030

TEL: (626) 403-7210 • FAX: (626) 403-7211

WWW.SOUTHPASADENACA.GOV

September 27, 2021

RE: UPCOMING PUBLIC SAFETY COMMISSION MEETING DISCUSSION ON PROHIBITING THE SALE OF ALL TOBACCO PRODUCTS IN SOUTH PASADENA

The South Pasadena City Council has requested that staff look into developing an ordinance that could prohibit the sale of all tobacco products in South Pasadena. The Council directed staff to explore the topic and to return to City Council with recommendations.

Due to the Columbus Day holiday, the Public Safety Commission will hold a special meeting on **Monday, October 18, 2021 at 8:30 a.m.** to discuss the item. The Commission will take public comment and hold a discussion, in order to make a recommendation to the City Council at a later date.

Please be advised that pursuant to the Executive Order(s), and to ensure the health and safety of the public, staff, and Commission, all are kindly reminded to follow Los Angeles County Public Health and CDC regulations and guidelines that are in place and may be posted. The Council Chambers will be open to the public for the meeting and members of the public may attend and/or participate in the in-person meeting.

The October 18, 2021 special meeting at 8:30 a.m. will be available:

- In-person Hybrid– City Council Chambers, 1424 Mission Street, South Pasadena - pursuant to Los Angeles County health guidelines.
- Live broadcast via the website – http://www.spectrumstream.com/streaming/south_pasadena/live.cfm
- Via Zoom – Please contact City Staff for login information, or check City website for the Public Safety Commission agenda within 72 hours before meeting date.
- To submit a letter for the public record, please send it to the following email address: pscpubliccomment@southpasadenaca.gov. All letters will be included in the record for the Public Safety Commission meeting.

If you have any additional questions, please contact Alison Wehrle at (626) 403-7273 or awehrle@southpasadenaca.gov.



ATTACHMENT K
Public Comment Received as of October 14, 2021
at 4:00pm

**Public Safety Commission
Tobacco Item Public Comment
Special Meeting Monday, October 18, 2021**

Received as of Thursday, October 14, 2021 at 4:00pm		
Date	Address	Notes
9/9/2021	736 Mission Street	Business located in City
10/6/2021	301 Monterey Road	Business located in City
10/13/2021	Unknown	Policy Director, Action on Smoking and Health
10/13/2021	Unknown	Tobacco Research Policy Group, upEND Tobacco Project
10/14/2021	736 Mission Street	Business located in City

My name is Kevin Bibayan and I am an owner of Arco Gas Station at South Pasadena. I am writing to you because I received a memorandum that South Pasadena is considering prohibiting the sale of all tobacco products.

I understand the intent of what you are trying to do and applaud you for trying to promote a healthier and safer city. Unfortunately, a total ban of tobacco is not the answer.

Tobacco sales are critical to my business. Nationwide, tobacco products make up more than one third of all convenience store sales. Whether you agree with using the product or not, the reality is that there's a massive demand for these products.

If the City of South Pasadena were to prohibit tobacco sale, customer will simply drive to surrounding areas where the products remain readily available. As you can see, a local law that's bound to city limits does nothing to curb usage of the product. What's worse is that we'd surrender sales and revenue to neighboring communities. That'll hurt my business and ultimately city revenue from things like business tax, property tax, and payroll tax.

The timing of a proposal like this couldn't be worse. According to the National Association of Convenience Stores convenience store sales were down 15.4% in 2020 due to the COVID-19 pandemic. Removing one of my largest revenue drivers on top of wholistic massive sales losses creates a catastrophe that I may not be able to overcome.

Once more, I understand that you are trying to do what is best for all members of your community. However, we are still far from done with the immediate and long-term impacts of the COVID-19 pandemic. This pandemic was not just a health pandemic. It was also a business pandemic. I am hoping you could consider the voices of business owners who contribute not just to the city's revenue but to the needs of our constituents as well.

Sincerely,

Kevin Bibayan
Veer Partners/Arco #42540
736 Mission St
South Pasadena CA 91030
626.348.2304
veerpartners@gmail.com

6 October 2021

Dear Representatives of the City of South Pasadena,

We represent the Foremost Liquor Market, located at 301 Monterey Road, South Pasadena. We would like to express that we are **AGAINST** the ordinance proposed to prohibit the sale of all tobacco within the city for the following reasons:

1. If we no longer are able to sell tobacco products, we will lose business and our regular customers will instead go to neighboring cities.
2. By simply prohibiting the sale of tobacco in South Pasadena, we will not stop the root issue of smoking. People will still buy cigarettes and still smoke because cigarettes would still be accessible just a few blocks away in neighboring cities in all four directions.
3. People who purchase cigarettes also buy other items, such as sodas or chips. Because of this, we would lose significant revenue if tobacco were prohibited and may have to close our business, which has been in South Pasadena for decades.

As we have described, this ordinance would adversely affect our business, inconvenience our customers significantly, and have absolutely no effect on health outcomes. We hope you consider these points in your decision.

Thank you very much for your time.

Sincerely,
Foremost Liquor Market
South Pasadena, CA

South Pasadena Public Safety Commission
October 18, 2021 Public Safety Meeting
Re: Prohibiting the sale of tobacco products

October 13, 2021

Dear Commissioners,

Thank you for this opportunity to weigh in on your discussions regarding prohibiting the sale of all tobacco products. Action on Smoking and Health (ASH) is the nation's oldest anti-tobacco organization, and chairs Project Sunset, a global coalition aiming to phase out the sale of commercial tobacco products. ASH also serves on the California Endgame Advisory Committee, and supported the efforts of Beverly Hills and Manhattan Beach.

We congratulate South Pasadena for considering this path, and for placing health squarely above corporate profits. As you embark on this discussion, ASH would like to make a few general comments that we hope are helpful to you.

1. South Pasadena is on solid legal ground. Both federal and state law give the city jurisdiction on this issue. In addition, there is a growing consensus under global human rights laws and norms that the marketing of tobacco products amounts to a violation of basic human rights.¹ Indeed, governments have a human rights duty to phase out the sale of tobacco products in order to safeguard citizens against the predations of the tobacco industry.
2. We urge you to continue to make this discussion about the behavior of the tobacco industry, rather than tobacco users. People who smoke are victims of an industry that intentionally addicted them – nearly always as children - to a deadly substance. Ending tobacco sales is a positive step for smokers, the vast majority of whom want to quit. In considering enforcement, please don't add penalties for individual possession, purchase, or use.
3. We urge you to consider a phase-in period, as Beverly Hills and Manhattan Beach have done. This allows current people who smoke time to quit, and retailers time to alter their business models.
4. Please ensure access to robust cessation aid. No doubt many people who smoke in South Pasadena will react to this initiative by trying to quit. It is in everyone's interest that they succeed.
5. Ending tobacco sales is not abnormal. Leaving addictive, deadly products on the market is abnormal. If a new product came out tomorrow that was highly addictive and killed when used as intended, it would be pulled from shelves immediately. The tobacco industry has received special treatment for decades, at the cost of millions of lives.

If we can provide information or background, please do not hesitate to reach out.

Best Regards,



Chris Bostic, Policy Director

¹ www.ash.org/declaration and <https://www.humanrights.dk/news/human-rights-assessment-philip-morris-international>.

Public Comment: Ordinance Ending Tobacco Sales in South Pasadena

*Information Prepared by Malone Tobacco Policy Research Group, upEND Tobacco Project
University of California, San Francisco*

South Pasadena has taken a landmark step in proposing to become the third California city to pass an ordinance ending sales of tobacco products. This background information may be useful.

The tobacco epidemic: Background and current context

- *The tobacco epidemic is a phenomenon of the 20th century.* Only after the invention of the cigarette rolling machine in the late 1800s did the cigarette become the single most deadly consumer product ever sold, causing millions of premature, preventable deaths.¹
- The tobacco industry knew for decades that its products were deadly, but concealed the evidence from the public.²
- Globally, public health leaders have begun discussing how to end the tobacco epidemic.³
- The 50th anniversary edition of the U.S. Surgeon General's Report on the Health Consequences of Smoking suggests policies to do this, including "greater restrictions on sales, particularly at the local level, including bans on entire categories of products."⁴
- *California is a world leader, with the second-lowest smoking prevalence of any US state after Utah.*⁵
- If present progress continues, retailers will soon need to develop new business models that do not rely on tobacco sales.

Facts about smoking

- Smoking is the leading preventable cause of disease and death in the US, responsible for about 1 in every 5 deaths, more deaths each year than human immunodeficiency virus (HIV), illegal drug use, alcohol use, motor vehicle injuries, well-known microbial agents, such as flu and pneumonia (excluding the corona virus, which killed nearly 350,000 in the US in 2020),⁶ and toxic agents, combined.⁷
- In California, 40,000 adults die annually from smoking, and 440,600 California youth now aged 0-17 are projected to eventually die from smoking.⁸
- In 2009, the cost of smoking in California totaled \$18.1 billion: \$9.8 billion in healthcare costs, \$1.4 billion in lost productivity from illness, and \$6.8 billion in lost productivity from premature mortality. This adds up to \$487 per state resident and \$4,603 per smoker.⁹
- Smoking is concentrated among marginalized communities, including those living below the poverty level, sexual and gender minorities, and persons with mental health disorders, contributing to disparities in smoking-related disease and death.¹⁰⁻¹⁵

The retail environment influences smoking

- *The ubiquity of tobacco outlets undermines a strong public health message that tobacco products are addictive and deadly,*¹⁶ and helps normalize smoking, suggesting that tobacco use is common and acceptable.¹⁷
- Tobacco outlet density increases the likelihood of smoking among both minors¹⁷⁻²⁹ and adults,³⁰⁻³² and living near tobacco outlets is associated with unsuccessful quit attempts.³³⁻³⁶
- Tobacco use disparities have also been linked to the greater concentration of tobacco outlets in economically and socially deprived neighborhoods compared with wealthier neighborhoods.³⁷⁻⁴⁵
- Emerging evidence suggests that tobacco retailer reduction is associated with a decline in cigarette pack purchases.⁴⁶

Policy considerations

- The most fundamental purpose of consumer protection law is to protect people from hazardous products. The 1985 United Nations consumer protection guidelines state that “Governments should adopt or encourage the adoption of appropriate measures . . . to ensure that products are safe for either intended or normally foreseeable use.”⁴⁷ Any other product that caused the well-documented levels of death and disease that the manufactured, highly engineered modern cigarette does would have been recalled from the market decades ago.
- Sales of other legally sold consumer products that were found to be dangerous to the public have been phased out, including leaded gasoline, leaded paint and asbestos.
- The 2009 Family Smoking Prevention and Tobacco Control Act specifically permits states and localities to prohibit sales of tobacco products.⁴⁸
- Nationwide, support for a ban on tobacco sales within a ten-year time frame was 55% among nonsmokers and 33% among smokers in 2011.⁴⁹ In 2019, 52.8% of California adults agreed or strongly agreed that the sale of cigarettes should be gradually banned, while 37.3% agreed or strongly agreed that their sale should be immediately banned.⁴⁹

Contact: Professor Ruth E. Malone, RN, PhD
Department of Social and Behavioral Sciences
University of California, San Francisco



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From: [Veer Partners](#)
To: [Public Safety Commission Comment](#)
Subject: South Pasadena Tobacco Ban Opposition
Date: Thursday, October 14, 2021 3:40:41 PM

CAUTION: This email originated from outside of the City of South Pasadena. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello,

As a small business owner in the City of South Pasadena we OBJECT & OPPOSE the tobacco ban for our city.

Tobacco is not a class A drug or a gun. There is no reason why tobacco should be banned. We are lucky to have some of the greatest and smartest citizens in our city and they are more than capable of making the right decision for themselves if tobacco is right for them or not. That is not the city's job to do for them.

Most importantly, our city is surrounded by many small cities that still have not taken any type of ban. If we ban it in our city, customers and citizens will just travel a few miles and get it. At that point the only loser will be the city and it's citizens. Why should other cities take our tax dollars?

This is a meaningless proposition. Our cities' efforts should be set aside for better productivity.

--

Thank you,



Veer Management Company Inc

Additional Documents

Public Comment

Agenda Item # 3

Dear Members of the Public Safety Commission, My name is Juliana Fong and I currently serve as the Chair of the South Pasadena Youth Commission. In that position, I've had the opportunity to speak with Councilwoman Zneimer about the problem of teens in our city using tobacco products, including vaping. I share her concern about local businesses selling these products to minors because I've seen my classmates in high school vaping and smoking cigarettes. Even though businesses cannot legally sell tobacco products to persons under the age of 21, we all know that this law is not always enforced. This is why I strongly support Item number 3 of today's agenda, the proposed ordinance that would prohibit the sale of all tobacco products in the City of South Pasadena.

Thank you,

Juliana Fong

Agenda Item # 3

To whom it may concern;

Good afternoon Public Safety Commission,

We hope all is well.

Please allow this email to serve as an introduction. My name is Julia Ruedas, policy analyst with Los Angeles County, USC Medical Center Foundation. We work closely with the Breathe Free South Pasadena Adult and Youth Coalition/s. Please find attached public comments from the following:

- ***Senator Anthony Portantino***
- ***Assemblymember Chris Holden***
- ***Cancer Action Network***
- ***American Academy of Pediatrics***

We will be joining the meeting on tomorrow morning.

Thank you for your time.

Julia Ruedas

Agenda Item #3

PLEASE READ THIS COMMENT BELOW FOR THE COMMISSIONERS. THANKS IN ADVANCE

Honorable Public Safety Commissioners,

I am Myron Dean Quon, a resident at 741 Garfield Ave. My family has lived here for 6 years. Our two boys attend Monterey Hills Elementary.

We strongly support the passage of the ordinance listed in Item #3.

In 2021, and with the ongoing pandemic, it is especially clear that South Pasadena has no legitimate reason to allow the sales of tobacco products (including vaping devices). The chemicals from smoke and vaping harm everyone, whether directly inhaled or as secondhand smoke, and our young residents remain at high risk of addiction due to any access.

I am very active with other parents in Monterey Hills as well as the local Y. Literally every single person that I speak to about this issue is in support of this ordinance.

In addition, I have been an active member of the local coalition of South Pasadena residents and businesses in support of this ordinance. Although not everyone can attend today's session, I can freely share that all our members are in support of this ordinance.

Please support this ordinance unanimously, and ensure that the city council also can ultimately pass this ordinance.

Your actions through this commission will truly save lives. Thanks so much.

Sincerely,

Myron

Myron Dean Quon, Esq. | (he/him/他的)

Pacific Asian Counseling Services | Executive Director

Los Angeles | Long Beach | San Fernando Valley

CAPITOL OFFICE
STATE CAPITOL
ROOM 3086
SACRAMENTO, CA 95814
TEL (916) 651-4025
FAX (916) 651-4925

GLENDALE DISTRICT OFFICE
116 E. BROADWAY
SUITE 204
GLENDALE, CA 91205
TEL (818) 409-0400
FAX (818) 409-1256

SATELLITE OFFICE
201 EAST BONITA AVE.
SAN DIMAS, CA 91773
TEL (909) 599-7351
FAX (909) 599-7692

SENATOR.PORTANTINO@SENATE.CA.GOV

California State Senate

ANTHONY J. PORTANTINO
SENATOR

TWENTY-FIFTH SENATE DISTRICT



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July 12, 2021

South Pasadena City Council
1414 Mission St
South Pasadena, CA 91030

SUBJECT: *Breathe Free South Pasadena Coalition Support Letter*

Dear South Pasadena City Council:

I am writing to express my support of the Breathe Free South Pasadena Coalition in their efforts to protect the health and well-being of the youth residents in South Pasadena. This coalition consists of engaged parents and professionals that seek to prevent tobacco-related disease and death for youth. My office has met with the parent and student coalitions to listen to their advocacy on the damaging impacts of tobacco products on the adolescent brain.

The health of the youth is an utmost priority to our present and future. The science and research on the harms of flavored tobacco products to the youth are alarming. As State Senator, I am committed to efforts and policies that prioritize youth health, physical and mental wellbeing. I voted in favor of the legislature's policies in SB-793 to protect youth from tobacco products. While the State continues efforts to further protect and educate the youth on the damage of tobacco related products, the cooperation and implementation of local governments is essential.

Therefore, I strongly support the coalition's local efforts in raising awareness to this issue. I encourage the Council's support in further evaluating and implementing local measures to protect the youth and promote wellbeing. Should you have any questions, please feel free to contact my staff via phone at (818) 409-0400 or via email at David.Kim@sen.ca.gov.

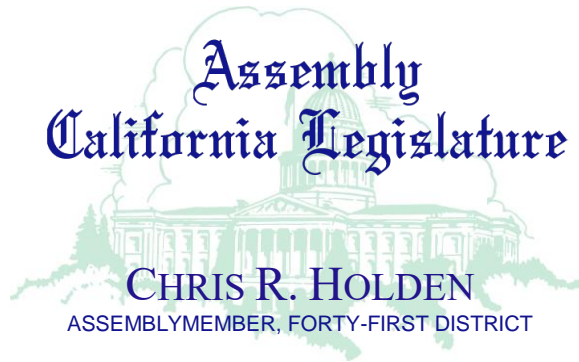
Thank you for your consideration,

A handwritten signature in black ink that reads "Anthony J. Portantino".

Anthony J. Portantino
State Senator, District 25

STATE CAPITOL
P.O. BOX 942849
SACRAMENTO, CA 94249-0041
(916) 319-2041
FAX (916) 319-2141

DISTRICT OFFICE
600 NORTH ROSEMEAD BLVD, #117
PASADENA, CA 91107
(626) 351-1917
FAX (626) 351-6176



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AND MATH EDUCATION
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BOARD MEMBER
SANTA MONICA MOUNTAINS
CONSERVANCY BOARD

July 12, 2021

Rosa Soto, Executive Director
The Wellness Center
1200 N. State Street
Los Angeles, Ca 90033

Dear Executive Director Soto,

As the Assemblymember representing the 41st Assembly District, I write in support of finding solutions for the youth and residents in the City of South Pasadena to have opportunities to live in a healthy breathing environment. I support the Breathe Free South Pasadena Coalition and their public health efforts to prevent tobacco-related disease and death and the growing epidemic of youth tobacco use initiation driven by flavored tobacco products. These products contain nicotine and can have damaging impacts on the adolescent brain and cause long-term addiction.

Smoking continues to be the leading preventable cause of death in the United States. The dangers of smoking is well documented by the Surgeon General who has concluded that smoking causes cancer, respiratory and heart diseases, and birth defects. My work in Sacramento has allowed the opportunity to pass legislation, Assembly Bill 1696 of 2016, which provided the necessary resources in assisting individuals to secede from addiction to nicotine products. Throughout California, cities have adopted data-driven approaches towards the sales of flavored tobacco products. I fully support movements, which promote healthy behavioral habits.

Thank you for your continued efforts to promoting a healthy breathing environment.

Sincerely,

A handwritten signature in black ink that reads "Chris Holden".

Assemblymember Chris Holden
41st Assembly District

WEBSITE: Assembly.ca.gov/holden

EMAIL: Assemblymember.Holden@assembly.ca.gov

SATELLITE OFFICE: 415 WEST FOOTHILL BOULEVARD, SUITE 124 • CLAREMONT, CA 91711 • (909) 624-7876 • (909) 247-7894 • FAX (909) 626-2548



June 14, 2021

The Honorable Diana Mahmud
City of South Pasadena
1414 Mission Street
South Pasadena, CA 91030

RE: Prohibiting the sale of Flavored Tobacco

Dear Mayor Mahmud and Members of the Council:

The American Cancer Society Cancer Action Network (ACS CAN) is committed to protecting the health and well-being of the residents of South Pasadena through evidence-based policy and legislative solutions designed to eliminate cancer as a major health problem. ACS CAN supports efforts to reduce youth tobacco use and eliminating the sale of flavored tobacco products is an important part of a comprehensive approach to preventing youth from ever beginning a deadly addiction to tobacco. **We support your efforts in eliminating the sale of all flavored tobacco products, including menthol cigarettes and Hookah, within the city of South Pasadena, and without exemptions.**

Smoking remains the leading preventable cause of death in the U.S. The 2014 U.S. Surgeon General's report found that more than 43 million Americans still smoke. It is estimated that tobacco use will cause 480,000 deaths this year in the U.S. Both opponents of smoking and purveyors of cigarettes have long recognized the significance of adolescence as the period during which smoking behaviors are typically developed. National data show that about 95 percent of adult tobacco users begin smoking before the age of 21, and most begin with a flavored product. In 2009, Congress prohibited the sale of cigarettes with flavors other than tobacco or menthol. Tobacco companies responded by expanding the types of non-cigarette tobacco products they offer, and now make most of those products available in a growing array of kid-friendly flavors. Little cigars, smokeless tobacco, hookah, and e-cigarettes are marketed in a wide variety of candy flavors with colorful packaging and deceptive names that appeal to youth.

Adolescents are still going through critical periods of brain growth and development and are especially vulnerable to the toxic effects of nicotine. A study published in the journal, *Pediatrics*, found that the earlier youth are exposed to nicotine, the less likely they will be able to quit smoking. Tobacco companies have a long history of marketing to under-resourced communities, and target youth with imagery and by marketing candy and fruit flavored tobacco. The anesthetizing effects of menthol masks the harshness of tobacco, making it more appealing to people who are beginning to smoke, and people who smoke menthol show greater dependence, and are less likely to quit than people who smoke non-menthol. Postponing youth experimentation and initiation can help reduce the number of youth who will ever begin smoking.

American Cancer Society Cancer Action Network
99 S. Lake Avenue, Suite 400 ■ Pasadena, CA 91101
626.243.5614 ■ FAX: 626.568.2888 ■ Primo.Castro@Cancer.org

Ending the sale of flavored tobacco products, including menthol, is not only a health issue; it is also a social justice issue. Targeted marketing to communities of color, low income communities and LGBTQ communities adds to the health disparities in populations already impacted by social inequities. In African American communities, the tobacco industry has aggressively marketed menthol flavored tobacco products to youth. Approximately 85% of African Americans who smoke use menthol cigarettes, and consequently, African American men have the highest death rates from lung cancer, when compared to other demographic groups. The anesthetizing effect of menthol masks the harshness of tobacco, making menthol cigarettes more appealing to beginning smokers, and menthol smokers demonstrate greater dependence, and are less likely to quit. Presently, more than 70 jurisdictions in places as diverse as Yolo County, Contra Costa County, and the cities of Beverly Hills and Alhambra have passed strong policies.

While cigarette smoking has declined in recent years, the use of menthol and other flavored products have continued to increase, especially among young people and people who are beginning to smoke. **We strongly encourage this council to move forward in drafting an ordinance, ending the citywide sale of all flavored tobacco products, without exemptions.** Taking this important public health step will help to prevent young people in South Pasadena from ever beginning this deadly addiction, as well as help to support those who are trying to quit.

Sincerely,



Primo J. Castro
Director, Government Relations
American Cancer Society Cancer Action Network

California Chapter 2

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Press Release

Pediatricians in Support of South Pasadena Tobacco Sales Ban

LOS ANGELES, CA (October 16, 2021)

Pediatricians support tobacco bans and urge the city of South Pasadena to pass a new ordinance to prohibit the sale of all tobacco products and applaud both Manhattan Beach and Beverly Hills for already taking this step to protect the health of children.

The evidence is clear that tobacco products are detrimental to the health and wellbeing of children and adolescents. Tobacco smoke exposure harms children from conception onward, either causing or exacerbating the risks of preterm birth, congenital malformations, stillbirth, sudden infant death, childhood obesity, behavior problems, neurocognitive deficits, wheezing, more severe asthma, more severe bronchiolitis, pneumonia, middle ear infection, reduced lung functioning, and cancer (<https://pediatrics.aappublications.org/content/136/5/998>). According to a 2014 US Surgeon General's Report, "If we continue on our current trajectory, 5.6 million children alive today who are younger than 18 years of age will die prematurely as a result of smoking."

Accessibility to tobacco products harms adolescents. A 2012 Surgeon General's report found that nearly 90% of tobacco dependent adults initiated their tobacco use well before their 18th birthday. Moreover, nicotine has been documented to be detrimental to the developing brains of children and adolescents.

Tobacco harms children. Smoke free legislation and bans on flavored tobacco are steps towards protecting children and adolescents from the harmful effects of tobacco smoke exposure and consumption. But we need to do more. Bans on the sale of all tobacco products will further limit accessibility, consumption, and the risk for second and third hand smoke exposure.

The Southern California Chapter 2 of the American Academy of Pediatrics is an organization of 1,500 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults.

AAP Southern California Chapter 2 (AAP-CA2)

Chapter2@aapca2.org

(818)422-9877

www.aapca2.org

Amended

To: The South Pasadena Public Safety Commission Special Meeting
Monday, October 18, 2021, at 8:30 am

Date: October 15, 2021

Re: Agenda Item #3 Potential New Ordinance for the South Pasadena Municipal Code Regarding Prohibiting the Sale of All Tobacco Products

Dear Commissioners,

We write you, in opposition to the proposed ordinance to Prohibit the Sale of All Tobacco Products. We are writing specifically on behalf of Faye Karroum, owner of Fair Oaks Cigar and Spirits, located at 806 Fair Oaks Ave., South Pasadena CA, 91030.

Faye, and Fair Oaks Cigars has been part of South Pasadena for 24 years. The primary business of Fair Oaks Cigars is the sale of cigars. Prohibiting the sale of cigars would close his business.

- Fair Oaks Cigars is a cigar lounge, that does not attract underage minors,
- Faye has never sold cigars to underage minors. While supporting the SPEF and High School, Faye has declined to place an ad in the SPSHS Football program because he does not advertise to children.
- Fair Oaks Cigars draw clients from a 30-mile radius. They are regular clients that come in from such places as Glendale, Burbank, Woodland Hills, Pacific Palisades, Glendora and Orange County. These clients not only enjoy the cigar lounge, but enjoy eating at our restaurants such as Gus's BBQ, ARNO, and others.

We support protecting and limiting the sale of tobacco products to those under the legal age of 21, but cigars are not marketed to those under 21. Not only are cigars not marketed to those under 21, but the price point of cigars is also a limiting factor for any interest from children.

We appreciate your consideration and do not include the prohibition of the sale of cigars in the ordinance. Faye Karroum and Fair Oaks Cigars are good neighbors and should not be forced to close.

Signed by: ERNEST ARNOLD

Name:

Address

Ernest Arnold

So Pasadena CA

Sancho D'Egidio

L.A., CA

James Hollingsworth

Ave, Pasadena
CA 91106

James Hollingsworth

Name	Address
Roland Gomez	#102 Pasadena Ca
Samuel Prado WLG	dunsmuir AKS
Jim Bututo	18C 2A 9100 413
Bryan Phillips	San Gabriel 91775
Mike Nantel	Los Angeles, CA 90012
Eduardo M Juli Soler	Ave Alameda City CANASTOT Palmdale CA
Willie	el Centro
Luis Melendez	Culver City CA 90230
R. Alan Valencia	LA, CA 90022
Luis Melendez	SPAS
Luis Melendez	ALHAMBRA CA Altadena CA 91001 Monrovia, CA 91016

Name	Address
DENNIS SCHREIBER	BLVD, LA 90068
Vince Samara	Alhambra CA 91801
KEVIN SANTAPPA	J. S. PASADENA CA 91030
Mark Priver	S. Pasadena 91030
Steven Scholtz	SAN MARINO
Mutt Bragg	Pasadena CA 91101
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MARK RIBRA	PACIFIC PALISADES, CA 90272
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ANITA KRALIS	SO. PAS.
TOM ROBERTSON	LA. 91105
TONY DANG Marcus Hamilton	LEONITOS 90703 #2 Pasadena 91106
Curtis Gonzalez Robin Johnson	Colton CA 91214 Pasadena CA 9110

Name

Address

Bobby Hamilton

LA 90059

Brandon Smith

Alhambra

91001

John Hawkins

3 PASA 91107

Mark Myner

Glendale 91201

Brian N. Lee, MD

LA, CA

90008

Peter Partida

Los Angeles

CA 90032

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LA 90031

Tiwei Chey

CA CA

JACQUES Vesperang

S. Pasadena

91030

Brandon Dalton

Pasadena

91030

Derek Walker

Pasadena 91107

JAMES SPK Spangler

Los Angeles
90042

Raffi Vakian

Pasadena CA
91107

Danny Bachman

Alhambra CA
91801

Melissa Mumkill

Alhambra
CA 91801

ALBERTO SERRANO

Alhambra
CA
91801

Judith M. Harris, MA, MSW
Licensed Clinical Social Worker License #LQ6719
807 Fremont Avenue
South Pasadena, California 91030
jmharris@sbcbglobal.net

**Statement Re: Negative Effects Upon the City of South Pasadena
of Having Smoking and Vaping Materials for Sale / Readily Available to Youth and Adults**

My name is Judith M. Harris, LCSW. I have been part of the South Pasadena community for the past 30 years. I raised a child who matriculated through all levels of South Pasadena public schools and have been integrally involved with the both the school and city communities over years. I am a mental health professional with both a private psychotherapy practice servicing children, adolescents and adults, and a private organizational consulting practice focused upon employee and organizational mental health and wellness.

An area in which I have acquired much expertise, and which is key to personal, workplace and community wellness is that of combatting addiction and substance use of all kinds. I have routinely taken many trainings covering the span of addictive and substance use disorders over years and have worked with scores of clients who present with a range of these disorders. Since 2019 I have taken a concentration of substance use trainings sponsored by UCLA School of Public Health, University of San Francisco and the State of CA regarding smoking cessation. The use of combustible as well as vaping smoking materials is posing increased threats to the health and mental health of all populations in our state and country, but especially to youth. Vaping materials have been manufactured to target youth and are many times more toxic and dangerous to all who use them, but especially to youth since many times the amount of nicotine, a neurotoxin, and other toxic chemicals and metals particles, are delivered to the developing brain and body through vaping mechanisms. Youth, whose brains are in the process of developing are placed at high risk for developing mental health and other health issues as a result of vaping and smoking.

During the pandemic I notice many of my clients stagnating and sinking through delivery of my services over telehealth, so I devised a safe way of meeting with them in person in outdoor spaces. I have frequently met with clients in Garfield Park in secluded places including behind the Scout House. As I learned, this area has been a designated area in the park for local youth to use, drink and engage in sexual activities, apparently over the past 30 years. I have certainly found much evidence of all. Almost every time I have worked in the area, I have found evidence of youth having used smoking and vaping tobacco, marijuana, and other drug materials as well as their having used alcohol and marijuana edibles, and having engaged in sexual activities, leaving unsafe, unhealthy discarded materials all over the area. This using/vaping youth population has also engaged in defacing public property including leaving graffiti on walls, the air conditioning unit by the Scout House, and carved into picnic tables! I have had to phone the So Pas police and Parks and Rec divisions on numerous occasions about what I am finding in areas of the park where I meet with clients. Of course, in order that areas in which I meet are not full of blight, I have become the "clean up crew" and "guardian" of the areas! In addition, the homeless population has been growing and many homeless persons are now living in Garfield Park, engaging in the same types of activities and leaving similar refuse in secluded areas of the parks such as behind the Scout House. It would be of great benefit to all in our community were the sale of smoking and vaping materials to be banned in the City of South Pasadena.

Salient Points re: testimony of Judith M. Harris, LCSW:

1. 30 year professional and community member of South Pasadena.
2. Raised a child all through So Pas public schools/ Has been integrally involved in school and city communities for 30 years
3. As mental health professional has both private psychotherapy and organizational practices focused upon mental health and wellness at home, school and work encompassing all areas of addictive and substance use disorders
4. From 2019 has taken concentration of continuing education courses on "smoking cessation" of all materials sponsored by UCLA School of Public Health, U of SF and State of CA.
5. Has firsthand testimony from professional and personal experiences of the danger availability of smoking/vaping materials is causing all and especially So Pas youth and general population.

Dear Members of the Public Safety Commission,

My name is Juliana Fong and I currently serve as the Chair of the South Pasadena Youth Commission. In that position, I've had the opportunity to speak with Councilwoman Zneimer about the problem of teens in our city using tobacco products, including vaping. I share her concern about local businesses selling these products to minors because I've seen my classmates in high school vaping and smoking cigarettes. Even though businesses cannot legally sell tobacco products to persons under the age of 21, we all know that this law is not always enforced. This is why I strongly support Item number 3 of today's agenda, the proposed ordinance that would prohibit the sale of all tobacco products in the City of South Pasadena.

Thank you.

Juliana Fong