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April 14, 2011

TO: Each Supervisor

FROM: Jonathan E. Fielding, M.D., M.P.H. *J. Fielding*  
Director and Health Officer

SUBJECT: **AMICUS BRIEF IN SUPPORT OF NEW YORK CITY'S LAW REQUIRING  
TOBACCO RETAILERS TO PLACE IN STORE WARNING SIGNS**

This is to notify you that the Department of Public Health (DPH) plans to sign onto an amicus brief in support of New York City's law requiring that tobacco retailers place a warning sign in their stores about the negative health effects of smoking.

**Background**

In 2009, New York City passed a law requiring tobacco retailers to post a sign in their stores warning about the negative health effects of smoking. The signs depict graphic images such as diseased lungs and teeth and include a message encouraging smokers to quit, along with the local quit line number.

After the law went into effect tobacco retailers and tobacco companies sued New York City, claiming that the law was preempted by the Federal Cigarette Labeling & Advertising Act (FCLAA) and that it violates the First Amendment rights of retailers by forcing them to post a message in their stores with which they disagree, often referred to as "compelled speech."

In December 2010, the U.S. District Court ruled that the New York City law was preempted by federal law. The Court did not address reach the First Amendment question. New York City appealed to the U.S. Court of Appeals for the Second Circuit.

DPH desires to support New York City's appeal because if the preemption ruling is upheld by the U. S. Court of Appeals, it will eliminate the ability of other local jurisdictions to pursue similar laws requiring in store health warning signs about tobacco or other public health dangers, and may jeopardize existing health warning laws. Such warnings have been proven to be an effective means at the point of purchase of informing consumers about the health hazards of smoking, encouraging smokers to quit, and preventing nonsmokers from starting to smoke.

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### **Purpose of Amicus Brief**

The amicus brief funded by DPH's Project TRUST will be drafted by counsel for the Public Health Institute's Public Health Law & Policy (PHLP). The brief will argue that New York City's law is not preempted by the FCLAA, and does not violate the First Amendment because the message on the health warning signs is clearly a message that is from the government of New York City, not from retailers. Additionally, the brief will purport that the First Amendment is meant to protect the speech of individuals and businesses and that it does not apply to speech that is made by the government.

### **Next Steps**

PHLP plans to submit the amicus brief to DPH by April 11, 2011 for review and approval. Other jurisdictions, including the City of Portland, OR, the State of Massachusetts, the City/County of San Francisco, the County of Santa Clara and the City of Seattle and King County have also been asked to sign on to the brief. County Counsel will review the brief with DPH prior to its filing.

In addition to this amicus brief, PHLP expects two others to be submitted in support of New York City: one from the Tobacco Control Legal Consortium, addressing the federal preemption issues; and one from the American Legacy Foundation, addressing the First Amendment "compelled speech" issue.

The amicus briefs must be filed with the Court of Appeals on April 18, 2011. The briefs will be filed simultaneously with a request for the Court to accept the amicus briefs.

If you have any questions or need additional information, please let me know.

JEF:lma

c: Chief Executive Officer  
County Counsel  
Executive Officer, Board of Supervisors  
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