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M E M O R A N D U M

From: C. D. Michel
To: Interested Parties
Date: April 16, 2008
Re: **Victory Over San Francisco Gun Ban**

I. INTRODUCTION

On behalf of the legal team that was privileged to represent the National Rifle Association and the other petitioners in the lawsuits successfully challenging Proposition H, the San Francisco Gun Ban initiative, I wanted to get some information out so that folks can understand what went into obtaining this decision and can fully appreciate the value of the results. The decision and all briefs filed in the case are posted at www.calgunlaws.com.

The central issue in these lawsuits was the extent to which California state law preempts local gun control efforts. The decision underscores the importance of strong state preemption laws. Forty-three states have preemption statutes. California's preemption statutes are not as clear as some in other states. California's preemption statutes prohibit local governments from banning handgun possession and from establishing their own "licensing" and "registration" systems. Determining the parameters of those preemption statutes was the heart of the case.

Below is a list of the associations and individuals who participated in the lawsuits challenging Prop H. At the end of this memo, I have laid out some thoughts about the significance of this case with respect to future local gun control efforts in California.

II. BACKGROUND

In 2005, San Francisco voters passed Proposition H, a local ordinance prohibiting virtually all city residents from possessing handguns and all city residents, without exception, from selling, distributing, transferring and manufacturing all firearms and all ammunition. Proposition H was an attempt by San Francisco to ban civilian handgun possession by city residents and to ban the sale, transfer, and distribution of all firearms and ammunition within the city.

The day after Proposition H passed, the NRA and other petitioners sought a writ of mandate declaring Proposition H invalid. Among other arguments, the petitioners challenged the ordinance on the grounds that it was preempted by state law.

The case was initially filed directly in the Court of Appeal – which can, but does not have to, accept original jurisdiction of cases when there are no factual issues involved that a trial court would need to resolve. The Court of Appeal declined to accept the case, so the case was refiled in the trial court.

The trial court agreed with the petitioners that Prop H was preempted by state law. Based on its further determination that the invalid portions of the ordinance were not severable from the arguably valid portions, the court found that the ordinance was preempted in its entirety. The court found further that the city's home rule power did not override state preemption because the field being regulated was one of statewide, rather than local, concern.

The state Court of Appeal affirmed the trial court's judgment in all respects. On January 9, 2008, the First District Court of Appeal issued its decision in *Fiscal v. City and County of San Francisco* (case number A115018). The Court of Appeal also found that San Francisco's Proposition H ordinance was preempted by California law. In its decision, the Court of Appeal noted that the "state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation."

San Francisco claimed the Proposition H gun ban was necessary as an anti-crime measure. The court rejected this, noting: "[T]he City's arguments fail to acknowledge the ordinance will affect more than just criminals. It will also affect every City resident who has not, through some demonstration of personal disability or irresponsibility, lost his or her right to possess a handgun."

On February 19, 2008, San Francisco asked the California Supreme Court to review the case. The City of Los Angeles and the Legal Community Against Violence also urged the court to review the case. Review by the California Supreme Court is discretionary.

On March 10, 2008, San Francisco and the Legal Community Against Violence argued that if the California Supreme Court were not inclined to review the Court of Appeal's decision, then the court should depublish the decision so it would have no precedential value.

On April 9, 2008 the California Supreme Court decided not to hear the case and not to depublish the Court of Appeal's decision. So the decision is now final and stands as precedent against many future local gun control efforts.

III. TEAM EFFORT

This success was the result of a team effort, both in terms of the petitioners who were named in the lawsuit itself, and the *amici curiae* ("friends of the court") that presented their unique perspectives to the court through their own amicus briefs. The lawyers representing all those various parties and *amici* also all contributed to the effort, and to the victory. Each of these parties, *amici*, and attorneys cooperated and supported each other and worked closely

together to achieve this tremendous result for those who choose to own a gun to defend themselves and their families.

Below is a list of the petitioners and a description of their involvement. Below that is a list of *amici* that filed *amicus* briefs. I've listed the lawyers that were on the teams for the petitioners in the case in chief, as well as the attorneys that represented the various *amicus* parties.

A. Petitioners/Named Parties

1. Associations

The **National Rifle Association** (NRA) is a non-profit membership organization founded in 1871 and incorporated under the laws of New York, with headquarters in Fairfax, Virginia and an office in Sacramento, California. Principal funding for the case was provided by the NRA. The NRA represents several hundred thousand individual members and 850 affiliated clubs and associations in California, and tens of thousands of members in San Francisco, including police officers. www.nra.org

Additional funding for this lawsuit was provided by the **Second Amendment Foundation**. SAF is a 501(c)(3) corporation founded in 1974, and is the nation's oldest and largest tax-exempt education, research, publishing and legal action group focusing on the Constitutional right and heritage to privately own and possess firearms. www.saf.org

The NRA and SAF negotiated the joint funding effort and cooperated from the outset. The two organizations also worked behind the scenes on many levels to motivate opposition to Proposition H, both before and after it was passed.

The Second Amendment Foundation also deserves special recognition for being heavily involved in the *Doe v. City and County of San Francisco* case, a 1982 decision that was relied on heavily to obtain the results in the *Fiscal* case. www.saf.org

California Association of Firearm Retailers (CAFR) is a 501(c) non-profit membership organization founded in 2004 and incorporated under the laws of California. The California Association of Firearm Retailers represents firearm retailers throughout California and has a lobbyist in Sacramento. It operates under the umbrella of the National Association of Firearm Retailers and the National Shooting Sports Foundation. www.cafr.biz, www.nssf.org.

Law Enforcement Alliance of America (LEAA) is a nonprofit, non-partisan advocacy organization under section 501, subdivision (c)(4) of the Internal Revenue Code. Its principal offices are in Virginia and its executive director is James J. Fotis, a retired New York police officer. LEAA's members consist of law enforcement professionals and officers, crime victims, and concerned citizens, many of whom reside and/or work in San Francisco and pay taxes thereto. www.leaa.org

The **San Francisco Veteran Police Officers Association** (SFVPOA) represents retired San Francisco officers and is active in protecting their interests, particularly their interest in being able to defend themselves from the criminals they have arrested throughout their careers. SFVPOA is also active in protecting its members' interests in post-retirement employment.

2. Individuals

Paula Fiscal was one of the petitioners/plaintiffs in the original San Francisco handgun ban victory in 1982 in the *Doe* case. She is a state board member of the Mexican American Political Association. She is also a businesswoman and property owner living in and having an office in San Francisco, in which locations she keeps handguns for protection.

Larry P. Barsetti is a lifelong resident of San Francisco and a handgun owner. Having retired from the San Francisco Police Department as a Lieutenant, he has a special permit to carry handguns issued under Penal Code section 12027.

Rebecca Kidder was born and has lived her entire life in San Francisco. She owns a handgun therein.

Dana K. Drenkowski, is a retired U.S. Army Lieutenant Col., who last toured Iraq before retiring. He currently works as a Deputy District Attorney in the San Joaquin District Attorney's office. He still resides in San Francisco and stores his extensive collection of handguns there. His handguns would not have been exempt under Proposition H because the ordinance had no exemption for the military; and, in any event he is a member of the reserves, not of the regular Army, and his handguns are kept only for his personal use both for defense and as a competitive target shooter and hunter.

John Candido, a resident of San Francisco, was a police officer with the San Francisco Police Department from 1963 through 1995. He was also a law enforcement officer with the San Francisco Sheriff's Department from 1951 through 1960.

Alan Byard is a San Francisco Patrol Special Police Officer and has been since 1977. He also works for a private security company as a trainer and is a lifelong resident of San Francisco.

Andrew Sirkis, a San Francisco handgun owner, owns real property and also has a business office in San Francisco.

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B. Amici / Friends of the Court

1. Government Code Section 53071 Amicus Brief

Senator H. L. Richardson (Retired) first entered the California Senate in 1966 – the same year that Ronald Reagan was elected governor. During the ensuing twenty-two years, he bypassed three opportunities to run for Congress, choosing to remain in the Senate and the GOP leadership. The result was a record of success, even in the face of partisan opposition, including authoring the bill that became Government Code section 53071, the California law that preempts local government ordinances relating to the licensing or registration of firearms. Senator Richardson left the Senate in 1988.

Gun Owners of California, Inc. (GOC), is a California non-profit corporation organized in 1974. It has offices in Sacramento, California, conveniently located to facilitate lobbying the state legislature. GOC is a leading voice in California supporting the right to self defense and to keep and bear arms guaranteed by the Second Amendment. GOC monitors government activities that may affect the rights of all Americans who choose to own firearms. www.gunownersca.com

The Madison Society is a Nevada non-profit, membership corporation with numerous chapters in California. Its purpose is to preserve and promote the legal and Constitutional right to arms of its members and of law-abiding, responsible Americans in general. To that end, the Madison Society engages in and supports litigation in California and nationwide. The Madison Society also engages in political education and advocacy through public meetings, advertising, publishing and distribution of literature, and contact with public officials. www.madison-society.org

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2. Penal Code Section 12026 Amicus Brief

The **California Rifle & Pistol Association (CRPA)** is a non-profit membership organization with roughly 65,000 members. CRPA is incorporated under the laws of California, with headquarters in Fullerton. Among its other activities, CRPA works to preserve Constitutional and statutory rights of gun ownership, including the right to self-defense and the right to keep and bear arms. www.crpa.org.

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3. Propmaster's Brief

The **American Entertainment Armories Association** (AEAA) represents entertainment prop houses, armories, prop masters, and related professionals and businesses that service the entertainment industry. AEAA members (as federally and state licensed firearms dealers, importers, or manufacturers) provide film, television, and stage production companies with “prop” (i.e., typically real and regulated, but rigged to fire only blanks) handguns, rifles, and shotguns, as well as more heavily-regulated “assault weapons,” 50 BMG rifles, machine guns, “destructive devices,” “short barreled” weapons, and custom built firearms and related devices used in productions. AEAA members often provide production companies and actors with dozens, or *hundreds* of firearms for any given production.

While the entertainment industry struggles to keep productions in the United States, and cities like Los Angeles and New York are actively courting film production business, Proposition H reflected the carelessness of certain San Francisco politicians who, in their desire to make a political statement, did not carefully study the existing regulatory regimen, consult with impacted parties, or consider the effects of Proposition H on the entertainment industry. Had Proposition H gone into effect, prop handguns would have been outlawed in theatrical, motion picture, and television productions.

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4. Law Enforcement Brief

The **San Francisco Police Officers Association** is the professional union of the more than 2,200 sworn officers of San Francisco Police Department. SFPOA supports the San Francisco community through charitable giving and the promotion of programs that enhance public safety. The SFPOA also represents many retired San Francisco officers and is active in protecting their interests, particularly their interest in being able to defend themselves from the criminals they have arrested throughout their careers. The SFPOA is also active in protecting its members' interests in post-retirement employment in the private security field.
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5. Criminology Amicus Brief

Pink Pistols is an unincorporated association established in 2000 to advocate for the interests of gay, lesbian, bisexual, and transgendered (GLBT) firearms owners, with specific emphasis on self-defense issues. There are 49 Pink Pistols chapters, in 32 states. Membership is open to all people who support the rights of GLBT firearms owners, regardless of their sexuality. www.pinkpistols.org

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6. Hunting Brief

The **California Sportsman's Lobby** (CSL) is an organization of hunters and fishermen that maintains a full time lobbyist in Sacramento. The California Sportsman's Lobby has been advocating wildlife conservation from the sportsman's perspective for over forty years. Its representation of hunting issues at the capitol and with the Department of Fish & Game has largely been responsible for stemming the anti-hunting tide that is eroding the state's hunting heritage and undermining sound wildlife management. www.calwildlife.org

The **Outdoor Sportsmen's Coalition of California** (OSCC) is a nonprofit organization of sportsman's clubs and individuals dedicated to preserving outdoor recreation in California. Its principal activities are to monitor legislation that might negatively impact hunting, fishing and other recreation, and to oppose unwise changes in laws and regulations relating to these activities.

OSCC promotes the conservation, enhancement, scientific management, and wise use of all our natural resources. OSCC seeks to end activities needlessly destructive to natural resources. OSCC also endeavors to educate and encourage the public generally, and the youth specifically, to an understanding of the advantages and importance of the conservation and enhancement of our natural resources.

OSCC works to enhance outdoor opportunities for all citizens. With several thousand members located throughout California, the organization stays in contact with its members via newsletters and the internet so they can be involved as they see fit. www.osconline.org

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III. THE DECISION(S)

A. Proposition H Section Three

With narrow exceptions, Section 3 of Proposition H would have banned the possession of handguns by San Francisco residents, including handgun possession within the sanctity of homes, businesses, and private property. The trial court and the Court of Appeal both properly found this section to be preempted by *both* Penal Code section 12026 (b) and Government Code section 53071.

Penal Code section 12026 prohibits localities from restricting handgun possession in an individual's home, business, or private property. Government Code section 53071 expressly preempts any local enactments "relating to" the licensing or registration of commercially manufactured firearms and indicates an express intent by the Legislature to occupy the whole field of firearms licensing and registration.

The conclusion of the trial court and the Court of Appeal was supported by the legislative history and subsequent judicial interpretation of both provisions. Notably, *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 interpreted Section 12026 as depriving local entities of any power to regulate handgun possession on private property.

Despite San Francisco's contention that the *Doe* decision was based on faulty reasoning, the City was unable to cite to any subsequent case that overruled, disapproved of, or even sought to limit or clarify the *Doe* decision. To the contrary, *Doe* had been cited with approval by the California Supreme Court.

B. Proposition H Section Two

Section 2 of Proposition H would have prohibited, without exception, "the sale, distribution, transfer and manufacture of all firearms and ammunition" within city limits. Noting the lack of any exception to the prohibition, the courts observed that if Section 2 had been enforced, there would have been no sales of firearms or ammunition in the city. Storefront firearms dealers would have gone out of business. Other businesses that deal in the sale of firearms, such as the auction houses that offer collectible firearms for sale, would also have been affected. A literal interpretation of the transfer/distribution ban could have led to absurd results, such as prohibiting law enforcement agencies from distributing firearms and ammunition to their officers.

The trial court and the Court of Appeal found that Section 2 ran into many of the same preemption obstacles as Section 3 did.

First, Section 2 is at odds with Penal Code § 12026's guarantee that San Francisco residents be able "to purchase, own, possess, keep, or carry" firearms at their homes and businesses. As the trial court recognized, "[a] local ordinance that substantially burdens the purchasing and possession of handguns by banning their sale is just as contrary to section 12026 as was the possession ban struck down by *Doe*."

The Court of Appeal further agreed with the trial court that Section 2 contravened

Government Code § 53071. As noted by both courts, Section 2 would have effectively canceled all licenses otherwise lawfully held by gun shops, pawnshops, and auction houses in San Francisco. In adopting Section 2, San Francisco entered the preempted field of firearms registration and licensing in express derogation of Government Code § 53071.

Finally, the Court of Appeal agreed with the trial court's finding that Section 2's city-wide ban on the sale of firearms was impliedly preempted due to its duplication of, and contradiction with, the Unsafe Handgun Act (UHA). The UHA was enacted in 1999 in response to the proliferation of local ordinances banning low cost, cheaply made handguns known as "Saturday Night Specials." The UHA uniformly bans the sale of Saturday Night Specials in California, but it also includes provisions applicable to all handguns sold in the state, including those of higher quality. As the trial court observed, with respect to unsafe UHA-prohibited handguns, Section 2 of Proposition H "duplicate[d] state law by doubly banning them." For UHA-approved handguns, Section 2 conflicted with state law by banning the sale of even those handguns that the UHA indicates may be sold in California. The trial court and the Court of Appeal also properly found that Proposition H did not relate to a purely "municipal affair" so as to avoid preemption under the home rule provision of the city's charter.

IV. SIGNIFICANCE OF THIS RULING

For years the Legal Community Against Violence (LCAV), a group of anti-gun lawyers in San Francisco, has urged local cities to pass gun control ordinances. Well-heeled San Francisco lawyers working *pro bono* for the LCAV have claimed that state law allowed cities broad leeway to enact these types of ordinances.

Beginning in approximately 1998 when the LCAV started its California "local ordinance project," the NRA and CRPA formed and jointly funded a strategic partnership to fight these local ordinances on a city-by-city level in California. (Interestingly, a similar effort was and is still underway to regulate smoking at the local level. Tobacco companies decided that it would require too much effort for them to fight these ordinances city by city.)

The NRA's and CRPA's counter "Local Ordinance Project" has been largely successful. Initially, the NRA and CRPA funded several lawsuits, including one against the City of West Hollywood over its Saturday Night Special ordinance. Unfortunately, the Court of Appeal did not recognize the significance of Government Code § 53071 and Penal Code § 12026 in restricting local cities from passing laws like the one at issue in the *West Hollywood* case.

The LCAV, emboldened by its victory in the *West Hollywood* case, then pushed a variety of ordinances across the state of California to ban gun shows, to ban "ultra compact" handguns, to require that trigger locks be sold with every gun sold by a firearms retailer, and to impose additional restrictions on firearms retailers opening or operating a business in their cities, along with a host of other restrictions. On behalf of the NRA and CRPA, this law firm fought those ordinances and was successful in stopping a number of them from being passed. In cities where some were passed, we have since been successful in getting some of them repealed – particularly when the state had passed legislation on similar subjects.

Regardless, since the *West Hollywood* decision the LCAV has continued to claim that local cities have broad authority to pass gun control ordinances restricting the sale, transfer, use and even possession of firearms in local jurisdictions. The LCAV was highly critical of the *Doe*

decision in its briefs, and in fact asked the court to overrule *Doe* in the *Fiscal* briefs. It is clear that the LCAV had plans to continue its efforts at the local level in light of the LCAV's recent efforts to get local ammunition licensing schemes, mandatory gun theft reporting laws, and other ordinances passed.

V. CONCLUSION

The *Fiscal* decision is a tremendous result. The ruling goes a long way toward reestablishing the line over which cities cannot cross in attempting to regulate firearms locally. The decision reinvigorated the interpretation of both Penal Code Section 12026 and Government Code Section 53071 and broadly interpreted the definition of the term "license" so that many of the actions that local cities have taken over the years to restrict firearms ownership through local ordinances can be stopped, and in some cases reversed.

Additionally, the *Fiscal* decision recognized the preemptive effect of the Unsafe Handgun Act. Although the Unsafe Handgun Act has problems of its own, the UHA provides manufacturers and sellers of handguns with a statewide standard to which they can attempt to comply. This standard does not vary locally and is not nearly as ambiguous as the local "Saturday Night Special" ordinances were. As a result of the *Fiscal* decision's ruling on the Unsafe Handgun Act, ordinances like the "ultra compact handgun" sales bans in Los Angeles, San Francisco, and Oakland can now be challenged in court. Ultra compact handgun ban ordinances prohibit the sale of handguns under a certain size, some of which are approved for sale under the UHA.

Additionally, in San Francisco there are several ordinances regulating firearms retailers and requiring them to register their inventory with the local authorities. The *Fiscal* decision should enable us to challenge those ordinances, as well as others that are in effect or have been considered or proposed by the gun ban lobby.

Perhaps more significantly, a copy of the *Fiscal* decision is being sent to all the cities that have been listening to the LCAV's mischaracterization of the law for several years, and many of these cities may reconsider the LCAV's credibility. At least in cities that are only marginally supportive of gun control efforts, the *Fiscal* decision should enable us to successfully rebut any attempt by LCAV to get local ordinances passed there.

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