

1 Roderick M. Thompson (State Bar No. 96192)  
Cory Mason (State Bar No. 240987)  
2 FARELLA BRAUN & MARTEL LLP  
235 Montgomery Street, 30th Floor  
3 San Francisco, CA 94104  
Telephone: (415) 954-4400  
4 Facsimile: (415) 954-4480



5 Attorneys for Amicus Curiae  
6 Legal Community Against Violence

7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF SAN FRANCISCO  
10 UNLIMITED JURISDICTION  
11

12 PAULA FISCAL, et al.,  
13 Plaintiffs and Petitioners,  
14 vs.  
15 CITY AND COUNTY OF SAN  
FRANCISCO, et al.,  
16 Defendants and Respondents.

Case No. CPF-05-505960

**AMICUS LEGAL COMMUNITY  
AGAINST VIOLENCE'S POST  
ARGUMENT CLARIFICATION**

Department: 301  
Judge: Honorable James L. Warren

Date Action Filed: December 29, 2005  
Trial Date: None scheduled

18  
19 During the lengthy oral argument on February 23, 2006, the Court several times asked  
20 what effect *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 should have in  
21 this Court. In particular, the Court asked about *Doe's* inference "from Penal Code section 12026  
22 that the Legislature intended to occupy the field of residential handgun possession to the  
23 exclusion of local government entities." (*Id.* at p. 518.) Amicus Curiae, Legal Community  
24 Against Violence ("LCAV"), submits this clarification to provide further guidance to the Court on  
25 the proper approach for consideration of this question.<sup>1</sup>  
26

27 Preliminarily, although the Court at the oral argument did not ask the City whether it

28 <sup>1</sup> Although counsel for LCAV attended the oral argument, Petitioners objected to its participation in the argument. LCAV therefore provides this short written clarification in response to an issue of obvious interest to the Court.

1 agreed with *Doe's* statement on implied preemption, the City has set out its position on that issue  
2 in its brief -- *Doe's* inference is legally unsound. (See Memorandum of Points and Authorities in  
3 Support of Respondents' Opposition to Motion for Writ of Mandate and/or Prohibition or Other  
4 Appropriate Relief, filed January 25, 2006 ["Opposition"], p. 13, fn. 10.) Among other things,  
5 *Doe's* cryptic statement does not employ the three-part implied preemption standard used by the  
6 Supreme Court in *Galvan* and reaffirmed in *Great Western/Nordyke*.<sup>2</sup> It appears that the City  
7 anticipated, however, that this Court would be reluctant to disregard the *Doe* court's seemingly  
8 unequivocal statement, quoted above. Therefore, for purposes of its argument in this Court, the  
9 City has rested on its primary argument that Section 3 of Proposition H is a municipal affair  
10 within the City's Home Rule power. The City has assumed that the quoted statement from *Doe*  
11 creates a conflict with Section 3 to satisfy the "preliminary consideration" required by the  
12 *California Federal Savings & Loan Association v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-18  
13 (*CalFed*) analysis. (Opposition, at p. 13.)

14 LCAV agrees with the City that if the *CalFed* preliminary consideration is satisfied, the  
15 Court should uphold Section 3 of Proposition H as a municipal affair. Alternatively, however, the  
16 Court may wish to dig deeper to "satisfy itself that [Section 3] presents an actual conflict" with  
17 Penal Code Section 12026 before reaching the municipal affair argument. (*CalFed, supra*, 54  
18 Cal.3d at p. 16.) LCAV submits that this Court is not necessarily bound by the quoted statement  
19 in *Doe* and there may be no "real conflict" as required to satisfy the *CalFed* preliminary  
20 consideration. For the reasons explained in LCAV's Amicus Brief, the statement in *Doe* about  
21 implied preemption arguably was dicta inasmuch as it was not necessary for the *Doe* holding of  
22 express preemption. (See Amicus Brief of Legal Community Against Violence in Support of  
23 Respondents' Opposition to Writ of Mandate, filed January 25, 2006, p. 4, fn. 5.) In addition,  
24 because the same statement in *Doe* led directly to the Supreme Court's accepting certification  
25 from the Ninth Circuit in *Great Western* and *Nordyke*, the fact that those decisions did not  
26 endorse (or even mention) the *Doe* inference suggests disapproval. (See *Id.* at pp. 10-12.)

27  
28 <sup>2</sup> *Galvan v. Superior Court* (1969) 70 Cal.2d 851; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853 (*Great Western*) and *Nordyke v. King* (2002) 27 Cal.4th 875 (*Nordyke*).

1           In sum, it is not clear that this Court must accept the quoted statement in *Doe* as  
2 established law. The City's position has assumed that *Doe* creates the requisite conflict required  
3 to apply the *CalFed* Home Rule analysis to uphold the validity of Section 3. The fact that the  
4 City elected not to pursue at argument the alternate ground for reaching the same result -- that  
5 there is no preemption of Section 3 -- discussed in the LCAV brief, does not foreclose the Court's  
6 consideration of the alternate ground on its merits. Indeed, because the Court of Appeal is free to  
7 revisit that purely legal issue, this Court may wish to address the arguments advanced by LCAV  
8 on this point, which have been thoroughly briefed by Petitioners and their amici.

9  
10 DATED: March 6, 2006

FARELLA BRAUN & MARTEL LLP

11  
12 By: 

Roderick M. Thompson

Attorneys for Amicus Curiae  
Legal Community Against Violence

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

I, the undersigned, declare as follows. I am employed in the County of San Francisco where this service occurred. I am over the age of eighteen years and not a party to this action. My business address is 235 Montgomery Street, 30th Floor, San Francisco, California. On the date below I served true copies of the document(s) listed below:

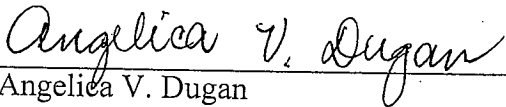
**AMICUS LEGAL COMMUNITY AGAINST VIOLENCE'S POST ARGUMENT CLARIFICATION**

- FACSIMILE -- same day delivery to the addressee's facsimile number to all listed below.
- MAIL -- placed in the US mail at San Francisco, postage fully prepaid. I am familiar with this firm's practice for processing of US mail. In the ordinary course of business this firm deposits US mail on the day collected.
- FEDERAL EXPRESS -- placed in a Federal Express facility for delivery by overnight courier to the addressee -- as noted below (Mediation Brief w/Exhibits)
- PERSONAL SERVICE -- caused delivery by hand to the addressee via Specialized Legal Services.
- ELECTRONIC MAIL -- transmitted via electronic mail in Portable Document Format ("PDF") Adobe Acrobat.

C.D. Michel  
Don B. Kates  
Trutanich Michel, LLP  
180 East Ocean Blvd., Suite 200  
Long Beach, CA 90802  
Tel: 562-216-4444  
Fax: 925-930-6620

Dennis J. Herrera  
Wayne K. Snodgrass  
Vince Chhabria  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102-4682  
Tel: 415-554-4675  
Fax: 415-554-4699

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed in San Francisco, California on March 6, 2006.

  
\_\_\_\_\_  
Angelica V. Dugan