IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER, DANA DRENKOWSKI, JOHN CANDIDO, ALAN BYARD, ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF FIREARMS RETAILERS, LAW ENFORCEMENT ALLIANCE OF AMERICA, and SAN FRANCISCO VETERAN POLICE OFFICERS ASSOCIATION, Plaintiffs/Respondents, vs. CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE CHIEF HEATHER FONG in her official capacity and SAN FRANCISCO POLICE DEPARTMENT, and Does 1-25, Defendants/Appellants.	Case No. A115018 (San Francisco Superior Court No. 505960)

APPELLANTS' ANSWER TO AMICUS CURIAE BRIEFS

The Honorable Paul H. Alvarado

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INTRODUCTION

The amicus curiae briefs filed by respondents' supporters display all of the flawed legal reasoning that persuaded the trial court to invalidate Proposition H. In four separate amicus briefs, amici Gun Owners of California, former California Senator H.L. Richardson, and the Madison Society (collectively "GOC"), California Rifle & Pistol Association ("CRPA"), American Entertainment Armories Association ("Armories"), and San Francisco Police Officers's Association ("SFPOA") ask this Court to turn the law of firearms preemption on its head. Even though our Supreme Court has held that "the Legislature has chosen *not* to broadly preempt local control of firearms" (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 864 [emphasis added]) – and even though other courts, including this one, have observed that "the cases uniformly construe state regulation of firearms narrowly" (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 fn. 2 – amici nonetheless invite the Court to expansively interpret two firearms statutes, Government Code Section 53071 and Penal Code Section 12026(b), in a manner that would eliminate virtually all local authority to regulate firearms.

This Court should reject the invitation. The Court should interpret Government Code Section 53071 and Penal Code Section 12026(b) in accordance with those statutes' plain language, and faithfully to relevant precedent. Based on that interpretation, the Court should reverse the trial court's legally erroneous judgment.

would wholly transform California's firearms preemption law, tilting regulatory authority almost exclusively toward the state in a way that flies in the face of established precedent.

Under settled law, local governments possess considerable authority to regulate firearms to respond to local conditions. As California's high court has repeatedly noted, "[t]hat problems with firearms are likely to required different treatment in San Francisco County than in Mono County should require no elaborate citation of authority." (*Great Western, supra*, 27 Cal.4th at p. 862 [citing *Galvan, supra*, 70 Cal.2d at pp. 863-64].)[1] Because firearms problems are often require local solutions, the Legislature "has chosen to legislate narrowly," and "has been cautious about depriving local municipalities of aspects of their constitutional police power to deal with local conditions." (*American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1255.) And because of this "significant local interest to be served that may differ from one locality to another," courts are reluctant to conclude an implied legislative intent to preempt local power to regulate firearms. (*Great Western, supra*, 27 Cal.4th at p. 866.) This reluctance is evident, for example, in *California Rifle and Pistol Ass'n,*

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[1] COG, like respondents, argues that although the Supreme Court has repeatedly recognized that "problems with firearms are likely to require different treatment in San Francisco County than in Mono County," that principle applies only to problems arising from firearms *in public*, not in the home. (COG Brief at 7-10.) Appellants have already explained why the Supreme Court's "Mono County" principle is not so confined. (Appellants' Reply Brief at 7-9.) And while COG asserts that "the possession of a firearm for self defense in the home is no different whether one resides in Mono County or in San Francisco or Los Angeles," COG offers neither legal authority or logical argument to support that assertion. It is certainly not self-obvious that factors that can lead to gun fatalities in the home – including familiarity with guns, awareness of how to best handle and store guns, and parental supervision of children – are "no different" between rural and urban jurisdictions.

supra, in which the court held that "[c]laims of implied preemption must be approached carefully," because they "necessarily beg[] the question of why, if preemption was legislatively intended, the Legislature did not simply say so[.]" (*Id.*, 66 Cal.App.4th at p. 1317.)

Amici's "licensing" theory, however, would stand this established legal order on its head. If every state legislative decision as to which circumstances or persons should and should not be covered by a state prohibition created "state-created licenses" with respect to the persons or circumstances not covered, as amici claim, then every state firearms statute would automatically occupy the entire field in which it regulated, except to the extent it expressly provided otherwise. And every local ordinance that went beyond the scope of the state's restrictions – in other words, that prohibited or restricted anything that the Legislature had not prohibited or restricted – would thereby invalidate such supposed "licenses," and thus run afoul of Section 53071. The result would be to strip local governments of their Constitutional police power to regulate firearms subject only to preemptive state law. Instead, local governments would be left only with whatever authority the Legislature *expressly* delegated to them.

Under amici's "licensing" theory, implied preemption of local power over firearms would cease to be the exception – as the Supreme Court and other courts have repeatedly held it should be – and would, instead, become the rule. Local authority over this historically local issue would shrivel and virtually disappear. For that reason alone, this Court must reject amici's broad construction of "licensing" under Section 53071.

2. Other California courts have rejected the reasoning underlying amici's licensing theory.

Amici's "licensing" theory rests on the notion that when the Legislature enacts a general prohibition of gun-related conduct, but exempts specified

persons or circumstances from that prohibition, such exemptions demonstrate that the Legislature seeks to preempt local power to prohibit such conduct by those specified persons or within those specified circumstances. But the California Supreme Court and other appellate courts have expressly rejected that very argument.

The high court in *Nordyke v. King* (2002) 27 Cal.4th 875 squarely rejected just such reasoning. The plaintiff in *Nordyke* argued that a county ordinance that prohibited the possession of firearms on county property, including at gun shows, was preempted by Penal Code Section 171b, because that statute prohibits gun possession in public buildings, but exempts gun shows from that prohibition. (*Id.*, 27 Cal.4th at p. 883-84.) The high court disagreed, holding that local governments were free to prohibit gun shows, even though the Legislature had exempted gun shows from its general prohibition against gun possession within public buildings. (*Id.* at p. 884.) Penal Code Section 171b's exemption of gun shows from its general bar on gun possession in public buildings "permit[s] local government entities to authorize such shows," but "does not *mandate* that local government entities" allow gun shows. (*Id.*, 27 Cal.4th at p. 884 [emphasis original].)

Although *Nordyke* did not discuss the plaintiff's Penal Code Section 171b preemption claim in terms of "licensing," the Court's holding necessarily undermines amici's "licensing" theory. Under that theory, the Legislature's exemption of gun shows from Penal Code Section 171b's general prohibition would clearly constitute a "license," yet that statutory exemption did not displace local power to prohibit gun shows. In other words, the local ordinance did not invalidate a state-issued "gun show license," even though gun shows were authorized under state law.

The *Nordyke* plaintiff also argued the county ordinance was preempted because it purported to prohibit gun possession by classes of persons – such as retired federal law enforcement officers or animal control officers – who were specifically exempted from the state's "general prohibition on possession of firearms." (*Nordyke, supra*, 27 Cal.4th at p. 884.) The Supreme Court rejected this claim, for two reasons. First, "the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possesing the gun on restricted county property." (*Id.*) And second, "even if ... in at least some cases the Legislature meant to preempt local governments from criminalizing the possession of firearms by certain classes of people, that would establish at most that the Ordinance is partially preempted with respect to those classes. Partial preemption does not invalidate the Ordinance as a whole." (*Id.*)

Again, the *Nordyke* Court's holding defeats any claim that by exempting specific conduct from a general state prohibition, the Legislature has thereby "licensed" that conduct within the meaning of Government Code Section 53071, precluding a local prohibition against such conduct. As *Nordyke* makes clear, the Legislature's decision to exempt specified conduct from a state law does *not* demonstrate that the Legislature intended to "license" such conduct, or otherwise shield it from local regulation. And even if there were specific evidence that the Legislature had sought to displace local power to restrict a specified class of persons from engaging in the conduct at issue – which neither respondents nor amici have shown here – the result would be, at most, *partial preemption of the local law as to that class of persons*. Such partial preemption would not be a ground to wholly invalidate Proposition H.

Other California cases are in accord. In *Great Western, supra*, the Supreme Court held that a county ordinance prohibiting the sale of guns and

ammunition on county property was not preempted. The fact that state statutes authorized such sales did not prevent the local government from prohibiting them, even though – to use amici's terminology – such a local prohibition obviously "invalidated a state-issued license." (*Id.*, 27 Cal.4th at p. 866.) And in *California Rifle and Pistol Ass'n, supra*, the court of appeal explained why the fact that "the sale of firearms that are not expressly prohibited by state law is lawful under state law" does not demonstrate preemption of local authority, including under Government Code Section 53071:

> It must initially be acknowledged as impeccably true that something that is not prohibited by state law is lawful under state law, because under our system of law this is a simple tautology. Such a tautological observation, however, is hardly a firm foundation for an analysis of what the Legislative impliedly intended, but for some reason did not expressly state.

(*California Rifle and Pistol Ass'n, supra*, 66 Cal.App.4th at p. 1323 [emphasis added; footnote omitted].)

Amici's "licensing" theory – which respondents also urge (AA 39-40), and which was, unfortunately, accepted by the trial court (AA 961-63) – is wholly inconsistent with California firearms preemption law. The Legislature's choice to exempt specified persons or circumstances from its own general prohibition does not demonstrate that the Legislature sought to shield those persons or circumstances from local regulation. For that reason, such a legislative choice also does not create a state-issued "license" with the meaning of Government Code Section 53071.

II. PENAL CODE SECTION 12026 DOES NOT PREEMPT PROPOSITION H

Amicus CRPA advances an equally expansive interpretation of Penal Code Section 12026. It argues that that statute was intended, and should thus be interpreted, to "protect the right to buy and own handguns." (CRPA Brief at 7.)

As a result, according to CRPA, Section 12026 has a broad preemptive effect, "extinguishing any local power to add restrictions on buying and owning any kind of handgun to those that are established by state law." (*Id.* at 18.) Based on this exceedingly broad interpretation of Section 12026, amicus CRPA asserts that that statute preempts Section 3 of Proposition H, which prohibits handgun possession by most San Francisco residents within City limits.

For a number of reasons, CRPA's interpretation of Section 12026, like the erroneous statutory interpretation theories advanced by the other amici, is squarely contrary to established law. It must be rejected.

A. Section 12026's Plain Text Creates No Right To Purchase Or Possess A Handgun.

CRPA does not, and cannot, argue that its interpretation of Penal Code Section 12026 finds any support in that statute's plain language. In relevant part, Section 12026 states that "[n]o permit or license ... shall be required ... to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence [or] place of business ..." (*Id.*, §12026(b).)

The Supreme Court has limited Section 12026's preemptive reach to the statute's plain text, holding it "expressly prohibits *requiring a license* to keep a concealable weapon at a residence or place of business." (*Great Western, supra*, 27 Cal.4th at pp. 861-62 [emphasis added].) The Court of Appeal, likewise, has held that Section 12026 "prohibits only local 'permit or license' requirements," and does not address other regulatory fields, such as handgun sales. (*California Rifle & Pistol Ass'n, supra*, 66 Cal.App.4th at p. 1319 [local ban on sales of Saturday Night Specials is not preempted by Section 12026, as it "creates no permit or license requirement, and instead regulates only sales"].) As that court

held, the interpretation of Section 12026 that CRPA argued in that lawsuit – namely, that it expressly preempts a local ban on sales of Saturday Night Specials – "stretches the words of [Section 12026] beyond their literal meaning," and is simply untenable. (*Id.* at p. 1313.)

The interpretation of Section 12026 that CRPA urges in this lawsuit is equally untenable. The statute preempts only what its text states: local permit or license requirements to purchase or possess handguns on private property. Because Proposition H does not impose any such requirement, it is not preempted.[2]

B. The Supreme Court Has Narrowly Interpreted Section 12026, Confining The Statute's Preemptive Scope To Its Plain Text.

Because Section 12026's actual terms create no "right to purchase or possess a handgun," CRPA, of necessity, argues that the statute must be broadly interpreted to give rise to such a right by implication. But this argument founders in the face of *Galvan*, in which, far from broadly construing Section 12026, the Supreme Court "gave section 12026's expression of Legislative intent *the narrowest possible construction*." (*Suter, supra*, 57 Cal.App.4th at p. 1120 fn. 3 [emphasis added].) The *Galvan* Court refused to put any extra-textual gloss on Section 12026's plain language, and held that the statute did not preempt a local ordinance that barred San Francisco residents from possessing unregistered firearms, "notwithstanding the similarities between licensing and registration." (*Suter, supra*, 57 Cal.App.4th at p. 1120 fn. 3 [citing *Galvan, supra*, 70 Cal.2d at

[2] CRPA cites to Penal Code Section 629.85 to support its claim that Section 12026 creates a "right" to possess a handgun in one's home. (CRPA Brief at 14-15.) However, the Penal Code does not contain a Section 629.85. Moreover, Penal Code Sections 629.50 through 629.98 are found in Part I, Title 15, Chapter 1.4 of that Code, entitled "Interception of Wire, Electronic Digital Pager, or Electronic Cellular Telephone Communications." They relate to the interception of telephone conversations, and are irrelevant here.

pp. 856-59].) The Supreme Court's treatment of Section 12026, therefore, confirms that the statute preempts no more than what its plain language encompasses: local permit or license requirements to purchase or keep a handgun in one's home or business.

C. The Single Court To Consider The Issue Has Squarely Rejected CRPA's "Rights" Claim.

CRPA barely acknowledges – and does not attempt to explain or distinguish – the appellate opinion in *California Rifle and Pistol Ass'n, supra*, which is the single California decision to squarely address the question of whether Section 12026 creates a "right" to purchase a handgun. After carefully considering the text, legislative history, and judicial treatment of Section 12026, the court held that that statute does not create any rights:

> There is no basis for a conclusion that Penal Code section 12026 was intended to create a 'right' or to confer the 'authority' to take any action (such as purchasing a [Saturday Night Special] for which a license or permit may not be required.

(*Id.*, 66 Cal.App.4th at p. 1324.) The court explained that this conclusion was mandated by the plain language of Section 12026, whose words "are words of proscription and limitation upon local governments, not words granting a right or authority to members of the public." (*Id.*) As the court stated,

> No authority has been cited for the proposition that a statute prohibiting a permit requirement can be construed as intended to create a broad enforceable right to purchase any type of handgun not specifically outlawed by state law. Again, the Legislature could expressly create such a right, but has not.

(*Id.*, 66 Cal.App.4th at p. 1324; *see also Suter, supra*, 57 Cal.App.4th at p. 1127 [holding that Penal Code provisions regulating how firearms may be sold do not create a "right of private citizens to sell weapons," because "[t]he Penal Code ... establishes a *limitation*, not a right"] [emphasis original].)

Moreover, *California Rifle and Pistol Ass'n* is wholly incompatible, on multiple levels, with the broad interpretation of Section 12026 that CRPA urges here. The court there held that Section 12026 did not preempt the City of West Hollywood's ordinance that prohibited the sale of any handguns determined to be Saturday Night Specials – an ordinance that obviously added local restrictions on buying numerous kinds of handguns beyond those established by state law. And, significantly, the court in *California Rifle and Pistol Ass'n* upheld the local ordinance without even inquiring into the degree to which that ordinance might affect the ability of any person to obtain a handgun to keep at home. CRPA's "rights" claim is thus undermined by both the result reached and the legal analysis employed by the *California Rifle and Pistol Ass'n* court.

CRPA's claim that Section 12026 creates a supposed right to buy a handgun and to possess a handgun at home is similarly defeated by the fact that in its landmark gun preemption case, *Great Western*, the Supreme Court upheld a significant restriction on firearms sales without ever mentioning such a supposed "right." The Court there upheld a county's ability to entirely prohibit gun sales on county property, without discussing whether or to what extent that local prohibition would affect any person's ability to buy a handgun or to possess such a weapon at home. Such an omission would be inexplicable if Section 12026 actually created such a right.

D. *Galvan* Does Not Support CRPA's "Rights" Claim.

While completely ignoring *California Rifle and Pistol*'s carefully reasoned opinion, amicus CRPA relies on a single sentence from *Galvan,* stating that in adopting what became Section 12026, "[t]he Legislature intended that the right to possess a weapon at certain places could not be circumscribed" by requirements such as the need to show good moral character. (*Galvan, supra*, 70 Cal.2d at p. 858.) This passing sentence, however, is far too slender a reed to support CRPA's

aggressive interpretation of Section 12026. Read fairly, the *Galvan* sentence does not suggest that the Legislature intended Section 12026 to *create* any right; it merely describes the Legislature's intent to limit local regulatory authority by precluding local license requirements. In contrast, the Court used the phrase "right to possess a weapon" to refer to the state of affairs that existed before, and independent of, the Legislature's adoption of Section 12026.[3] *Galvan* thus does not suggest – and did not hold – that Section 12026 creates any "right to purchase and possess a handgun."

E. CRPA's Self-Serving "Legislative History" Is Entirely Inadmissible And Sheds No Light On The Intent Of The California Legislature.

Finally, CRPA's claim that Section 12026 is intended to protect a supposed right to purchase and possess handguns at home fails because CRPA offers no legitimate legislative history to support that interpretation.

First, even by CRPA's own admission, the sole item of purported "California legislative history" relating to Section 12026 is a newspaper article, printed in the San Franciso Chronicle *after* the Legislature adopted the predecessor to Section 12026, quoting a statement by a non-legislator (an anti-gun control proponent) that was not even purportedly before the Legislature at the time it acted. (CRPA Brief at 7; *id.* at 8, fn. 14.) Appellants have already objected to this document in their Opposition to Respondents' Motion for Judicial Notice, and will not repeat here their arguments here. Suffice it to say that the 1923 newspaper article cannot shed any light on the intent of the Legislature.

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[3] Elsewhere in *Galvan*, the high court made clear that it was not finding any actual legal entitlement to possess a firearm, noting that "the claim that legislation regulating weapons violates the Second Amendment has been rejected by every court which has ruled on the question," and that "[i]t is long since settled in this state that regulation of firearms is a proper police function." (*Galvan, supra*, 70 Cal.2d at p. 866.)

Second, the other purported authorities CRPA relies on are wholly unreliable and unauthoritative as a matter of law. CRPA's purported "legislative history" consists of either obviously self-interested statements made by opponents of gun control (*see, e.g.*, CRPA Brief at 7 [relying on statement by National Rifle Association, one of respondents herein]; *id.*, at 3, fn. 2 [citing articles written by one of respondents' attorneys]), or of hearsay statements contained in articles or books that have not been provided to the Court or to appellants, and that are not matters of which this Court may take judicial notice under California law, as they are far from "so universally known that they cannot reasonably be the subject of dispute." (Cal.Evid.Code §451(f).) Those documents, moreover, do not constitute "legislative history" for Section 12026 because there is no suggestion – much less any showing – that they, or the hearsay statements they contain, were before the California Legislature at the time it adopted that statute's predecessor.

CRPA's entire discussion of Section 12026's supposed historical background is unreliable and self-serving, and constitutes simple advocacy, not history. That discussion, and CRPA's purported "legislative history," provide no basis for this Court to interpret that statute.

CONCLUSION

The Legislature knows quite well how to create statutory rights. It also knows quite well how to preempt local authority to restrict or prohibit gun-related conduct that is not prohibited by statet law. However, the Legislature has not done either of these things in Government Code Section 53071 or Penal Code Section 12026. Appellants respectfully urge the Court to reject the unjustified

and overbroad interpretations of those statutes proffered by amici, and to instead reverse the judgment of the trial court.

Dated: July 18, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,231 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on July 18, 2007.

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PROOF OF SERVICE

I, HOLLY TAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, #1 Dr. Carlton B. Goodlett Place – City Hall, Room 234, San Francisco, CA 94102.

On July 18, 2007, I served the following document(s):

APPELLANTS' ANSWER TO AMICUS CURIAE BRIEFS

on the following persons at the locations specified:

PLEASE SEE ATTACHED SERVICE LIST

in the manner indicated below:

☒ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 18, 2007, at San Francisco, California.

HOLLY TAN

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