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' OPENING BRIEF

The Honorable Paul H. Alvarado

DENNIS J. HERRERA, State Bar #139669
City Attorney
WAYNE SNODGRASS, State Bar #148137
VINCE CHHABRIA, State Bar #208557
Deputy City Attorneys
#1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, California 94102-4682
Telephone: (415) 554-4675
Facsimile: (415) 554-4699
E-Mail: wayne.snodgrass@sfgov.org

Attorneys for Defendants and Appellants

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: Case No. A115018

Case Name: *Paula Fiscal, et al. v. City and County of San Francisco, et al.*

Please check the applicable box:

☒ There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: December 28, 2006

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
Deputy City Attorney

By: _____
WAYNE SNODGRASS

Printed Name: Wayne Snodgrass
Deputy City Attorney

Address: Office of the City Attorney
#1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

State Bar # DCA State Bar #148137

Party Represented: City and County of San Francisco

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes & Codes

Federal Cases

Constitutional Provisions

Other Authorities

Other References

INTRODUCTION

This appeal concerns the scope of San Francisco's authority to regulate firearms. But as much as it is about doctrines of preemption and home rule, the case also is about a genuine, and growing, public safety crisis. It is about Deanne Bradford, whose husband used a legally-owned handgun to murder her and kill himself, leaving her six young children orphans. It is about six-year-old Brian Williams Jr., who was hit by a stray bullet as he lay in bed, requiring major surgery – only to be left fatherless by another misguided bullet. It is about the thousands of San Franciscans who have been killed or injured in the City's surging epidemic of gun violence, which has particularly devastated its less affluent neighborhoods and minority communities. And it is about a crucial question: can the City's voters, faced with clearly inadequate firearms regulation at the state level, enact local legislation to reduce the prevalence of guns and ammunition in their own city?

Petitioners (collectively "the NRA") claim the answer is no. They assert that Proposition H – which prohibits the sale, transfer, distribution, and manufacture of firearms and ammunition in the City, and also bars most City residents from locally possessing handguns – is unlawful. But the NRA, and the court below, misread or overlooked multiple, controlling decisions that have found broad local power to regulate firearms, and have construed the scope of statutory preemption narrowly. If upheld, the trial court's ruling would effect a seismic shift in our state's gun preemption laws.

As our high court pointedly reaffirmed in 2002, "[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 862.) The courts, in recent decades, have "uniformly construe[d] state regulation of firearms

narrowly, finding no preemption of areas not specifically addressed by state statute." (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 fn. 2.) They have upheld local laws banning sales of certain firearms, and prohibiting sales of all firearms and ammunition in specified areas. They also have held that state statutes occupying the field of firearms *licensing* do only that, and thus do not preempt local sales *prohibitions*. And the Legislature has affirmatively recognized that cities can regulate the sale, transfer, and possession of firearms.

In light of these authorities, Section 2 of Proposition H – which bans sales, transfers, and distribution of firearms and ammunition – is not preempted. The NRA asks the Court to expand the preemptive effect of gun *licensing* laws far beyond licensing, which would undermine local power to regulate virtually all aspects of firearms. The NRA also reads a broad preemptive intent into statutes whose text and legislative history demonstrate no such intent. This Court should not do so.

Section 3, which prohibits most City residents from possessing handguns, also is not preempted. The NRA's reliance on *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 is misplaced. While *Doe* "inferred" that a state statute which does not mention firearms possession nonetheless reflects an implied intent to occupy the field of residential handgun possession, that inference was only dictum, and subsequent courts have squarely rejected its reasoning. Moreover, *Doe* held a local law expressly preempted because it specifically exempted persons holding state-issued concealed weapons permits, while Proposition H contains no such exemptions and thus is distinguishable. In 2002, the Supreme Court held that a local ordinance prohibiting gun possession, which like Section 3 did not expressly exempt all holders of state-issued permits from its prohibition, was not preempted. The same is true here.

If Section 3 were nonetheless found to conflict with state law, it would still

survive because it constitutes a proper exercise of San Francisco's home rule power. (Cal. Const. Art. XI, Sec. 5(a)). This power reflects "the principle that the municipality itself knew better what it wanted and needed than the state at large," and "give[s] that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs[.]" (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 395-96 [emphasis omitted].) San Franciscans have a vital interest in protecting themselves from gun violence, and their collective decision to not possess handguns should concern no one outside the City. That policy choice is a proper exercise of home rule power, valid without regard to potentially conflicting state statutes.

Even if some portion of Proposition H were invalid, its severability clause should be given effect. The voters' paramount goal was to make all types of guns and ammunition less available in the City. Given the City's gun violence epidemic, there is little question the voters would prefer a partial solution to none.

LEGAL AND FACTUAL BACKGROUND

I. SAN FRANCISCO'S EPIDEMIC OF GUN VIOLENCE

A. The Gun Violence That Led To The Adoption Of Proposition H.

The tragic slayings of Deanne Bradford, Roger Young, and Brian Williams illustrate how firearms have shattered the lives of many San Franciscans in recent years.

1. Deanne Bradford.

Deanne Bradford, recently separated from her husband, Roger Johnson, was raising her six children by herself in the City's Bayview neighborhood. One morning in July 2005, Deanne took her children in to the William Cobb School. As Deanne emerged, Roger – who had no criminal record – confronted her on the sidewalk with a legally-owned handgun. He repeatedly shot Deanne, killing her. He then used the same gun to kill himself. (Appellants' Appendix ["AA"] 129,

130.)

Deanne's six children – all between two and twelve years old – are now being raised separately. They still talk about their mother every day. They also say they wish they could kill Roger Johnson. (*Id.*)

2. Roger Young.

Roger Young was to be married on July 25, 2004. But the day before his wedding day, he went to a friend's house in the Ingleside, where he inadvertently interrupted a burglary. The burglars killed Roger, shooting him twice in the head with a handgun. They also killed Roger's friend and shot another resident, leaving her permanently disabled. More than a year later, Roger's three-year-old daughter, Kelani, still asks for her father. (AA 133.)

3. Brian Williams.

On December 31, 2000, Brian Williams was fatally shot, hit with bullets intended for someone else. When his six-year-old son, Brian Williams Junior – who was also no stranger to gun violence, having required major surgery less than a year earlier after being hit by a stray bullet while he lay in bed – learned of his father's killing, he was devastated, and asked his grandmother "why God kept taking away the people he loved. Later, Brian Junior told me that his chest hurt him. When I asked him if it was something he ate, he said, 'no, I don't think I have a heart anymore.'" (AA 126, 127.)

B. The Scope of San Francisco's Gun Violence Epidemic.

Such stories are far from unique. In recent years, San Francisco increasingly has been wracked by brutal acts of gun violence. From 2001 to 2005, the total number of homicides in the City climbed each year, increasing by 50%. (AA 119.) And more and more of the City's homicides are gun-related. The percentage of killings committed with firearms jumped from 61% in 2001 to

83% in 2005, while the total number of firearms killings more than doubled during those five years. (*Id.*)

This epidemic of gun violence has particularly ravaged the City's less affluent neighborhoods and minority communities. The vast majority of gun violence occurs in the City's southern neighborhoods of Bayview/Hunter's Point, the Mission, Visitacion Valley, Ingleside, and Potrero Hill, which comprise less than 35% of the City's geographical area, and account for less than a third of its population. (AA 120, 85, 88-93.) In a 2002 study, the City's Department of Public Health ("DPH") confirmed that those neighborhoods suffer a greatly disproportionate share of gun violence. (AA 209.) It also found that African-American males in San Francisco "were 72 times more likely to be injured by a firearm than White males of any age, even though the African American male population represents less than 5% of the total SF population." (AA 197; *see also* AA 378 [in 2001, "close to 58% (287) of all firearm-related homicide and assault victims were African American males"].)

Gun violence has so permeated some neighborhoods that police and school officials regularly must "lock down" local schools, closing off all those buildings' entrances and exits to keep children inside when a threat is near. (AA 123.) In just the first five months of the 2005-06 school year, authorities had to lock down at least ten schools. (*Id.*) Seven Visitacion Valley-area schools were locked down after authorities learned that an armed homicide suspect was in a nearby park. (*Id.*) A week earlier, authorities had to lock down a child development center in the Bayview because of a nearby gunman, and to divert approximately 25 buses full of children who were on their way to the center for an after-school program. (*Id.*) In 2006, authorities have been shot at by gun-toting students, and have found illegal guns in the hands of school children. (AA 123, 124.)

The vast majority of guns used in killings over the past three years have been handguns. (AA 120.) In its 2002 study, DPH reported that 67%, or 129 of the 176, incidents of gun violence in San Francisco in 1999 involved a handgun. (AA 322.)

Opponents of gun control frequently assert that guns are necessary for self-defense. Notably, however, DPH's study reported that none of the 176 shootings in 1999 were in self-defense. (AA 209.)

C. The Financial Costs of Gun Violence To San Francisco.

This gun violence epidemic also imposes dramatic economic costs on the City's taxpayers. Each year, gun violence costs the City at least $31.2 million, including the costs of hospital care to gunshot victims, incarceration of gun offenders, and police and fire response to gun-related crimes. (AA 599, 602.)

II. THE VOTERS ADOPT PROPOSITION H

In November 2005 the City's voters approved Proposition H. The measure's title stated it would do two separate things: "prohibit[] the sale, manufacture and distribution of firearms in the City," and "limit[] the possession of handguns in the City[]." (AA 143.)[1]

To accomplish its dual goals, Proposition H contains two distinct substantive provisions. Section 2 states that within City limits "the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited." Section 3 prohibits City residents from possessing handguns within City limits, except peace officers and others needing guns for professional

---

[1] In addition, the voter pamphlet told voters that Proposition H would accomplish two separate results: it would "ban the manufacture, distribution, sale, and transfer of firearms and ammunition within San Francisco," and also would ban handgun possession by most City residents. (AA 137 [ballot question and Digest].)

purposes.[2] The measure states that Section 3 is not intended to affect "any resident of other jurisdictions with regard to handgun possession, including those who may temporarily be within the boundaries of the City and County." (AA 143.)

Proposition H states that "nothing in this ordinance is designed to duplicate or conflict with California state law," and that any person barred from possessing a handgun under state law would not be subject to the local prohibition. (AA 143, §6.) The measure also imposes no registration or licensing requirement, stating that "[n]othing in this ordinance shall be construed to create or require any local license or registration for any firearm[.]" (*Id.*)

The measure's severability clause states that if any provision of the measure "or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications o[f] this ordinance which can be given effect[.]" (AA 143, at §7.)

The Proponent's Argument In Favor of Proposition H highlighted the dangers of guns "in the home," and stressed that Proposition H would not keep firearms from "those who protect us." (AA 138.) The proponent also acknowledged that a previous City firearms law had been invalidated (referring to *Doe*), but stated that Proposition H was sufficiently different to withstand legal challenge. (AA 138.)

---

[2] San Francisco is not the first municipality to prohibit handgun possession. In 1976, Washington, D.C. banned civilian handguns. [AA 102-111].) Several Illinois communities also have banned handguns. (*See Quilici v. Village of Morton Grove* (7th Cir. 1982) 695 F. 2d 261, 270 [upholding ban against Second Amendment challenge].)

III. PROCEEDINGS IN THE TRIAL COURT

A. The Parties' Arguments.

On December 29, 2005, the NRA filed this action in San Francisco Superior Court, seeking a writ of mandate and declaratory and injunctive relief. (AA 1.)

On January 11, 2006, the NRA moved for a writ of mandate. Relying primarily on *Doe,* the NRA asserted that Section 3 of Proposition H was preempted by state law, was not a proper exercise of the City's home rule power, and violated equal protection guarantees. (AA 33, 34.) While the NRA also argued that Section 2 was preempted by several state statutes, it asserted that the court need not reach that issue, claiming that in spite of the measure's severability clause, the purported invalidity of Section 3 rendered the entire proposition unlawful. (AA 34.)

In response, the City contended that *Doe* was wrongly decided, but acknowledged that the trial court was bound to follow it. (AA 481, 859; Reporter's Transcript ["RT"] 20:24-21:3.)[3] The City argued that Section 3 was a proper exercise of the City's home rule authority, and did not violate equal protection. (AA 476, 495.) It also argued that Section 2 was not preempted, and that any invalid portions of Proposition H must be severed and the remainder of the measure upheld. (AA 488, 496.)

B. The Trial Court's Ruling.

San Francisco Superior Court Judge James Warren heard the NRA's writ motion on February 23, 2006. (AA 941.) On June 12, 2006, he issued a

---

[3] The trial court also had before it an amicus brief that Legal Community Against Violence had filed in support of the City, which argued at length that this Court's *Doe* opinion was no longer good law, and that Section 3 was not preempted by state law. (AA 501.)

Statement of Decision and Order Granting Motion for Writ of Mandate and/or Prohibition or Other Appropriate Relief. (AA 940.)

As to Section 2, the court found its sales ban, as applied to sales of handguns and handgun ammunition (AA 966), was preempted by (1) California Government Code Section 53071, because Section 2 would prohibit sales by state-licensed vendors and thus "'relates to' the State's plan to regulate firearms" (AA 962); (2) California Penal Code Section 12026, because Section 2 "substantially burdens the purchasing" of handguns (AA 962); and (3) the Unsafe Handgun Act ("UHA"), California Penal Code Sections 12125-12133, which, the court said, "establishes a comprehensive protocol for designating which handguns may be sold in California." (AA 957.) And Section 2's sales ban could not be effectuated as to sales of long guns, the court ruled, because Section 2 did not separately mention long guns, and because in spite of the proposition's severability clause, "the difference between regulation of handguns and regulation of long guns" was not "presented to the voters." (AA 967.)

It also ruled that Section 2's distribution ban would be "inimical" to law enforcement, because it might prevent police departments from distributing firearms to their officers, unless such agencies were impliedly exempted from the ban. (AA 965.)

The trial court also ruled that the voters could not rely on the City's home rule power to adopt Section 3. Even though Section 3 prohibits only San Francisco residents from possessing handguns, the court stated it does not "merely involv[e] handgun possession by San Francisco residents," but rather involved "firearms control," which is subject to sufficient state regulation to make the subject of Section 3 a matter of statewide interest. (AA 949.)

On June 22, 2006, Superior Court Judge Paul Alvarado entered judgment in the NRA's favor. On June 30, the court issued a peremptory writ restraining

the City from enforcing Proposition H. (AA 892, 978.) Appellants timely filed their notice of appeal on July 20, 2006. (AA 985.)

ARGUMENT

I. THIS COURT REVIEWS THE NRA'S CHALLENGE DE NOVO

This case raises solely legal issues. The trial court heard no live witnesses, was presented with no disputed issues of fact, and made no factual findings. Because "the facts are undisputed and the issue involves statutory interpretation," this Court must "exercise [its] independent judgment and review the matter de novo." (*Lindelli v. Town of San Anselmo* (2003) 111 Cal.App.4th 1099, 1104; *Kavanaugh v. West Sonoma County Union H.S. Dist.* (2003) 29 Cal.4th 911, 916.)

II. THE LEGISLATURE HAS MANIFESTED AN INTENT ONLY TO NARROWLY PREEMPT THE REGULATORY FIELDS SPECIFICALLY ADDRESSED IN STATE STATUTES

In adjudicating this case, the Court does not write on a blank slate. California's Supreme Court and appellate courts have repeatedly analyzed claims that state firearms laws, including Sections 53071 and 12026, preempt local authority to regulate firearms. Mindful of the need to protect local authority, the courts have "uniformly construe[d] state regulation of firearms narrowly, finding no preemption of areas not specifically addressed by state statute." (*Suter,* 57 Cal.App.4th at p. 1119 fn. 2.)

A. Preemption Principles.

1. Courts Presume That Local Laws Are Not Preempted.

A court analyzing a preemption claim presumes the local law is valid. "The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) California courts thus follow a "presumption *against* preemption." (*Id.* [emphasis added].)

This presumption is especially strong in areas that are traditionally subject

to local regulation, and in which local interests vary. Courts must be "particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another." (*Id.*; *Great Western,* 27 Cal.4th at pp. 866-67.) Similarly, "when local government regulates in an area over which it traditionally has exercised control ... California courts will presume, absent a *clear indication* of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." (*Big Creek*, 38 Cal.4th at p. 1149 [first emphasis added].) California's presumption against preemption is "analogous" to the federal principle that in areas traditionally subject to State regulation, courts "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." (*Id.*, 38 Cal.4th at p. 1150, fn. 7.) As the Supreme Court pointedly noted, the presumption "applies both to the existence of preemption and to the scope of preemption." (*Big Creek*, 38 Cal.4th at p. 1150 fn.7.)

2. Preemption Standards.

The general standards of preemption are well settled. "Local legislation is 'duplicative' of general law when it is coextensive therewith." (*Great Western,* 27 Cal.4th at p. 860.) A local firearms ordinance duplicates state law only if it prohibits "precisely the same acts" as state law prohibits. (*Id.* at p. 865.)

"Local legislation is 'contradictory' to general law when it is inimical thereto." (*Id.*, 27 Cal.4th at p. 860.) A local firearms law does not contradict state law unless it "mandate[s] what state law expressly forbids," or "forbid[s] what state law expressly mandates." (*Id.* at p. 866.)

"Local legislation enters an area 'fully occupied' by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so in light of recognized indicia of intent." (*Big Creek,* 38

Cal.4th at p. 1150; *Great Western*, 27 Cal.4th at p. 860-61.) Implied preemption will not found unless

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

(*Id.* at p. 861.) "Claims 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, as the Legislature has done many times in many circumstances. Hence the rule has developed that implied preemption can properly be found only when the circumstances 'clearly indicate' a legislative intent to preempt." (*California Rifle & Pistol Ass'n, Inc. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1317 ["*CRPA*"].)

B. California's Legislature And Courts Have Consistently Acted To Preserve Broad Local Authority To Regulate Firearms.

1. Local firearms problems demand local solutions.

The Supreme Court has repeatedly held that some localities have a much greater need to limit access to firearms than others. As the high court reaffirmed in 2002, "[i]t is true today as it was more than 30 years ago when we stated it in *Galvan* [*v. Superior Court* (1969) 70 Cal.2d 851], 'that problems with firearms are likely to require different treatment in San Francisco County than in Mono County.'" (*Great Western*, 27 Cal.4th at p. 867 [brackets omitted].) "The need for the regulation or prohibition of the carrying of deadly weapons, even though not concealed, may be much greater in large cities, where multitudes of people congregate, than in the country districts or thinly settled communities, where there is much less opportunity and temptation to commit crimes of violence for

which such weapons may be used." (*Id.*) "Thus, the costs and benefits of making firearms more available ... to the populace of a heavily urban county ... may well be different than in rural counties, where violent gun-related crime may not be as prevalent." (*Id.*)

The record in this case underscores this point. San Francisco is California's most densely populated county, with 776,733 people living within only 46.7 square miles. (AA 88.) By comparison, Mono County's 12,853 residents live within 3,044.4 square miles. (AA 96.) And San Francisco suffers far more gun violence than do sparsely populated rural counties. (AA 98.) Between 1991 and 2003 – when 1,844 San Francisco residents were hospitalized for non-fatal firearms injuries – only three Mono County residents, and only *one* Alpine County resident, were hospitalized for such injuries. (AA 99, 100.)

2. The courts and the Legislature have recognized the need to preserve local control over firearms regulation.

Recognizing that particularly local firearms problems require local solutions, the Legislature, over the last three decades, has been reluctant to preempt local power to regulate firearms. Instead, the Legislature has moved cautiously, preempting only those regulatory fields it has explicitly addressed, while leaving other areas of gun regulation within local control. It thus has shown its "intent to permit local governments to tailor firearms legislation to the particular needs of their communities." (*Suter,* 57 Cal.App.4th at p. 1119.)

a. The courts have narrowly construed Penal Code Section 12026 and Government Code Section 53071.

In 1969, in *Galvan*, the high court held that Penal Code Section 12026 ("Section 12026") – which, at that time, stated that "no permit or license to purchase, own, possess, or keep any [concealable] firearms at [the owner's] place of residence or place of business shall be required" – did not preempt a local

ordinance that generally required all firearms to be registered.[4] As the Court later explained, in *Galvan* "[w]e distinguished between licensing, which signifies permission or authorization, and registration, which entails recording 'formally and exactly,'" and thus did not find the local law to be preempted. (*Great Western,* 27 Cal.4th at p. 861.) *Galvan* "thus gave section 12026's expression of Legislative intent the *narrowest possible construction.*" (*Suter,* 57 Cal.App.4th at p. 1120 fn.3 [emphasis added].)

Galvan prompted only a limited legislative response: the adoption of what became Government Code Section 53071, which expressly occupies "the whole field of regulation of the registration and licensing" of firearms ("Section 53071").[5] Significantly, "the Legislature did not respond to *Galvan*, as it could have, by expressly stating its intent to preempt all local regulation of firearms, or all local regulation of handgun sales, but instead expressly limited its preemption to registration or licensing only." (*CRPA*, 66 Cal.App.4th at p. 1315.) In adopting what became Section 53071, "the legislative intent was *limited to registration and licensing.*" (*Great Western,* 27 Cal.4th at p. 862 [emphasis added].) Consequently, in *Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897, 902, this

---

[4] Section 12026 now states, in relevant part, that "[n]o permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state ... to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person" in such person's home or business or on his or her private property. (*Id.*, §12026(b).)

[5] Section 53071 now states, in its entirety, that "[i]t is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code." (*Id.*)

Court held that a local law prohibiting parents from allowing minors to possess or fire BB guns was not preempted. (*Id.*)

Again, the Legislature responded cautiously. It adopted Government Code Section 53071.5, which expressly occupies the field of regulation of the manufacture, possession, and sale – but only with respect to *imitation* firearms.[6] Section 53071.5 "shows the language that the Legislature can be expected to use if it intends to 'occupy the whole field.'" (*CRPA*, 66 Cal.App.4th at p. 1312.) And Section 53071.5's "express preemption of local regulation of sales of imitation firearms, but not sales of real firearms, demonstrates that the Legislature has made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms." (*Great Western*, 27 Cal.4th at p. 864.)

In 1998, the *CRPA* court held that a local law banning the sale of Saturday Night Specials was not preempted. (*Id.*, 66 Cal.App.4th at p. 1312.) Pointing to the imitation firearms statute, Government Code Section 53071.5 – which "shows the Legislature's view of 'sale' as a separate area of regulation," distinct from the field of licensing – the court held that Sections 12026 and 53071 preempt only local registration and licensing requirements, not an outright sales ban. (*Id.* at pp. 1314, 1311.) Similarly, in 1997 this Court held in *Suter* that "state law does not preempt the broad field of sales of firearms." Thus, it held, a city could confine firearms dealers to certain areas, require dealers to obtain specific local permits,

---

[6] Government Code Section 53071.5 states, in relevant part, that "[t]he Legislature occupies the whole field of regulation of the manufacture, sale, or possession of imitation firearms ... and that section shall preempt and be exclusive of all regulations relating to the manufacture, sale, or possession of imitation firearms[.]" (*Id.*)

and require that guns be sold with accompanying safety devices. (*Id.*, 57 Cal.App.4th at pp. 1122, 1126-27.)[7]

b. The *Great Western* and *Nordyke* decisions.

Most significantly, in 2002 the Supreme Court decided *Great Western,* and *Nordyke v. King* (2002) 27 Cal.4th 875. These companion decisions represent the controlling statement of gun preemption law in California, and bear close examination here.

In *Great Western* the Court held that a county ordinance prohibiting all sales of firearms and ammunition on county property – and thus banning gun shows – was not preempted. The Court first reaffirmed *Galvan's* principle that gun violence requires different solutions in different localities, and traced the history of Legislative and judicial deference to local authority to regulate firearms. (*Id.* at pp. 861-64.) State law, the Court held, did not expressly or impliedly preempt the local sales ban at issue, because the Legislature has expressly empowered local governments to regulate "the possession and transfer of firearms." (*Id.*, 27 Cal.4th at p. 865 [citing Penal Code §12071.4(b)].) Moreover, while the Legislature had responded to *Galvan* by adopting what became Section 53071, its "legislative intent was limited to registration and licensing." (*Id.* at p. 862.)

Moreover, the sales ban did not conflict with state law. The Legislature's decision to expressly *authorize* certain conduct – in this case, firearms sales at gun shows – does not show, as a legal matter, that the Legislature intends to prevent local governments from prohibiting that conduct:

---

[7] *Suter* held that a single aspect of the local law, relating to gun dealers' security measures for firearms storage, was preempted because the Legislature had enacted detailed storage requirements for dealers. (*Id.* , 57 Cal.App.4th at p. 1125.)

> [A]lthough the gun show statutes regulate, among other things, the sale of guns at gun shows, and therefore contemplate such sales, the statutes do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes.

(*Id.*, 27 Cal.4th at p. 866.)

In *Nordyke*, the Court held that a county law prohibiting the possession of guns and ammunition on county property was not preempted. That law expressly exempted from its prohibition certain classes of persons holding state-issued licenses – such as "persons holding valid firearms' licenses pursuant to Penal Code section 12050" – while banning gun possession even by certain other classes of persons, such as animal control officers and retired federal law enforcement officers, who were authorized by state law to possess firearms. (*Id.*, 27 Cal.4th at pp. 881, 884.)

The Court rejected the plaintiffs' preemption claim. First, it held that although a state statute generally prohibited the possession of firearms in public building, yet permitted gun shows in public buildings, that statute simply *allows* local governments to authorize gun shows but "does not *mandate* that local government entities permit such a use." (*Id.* at p. 883-84 [emphasis original].)

Second, the Court declined to find the local law invalid even though it was concededly "more restrictive than state statutes," in that it banned local gun possession even by some persons who held state-issued licenses. (*Id.*, 27 Cal.4th at p. 884.) Echoing the theme of local authority it sounded in *Great Western*, the Court held that "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 possessing the gun on restricted county property." (*Id.*) Moreover, 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.* [emphasis original].)

As these decisions show, the courts have been remarkably reluctant to find preemption of local laws restricting or prohibiting sales or possession of firearms and ammunition, even as to conduct that the state has exempted from its own prohibitions, and even as to persons whom the state has authorized to engage in such conduct. More generally, these cases also show that the Legislature "has no intention of preempting areas of weapons laws not specifically addressed by state statute." (*CRPA*, 66 Cal.App.4th at p. 1316.) "That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities." (*Suter,* 57 Cal.App.4th at p. 1119.)

c. *Doe v. City and County of San Francisco.*

Virtually the only exception to this marked trend of narrow preemption is *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509. There, this Court held that Sections 12026 and 53071 expressly preempted a local law that prohibited all persons from possessing handguns in San Francisco, finding that the local law at least "related to licensing" because it expressly exempted from its ban "any person authorized to carry a handgun by Penal Code section 12050." (*Id.* at pp. 516-18.) In dicta, this Court also stated that the handgun possession ban was impliedly preempted by Section 12026, because even though that statute does not mention possession, the Court "infer[red] ... that the Legislature intended [it] to occupy the field of residential handgun possession to the exclusion of local [regulation]." (*Id.* at p. 518.)

III. SECTION 2 IS NOT PREEMPTED BY STATE LAW

As noted above, Proposition H contains two separate prohibitions. The first of these, Section 2, prohibits "the sale, distribution, transfer and manufacture of all firearms and ammunition" within City limits.

Relying on overly expansive misreadings of state statutes, and ignoring the overwhelming judicial trend of narrow preemption in this area, the NRA claims Section 2 is preempted by several state laws. As explained below, it is not preempted.

"The question as to preemption is whether the state Legislature has *removed* the constitutional police power of the City to regulate [firearms] sales." (*CRPA*, 66 Cal.App.4th at p. 1309[emphasis original].) Far from removing such local power, the Legislature has affirmatively *recognized* local power to regulate firearms sales. (Pen.Code. §12071(a)(6) [a licensed gun dealer most possess "any regulatory or business license, or licenses, required by local government," which may consist of a letter from the local government "stating that the jurisdiction does not require any form of regulatory or business license or *does not otherwise restrict or regulate the sale of firearms*"] [emphasis added].) The Legislature also has expressly recognized local authority to regulate firearms transfers. (Pen.Code §12071.4(b)(2) [persons selling firearms at gun shows must acknowledge in writing "that they are responsible for knowing and complying with all applicable *...local laws dealing with the possession and transfer of firearms*"] [emphasis added].) And as explained below, none of the statutes cited by the NRA, or relied on by the trial court, shows that the Legislature has sought to strip the City of its Constitutional power to prohibit the sales, transfer, distribution, and manufacture of firearms or ammunition.

A. Section 2 Is Not Preempted By Section 53071.

The NRA claims Section 2's sales prohibition is preempted by Section 53071. (AA 49.) The trial court agreed, stating that the sales prohibition is "related to licensing" because it "relates to the State's plan to regulate firearms." (AA 961-62.) This conclusion flies in the face of settled law.

First, Section 53071 does not even *mention* firearms or ammunition sales. It mentions only "registration and licensing" of firearms – a regulatory field that is distinct from the field of firearms sales. (*CRPA*, 66 Cal.App.4th at p. 1314.) Section 53071 thus cannot expressly occupy the field of gun or ammunition sales, or create duplication or contradiction with Section 2's sales prohibition.

Nor does Section 53071 demonstrate the Legislature intended to occupy the field of sales by implication. In adopting what became Section 53071, "the legislative intent *was limited to registration and licensing*." (*Great Western*, 27 Cal.4th at p. 862 [emphasis added].) "The fact that the Legislature expressly limited its preemption in this statute to 'registration and licensing' shows a Legislative intent not to preempt other areas of firearms regulation, at least not in this statute." (*CRPA*, 66 Cal.App.4th at p. 1311; *Suter*, 57 Cal.App.3d at p. 1122.)

Although the trial court, in its discussion of Section 53071, did not even mention *Great Western* or *CRPA*, those decisions undermine its conclusion. The local ban on sales of Saturday Night Specials upheld in *CRPA*, and the local ban on sales of all guns and ammunition on county property upheld in *Great Western*, unquestionably prevented guns from being sold, and "related to" state firearms regulation. But because those local laws did not impose license or permit requirements, they did not run afoul of Section 53071. By the same token, Section 2's ban on sales of guns and ammunition is not preempted by that statute.

The NRA's claim that Section 53071 preempts Section 2 "stretches the words of [Section 53071] beyond their literal meaning." (*CRPA,* at p. 1313.) The

claim also flies in the face of the repeated, narrow preemption holdings of the Supreme Court and appellate courts. If any local law that "related to the State's plan to regulate firearms" was for that reason preempted by Section 53071, then that statute would effectively "occupy the whole field of firearm regulation" – which, as this and other courts have held, it does not. (*Suter*, 57 Cal.App.4th at p. 1119 fn.2.) Section 53071 does not preempt Section 2.

B. Section 2 Is Not Preempted By Section 12026.

The NRA also contends that Section 2 is preempted by Penal Code Section 12026, both with respect to sales of handguns and of handgun ammunition. (AA 48.) The trial court agreed, stating that Section 12026 preempts any law that "substantially burdens the purchasing and possession of handguns." But this conclusion, too, ignores settled law and cannot stand.

Section 12026, like Section 53071, "deals only with *permits* or *licenses*" – specifically, permits or licenses to carry concealable firearms at home or in other specified locations. (*CRPA*, 66 Cal.App.4th at p. 1311 [emphasis original]; *Great Western*, 27 Cal.4th at p. 861 [stating that in Section 12026, "the Legislature has expressly prohibited *requiring a license* to keep a concealable weapon at a residence"] [emphasis added].) While Section 12026(b) obviously mentions handgun "purchases," it merely precludes local laws that require a "permit or license" to make such a purchase. (*CRPA,* at p. 1314.) It thus does not expressly or impliedly preempt local laws that prohibit sales without imposing any permit or license requirement. (*Id.* at p. 1311; *see Great Western*, 27 Cal.4th at p. 863 ["the Legislature has made a distinction, for whatever policy reason," between sales of real firearms and of imitation firearms, precluding local regulation only of the latter].) "The fact that the Legislature limited the coverage of [Section 12026] to permits or licenses for possessing a weapon at home, in a place of business, or on private property shows a Legislative intent not to preempt other

areas of firearms regulation, at least not in this statute." (*CRPA*, at pp. 1311-1312.)

As it has done with respect to numerous statutes throughout this action, the NRA argues that Section 12026 has a preemptive effect broader than its plain language. It asserts Section 12026 preempts any local law that would impede a citizen's ability to purchase and possess "a handgun that could be used for its intended purpose." (AA 48.) But the courts, other than *Doe*, have refused to read Section 12026 broadly: as this Court has observed, the Supreme Court in *Galvan* "gave section 12026's expression of Legislative intent *the narrowest possible construction*," holding that as then drafted, that statute did not preempt a local ordinance making handgun possession subject to local registration requirements. (*Suter*, 57 Cal.App.4th at p. 1120 fn.3 [emphasis added].) And more recent decisions, such as *CRPA*, *Great Western*, and *Suter,* have resoundingly upheld local laws that prohibit gun sales, or otherwise restrict access to firearms – in other words, laws that unquestionably make it more difficult to purchase "a handgun that could be used for its intended purpose." Equally, important, those cases also have rejected the broad, non-textual approach to preemption on which the NRA relies, and have instead found "no preemption of areas not specifically addressed by state law." (*CRPA*, 66 Cal.App.4th at p. 1313.)

The NRA strives to defend its inflated preemption claims by arguing that Section 2's sales ban would interfere with a supposed "right to own and use handguns" purportedly created by Section 12026. (AA 49.) But "[t]here 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 ... for which a license or permit may not be required. The words of the statute are words of proscription and limitation upon local governments, not words granting a right or authority to members of the public." (*CRPA*, at p. 1324.) The NRA cannot use its "rights"

claim to sidestep the doctrinal requirements of preemption. Section 12026 preempts only what its terms say: local permit and licensing requirements for handguns.[8]

C. Section 2 Is Not Preempted By The Unsafe Handgun Act.

The NRA claims that the Unsafe Handgun Act ("UHA") "covers the entire area of the licensing of handgun sales," and that Penal Code Section 12131(a), a provision of the UHA, expressly preempts Section 2 of Proposition H with respect to handgun sales. (AA 48.) The trial court concluded that the UHA "establishes a comprehensive protocol for designating which handguns may be sold in California." (AA 957.) These assertions, too, stretch statutory text beyond its reasonable meaning, and buck the strong trend toward narrowly interpreting the scope of firearms preemption.

The UHA is intended to prohibit the sale of "unsafe handguns." (*See* Pen.Code §12126 [defining "unsafe handgun," principally by presence of safety devices]; *id.*, §12125 [prohibiting sale of "any unsafe handgun"].) To do so, Penal Code Section 12131(a) directs the Department of Justice to maintain a

---

[8] The NRA relies on a 1994 Attorney General opinion (77 Ops.Cal.Atty.Gen. 147 (1994)) to support its claim that Section 2 is preempted with respect to ammunition sales. (AA 48-49.) But as both *CRPA* and *Suter* recognized, that non-binding opinion is fundamentally flawed and should not be followed. It relies on two statutes, Section 12026 and Penal Code Section 12304 (outlawing the sale of ammunition with a power of greater than .60 caliber). (77 Ops.Cal.Atty.Gen. 147 (1994) [1994 WL 323316 at *5.]) But because Section 12026 does not occupy the field of firearms sales, and does not even mention ammunition, it is doubly absurd to claim that statute nonetheless occupies the field of ammunition sales. Moreover, absent a clear indication of legislative intent to the contrary, a law such as Section 12304 that outlaws certain types of conduct on a statewide basis does not prevent local governments from adopting stricter regulations of that conduct. (*Great Western,* 27 Cal.4th at pp. 866, 868.) Penal Code Section 12304 contains nothing to suggest that the Legislature intended it to occupy the field of ammunition sales.

roster of handguns that "have been determined not to be unsafe handguns, and may be sold in this state pursuant to this title." (*Id.*) The NRA asserts the City cannot prohibit the sale of any handgun on that roster, because doing so would "penaliz[e] conduct which the state law expressly authorizes." (AA 48.)

But the UHA does not expressly or impliedly occupy the whole field of handgun sales. Notably, the UHA makes no mention of local regulatory power, of preemption, or of any legislative intent to occupy any field. Nor, contrary to the trial court's characterization, does it state any intention to "comprehensively" regulate handgun sales.

In this respect Section 12131(a) stands in stark contrast to statutes such as Government Code Section 53071.5, in which the Legislature has plainly stated that it "occupies the whole field of regulation of the ...sale... of imitation firearms," and which expressly states that it shall "preempt and be exclusive of all regulations" relating to that subject. (*Id.*) Section 53071.5 "shows the language that the Legislature can be expected to use if it intends to 'occupy the whole field.'" (*CRPA*, 66 Cal.App.4th at p. 1312.) The fact that the Legislature chose not to employ even remotely similar language in Penal Code Section 12131(a) strongly suggests that it did not intend to occupy the field of handgun sales.

Nor does Section 2's sales ban contradict the UHA. The NRA claims otherwise, relying solely on Section 12131(a)'s phrase "may be sold." But while that phrase is permissive, it is hardly mandatory. And the NRA overlooks the statute's qualifying statement, found in the same sentence within Section 12131(a), that handguns found not to be unsafe "may be sold in this state *pursuant to this title*." (Pen.Code §12131(a) [emphasis added].) The italicized terms suggest that rather than seeking to prohibit local laws restricting sales of guns listed on the DOJ roster, the Legislature simply sought to distinguish between handguns that are "unsafe," whose sale the UHA prohibits, and handguns

found not to be "unsafe," whose sale *does not violate the UHA*. The statute, therefore, merely defines the circumstances under which *it* does and does not prohibit handgun sales. In this respect the UHA is like California's gun show statutes, which "regulate ... the sale of guns at gun shows, and therefore contemplate such sales," but "do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes." (*Great Western,* 27 Cal.4th at p. 866; *Nordyke,* 27 Cal.4th at p. 884 [statute that "exempts gun shows from the state criminal prohibition on possessing guns in public buildings," and thus allows guns shows, "does not *mandate* that local government entities permit such a use"] [emphasis original].) While it is "impeccably true that something that is not prohibited by state law is lawful under state law," such "a tautological observation, however, is hardly a firm foundation for an analysis" of whether the Legislature sought to preempt local authority. (*CRPA*, 66 Cal.App.4th at p. 1323.) The UHA's text simply cannot support the preemptive intent the NRA attributes to it.

The UHA preemption claim also fails because the UHA principally serves a different regulatory goal than Section 2's sales ban. (*Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1474-75 [although state civil rights statute and local law prohibiting discrimination on the basis of HIV status "employ similar regulatory tools," local law is not preempted because it promotes separate public health purpose of removing barriers to HIV testing]; *San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 793.) The UHA's title shows its focus is on keeping poor quality handguns off the market. Its legislative history confirms the fact, showing the statute seeks to subject handguns to "quality standards" designed to ensure that those guns are reliable and fire only when intended. (AA 460.)

The NRA argues, and the trial court agreed, that the UHA preempts local laws that similarly bar the sale of shoddily-built handguns. But even if this is so, the UHA would not preempt any portion of Proposition H. Not only does Proposition H not regulate handgun "quality," but it reflects the voters' judgment that consumer sales of *any* firearms, regardless of their safety features, are unacceptably problematic. Proposition H seeks to reduce firearms violence – such as "murder," "suicides," "domestic disturbances," and "workplace violence" – that has nothing to do with the quality, reliability, or safety features of the firearms involved, and that cannot be addressed by ensuring that gun owners possess high-quality weaponry. (AA 138, 139.) While some supporters of the UHA may have believed that so-called "junk guns" are often used to commit crimes, the statute's primary goal was clearly to ensure that people possess only quality handguns – a purpose that, to put it mildly, did not motivate the voters who adopted Proposition H.

The UHA regulates in a different field, and makes no mention of any intent to occupy even that field. It does not preempt Section 2.

IV. SECTION 2 WILL NOT UNDERMINE LOCAL LAW ENFORCEMENT

Because Section 2 lacks express exceptions, the NRA – interpreting it literally and expansively – claims it gravely disrupts criminal law enforcement and the criminal justice system by, for example, preventing police forces from providing their officers with firearms, and preventing police officers from confiscating guns at crime scenes. (AA 52.) This is absurd.

First, it is a "traditional rule of statutory construction ... that, absent express words to the contrary, governmental agencies are not included within the general words of a statute." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1192 [construing California False Claims Act to preclude false

claims suits against public entities].) Section 2 is silent as to whether it applies to governmental agencies. This Court thus can, and should, interpret it to not apply to government agencies.

Second, government agencies must be "excluded from the operation of general statutory provisions ... if their inclusion would result in an infringement upon sovereign governmental powers[.]" (*Id.*; *People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703-04 [statute does not limit sovereign governmental powers "unless such intent clearly appears"].) Even if Section 2 did apply to public agencies, the Court must construe it to not impair their sovereign power to protect the public, and to catch and prosecute lawbreakers. Section 2's undefined terms "transfer" and "distribution" need not be interpreted to hamstring law enforcement and the justice system as the NRA postulates. As the trial court noted, "[o]ne ordinary meaning of transfer is a change in ownership." (AA 964.) The voters might have understood "transfer" to refer to a conveyance of property or an interest in property, rather than the mere physical passing of an item from one person's hands to another's, however temporarily. And they might have understood "distribution" in its commercial sense, or to refer to the act of apportioning or dividing, not simply to providing in the sense in which a police department provides its officers with necessary equipment.[9] Because such reasonable interpretations avoid potentially serious infringements on sovereign governmental powers, this Court should construe Section 2's terms accordingly.

---

[9] One widely used dictionary defines a "transfer" as follows: "**1a:** conveyance of right, title, or interest in real or personal property from one person to another **b**: removal or acquisition of property by mere delivery with intent to transfer title . . . ." (Merriam-Webster's Collegiate Dictionary (10th Ed. 2001) at p. 1249.) The same dictionary defines "distribution" as "the act or process of distributing," which, in turn, means "**1**: to divide among several or many: APPORTION . . . . " (*Id.* at pp. 337-338.)

Third, a court must "construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 348.) It also will interpret an ambiguous statute to promote wise public policy. (*Wells,* 39 Cal.4th at p. 1190.) The NRA's overly literal interpretations of Section 2 would harm the vital public policy of effective law enforcement. There is no reason to think the voters – who sought to curb violence due to firearms in private hands, not to stop "those who protect us" from doing their jobs – intended such results.[10] Section 2's terms "transfer" and "distribution" should be interpreted not to apply to the acquisition and internal handling of firearms and ammunition by police agencies, officers and personnel, or district attorneys and others employed or functioning within the justice system.

Finally, even if Section 2 were preempted as it relates to certain conduct by law enforcement and criminal justice personnel, "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." (*Nordyke*, 27 Cal.4th at p. 884 [emphasis original].)

V. SECTION 3 DOES NOT CONFLICT WITH STATE FIREARMS STATUTES

Section 3 of Proposition H generally bars City residents from possessing handguns within City limits, while allowing peace officers and certain others to possess handguns for professional purposes. Relying almost entirely on *Doe,* the NRA asserts that Section 3 is preempted by Sections 53071 and 12026. The trial

---

[10] The Court "look[s] to the entire substance of the statute in order to determine the scope and purpose of the provision . . . . keeping in mind the nature and obvious purpose of the statute." (*People v. Murphy* (2001) 25 Cal.4th 136, 142 [cites, quotes, and ellipses omitted; emphasis added].) It therefore must interpret Section 2 in light of Section 3, which expressly allows peace officers to possess handguns to do their jobs.

court agreed. (AA 959.) But subsequent decisions of the Supreme Court and appellate courts have substantially undermined *Doe's* reasoning, and have rendered that case inapplicable here. Neither *Doe* nor any other authority shows that Section 3 is preempted.

Doe involved a San Francisco ordinance that generally prohibited any person, resident or otherwise, from possessing a handgun in the City. The local law, however, expressly exempted any persons authorized to carry handguns pursuant to Penal Code Section 12050. (*Id.*, 136 Cal.App.3d at p. 512.) The Court held that because it "exempt[ed] licensed persons from the ban" on possession, the law "implicitly creates" a licensing requirement, making it "at least a local regulation *relating to licensing*," and thus preempted by Section 53071. (*Id.* at p. 517 and fn. 1.) For the same reason, the Court held that the law conflicted with Section 12026, under which possession of a handgun at home may not be conditioned on a permit or license. (*Id.* at p. 518.)

In a single, conclusory paragraph, the Court stated that even if it "were to find ... no 'licensing' requirement," it would interpret Section 12026 to have an implied preemptive effect beyond the statute's terms. Specifically, the Court "infer[red]" that in Section 12026, "the Legislature intended to occupy the field of residential handgun possession," even apart from any licensing and permitting, because it "strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." (*Id.*) However, the Court cited no legal authority for its brief statement, and also did not mention, much less follow, the settled tests of implied preemption required by *Galvan* and other cases. (*Id.*)

Relying heavily on *Doe's* implied preemption dictum, the NRA claims that Section 12026 occupies the field of residential handgun possession by implication, and thus preempts Section 3 of Proposition H. It also asserts that

even though Section 3 – unlike the ordinance in *Doe* – does not exempt holders of state-issued licenses from its prohibition, it nonetheless "creates a licensing scheme," and thus is expressly preempted by Sections 12026 and 53071, as construed by *Doe*. (AA 39.) When considered in light of the subsequent series of cases that have narrowly construed the scope of preemption under state firearms laws, neither claim withstands scrutiny.

A. Section 12026 Does Not Occupy The Field Of Residential Handgun Possession.

Doe's approach to preemption is fundamentally at odds with subsequent cases. In concluding that Section 12026 – whose text does not address handgun possession outside the context of permits and licensing requirements – nonetheless impliedly occupies the field of residential handgun possession, *Doe* interpreted that statute extraordinarily broadly, giving it a preemptive scope far beyond its plain language. Yet in *Suter*, this Court held that the Legislature, in Section 12026 and elsewhere, has "preempt[ed] only those regulatory fields it has expressly addressed." (*Id.*, 57 Cal.App.4th at p. 1119.) It also recognized the Supreme Court, in *Galvan*, "gave Section 12026's expression of Legislative intent the narrowest possible construction." (*Id.* at p. 1120 fn. 3.) Likewise, the *CRPA* court held that Section 12026 preempted only local laws that "require permits or licenses" to purchase or possess handguns. (*Id.*, 66 Cal.App.3d at p. 1313.) *CRPA* also held that "the Legislature's successive enactments have all been carefully worded *not* to preclude local action on related topics" (*id.* at p. 1319 [emphasis original]) – indicating that Section 12026 does not impliedly occupy any other fields, as *Doe* "inferred."

In 2000, the Ninth Circuit, reviewing a preemption challenge to a local law prohibiting sales of firearms and ammunition on county property, noted the "tension" between *Doe*'s implied preemption dictum and *CRPA*, which "appears

to have disavowed the logic underlying" *Doe*. (*Great Western Shows, Inc. v. Los Angeles County* (9th Cir. 2000) 229 F.3d 1258, 1262.) Referring to *Doe*, *CRPA*, and *Suter*, the Ninth Circuit determined that the California courts "have responded in seemingly conflicting ways" to firearms preemption claims, and stated that "there is tension in the reasoning underlying several decisions of the Courts of Appeal of the State of California[.]" (*Id.* at pp. 1261-63.) It therefore certified to the California Supreme Court "questions of law concerning the possible state preemption of local gun control ordinances." (*Id.* at p. 1259.)

The California Supreme Court granted the certification request, and in 2002 issued its *Great Western* decision. As noted above, the Court there exhaustively traced the development of California's gun preemption jurisprudence, emphasizing the Legislature's consistent deference to local authority and reaffirming that local firearms problems require different solutions in different jurisdictions. (*Id.*, 27 Cal.4th at p. 867.) After recounting cases from *Galvan* to *CRPA* that had upheld local authority, the Supreme Court turned, "[o]n the other hand," to the only decision it discussed that found a local ordinance preempted – *Doe*. (*Id.* at p. 863.) The Court then described *Doe*'s preemption holding as being that "the ordinance directly conflicted with Government Code section 53071 and Penal Code section 12026, the former explicitly preempting local licensing requirements, the latter exempting from licensing requirements gun possession in residences and places of business." (*Id.*, 27 Cal.4th at p. 864.) Significantly, however, the Court said nothing about *Doe*'s one-paragraph implied preemption discussion. (*See id.* at pp. 863-864, 865-67.)

Great Western leaves little doubt that *Doe* must be read narrowly, and that it stands, at most, for the proposition that a local law that prohibits firearms possession but expressly exempts holders of state-issued licenses from its prohibition will be expressly preempted as creating a licensing scheme. The

Great Western Court specifically described *Doe's* holding as such: "local law may not impose additional licensing requirements when state law specifically prohibits such requirements." (*Great Western*, 27 Cal.4th at p. 866). Particularly since the Supreme Court had accepted the certification to resolve the tension identified by the Ninth Circuit regarding *Doe's* implied preemption reasoning, the high court's silence as to that reasoning is tantamount to disapproval.[11] *Doe's* implied preemption discussion thus does not control here, and provides no authority to conclude that Section 12026 impliedly preempts Section 3 of Proposition H.

B. Section 3 Does Not Impose A Licensing Scheme Or Relate To Licensing.

Nor do *Doe's* express preemption and conflict holdings apply to Section 3. As noted above, Section 3 – which was deliberately drafted to avoid preemption under *Doe* – does not exempt persons who hold licenses issued pursuant to Penal Code Section 12050 or other state laws from its prohibition. Moreover, the proposition specifically disclaims any intent to "create or require any local license or registration for any firearm ..." (AA 143.) The NRA claims that Section 3 either impliedly exempts state licensees, creating a "de facto" licensing scheme giving rise to preemption under Sections 12026 and 53071, or else conflicts with the state laws giving rise to those licenses, thereby preempting Section 3. (AA

[11] Moreover, "it is settled that the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it." (*Fujii v. State* (1952) 38 Cal.2d 718, 728.) The clear trend of decision since the 1982 *Doe* case has been to construe state statutes narrowly as targeting only "certain specific areas for preemption" of local gun control regulations. (*Great Western*, 27 Cal.4th at p. 864.) *Doe's* implied preemption finding of a legislative intent to occupy the field of residential handgun possession is contrary to that trend.

40.) In fact, *Nordyke*, the Supreme Court's companion case to *Great Western*, shows that Section 3 is not preempted on either ground.

Nordyke involved a local law that prohibited the possession of guns and ammunition on county property. While that local law expressly "exempted from its prohibition various classes of persons," it lacked express exemptions for other holders of state-issued licenses, such as security officers appointed by a sheriff or police chief and animal control officers. (*Id.*, 27 Cal.4th at pp. 881, 884.) In other words, the law in *Nordyke* presented the same lack of express exemptions as does Section 3. The *Nordyke* Court, however, held that the local possession ban was not preempted, either as a de facto licensing law or through possible conflict with the state statutes that give rise to the licensing at issue.

First, the Court did not find the law to be preempted under Sections 12026 or 53071, the permitting and licensing statutes whose origins and development the Court had recounted at length in the companion case of *Great Western*. *Nordyke*'s conspicuous failure to find the local possession ban preempted as a de facto licensing scheme defeats the NRA's claim that Section 3 is preempted on that basis.

Second, the Court held that the local law's failure to exempt state license holders did not render that law preempted. As it explained, "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 possessing the gun" at a location where such possession is forbidden by the local law. (*Id.*, 27 Cal.4th at p. 884.) Moreover, 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.*) *Nordyke*'s

holding that the local possession ban was not preempted even if it conflicted with state licensing statutes defeats the NRA's claim that Section 3, if it is not a de facto licensing statute, is invalid on the ground that it conflicts with such licensing statutes.

Doe, in sum, does not control. Neither *Doe* nor any other authority shows that there is any conflict between Section 3 and state law.

VI. EVEN IF SECTION 3 DID CONFLICT WITH STATE LAW, IT WOULD BE VALID AS AN EXERCISE OF THE CITY'S HOME RULE POWER

Article XI, Section 5 of the California Constitution grants charter cities exclusive authority over their own municipal affairs, making such cities "supreme and beyond the reach of legislative enactment" in that domain. (*California Federal Savings and Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 ["*CalFed*"]; Art. XI, §5(a).)[12] Under Section 5(a), a charter city "gain[s] exemption, with respect to its municipal affairs, from the 'conflict with general laws' restrictions of section 11 of article XI." (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.) Section 5(a) articulates "the general principle of self-governance" for charter cities. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 398.)

In adopting Proposition H, the voters expressly invoked the City's home rule power. That invocation was entirely appropriate as to Section 3. By reducing the number of handguns in the City, Section 3 seeks to lessen handgun violence's awful consequences – a matter of vital local concern. And by not

---

[12] "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." (Art. XI, §5(a).)

affecting any non-City resident's ability to possess a handgun, and by allowing peace officers, other public employees, and security guards to possess handguns for their job duties, Section 3 is narrowly tailored to San Francisco's interests, and raises no significant extramunicipal concerns that could exceed the City's home rule authority. Section 3 thus is insulated from preemption as a valid exercise of the City's home rule power.

A. San Francisco Enjoys Exclusive Authority Over Its Municipal Affairs.

1. Charter cities' broad home rule powers.

In 1896, California's voters amended the Constitution to expressly provide for charter city home rule power. In granting charter cities broad self-rule power, and equally broad protection against conflicting state legislation, the voters intended

> to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. [The amendment] *was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs[.]*

(*Johnson,* 4 Cal.4th at pp. 395-96 [emphasis original, ellipses omitted]; *Ex parte Braun* (1903) 141 Cal. 204, 208-09.) Soon after 1896, the high court confirmed the breadth of the home rule power, holding that the words "municipal affairs" are "words of *wide import – broad enough to include all powers appropriate for a municipality to possess*." (*Ex parte Braun,* 141 Cal. at p. 209 [emphasis added].) It reaffirmed that holding in 1991. (*CalFed,* 54 Cal.3d at p. 12.) The "comprehensive nature of the [home rule] power" is beyond dispute. (*Bishop,* 1 Cal.3d at p. 62.)[13]

---

[13] The 1896 addition of those provisions caused "a fundamental reallocation of political powers between the legislature and a chartered city." (continued on next page)

A city that adopts a charter for self-governance assumes the full sovereign powers of the State over municipal affairs. It is presumed to have granted itself the broadest possible authority over municipal affairs, unless the charter expressly limits that authority. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.)

"No exact definition of the term 'municipal affairs' can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case." (*CalFed,* 54 Cal.3d at p. 16.) Rather than employing a "static and compartmentalized description of 'municipal affairs,'" courts must "allocate the governmental powers under consideration in the most sensible and appropriate fashion as between local and state legislative bodies." (*Id.* at pp. 13, 17.)

2. Charter cities' home rule powers encompass the police power.

The municipal affairs power is "broad enough to include all powers appropriate for a municipality to possess." (*Ex parte Braun,* 141 Cal. at p. 209.) One such appropriate, and in fact "indispensable[,] prerogative of sovereignty" is the police power. (*Miller v. Board of Public Works* (1925) 195 Cal. 477, 484.) A charter city may use its home rule power to regulate private conduct within the municipality to promote the public welfare, which is the essence of the police power. (*CalFed,* 54 Cal.3d at p. 14 [municipal affairs doctrine is applicable to "charter city regulatory measures"]; *In re Hubbard* (1964) 62 Cal.2d 119, 127-28

(footnote continued from previous page)
(Sato, *Municipal Affairs in California* (1972) 60 Cal.L.Rev. 1055, 1058.) Charter cities' "power of complete autonomous rule with respect to municipal affairs represents a vast residuum of power ... giving to a charter city a potentially much greater range of power than that available to the general law cities." (Grodin et al., *The California State Constitution: A Reference Guide* (1993 Ed.), at 189.)

[charter city may enforce local law banning games of chance notwithstanding state anti-gambling statutes, because local law was "a regulation of a municipal affair" as to which charter cities enjoy "the exclusive right" to regulate].)

3. The *CalFed* analysis.

CalFed and its progeny describe the approach that courts facing home rule issues must follow. First, the court will not resolve a putative conflict between a state statute and a charter city measure unless it "implicates a municipal affair," and "poses a genuine conflict with state law." (*CalFed,* 54 Cal.3d at p. 17.) If these requirements are met, "the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted." Only where a genuine statewide concern is implicated, and where the state law is narrowly tailored to resolve that concern, can the state statute take precedence over the conflicting charter city measure. (*Id.*)

A court may not lightly assume that a matter implicates statewide interests. Rather, in order to "resist[] the invasion of areas which are of intramural concern only, preserving core values of charter city government," *CalFed* "*requir[es], as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal interests.*" (*Johnson,* 4 Cal.4th at pp. 399-400 [emphasis original].) It is for the courts, not the Legislature, to decide whether a given local law address a municipal affair or statewide concern. Even if the Legislature declares a subject to be of statewide concern, such declarations "do not ipse dixit make it so; we exercise our independent judgment as to that issue." (*CalFed,* 54 Cal.3d at p. 24, fn. 21.)

B. Section 3's Prohibition Addresses A Municipal Affair.

1. Section 3 implicates a municipal affair.

As an initial matter, Section 3 "implicate[s] a municipal affair." It addresses an urgent municipal concern: the handgun violence that exacts a

profound human and emotional toll on the City's residents, and also imposes huge financial costs on the City and its taxpayers. The power to protect public safety and the public fisc is certainly a "power appropriate for a municipality to possess." (*CalFed,* 54 Cal.3d at p. 12.)

2. Allowing a charter city to prohibit only its own residents from possessing handguns does not implicate any significant statewide interests.

If the Court concludes that Section 3 conflicts with state law, it must adjust the conflict between any state and local interests involved in that local provision, "allocat[ing] the governmental powers under consideration in the most sensible and appropriate fashion as between the local and state legislative bodies." (*CalFed,* 54 Cal.3d at p. 17.) To divest the City of its Constitutional home rule power, statewide concerns implicated by Section 3 must be genuine and weighty, not insubstantial or remote. The Court must uphold Section 3's prohibition as a municipal affair unless it finds "a *convincing basis* for [state] legislative action originating in extramunicipal concerns, one justifying legislative supersession based on *sensible, pragmatic considerations*." (*Johnson,* 4 Cal.4th at p. 405 [emphases added].)

a. Section 3's prohibition applies only to local residents.

Section 3 implicates no significant extramunicipal concerns, and thus regulates a municipal affair. One of the primary reasons is because it will not have meaningful impacts outside the City.

In *Ex parte Braun,* for example, the Court held that a charter city tax measure was a municipal affair, because it was "confined in operation to the city of Los Angeles, and affects none but its citizens and taxpayers and those doing business within its limits." (*Id.*, 141 Cal. at p. 210.) The law was "peculiarly for the benefit of the inhabitants of the city, and not directly for the benefit of any

one else." (*Id.*) Likewise, *Fisher v. County of Alameda* (1993) 20 Cal.App.4th 120 held that a charter city's real estate transfer tax regulates a municipal affair because it "has no impact outside the limits of the taxing municipality but rather 'is purely local in its effects.'" (*Id.* at pp. 130-31.) In *CalFed*, by contrast, the Court – relying on an unusually detailed record of express Legislative findings and reports – held that a charter city ordinance taxing financial institutions created extramunicipal concerns, because it implicated "a widespread fiscal crisis across the state." (*Id.*, 54 Cal.3d at p. 12.) Notably, the Legislature had expressly found a need for "tax rate parity" to create a level playing field among different types of financial institutions, and its findings were supported by extensive legislative and regulatory reports, developments in federal law, and "the increasingly vulnerable financial condition of the savings and loan industry throughout the decade of the 1970's and beyond." (*Id.* at pp. 18-24.) This elaborate record, the Court held, was sufficient to oust the charter city of the home rule authority it normally would enjoy over local taxes.

Like the ordinances in *Ex parte Braun* and *Fisher*, Section 3's handgun possession ban has purely local consequences, affecting "none but its citizens." (*Ex parte Braun,* 141 Cal. at p. 210.) It has no effect on transient, non-resident citizens who travel to or pass through San Francisco. Nor does it affect residents of neighboring cities who operate businesses in San Francisco, and keep handguns at such businesses. Section 3 creates no extramunicipal concerns that could take it outside San Francisco's home rule power.

b. *Doe* does not defeat the voters' exercise of home rule power.

The NRA argued below that *Doe* held that the 1982 handgun ban was not defensible under the home rule doctrine because of its effect on residents of nearby cities where San Francisco's handguns might be sold. Not so.

First, *Doe* contains no holding on home rule power. The City there *conceded* that its ordinance – which applied to non-residents and residents alike – did not regulate municipal affairs (136 Cal.App.3d at p. 513), and the scope of home rule authority was not at issue. While the court opined that the ordinance implicated statewide interests, its musings were unnecessary to the decision. As such, they are pure dicta that have no precedential value, and do not bind this Court. (*Trope v. Katz* (1995) 11 Cal.4th 274, 287.) [14]

Second, *Doe's* views about possible effects on residents of nearby cities do not accurately reflect the law of municipal affairs. In assessing possible extramunicipal effects, "no city acts in isolation," and "there are external consequences in whatever a city does. The issue is one of substantiality." (Sato, 60 Cal.L.Rev. at p. 1103.) And the cases require "a *convincing basis* for [state] legislative action originating in extramunicipal concerns," based on a "dimension *demonstrably* transcending identifiable municipal interests" – not merely a hypothetical extramunicipal ripple effect – to justify ousting a charter city of its home rule power. (*CalFed*, 54 Cal.3d at pp. 17, 18 [emphases added].) If the mere chance that a charter city law might have some slight extramunicipal consequence made the law a matter of statewide concern, then local tax measures – which logically will affect persons outside the jurisdiction, because they make the jurisdiction a more or less attractive place in which to live or do business – would address matters of statewide concern. But of course, that is not the law.

---

[14] Even if *Doe*'s statements on municipal affairs had precedential value, they would support the City more than the NRA. *Doe* opined that the 1982 ordinance was not a municipal affair primarily because it "prohibits possession by both residents and those passing through San Francisco," and thus "affects not just persons living in San Francisco, but transients passing through[.]" (*Id.*) That statement neatly underscores why *Doe* does not control, and why §3, being limited to City residents, is a valid exercise of home rule power.

(*Ex parte Braun*, 141 Cal. at p. 213 [business license tax is municipal affair]; *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4th 37, 47 [same].) This Court should not find any extramunicipal effect of Section 3 absent convincing proof. (See, e.g., *CalFed,* 54 Cal.3d at pp. 10, 20 at fn. 16, 24 [holding that charter city tax law implicated statewide concerns based on record of detailed Legislative findings].)

c. There is no state policy favoring handgun possession.

Section 3's prohibition also does not run afoul of any statewide concerns because California has no state policy favoring handgun possession, or promoting wider handgun availability.

Neither the federal nor the state Constitution contains any such policy. Indeed, there is no individual constitutional right to possess a handgun or other firearm. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481 [state assault weapons prohibition "does not burden a fundamental right under either the federal or the state Constitutions"]; *Galvan,* 70 Cal.2d at p. 866 [handgun registration requirement does not implicate Second Amendment].)

Nor does any state statute create a policy favoring handgun possession, or promoting wider handgun availability. To the contrary, the Legislature and the courts have concluded that "free access to firearms" creates a "danger to public safety." (*People v. Bell* (1989) 49 Cal.3d 502, 544 [holding that "the clear intent of the Legislature" in adopting Dangerous Weapons Control Act was to reduce that danger]; *People v. Scott* (1944) 24 Cal.2d 774, 782.) And the high court has held that firearms, and specifically handguns, create significant problems that are likely to require legislative attention. (*Galvan,* 70 Cal.2d at pp. 864, 866.)

Moreover, neither in Penal Code Section 12026, nor in any other statute cited by the NRA, has the Legislature even *attempted* to identify any statewide

concern that would warrant overriding local charter city regulations. And the Legislature has affirmatively recognized that local governments can regulate the possession of firearms. (Pen.Code Sec. 12071.4(b)(2).) The NRA offers no reason why the modest handgun possession prohibition that Section 3 imposes – upon San Franciscans, by San Franciscans, for San Franciscans – implicates any statewide concerns.

Because Proposition H carefully avoids regulating handgun possession by persons prohibited from possessing handguns under state law, upholding Section 3 as a valid home rule ordinance will not lead to a crazy quilt of local laws flouting state-imposed prohibitions. And because state laws that prohibit handgun possession by certain classes of persons or under certain circumstances, by definition, do not overlap with Section 3's prohibition, they do not show that prohibition implicates any statewide interest.[15]

VII. IF ANY PROVISION OF PROPOSITION H WERE UNENFORCEABLE, THE REMAINDER WOULD BE VALID

The trial court and the NRA failed to recognize that even if *Doe* were thought to compel a holding that Section 3 conflicts with state law, and even if Section 3 were not found to constitute a legitimate exercise of the City's home rule power, Section 2's ban on the *sale* of firearms and ammunition within City limits would survive. As discussed at pp. 18-25, *supra*, whatever the force of *Doe* with respect to bans on the *possession* of firearms, the California Supreme Court in *Great Western*, and the Court of Appeal in *CRPA* and *Suter*, have made abundantly clear that state law does not preempt local laws that outlaw *sales*. And the severability clause in

[15] For example, a state statute that prohibited handgun possession by convicted felons would not show Section 3 concerns any statewide interest, because Section 3 would not apply to convicted felons.

Proposition H makes equally clear that the voters would have intended the sales ban to survive even if the possession ban were struck down.[16]

The NRA attempts to avoid this result by instead drawing a distinction between handguns and long guns. It assumes that that Proposition H's bans on handgun possession *and* on sales of handguns and handgun ammunition should be invalidated, and then argues that the remainder of the measure cannot be given effect, because "anti-gun proponents," entirely unconnected to San Francisco and Proposition H, have sought to ban handguns but not long guns. (AA 62.) The City submits that this is a red herring, because the relevant distinction for severability purposes is between possession and sales, not between handguns and long guns. But the trial court adopted the NRA's approach and ruled that Section 2's ban on sales of long guns – though valid – could not be given effect, noting that "gun laws have traditionally regulated handguns more vigorously than long guns" and that Section 2 prohibits sales of "firearms" without separately mentioning handguns and long guns. (AA 967-68.) This was error.

"[T]he general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part." (*Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 330.) If the "full purpose of [an initiative] cannot be realized, *it seems eminently reasonable to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose*[.]" (*Gerken v. FPPC* (1993) 6 Cal.4th 707, 715 [emphasis original].) Courts "must give effect to

[16] "If any provision of this ordinance or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications o[f] this ordinance which can be given effect without the invalid or unconstitutional provision or application. To this end, the provisions of this ordinance shall be deemed severable."

the intent of the electorate to the greatest extent possible where only portions of an enactment are defective." (*City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 631.)

Even if this Court concludes that Proposition H is partially invalid, therefore, the valid portions must be given effect. Volitional severability turns not on the views of academics and gun control advocates, but rather on the intent of the voters. (*Gerken*, 6 Cal.4th at pp. 714-15.) Proposition H makes that intent clear. The text sets forth distinct substantive sections, of which Section 2 seeks to reduce access to all firearms and ammunition, while Section 3 separately seeks to prohibit handgun possession. Even within Section 2, the measure separately addressed "firearms" and "ammunition," calling its prohibitive intent as to each to the voters' explicit attention. Within the initiative's substantive sections, all of its various prohibitions are presented with equal dignity and importance.

The measure's legislative history, likewise, shows that the voters' overall goal was not limited to handguns, but rather was to tackle the gun violence crisis with a combination of distinct prohibitions. The ballot title informed voters the measure was a "Firearm Ban," not merely a handgun ban. The ballot question called out the measure's distinct goals of prohibiting sales and transfers of firearms and ammunition, and, separately, prohibiting handgun possession. And the Ballot Simplification Committee's Digest highlighted the distinct purposes of Sections 2 and 3 in separate paragraphs. The voters, therefore, desired to address violence caused by all types of guns, not merely handguns, by making *all* firearms and *all* ammunition less available through a variety of prohibitions. As the measure's Proponent argued, "no single strategy will solve San Francisco's epidemic of violence," and the voters thus sought a combination of strategies. If some of their chosen strategies are invalid, the remainder must be put into effect.

Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, cited by the trial court, does not control. The Court there struck down a rent control initiative because it allowed approval of rent increases only through cumbersome administrative adjudication process, "making inevitable the arbitrary imposition of unreasonably low rent ceilings." (*Id.,* 17 Cal.3d at p. 169.) The Court invalidated the entire initiative, because severing its illegal provisions would leave the initiative with *no* rent increase mechanism, and the Court was powerless to craft a replacement mechanism. (*Birkenfeld,* 17 Cal.3d at p. 173.) Here, in contrast, no judicial drafting would be required even if Section 2's sales prohibition were preempted as to handguns, because such partial preemption would not dictate that the term "firearm" be excised from Section 2. Instead, if the sales ban could not be legally applied to handguns, the result would be only "partial preemption" – that is, preemption of a law in some but not all of its possible applications – which "does not invalidate the Ordinance." (*Nordyke,* 27 Cal.4th at p. 884.) And more fundamentally, as discussed above, if this Court determines that Section 3 is invalid, it should nonetheless uphold Section 2 in its entirety.

CONCLUSION

The City respectfully requests that the judgment be reversed, and that the trial court be directed to deny the NRA's writ petition and enter judgment in the City's favor.

Dated: December 28, 2006

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Deputy City Attorneys

By: Wayne Snodgrass
WAYNE SNODGRASS

Attorneys for Defendants and Appellants

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 13,915 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 December 28, 2006.

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
VINCE CHHABRIA
Deputy City Attorneys

By: 
WAYNE SNODGRASS

Attorneys for Defendants and Appellants

PROOF OF SERVICE

I, MONICA QUATTRIN, 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 December 28, 2006, I served the following document(s):

APPELLANTS' OPENING BRIEF

on the following persons at the locations specified:

C.D. Michel
Don B. Kates
Thomas E. Maciejewski
TRUTANICH MICHEL, LLP
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Via Express Services Overnite

Honorable Paul H. Alvarado
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102
Via Hand Delivery

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
Via Hand Delivery

in the manner indicated below:

☒ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the 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 December 28, 2006, at San Francisco, California.

Monica Quattrin
MONICA QUATTRIN