

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)

FILED

MAY 18 2007

Court of Appeal - First App. Dist.
DIANA HERBERT

By _____
DEPUTY

**APPELLANTS' OPPOSITION TO
MOTION TO STRIKE OR DISREGARD**

The Honorable Paul H. Alvarado

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INTRODUCTION

Respondents have moved to strike or disregard declarations and other documents filed by appellants City concerning gun violence in San Francisco. Such evidence is legally relevant. It illuminates the problem that the City's voters adopted Proposition H to address, and it shows that the voters' response to that problem is rational. Respondents' motion should be denied.

ARGUMENT

A. The Challenged Evidence Shows That Section 3 Implicates a Municipal Affair.

Section 3 of Proposition H prohibits most San Francisco residents from possessing handguns within the city limits. The voters adopted this restriction as an exercise of the City's charter city home rule power. And as the City has explained in its Opening Brief, the Supreme Court, in *California Federal Savings and Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17 ("*CalFed*") and decisions following it, has described the analysis that courts must follow in adjudicating disputes involving the scope of charter city powers. Under *CalFed* and decisions that follow it, the impact that gun violence has on San Franciscans is relevant to this Court's municipal affairs analysis.

First, to avoid making unnecessary "choices between competing claims of municipal and state government," a court presented with a municipal affairs issue must first ensure that two "preliminary conditions are satisfied." (*CalFed, supra*, 54 Cal.3d at p. 17.) The first such "preliminary condition" is that the charter city measure at issue must "implicate[] a municipal affair" – that is, it must address a subject that is of legitimate concern to the municipality. (*Id.*; *see also id.* at p. 17 [requiring "identifiable municipal interests"].) This threshold requirement helps ensure that courts confront difficult constitutional questions only when there is a real need to do so – which would not exist when a municipality has legislated on subjects of no genuine local concern.

The declarations and evidence to which respondents object show how the lives of San Francisco residents are being devastated by gun violence. Those declarations and evidence are relevant to show that the City has a vital local interest in addressing gun violence. They thus prove beyond dispute that Section 3 of Proposition H "implicates a municipal affair" as required by *CalFed*.

Second, the *CalFed* Court emphasized that far from being "a fixed or static quantity, "the constitutional concept of municipal affairs ... must be answered in light of the facts and circumstances surrounding each case." (*CalFed, supra*, 54 Cal.3d at p. 16.) The "facts and circumstances" surrounding this case, which underscore the appropriateness of a home rule remedy, must include the circumstances that gave rise to Proposition H: namely, the damage that gun violence is wreaking on the fabric of City residents' lives.

Third, the Supreme Court repeatedly has held the Constitutional home rule power "was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large," and was intended "to give 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 [citing *Fragley v. Phelan* (1899) 126 Cal. 383, 387].) The declarations at issue here are relevant because they clearly and dramatically illustrate the "wants and needs" that the voters intended Proposition H, including its handgun possession prohibition, to address.

B. The Challenged Evidence Shows That Gun Violence Is Locally Variable, And Demands Local Solutions.

Respondents also move to strike or disregard the Declaration of Vince Chhabria, including its attached exhibits. But those exhibits are also entirely relevant, because they show that gun violence is a particularly localized problem.

They thus underscore the importance of San Francisco's interest in adopting locally tailored measures to tackle its gun violence epidemic.

The exhibits attached to the Chhabria Declaration show that between 1991 and 2003, almost 2,000 San Francisco residents were hospitalized for non-fatal firearms injuries, while only *three* residents of the far less densely populated Mono County – and just *one* resident of rural Alpine County – were hospitalized for such injuries during the same period. Those exhibits also show that even within San Francisco, gun violence is particularly prevalent in specific neighborhoods. They show that far from being an issue which is susceptible to uniform regulation at the state level, gun violence is enormously variable, plaguing some communities while leaving others relatively unscathed.

The Supreme Court has recognized that the need for gun regulation "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." (*Great Western Shows, Inc v. County of Los Angeles* (2002) 27 Cal.4th 853, 867.) Appellants' evidence, which amply documents that San Francisco's far greater population density is accompanied by far higher rates of gun violence, is relevant to support the voters' decision to rely on their home rule power to adopt this local firearms regulation.

C. The Challenged Evidence Shows That The Voters Have Not Acted Irrationally.

Respondents also move to strike or disregard what they call "policy evidence," such as (1) a study printed in the *New England Journal of Medicine* which found, among other things, that a handgun in the home was far more likely to be used against a friend, family member or acquaintance than against an intruder (A. Kellermann and D. Reay, *Protection or Peril? An Analysis of*

Firearm-Related Deaths in the Home, 314 New England Journal of Medicine 24, 1557 (June 1986) [Chhabria Dec., Ex. E]), and (2) another study from the New England Journal of Medicine concluding that Washington D.C.'s handgun ban has led to reduced rates of gun violence. (C. Loftin, et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 New England Journal of Medicine, 1615 (Dec. 5, 1991) [Chhabria Dec., Ex. D].)

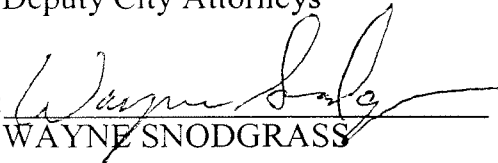
These documents were part of the voters' decision to adopt Proposition H and show the rationality of that decision. The first New England Journal of Medicine study mentioned above, finding that a handgun in the home was far more likely to be used against friends and family members than against intruders, *was specifically cited and described to the City's voters by Proposition H's proponent as a reason to support the measure*. Because the voters were specifically told of that study, and made aware of its conclusion, in connection with their consideration of Proposition H, the study is effectively part of the measure's legislative history. It is certainly relevant.

Likewise, the second New England Journal of Medicine study mentioned above – concerning gun violence rates in the District of Columbia – simply shows that the voters had a rational ground to conclude that prohibiting handgun possession by San Francisco residents would have a similarly salutary effect here. Because respondents have called into question the rationality of the voters' policy choice, and have expressly alleged that that decision was irrational in violation of

equal protection requirements, this evidence that the voters acted rationally is relevant.

Dated: May 18, 2007

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

By: 
WAYNE SNODGRASS

Attorneys for Defendants and Appellants

PROOF OF SERVICE

I, HOLLY TAN, declare as follows:

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

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

**APPELLANTS' OPPOSITION TO MOTION TO STRIKE OR
DISREGARD**

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

in the manner indicated below:

- BY MAIL:** I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, #1 Dr. Carlton B. Goodlett Place – City Hall, Room 234, City and County of San Francisco, California, 94102, for collection and mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.
- 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.

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

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



HOLLY TAN