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' OPPOSITION TO RESPONDENTS' MOTION FOR JUDICIAL NOTICE

The Honorable Paul H. Alvarado

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INTRODUCTION

Respondents' motion for judicial notice stretches the term "legislative history" well beyond the bounds of reason or precedent. The documents attached to respondents' motion either cannot constitute permissible legislative history for Penal Code Section 12026 and the Unsafe Handgun Act (Penal Code §§ 12125 *et seq.*), or else are irrelevant here because they shed no light on the intent of the Legislature with respect to the issues presented in this case. Appellants respectfully request that respondents' motion for judicial notice be denied.

LEGAL STANDARDS

"If the language [of a statute] is clear and unambiguous, there is no need for construction." (*People v. Boudames* (2006) 146 Cal.App.4th 45, 51 [cites omitted].) Therefore, a court will not even consider legislative history unless the statutory language is ambiguous. (*Kavanaugh v. West Sonoma County Union H.S. Dist.* (2003) 29 Cal.4th 911, 919; *Zembsch v. Superior Court* (2006) 146 Cal.App.4th 153, 168 fn. 10.) Where there is no ambiguity, the Court will not take judicial notice of secondary indicia of legislative intent, because such materials are legally irrelevant. (*Id.*)

Even if the statutory language is ambiguous, the Court may only consider legislative history that reflects the probable intent of *the entire Legislature* – not merely the views of a single legislative proponent, or a person or entity outside the Legislature. "In construing a statute we do not consider the objective of an authoring legislator when there is no reliable indication that the Legislature as a whole was aware of that objective and believed the language of the proposal would accomplish it." (*Kavanaugh v. West Sonoma County Union H.S. Dist.* (2003) 29 Cal.4th 911, 920 fn. 6; *People v. Johnson* (2002) 28 Cal.4th 240, 247; *Gaetani v. Goss-Golden Wet Sheet Metal Profit Sharing Plan* (2000) 84 Cal.App.4th 1118, 1132 [purported legislative history materials "are not helpful on the question of

legislative intent" where "there is no showing that legislators had any of those sources before them" when they enacted the statute in question].)

These rules apply with equal force to *all* purported legislative history documents, whether obtained from the Legislative Intent Service or elsewhere. (*In re Marriage of Pendleton and Fireman* (2000) 24 Cal.4th 39, 47 fn. 6 [declining to take judicial notice of documents gathered by Legislative Intent Service because "it is not apparent that either was considered by the Legislature when [the statute] was considered"]; *Whaley v. Sony Computer Entertainment America, Inc.* (2004) 121 Cal.App.4th 479, 487 [report "obtained by Legislative Intent Service" is "not a proper indicator of legislative intent" because "there is no evidence that this ... report was ever presented to any of the legislators who voted on the bill"].)

RESPONDENTS' PROFFERED MATERIALS ARE NOT PERMISSIBLE LEGISLATIVE HISTORY

I. PURPORTED LEGISLATIVE HISTORY FOR PENAL CODE SECTION 12026

A. Because Penal Code Section 12026 is Unambiguous, Its Purported Legislative History Is Irrelevant.

The first seven documents of which respondents seek judicial notice purportedly constitute legislative history for Penal Code Section 12026. But there is no need to consider *any* legislative history for Section 12026, because that statute is straightforward and unambiguous. It simply states, in relevant part, that "no permit or license" may be required to purchase, own, possess, keep, or carry a concealable firearm in one's home or place of business. (*Id.*, §12026(b).)

The courts have repeatedly applied Section 12026 according to its plain terms, "finding no preemption of areas not specifically addressed" by the statute. (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 fn. 2.) The Supreme Court has given "section 12026's expression of Legislative intent *the narrowest possible construction*" (*id.* [emphasis added]), holding that "Section 12026 ... prohibits licenses or permits," but does not preempt local firearms laws that do

not impose a license or permit requirement. (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 856.) "The fact that the Legislature limited the coverage of this statute 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 ..." (*California Rifle & Pistol Ass'n v. City of West Hollywood* (1998) 66 Cal.App.4th 1032, 1311-12.)

Section 12026 unambiguously prohibits only local laws *requiring permits or licenses* to possess handguns at home. Respondents' motion for judicial notice of purported legislative history for Section 12026 should be denied.

B. The Court Cannot Take Judicial Notice of Documents That Were Not Before The Legislature.

Moreover, many of the materials attached to respondents' motion are not subject to judicial notice because there is no evidence that the Legislature was ever aware of them. (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 168 fn. 2 [rejecting request for judicial notice of press articles where "there is no indication that these articles were considered by the Legislature"]; *Johnson, supra,* 28 Cal.4th at p. 247 ["memorandum prepared in the Office of the Attorney General ... is irrelevant to our interpretation" of statute absent any evidence the Legislature was aware of it].)

1. Exhibit 1.

Respondents' proffered Exhibit 1 is an undated newspaper article from the San Francisco Chronicle, apparently published in or about 1923. Because it reports on the Legislature's adoption of the Dangerous Weapons Control Act, it obviously was printed *after* that Act was adopted. As such, it could not have been considered by either the Legislature or the Governor in connection with the passage of that Act. And while the article purportedly reflects the views of a single individual – "R.T. McKissick, president of the Sacramento Rifle and

Revolver Club" – Mr. McKissick was not a legislator. There is no suggestion that his views were ever communicated to even a single legislator, let alone to the entire Legislature or to the Governor. The article says nothing about the intent of the Legislature as a whole, and thus is incompetent and inadmissible as legislative history. This Court should not take judicial notice of the article, and should not consider any portion of respondents' brief that discusses it.

2. Exhibit 2.

Respondents' proffered Exhibit 2 is an article entitled "Pistol Regulation – Its Principles and History." The document states that it was written by "a former President of the National Rifle Association and member of its Board of Directors and Executive Committee," and that it was originally published in the 1930 and 1931 issues of "The American Rifleman," before it was "[r]evised [in] 1964 by [the] National Rifle Association." (Ex. 2 at pp. 1, 2.) This document is entirely hearsay, and consists of the self-interested views of a member of one of the parties to this suit.

Equally important, the document – even in its original, 1930 version, before it was revised in some unspecified manner by the NRA in 1964 – was published seven years *after* the Legislature, in 1923, adopted the Dangerous Weapons Control Act, including what became Penal Code Section 12026. Exhibit 2 thus was not before the Legislature when it adopted that Act in 1923. Moreover, none of the statements in Exhibit 2 purport to reflect the views of any member of the Legislature. It is inadmissible as legislative history, and this Court should not take judicial notice of it.

3. Exhibit 3.

Respondents' proffered Exhibit 3 is a memorandum, apparently authored by a single Deputy Attorney General, concerning AB 4370, which was subsequently adopted and amended Penal Code Section 12026. The

memorandum is variously dated "4/25/88" (on its first page) and "4/21/88" (on its last page). Exhibit 3 does not state why it was prepared, or to whom it was provided.

There is no suggestion that even a single member of the Legislature, much less the entire Legislature, was ever aware of Exhibit 3, either at the time the Legislature considered AB 4370 or at any other time. Therefore, Exhibit 3 is inadmissible as legislative history, and this Court should not take judicial notice of it. (*Johnson, supra,* 28 Cal.4th at p. 247 ["memorandum prepared in the Office of the Attorney General ... is irrelevant to our interpretation" of statute absent any evidence the Legislature was aware of it].)

II. PURPORTED LEGISLATIVE HISTORY FOR THE UNSAFE HANDGUN ACT

Exhibits 8 through 18 attached to respondents' motion for judicial notice purportedly constitute legislative history for the Unsafe Handgun Act, Penal Code Sections 12125 *et seq.* The Court should not take judicial notice of these documents because they do not constitute permissible legislative history for that enactment.

1. Exhibits 9 through 13.

Respondents' proffered Exhibits 9 through 13 purport to show that an amendment to the Unsafe Handgun Act addressing preemption was proposed by the City of San Jose, was approved by the Assembly, but was ultimately removed from the bill prior to its adoption.

"[W]hen the Legislature amends a bill to add a provision, and then deletes that provision in a subsequent version of the bill, this failure to enact the provision is of little assistance in determining the intent of the Legislature." (*American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1261-62 [fact that Legislature did not include preemption provision in statute as

adopted does not shed any light on legislative intent].) Therefore, Exhibits 9 through 13 are not admissible as legislative history, and this Court should not take judicial notice of them.

2. Exhibits 8 and 15-18.

Respondents' proffered Exhibits 8 and 15 through 18 are letters sent to one or a few members of the Legislature (or, in one instance, to the Governor) by various members of the public, constituents, interested advocates, or local government entities, concerning the UHA, including a prior version of that law that was not enacted.

Such "comments from constituents to the Legislature" and "third party's opinion[s] regarding the legislative process" are not evidence of the Legislature's intent. (*American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1262 fn. 11 [holding such outside communications are of even "less worth" than "the statements of individual legislators [which] generally are not considered"].) Additionally, letters sent to individual legislators, stating "the individual opinions of their authors," do not constitute proper legislative history because they shed no light on the views of the Legislature as a whole. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 fn. 5 [denying judicial notice of "several letters ... to various legislators and the governor expressing opinions in support of and in opposition to the bill"]; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 38.)

Exhibits 8 and 15 through 18 are solely the comments or views of outsiders to the legislative process. They thus are not admissible as legislative history. This Court should not take judicial notice of them.

3. Exhibit 14.

Respondents' proffered Exhibit 14 is a Senate Committee report opining that the UHA, if adopted, "would appear to preempt" local laws that, like the UHA, prohibit the sale of handguns deemed to be unsafe because of their inferior quality, such as Saturday Night Specials. Whether the UHA would preempt such local laws, however, is irrelevant here, because the sales prohibition contained in Proposition H is unrelated to the perceived quality of the handgun at issue, and does not share the UHA's consumer protection purpose. Because Exhibit 14 is irrelevant to the preemption issue presented here, this Court should not take judicial notice of it.

Dated: May 18, 2007

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

By: /s/ Wayne Snodgrass
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 RESPONDENTS' MOTION FOR JUDICIAL NOTICE

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