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' REPLY BRIEF

The Honorable Paul H. Alvarado

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal Cases

State Statutes & Codes

INTRODUCTION

This case involves Proposition H, a 2005 San Francisco firearms control initiative adopted by voters who were shocked at the City's mounting and seemingly intractable gun violence epidemic.

In seeking to respond to this crisis, the City's voters employed tools long enjoyed by local governments. It is well-settled that problems of gun violence are highly variable, often differing significantly between dense urban cities and sparsely populated rural counties. For that reason, the Legislature has proceeded with considerable caution in its regulation of firearms, and local governments retain considerable authority to adopt individually tailored measures to respond to local conditions. Particularly within the last 10 years, the Supreme Court and courts of appeal have repeatedly recognized that local jurisdictions are the front line of firearms regulation. They have repeatedly interpreted state gun statutes so as to preserve and protect cities' and counties' regulatory authority, and have found preemption only reluctantly, upon a clear indication that the Legislature sought to preempt local authority.

In opposing Proposition H, respondents the National Rifle Association *et al.* (hereinafter "the NRA") seek to set all of these principles aside. The NRA asks the Court to expansively interpret state gun statutes in a manner that would greatly diminish local jurisdictions' well-settled regulatory power. Most significantly, the NRA urges the Court to adopt sweeping interpretations of state statutes that, by their clear terms, do nothing more than prohibit local licensing requirements, so that those statutes instead preempt regulatory power over a wide variety of gun-related conduct not related to the licensing of firearms. It also asks this Court to imply into those statutes an *individual right* to purchase handguns and handgun ammunition – a request that other appellate courts have carefully

considered and rejected, and that, if granted, would further encroach on local authority in this all-too-vital regulatory arena.

The City respectfully urges the Court to reject these efforts to refashion California's gun preemption jurisprudence. Because the Legislature has not sought to preempt local authority to regulate sales of firearms, including handguns, Section 2 of Proposition H – which prohibits such sales within city limits – must be upheld. And because the 1982 appellate decision that the NRA relies on to oppose Proposition H's handgun possession ban cannot be reconciled with the significant developments in our state's gun preemption jurisprudence since then, the measure's ban – which affects only San Francisco residents, and precludes handgun possession only within city limits – must also be upheld.

ARGUMENT

I. THE TRIAL COURT'S ENTIRE RULING IS SUBJECT TO DE NOVO REVIEW

A trial court decision invalidating a local ordinance on grounds of preemption is reviewed de novo. (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 889.) Similarly, where a charter city ordinance is challenged on preemption grounds and is defended as a permissible exercise of the city's home rule power, the challenge presents "a pure question of law subject to de novo review." (*City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 882 [footnote omitted].) Because such a claim "requires a critical consideration" of "legal principles and their underlying values," it presents legal questions, and requires de novo review – particularly where, as here, the historical facts are undisputed. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1236.)

The NRA tries to insulate the decision below from *de novo* review, claiming that the trial judge's conclusions about future consequences of

Proposition H's ban on handgun possession are "foundational findings of fact" that "should be reviewed with deference." (Respondents' Brief ("RB") at 19.) But the trial judge did not purport to be engaged in factfinding. (Appellants' Appendix ("AA") 952-54.) He could not have done so, because neither party presented *any* evidence about potential consequences of prohibiting handgun possession by San Francisco residents.[1] The very limited evidence that was before the trial judge – consisting only of a few declarations, with no live testimony – related only to other issues, and was, in any event, undisputed. The NRA has conceded the purely legal nature of the dispute, both by initially filing its petition directly in this Court (AA 7), and by subsequently acknowledging that this case presents "purely legal issues." (AA 636.) The trial judge's opinions as to the consequences of Proposition H's handgun ban are not entitled to deference.[2]

The NRA also attempts to shift the burden of proof on the substantive preemption issues to the City, based on the presumption that a judgment is correct and will be affirmed absent a sufficient showing that the trial court erred. (RB at 19.) But that presumption merely requires, as a procedural matter, that the appellant provide a record and arguments adequate to show trial court error. It "applies only on a silent record," and is irrelevant where, as here, the record shows the grounds on which the trial court ruled. (*Border Business Park, Inc. v.*

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[1] The sole exception was the declaration of an antique firearms dealer, addressing the effects of Proposition H on sales of antique weapons. (AA 70-73.) That declaration did not discuss any subject relevant to the trial judge's conclusions that the NRA labels "foundational findings of fact."

[2] The NRA also claims the trial judge's conclusions must be given deference under the "conflicting inference rule." (RB at 20.) But in trying to use that rule to convert a legal question into a question of fact, the NRA "stretche[s the rule] beyond reasonable limits." (*Hudson Properties Co. v. Governing Board* (1985) 168 Cal.App.3d 63, 72 fn. 6.) The rule "has no application" here, because the Court "is not drawing inferences from conflicting facts." (*Id.*)

City of San Diego (2006) 142 Cal.App.4th 1538, 1550; *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 39 Cal.App.4th 1379, 1384.) On appeal, therefore, as in the trial court, the NRA has the burden of demonstrating that Proposition H is preempted.

II. THE COURT CANNOT FIND THAT PROPOSITION H IS PREEMPTED ABSENT A CLEAR INDICATION OF PREEMPTIVE INTENT ON THE PART OF THE LEGISLATURE

In its opening brief, the City explained that California courts follow a "presumption against preemption," requiring that the party challenging a local law bears "the burden of demonstrating preemption." (Appellants' Opening Brief ("AOB") at 10-11 [citing, *inter alia, Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149].) As the City explained, courts are "particularly reluctant to infer" a legislative intent to displace local authority to regulate guns and ammunition, because "there is a significant local interest to be served that may differ from one locality to another." (AOB at 11 [citing *Big Creek, supra*, 38 Cal.4th at p. 1149, and *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866-67].)

Seeking to avoid this "presumption against preemption," the NRA tries to distinguish *Big Creek* as merely "a land use case" that "had nothing to do with firearms law." (RB at 35.) It also insists that "regulation of guns is primarily a state matter." (RB at 35-36.) This claim is squarely wrong. Multiple Supreme Court decisions show that gun control, much like land use, is an area of primarily local regulatory concern, in which the courts must uphold local power absent a clear indication that the Legislature sought to preempt local authority.

In *Big Creek* itself, for example, the high court expressly relied on its prior gun control decisions in *Great Western, supra*, and *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 862-64, to support its holding that "if there is a significant local interest to be served which may differ from one locality to another then the

presumption favors the validity of the local ordinance against an attack of state preemption." (*Big Creek, supra*, 38 Cal.4th at p. 1149.) .By explicitly grounding its holding as to the primacy of local regulatory power in the Court's gun control jurisprudence, *Big Creek* shows that gun regulation is a matter of significant and longstanding local interest. It is not, as the NRA claims, primarily a state matter.

This conclusion is bolstered by *American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239. The Court there held a municipal ordinance regulating mortgage lending to be preempted by state law, in part because of the Court's conclusion that "regulation of mortgage lenders has historically occurred at the state, not the municipal, level." (*Id.*, 34 Cal.4th at p. 1255.) The Court explained that conclusion by *expressly distinguishing* the subject of gun control, an area in which "the Legislature has attempted 'to tread lightly on a narrow path'" to preserve local regulatory authority:

> [M]ortgage lending is **unlike the area of gun control law ... in which courts have concluded that the Legislature has chosen to legislate narrowly**, and 'rather than intending to deprive municipalities of their police power to regulate handgun sales has been cautious about depriving local municipalities of aspects of their constitutional police power to deal with local conditions.'

(*American Financial Services, supra*, 34 Cal.4th at pp. 1255-56 [emphasis added] [citing *California Rifle & Pistol Ass'n, Inc. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302 ["*CRPA*"] and *Great Western, supra*].) *American Financial Services* underscores that far from being a matter of primarily state control, gun regulation is a subject of longstanding local concern, with great variability in local conditions, and correspondingly broad local regulatory power to address those conditions.

Moreover, the Supreme Court's gun control cases undermine the NRA's claim that gun control is a subject of primarily state concern. (*See* AOB at 12-13.) To the contrary, the Court has held that because "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," there "is a significant local interest to be served" in gun regulation "that may differ from one locality to another." (*Great Western, supra*, 27 Cal.4th at p. 867.) In the area of firearms regulation,

> [w]e are persuaded .... that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities, so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements.

(*Galvan, supra*, 70 Cal.2d at p. 864.) For that reason, courts are "reluctant to find ... implied preemption" of local gun control laws. (*Great Western, supra*, 27 Cal.4th at p. 867.) Instead, "the cases uniformly construe state regulation of firearms narrowly, finding no preemption of areas not specifically addressed by state law." (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 fn. 2.)

This does not mean, of course, that the Legislature *cannot* preempt any aspects of local power to regulate firearms. Nor does it mean that some aspects of gun control are not already fully occupied by state statute. For example, the Legislature has preempted local power to require that guns be registered or licensed (Gov.Code § 53071); to regulate the manner in which gun dealers store their weapons (Pen.Code §12071); and to require that gun owners obtain a permit to purchase a handgun or to keep a handgun in their home or business (Pen.Code §12026(b).) But these regulatory fields are preempted because the Legislature has made its preemptive intent as to them quite clear – not, as the NRA would urge, merely because they are somehow related to an area covered by state statute, or contain a few words in common with a state statute, or otherwise are within the penumbra of a state statute.

This Court, therefore, must start with the presumption that Proposition H is not preempted. The Court must uphold the choice of San Francisco's voters.

unless there is a clear indication that the Legislature intended to preempt the voters' power to adopt such a measure.

III. THE NRA MISCHARACTERIZES CALIFORNIA GUN LAWS

To support its efforts to rewrite California gun preemption jurisprudence, the NRA repeatedly misstates the holdings of California firearms decisions, as well as the nature of state firearms statutes. This Court should not allow itself to be misled.

A. The "Mono County" Principle Is Not Limited To Problems Caused By Guns That Are Carried Or Fired In Public.

First, the NRA tries to sidestep the principle that has guided California's gun preemption jurisprudence since our high court announced it nearly four decades ago: "[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." (*Galvan, supra*, 70 Cal.2d at pp. 863-64; *see also Great Western, supra,* 27 Cal.4th at pp. 862, 867 [repeating principle twice].) The NRA claims this seminal language refers only "to *public* possession of loaded firearms and *public discharge* of firearms," but not to gun possession in one's home or business. (RB at 5 [emphasis original].) While such an artificial reading dovetails with the NRA's claim that cities cannot regulate gun-related conduct occurring in private homes, the high court's words were not so limited.

It is illogical to think that the only "problems with firearms" that are more prevalent in urban areas are those that involve guns in public places. Guns create very serious threats to health and safety even when they remain behind closed doors. Accidental shootings are tragically common; all too often, the victims are children. The Legislature has found that "[t]he United States leads the industrialized world in the rates of children and youth lost to unintentional, firearms-related deaths," and that according to a federal study, the rate of

accidental gun killings of children under age 15 in the United States is "nine times higher than in 25 other industrialized countries combined." (Pen.Code §12087.5(b).) More than 11 children each month are accidentally shot or killed by guns in a single year, and for every child accidentally shot to death, nearly eight more children require emergency hospital treatment for nonfatal accidental gunshot wounds. (*Id.*, §12087.5(a), (c).) The great danger posed by guns, even in private homes, is shown by statutory requirements, for example, that all firearms be sold with an accompanying approved safety device (such as a storage safe) to reduce the risk of accidental shootings (Pen.Code §12088.1(a)), and that no handgun purchaser may take possession of a handgun until he or she has obtained "a valid handgun safety certificate." (Pen.Code §12071(b)(8)(B).)

Even if they are never carried or fired in public, therefore, guns create deadly risks to human life and safety. Those risks may well increase in urban areas, where gun owners and their children are less likely to have experience with hunting and with cleaning and handling guns, and where children of working parents who own guns may often be at home unsupervised.

Moreover, the facts of *Galvan* and its progeny, as well as the language used in those cases, show that the high court's Mono County statement does not refer only to problems caused by carrying or firing loaded guns in public. *Galvan* itself upheld a local ordinance that made it unlawful "to own, possess or control an unregistered firearm" at any location (70 Cal.2d at p. 854, fn 1) – including inside one's home or business.[3] The conduct at issue was not limited to loaded

[3] If the ordinance in *Galvan* had not prohibited possession of unregistered guns in one's home, the Court would have had no need to differentiate between "registration" and "permitting"/"licensing" in order to hold that Penal Code Section 12026 – which forbids local permit or license requirements to possess a handgun in one's home – did not preempt that ordinance. (*Id.*, 70 Cal.2d at pp. 856-57.)

guns, to carrying any gun (loaded or not) in public, or to firing guns in public, and the Court's discussion of the need for local regulation was equally broad. Similarly, *Suter* – which upheld a local ordinance that imposed local permit requirements on gun dealers (*id.*, 57 Cal.App.4th at p. 1116) – did not involve public possession or public firing of loaded guns. This Court there cited the Mono County principle to explain the narrow scope of preemption of local power to regulate guns *in general*, not merely to regulate how guns are carried or used in public. (*Id.*, 57 Cal.App.4th at pp. 1119-20; *see CRPA, supra*, 66 Cal.App.4th at p. 1318.) The high court's recognition of the need for local authority to regulate firearms applies with equal force, therefore, to all gun problems, including those occurring in private homes or on private property.

B. The Legislature Has Not Comprehensively Regulated Most Aspects of Firearms-Related Conduct.

Based on the large number of state statutes regulating different kinds of firearms and firearms-related conduct, the NRA asserts that the state has adopted "comprehensive firearms regulations" making up a "comprehensive regulatory regimen." (RB at 17.) This contention mischaracterizes California's firearms statutes, and it also ignores controlling precedent.

Even by their own terms, our state's gun statutes are *not* comprehensive. Even as it has enacted various prohibitions and exceptions to those prohibitions, the Legislature has expressly acknowledged that local governments retain considerable latitude to regulate most firearms-related conduct. For example, the Legislature has recognized local authority to "restrict [and] regulate the sale of firearms" (Pen.Code §12071(a)(6)), and to adopt "local laws dealing with the possession and transfer of firearms." (*Id.*, §12071.4(b)(2).) Such statutory recognitions of local power defeat any claim that the Legislature has occupied the fields of gun sales, transfers, or possession.

Second, the NRA's claims of a "comprehensive regulatory regimen" fly in the face of repeated judicial holdings that the Legislature has preempted only "discrete areas" of gun regulation (*Great Western, supra*, 27 Cal.4th at p. 861), and has been "cautious about depriving local municipalities of aspects of their constitutional police power to deal with local conditions." (*American Financial Services, supra*, 34 Cal.4th at p. 1255.) "'The Legislature's response to cases upholding local weapons legislation against a preemption challenge itself is persuasive evidence that *it has no intention of preempting areas of weapons laws not specifically addressed by state statute*.'" (*CRPA, supra*, 66 Cal.App.4th at p. 1316 [emphasis added]; *Suter, supra*, 57 Cal.App.4th at p. 1119.) The NRA's claims of comprehensive state firearms regulation are simply fiction.[4]

IV. THE NRA HAS FAILED TO SHOW THAT SECTION 2 OF PROPOSITION H IS PREEMPTED

In its opposition brief, the NRA greatly exaggerates the preemptive scope of state law, claiming that Section 2 of Proposition H – which prohibits the sale, transfer, manufacture, and distribution of firearms and ammunition in San Francisco – is preempted by Government Code Section 53071 ("Section 53071"), and, at least with respect to handguns, by Penal Code Section 12026 ("Section 12026") and by the Unsafe Handgun Act (Penal Code Section 12125 *et seq.*) None of these arguments withstands scrutiny.

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[4] The number of gun-related statutes is not determinative of the Legislature's preemptive intent. "The fact that there are numerous statutes dealing with guns ... does not by itself show that the subject of gun or weapons control has been completely covered .... [t]o approach the issue of preemption as a quantitative problem provides no guidance in determining whether the Legislature intends that local units shall not legislate concerning a particular subject, and further confounds a meaningful solution to preemption problems by offering a superficially attractive rule of preemption that requires only a statutory nose-count." (*Galvan, supra*, 70 Cal.2d at p. 861.)

A. Government Code Section 53071 Does Not Preempt Section 2.

According to the NRA, Section 53071 expressly preempts Section 2's ban on sales of firearms because Section 53071 bars local laws "relating to registration or licensing of ... firearms," and any gun dealers operating in San Francisco possess state-issued licenses to sell firearms. (AOB at 47.) This claim, if accepted by this Court, would rewrite Section 53071 to preempt virtually all local firearms regulations. This Court must reject it.

First, the NRA ignores Section 53071's plain text. Licensing of *firearms* – which is all that Section 53071 addresses – is distinct from licensing of firearms *dealers*. A law that affects a gun dealer's operations, even one that forbids a gun dealer from selling guns or ammunition, does not have any effect on the "registration or licensing of commercially manufactured firearms." Whether or not guns and ammunition can be sold in San Francisco, the degree to which any person must register or license any firearm remains unchanged. The NRA in effect asks the Court to read into Section 53071 a prohibition against local laws "relating to registration or licensing *of dealers* of commercially manufactured firearms," but the law's plain text precludes such a claim.

Moreover, the NRA's Section 53071 claim is undermined by controlling caselaw, which repeatedly has held that local laws restricting the operations of state-licensed gun dealers are *not* preempted by Section 53071. Respondents' claim rests on the proposition that because gun dealers are licensed by the state, any law that restricts such dealers' operations interferes with those state-issued licenses, and thereby "relates to" licensing for purposes of Section 53071. But the local law prohibiting sales of Saturday Night Specials upheld in *CRPA*, *supra*, obviously interfered with the operations of state-licensed gun dealers in West Hollywood, yet it was not preempted by Section 53071; to argue otherwise, the court explained, "stretches the words of [Section 53071] beyond their literal

meaning[.]" (*Id.*, 66 Cal.App.4th at p. 1313.) Similarly, the local law prohibiting sales of any firearms or ammunition on county property upheld in *Great Western, supra*, obviously interfered with the operations of state-licensed gun dealers at gun shows, but the high court held that local law was not preempted by Section 53071. (*Id.*, 27 Cal.4th at pp. 862-63.) And the local law that this Court upheld in *Suter, supra* – which prohibited gun dealers from operating in many areas of the locality, and prohibited gun sales unless accompanied by trigger locks or similar safety devices – clearly interfered with the operations of state-licensed gun dealers in Lafayette, but nonetheless was held not preempted. (*Id.*, 57 Cal.App.4th at pp. 1118-22, 1127.)

The NRA strives to avoid these holdings, pointing out that the local law upheld in *CRPA* applied only to certain kinds of guns, while the local law upheld in *Great Western* prohibited sales on county property. (RB at 47.) But such factual distinctions do not alter the central fact about how the courts have interpreted Section 53071: although that statute "expressly declare[s] that the City may not require the licensing or registration of firearms" (*CRPA, supra*, 66 Cal.App.4th at p. 1313), it does not limit the City's ability to regulate firearms sales in ways that do not impose registration or licensing requirements. Its "legislative intent was limited to registration or licensing." (*Great Western, supra*, 27 Cal.4th at p. 862.) As Government Code Section 53071.5 – expressly occupying the field of imitation firearms sales – shows, "the Legislature has made a distinction, for whatever reason, between regulating the sale of real firearms and regulating the sale of imitation firearms." (*Id.*, 27 Cal.4th at p. 863.) It has occupied the field of sales of imitation firearms, but has left the field of real firearms sales to local control.

The NRA also complains that even though "state law authorizes cities to regulate gun store operations," it "says nothing about outlawing gun sales

entirely." (RB at 45.) But this assertion turns preemption principles on their head. The fact that state law says nothing about whether cities can regulate in a particular manner means that cities can do so, not that they cannot. (*CRPA, supra*, 66 Cal.App.4th at p. 1322-23.) And the NRA's concession that cities retain the power to regulate gun sales effectively undermines its preemption claim. Because the "power to regulate includes the power to prohibit" (*Personal Watercraft Coalition v. Board of Supervisors* (2002) 100 Cal.App.4th 129, 150 [ellipses omitted] [citing *Young v. Dept. of Fish & Game* (1981) 124 Cal.App.3d 257, 279]), "[p]rohibition does not ... establish a per se excess of regulatory power." (*Personal Watercraft Coalition, supra,* 100 Cal.App.4th at p. 150.) The NRA has identified nothing in Section 53071 that distinguishes between local power to limit gun sales and local power to prohibit such sales. In deciding not to strip local jurisdictions of their power to regulate firearms sales, therefore, the Legislature has effectively allowed local jurisdictions to retain their power to completely prohibit such sales.

B. Penal Code Section 12026.

The NRA also claims that Proposition H's ban on firearms sales, at least as it applies to handguns, is preempted by Section 12026. Seeking to leverage the faulty reasoning of *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509, the NRA claims that by expressly preempting local power to require a permit or license to purchase a firearm, the Legislature must have also meant "that sales are lawful without a local license or permit" – that is, that local power to prohibit any firearms sales is preempted. (RB at 49.) This claim, too, seeks to reconfigure a statute of limited preemptive scope into a statute that would bar most, if not all, local gun regulation. It must be rejected.

1. The Supreme Court and other courts have held that Section 12026 has no such broad preemptive effect.

First, respondents' claim is flatly refuted by *CRPA* and *Great Western*. The court in *CRPA* held that Section 12026 does *not* preempt local authority to prohibit sales of handguns, because Section 12026 "prohibits only local 'permit or license' requirements, and does not deal with sales," while the ordinance at issue in *CRPA* "creates no permit or license requirement, and instead regulates only sales" of handguns. (*Id.*, 66 Cal.App.4th at p. 1319.) Similarly, *Great Western* held that Section 12026, among other firearms statutes, does not deprive a county of authority to prohibit sales of all firearms on county property – even though such a prohibition necessarily violates the NRA's claim that under Section 12026, "sales are lawful without a local license or permit."

Second, the NRA's claim rests on the notion that Section 12026 preempts more broadly than its actual terms – which, as relevant here, simply prohibit local laws that condition the ability to purchase a handgun on a permit or license. But the courts have repeatedly rejected such attempts to imply more into Section 12026 than the Legislature put there. Not only have courts consistently construed state firearms laws "narrowly, finding no preemption of of areas not specifically addressed by state law" (*Suter, supra*, 57 Cal.App.4th at p. 1119 fn. 2 [reviewing decisions]), but the Supreme Court, in *Galvan*, has specifically given Section 12026 "the narrowest possible construction," holding it bars only what its actual terms say: local permit or license requirements to purchase a handgun. (*Suter, supra*, 57 Cal.App.4th 1120 fn. 3.) This Court's *Doe* decision stands conspicuously alone as the sole case to suggest that Section 12026 preempts any more than that – a fact that nicely illustrates just how inconsistent with subsequent firearms preemption cases *Doe* is. This Court should reject *Doe's* discredited construction of Section 12026, and should instead follow the better-reasoned holdings of cases such as *Great Western* and *CRPA*.

2. Section 12026 does not create any "right" that is relevant here.

The NRA tries to bolster its Section 12026 claim by arguing that that statute "guarantees the right to 'purchase' handguns[.]" (RB at 49-51.) This claim, perhaps more than any other in this case, seeks to twist the principles of firearms preemption to create enormous impediments to local gun regulation – which is, of course, precisely what the Legislature has *avoided* doing. (*Great Western, supra*, 27 Cal.4th at p. 864 ["the Legislature has chosen not to broadly preempt local control of firearms"].) For a number of reasons, this Court should reject the NRA's "rights" claim.

a. *CRPA* and *Suter* preclude the NRA's rights claim.

The NRA's claim is wholly irreconcilable with *CRPA*. The Second District there squarely rejected just such a claim, holding that Section 12026 limits the regulatory authority of local governments to impose permit or license requirements, but it does not grant any rights or entitlements to private individuals. As the court held:

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

(*Id.*, 66 Cal.App.4th at p. 1324.) The NRA's claim is also inconsistent with *Suter, supra*, in which this Court rejected a claimed "right of private citizens to *sell* weapons," and held that the "Penal Code ... establishes a *limitation*, not a right." (*Id.*, 57 Cal.App.4th at p. 1127 [emphases original].)

Although the City quoted *CRPA*'s above holding in its opening brief (AOB at 22), the NRA makes no effort to address or distinguish that holding. The NRA's silence is telling: the *CRPA* court faced the very same claim that the NRA here urges, and the court's well-reasoned rejection of that claim is compelling

authority that Section 12026 creates no "right" to purchase or sell handguns. This conclusion accords respect to the plain text of Section 12026, and it also follows common sense. The Legislature knows quite well how to create affirmative entitlements, and it would be quite surprising if it chose to do so by implication, in a statute whose express terms limit local regulatory power, but say nothing about rights or entitlements granted to individuals. This Court should follow *CRPA's* compelling reasoning here.

b. The NRA's rights claim would upend settled principles of firearms preemption and leave little or no room for local control.

Equally important, reading a right to purchase a handgun into Section 12026 would significantly alter California's gun preemption doctrine, drastically reducing local authority to regulate firearms.

Courts have held that cities and counties may restrict and regulate much handgun-related conduct, including sales of handguns at gun shows, sales of particular types of handguns, and restrictions on the locations and operations of gun dealerships. But if this Court were to construe Section 12026 to create an individual entitlement to purchase a handgun, that statute's preemptive reach would be greatly enlarged, and would spill over into regulatory fields beyond the statute's express textual moorings, involving activities that are logically connected in some fashion to handgun purchases. Areas of regulation that until now have been within local control – from local zoning and permitting authority over gun dealers, to regulation of the types of handguns and handgun ammunition that may be sold, to regulation or prohibition of gun show sales – could well be placed beyond local reach, on the theory that restricting such activities unduly burdens or interferes with the supposed right to buy a handgun. The result would be a virtual evisceration of local governments' power to adopt firearms regulations in response to local problems and conditions.

This Court should not lightly countenance such a wholesale revision of firearms preemption law. Particularly in view of the Legislature's recognized "intent to permit local governments to tailor firearms legislation to the particular needs of their local communities," and its longstanding desire not to "preempt[] areas of weapons laws not specifically addressed by state statute" (*Suter, supra*, 57 Cal.App.4th at p. 1119), this Court must be extremely reluctant to infer a right to purchase a handgun into Section 12026. The Court must not infer such a right into the statute absent a far more compelling showing of legislative intent than the NRA has provided here.

c. The NRA's rights claim is unsupported by any persuasive authority.

The NRA cites *Galvan, supra*, and *Sippel v. Nelder* (1972) 24 Cal.App.3d 173 to supports its rights claim. (RB at 50-51.) Neither case, however, defeats the well-reasoned holdings of *CRPA* and *Suter*, or otherwise shows that Section 12026 creates the supposed "right" the NRA urges the Court to imply into that statute.

The *Galvan* Court did not analyze or discuss whether Section 12026 creates an affirmative entitlement to purchase or possess a handgun, rather than simply prohibiting local license and permit requirements. Moreover, while the Court did refer, in a single sentence, to a "right to possess a weapon," the Court's holding that a local jurisdiction could *prohibit* possession of unregistered firearms, as well as its ringing endorsement of the need for local power to regulate firearms, show that the decision's mention of such a "right" either was dictum, or, at most, merely echoed Section 12026's express mandate that a local jurisdiction could not prevent handgun possession by imposing permit or license requirements.

Sippel, supra, offers even less support to the NRA. The court there used the word "entitled" to mean only an entitlement to be free from *local licensing and permit requirements*, noting that the plaintiff was "entitled, under [Section 12026], to possess a concealed firearm at his residence without obtaining a license or permit of any kind." (*Id.*, 24 Cal.App.3d at p. 177.) *Sippel* did not involve or discuss any issue of purported rights or entitlements outside the context of a local permit scheme. The decision certainly does not suggest that Section 12026 precludes local laws that restrict or prohibit handgun sales but do not impose permit or license requirements.

The NRA's reliance on a 1994 Attorney General opinion is equally misplaced. The courts in both *Suter* and *CRPA* expressly rejected that opinion's flawed reasoning, finding it to "ha[ve] little persuasive force[.]" (*CRPA, supra*, 66 Cal.App.4th at p. 1325.) And while the NRA cites the presumption of legislative acquiescence in an effort to bolster the Attorney General opinion's persuasive value (RB at 49-50), that presumption is of little help. According to the presumption of legislative acquiescence, the Legislature's failure to amend Section 12026 in the wake of the *Suter*, *CRPA*, and *Great Western* decisions shows that the Legislature *approves* of those courts' holdings that Section 12026 does not preempt local authority outside of licensing and permit requirements. (*People v. Leahy* (1994) 8 Cal.4th 587, 604 [Legislature's failure to amend Evidence Code provisions following judicial interpretation "may be presumed to signify legislative acquiescence in our ... decision"].) Particularly because the Legislature is more likely to be aware of repeated appellate court decisions than a single non-binding Attorney General opinion, the Legislature's failure to amend Section 12026 following the 1994 Attorney General opinion helps the City, not the NRA. That legislative inaction certainly adds nothing to the Attorney General opinion's persuasive value.

Finally, the NRA's purported "legislative history" for Section 12026 is either inadmissible, or simply uninformative. As the City has explained in its opposition to the NRA's motion for judicial notice, several purported items of legislative history for Section 12026, including a 1988 memorandum prepared by a single Deputy Attorney General, are inadmissible and reveal nothing of the Legislature's intent, because there is no suggestion that those documents were ever made available to the Legislature. (*People v. Johnson* (2002) 28 Cal.4th 240, 247.) And the remainder of the NRA's proffered legislative history documents are simply unilluminating. As the NRA essentially concedes, they can be read, at most, to "imply" that Section 12026 creates an implied entitlement. (RB 50.) The City respectfully suggests that a possible implication of an alleged right which itself would be created by implication (assuming it existed at all) is insufficient to meet the NRA's burden of showing that Section 12026 preempts Section 2 of Proposition H.

C. The Unsafe Handgun Act.

The NRA also argues that Section 2 of Proposition H is preempted, at least with respect to handgun sales, by the Unsafe Handgun Act (Pen.Code §12125 *et seq.*; "UHA"). This UHA preemption claim does not withstand scrutiny.

1. The UHA's regulation of which handguns "may be sold" is permissive, and does not mandate sales.

The NRA claims that Section 2's sales prohibition is expressly preempted by Penal Code Section 12131(a). (RB at 51.) That statute requires the Department of Justice to compile a roster of handguns that have been tested and "have been determined not to be unsafe handguns, and may be sold in this state pursuant to this title." (*Id.*) The statutory phrase "may be sold," according to the NRA, preempts Section 2 of Proposition H, because that local law prohibits the sale of handguns listed on the DOJ's roster.

But as the City explained in its opening brief, the Legislature's use of the permissive term "may" in Penal Code Section 12131(a), rather than of any mandatory term that would *compel* local jurisdictions to allow sales of handguns listed on the roster, shows that the UHA was not intended to preclude local sales prohibitions.[5] The NRA offers no response to this argument, except to cite *Great Western* while misstating its holding as to the requirements for conflict preemption, tacitly acknowledging the weakness of its UHA preemption claim.[6]

In fact, rather than supporting the NRA's UHA preemption claim, *Great Western* shows its error. As that case demonstrates, a statutory reference to gun sales conduct that "may" occur does not preempt local power to prohibit that conduct. In *Great Western* the Supreme Court examined the preemptive effect of several statutes regulating gun sales and gun shows, and started by quoting Penal Code Section 12071(b)(1)(B)'s statement that a licensed gun dealer "*may* take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events." (*Great Western, supra*, 27 Cal.4th at p. 864 [emphasis added].) Notably, the Court held that the quoted

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[5] As the City also explained – and as the NRA fails to contest – this conclusion is bolstered by the UHA's qualifier that handguns listed on the roster "may be sold in this state *pursuant to this title.*" (Pen.Code §12131(a) [emphasis added].) The italicized terms show the statute merely distinguishes between handguns that are "unsafe," whose sale the UHA prohibits, and handguns found not to be "unsafe," whose sale *that statute* does not prohibit. (AOB at 24-25.)

[6] The NRA claims the *Great Western* Court held that a local law directly conflicts with state law "if it forbids what state law expressly *allows*." (RB at 52 [emphasis added].) In fact, however, the Court held that a direct conflict exists only if the local law "forbid[s] what state law expressly *mandates*." (27 Cal.4th at p. 866 [emphasis added].) The difference between conduct that state law allows and conduct that it mandates, of course, is vital in determining the scope of preemption; in this case, that difference dooms the NRA's UHA preemption claim.

language, and related statutory provisions, merely "contemplate" that guns can be sold at gun shows, but "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.)

The UHA uses the term "may" in the same permissive way. It contemplates sales of handguns found not to "unsafe," but it does not mandate such sales. Proposition H's prohibition against sales of handguns on the UHA roster, therefore, does not "forbid what state law expressly mandates," and does not conflict with the UHA. (*Great Western, supra*, 27 Cal.4th at p. 866.)

2. The NRA's purported legislative history does not support preemption of Section 2.

The NRA principally defends its UHA preemption claim by relying on that statute's actual or purported legislative history. None of its arguments, however, are persuasive.

First, the NRA points out that before the UHA was approved, the statute's sponsor proposed an amendment that would have expressly recognized local regulatory authority, but that amendment did not appear in the bill as ultimately enacted. (RB at 53-54.) But the Supreme Court has recently confirmed that such circumstances are of very little value in assessing legislative intent. "[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, supra*, 34 Cal.4th at pp. 1261-62 [Legislature's failure to include preemption provision in statute as enacted is not useful evidence of legislative intent] [citing, e.g, *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 573 fn. 5].) Evidence that the Legislature has debated and rejected a provision expressly addressing a statute's preemptive effect sheds no light on the

Legislature's intent as to preemption, the Court explained, because such evidence "would merely show that lawmakers left the preemption issue exactly where it would have been if nothing had been said during the bill enactment process." (*American Financial Services, supra,* 34 Cal.4th at p. 1262 fn. 11.)

Therefore, the fact that an amendment to the UHA to address preemption was proposed, but did not appear in the final bill, is unhelpful in assessing the Legislature's intent. It does not show that the Legislature wanted the UHA to preempt local restrictions on handgun sales.

Second, the NRA relies on letters written by persons outside the Legislature – principally outside interest groups and representatives of local jurisdictions – to support its claims that the Legislature intended the UHA to "reduce handgun crime," and that the Legislature intended the UHA to preempt local laws restricting handgun sales. (RB 52-53.) But as the Supreme Court made clear in *American Financial Services, supra,* "our preemption principles simply cannot be so arbitrary and malleable" as to be swayed by "comments from constituents to the Legislature." (*Id.* at p. 1262 fn. 11.) As the Court explained, "even the statements of individual legislators are generally not considered in construing a statute. Of how much less worth is a third party's opinion regarding that legislative process?" (*Id.*) The NRA's proffered third party opinions and comments on the purposes and potential effects of the UHA, therefore, shed no meaningful light on the Legislature's purposes and intentions as to that statute. The fact that an outside advocate may have believed that prohibiting sales of junk guns would reduce crime, or that a city may have feared that the UHA would preempt local authority, provides no reliable guidance as to the Legislature's intentions in enacting that law.

Finally, as the City observed in its opening brief, even if the Legislature had agreed with the concerns of some third parties that the UHA would preempt

local laws prohibiting sales of poor-quality handguns, that would not give rise to preemption of any portion of Proposition H. (AOB at 26.) San Francisco's law is qualitatively different from a junk gun sales ban; it has nothing to do with handgun quality, reliability, or safety, and instead reflects the voters' conclusion that the City's gun violence crisis requires that no further guns be sold locally, regardless of their reliability or safety features. The UHA, therefore, does not preempt Section 2 of Proposition H.

V. THE NRA HAS FAILED TO SHOW THAT SECTION 3 OF PROPOSITION H CONFLICTS WITH STATE LAW

In its opening brief, the City explained that the NRA has not shown that Section 3 of Proposition H ("Section 3"), which generally prohibits San Francisco residents from possessing handguns within the City, conflicts with or is preempted by state law. The NRA's argument to the contrary relies almost exclusively on this Court's 1982 *Doe* opinion, particularly its implied preemption dictum stating that Section 12026's prohibition against local license or permit requirements shows a Legislative intent to "occupy the field of residential handgun possession." (*Id.*, 136 Cal.App.3d at p. 518; AOB at 28-34.) But subsequent firearms preemption decisions, such as *Suter*, *CRPA*, *Great Western*, and *Nordyke*, have construed the preemptive scope of California's firearms statutes considerably more narrowly, and have given far greater weight to the Legislature's desire to preserve local authority to regulate guns. Those decisions, similarly, have made it clear that Section 12026 preempts only "local laws that require permits or licenses" to purchase handguns. (*CRPA, supra*, 66 Cal.App.4th at p. 1313; *Galvan, supra*, 70 Cal.2d at p. 856.) Therefore, *Doe's* conclusion that Section 12026 impliedly bars local laws that restrict residential handgun possession but do not impose licensing requirements has been discredited, and should not be followed.

A. Subsequent Decisions Do Not Show That *Doe* Is Good Law.

In its opposition, the NRA asserts that *Doe* must remain valid, because "no case has repudiated or even criticized *Doe*," while several cases have cited at least portions of that decision. (RB at 23.) For several reasons, however, this objection does not show that *Doe's* implied preemption dictum retains any continuing vitality as a statement of the preemptive scope of Section 12026.

First, the NRA overlooks the Ninth Circuit's conclusion that *CRPA*, and its narrow approach to preemption under Section 12026, "appears to have disavowed the logic underlying" *Doe*, creating "tension" and "seemingly conflicting" decisions within California's gun preemption jurisprudence. (*Great Western Shows, Inc. v. Los Angeles County* (9th Cir. 2000) 229 F.3d 1258, 1262.) Moreover, the NRA overlooks the fact that the Supreme Court accepted the Ninth Circuit's certification request, and in its *Great Western* opinion, cited *Doe's* express preemption holdings – which were premised on express exemptions contained in the ordinance at issue there – while conspicuously remaining silent as to Doe's implied preemption dictum. (*Great Western, supra*, 27 Cal.4th at pp. 863064, 865-67.) It also ignores the *CRPA* court's clear holding that Section 12026 is "limited ... to permits or licenses for possessing a weapon at home," and "shows a Legislative intent not to preempt other areas of firearms regulation[.]" (*CRPA, supra*, 66 Cal.App.4th at p. 1312.)

Equally important, that cases such as *CRPA*, *Suter* and *Great Western* have mentioned *Doe* within their overview of the development of California's gun preemption jurisprudence does not in any way suggest that those courts approved of *Doe's* expansive approach to implied preemption under Section 12026. *CRPA* and *Suter* involved local ordinances that were factually distinct from the one at issue in *Doe*; upholding those ordinances required those courts to employ preemption principles materially at odds with those found in *Doe*, but did not

require them to expressly attack *Doe's* holdings. And because the ordinance in *Great Western* did not concern residential handgun possession, the Supreme Court there was similarly not required to expressly overrule or disavow *Doe's* implied preemption dictum in order to conclude that that ordinance was not preempted.

But even if *CRPA*, *Suter*, and *Great Western* found it unnecessary to expressly repudiate *Doe*, the narrow approach to firearms preemption that forms the analytical backbone of each of those cases – the insistence that the scope of preemption be narrowly construed, and the repeated recognition that the Legislature has carefully crafted its firearms statutes to preempt only those areas specifically addressed – have left *Doe*, and specifically its expansive assertion that Section 12026 occupies the field of residential handgun possession, strikingly marginalized. California's firearms preemption principles have significantly moved on since 1982, and *Doe's* implied preemption dictum is no longer consistent with those principles.[7]

The NRA attempts to avoid the evolution of firearms preemption principles since 1982 by defending *Doe's* implied preemption dictum, arguing that "there [is no] doubt that prohibiting local restrictions on private possession of handguns necessarily prohibits banning possession." (RB at 28.) That

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[7] Even in 1982, there was significant tension between *Doe's* dictum stating that Section 12026 "occupies the field of residential handgun possession," and the Supreme Court's holding in *Galvan* that Section 12026 does not preempt a local law under which no person may possess a handgun in his or her residence (among other places) unless that handgun is registered. And while the *Doe* Court opined that "[i]t strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession" (*id.*, 136 Cal.App.3d at p. 511), it is no more obvious why the Legislature would prohibit licenses and permits but allow a local registration mandate – yet the *Galvan* Court held that the Legislatur had done precisely that.

proposition, however, is not self-obvious. The Legislature's intent underlying Section 12026 is best assessed by the statute's plain text, which prohibits only local permit and licensing requirements. Effectuating the intent demonstrated by the statute's plain text is not irrational; the Legislature may have concluded, for example, that the responsibilities of administering any licensing systems for residential handgun possession would best be lodged at the state level rather than in the hands of local authorities. Moreover, "[t]he courts cannot properly base decisions about preemptive intent upon subjective opinions regarding the quality or value of the Legislature's reasons. Instead, the courts must simply determine whether the Legislature did or did not intend to preempt. The reasons which might motivate one decision or the other are matters within the exclusive province of the Legislature." (*CRPA, supra*, 66 Cal.App.4th at p. 1312.)

Doe's implied preemption dictum no longer reflects, and cannot be reconciled with, the principles of firearms preemption that have been enunciated in subsequent decisions of the Supreme Court and appellate courts. This Court should not follow *Doe's* reasoning here. Instead, the Court should conclude that because Section 3 does not impose a permitting or licensing scheme, and does not require permits or licenses for the possession of handguns by San Francisco residents in their residences or private property, it does not conflict with Section 12026 or Section 53071.

VI. EVEN IF SECTION 3 CONFLICTED WITH STATE LAW, IT WOULD BE A PERMISSIBLE EXERCISE OF THE CITY'S HOME RULE POWER

As the City explained in its opening brief, even if the Court were to determine that Section 3 conflicted with state law, Section 3 would still be a permissible exercise of the City's Constitutional authority to regulate its own municipal affairs. (AOB at 34-42.) The NRA argues that Section 3 cannot

regulate a municipal affair, but its arguments are insufficient to defeat the City's use of its home rule authority. This Court should reject them.

A. Whether Section 3 Regulates A Municipal Affair Must Be Determined With Reference To The Regulation Section 3 Actually Imposes.

First, the NRA insists that Section 3 cannot be justified under the City's municipal affairs power because "firearms regulation," "handgun possession," and "controlling guns to reduce violent crime" are obviously subjects in which the state has a very significant interest. (RB at 32.) The City does not contend otherwise, but the NRA's argument misses the point, and is essentially a straw man. The NRA provides no legal authority or persuasive rationale why the analysis of whether Section 3 implicates statewide interests should be based not on the regulation that Section 3 actually imposes, but rather on a fictional and far broader regulation.

Whether Section 3 is a valid exercise of the City's home rule power turns on whether "the subject of the regulation is a municipal affair." (*American Financial Services, supra*, 34 Cal.4th at p. 1251.) Section 3's status as a municipal affair, therefore, must be assessed with reference to what Section 3 actually does – which is simply, and only, to prohibit handgun possession, within San Francisco, by most San Francisco residents. The NRA must show that the prohibition Section 3 does impose implicates any statewide concern that is sufficient to justify stripping the City of its regulatory powers. It has not done so.

B. The NRA Has Not Shown Any Statewide Concern In Ensuring That San Francisco Residents Can Possess Handguns

The NRA offers several arguments in an attempt to show that Section 3 implicates statewide concerns. None are persuasive.

First, the NRA repeatedly points to the plain language of Section 12026, claiming that statute "manifests a statewide concern over local licensing and

permitting schemes that might interfere with the ability" of Californians to possess guns in their homes. (RB at 28.) But any such statewide concern is not implicated here, because Section 3 does not impose any local licensing or permitting scheme. And as explained above, any claim that Section 12026 prohibits anything beyond local licensing and permitting schemes is untenable, even as a matter of preemption law. It is even less persuasive as the required "convincing basis for legislative action" superceding charter city regulatory authority. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 405.)

Second, the NRA argues that Section 3 implicates statewide concerns because of "the profusion of legislation" regulating guns at the state level. (RB 32.) But that argument relies on the simple "nose count" approach that the Supreme Court held in *Galvan* was insufficient to show that the Legislature had occupied a particular regulatory field. (*Id.*, 70 Cal.2d at pp. 861-62.) If the mere number of state enactments addressing a particular subject were sufficient to convert a municipal affair into a matter of statewide concern, then such subjects as local taxation, public contracting, and even local elections would be matters of statewide concern, beyond the reach of charter cities' home rule powers; but that is not the case.

Moreover, the NRA fails to identify any firearms statute in which the Legislature has identified any statewide concern in the subject matter of the statute, much less in ensuring access to handguns. While the presence of such a legislative determination does not control the municipal affairs analysis, its absence is telling evidence that the Legislature has not perceived the subject as being of sufficient statewide dimension to justify placing it beyond the regulatory powers of charter cities. The Legislature has obviously enacted a great number of statutes regulating access to firearms, but those statutes, and the exceptions they impose to their own prohibitions, do not state any positive state interest in

ensuring access to handguns. At most, they impose prohibitions under certain circumstances, while limiting the reach of those prohibitions in other circumstances.

Notably, the NRA, like the trial court, relies on *City of Watsonville v. State Department of Health Services* (2005) 133 Cal.App.4th 875, but that case illustrates why Section 3, as a restriction on handgun possession by . The court there held that a charter city could not use its home rule power to prohibit water fluoridation, because the Legislature had expressly found that promotion of the public health through drinking water fluoridation "is a paramount issue of statewide concern" (Health & Safety Code §116409), and also had assigned the authority to set permissible levels of water contaminants to a state agency. (*City of Watsonville, supra,* 133 Cal.App.4th at p. 887.) The court expressly distinguished other types of public health regulation that "require local flexibility," such as aerial spraying of herbicides, holding that setting water quality levels requires no such local flexibility. (*Id.*)

The contrasts between *City of Watsonville* and this case could hardly be greater. Section 3 regulates firearms, a subject in which the courts have repeatedly stressed that there *is* a considerable need for local flexibility to regulate in a manner that responds to local conditions. The Legislature has *not* adopted any statute declaring that ensuring access to handguns is "a paramount issue of statewide concern." And rather than affecting the public drinking water supply, which impacts residents and transient citizens alike, Section 3 regulates only handgun possession by the City's own residents. *City of Watsonville*, therefore, simply highlights the factors that courts rely on to conclude that a subject is a matter of statewide concern – factors that are wholly absent here.

The NRA has failed to identify any statewide concern that is meaningfully implicated by the decision of voters in one charter city to prohibit residents of

only that city from possessing handguns within the city limits. Accordingly, even if Section 3 conflicted with state law, it would be a permissible exercise of the City's home rule power.

VII. PROPOSITION H MUST BE GIVEN EFFECT TO THE GREATEST EXTENT POSSIBLE

In its opening brief, the City argued that any invalid portions of Proposition H should be severed and the remainder of the measure put into effect. The City also explained why Section 2 of the measure was readily severable from Section 3. (AOB at 42.) In response, the NRA does not dispute – and thus effectively concedes – that Section 2 of the measure can be severed from Section 3.

Instead, the NRA takes up a quite different scenario, in which *no* word or provision of Section 2 is held preempted, but the Court concludes that Section 2's sales ban is preempted only as applied to handguns. The NRA claims that because Section 2 consists of a single prohibition against the sale of "all firearms and ammunition" within the City, rather than separate prohibitions against handgun sales and long gun sales, preemption of Section 2 as applied to handgun sales would also bar Section 2's sales ban from being applied to long guns, and would require Section 2 to be invalidated in its entirety. (RB at 56-61.) The NRA claims this result is mandated by principles of severability. (*Id.*)

The NRA is wrong, both in its reliance on severability principles and in its conclusion that preemption as to handgun sales would prevent Section 2 from being applied in other, non-preempted circumstances. In fact, a ruling that Section 2's sales ban is preempted to the extent it applies to handguns, but is not preempted to the extent it applies to long guns, would present no issue of severability. The Court would simply determine that Section 2 is facially valid, but that its application to handgun sales is preempted.

When a local ordinance is held to be preempted to the extent it is applied to particular circumstances, but valid if applied to other circumstances, the ordinance is deemed "partially preempted." (*Nordyke v. King* (2002) 27 Cal.App.4th 875, 884.) Just as a ruling that a law is unconstitutional as applied in particular circumstances does not result in facial invalidation of the law, a finding of partial preemption, preventing an ordinance from being applied in particular circumstances, "does not invalidate the Ordinance." (*Nordyke v. King* (2002) 27 Cal.App.4th 875, 884.) Moreover, a court finding partial preemption does not inquire whether the preempted application of the ordinance can be severed. It simply upholds the ordinance as a facial matter, while holding it preempted to the extent it is applied within the regulatory field covered by state law. (*Nordyke, supra* [holding county ordinace not preempted by state statutes, but not inquiring into severability of potentially preempted provisions of ordinance]; *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 539.)

Baron, supra, is illustrative. There, the Supreme Court considered a preemption challenge to a municipal ordinance that required local lobbyists – defined as persons paid "for the purpose of attempting to influence" local legislation – to register as "municipal legislative advocates." (*Id.* at pp. 537-38.) The ordinance purported to apply even to attorneys engaged in the practice of law, whose conduct, the Court held, could only be regulated by the state. (*Id.* at p. 540.) Moreover, it drew no distinctions between, and did not separately discuss, attorneys and non-attorneys.

Tellingly, however, the high court did not discuss severability, and did not ask whether the ordinance's requirements as applied to attorneys engaged in the practice of law could be mechanically or grammatically severed from those requirements as applied to non-attorneys. Instead, it simply affirmed the lower court's holding "that the ordinance is a valid exercise of the police power" which

could be applied to anyone, except to attorneys whose lobbying activities constituted the practice of law. (*Id.* at p. 539.) Other "partial preemption" cases are in accord. (*See, e.g., Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 893-95 [local ordinance requiring payment of relocation assistance to evicted tenants is preempted by state Ellis Act to extent it imposes prohibitive price on landlord's decision to exit rental business, but is not invalidated on its face, because not all applications of ordinance will be preempted].)

As *Nordyke*, *Baron* and *Pieri* illustrate, when a local ordinance is held preempted to the extent it is applied within a regulatory field occupied by state law, the court faces no question of severability, because there is no invalid part of the ordinance – be it a word, phrase, or provision – to sever. Such a ruling does not require the court to rewrite the ordinance, or to substitute new terms into the ordinance to distinguish between the permissible and preempted applications. Nor does not require the court to inquire as to whether the legislative body would have enacted the ordinance knowing that some of its possible applications would be preempted.

If this Court were to determine that Section 2 is preempted as applied to handgun sales, but valid as applied to long gun sales, the Court must follow these authorities. It must decline to facially invalidate all of Section 2, and must instead order that Section 2 is partially preempted and cannot be applied to prohibit sales of handguns.

The NRA attempts to distinguish *Nordyke*, arguing that the Supreme Court was not required to determine whether the local ordinance at issue was partially preempted, and that a ruling of partial preemption would simply require the Court to "impliedly add" exemptions derived from state law to the ordinance. (RB at 58.) But these observations do not meaningfully distinguish *Nordyke*. They do

not change the high court's holding that a finding of partial preemption, which prevents a local ordinance from being applied to regulate within a certain field occupied by state law, does not invalidate the entire enactment, because the court can simply order that the ordinance not be applied within the field.[8]

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: May 22, 2007

DENNIS J. HERRERA
City Attorney
WAYNE SNODGRASS
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By: _____
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[8] *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 is inapposite here because it did not involve partial preemption. The Court there invalidated a local rent control law because its rent adjustment provisions, in virtually all if not all cases, "inherently and unnecessarily preclude[] reasonably prompt [administrative] action" to adjust rent ceilings upward. (*Id.*, 17 Cal.3d at p. 172.)

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 10,806 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 May 22, 2007.

DENNIS J. HERRERA
City Attorney
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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 22, 2007, I served the following document(s):

APPELLANTS' REPLY BRIEF

on the following persons at the locations specified:

C.D. Michel
Don B. Kates
Thomas E. Maciejewski
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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
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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 May 22, 2007, at San Francisco, California.

HOLLY TAN