CITY AND COUNTY OF SAN FRANCISCO

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March 10, 2008

SUPREME COURT
FILED

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Frederick K.Ohlrich Clerk

Deputy

Clerk of the Supreme Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Fiscal et al. v. City and County of San Francisco et al.*
Supreme Court Case No. S160968
Court of Appeal Case No. A115018 (First District Court of Appeal, Division Four)
Superior Court Case No. 505960
City and County of San Francisco's Request for Depublication of Court of Appeal Opinion (Rule 8.1125)

Dear Justices of the Supreme Court:

We write on behalf of the City and County of San Francisco, one of the defendants/respondents in the above action, to request that the Court order depublication of the Court of Appeal's opinion in this action (the "Opinion"). The Opinion invalidates Proposition H, a local initiative ordinance adopted by San Francisco's voters in 2005, on the ground that it is preempted by state law. Proposition H prohibits sales of firearms and ammunition within San Francisco, and also prohibits most San Francisco residents from possessing handguns within City limits.[1]

If it is allowed to remain published, the Opinion make it harder for cities and counties to protect their citizens by enacting many types of firearms regulations, including regulations that do not contain broad prohibitions such as are found in Proposition H. The Opinion will have such effects because it erroneously alters the balance between state and local regulatory authority over firearms. The Opinion interprets several state firearms statutes in a manner that greatly expands those laws' preemptive scope, in conflict both with those statutes' plain language and with prior decisions of this Court and other courts of appeal. Moreover, the Opinion characterizes firearms regulation as an area in which local regulatory authority is minimal, and it expressly directs that if cities and counties' remaining regulatory authority must be used at all, it must be exercised only sparingly.

By mistakenly expanding the scope of the state's preemption of local governments' police powers, the Opinion will lead other courts to erroneously invalidate other cities and counties' locally tailored firearms ordinances. The result will be to deprive Californians of potential solutions to the significant problems of firearms violence that plague many California communities. This Court has held that problems of gun violence are often not amenable to one-size-fits-all, statewide solutions, repeatedly recognizing "that problems with firearms are likely to require different treatment in San Francisco County than in Mono County." (*Great Western*

[1] On February 19, 2008, the City and County of San Francisco filed a Petition for Review in this case. Even if the Court declines to grant review, it should depublish the Opinion for the reasons set forth in this letter.

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Shows, Inc. v. County of Los Angeles (2002) 27 Cal.4th 853, 867; *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 863-64.) If allowed to remain published, the Opinion will hinder Californians' ability to enact locally appropriate protections against gun violence that are tailored to the particular needs of their communities. We respectfully request, therefore, that the Court order the Opinion to be depublished.

I. THE COURT OF APPEAL'S OPINION

Alarmed at the inexorably rising numbers of San Franciscans who have been killed or injured by firearms in recent years, the City's voters adopted Proposition H in November 2005. That initiative ordinance states that within the City's limits "the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited." (Proposition H, §2; Opinion at 2.) It also bars City residents from possessing handguns within City limits, except peace officers and others needing guns for professional purposes. (*Id.* at 3.) Proposition H states that its prohibition against local handgun possession is not intended to affect "any resident of other jurisdictions with regard to handgun possession, including those who may temporarily be within the boundaries of the City and County." (Opinion at 2.) The measure also states that it is not "designed to duplicate or conflict with California state law," and is not intended "to create or require any local license or registration for any firearm[.]" (*Id.* at 3.)

In December 2005, the National Rifle Association and several other organizations and individuals commenced this action for ordinary mandate, alleging that Proposition H is preempted by state law. (Slip Op. at 3.) The trial court held the measure to be preempted, and the Court of Appeal affirmed.

The Opinion is premised on the appellate court's evident belief that the state has preempted most of local governments' regulatory authority over firearms, thus requiring local governments to "tread lightly" by adopting, at most, "subtle local encroachments into the field of firearms regulation." (Opinion at 24.) The Opinion states that Proposition H is preempted by several state statutes, including, most prominently, Penal Code Section 12026(b) and Government Code Section 53071. Penal Code Section 12026(b) states that "[n]o permit or license" shall be required "to purchase, own, possess, keep, or carry" any concealable firearm within one's residence or place of business. (*Id.*) Government Code Section 53071 states that the Legislature has occupied the "whole field of regulation of the registration or licensing of commercially manufactured firearms," and has prohibited "all local regulations, relating to registration or licensing of commercially manufactured firearms[.]" (*Id.*)

The Opinion is wrong and should be depublished for at least three reasons. First, the Opinion significantly mischaracterizes the extent of local authority to regulate firearms, suggesting that the Legislature has broadly preempted most local power in this area. Second, the Opinion erroneously expands the preemptive scope of Government Code Section 53071, so that rather than merely prohibiting local laws relating to registration or licensing of firearms, that statute potentially prevents local governments from restricting any firearms-related conduct that the Legislature has not elected to regulate. And third, the Opinion erroneously expands the preemptive scope of Penal Code Section 12026(b), so that rather than barring only local laws that require permits or licenses to purchase or possess handguns on private property, that statute bars local laws that create any "impediments" against such purchases or possession.

A. The Court of Appeal Overstates The Degree To Which The State Has Preempted Local Authority To Regulate Firearms.

Gun control is a area in which the Legislature has acted cautiously, and has sought to leave significant regulatory power to local governments. As this Court has long recognized, 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 Shows, Inc., supra,* 27 Cal.4th at p. 867.) When it comes to guns, "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.)

Accordingly, as this Court has recognized, "the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption." (*Great Western Shows, Inc., supra*, 27 Cal.4th at p. 864.) It "has chosen to legislate narrowly," and "has been cautious about depriving local municipalities of aspects of their constitutional police power to deal with local conditions" concerning gun violence. (*American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1255.) In recognition of the Legislature's narrow and cautious approach to preemption in this area, "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.)

The Opinion, however, draws a line between state and local regulatory power over firearms that is very different from that drawn by the above authorities. Disregarding the Legislature's "measured and limited" approach to preemption (*Great Western Shows, supra,* 27 Cal.4th at p. 863), the Opinion broadly advises local governments that as the result of preemptive state enactments, cities and counties retain only limited authority to regulate firearms. After explaining its specific conclusions with regard to Proposition H, the Opinion closes by announcing, in dictum, that the Court of Appeal "wish[es] to stress that the goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law. As we have seen, while courts have tolerated subtle local encroachment into the field of firearms regulation, laws which significantly intrude upon the state prerogative have been uniformly struck down as preempted." (Opinion at 24 [cites omitted].) The Opinion then warns cities and counties that "when it comes to regulating firearms, local governments are well advised to tread lightly." (*Id.*)

This warning, of course, has the law of firearms preemption backward. It is *the Legislature* that "has chosen to legislate narrowly" in the area of gun control. (*American Financial Services Ass'n, supra,* 34 Cal.4th at p. 1255.) As a result of that Legislative choice, local governments retain significant and meaningful authority to adopt firearms regulations, not merely the scant authority suggested by the Opinion.

Moreover, as support for its novel view that local governments possess only a limited and narrow power to regulate firearms, the Opinion cites Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation* (1996) 30 U.S.F.L.Rev. 395. (Opinion at 24.) But as the title of that law review article – which describes state preemption of local power to regulate firearms as a "myth" – demonstrates, the article does not at all support the Opinion's broad views of state preemption. To the contrary, that article supports the opposite view, namely, that state preemption has been limited and that local governments retain significant regulatory power in this area. This is, of course, very similar to this Court's holding in *Great Western Shows, Inc.* that "the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption." (*Id.*, 27 Cal.4th at p. 864.)

Neither the prior decisions of this Court and the other appellate courts, nor even the law review article the Opinion cites, supports the Opinion's characterization of the scope of state preemption in this area.

B. The Opinion Mischaracterizes The Scope Of Preemption Under Government Code Section 53071.

The Opinion states that Proposition H's prohibition against gun sales within San Francisco, found in Section 2 of the initiative, is preempted by Government Code Section 53071. That statute precludes local laws "relating to registration or licensing of commercially manufactured firearms." (*Id.*)[2] Government Code Section 53071 preempts Proposition H's ban on local firearms sales, the Opinion explains, because unspecified "gunshops, pawnshops, and auction houses" hold "valid state licenses specific to their firearm transactions," and Proposition H's ban on local gun sales "effectively cancels all of these licenses." (Opinion at 15.) The Opinion thus interprets Section 53071's preemptive scope more broadly than the statute's text, so that that statute preempts not only local laws relating to registration or licensing of *commercially manufactured firearms,* but also local laws relating to registration or licensing of *firearms dealers*.

This aspect of the Opinion is entirely unprecedented, finding no support in any prior decision or statute. The Opinion does not cite any authority for its view that Section 53071 preempts local laws that cancel or otherwise affect gun dealer licenses, but do not require any firearm to be registered or licensed.

Moreover, this aspect of the Opinion is contradicted by Penal Code Section 12071(a)(6), which expressly authorizes cities and counties to regulate firearms dealers – both by requiring such dealers to obtain local business licenses, as well by "otherwise restrict[ing] or regulat[ing] the sale of firearms." (Penal Code Section 12071(a)(6).) Indeed, other courts have relied on Penal Code Section 12071 to hold that local ordinances that dictate where and how gun stores may operate – and that, under the broad reading of Government Code Section 53071 adopted by the Opinion, would certainly "relate to" licensed firearms dealers – are not preempted. (*Suter v. City of Lafayette, supra*, 57 Cal.App.4th at pp. 1120-1121.) This aspect of the Opinion is inconsistent with this Court's decision in *Great Western Shows,* which agreed with a lower appellate court that Government Code Section 53071's "legislative intent was limited to registration and licensing," and held that a local law banning gun shows on county property was not preempted, even though it clearly restricted the operations of state-licensed gun dealers. (*Id.*, 27 Cal.4th at p. 862.) Other courts have also squarely held that Government Code Section 53071 does not preempt a local law that affects the operations of gun dealers, but does not require any firearm to be licensed or registered. (*California Rifle and Pistol Ass'n v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1312-14 [rejecting argument that Section 53071 preempts local law banning sales of specified handguns, on ground that such an argument "stretches the words of the[] statute[] beyond their literal meaning ..."].)

Section 53071 thus does not preempt local laws that prohibit gun sales or otherwise affect what gun dealers can do, but do not require licensing or registration of firearms. The Opinion erred in conflating registration and licensing of firearms (which is preempted by Government Code Section 53071) with registration and licensing of firearms dealers (which is outside of Section 53071's preemption, and is expressly authorized by Penal Code Section 12071).

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

The Opinion also errs in holding that Government Code Section 53071 preempts Proposition H's ban on local handgun possession by San Francisco residents. (Opinion at pp. 13-14.) The Opinion apparently finds preemption because the local possession ban would prohibit possession even by persons who are not within the scope of state law restrictions on possession, such as "the private security industry," "entertainment industry professionals," and "members of gun clubs." (Opinion at 13 [stating that such classes of person have "special exemptions and licenses" under state law].) But this aspect of the Opinion greatly expands the definition of "licensing" under Section 53071. According to the Opinion, where a state law generally prohibits specified gun-related conduct but does not extend that prohibition to cover all persons or circumstances, persons falling outside of the state's prohibition are deemed to hold "licenses" within the meaning of Section 53071, so that a law – such as Proposition H's Section 3 – that bars those persons from engaging in such firearms-related conduct "relates to" gun licensing and is preempted by Section 53071. (Opinion at 13-14 [stating that a "local regulation that invalidates existing licenses, but does not affirmatively create new licensing schemes, 'relates' to the state's regulatory scheme of licensing firearms and, consequently, is expressly preempted by Government Code Section 53071"].) Under this view, a decision by the Legislature to prohibit specified gun-related conduct would create an affirmative, state-issued "license" in those falling outside the prohibition, so that *any* effort by a local government to restrict that conduct will be preempted under Government Code Section 53071 as an impermissible local law "relating to" licensing.

Under this interpretation of Government Code Section 53071, the state, by definition, would occupy every regulatory field within which it operated. Any decision by the Legislature to impose certain restrictions on particular gun-related conduct would automatically give rise to a "license" in anyone not covered by that restriction. The result, of course, would be to virtually eliminate local regulatory authority over firearms, because any local law that restricted conduct also restricted by the state would be preempted as duplicative, while any local law that restricted conduct not restricted by the state would be preempted on the ground that it interferes with "licensing" and thus runs afoul of Section 53071.

This Court and other courts, however, have expressly rejected that wildly expansive view of "licensing." This Court has held that local governments are *not* necessarily precluded from regulating, or even prohibiting, firearms-related conduct that the state has exempted from its own prohibitions. As the Court held in *Nordyke, supra*, "the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property." (*Id.*, 27 Cal.4th at p. 884.) And other courts have expressly rejected the argument that Section 53071 "is itself an expression of intent to occupy the whole field of firearm regulation." (*California Rifle and Pistol Ass'n, supra,* 66 Cal.App.4th at p. 1313; *Suter, supra,* 57 Cal.App.4th at p. 1119 fn. 2.) The Opinion's overbroad interpretation of Section 53071's "licensing" is thus erroneous.

C. The Opinion Mischaracterizes The Scope of Preemption Under Penal Code Section 12026(b).

The Opinion states that Penal Code Section 12026(b) – which bars any requirement of a "permit or license" to purchase or possess a handgun in one's home or business – preempts Section 3 of Proposition H, which generally bans local possession of handguns by San Francisco residents.[3] The Opinion also states that Penal Code Section 12026(b) preempts the initiative's

[3] Section 12026 states, in relevant part, that "[n]o permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state ... to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other

ban on the sales of firearms, at least as applied to handguns. The Opinion reaches these conclusions by interpreting Penal Code Section 12026(b) very broadly. According to the Opinion, Section 12026(b) preempts not only local license or permit mandates, but also any local "impediment" to citizens' ability to purchase and possess handguns. (Opinion at p. 9.)

The Opinion does not in any way limit which types of local laws would be preempted under its "impediment" approach, and it thus leaves open the possibility, for example, that a local decision to deny a land use permit to a gun dealer might violate Section 12026(b) by creating an "impediment" to the purchase of handguns. Indeed, the Opinion states that Section 12026(b) constitutes a "guarantee" that local residents will be able to purchase or possess handguns, and it bars any local ordinance that "substantially burdens the purchasing and possession" of handguns. (Opinion at 9, 15.) It thus invites a very broad application of Section 12026(b) that effectively prevents local regulation of gun dealers – notwithstanding Penal Code Section 12071's affirmative recognition that local governments *can* regulate gun dealers, and *can* "restrict" or "regulate" firearms sales. (*Id.*) The Opinion will thus cause confusion among courts and local governments, and will lead to spurious lawsuits challenging local governments' exercise of such wholly legitimate regulatory authority.

The Opinion's very broad construction of Section 12026(b) also conflicts with *California Rifle and Pistol Ass'n, supra,* in which the appellate court held that Section 12026 did not preempt a local law that made it unlawful to sell a specified class of handguns, but did not impose any permit or license requirement. (*Id.*, 66 Cal.App.4th at pp. 1311, 1317-20.) As the court there held, Section 12026 did not preempt West Hollywood's ban on sales of Saturday Night Specials, because that statute "preempts a narrowly limited field of firearms regulation," and "prohibits only local 'permit or license' requirements, and *does not deal with sales*." (*Id.*, 66 Cal.App.4th at p. 1319 [emphasis added].) West Hollywood's local sales ban, in contrast, "creates no permit or license requirement, and instead regulates only sales." (*Id.* at p. 1319.) Moreover, the Opinion's expansive interpretation of Section 12026(b) flies in the face of the settled principle that state regulation of firearms is to be construed "narrowly," in view of the significant local interest in matters of gun violence (*Suter, supra,* 57 Cal.App.4th at p. 1119 fn. 2), and that courts are "reluctant to find ... implied preemption" of local gun control laws. (*Great Western, supra*, 27 Cal.4th at p. 867.)

II. THIS COURT SHOULD ORDER THE OPINION TO BE DEPUBLISHED

For the reasons set forth above, as well as other reasons explained in San Francisco's Petition for Review, the Opinion was wrongly decided. Moreover, if the Opinion is allowed to remain published, it is likely to spur groundless suits challenging other local gun ordinances enacted by California's cities and counties, to confuse the courts, and to cause permissible and important local laws to be erroneously struck down.

Each aspect of the Opinion discussed above will lead to harmful effects if the Opinion remains published. The Opinion's strong message against local regulation will deter local governments from enacting firearms ordinances necessary to respond to gun violence. Even though the sale, transfer, possession, and use of firearms in California's densely populated urban areas obviously create problems that are different in type and scope than the problems those activities may engender when they take place in sparsely settled rural counties, the Opinion will hurt local governments' ability to respond to those localized differences by adopting locally-appropriate regulation. The result may be that local governments in California's urban areas such as San Francisco, Los Angeles, Oakland, and San Jose are unable to adopt firearms regulations

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firearm capable of being concealed upon the person" in such person's home or business or on his or her private property. (*Id.*, §12026(b).)

beyond those that are appropriate to rural areas, where citizens may have a much greater familiarity with hunting and with the safe storage of firearms.

The Opinion's expansive interpretations of Government Code Section 53071 and Penal Code Section 12026(b) also threaten to transform the legal landscape of gun regulation in California, placing numerous types of public safety regulations beyond the legislative reach of local governments. For example, if the Opinion's expansive view of what constitutes a "license" under Government Code Section 53071 prevailed, then any local ordinance that imposed restrictions beyond those contained in state law – in other words, that restricted gun-related conduct that the Legislature had not prohibited or restricted – would likely be challenged as preempted by Section 53071 on the ground that it invalidated or interfered with a state-created "license." Similarly, if the Opinion's broad interpretation of Penal Code Section 12026(b) were the law, then any local ordinance addressing the storage or use of handguns on private property, and even any local land use ordinances that restrict permissible areas for gun stores, might be held preempted as an "impediment" to gun owners' ability to purchase and keep a handgun. The Legislature did not intend these statutes to have such a broad preemptive reach, or to so significantly tie the hands of local governments' efforts to protect their citizens.

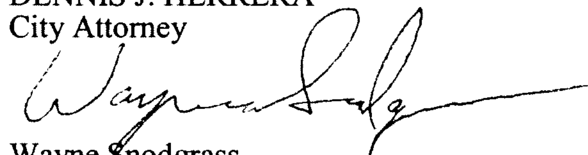
Allowing the Opinion to remain published could harm California's citizens, many of whom face significant risks of gun violence in their daily lives. Californians look to their local governments to take reasonable measures to promote public safety, and they are entitled to expect their elected representatives to adopt such lawful measures. By significantly expanding the scope of state preemption, however, the Opinion will make it harder for local governments to respond to their citizens' valid safety concerns, and thus to protect Californians against such a grave threat to public safety.

III. CONCLUSION

Because the Opinion erroneously asserts that local governments possess only limited regulatory power over firearms, and wrongly expanded the scope of preemption under Government Code Section 53071 and Penal Code Section 12026(b), the City and County of San Francisco respectfully requests that this Court order depublication of the Opinion.

Very truly yours,

DENNIS J. HERRERA
City Attorney



Wayne Snodgrass
Deputy City Attorney

cc: California Court of Appeal, First Appellate District, Division Four
The Honorable Paul H. Alvarado, San Francisco Superior Court
C.D. Michel, Counsel for Plaintiffs/Petitioners

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, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On March 10, 2008, I served the following document(s):

LETTER REQUESTING DEPUBLICATION OF COURT OF APPEAL OPINION (RULE 8.1125)

on the following persons at the locations specified:

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in the manner indicated below:

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

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

Executed March 10, 2008, at San Francisco, California.

HOLLY TAN