COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PAULA FISCAL, LARRY P. BARSETTI, RECECCA KIDDER, DANA K. DRENKOWSKI, JOHN CANDIDO, ALAN BYARD, ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF FIREARM RETAILERS, LAW ENFORCEMENT ALLIANCE OF AMERICA, and SAN FRANCISCO VETERAN OFFICERS ASSOCIATION,

Plaintiffs/Respondents,

vs.

THE 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)

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF OF LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF APPELLANTS

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Legal Community Against Violence ("LCAV") hereby seeks permission pursuant to Rule 8.200(c) of the California Rules of Court to file the accompanying amicus curiae brief in support of Appellants, the City and County of San Francisco, *et al.* (the "City").

LCAV is a public interest law center dedicated to preventing gun violence, formed in the wake of the 1993 assault weapon massacre at 101 California Street in San Francisco. LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV concentrates on state and local policy reform, serving governmental entities and advocacy organizations in California and throughout the United States. Although it was not involved in drafting the ordinance at issue here, LCAV has particular interest in and experience with California local gun ordinances. It has assisted counties and municipalities in crafting a variety of local regulations to fit community needs, and, as amicus curiae, it has provided the courts with informed analysis of the legal bases for such local regulation.

The attached amicus brief will assist the Court in deciding the issue of central importance to this proceeding — the scope of state law preemption of local ordinances. The Respondents place undue reliance on a few sentences in *Doe v. City and County of San Francisco* (1982) 136 Cal. App. 3d 509. There are no shortcuts, however, for disciplined analysis of the preemption issue. The *Doe* court's implied preemption comments do

not conform with current, well-established preemption analysis and were not necessary to that decision. The Supreme Court's 2002 companion decisions in *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal. 4th 853 and *Nordyke v. King* (2002) 27 Cal. 4th 875 have since addressed and clarified state preemption analysis of local gun regulations.

The LCAV amicus brief summarizes the current law, and analyzes this important preemption issue under the proper framework provided by the Supreme Court.

Respectfully submitted,

Dated: May 29, 2007

FARELLA BRAUN & MARTEL LLP

By: _____

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INTRODUCTION

Death or injury by handguns in this country has become so common it is almost mind-numbing. In 2004, the most recent year for which statistics are available, guns killed nearly 30,000 Americans – the equivalent of more than ***80 deaths each day*** and more than ***three deaths each hour***.[1] Tragic incidents like the Virginia Tech shootings, in which 32 innocent people were murdered and another fifteen injured over the course of a two and a half hour handgun massacre, crystallize the national conscience for a moment. Despite the great media attention given this latest tragedy, Congress continues to be unwilling or unable to enact effective federal legislation. As the media spotlight turns elsewhere, so does the attention of our politicians. But this serious problem remains.

To fill the void left by an absence of meaningful federal firearms regulations,[2] municipalities like Appellant City and County of San Francisco (the "City"), have taken it upon themselves to address the handgun violence that wreaks such harm on their communities. Gun violence has particularly tragic consequences in densely-populated urban

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[1] The *2006 California Report: Recent Developments in Federal, State and Local Gun Laws*, Legal Community Against Violence (2007), at 1. http://www.lcav.org/library/reports_analyses/regulating_guns.asp

[2] The federal government has done little to address our nation's epidemic of gun violence As evidenced by Congress' failure in 2004 to renew the federal assault weapon ban and 2005 passage of a law to grant the gun industry sweeping legal immunity, federal gun policy is becoming increasingly weaker.

areas such as San Francisco. For example, 96 men, women and children were killed in the City during the year 2005 alone. Of those deaths, 83% involved a firearm, and the great majority of those firearms were handguns. (AA, Vol. 4, p. 0788.) And handguns do not merely kill. They also maim and injure, often leaving the victim with lifelong debilitating injuries.[3]

It was against this grim backdrop that on November 8, 2005, the voters of San Francisco passed Proposition H, by a margin of 58% to 42%. It has two operative provisions. Section 2 bans within the limits of the City "the sale, distribution, transfer and manufacture of all firearms and ammunition." (AA, Vol. 3, p. 0534.) Section 3, entitled "Limiting Handgun Possession in the City," applies only to City residents, who shall not, within city limits, "possess any handgun unless required for specified professional purposes." (*Id.*) Among residents not covered by the possession ban are all state and federal peace officers, active members of the armed forces and security guards who are protecting and preserving property or life within the scope of their employment. (*Id.*) The aim of

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[3] Testifying before the San Francisco Board of Supervisors, the Chief of Medicine for San Francisco General Hospital, Dr. Andre Campbell, observed that "the rising tide of violence is staggering." Moreover, because of advanced medicine, fewer gunshot victims die, but they are often left with spinal cord injuries and serious health problems. Dr. Campbell noted that the care of a quadriplegic individual can cost approximately $2.9 million over the course of a lifetime and these costs are borne by victim's families who are often poor and without resources, leaving the City to pick up the costs. (H. Knight and C. Vega, "Big problems for survivors of shootings" *SF Chronicle*, April 24, 2007, at B1.)

Proposition H is to have fewer guns in the flow of commerce thereby reducing the death and destruction they cause. (*Id.*) "It limits handgun possession to those who protect us, and ends firearm sales." (*Id.*)

Amicus Curiae Legal Community Against Violence ("LCAV"), although not involved in drafting Proposition H, has extensive experience with California local gun ordinances. It has assisted many counties and municipalities in crafting a variety of local regulations to fit community needs. Nationwide, local communities have been willing to advance and test aggressive policies in their attempts to solve the problem of gun violence – policies that might not be appropriate or politically viable on a statewide or national level. In addition to handgun bans, some communities prohibit the manufacture and/or sale of firearms, ammunition or both. LCAV is called upon by governmental entities and advocacy organizations to provide legal assistance for the development and legally effective implementation of these and other policies. LCAV supports the ability of state and local governments to fashion regulations like Proposition H to best address the specifics of the gun violence that plagues their communities.

LCAV provides this brief to assist the Court in its evaluation of the important state preemption law issues raised by this appeal.

ARGUMENT

I. THE CALIFORNIA LEGISLATURE AND COURTS HAVE TAKEN A NARROW AND CAREFUL APPROACH TO PREEMPTION OF LOCAL GUN REGULATION.

The California Legislature and courts have had many opportunities to broadly preempt large areas of firearms regulations or the field of gun regulation as a whole. Both have declined. The Legislature and the courts have consistently taken a narrow and careful approach to preemption of local gun control regulations and both have consistently recognized the power of local governments to enact laws designed to address problems faced at the local level. The California Supreme Court's most recent and authoritative pronouncement on the subject in *Great Western Shows, Inc. v. County of Los Angeles ("Great Western")* emphasized this approach by the Legislature:

> [A] review of the case law and the corresponding development of gun control statutes in response to that law demonstrates that the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption.

((2002) 27 Cal.4th 853, 864.)

A. The *Great Western Shows* Standard in California for Preemption Analysis of Local Gun Regulations.

The Supreme Court decision in *Great Western* arose from the federal opinion *Great Western Shows, Inc. v. Los Angeles County* (9th Cir. 2000) 229 F.3d 1258 ("*Great Western Shows*"), where the Ninth Circuit reviewed a preemption challenge to a Los Angeles County ordinance outlawing sales

of firearms and ammunition on county property, including the county fairgrounds where plaintiff had held its gun shows for many years.

Applying California law, the federal appellate court noted that several state laws "clearly pertain to the sale of firearms at gun shows." (*Id.* at 1261.) The federal district court had reasoned that "'[i]t would be nonsensical'" for the Legislature to expressly permit gun sales at gun shows and still intend to allow local ordinances to ban such sales. (*Id.*) The Ninth Circuit found support for this argument in *Doe v. City and County of San Francisco* (1982) 136 Cal. App.3d 509, 518 ("*Doe*"), which "inferred from the legislature's restriction on local handgun permit requirements an intent to foreclose local laws banning possession citywide." (*Id.* at 1262 [referring to *Doe's* statement that it "'strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession.'" (*Doe*, 136 Cal. App.3d at 518.) The Ninth Circuit also noted that an Opinion of the Attorney General adopted this same reasoning, explicitly relying on *Doe*. (*Id.* [citing 77 Ops.Cal.Atty.Gen 147 (1994)].)

On the other hand, the Ninth Circuit observed that the later-decided opinion *California Rifle and Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302 ("*California Rifle*"), "appears to have disavowed the logic underlying the district court's conclusion and the pertinent part of *Doe*." (*Great Western Shows*, *supra*, 229 F.3d at 1262.) The court

explained why it believed the reasoning of *Doe* and *California Rifle* were in tension:

> [T]he [California *Rifle*] court confronted the argument that because under state law sales of firearms are regulated, but legal, a city cannot ban the sale of certain types of firearms. [Citation.] The court rejected this reasoning as tautological: "Again, it is no doubt tautologically true that something that is not prohibited by state law is lawful under state law, but the question here is whether the Legislature intended to strip local governments of their constitutional power to ban the local sale of firearms which the local governments believe are causing a particular problem within their borders." [Citation.] **This reasoning appears to be at tension with the reasoning of *Doe.***

(*Id.*, bold, emphasis added [quoting *California Rifle*, *supra*, 66 Cal.App.4th at 1324].)

Referring to *Doe* and *California Rifle*, the Ninth Circuit determined that "[t]he Courts of Appeal of the State of California have responded in seemingly conflicting ways to this type of argument in the area of local gun regulation preemption." (*Great Western Shows*, *supra*, 229 F.3d at 1261-62.) After noting that *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109 ("*Suter*") was discussed in *California Rifle*, the Ninth Circuit concluded "[i]n sum, there is tension in the reasoning underlying several decisions of the Courts of Appeal of the State of California and an Opinion of its Attorney General." (*Id.* at 1263.) Mindful that "[t]he area of gun control regulation is a sensitive area of local concern," the court suggested that "[a] clear statement by the California Supreme Court would provide

guidance to local governments with respect to the powers they may exercise in passing local gun control regulations." (*Id.*) For this reason, it certified pursuant to then California Rule of Court 29.5 (now Rule 8.544) to the "California Supreme Court questions of law concerning the possible state preemption of local gun control ordinances." (*Id.* at 1259.)

The California Supreme Court granted the Ninth Circuit's request for certification. (*Great Western, supra*, 27 Cal.4th at 858.) In April, 2002 it provided the suggested "clear statement" on the powers of local governments to pass gun regulation. Under the heading "*State Law Preemption in General and as Applied to Gun Control*," the Court carefully and exhaustively traced the development of the law on preemption of local gun regulation through the principal cases. (*Id.* at 861-64.) "A review of the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun regulation rather than the entire field of gun control." (*Id.* at 861.)

The *Great Western* Court started with "the seminal case to advance this proposition" – its unanimous decision in *Galvan v. Superior Court* (1969) 70 Cal.2d 851 ("*Galvan*"). (*Great Western, supra*, 27 Cal.4th at 861.) That case involved an earlier San Francisco ordinance that made it "unlawful for any person within San Francisco to own, possess or control

an *unregistered* firearm." (*Galvan*, 70 Cal.2d at 855, fn. 1, italics added.)[4] The issue raised in *Galvan*, the *Great Western* Court explained, concerned the requirement that "all firearms within San Francisco, with certain exceptions . . . be registered" with the City. (*Great Western*, *supra*, at 861.)

The Court first briefly described its conclusion in *Galvan* that the registration requirement was not expressly preempted by the licensing prohibition in Penal Code Section 12026, distinguishing between "licensing, which signifies permission or authorization, and registration, which entails recording." (*Great Western*, *supra*, 27 Cal.4th at 861.) The *Great Western* Court next discussed and summarized for three paragraphs the lengthy *Galvan* implied preemption analysis using its three-part test.[5] (*Id.* at 861-62.)

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[4] The City's power to ban possession of firearms generally does not appear to have been directly questioned or addressed in *Galvan*. The *Galvan* Court did swiftly reject challenges to the ordinance as violative of the Second Amendment ("It is . . . settled in this state that regulation of firearms is a proper police function") and due process-notice (because "the penalty is imposed upon the possession of unregistered firearms" and "Galvan does not contend that the law violates due process because one might unknowingly possess a firearm"). (*Galvan*, *supra*, 70 Cal.2d at 866, 868.) Respondents here do not contend that the Second Amendment or Due Process are at issue.

[5] The Court had earlier in the opinion set out the implied preemption test, by quoting from its decision in *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98, fn. omitted (*Sherwin-Williams*):

> ["][L]ocal legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of

In *Galvan*, the Court "found the San Francisco ordinance did not meet the first test, i.e., that the subject matter had been so fully and completely covered by general law as to clearly indicate that it had become exclusively a matter of state concern." (*Great Western*, *supra*, 27 Cal.4th at 861.) This finding was based on a determination that despite the many state statutes relating to weapons, there were "'various subjects that the legislation deals with only partly or not at all.'" (*Id.* at 861 [quoting *Galvan*, *supra*, 70 Cal.2d at 860].) Further, the *Great Western* Court quoted *Galvan*'s conclusion that "'there are some indications that the Legislature did not believe that it had occupied the entire field of gun or weapons control'" in the context of the implied reach of Penal Code section 12026: "'[T]he Legislature has expressly prohibited requiring a license to keep a concealable weapon at a residence or place of business. (Pen. Code, § 12026.) Such a statutory provision would be unnecessary if the

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

(*Great Western*, *supra*, 27 Cal.4th at 860-61.)

Legislature believed that all gun regulation was improper.'" (*Id.* at 861-62 [quoting *Galvan*, *supra*, 70 Cal.2d at 860].)

Second, the *Great Western* Court explained, *Galvan* found no implied preemption under part two of the implied preemption test because partial legislative coverage of the area did not indicate that any paramount state concern "would not tolerate further or additional local action":

> "The issue of 'paramount state concern' also involves the question 'whether substantial, geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether local needs have been adequately recognized and comprehensively dealt with at the state level.' [Citation.] [¶] That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority . . . ."

(*Great Western*, *supra*, 27 Cal.4th at 862 [quoting *Galvan*, *supra*, 70 Cal.2d at 863-74].)[6] The *Great Western* Court repeated this quote from *Galvan* later in the opinion in performing its own implied preemption analysis,

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[6] Respondents unpersuasively seek to distinguish this language in *Galvan* by inaccurately recasting it as a reference "generally to *public* possession of loaded firearms and *public discharge* of firearms," as opposed to private possession in a residence. Respondent's Brief (RB) at 7 (original emphasis). The context of this oft-quoted statement form *Galvan*, however, is not in any way limited to "public" use of firearms. The *Galvan* Court was addressing the issue of whether "gun registration or gun or weapons control" is a matter of paramount state concern. (*Galvan, supra*, 70 Cal.2d at 863.) While the Court did earlier mention in that discussion Government Code § 25840 (on the subject of firing of weapons in public places), it also considered Penal Code § 12026 (addressing local licensing requirements for possession of handguns in a residence or place of business). (*Id.*) Indeed, the reference to Section 12026 came after the cite to Section 25840, and immediately preceded the passage quoted above.

noting that the statement "is true today [2002] as it was more than 30 years ago." (*Id.* at 867.)

Third, the *Great Western* Court noted *Galvan*'s conclusion on the last prong of the implied preemption analysis, i.e., that the ordinance in question placed no undue burden on non-San Franciscans who were given seven days to register their guns. (*Great Western*, *supra*, 27 Cal.4th at 862.) Once again, the *Great Western* Court specifically endorsed and reaffirmed *Galvan*'s reasoning on this point in applying the third test to its own facts: "As for the third test, we agree with previous cases that '[l]aws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges.'" (*Id.* at 867 [quoting *Suter*, *supra*, 57 Cal.App.4th at 1119 and citing *Galvan*, *supra*, 70 Cal.2d at 864-65].)

The *Great Western* Court next turned to the legislative reaction to *Galvan*. Here the Court used the Court of Appeal's decision in *Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897 ("*Olsen*") to explain that the Legislature had enacted a narrow preemption statute, "Government Code section 53071, which made clear an 'intent "to occupy the whole field of registration or licensing of . . . firearms."'" (*Great Western*, *supra*, 27 Cal.4th at 862 [quoting *Olsen*, *supra*, 15 Cal.App.3d at 902, italics omitted].) Noting "*Galvan's* strong statement concerning the narrowness

of state law firearms preemption," the *Great Western* Court quoted the *Olsen* court on the significance of "the Legislature's limited response to *Galvan*":

> Despite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent was limited to registration and licensing. We infer from this limitation that the Legislature did not intend to exclude [localities] from enacting further legislation concerning the use of firearms.

(*Id.* at 862-63 [quoting *Olsen*, *supra*, 15 Cal.App.3d at 902].) *Olsen* upheld the validity of a local ordinance prohibiting a parent from allowing a minor child to possess or fire a BB gun. (*Id.* at 863.)

Great Western next noted the legislative reaction to *Olsen,* section 53071.5 of the Government Code, "'which expressly occupies the field of the manufacture, possession, or sale of *imitation* firearms.'" (*Great Western*, *supra*, 27 Cal.4th at 863 [quoting *California Rifle*, *supra*, 66 Cal.App.4th at 1315].) Here, quoting *California Rifle*, the Court explained:

> ["]Thus once again the Legislature's response was measured and limited, extending state preemption into a new area in which legislative interest had been aroused, but at the same time carefully refraining from enacting a blanket preemption of all local firearms regulation." (Italics added.) As the court further explained: "This statute is expressly limited to imitation firearms, thus leaving real firearms still subject to local regulation. The express preemption of local regulation of sales of imitation firearms, but not sales of real firearms, demonstrates that the Legislature has made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms."

(Id. [quoting *California Rifle*, *supra*, 66 Cal.App.4th at 1312, italics omitted].) *California Rifle* upheld a local ban on sales of a type of handguns known as Saturday Night Specials. (*Id.*) The Court also noted that *Suter* had upheld a city's authority to confine firearms dealers to specified commercial zones, but struck down the portion of the ordinance "regarding firearms storage covered by the detailed provisions of Pen. Code § 12071." (*Id.*)

Lastly, in its survey of the developing case law on preemption, the *Great Western* Court turned, "[o]n the other hand" to the only decision it discussed finding a local gun ordinance preempted – *Doe*. (*Great Western*, *supra*, 27 Cal.4th at 863.) It described the San Francisco ordinance there as "outlaw[ing] the possession of handguns within the city but exempt[ing] those persons who obtained a license to carry a concealed weapon under Penal Code section 12050." (*Id.*) In contrast to its expansive discussion of *Galvan*, *California Rifle* and *Suter*, the Court was cryptic in its description of *Doe*. It noted *Doe*'s acknowledgement that *Galvan* and *Olsen* "'suggested the Legislature has not prevented local government *bodies from regulating all aspects of the possession of firearms.'* [Citation.]" (*Id.* at 863-64, original italics [quoting *Doe*, *supra*, 136 Cal.App.3d at 516].) The Court then described *Doe*'s preemption holding:

> Nonetheless, the ordinance directly conflicted with Government Code section 53071 and Penal Code section 12026, the former explicitly preempting local licensing requirements, the

> latter exempting from licensing requirements gun possession in residences and places of business. Thus, the effect of the San Francisco ordinance "is to create a new class of persons who will be required to obtain licenses in order to possess handguns" in residences and places of business [citation], which the two statutes forbid [citation].

(*Id.* at 864 [quoting and citing *Doe*, *supra*, 136 Cal.App.3d at 517, 571-18].) Significantly, the Court said nothing about *Doe*'s one-paragraph discussion under the heading "Implied Preemption," which had not utilized the three-part implied preemption test established in *Galvan* and described at length and applied by the *Great Western* Court. (See *id.* at 863-67.) Thus, contrary to the statements in the Respondents' brief, it cannot be fairly said that *Doe* has been "ratified" or cited "approvingly" by the courts. (See Respondents' Brief (RB) at 22, 26.)

The *Great Western* Court summarized its "review of case law and the corresponding development of gun control statutes in response to that law" as demonstrating "that the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption." (*Great Western*, *supra*, 27 Cal.4th at 864.) The Court proceeded to apply this structure for its analysis of the issue presented and held that the Los Angeles County ordinance was not preempted.

The Supreme Court decided *Nordyke v. King* (2002) 27 Cal.4th 875 (*"Nordyke"*), which involved a preemption challenge to an Alameda county ordinance banning possession of firearms on county property, on the

same day as *Great Western*. In *Nordyke*, the Court first noted that "[g]eneral preemption principles are recapitulated in *Great Western*." (*Id.* at 881.) After summarizing the *Great Western* decision, the Court applied the principles set forth in *Great Western* and upheld the local possession ban. (*Id.* at 881-85.)

B. *Great Western* and *Nordyke* Are The Controlling Authority on California's Gun Preemption Law.

The California Supreme Court's 2002 companion decisions in *Great Western* and *Nordyke,* form the controlling authority on state preemption of local gun regulation. Respondents, the National Rifle Association, et al. (collectively the "NRA") mischaracterize the *Great Western* and *Nordyke* holdings as "narrow." (See RB, p. 46.) Yet the history of these cases as recounted above demonstrates just the opposite.

Rather than being narrowly drawn to the facts presented, the Supreme Court deliberately in its words "recapitulated" the "general preemption principles" in *Great Western* (*Nordyke* at 881), setting out at length the proper structure to be used to determine under California law whether a local gun regulation ordinance is preempted:

> If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication."

(*Great Western, supra*, 27 Cal.4th at 860 [quoting *Sherwin-Williams Co. v. City of Los Angeles, supra*, 4 Cal.4th 893, 897-98].)

"'Local legislation is "duplicative" of general law when it is coextensive therewith,'" and is "'contradictory' to general law when it is inimical thereto.'" (*Id.*)

An area can be "fully occupied" by general law if the legislature has either "'expressly manifested its intent to "fully occupy" the area,'" or has impliedly manifested such an intent. (*Id.*) Implied legislative intent to fully occupy an area exists if any one of the following indicia of intent is present:

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

(*Id.* at 861 [quoting *Sherwin-Williams*, 4 Cal.4th at 897-98].)

II. SECTION 2 IS NOT PREEMPTED BY STATE LAW, EXPRESSLY OR BY LEGISLATIVE IMPLICATION.

A. Section 2 Is Not Duplicative Of State Law.

An ordinance is duplicative if it is coextensive with state law. (*Great Western, supra*, 27 Cal.4th at 860.) Stated another way, a local law duplicates state law if it "criminalize[s] 'precisely the same acts which are

. . . prohibited'" by state law. (*Id.* at 865 [quoting *Pipoly v. Benson* (1942) 20 Cal.2d 366, 370].)

Here, Section 2 of Proposition H provides that the sale, distribution, transfer and manufacture of all firearms and ammunition "shall be prohibited" within City limits. There is no state law banning the sale, distribution, transfer and manufacture of *all* firearms and ammunition. That Section 2 may overlap with certain state laws does not tip the balance in favor of preemption. This specific argument was rejected by the *Great Western* Court, which held that preemption did not result merely because the Los Angeles ordinance, which banned the sale of firearms and ammunition on county property, overlapped with certain states laws banning the sale of dangerous firearms. (*Great Western*, *supra*, 27 Cal.4th at 865; see also *Suter*, *supra*, 57 Cal.App.4th at 1123 [holding that a local ordinance, "although echoing the provisions of *Penal Code section 12071*," was not "coextensive with it"].) Because Section 2 does not punish "precisely the same acts" that are forbidden by state law, it is not preempted by duplication.

B. Section 2 Does Not Contradict State Law.

"An ordinance contradicts state law if it is inimical to state law." (*Suter, supra*, 57 Cal.App.4th at 1124.) A local law is inimical to state law if it "mandate[s] what state law expressly forbids" or "forbid[s] what state law expressly mandates." (*Great Western*, *supra*, 27 Cal.4th at 866.)

1. Section 2 Does Not Contradict the Unsafe Handgun Act.

There is no state law mandating firearms and ammunition sales, a fact which precludes any preemption of Section 2 by contradiction. The NRA nevertheless contends that Section 2 contradicts the Unsafe Handgun Act ("UHA"). (See RB, pp. 51-52.) Specifically, the NRA argues that Section 2 conflicts with Penal Code section 12131(a)'s provision that handguns on the Department of Justice's roster "may be sold in this state pursuant to this title," because Section 2's ban on all firearms sales prohibits sales of handguns listed on the roster. (RB, pp. 51-52.)

The UHA does not, however, *mandate* the sale of handguns on the Department's roster; it merely *allows* the sale of certain handguns deemed safe under certain circumstances. It does not say that those handguns "must" be sold, but only that they "may" be sold. At most, the UHA contemplates the sale of such handguns, which is not, as explained in *Great Western*, a sufficient ground for finding preemption by contradiction.

In *Great Western*, the court considered whether the local ordinance banning sales on county property contradicted the extensive gun show regulations at the state level. The court found that while these state laws regulated sales and "therefore contemplated such sales," they did "not mandate such sales." (*Great Western, supra*, 27 Cal.4th at 866.) Thus, the ordinance banning sales on county property was not in conflict with state

law. (*Id.*) Similarly here, Section 2 is not in conflict with the UHA, or with any other state law that merely contemplates the sale of firearms.[7]

The NRA erroneously claims that the UHA's legislative history shows that "it was generally acknowledged that the UHA would preempt local firearms bans." (RB, p. 53.) The NRA bases this claim in part on the misquoted statement from a Senate committee report, taken out of context, that the UHA would or might preempt any "local [contrary] ordinance, both those already in existence and *any proposed locally in the future.*" (*Id.*) The passage of the committee report on which the NRA relies in fact reads as follows:

> Under existing Government Code section 53071, some local entities have adopted restrictions on the local sale by licensed dealers of so-called 'Saturday Night Specials' . . . . This bill would appear to preempt any such local ordinance, both those already in existence and any proposed locally in the future.

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[7] As additional support for its determination that Section 2 cannot stand, the Superior Court below cited *Great Western* for the proposition that a local government cannot ban an activity that the state promotes. (See AA, Vol. 5, pp. 21-22.) But the state does not *promote* handgun sales. As explained above, it *allows* the sale of certain enumerated handguns determined to be safe according to certain standards. The Supreme Court in *Great Western* rejected an argument similar to the one made by the Superior Court here. (*Great Western*, *supra*, 27 Cal.4th at 868 ["there is no evidence in the gun show statutes or, as far as we can determine, in their legislative history, that indicates a stated purpose of promoting or encouraging gun shows. Rather the overarching purpose of Penal Code sections 12071, 12071.1, and 12071.4 appears to be nothing more than to acknowledge that such shows take place and to regulate them to promote public safety."].)

(AA, Vol. 4, p. 0720.) The statement relied on by the NRA speaks only to preemption of local junk gun bans, *not*, as the NRA argues, to preemption of local firearms bans generally. At most, a local law banning handguns that fail to meet certain safety standards, which is not at issue here, would be preempted by the UHA through duplication. The UHA does not preempt all local firearms sales bans.

2. There Is No Basis To Find Section 2 Contradicts Penal Code Section 12026.

Penal Code section 12026 does not provide a basis for preemption of Section 2 by contradiction. Section 12026 has two parts. Sub-part (a) provides an exception to Penal Code section 12026's sanction for carrying a concealed weapon. Sub-part (b) prohibits requiring a "permit or license to purchase, own, possess, keep or carry" a concealable firearm in a person's residence or business. The NRA's reliance on section 12026 to find preemption is flawed in several ways.

First, the NRA erroneously claims that section 12026 creates a "right" to purchase handguns. (RB, pp. 28, 49-51.) This argument was also adopted by the court below. (AA, Vol. 1, p. 0048; AA, Vol. 5, p. 23.) Specifically, the Superior Court held that "[a] complete ban on the sale of guns and ammunition necessarily would render a citizen's *right to purchase* handguns illusory, since citizens typically come to possess a handgun by buying it." (AA, Vol. 5, p. 23) (emphasis added). However, the *California*

Rifle court, in the context of upholding a local ban on the sale of "Saturday Night Special" handguns, directly rejected a reading of section 12026 as creating "rights":

> 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 an SNS) 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. (See, e.g., *Suter v. City of Lafayette*, *supra,* 57 Cal.App.4th at 1127 (interpreting Pen. Code, § 12072) ["The Penal Code, however, establishes a *limitation*, not a right."].) No authority has been cited for the proposition that a statute prohibiting a permit requirement can be construed as intended to create a broad enforceable right to purchase any type of handgun not specifically outlawed by state law. Again, the Legislature could expressly create such a right, but has not.

(*California Rifle, supra*, 66 Cal.App.4th at 1324.)[8]

Second, even were Penal Code section 12026 to confer a right to *purchase* handguns, it would not confer a right to *sell* all firearms and ammunition. Firearms sales are a different area of regulation than firearms purchases. (*See California Rifle*, *supra*, 66 Cal.App.4th at 1314 ["The

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[8] The NRA's citation to *Sippel v. Nelder* (1972) 24 Cal.App.3d 173 does nothing to further its argument, but instead merely highlights another example in which a case has been quoted out of context. There, the court used the word "entitled" to mean that the plaintiff qualified under section 12026 to possess a concealed weapon: "The plaintiff in the instant case did not fall within the excepted classes prescribed by Penal Code, section 12021, and he was therefore entitled, under Penal Code, section 12026 to possess a concealed firearm at his residence without obtaining a license or permit of any kind." Nothing in *Sippel* contradicts the holding of *California Rifle*.

imitation firearms statute . . . shows the Legislature's view of 'sale' as a separate area of regulation."].) Section 2's prohibition on the *sale* of firearms and ammunition would thus not be in conflict with any purported right to purchase handguns.

In sum, Section 2 does not contradict Penal Code section 12026. Section 2 does not require any "permit or license *to purchase*." It prohibits sales. Indeed, Proposition H expressly states in Section 6 that it is not "designed to duplicate or conflict with California state law" and that it shall not be "construed to create or require any local license or registration for any firearm, or create an additional class of citizens who must seek licensing or registration." (AA, Vol. 3, p. 0534.)

3. Section 2 Does Not Contradict Government Code Section 53071.

Finally, the NRA argues that Government Code section 53071, which preempts local enactments related to "registration or licensing of commercially available firearms" preempts Section 2. This argument is fallacious. Government Code section 53071 deals with the licensing of firearms in connection with individuals, not with the licensing of dealers. Under Penal Code section 12071, local governments already have the authority to regulate and license dealers and auction houses. Furthermore, in *Suter,* the appellate court specifically held that local governments have explicit authority to license dealers. (*Suter*, *supra*, 57 Cal.App.4th at 1121.)

As the City notes in its reply brief at p. 12, while section 53071 mandates that a city may not require the licensing or registration of firearms, nothing in that statute prevents a city from regulating firearms sales in ways that do not implicate licensing and registration. Here, Section 2's prohibition on firearms and ammunition sales does not conflict with state law through contradiction. It neither mandates anything forbidden by state law nor forbids anything mandated by that law.

C. Section 2 Does Not Enter An Area Fully Occupied By State Law, Either Expressly Or Impliedly.

1. State Law Has Not Fully Occupied the Area of Firearms Sales Regulation Through an Express Manifestation of Legislative Intent.

The NRA also cannot credibly argue that state law has expressly preempted the field of firearms sales regulation. In *Great Western*, the Supreme Court held that "the Legislature has declined to preempt the entire field of gun regulation, instead preempting portions of it, such as licensing and registration of guns and sale of imitation firearms." (*Great Western*, *supra*, 27 Cal.4th at 866.) Section 2's prohibition on the sale of firearms does not fall in any of those targeted areas.

This conclusion is mandated by the plain language of Government Code sections 53071 and 53071.5 and Penal Code section 12026, which are "essentially all of the legislative pronouncements from which an express preemption argument might be constructed." (*California Rifle*, *supra*, 66

Cal.App.4th at 1312.) "It is the intention of the Legislature to occupy the whole field of *regulation of the registration or licensing*" of firearms. (Gov. Code, § 53071, italics added.) There is no mention of the broader field of firearms sales. Nor could this omission have been accidental. When the Legislature decided to occupy the field of imitation firearms in the very next section, it stated its intent to occupy "the whole field of regulation of the manufacture, sale, or possession of imitation firearms." (Gov. Code, § 53071.5.) Finally, Penal Code section 12026 states only that local licensing and permitting requirements to "purchase, own, possess, keep, or carry" handguns in the home or place of business are prohibited. It says nothing about the sale of firearms, which, as noted, is an entirely separate field of regulation from purchases. (See *California Rifle*, *supra*, 66 Cal.App.4th at 1314 ["Legislature's view of 'sale' as a separate area of regulation."].)

If the Legislature intended to occupy the field of "regulation of the manufacture, sale, or possession" of real firearms, the Legislature would have said so. "The express preemption of local regulation of *sales* of *imitation* firearms, but not sales of real firearms, demonstrates that the Legislature has made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms." (*Id.* at 1312.) As held by the *California Rifle* court, the above three statutes "demonstrate the use of clear methods for expressly

preempting an entire defined field of possible local regulation. . . . The statutes contain no express preemption covering the field of handgun sales. To the contrary, the state statutes are carefully worded to avoid any broad preemptive effect." (*Id.* at 1314.)

Section 2 does not regulate licensing or registration of firearms, does not create a license or permit requirement to purchase, own, possess, keep or carry a handgun, and does not regulate the sale of imitation firearms. Because this "is the extent of the fully preempted fields," there is plainly no express preemption of Section 2. (See *id.* at 1313, 1317 [concluding that "it is quite clear that the Legislature has not expressly preempted the area of local regulation of handgun sales".])

The NRA apparently relies in part on the UHA to conclude that Section 2 is preempted by Government Code section 53071. (RB at pp. 51-53; see also AA, Vol. 1, p. 0048; AA, Vol. 5, pp. 0958, 0962.) The NRA contends that the UHA grants a license to manufacturers to sell particular handgun models in California. (*Id.*) Below, the Superior Court found that "Section 2 operates to revoke that license, thereby infringing into the area of licensing which the state fully occupies." (AA, Vol. 5, p. 0958.)

This is an overly expansive and unwarranted view of the meaning of "licensing." Under the UHA, "the Department of Justice shall compile, publish, and thereafter maintain a roster listing all of [handguns] that have been tested by a certified testing laboratory, have been determined not to be

unsafe handguns, and may be sold in this state pursuant to this title." Sub-part (b) of section 12131 states that the Department of Justice "may charge" manufacturers an annual fee no greater than the amount of certain administrative and infrastructure costs, and provides for the removal of handguns from the roster should a manufacturer fail to pay this required fee. It is difficult to see how this system, by which handguns are tested and listed on a roster if they pass certain safety tests, and which is funded in some part by fees paid by manufacturers, somehow grants a "license." Such an interpretation of the meaning of "license" would stretch the language of the statute too far. Moreover, as noted, the licensing under 53071 and 12026 refers to the licensing *of individuals*, not dealers or manufacturers. Nothing in state law preempts laws relating to the licensing of these businesses; to the contrary, state law contemplates local dealer licensing. There can be no finding of express preemption on this basis.

2. State Law Has Not Fully Occupied the Field of Firearms Sales Regulation by Implication.

Using the three-part test for implied preemption from *Great Western*, which the Superior Court did not apply, Section 2 is plainly not preempted.

As a preliminary matter, implied preemption should not be found easily. This is particularly true in the context of the Legislature's cautious and controlled approach to preemption of local gun control regulations:

> Claims of implied preemption must be approached carefully, because they by definition involve situations in which there is no express preemption. Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances. Hence the rule has developed that implied preemption can properly be found only when the circumstances 'clearly indicate' a legislative intent to preempt.

(*California Rifle*, *supra*, 66 Cal.App.4th at 1317.) The implied preemption analysis must begin from the premise that localities have "the basic police power to regulate the sale of firearms within [their] borders." (*Id.* at 1322.)

The question is not whether the Legislature has impliedly granted local governments the power to regulate firearms sales, but is instead "whether the Legislature intended to strip local governments of their **constitutional power to ban the local sale of firearms** which the local governments believe are causing a particular problem **within their borders**." (*Id.* at 1324.) (emphasis added.) There can be no implied preemption where, as here, there is no "clear indication" by the Legislature of an intent to take away the power of localities to prohibit the local sale of firearms.

a. Firearms sales regulation has not been so fully and completely covered by state law to indicate that it is exclusively a matter of state concern.

The *Great Western* decision – which upheld a sales ban on county property – considered and rejected the argument that the field of firearm

sales has been so completely covered by state law as to be preempted. That holding is controlling here. In this context, the *Great Western* court relied on the Legislature's failure "to preempt the entire field of gun regulation, instead preempting portions of it." (*Great Western*, *supra*, 27 Cal.4th at 866.)

The *California Rifle* court's discussion of this first factor of implied intent is also on point. In upholding an ordinance that banned within city limits the sale of handguns classified as Saturday Night Specials, the *California Rifle* court could not find the requisite "clear indication" that the field of handgun sales was completely covered by state law. (*California Rifle*, *supra*, 66 Cal.App.4th at 1318.) Instead, the court noted that "the Legislature has been cautious about depriving local municipalities of aspects of their constitutional police power to deal with local conditions." (*Id.*) Citing the three express preemption statutes described above, the court then held that "the very existence of [those statutes] . . . each of which specifically preempts a narrowly limited field of firearms regulation, is a rather clear indicator of legislative intent to leave areas not specifically covered within local control." (*Id.*) The court concluded that there was no clear indication by state law of an intention to preempt the field of handgun sales, holding instead that state law "clearly indicates the opposite." (*Id.*)

Thus, these cases establish that the field of firearm sales has not been fully occupied by state law, such that there is a clear indication that it is exclusively a matter of state concern.

b. Gun sales regulation is not partially covered by state law in such terms as to indicate that it is an issue of paramount state concern.

Great Western's discussion on this issue is on point:

> [W]e are reluctant to find such a paramount state concern, and therefore implied preemption, "when there is a significant local interest to be served that may differ from one locality to another." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707 [209 Cal. Rptr. 682, 693 P.2d 261].) It is true today as it was more than 30 years ago when we stated it in *Galvan*, "[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County." (*Galvan*, *supra*, 70 Cal.2d at 864.)

(*Great Western*, *supra*, 27 Cal.4th at 866-67.)

As noted above and in the City's briefing, gun violence is of significant local interest to the citizens of San Francisco. Indeed, and unfortunately, the gun homicide rate has increased in each of the years since the *Great Western* court's recognition that San Francisco's firearms problems may require different legislative treatment than those of other localities. (AA, Vol. 4, p. 0788.) San Francisco undoubtedly has a particular need for local gun control laws that differs from that of non-urban areas of California. (See, e.g., *Great Western, supra*, 27 Cal.4th at 867 ["the costs and benefits of making firearms more available through gun shows to the populace of a heavily urban county such as Los Angeles may

well be different than in rural counties, where violent gun-related crime may not be as prevalent"].) The second factor of implied legislative intent is therefore absent here.

c. Section 2 is narrowly drawn to minimize adverse effects on citizens of other nearby counties and towns, which plainly do not outweigh its benefits.

Once again, the Supreme Court's decision in *Great Western* addressed this issue in terms equally applicable here: "[W]e agree with previous cases that '[l]aws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges.'" (*Great Western, supra*, 27 Cal.4th at 867 [quoting *Suter, supra*, 57 Cal.App.4th at 1119; *Galvan, supra*, 70 Cal.2d at 864-65].) Section 2, which applies only to the sale, distribution, transfer and manufacture of firearms and ammunition within the City and County of San Francisco, will have less effect on outsiders than the ordinances upheld in *Galvan, Suter* and *Great Western*.

III. SECTION 3 IS NOT PREEMPTED

Just as Section 2 is not preempted, neither is Section 3 of Proposition H. Section 3, unlike Section 2, applies only to City residents, who shall not, within city limits, "possess any handgun unless required for specified

professional purposes." (AA, Vol. 3, p. 0534.)[9] State and federal peace officers, active members of the armed forces and security guards who are protecting and preserving property or life within the scope of their employment are not subject to the ban. (*Id.*) Residents may give up their handguns at any police station within 90 days of the effective date without penalty. (*Id.*)

The NRA again argues for preemption, but it does not apply the proper analysis set forth in *Great Western*. Instead it relies on dicta from *Doe,* and in doing so invites the Court to err.

A. Section 3's Possession Ban on Some Local Residents Creates No Licensing or Permitting Requirement, and, Therefore, Is Not Preempted Expressly or Impliedly by State Law.

The NRA relies almost exclusively on the Court of Appeal decision in *Doe*, which invalidated an 1982 ordinance that the NRA asserts to be "indistinguishable" from Section 3 of Proposition H. (RB at pp. 23-29.) In fact, Section 3 is materially different from the ordinance at issue in *Doe*. When tested under the *Great Western* preemption analysis, Section 3 should be upheld as a valid exercise of local police power not in conflict with state law.

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[9] Some localities have successfully implemented handgun bans, which have withstood judicial challenges. For example, a number of Illinois communities, including Morton Grove, have enacted ordinances prohibiting the possession and sale of handguns. (See *Quilici v. Village of Morton Grove* (7th Cir. 1982) 695 F.2d 261, 271 [upholding law against Second Amendment challenge].)

1. The NRA Overstates the Significance of *Doe*, Which Has Been Narrowly Construed by the Courts and the Legislature.

Doe struck down San Francisco's 1982 handgun possession ban, which applied to residents and nonresidents alike, because it contained an express exemption for concealed weapons licensees and thereby created a licensing requirement in contravention of state law. In particular, *Doe* found express preemption and a conflict with state law based on the language in the 1982 ordinance "that exempt[ed] from the general ban on possession any person authorized to carry a handgun pursuant to Penal Code section 12050." (*Doe*, *supra*, 136 Cal.App.3d at 516-17.) *Doe* recognized that "this particular exemption plays an important role in the arguments" it considered. (*Id.* at 512.) Because of that exemption, the ordinance's effect, the *Doe* court held, was to create a new class of persons who "must obtain licenses or relinquish their handguns," something expressly preempted by Government Code section 53071 and in conflict with Penal Code section 12026.[10] (*Id.* at 517, 518.) Section 3 of Proposition H, in contrast, has no such exemption.

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[10] At the time, Section 12026 provided: "'Section 12025 shall not be construed to prohibit any citizen of the United States over the age of 18 years who resides or is temporarily within this State, and who is not within the excepted classes prescribed by Section 12021 [related to felons and narcotics addicts], from owning, possessing, or keeping within his place of residence or place of business any pistol, revolver, or other firearm capable of being concealed upon the person, *and no permit or license to purchase, own, possess, or keep any such firearm at his place of residence or place of*

In the portion of the *Doe* decision that the Ninth Circuit in *Great Western* found to be inconsistent with other court of appeal decisions (and which was not mentioned by the Supreme Court in *Great Western*) , the *Doe* court has a one-paragraph discussion of "Implied Preemption." (*Id.* at 518.) There, the court stated that even if there were no licensing "requirement within the express wording of" sections 53071 and 12026, it would still have found the ordinance preempted under "the theory of implied preemption." (*Id.)* The court "infer[red]" from section 12026 "that that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities." (*Id.*)

2. As Subsequent Case Law Has Confirmed, the *Doe* Holding Is Properly Limited to Finding State Preemption of Local Licensing or Permitting of Handguns.

The NRA argues that *California Rifle* "recognized the continuing validity of *Doe.*" (RB at 26.) However, *California Rifle* paraphrased and distinguished *Doe* and, as noted, upheld a local ban on sales of Saturday Night Specials. Significantly, as noted, the *California Rifle* court directly

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business shall be required of him.'" (*Doe, supra*, 136 Cal.App.3d at 513-514, italics added by the *Doe* court [quoting Pen. Code, § 12026].)

Section 53071 read then and reads now "It 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." (Gov. Code, § 53071.)

and unequivocally rejected The NRA reading of section 12026 as creating "rights." *Doe*'s treatment in *Suter* and *Great Western* confirms that *Doe* must be read narrowly.

Notably, the NRA omits any mention of the *Suter* court's interpretation of the legislative non-reaction to *Doe*'s invitation to endorse its broad implied preemption discussion (described above) and it misinterprets the controlling Supreme Court opinions decided twenty years after *Doe* squarely addressing the preemption issue, *Great Western,* 27 Cal.4th 853 and *Nordyke*, 27 Cal.4th 875. Those decisions, upholding, respectively, sales and possession bans on county property, necessarily confine *Doe* to its narrow holding that state statutes preempt local licensing and registration schemes.

The *Great Western* Court specifically described the *Doe* holding as such: "local law may not impose additional licensing requirements when state law specifically prohibits such requirements." (*Great Western, supra*, 27 Cal.4th at 866). The *Great Western* Court's lengthy description of the other cases and its cursory treatment of *Doe* signal a strong trend in the law away from *Doe*'s implied preemption "analysis."[11] Most significant,

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

although exhaustively describing and applying the case law on implied preemption of local gun regulations, the companion Supreme Court decisions never mention, let alone approve, *Doe's* implied preemption discussion. Thus, contrary to the NRA's contention, *Great Western* does not cite *Doe* "approvingly."

Great Western's treatment of *Doe* is also significant because its reason for accepting certification from the Ninth Circuit was "'the settlement of important questions of law.'" (*Great Western*, supra, 27 Cal.4th at 859 [quoting former Cal. Rules of Ct., Rule 29(a)].) The Ninth Circuit had requested certification because it found "tension" among the Courts of Appeal regarding the *Doe* implied preemption reasoning. In particular, the Ninth Circuit pointed to *California Rifle* as "appear[ing] to have disavowed the logic underlying . . . the pertinent part of *Doe*." (*Great Western Shows*, *supra*, 229 F.3d at 1262.) The *Great Western* Court's lengthy survey of California gun law preemption cases mentions *only* the *Doe* court's express preemption holding; it makes no reference whatsoever to *Doe*'s treatment of implied preemption. (*Great Western, supra*, 27 Cal.4th at 863-64.) Given the Court's goal to resolve the tension identified

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implied preemption finding of a legislative intent "to occupy the field of residential handgun possession" (*Doe, supra*, 136 Cal.App.3d at 518) is contrary to the trend in later decisions like *Suter* which "by implication overrule[d] the holdings in *Doe*" and demonstrates the court's movement away from the notion that firearm regulation is reserved exclusively to the state Legislature.

by the Ninth Circuit regarding *Doe's* implied preemption reasoning, its silence on *Doe*'s reasoning is tantamount to disapproval.

B. Under the *Great Western* Standard, Section 3 Is Not Preempted by State Law Expressly or by Legislative Implication.

Applying the *Great Western* preemption standard to Section 3 produces the same result as Section 2: no preemption

1. Section 3 Is Not Duplicative Of State Law.

Section 3 provides that no San Francisco resident "shall possess any handgun" within City limits (except for specified law enforcement and related purposes). It does not create a licensing or registration requirement to allow possession. It simply bans all possession by those residents covered by the ordinance.

The Supreme Court in *Nordyke*, *supra*, 27 Cal.4th at page 883 addressed the same issue in the context of an Alameda county ordinance that made it a misdemeanor to "bring[] onto or possess[] on county property a firearm, loaded or unloaded, or ammunition for a firearm." After reviewing the same Penal Codes sections relied upon by The NRA here (12025, 12031, 12050 and 12051) the Court found "the state statutes, read together, make it a crime to possess concealed or loaded firearms without the proper license." (*Id.*) Comparing the effect of the state statutes and the local possession ban ordinance, the *Nordyke* Court concluded there was no conflict, in reasoning equally applicable here:

> The Ordinance does not duplicate the statutory scheme. Rather, it criminalizes possession of a firearm on county property, whether concealed, loaded or not, and whether the individual is licensed or not. Thus, the Ordinance does not criminalize "'precisely the same acts which are . . . prohibited'" by statute.

(*Id.*)

San Francisco's ordinance differs from the Alameda ordinance in that it applies to a more narrow class – only county residents – and a more narrow category of firearms – only handguns – but covers a larger area, city limits as opposed to only county property. None of these differences, however, makes *Nordyke* legally distinguishable. Just like the Alameda ordinance at issue in *Nordyke*, Section 3 "does not duplicate the statutory scheme. Rather, it criminalizes possession of a [handgun] . . . whether the individual is licensed or not." (*Nordyke*, *supra*, 27 Cal.4th at 883.) *Nordyke* is controlling; Section 3 is not duplicative of state law.

2. Section 3 Does Not Contradict State Law.

There is no state law that contradicts Section 3. No state law mandates possession of handguns. The purpose of the Dangerous Weapon Control Act (of which Penal Code Section 12026 is a part) was to curtail crime by limiting the free availability of firearms. Among other things, it contains a prohibition against carrying concealed weapons (Pen. Code § 12025) and provides for licenses and permits allowing handguns to be "carried concealed" (Pen. Code § 12050).

The extensive gun show regulations at the state level in *Great Western* regulated sales and "therefore contemplated such sales," but did "not mandate such sales." Thus, the ordinance banning sales on county property was not in conflict with state law. (*Great Western, supra*, 27 Cal.4th at 866.) Similarly, here the state laws prohibiting local permitting of guns possessed in the home contemplate that some citizens may want to possess a handgun in their homes, but they do not mandate such possession. Section 12026(b) provides that no license or permit will be required for handguns in the home or a place of business. "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." (*California Rifle*, *supra*, 66 Cal.App. at 1324 ["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."].)

As noted, section 12026 has two parts. Subpart (a) provides an exception to section 12025's sanction for carrying a concealed weapon. It states "Section 12025 shall not apply" to a person (except felons and other enumerated classes) who carries at the person's residence or business. The reach of section 12025 is immaterial here. It criminalizes the act of concealing a weapon, and the exception of section 12026(a) applies only to that act of concealing, as that is all that is criminalized by section 12025. Section 3 of Proposition H, in contrast, criminalizes possession of handguns

by San Francisco residents within its borders – whether or not concealed. It has no effect on whether a person who conceals a weapon is or is not in violation of section 12025.

Subpart (b) of section 12026 prohibits requiring a "permit or license to purchase, own, possess, keep or carry" a concealable firearm in the person's residence or business. Section 3 poses no conflict. It does not require any permit or license. It prohibits possession. Section 3 is more restrictive than, but not contradictory to, state licensing law requirements. It neither mandates anything forbidden by state law nor forbids anything mandated by that law. Section 3's prohibition on possession of handguns does not conflict with state law. "The Ordinance does not mandate what state law expressly forbids, nor does it forbid what state law expressly mandates." (*Great Western, supra*, 27 Cal.4th at 866 [citing *Doe*, *supra*, 136 Cal.App.3d at 509, for the proposition that "local law may not impose additional licensing requirements when state law specifically prohibits such requirements"].)

Doe found a conflict based on the express exception in the 1982 ordinance that 'exempt[ed] from the general ban on possession any person authorized to carry a handgun pursuant to Penal Code section 12050." (*Doe, supra*, 136 Cal.App.3d at 516-17.) By its terms, section 12050 allowed then, as it does today, licenses "to carry concealed" a handgun.

The ordinance's effect, the *Doe* court held, was to create a new class of persons who "must obtain licenses or relinquish their handguns." (*Id.* at 517.) Proposition H's possession ban, in contrast, contains no such exception. Its effect is to bar possession of handguns by San Francisco residents (outside of law enforcement and the other enumerated classes). No permits or licenses are involved. Residents subject to the ban cannot avoid it by obtaining a permit to carry a concealed weapon under section 12050. They are still subject to the ban whether or not they have a permit to carry a concealed weapon.

3. Finally, Section 3 Is Not Impliedly Preempted.

Section 3 is not expressly preempted for the same reasons discussed above that Section 2 is not. See 23-26. Section 3 is also not impliedly preempted under the three-part test elucidated in *Great Western*. Each of the three parts examines the extent of state regulation in the area. First, handgun possession regulation has not been so fully and completely covered by state law to indicate that it is exclusively a matter of state concern.

The Supreme Court's decision in *Nordyke* – which upheld a possession ban on county property – necessarily rejected this argument and is also controlling here. (See, e.g., *Nordyke, supra*, 27 Cal.4th at 884 [noting that the fact that "certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they

are exempt from local prosecution for possessing the gun on restricted county property."].) The various state statutes related to possession are limited to specific classes of people or other specific situations. They do not cover the field. In this context, as noted, the *Great Western* Court held "the Legislature has declined to preempt the entire field of gun regulation, instead preempting portions of it, such as licensing and registration of guns and sale of imitation firearms." (*Great Western, supra*, 27 Cal.4th at 866.)

Second, gun possession regulation is not partially covered by state law in such terms as to indicate that it is an issue of paramount state concern. Gun violence is of significant local interest to the citizens of San Francisco. Indeed, and unfortunately, the gun homicide rate has increased in each of the years since the *Great Western* court's recognition that San Francisco's firearms problems may require different legislative treatment than those of other localities.

Third, Section 3 is narrowly drawn to minimize adverse effects on citizens of other nearby counties and towns, which plainly do not outweigh its benefits. "Laws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges.'" (*Great Western, supra*, 27 Cal.4th at 867 [quoting *Suter*, *supra*, 57 Cal.App.4th at 1119; *Galvan*, *supra*, 70 Cal.2d at 864-65].) Section 3, which applies only to San Francisco residents, will have less

effect on outsiders than the ordinances upheld in *Galvan, Suter* and *Great Western.*

IV. TO THE EXTENT STATE LAW HAS PARTIALLY PREEMPTED THE FIELD, THE REMAINDER OF PROPOSITION H SHOULD BE UPHELD.

If one or more of the specific areas treated by state law is found to be included within the literal reach of Proposition H, the remainder of the ordinance should be upheld. As the Supreme Court recognized in *Nordyke*, the possibility that local ordinances might theoretically conflict with one or more very specific state laws directed to gun regulation would result in at most partially preempting but not invalidating the ordinance:

> We first note that the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property. But even if we accept the Nordykes' argument that in at least some cases the Legislature meant to preempt local governments from criminalizing the possession of firearms by certain classes of people, that would establish at most that the Ordinance is *partially* preempted with respect to those classes. Partial preemption does not invalidate the Ordinance as a whole.

(*Nordyke, supra*, 27 Cal.4th at 884 [citation omitted].)

Section 7 of Proposition H makes manifest San Francisco's intent that if any part of the ordinance is held invalid, it "shall not affect other provisions or applications of this ordinance."

V. CONCLUSION

Under California law, cities and counties are left with broad latitude to craft their own answers to the vexing problem of gun violence. Under *Great Western*, the City's ordinance is not preempted by state law. Proposition H should be upheld as a valid exercise of the City's police power.

Respectfully submitted,

Dated: May 29, 2007

FARELLA BRAUN & MARTEL LLP

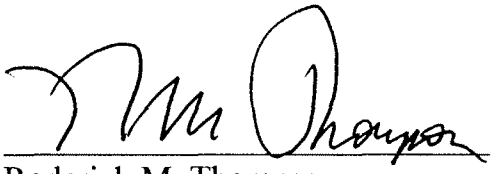
By: _____

Roderick M. Thompson
Attorneys for Amicus Curiae
Legal Community Against Violence

CERTIFICATION OF COUNSEL

I, Roderick M. Thompson, certify pursuant to Rule of Court 8.204(c)(1) that the foregoing brief of Amicus Curiae Legal Community Against Violence contains 9,373 words, excluding the tables and this certification, as calculated by the Microsoft Word computer program used to prepare the brief.

Dated: May 29, 2007



Roderick M. Thompson

DECLARATION OF SERVICE

Case Name: *Paula Fiscal, et al. v. The City and County of San Francisco, et al.*
Case Nos.: Court of Appeal; First Appellate Dist., No. A115018
(San Francisco County Superior Court Case No. 505960)

I, Noel Roller, declare:

I am employed at Farella Braun & Martel LLP, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at Farella, Braun & Martel LLP for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the office of Farella Braun & Martel LLP is deposited with the United States Postal Service that same day in the ordinary course of business. On May 29, 2007, I served the attached

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF OF LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF APPELLANTS

BRIEF OF AMICUS CURIAE LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF APPELLANTS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the office of Farella Braun & Martel LLP at 235 Montgomery Street, San Francisco, CA 94104, and addressed as follows:

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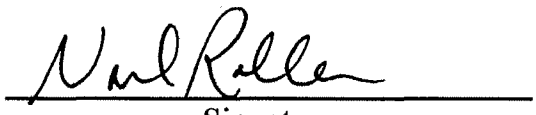
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 29, 2007, at San Francisco, California.

Noel Roller	
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