

COURT OF APPEAL  
STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

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No. A115018

PAULA FISCAL, LARRY P. BARSETTI, REBECCA 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 POLICE 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.

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APPLICATION OF  
AMERICAN ENTERTAINMENT ARMORIES ASSOCIATION  
TO FILE AMICUS CURIAE BRIEF;  
[PROPOSED] AMICUS CURIAE BRIEF  
IN SUPPORT OF RESPONDENTS

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 **COPY**

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## **APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF**

Amicus Curiae, the American Entertainment Armories Association, respectfully moves this court, pursuant to California Rules of Court, Rule 8.200 (c)(1), for leave to file the concurrently submitted amicus brief in support of Respondents.

### **INTEREST OF THE AMICUS CURIAE**

The American Entertainment Armories Association (AEAA) represents entertainment prop houses, armories, prop masters, and related professionals and businesses that service the entertainment industry. AEAA members (as federally and state licensed firearms dealers, importers, or manufacturers) provide film, television, and stage production companies with “prop” (i.e., typically real and regulated, but rigged to fire only blanks) handguns, rifles, shotguns, as well as more heavily regulated “assault weapons,” 50 BMG rifles, machine guns, “destructive devices,” “short barreled” weapons, and custom built firearms and related devices used in productions.

AEAA members often provide production companies and actors with dozens, or *hundreds* of firearms for any given production.

While the entertainment industry struggles to keep productions in the United States, and cities like Los Angeles and New York are

actively courting film production business, Proposition H appears to reflect the carelessness of certain San Francisco politicians who, in their desire to make a political statement, did not carefully study the existing regulatory regimen, consult with impacted parties, or consider the effect of Prop H on the entertainment industry.

### **REASONS FOR FILING**

AEAA filed an amicus brief in the trial court proceedings. AEAA has reviewed the city and county of San Francisco's opening brief on appeal, and AEAA requests that this court consider the abbreviated brief below. Absent from the City's brief is any discussion of the effects Proposition H would have on the entertainment industry, and AEAA submits this brief to highlight these likely severe consequences. AEAA also asks that this court consider, in full, the AEAA amicus brief filed in the trial court. (Appellants' Appendix at Volume III, Tab 22, pages 0574-0585.)

Dated: June 5, 2007

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**LAW OFFICES OF BRUCE COLODNY**



Bruce Colodny  
Attorneys for Amicus American  
Entertainment Armories Association

## AMICUS CURIAE BRIEF

### I. INTRODUCTION

As amicus noted in its amicus brief filed before the trial court, Respondents correctly argued that Proposition H intrudes on areas of firearm regulation occupied by state law. Government Code section 53071 renders state licensing laws exclusive. (III AA 22:0575-0576.)

The concept of licensing in Government Code section 53071 encompasses two distinct forms. The narrower and secondary type of licensing law provides for the issuing of a piece of paper called a license (or permit or certificate.) The broader type of license law is any law which expressly authorizes or permits acquisition, possession, or use of a firearm by certain people or under certain circumstances.<sup>1</sup> This broader use of the term "license" is the usage preferred in both general and legal dictionaries.<sup>2</sup> More important,

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<sup>1</sup> Example of a licensing statute of the broader type include the statutory allowances (i.e licenses) to carry concealed handguns *without* a formal license to carry a concealed weapon (CCW) (i.e., a CCW issued pursuant to Penal Code section 12050) contained in Penal Code sections 12026, 12026.1, 12026.2, 12027, and 12027.1.

<sup>2</sup> Compare Black's Law Dict. (5th ed. 1979) at p. 829 defining "license" as *either* "[t]he permission by competent authority to do an act which, without such permission, would be illegal, a trespass or a tort. [Or a c]ertificate or the document itself which gives permission." to Webster's Encyclopedic Unabridged Dictionary Of The English Language (1989):

this broader usage of “license” is the one discussed and approved in relation to firearm licensing in *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 856 defining “license” as “permission or authority to do a particular thing or exercise a particular privilege.” Government Code section 53071 was passed in response to the *Galvan* decision, and section 53071 was meant to adopt the broader meaning of the word “license” as expressed by the *Galvan* court.

Numerous state laws “license” prop managers, actors, and others involved in theatrical productions or performance art to do things that the ordinance prohibits. Proposition H illegally invalidates those licenses. The state laws permitting, allowing, and “licensing” film, theatrical, and performance art involving firearms laws preempt and voids the ordinance.

## **II. BACKGROUND ON THE USE OF FIREARMS IN THEATRICAL PRODUCTIONS**

### **A. Typically Real Firearms Are Used**

As noted in amicus’s trial court brief, the feasibility of using imitation firearms in most productions is limited. For the most part,

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defining “License” as: “1. permission to do or not to do something. 2. Formal permission from a constituted authority to do something. [Or] 3. a certificate of such permission; an official permit . . . .”



the firearms used in film, television, and theatrical productions are real, but temporarily modified to fire only blank ammunition. This is the only way to provide the semblance of realism that is essential to a successful production. (For further discussion, see III AA 22:0576-0577.)

**B. Propmasters and Armories Are Heavily Regulated and “Licensed” By Federal and State Law**

The “prop master” is responsible for the acquisition, transportation, safe keeping, transfer, and safe use of the firearm(s) being used on a production. Different types of prop firearms are regulated to different degrees, and different parts of the process of transferring and using firearms in a production are covered by different statutes – from which exceptions for prop masters and other AEAA members are carefully crafted by the Legislature.

In addition to being “licensed” (i.e., having permission to conduct business) through various statutory exceptions, to conduct business supplying ordinary firearms a prop master must have a federal firearm license (FFL) to transfer or rent basic firearms such as handguns, rifles, shotguns, period pieces, etc., to production companies. Prop masters need to be issued a California Department of Justice “Entertainment Firearms Permit” (EFP)

pursuant to Penal Code section 12081.

In addition to the above, to rent or transfer “assault weapons,” “short-barreled” firearms, “destructive devices,” machineguns, .50 BMG rifles, and similar more heavily regulated firearms, the prop master must have additional federal and state licenses. (For further discussion, see III AA 22:0577-0578.)

**C. The Process of Providing Firearms to Theatrical Productions is Heavily Regulated**

Once a production company contacts a prop master to supply firearms for a production, typically the prop master goes to a firearm prop house or entertainment industry “armory” and fills out paperwork (the necessary federal and state transfer forms) to get the firearms released to the prop master to transport to the location or “set” of the production where the actors can use the firearms. Each step of this process (acquisition of firearms from armorer, transportation of firearms to set, distribution of firearms to actors on set, use of firearms by actors, collection of prop firearms from the set, transportation back to the armory, and transfer back into the armory’s inventory) is regulated by federal and state law, and or exempted from those regulations. (For further discussion of this process, see III AA 22:0578-0579.)

**III. THE INDUSTRY IS HEAVILY “LICENSED” WITHIN THE MEANING OF GOVERNMENT CODE SECTION 53071; PROPOSITION H REVOKES THESE LICENSES**

Section two of Proposition H outlaws “the sale, distribution, transfer and manufacture of all firearms and ammunition . . .” *There are no exceptions to this section.*

Firearms are routinely transferred and distributed between and amongst armories, prop masters, production assistants, stage hands, and actors during film, television, and theatrical productions. So any such production involving a real firearm, even if it has been temporarily modified to fire only blanks, is prohibited in San Francisco under Proposition H, despite the licenses created by the state statutory scheme. And unlike state laws which exempt antique firearms from most regulation, see, e.g., Penal Code section 12001(e), Proposition H’s bans on handgun possession, and on the transfer of all firearms, even applies to antique guns.

Besides the section two firearms transfer ban, section three of Proposition H provides that “. . . no resident of the City and County of San Francisco shall possess any handgun unless required for professional purposes, *as enumerated herein.*” This limited exception for “professional purposes” is only for a city, state, or

federal employee “*carrying out the functions of his or her government employment*, including but not limited to police and animal control officers . . .” and for active duty military.

So section three bans the possession of handguns by all San Francisco residents. There is no exception whatsoever for entertainment productions or the movie industry, and no acknowledgment of the state statutory scheme under which the entertainment industry is granted permission to operate.

To illustrate this point, consider that given the sweeping strictures of section two of Proposition H, unless reworked to use unrealistic plastic non-firing replicas instead of regulated firearms, certain operas are now illegal to be staged in San Francisco. These include: *Tosca*, *Carmen*, *The Girl of the Golden West*, *Candide*, *The HMS Pinafore*, *The Death of Klinghoffer*, *Lady Macbeth of Mtensk*, *Eugene Onegin*, and *Der Freischutz*.

Theater that can't be staged under Proposition H includes Chekhov's *Uncle Vanya*, Harold Pinter's *The Dumb Waiter* and others by notable playwrights such as Eugene O'Neill, Sean O'Casey, Lillian Hellman, Arthur Miller, Sam Shepard, Albert Camus, Aaron Sorkin and Tennessee Williams (even *The Nutcracker* has need of a firearm).

Many films and television productions today also involve firearms. As a result films and television shows like *Dirty Harry*, *Magnum Force*, *James Bond: A View To A Kill*, *The Presidio*, *Bullit*, *48 Hours*, *The Rock*, *Basic Instinct*, and *The Streets of San Francisco* can no longer be made. In addition to the conventional type “licenses” or permits issued to prop masters and armories, the industry also enjoys statutory permission to engage in certain activities (i.e., “licenses”) through overlapping statutory exceptions creating exemptions to state firearm statutes and regulations. These licenses, which would be revoked by Proposition H, include the following:

- Penal Code section 12026.2(a)(1), which exempts “the possession of a firearm by an authorized participant in a motion picture, television, or video production or entertainment event when the participant lawfully uses the firearm as part of that production or event or while going directly to or coming directly from the event” from the prohibition on carrying a concealed handgun.
- Penal Code section 12026.2(a)(8), which exempts “the transportation of a firearm by an authorized employee or agent of a supplier of firearms when going directly to, or coming directly from, a motion picture, television, or video production or entertainment event for the purpose of providing that firearm to an authorized participant to lawfully use as part of that production or event” from the prohibition on carrying a concealed handgun.
- Penal Code section 12070(b)(16), which exempts “the loan of an unloaded firearm or the loan of a firearm

loaded with blank cartridges for use solely as a prop for a motion picture, television, or video production or entertainment of theatrical event” from being subject to section 12071(a)’s licensing restrictions.

- Penal Code section 12078(p)(2)(B) and (C), and (p)(3)(A) and (B), which exempts the movie industry from Penal Code section 12072(a)(3)’s prohibition on transferring handguns to minors.
- Penal Code section 12078(s)(1), which exempts “the infrequent loan of an unloaded firearm by a person who is neither a dealer as defined in Section 12071 nor a federal firearms licensee pursuant to Chapter 44 of Title 18 of the United States Code, to a person 18 years of age or older for use solely as a prop in a motion picture, television, video, theatrical, or other entertainment production or event” from the 12072(d) requirement that all gun transfers be conducted through a licensed firearm dealer, and from the 12081(b) requirement that a transferee of a handgun must have been issued a “handgun safety certificate” (i.e., a “license” to be able to acquire a handgun).
- Penal Code section 12078(s)(2), which provides that “Subdivision (d), and paragraph (1) of subdivision (f), of Section 12072, and subdivision (b) of Section 12801 shall not apply to the loan of an unloaded firearm by a person who is not a dealer as defined in Section 12071 but who is a federal firearms licensee pursuant to Chapter 44 of Title 18 of the United States Code, to a person who possesses a valid entertainment firearms permit issued pursuant to Section 12081, for use solely as a prop in a motion picture, television, video, theatrical, or other entertainment production or event. The person loaning the firearm pursuant to this paragraph shall retain a photocopy of the entertainment firearms permit as proof of compliance with this requirement.”
- Penal Code section 12078(s)(3) which provides that:

“Subdivision (b) of Section 12071, subdivision (c) of, and paragraph (1) of subdivision (f) of, Section 12072, and subdivision (b) of Section 12801 shall not apply to the loan of an unloaded firearm by a dealer as defined in Section 12071, to a person who possesses a valid entertainment firearms permit issued pursuant to Section 12081, for use solely as a prop in a motion picture, television, video, theatrical, or other entertainment production or event. The dealer shall retain a photocopy of the entertainment firearms permit as proof of compliance with this requirement.”

Penal Code section 12081, which creates the Entertainment Armories Permit system. This section allows any person who is at least 21 years old to apply for an entertainment firearms permit from the California Department of Justice. The permit authorizes the holder to “possess firearms loaned to him or her for use solely as a prop in a motion picture, television, video, theatrical, or other entertainment production or event.”

#### **IV. THE ORDINANCE’S LIMITED GRANT OF POWER TO AMEND DOES NOT SOLVE THIS PROBLEM.**

Proposition H provides that “By a two-thirds vote and upon making findings, the Board of Supervisors may amend this ordinance *in the furtherance of reducing handgun violence.*” The concerns of AEAA cannot be addressed by amendment because the amendment must be one that is “in the furtherance of reducing handgun violence.” It would not be possible to amend the Proposition H ordinance to allow film, television or theatrical productions, nor for that matter museum exhibits, military burials, or civil war and similar

reenactments because allowing these things to take place has nothing to do with “ reducing handgun violence.” Moreover, any attempt to amend the ordinance to create exemptions for the industry would only serve to create a local licensing scheme prohibited by Government Code section 53071. (For further discussion, see III AA 22:0583.)

### CONCLUSION

As amicus noted before the trial court, Proposition H would have a devastating effect on the entertainment industry’s operations in San Francisco. Moreover, Proposition H invalidates numerous licenses granted to the entertainment industry by state law. Proposition H is preempted on this ground alone. Accordingly, the American Entertainment Armories Association respectfully requests that this Court affirm the trial court’s decision.

Dated: June 5, 2007

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**LAW OFFICES OF BRUCE COLODNY**



Bruce Colodny  
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**CERTIFICATE OF WORD COUNT**

**(Cal. Rules of Court, rule 8.204 (c)(1))**

The text of this brief consists of 2513 words as counted by the Microsoft Word 2003 word-processing program used to generate the brief.

Dated: June 5, 2007

  
\_\_\_\_\_  
**LAW OFFICES OF BRUCE COLODNY**

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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

I, Joy Gordon, am employed in the City of San Bernardino, San Bernardino County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 1881 Business Center Dr., Suite 8B, San Bernardino, CA 92408.

On June 7, 2007, I served the foregoing document(s) described as

**APPLICATION OF AMERICAN ENTERTAINMENT ARMORIES  
ASSOCIATION TO FILE AMICUS CURIAE BRIEF; [PROPOSED]  
AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS**

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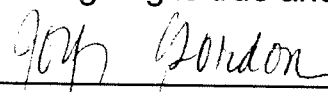
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\_\_\_\_\_  
Joy Gordon

PAULA FISCAL et al.,  
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