COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

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.

APPLICATION OF CALIFORNIA RIFLE & PISTOL ASSOCIATION TO FILE AMICUS BRIEF; [PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS

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

INTEREST OF THE AMICUS CURIAE

The California Rife and Pistol Association, Inc. ("CRPA") is a non-profit membership organization with roughly 65,000 members. CRPA is incorporated under the laws of California, with headquarters in Fullerton. Among its other activities, CRPA works to preserve constitutional and statutory rights of gun ownership, including the right to self-defense and the right to keep and bear arms.

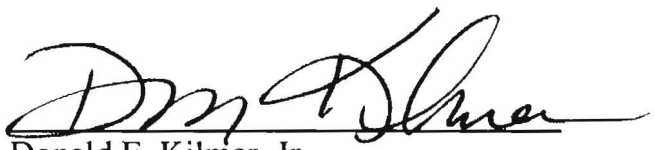
REASONS FOR FILING

When this case was before the trial court, the City of San Francisco conceded that the trial court was bound to follow *Doe v. City of San Francisco* (1982) 136 Cal.App.3d 509, which found an ordinance similar to Proposition H was preempted by Penal Code Section 12026. (Appellants' Appendix, Volume 3, Tab 14, p. 0481.) Due to the concession, at the trial court level, the parties' briefs contained little discussion of whether *Doe* was correctly decided or of the legislative history of Section 12026. Now that the matter is before the appellate court, the City argues that the court should reverse its earlier determination in *Doe*. CRPA submits this brief to

show that 1) *Doe* was correctly decided, 2) the legislative history of Penal Code section 12026 confirms that *Doe* was correctly decided, and 3) *Doe*'s "implied preemption" discussion was a holding, and not mere dictum. CRPA is an especially appropriate entity to present information on the legislative history of Section 12026 as it promoted the bill that resulted in enactment of that statute in 1923.

Dated: June 4, 2007

LAW OFFICES OF DONALD KILMER



Donald E. Kilmer, Jr.
Attorney for Amici Curiae

AMICUS CURIAE BRIEF

DOE'S CONCLUSION THAT PENAL CODE SECTION 12026 WAS INTENDED TO FORECLOSE LOCAL HANDGUN BANS IS CONFIRMED BY THE LEGISLATIVE HISTORY OF THE UNIFORM FIREARMS ACT (UFA) FROM WHICH THE CURRENT SECTION 12026 ORIGINATED.

Cognizant of the Supreme Court's admonition that "a page of history is worth a volume of logic"[1], amicus offers the following historical background.

Penal Code section 12026 must be seen in the context of the first quarter of the Twentieth Century in which total bans of handgun sale or possession and/or handgun permit laws were being enacted across America and the world.[2] These laws in turn reflected the tumultuous late 19th and early 20th Centuries, in which assassins took or menaced the lives of a

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[1] *Santa Clara Local Tranport. Authority* v. *Guardino* (1995) 11 Cal.4th 220, 235 (quoting Oliver Wendell Holmes, Jr.).

[2] Unless otherwise referenced, all facts in this section come from: Joyce Lee Malcolm, GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE 141-47 (Harvard, 2002); Stephen P. Halbrook, "Nazi Firearms Law and the Disarmament of the German Jews," 17 Az. J. Intl. & Compar. Law 483-532 (2000); David B. Kopel, THE SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROL OF OTHER DEMOCRACIES? (1992)(winner of the International Criminology award of the American Society of Criminology); Edward Leddy, MAGNUM FORCE LOBBY: THE NATIONAL RIFLE ASSOCIATION FIGHTS GUN CONTROL (University Press, 1987) 85-89; Don B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 203, 209-210, fn. 23 (1983); Don B. Kates, History of Handgun Prohibition in the United States, in Kates, RESTRICTING HANDGUNS (1979) 14-20, 29-30; and Lee Kennett & James LaVerne Anderson, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA, 213 (1976).

Russian Czar, an Empress of Austria, an Austrian Archduke (which led to WWI), Georges Clemenceau, and other luminaries including President William McKinley, former President Theodore Roosevelt, Oliver Wendell Holmes, U.S. Attorney General Palmer, Henry Frick, J. P. Morgan, John D. Rockefeller and the mayors of Chicago and New York.

In response to these tragedies, gun bans, either explicit or in the form of permit requirements, were enacted across the world and in the United States. Motivated by fears of political turmoil and labor unrest, such permit laws appeared in England, Canada, Australia, New Zealand and in Europe, while Germany and a few other nations banned civilian sales and/or ownership of any kind of firearm.[3]

The first such 20th Century American law was South Carolina's 1903 total ban of handgun sales, something later endorsed for all states by the American Bar Association.[4] In 1911, New York enacted the Sullivan Law, requiring permits to buy or own a handgun. Over the next twenty years, six more states enacted permit requirements to buy a handgun. Across the nation, total handgun bans or Sullivan-type laws were advocated

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[3] See, respectively, Malcolm, *supra*, at 141-47; Kopel, *supra*, 141, 195, and 237; Halbrook, *supra*; and THE GUN IN AMERICA, *supra*, at 213.

[4] ABA Journal (1922) at p. 591.

under the slogan "if nobody had a gun nobody would need a gun."[5]

To forestall such legislation, gun owner groups responded with a program of moderate gun laws that came to be known as the UFA (Uniform Firearms Act).[6] This consisted in various moderate controls to be adopted by states in lieu of bans, permit laws and other severe regulations. As Professor Leddy writes:

> It soon became clear that if target shooters and other legal gun owners did not want to see the uses of guns totally banned they must become active politically with a program of laws which would both *protect gun ownership* and reduce crime. This program was the "Uniform Firearms Act" ... This act was drafted by Karl T. Frederick, a former president of the National Rifle Association....[7]

The UFA was later endorsed by the National Conference of Commissioners on Uniform State Laws as an antidote to what it called "the wrong emphasis on more pistol legislation," i.e., laws "aimed at regulating pistols in the hands of law abiding citizens." As an alternative, the National Conference lauded the UFA approach, describing it as "severely punishing criminals who use pistols . . . [by] a program of laws which would both

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[5] THE GUN IN AMERICA, *supra*, at 192.

[6] The UFA was also known as the Uniform Revolver Act. Curiously both these names were misnomers. The UFA was not a "Uniform *Firearms* Act" because it applied only to handguns not to rifles or shotguns. Neither was it a "Uniform *Revolver* Act" because it applied to all handguns, not just revolvers.

[7] MAGNUM FORCE LOBBY, *supra*, at 87 (emphasis added).

protect gun ownership and reduce crime."[8]

As the NRA proclaimed, "This law was adopted in 1923 *by California,* North Dakota and New Hampshire.'"[9] California's UFA originated many moderate controls that remain in our laws to this day, such as prohibiting handgun possession by convicted felons, requiring firearms dealers to be licensed, requiring that handguns have serial numbers and that persons carrying them concealed be licensed, etc.

Curiously, the California UFA seems to have been initially sponsored by an anti-gun advocate. As he introduced it, the UFA included a permit requirement to either buy or possess a handgun.[10] But the outcome was a dramatic triumph for gun owners. Not only was the permit requirement deleted, it was replaced by the provision from which springs current Penal Code section 12026(b)'s express preclusion of government licensing or permit requirements to buy or possess handguns in home or

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[8] HANDBOOK OF THE OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF STATE LAW AND PROCEEDINGS OF THE 34TH ANNUAL MEETING 728 (1924). See also Lee Kennett & James LaVerne Anderson, THE GUN IN AMERICA: THE ORIGINS OF A NATIONAL DILEMMA, 191-93 (1976), Edward Leddy, MAGNUM FORCE LOBBY: THE NATIONAL RIFLE ASSOCIATION FIGHTS GUN CONTROL (University Press, 1987) 85-89.

[9] *Ibid*; see also THE GUN IN AMERICA, *supra*, at 192-93.

[10] A copy of the Act as introduced appears at 14 Am. Inst. Crim. L & Criminology 135ff. (1923-24). The permit requirement to possess or buy a handgun was the second section set out on p. 135 of the volume.

office. (It bears emphasis that then as now this gun rights guarantee applies only to law-abiding, responsible adults and not to criminals.)

That the object was to protect the right to buy and own handguns is confirmed by the only contemporary comments we have been able to locate as to California's adoption of the UFA in 1923, including what is now Penal Code section 12026 (b). The July 15, 1923 San Francisco Chronicle reported, "It was largely on the recommendation of R.T. McKissick, president of the Sacramento Rifle and Revolver Club, that Governor Richardson" signed the UFA. The Chronicle quoted McKissick's endorsement of the UFA as "frankly an effort on the part of those who know something about firearms to forestall the flood of fanatical legislation intended to deprive all citizens of the United States of the right to own and use" handguns.[11]

1. Prop H violates Penal Code section 12026(b) and is wholly inconsistent with its purpose and policy.

The Supreme Court has admonished us that to understand statutes courts must "take into account matters such as context, the object in view,

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[11] A copy of this document is contained in Appellants' Appendix at Volume I, Tab 4, p. 0068) As to the admissibility of such materials see *County of San Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 917, 926 (letters by proponents of the bill urging its enactment) and *Karlin v. Zalta* (1984) 154 Cal.App.3d 953, 968, fn. 9 (holding that for purpose of construing laws courts may take notice of communications urging the governor to sign a bill as well as committee reports and testimony at public hearings).

the evils to be remedied, the history of the times, and of legislation upon the same subject. . . ."[12] The history set out above provides the following information as to each of these factors: Penal Code section 12026 was enacted in a period in which prohibition of handgun sales and/or possession was being proposed all over the world – either through outright bans or through permit laws. The context of Penal Code section 12026 was its substitution for – and contradiction to – a proposed permit requirement to possess a handgun. The object in view was to "protect gun ownership"[13]– "to forestall the flood of fanatical legislation intended to deprive... [responsible law-abiding, adults] of the right to own and use" handguns.[14] As to the evil to be corrected, that evil was "the wrong emphasis on more pistol legislation" – laws "aimed at regulating pistols in the hands of law abiding citizens" rather than criminals.[15]

In sum, Prop H is exactly the kind of "fanatical legislation" that Section 12026 was enacted to forestall. And, to reiterate, if there is any

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[12] *Harry Carian Sales v. Agricultural Labor Relations Board* (1985) 39 Cal.3d 209, 223.

[13] Quoting the National Conference's description of the UFA's purpose; see text accompanying note 8, *supra*.

[14] Quoting the only California legislative history; see text accompanying note 11, *supra*.

[15] Again quoting the National Conference's endorsement of the UFA, *supra*.

other or different legislative history, the City found no occasion to mention it either below or in its brief on this appeal.

In enacting Penal Code section 12026, the Legislature necessarily decided that the benefits of allowing law abiding, responsible adults to posses handguns outweigh the dangers. Apparently, a majority of voters in the 2005 San Francisco election disagreed. "However, this problem is a policy matter properly addressed to the Legislature"[16] – i.e., by urging it to repeal Section12026. But until Section 12026 is repealed the judicial branch "is to take the statutes as they read and to ascertain the legislative intent from the language used."[17] Having done so the Judicial Branch is to effectuate that act "whatever may be thought of the wisdom, expediency, or policy of the Act."[18] That is exactly what the court below did and its action should be upheld on this appeal.

2. *Doe's* conclusion as to Section 12026's purpose is an alternative holding, not dictum.

Desperate to evade *Doe*'s holding that "the Legislature intended to

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[16] *Board of Education v. Round Valley Teachers Ass'n.* (19996) 13 Cal.4th 269, 279 (quoting prior authority).

[17] *Id.*

[18] *Lake v. Reed* (1997) 16 Cal.4th 448, 465, *Atherton, supra* 48 Cal. at 160, *Santa Monica Beach. Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 962 ("'Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless'" the act is unconstitutional.).

occupy the field of residential handgun possession[,]" the City mis-characterizes that as dictum, asserting that *Doe* really invalidated the 1982 ordinance on another basis, to wit that the ordinance was a permit law.

But it is a category error to describe that holding as mere dictum. The category in question is the concept of alternative holdings. Whenever a party presents a claim that a court accepts (or rejects) on two separate grounds, those grounds are each alternative holdings and neither is dictum.[19] In *Doe,* the City claimed that its handgun ban was a total ban rather than a permit law. *Doe* rejected that on two grounds – that the ban was a permit law within the meaning of Penal Code section 12026; and that even if it were not a permit law it was a handgun ban and so implicitly preempted by Penal Code section 12026. Compare *Southern Cal., supra*, 4 Cal.4th at 431, fn. 3 (quoting *Bank of Italy v. Bentley*, 217 Cal. 644, 650 (italics in original)):

> [It is] "well settled that where two independent reasons are given for a decision, neither one is to be considered mere *dictum*, since there is no more reason for calling one the real basis of the decision than the other. The ruling on both grounds is the judgment of the court and is of equal validity."

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[19] *Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 485 (denying that a prior holding was dictum because "[w]hen an appellate court bases its decision on alternative grounds, none is dictum." (See the text infra for quotation from *Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431, fn. 3.)

Equally well settled is that an assertion in an opinion is a holding, not dictum, if it is *either* "relevant to the material facts before the court"[20] or responsive to arguments made to the court concerning the issues in the case.[21] In *Doe*, the issues included the validity of handgun bans which counsel for the challengers claimed Section 12026 precludes while counsel for the City pressed the opposite conclusion on the court. In accepting the challengers' argument, *Doe* made a holding that addressed the arguments made to it by counsel and also the material facts before the court. Thus that holding cannot be mere dictum.

The Ninth Circuit expressly recognized the implied preemption discussion in *Doe* as a holding and not dictum:

> The Ordinance here does not ban sales at gun shows held in the County, it bans sales on County property only. This may distinguish it from the Ordinance held impliedly preempted in *Doe*. See 136 Cal.App.3d at 518, 186 Cal.Rptr. 380

(*Great Western Shows, Inc. v. Los Angeles County* (9th Cir. 2000) 229 F.3d 1258, 1263.)

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[20] *Dunn v. Superior Court* (1993) 21 Cal.App. 4th 721, 726, *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013, 1033, and cases there cited.

[21] *As You Sow v. Conbraco Industries* (2005) 135 Cal.App. 4th 431, 451 ("directly responsive to an argument raised by" a party), *Fogerty v. State of California* (1985) 187 Cal.App.3d 224, 234, *United Steelworkers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 835.

Last, but scarcely least, language in an opinion which the court itself viewed as a holding is not dictum.[22] In *Doe*, the court clearly viewed its conclusion that Section12026 precludes handgun bans as a holding. That is why the opinion covered that holding under a separate heading ("Implied Preemption") which came after its prior alternative holding which the court set out under the heading "Express Preemption."[23]

3. The Legislature has ratified *Doe* by thrice re-enacting Section 12026 without disavowing *Doe*'s conclusions.

Since *Doe* came down Penal Code section 12026 has been thrice reenacted without change to disavow *Doe*'s holdings.[24] Even one re-enactment would raise a conclusive presumption that the Legislature

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[22] *Estate of Hilton* (1996) 44 Cal.App.4th 890, 919 and *Fogerty* and *United Steelworkers*, *supra*, stating that language is not dictum if it was intended to respond to arguments made by the parties and/or to instruct another court. See also *As You Sow, supra.*

[23] Although not part of the opinion, we note that the lawyers at Westlaw recognized this, as both the headnote and "key cite" refer to the express *and* implied preemption holdings. (*Doe*, *supra*, 103 Cal.App.3d 509, 510.)

[24] Acts of 1988, Ch. 577, § 2, Acts of 1989, Ch. 958, § 1, Acts of 1995, Ch. 322, § 1. Among the changes made by the post-Doe reenactments of Section 12026 is that it has been divided it into subsections with the language *Doe* construed being broken out as subsection (b).

Only one of the reenactments changed subsection (b). It was rewritten but not to disavow *Doe*'s holding that Section 12026 impliedly preempts local power over residential handgun possession. Even if a reenactment makes other changes to a statute, where those changes do not affect the meaning of the words judicially construed the decision construing those words is deemed to have been reaffirmed, not repudiated by the changes in other respects. *Peltier, supra*, 34 Cal.App. 4th at 1821 and fns. 6 and 7.

concurs in – and thus ratifies – *Doe*'s interpretation of Section 12026. (*People v. Bouzas* (1991) 53 Cal.3d 467, 475; *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 815; *People v. Massie* (1998) 19 Cal.4th 550, 568 (citations omitted).) These reenactments make *Doe*'s conclusion binding law – regardless of any argument that it was wrong when the opinion was originally delivered. (See *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App. 4th 1809, 1821, fn. 6 (refusing to consider arguments that a previous case's interpretation of a statute was wrong, given that statute's reenactment without change to the language interpreted.).)

Literally dozens of cases dating back a century or more enunciate the doctrine which *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 815, summarizes as follows:

> When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute.

Thus by three times reenacting Penal Code section12026 without expressly disavowing *Doe*, the Legislature retroactively adopted *Doe*'s analysis – regardless of whether that analysis was correct when the opinion was delivered. Conceptually, the effect is as if Legislature had rewritten

Section 12026 to incorporate the language of *Doe*, or with the observation: "Incidentally, this statute was correctly construed by the court of appeal in *Doe v. City and County of San Francisco.*" When the Legislature has reenacted a law without disavowing a previous judicial construction of it, the courts will not even entertain argument that that construction was incorrect. Such arguments are irrelevant since they "do not affect our point that the Legislature is presumed to have been aware of [the prior cases], yet did not expressly reject this line of authority" when it reenacted the statute the prior cases were construing.[25]

This presumption is even more imperatively conclusive as to Section 12026, given that the Legislature reenacted it not once but multiple times.[26] Moreover as to Section 12026 it is not necessary even to presume that the Legislature was aware of *Doe*'s conclusion that it precludes handgun bans. The fact that the Legislature was aware of *Doe* is shown by its subsequent enactment of Penal Code section 629.85 (h) and (i). These statutes provide that "[n]otwithstanding Section 12026" students may not have firearms in college- or university-managed student housing. So prefacing those new laws demonstrated the Legislature's understanding that Penal Code section

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[25] *Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App. 4th 1809, 1821, fn. 6.

[26] *People v. Bouzas* (1991) 53 Cal.3d 467, 475.

12026 crates a *general* right for law-abiding, responsible adults to have handguns in their homes. It is to this *generally applicable* right that Penal Code section 629.85 (h) and (i) represent a special exception. Courts may not disregard such express legislative references by later law to an earlier one.[27]

4. *Galvan*[28] Saw Penal Code section 12026 as Precluding Local Handgun Bans.

a. What Section 12026 precludes is localities exercising power to allow or deny handgun possession or purchasing.

Penal Code section 12026's preclusion of handgun licensing or permits may be read in either of two ways. The one for which the City opts (without ever discussing the other) is that Section 12026 just bars ordinances that require people to have been issued a piece of paper called a license (or permit) in order to legally possess a handgun. But both ordinary and legal dictionaries prefer a much broader concept: precluding "permit" or "license" requirements means that a locality may not arrogate to itself the authority to permit or to deny permission for something.[29]

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[27] *People v. Superior Court* (1996) 13 Cal.4th 497, 520.

[28] *Galvan v. Superior Court* (1969) 70 Cal. 2d 851, 859.

[29] Webster's Encyclopedic Unabridged Dictionary Of The English Language (1989): 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

More important, this broader meaning was given Section 12026's words by *Galvan, supra.* (70 Cal.2d at 856 defining "licensing" as the exercise of power to give "permission or authority to do a particular thing or exercise a particular privilege.") In contrast, the *Galvan* opinion did not even bother mentioning the narrow and secondary meaning the City suggests for Section 12026's words: that all Section 12026 forbids is laws requiring that one have been issued a paper document in order to possess a gun.

The issue in *Galvan* was the validity within Section 12026 of a San Francisco ordinance requiring all owners to register their handguns. *Galvan* held that the registration requirement did not violate Section 12026 – because registering a handgun does not affect the owner's right to have it which is what *Galvan* saw Section 12026 as guaranteeing. The court stressed that registration requires no more than that owners disclose what handguns they possess, but does not imply a locality has any power whatever to outlaw handgun ownership.

In choosing to rest its holding on this foundation, *Galvan*

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certificate of such permission; an official permit . . . ." Compare Black's Law Dictionary's definition of "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 certificate or the document itself which gives permission." (5th ed. 1979 at p. 829.)

necessarily recognized that an ordinance which did arrogate to a locality the power to dictate whether handguns may be owned or possessed would violate Section 12026. This was further enunciated, as previously discussed, by *Galvan*'s choice to broadly construe the term "license" thereby recognizing that Section 12026 forbids localities exercising power to bar people acquiring and having a handgun. It is thus clear that the power Section 12026 denies to localities is any power to ban acquisition and/or possession of a handgun which state law allows law abiding responsible adults to acquire and possess.[30]

The analogy *Galvan* drew to voting is instructive in this respect. The opinion distinguished registering people to vote from "licensing" their voting. Licensing people to vote, *Galvan* said, means fixing the qualifications for voting, in contrast to registering voters which involves only listing those who have the required qualifications.[31] Of course,

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[30] Penal Code section 12026 specifies the right it creates applies only to persons who may acquire handguns under state law. Penal Code sections 12021, 12021.1, 12101 prohibit guns to juveniles and persons who have been convicted of certain crimes; Health and Welfare Code §8103 excludes people of unsound mind from owning guns.

[31] *Galvan*, 70 Cal.2d at 856-57 ("[L]icensing regulates activity based on a determination of the personal qualifications of the licensee, while registration catalogs all persons with respect to an activity, or all things that fall within certain classifications. Thus, voter registration lists merely enumerate all those persons who satisfy the [voting] requirements (are "*licensed*" to vote.") (emphasis added).)

"licensing" in the sense of determining the qualifications for voting does not involve issuing any paper certificate called a license or permit.

In sum, the *Galvan* decision holds that Penal Code section 12026 establishes the supremacy and exclusivity of state law fixing the qualifications for handgun ownership. It does so by extinguishing any local power to add restrictions on buying and owning any kind of handgun to those that are established by state law. Penal Code section 12026 is a preemption law in that it prohibits any local enactment that seeks to govern whether persons qualified by state law may "purchase, own, possess, keep," etc., a handgun.

b. Section 12026 and Section 53071 Create a "Right" to Residential Gun Possession for Law Abiding, Responsible Adults.

The City denies that Section 12026 (b) embodies a "right," citing the assertion to that effect in *CRPA, supra*, 66 Cal.App.4th at 1324. But that assertion is contrary to positions taken by this court and by the Supreme Court. *Galvan* observed as to Section 12026 that "[t]he Legislature intended that *the **right** to possess a weapon at certain places could not be circumscribed* by imposing any permit requirements . . . ." (70 Cal.2d at 858 (emphasis added).)[32]

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[32] See also *People v. Frawley* (2000) 82 Cal.App.4th 784, 793 ("the *right* to possess a revolver or other handgun about her premises or her place of business as

What Section 12026 undoubtedly establishes is that law abiding responsible adults are "entitled" to buy handguns. (*Sippel v. Nelder* (1972) 2 Cal.App. 3d 173, 177.) *Sippel* struck down a local ban on such purchases because that ban contradicted that entitlement. Likewise Prop. H is contrary to state law in multiple ways. Its handgun ban violates Section 12026. So do its bans on the sale of handguns and handgun ammunition.

CONCLUSION

The primary provisions of Proposition H are preempted by the plain language of Penal Code section 12026, as this Court recognized twenty-five years ago in *Doe*. Moreover, the legislative history of Section 12026 confirms *Doe*'s conclusions. Finally, *Doe's* holdings have *never* been criticized, much less repudiated by the courts. Even the cases relied upon most by the City recognize the validity of *Doe* and the very holdings that the City now asks this Court to repudiate. (*See*, e.g., *CRPA*, *supra*, 66 Cal.App.4th at pp. 1315-16 and 1319 ("*Doe* identifies only 'residential handgun possession' as a preempted field. The ordinance at issue here [a *partial* sales ban] does not ban possession.").) Thus, the City's strongest case negates its argument that *Doe* is no longer good law, or that its implied preemption holding is dictum. It also shows that, at the very least, the

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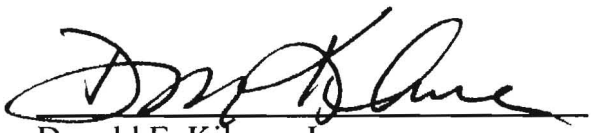
provided by Penal Code, section 12026. . . ." (emphasis added).)

handgun possession ban in Section 3 of Proposition H is preempted by State law.

For the foregoing reasons, the California Rifle & Pistol Association asks this Court to affirm the trial court's decision.

Dated: June 4, 2007

LAW OFFICES OF DONALD KILMER



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CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 4596 words as counted by the Corel WordPerfect version12 word-processing program used to generate the brief.

Dated: June 4, 2007

LAW OFFICES OF DONALD KILMER

Donald E. Kilmer, Jr.
Attorneys for Amici Curiae

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Cally Van Drielen, am employed in the City of San Jose, Santa Clara County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 1645 Willow Street, Suite 150, San Jose, CA 95125.

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

APPLICATION OF CALIFORNIA RIFLE & PISTOL ASSOCIATION TO FILE AMICUS BRIEF; PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

"SEE ATTACHED SERVICE LIST"

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Jose, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on June 7, 2007, at San Jose, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Cally Van Drielen

Cally Van Drielen

PAULA FISCAL et al.,
v.
CITY AND COUNTY OF SAN FRANCISCO et al.,
CASE NO.: A115018

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