COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

No.:A115018

PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER, DANA K. DRENKOSKI, JOHN CANDIDO, ALAN BYARD, ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF FIREARM RETAILERS, LAW ENFORCEMENT ALLIANCE OF AMERICA, 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, SAN FRANCISCO POLICE DEPARTMENT

Defendants-Appellants.

County of San Francisco Case No.: CPF05505960
The Honorable James Warren

APPLICATION OF CALIFORNIA SPORTSMAN'S LOBBY AND OUTDOOR SPORTSMEN'S COALITION OF CALIFORNIA TO FILE AMICUS BRIEF; [PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS

Kevin Lee Thomason S.B.N. 190377
5600 Picardy Dr. N
Oakland, CA 94605

Attorney for Amici Curiae

COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

No.:A115018

PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER, DANA K. DRENKOSKI, JOHN CANDIDO, ALAN BYARD, ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF FIREARM RETAILERS, LAW ENFORCEMENT ALLIANCE OF AMERICA, 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, SAN FRANCISCO POLICE DEPARTMENT

Defendants-Appellants.

County of San Francisco Case No.: CPF05505960
The Honorable James Warren

APPLICATION OF CALIFORNIA SPORTSMAN'S LOBBY AND OUTDOOR SPORTSMEN'S COALITION OF CALIFORNIA TO FILE AMICUS BRIEF; [PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS

Kevin Lee Thomason S.B.N. 190377
5600 Picardy Dr. N
Oakland, CA 94605

Attorney for Amici Curiae

TABLE OF CONTENTS

PAGE(S)

INTEREST OF THE AMICI 1

REASONS FOR FILING 2

AMICUS CURIAE BRIEF 4

INTRODUCTION 4

I. THE ORDINANCE CONFLICTS AND INTERFERES WITH STATE HUNTING LAW 4

A. State Law Occupies the Field of Hunting Regulation to the Exclusion of Local Enactments Relative to That Subject or Which Interfere with State Hunting Law or Policy. 4

B. The Ordinance Does Not Qualify Under the Exception that Allows Local Ordinances That Only "Incidentally" Affect Hunting If They Are Not Intended to Affect Hunting. 6

C. The Ordinance's Adverse Effect on Hunting Is Not "Incidental." 8

D. Independent of the State's Occupation of the Field, the Ordinance Is Both Inimical to State Hunting Laws and Policies and an Interference Therewith. 12

CONCLUSION 15

CERTIFICATE OF WORD COUNT 16

TABLE OF AUTHORITIES

PAGE(S)

STATE CASES

Baron v. Los Angeles,
(1970) 2 Cal.3d 535 6

Cencinino,
(1916) 31 Cal.App. 238 5

Northern Cal. Psychiatric Society v. City of Berkeley,
(1986) 178 Cal.App.3d 90 6

People v. Mueller,
(1970) 8 Cal.App.3d 949 7

Prindle,
(1905) 7 Cal.Unrep. 223 5

Sherwin-Williams Co. v. City of Los Angeles,
(1993) 4 Cal.4th 893 13

Wildlife Alive v. Chickering,
(1976) 18 Cal.3d 190 14

STATUTES & RULES

California Constitution Art. 4 5
Fish & Game Code § 1801 14
Fish & Game Code § 4180 13
Fish & Game Code § 4186 13
Fish & Game Code § 1801 9
Fish & Game Code § 325 13
Fish & Game Code § 200 5
Government Code § 53071 4
Penal Code § 12026 4
41 Ops.Cal.Atty.Gen. 79 (1963) 5
58 Ops.Atty.Gen. 519 (1975) 5, 11
70 Ops.Cal.Atty.Gen. 210 (1987) 7, 11

Amici Curiae respectfully move 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 AMICI

California Sportsman's Lobby

The California Sportsman's Lobby ("CSL") is an organization of hunters and fishermen that maintains a full time lobbyist in Sacramento. The California Sportsman's Lobby has been advocating wildlife conservation from the sportsman's perspective for over forty years. Its representation of hunting issues at the capitol and with the Department of Fish & Game has been largely responsible for stemming the anti-hunting tide that is eroding the state's hunting heritage and undermining sound wildlife management.

Outdoor Sportsmen's Coalition of California

The Outdoor Sportsmen's Coalition of California ("OSCC") is a nonprofit organization of sportsman's clubs and individuals dedicated to preserving outdoor recreation in California. Its principal activities are to monitor legislation that might negatively

impact hunting, fishing and other recreation, and to oppose unwise changes in laws and regulations relating to these activities.

The Outdoor Sportsmen's Coalition of California promotes the conservation enhancement, scientific management, and wise use of all our natural resources; OSCC seeks to end activities needlessly destructive to natural resources; OSCC endeavors to educate and encourage the public generally, and the youth specifically, to an understanding of the advantages and importance of the conservation and enhancement of our natural resources.

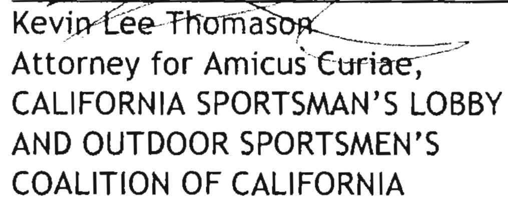
OSCC works to enhance outdoor opportunities for all citizens. With several thousand members located throughout California, the organization stays in contact with its membership via newsletters and the internet so they can be involved as they see fit.

REASONS FOR FILING

CSL and OSCC have reviewed the briefs of the parties to this appeal and request that this court consider the brief below. Although the parties' briefs discuss whether Proposition H is preempted by the Penal Code and the Government Code, they do not consider the ordinance's effects on hunting in California. As

show below, Proposition H contradicts and is inimical to state hunting law and policy. Proposition H is therefore preempted by state law on a ground not considered the parties.

Dated: June 30, 2007



Kevin Lee Thomason
Attorney for Amicus Curiae,
CALIFORNIA SPORTSMAN'S LOBBY
AND OUTDOOR SPORTSMEN'S
COALITION OF CALIFORNIA

AMICUS CURIAE BRIEF

INTRODUCTION

Amici agree with Respondents' argument that Proposition H is preempted by Penal Code section 12026 and Government Code section 53071. But amici further believe that Proposition H is also preempted by state law because the ordinance is in conflict with state hunting law and policy.

The pursuit of fish and game is governed exclusively by state law. Proposition H is preempted by state law because it effectively eliminates the ability of San Franciscans to pursue game through the most common methods of hunting. Moreover, as Proposition H's effective prohibition of hunting is wholly an extraterritorial effect, the ordinance cannot be saved by the City's "home rule" argument.

I. THE ORDINANCE CONFLICTS AND INTERFERES WITH STATE HUNTING LAW

A. State Law Occupies the Field of Hunting Regulation to the Exclusion of Local Enactments Relative to That Subject or Which Interfere with State Hunting Law or Policy.

The state has occupied the field of regulation of hunting.

(Cal. Const. Art. 4, section 20 (formerly Art. 4, section 25 1/2); Fish and Game Code § 200.) For upwards of a century it has been held that "the pursuit of fish and game" is a matter governed exclusively by state law and policy as to which localities have no authority "to legislate upon *or in any manner or degree interfere....*" (*Ex parte Cencinino* (1916) 31 Cal.App. 238, 244 [160 P. 167] (emphasis added); *Ex parte Prindle* (1905) 7 Cal.Unrep. 223 [94 P. 871].) The following Attorney General Opinions are relevant:

- 41 Ops.Cal.Atty.Gen. 79 (1963): County ordinance limiting use of dogs while hunting wild game is void because the Constitution vests the power to regulate hunting in the Legislature to the exclusion of local legislation.
- 58 Ops.Cal.Atty.Gen. 519 (1975): Proposed Burbank ordinance would be preempted insofar as it applied a ban on bow-and-arrow shooting to areas where hunting may occur without danger to life or property. Such a restriction would amount to a local regulation of

hunting, which field of activity has been occupied by state law.

As discussed *infra*, state law regulates hunting extensively, indeed comprehensively - thereby raising a presumption that an ordinance effectively banning hunting by San Franciscans is preempted. Compare *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 106-107 [223 Cal.Rptr. 609]: ("If the subject matter is one of general or statewide concern, the Legislature has paramount authority; and if the Legislature has enacted general legislation covering that matter, in whole or in part, *there must be a presumption that the matter has been preempted.*")

Even a local law that appears to address solely issues of purely local interest is preempted if it is so over-broad as to affect issues of statewide interest. (*Baron v. Los Angeles* (1970) 2 Cal.3d 535, 539-41 [86 Cal.Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036].)

B. The Ordinance Does Not Qualify Under the Exception that Allows Local Ordinances That Only "Incidentally" Affect Hunting If They Are Not Intended to Affect Hunting.

Even though the state has occupied the field of hunting,

localities may enact ordinances which (a) affect hunting only incidentally if (b) it is not their purpose to affect hunting. (*See People v. Mueller* (1970) 8 Cal.App.3d 949, 954 [8 Cal.Rptr. 157] (holding that although state has preempted field of fishing regulation, an ordinance prohibiting disposal of bait in harbor had only an incidental effect on fishing and thus was not precluded); *see also* 70 Ops.Cal.Atty.Gen. 210 (1987) (opining that an ordinance prohibiting the use of steel-jawed leghold traps was not preempted as the ordinance only "incidentally affect[ed] the field of hunting preempted by the Fish and Game Code).) But the Ordinance here does not meet either of those criteria.

The City may claim the Ordinance's *motive* is to prevent crime and argue that somehow that precludes a purpose of banning hunting. But that just confuses *motive* with purpose or intent. The Ordinance's purpose and effect is to end the use of firearms by San Franciscans - whether that use is for crime, or hunting, or self-defense, or target shooting. So the Ordinance's *purpose* of ending gun use altogether necessarily includes a purpose of ending gun use for hunting.

Yes, the City's *motive* for ending the use of firearms by San Franciscans is the belief that this will reduce violent crime. But seeing that *motive* as somehow nullifying the actual purpose of the Ordinance is as absurd for a mugger who assaulted his victim to deny he had the intent to assault her because his *motive* was robbery not assault. That the City's ultimate motive is stopping crime does not change the fact that it seeks to accomplish this by a measure it intends will end all gun use - including gun use for hunting.

In short, the Ordinance's intent and purpose, like its effect, most definitely was to preclude hunting - as well as every other use of guns. Thus the Ordinance does not meet the first part of the test that a local ordinance affecting an area occupied by the state may nevertheless be valid if it had some other purpose than affecting that area and has only an incidental effect in that area.

C. The Ordinance's Adverse Effect on Hunting Is Not "Incidental."

We anticipate that the City will insist that, while it is banning handguns and the sale of hunting rifles and shotguns, current long gun owners may keep their long guns and hunt with

them. Even if this were more than a half truth, the Ordinance would still conflict with the state law because state law seeks to *maximize* hunting as a socially beneficial part of the state's game management program. (See particularly Fish & Game Code § 1801 (e) - (g) asserting the societal benefit of hunting in reducing animal over-population and consequent destruction to the environment.) So even if the Ordinance's only effect was to limit hunting to rifle and shotgun owners, that would conflict with the state's objective of maximizing hunting.

But what the Ordinance does in fact is effectively prevent San Franciscans' hunting by banning sale of *all* ammunition, as well as by confiscating *all* handguns including those designed and intended for hunting.[1] The effect of banning ammunition sale is that even though hunting rifles and shotguns are not immediately banned, they become useless because owners cannot replenish their current stock of ammunition.

Moreover, in direct contravention of state's hunting policy,

---

[1] The use of handguns for hunting is recognized and regulated as to type by 14 California Code of Regulations §§ 311 (l) and 353 (c) and (d).)

the Ordinance's effect is to further *minimize hunting* in three other ways: a) those who use handguns for hunting have their hunting weapon confiscated and cannot buy a hunting rifle or shotgun to replace it; b) those who do not currently own a hunting rifle or shotgun can never buy one if and when they decide they want to take up hunting; and c) those who have a hunting weapon for one kind of game can never take up hunting for some other kind. For instance, those who have a .22 rifle for rabbit or squirrel hunting can never buy a deer rifle for hunting larger game, and those who do not now own a shotgun can never buy one for bird hunting.

Had the City banned only short barreled handguns, or only "Saturday Night Specials," that ban arguably would have only an incidental effect on hunting since those handguns are rarely used in hunting. But as to this Ordinance, which precludes the use of almost every instrument (firearms and ammunition) used in hunting, a claim that the effect is only incidental cannot be sustained.

A 1987 opinion of the California Attorney General ("the 1987

Attorney General Opinion") attempted to clarify when an ordinance that affects hunting only does so incidentally and is therefore not preempted by the state constitution. (70 Ops.Cal.Atty.Gen. 210 (1987).) In its 1987 Opinion, the Attorney General considered whether a county ordinance prohibiting the use of steel-jawed leghold traps within the county's jurisdiction was preempted by state law. The Attorney General noted that a given ordinance "may serve more than one purpose and affect more than one field of law." In such cases, the Attorney General opined that it was the duty of the court to determine the "principal purpose" of the ordinance.

The 1987 Attorney General Opinion reconsidered its previous opinion which determined that a City ordinance banning the use of bows and arrows, even in areas where such use was not likely to affect public safety, necessarily had more than an "incidental effect" on hunting. (58 Ops.Atty.Gen. 519 (1975).) The 1987 Opinion determined that the 1975 opinion was incorrect insofar as it asserted "that the effect of the a ban on the use of bows and arrows on hunting could never be incidental. . ." Although the

1987 Opinion stated that whether a ban on a particular means of hunting has an "incidental effect on hunting or not is a question of fact," the 1987 Opinion was at least partially based on the fact that the steel-jawed leghold ban, like the Burbank ordinance prohibiting bow and arrow use, did not "*absolutely* prohibit the activity of hunting. . ."

In contrast to the ordinances at issue in the *Mueller* case and in the 1975 and 1987 Attorney General opinions, the City's Ordinance in this case, if not *absolutely* prohibiting hunting by San Francisco residents, comes nearly as close as possible. Although City residents are presumably still entitled to purchase bows and arrows for use in hunting, they can no longer purchase any firearms or firearm ammunition. As nearly all hunting is carried out with firearms, the effect of the Ordinance is to ban nearly all forms of hunting by San Franciscans. This near-total prohibition cannot, as a matter of law, be described as "incidental."

D. Independent of the State's Occupation of the Field, the Ordinance Is Both Inimical to State Hunting Laws and Policies and an Interference Therewith.

Discussed above is whether the Ordinance is void because it

intrudes into a field occupied by state law to the exclusion of local legislation. A different form of preemption arises when a local law (though not affecting any area occupied by the state), is contrary to the letter or implementation of some state law or policy thereof. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898 (local law is void "when it is inimical" to state law.).)

Among the state hunting laws and policies the Ordinance contradicts and interferes with are: Fish and Game Code section 325 authorizing special hunting seasons where "game mammals . . . have increased in numbers in any areas, districts, or portions thereof . . . to such an extent that the mammals or birds are damaging public or private property, or are overgrazing their range"; Fish & Game Code section 4180 *et seq.* which variously either authorize unlicensed out-of-season hunting of pestiferous or destructive animals or empower the Department of Fish & Game to issue special permits for hunting in such situations; Fish & Game Code sections 4186 and 4188, which require the Department to inform landowners having special permits to rid their lands of

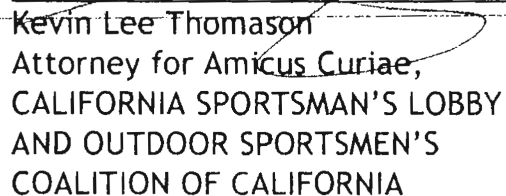
dangerous or pestiferous animals that they may open the lands to hunters out of season; and Fish & Game Code section 1801 (e) - (g) which declare the contribution of hunting and its importance in achieving state environmental and game management policy. In addition, of course, the Department of Fish and Game's duties include the proclamation of general hunting seasons of such duration as it Department determines will suffice to prevent over-population of animal species leading to destruction of the environment and the animals' death by starvation. (See, e.g., *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 [132 Cal.Rptr. 377].)

The Ordinance interferes with and is inimical to the policy and implementation of these laws in that it effectively precludes hunting by San Franciscans. It does this by banning acquisition of ammunition and long guns with which to hunt, and banning and confiscating handguns including those used and useful for hunting. As a result the Ordinance is void and would be so even if state law did not totally occupy the field of hunting.

CONCLUSION

Proposition H contradicts and is preempted by multiple areas of state law. Respondents have effectively presented the court with the reasons why the ordinance is preempted by the Penal Code and the Government Code. Amici submit this brief to show that, in addition, Proposition H is preempted by state hunting law and policy. To that end, amici respectfully request that this court rule in favor of Respondents and affirm the trial court's decision to nullify Proposition H.

Dated: June 30, 2007



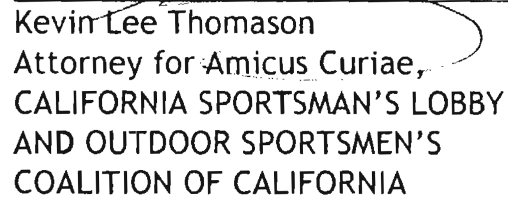
Kevin Lee Thomason
Attorney for Amicus Curiae,
CALIFORNIA SPORTSMAN'S LOBBY
AND OUTDOOR SPORTSMEN'S
COALITION OF CALIFORNIA

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 2469 words as counted by the Corel WordPerfect version12 word-processing program used to generate the brief.

Dated: June 30, 2007



Kevin Lee Thomason
Attorney for Amicus Curiae,
CALIFORNIA SPORTSMAN'S LOBBY
AND OUTDOOR SPORTSMEN'S
COALITION OF CALIFORNIA

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

I, Kevin L. Thomason am employed in the City of Oakland, San Francisco County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 5600 Picardy Dr. N, Oakland, California 94605.

On June 30, 2007, I served the foregoing document(s) described as
APPLICATION OF CALIFORNIA SPORTSMAN'S LOBBY AND OUTDOOR SPORTSMEN'S COALITION OF CALIFORNIA TO FILE AMICUS BRIEF;[PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS

on the interested parties in this action by placing
[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 Oakland, 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 30, 2007, at Oakland, California.

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

Kevin L. Thomason

LIST OF PARTIES
CASE NO.: A115018

C. D. Michel Glenn McRoberts TRUTANICH - MICHEL, LLP 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802	Attorneys for Paula Fiscal et al.,
Wayne K. Snodgrass Deputy City Attorney Vince Chhabria, Deputy City Attorney San Francisco City Attorney's Office #1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102	Attorneys for City and County of San Francisco et al.,
Hon. Paul H. Alvarado San Francisco County Superior Court 400 McAllister St. San Francisco, CA 94102	San Francisco County Superior Court Judge
California Supreme Court 350 McAllister St. San Francisco, CA 94102	