

COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

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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

No.: A115018

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
GUN OWNERS OF CALIFORNIA
SENATOR H. L. RICHARDSON (RET.)
THE MADISON SOCIETY
TO SUBMIT AMICUS BRIEF IN SUPPORT OF RESPONDENTS;
[PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS

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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.

INTERESTS OF THE AMICI

SENATOR H. L. RICHARDSON (RETIRED)

Senator H. L. “Bill” Richardson first entered the California Senate in 1966 – the same year that Ronald Reagan was elected governor. During the ensuing twenty-two years, he bypassed three opportunities to run for Congress, choosing to remain in the Senate and the GOP leadership. The result was a record of success, even in the face of partisan opposition, including authoring the bill that became Government Code section 53071 at issue herein. Senator Richardson left the Senate in 1988.

GUN OWNERS OF CALIFORNIA

Gun Owners of America, Inc., and its associated entity, Gun Owners of California (GOC), is a California non-profit corporation organized in 1974. It has offices in Sacramento, California and in Falls Church, Virginia, conveniently located to facilitate lobbying state and federal legislatures. GOC is a leading voice in California supporting the right to self defense and to keep and bear arms guaranteed by the Second Amendment to the Federal Constitution. It monitors government activities

at the national, state, and local levels that may affect the rights of all Americans who choose to own firearms.

THE MADISON SOCIETY

The Madison Society is a Nevada non-profit, membership corporation with numerous chapters in California. Its purpose is to preserve and promote the legal and constitutional right to arms of its members and of law-abiding, responsible Americans in general. To that end, the Madison Society engages in and/or supports litigation in California and nationwide. The Madison Society also engages in political education and advocacy through public meetings, advertising, publishing and distribution of literature, and contact with public officials.

REASONS FOR FILING

The accompanying brief primarily addresses the Legislative history and intent of Government Code Section 53071 and the significance of that intent in evaluating the legality of Proposition H. Understanding the intended scope and application of section 53071 is critical to understanding the preemptive effect of that statute on Proposition H. This is a topic about which these particular amici can provide valuable information to the Court, insofar as amici Senator H. L. Richardson (ret.) himself authored the bill that became Section 53071.


At the trial court level, amici filed a brief in support of the

Petitioners. Rather than repeat that brief verbatim, amici ask that this Court accept this abbreviated brief in support of Respondents. For the court's convenience, this brief contains citations to amici's trial court brief¹, which discusses in more detail some of the topics addressed in this brief. Other topics addressed herein are in response to the City's opening brief on appeal.

Accordingly, the amici curiae ask that this Court grant leave to file the amicus brief submitted herewith.

Dated: June 4, 2007

LAW OFFICES OF DONALD KILMER



Donald E. Kilmer, Jr.
Attorney for Amici Curiae

¹ Amici's trial court brief is located in Appellants' Appendix at Volume III, Tab 21, pages 0554-0572 (hereafter "III AA 21:0554-0572"). That brief was joined by the California Rifle and Pistol Association ("CRPA"). CRPA does not join this brief, but instead asks the appellate court to permit filing of a separate amicus brief.

AMICUS CURIAE BRIEF

I. BOTH THE TEXT AND LEGISLATIVE HISTORY OF GOVERNMENT CODE SECTION 53071 INDICATE THE LEGISLATURE'S INTENTION TO BAR LOCAL HANDGUN BANS

As amici noted in their brief before the trial court, it is beyond the purview of reasoned debate that Proposition H conflicts with state law. The plain meaning of the language used in Penal Code section 12026 and Government Code section 53071 cannot be reconciled with the Ordinance. The legislative history of Section 53071 simply reinforces the conclusion that local governments are prohibited from banning possession of handguns within the sanctity of one's home or business. (III AA 21:0558-0559.)

The California Legislature adopted the predecessor to Section 53071 in order to supersede a 1969 decision of the California Supreme Court. In that case, *Galvan v. Superior Court* (1969) 70 Cal.2d 851, the court rejected a challenge to a San Francisco ordinance that required handgun registration. The court held that although Penal Code section 12026 prohibited local governments from requiring permits or licenses for handguns, a registration law does not require a "permit" or "license" and is thus not preempted. (*Id.* at 859.) In response, the Legislature adopted the predecessor to Section 53071, which occupied "the whole field of the registration or licensing of commercially manufactured firearms" to the exclusion of all local

regulations. Section 53071 was intended to ban any local law that required either “registration” or “licensing,” as *Galvan* had broadly defined those terms, with respect to the purchase or possession of any kind of firearm. (III AA 21:0559-0560.)

It is normally presumed that when legislating on the same subject “the Legislature intended that similar phrases be accorded the same meaning, particularly if the terms have been construed by judicial decision.” (*People v. Wells* (1996) 12 Cal.4th 979, 986.) Regarding Section 53071, that presumption is fortified by our knowledge that its author, *amicus* Senator Richardson, and its sponsors were well aware of *Galvan* and the construction it had given the concept of “licensing” in interpreting Penal Code section 12026, and that they were adopting that construction, i.e., a “license” is defined as “permission or authority to do a particular thing or exercise a particular privilege.” (*Galvan, supra*, 70 Cal.2d at 856.) Section 53071 was not intended to prohibit only local ordinances involving the issuance of physical licenses, i.e., a piece of paper. Rather, the statute was enacted to bar local governments from adopting laws relating to any sort of permission where firearms are concerned. (III AA 21:0563-0565.)

II. PROPOSITION H INVALIDATES NUMEROUS STATE LICENSES

The state's regulatory regimen with respect to possession of firearms is strikingly comprehensive. The express statutory permissions to possess handguns that are created by statutory exemptions to the general prohibitions are also comprehensive. All of those statutory privileges are invalidated by Proposition H.

Foremost among the statutory privileges that would be invalidated by Proposition H are the physical licenses to carry a concealed weapon issued under Penal Code § 12050. But Proposition H would also cancel numerous statutory non-physical "licenses," as the term is defined in *Galvan*.

By way of example, Penal Code section 12025.5 permits a person who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order" to carry a concealed firearm. So even though state law recognizes the wisdom in allowing a battered spouse who has obtained a restraining order to carry a concealed handgun for protection, Proposition H endeavors to override this state-issued license.

Similarly, Penal Code sections 12027 and 12027.1 permit retired peace officers to carry concealed firearms. The state recognizes the value

in allowing retired police officers to possess concealed handguns to protect themselves and others. Under state law, the people of San Francisco benefit when, for example, a retired officer uses his handgun to intervene in an armed mugging. Proposition H nullifies this benefit by voiding these state-issued licenses.

Penal Code section 12026.2 permits concealed carry of firearms to an authorized participant in a motion picture production when the participant is using the firearm as part of that production. Proposition H cancels this state-issued license as well, and effectively prohibits an actor who resides in San Francisco from participating in action movies filmed within the City.

In all, California law permits the concealed carry of firearms without a physical permit in no less than twenty-five separate circumstances.² All of these state-granted licenses would be voided by Proposition H. For a more complete discussion of the ways Proposition H conflicts with, duplicates, and frustrates the state licensing scheme, see amici's trial court brief at III AA 21:0565-0568.)

III. THE CITY'S RELIANCE ON A NEED FOR DIFFERENT FIREARMS REGULATIONS IN DIFFERENT JURISDICTIONS IS MISPLACED

² Twenty of these circumstances are contained in Penal Code § 12026.2.

A recurring theme throughout the City's Opening Brief is that there is a need for differential treatment of firearms in different parts of the state because the problems facing different jurisdictions vary widely. (See, e.g., AOB at pp. 1, 12.) This assertion is based upon a statement made in *Galvan v. Superior Court*, *supra*, 70 Cal.2d 851, 864:

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. Such differences were recognized in *People v. Jenkins*, *supra*, 207 Cal.App.2d Supp. 904, 907, *People v. Commons*, *supra*, 64 Cal.App.2d Supp. 925, 932 [see fn. 5, *supra*.], and in *Gleason v. Municipal Court*, 226 Cal.App.2d 584, 587 [38 Cal.Rptr. 226]. The need for differential treatment of firearms was also recognized by the Legislature in section 25840 of the Government Code, which, as noted, authorizes counties to "prohibit and prevent the unnecessary ... discharge of firearms. ..."

Upon examination, however, the authority cited in *Galvan* for this proposition reveals that the *Galvan* Court was considering firearms ordinances unrelated to the complete possession ban at issue in this case. For example, in *People v. Jenkins* (1962) 207 Cal.App.2d Supp. 904, the court held that a Los Angeles ordinance that prohibited possession of a dangerous weapon in an automobile, whether concealed or not, was not preempted by state law as to possession of non-concealed firearms in vehicles. *People v. Commons* (1944) 64 Cal.App.2d Supp. 925, a case from twenty years earlier, considered the same Los Angeles ordinance as *Jenkins* and made the same holding. Government Code section 25840 allows

municipalities to enact ordinances regulating the discharge of firearms.^{3 4}

What is apparent from this authority is that the Legislature recognized the wisdom in allowing local governments some leeway to enact differing regulations regarding the use or possession of firearms *in public*. This makes sense, as the consequences of discharging a firearm or openly possessing a firearm in a vehicle on public streets may be quite different depending on whether one is in an urban or rural area. The Legislature saw the wisdom in allowing, for example, Mono County to permit discharge of rifles in its open spaces but for Los Angeles to prohibit rifle discharge in the Hollywood Hills.

What the Legislature specifically does not allow, however, is local regulation affecting the possession of handguns in the privacy of one's home or business. (Pen. Code § 12026.) The Legislature's wisdom in foreclosing differing regulations in this area is equally self-evident, as the possession of a firearm for self defense in the home is no different whether one resides in Mono County or in San Francisco or Los Angeles. When one

³ Cal. Gov. Code § 25840 provides: "The board of supervisors may prohibit and prevent the unnecessary firing and discharge of firearms on or into the highways and other public places and may pass all necessary ordinances regulating or forbidding such acts."

⁴ *Gleason v. Municipal Court* (1964) 226 Cal.App.2d 584, the third case cited in *Galvan*, concerned the legality of a local loitering ordinance and had nothing to do with firearms at all.

awakens at two o'clock in the morning to the sound of broken glass and the footsteps of an intruder, the usefulness of a firearm for the defense of home and family is the same regardless of where one resides.⁵

In sum, the City's reliance upon the *Galvan* Court's "Mono County" quote to support Prop H's complete handgun ban is misplaced. The "Mono County" quote had nothing to do with the possession of firearms within the privacy of one's home or business. Evidence in support of this proposition can be found in *Galvan*, itself, where the Court recognized that "[t]he Legislature intended that the right to possess a weapon at certain places could not be circumscribed by imposing any requirements" (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 858 (discussing the meaning of Penal Code section 12026's "no permit or license" language).) In other words, the City has taken a quote from *Galvan* out of context to support a handgun ban that the *Galvan* Court, itself, would have rejected based on its interpretation of Section 12026.

CONCLUSION

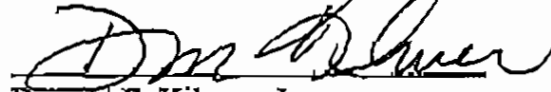
For the foregoing reasons, and those examined in greater detail in

⁵ Penal Code § 198.5, the HOME PROTECTION BILL OF RIGHTS, creates an evidentiary presumption that a reasonable fear of imminent peril or death was held by any person using deadly force (arguably this includes the use of a handgun) in his or her residence, if that force was used to protect themselves, a family member or member of the household, upon a forcible/unlawful entry into that residence by an intruder.

our amicus brief at trial, amici curiae respectfully request that this Court uphold the decision of the trial court.

Date: June 4, 2007

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 14(c)(1))

The text of this brief consists of 2,131 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

Dated: June 4, 2007

LAW OFFICES OF DONALD KILMER



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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 4, 2007, I served the foregoing document(s) described as

**APPLICATION OF GUN OWNERS OF CALIFORNIA
SENATOR H. L. RICHARDSON (RET.) THE MADISON SOCIETY
TO SUBMIT AMICUS BRIEF IN SUPPORT OF RESPONDENTS;
[PROPOSED] AMICUS BRIEF IN SUPPORT OF RESPONDENTS**

on the interested parties in this action by placing

the original

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 4, 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

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v.
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