



FARELLA BRAUN + MARTEL LLP

A Different Perspective

Russ Building / 235 Montgomery Street
San Francisco / CA 94104

T 415.954.4400 / F 415.954.4480
www.fbm.com

FACSIMILE TRANSMITTAL Number of Pages: 13

Date: 3/20/2008

To: Wayne Snodgrass F: 562-216-4445 T: 415-554-4699
City Hall

From: Dugan, Angelica (27) x3503 D: (415) 954-3503
Matter No: 20368

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Message: Fiscal v. City and County of San Francisco

Please see attached letter.

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 **FARELLA BRAUN + MARTEL LLP**

Attorneys At Law

Russ Building / 235 Montgomery Street
San Francisco / CA 94104

T 415.954.4400 / F 415.954.4480
www.fbm.com

RODERICK M. THOMPSON
rthompson@fbm.com
D 415.954.4445

March 19, 2008

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CLERK SUPREME COURT

Via Hand-Delivery

The Honorable Chief Justice Ronald M. George and
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-3600

Re: *Fiscal v. City and County of San Francisco,*
No. S160968 (First Appellate District, Division
Four, No. A115018, Jan. 9, 2008)

Dear Chief Justice George and Associate Justices:

Pursuant to Rule 8.500(g) of the California Rules of Court, *amici curiae* Legal Community Against Violence ("LCAV") and the City of Los Angeles, California, urge the Court to grant the City and County of San Francisco's Petition for Review (filed February 19, 2008) in the above-captioned case. The Court should grant review in order to secure uniformity of decision and to settle an important question of law—the extent to which local governments may regulate the sale and possession of firearms to protect the health and safety of their residents.



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The Interest of the *Amici Curiae*

Amici curiae are Legal Community Against Violence and the City of Los Angeles, largest city in California. Both *amici* are actively engaged in efforts to reduce the devastation regularly inflicted by gun violence on local, and especially urban, communities. *Fiscal* threatens to thwart those efforts. Whether or to what extent San Francisco's Proposition H may be held preempted, the ability of local governments to protect their citizens from the epidemic of injury and death caused by gun violence will remain of critical importance to both of the *amici curiae*.

Legal Community Against Violence. Formed in the wake of the 1993 assault-weapon massacre at 101 California Street in San Francisco, *amicus curiae* LCAV is a public interest law center dedicated to the prevention of gun violence. It is the nation's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. Serving governmental entities and advocacy organizations in California and throughout the United States, LCAV concentrates on state and local policy reform and has particular interest in, and experience with, local gun ordinances in California. As an *amicus curiae*, it has regularly provided the judiciary with informed analysis of the legal bases for such local regulation. Although not involved in drafting San Francisco's Proposition H, LCAV regularly assists counties and municipalities in crafting a variety of local regulations to fit community needs. Preserving the ability of local governments to regulate gun violence in the absence of comprehensive and effective state regulation is central to LCAV's mission.

The City of Los Angeles, California. Gun violence in California is an epidemic that destroys thousands of lives each year. In 2005 (the most recent year for which state-wide statistics are available), 3,335 people died from firearm-related injuries and 4,316 others were treated for non-fatal gunshot wounds.¹ California's cities

¹ See California Department of Health Services, Epidemiology and Prevention for Injury Control Branch (EPIC), *EPICenter California Injury Data Online* (2008),



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bear the majority of that violence—in 2005, almost half of California’s total firearm-related deaths (44.2%) and over half of its total firearm-related non-fatal injuries (56.4%) occurred in the home counties of its largest five cities.² Responsible for the safety of approximately eleven percent of the state’s population,³ Los Angeles has a direct interest in effectively protecting its citizens from the serious firearm-threats that they face. In the absence of federal or state regulation, the City has adopted a wide array of common sense laws to regulate firearms and ammunition in their communities. As the *Fiscal* court’s reasoning threatens to limit dramatically its ability to continue to so protect its citizens, Los Angeles has a keen interest in seeing the decision overturned.

Fiscal Creates a Legal Conflict in an Area of Urgent Public Concern

As this Court has long recognized, the local regulation of firearms is both proper and necessary in order to address the different needs of local governments throughout this varied state. (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal. 4th 853, 867.) Consistent with that recognition (i.e., aware that the challenges faced by urban cities differ from the needs of rural counties), the Legislature has repeatedly “chosen not to broadly preempt local control of firearms but has [instead] targeted certain specific areas for preemption.” (*Id.* at 864.) But the *Fiscal* court’s overbroad reasoning

at <http://www.applications.dhs.ca.gov/epicdata/default.htm> (last accessed March 18, 2008). The results cited can be accessed by selecting the “Custom Data Tables” for either “Fatal data” or “Nonfatal data” and then simultaneously selecting “Unintentional – Firearms,” “Self-Inflicted/Suicide – Firearm,” and “Assault/Homicide – Firearm” for “All ages” in “California” for the period from “2005” through “2005.”

² See *id.* (generating data as in note 1, *supra*, for the following counties: Los Angeles (cities of Los Angeles and Long Beach), San Diego, San Francisco, and Santa Clara (City of San Jose)).

³ The federal Census Bureau estimated Los Angeles’ 2003 population at approximately 3,819,951, or 10.8% of California’s 35,484,453 total. U.S. Census Bureau, *State & County Quickfacts*, available at <http://quickfacts.census.gov/qfd/states/06000.html> (last accessed March 18, 2008).



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concludes otherwise.

As annual statistics and daily news reports make clear, the need for effective local firearm regulation is an issue of urgent public concern. Already this year, almost one thousand firearm-related incidents have been reported in the streets of Los Angeles. These shootings are responsible for seventy-eight percent of the City's homicides. They have left more than three hundred other victims in their wake.⁴

The Court should intervene because the *Fiscal* decision runs contrary to the Court's previous holdings on the scope of state-law preemption of local firearm ordinances and would directly impact the ability of local governments to protect their citizens from local gun-related threats.

A. Fiscal Mischaracterizes the Preemptive Effect of Govt. Code § 53071

California courts have consistently recognized the limited preemptive scope of Government Code section 53071, with which the Legislature made clear its intent to occupy not the entire field of firearms regulation but, instead, the narrow area of affirmative registration and licensing of commercially-manufactured firearms.⁵ (*California Rifle & Pistol Ass'n v. City of West Hollywood* (1998) 66 Cal. App. 4th 1302, 1311; *Olsen v. McGillicuddy* (1971) 15 Cal. App. 3d 897, 902; accord *Great Western*, *supra*, at 862-63.) The Legislature confirmed the narrow preemptive scope of Section 53071

⁴ Based on 2008 statistics through March 11, 2008, provided by the Los Angeles Police Department.

⁵ In relevant part, Govt. Code § 53071 states:

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.



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with passage of Government Code section 53071.5, with which it indicated its intent to occupy fully a related area of firearm regulation: the manufacture, sale, or possession of imitation firearms. (*California Rifle & Pistol, supra*, at 1312 (“This section shows the language that the Legislature can be expected to use if it intends to ‘occupy the whole field.’ This statute is expressly limited to *imitation* firearms, thus leaving real firearms still subject to local regulation.” (original emphasis)); *accord Great Western, supra*, at 863.)

Nevertheless, the *Fiscal* court based its decision on a novel and sweeping interpretation of Section 53071. Despite every indication that the scope of that section is explicitly limited to the registration and licensing of firearms, the Court of Appeal held that it expressly preempts Proposition H’s ban on the sale, manufacture, transfer, or distribution thereof because it could be seen to “effectively cancel” the commercial licenses of firearm dealers. (Slip Op. at 15.) This conclusion is not only at odds with the text of Section 53071 and previous interpretations by this Court and others (*Great Western, supra*, at 682; *Suter v. City of Lafayette* (1997) 57 Cal. App. 4th 1109, 1120-21), it is directly contradicted by Penal Code section 12071, which expressly authorizes cities and counties to regulate firearm dealers. (Penal Code § 12071(a)(6).)

B. Fiscal Mischaracterizes the Preemptive Effect of Penal Code § 12125 et seq.

The *Fiscal* decision suffers from similar overbreadth in its conclusion that the Unsafe Handgun Act (“UHA”), Penal Code §§ 12125-12233, preempts Proposition H’s sales ban. Responding to a rising tide of violence and injury from cheap, physically-unsafe handguns (i.e., “junk guns” or “Saturday Night Specials”) some fifty California communities (including San Francisco, Los Angeles, and Oakland) passed anti-“junk gun” ordinances in the 1990s.⁶ Soon

⁶ Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* 217-22 (February 2008) (“*Regulating Guns in America*”), available at



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after, the Legislature passed the UHA to specifically regulate the manufacture, importation, and sale state-wide of these weapons. (Penal Code § 12125.) While the *Fiscal* court reasonably concluded that recent amendments to the UHA may have broadened its scope beyond simple gun-design safety (Slip Op. at 17), there is no support for the court's conclusion that the UHA impliedly preempts Proposition H's localized ban on the sale and manufacture of firearms. (Slip Op. at 15.)

As it does repeatedly throughout its decision, the *Fiscal* court's analysis of the UHA mistakes permissive statutory language for the affirmative guarantee of a right. Even with the addition of recent "microstamping" provisions to aid in tracing handguns used in the commission of a crime, the UHA remains a regulation plainly intended to protect and regulate California's commercial marketplace. Rather than guaranteeing any individual's right to sell handguns, the law continues to regulate only the design of handguns that "may be sold" in the state. (Penal Code § 12131(a) (emphasis added).)⁷ Nothing in the UHA mandates the sale of handguns. Moreover, there is no support for the *Fiscal* court's suggestion (Slip Op. at 18) that a local government's decision to repeal pre-UHA "junk gun" ordinances is anything other than the recognition of the preemption by duplication attributed to any superseding state law. (*Great Western, supra*, at 865.)

If allowed to stand, the *Fiscal* decision would recast California's law of gun-related preemption by reading more into the UHA than this Court, or the Legislature, have understood it to contain. A local ban on the sale or possession of firearms is neither duplicative of nor inconsistent with the Legislature's efforts to ensure that when

http://www.lcav.org/library/reports_analyses/RegGuns.entire.report.pdf (last accessed March 18, 2008).

⁷ The *Fiscal* court's interpretation of the UHA as embodying an affirmative right to sell handguns is unsupported by the text of the subsection it cites, which simply directs the state Department of Justice to compile a "roster" of guns which meet the Act's safety requirements thus qualifying for sale in California. See Penal Code § 12131(a).



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handguns are sold in this state, they are traceable and not patently unsafe. (*Great Western, supra*, at 865 (“The above statutes [Penal Code §§ 12080, 12125] prohibit the sale of certain dangerous firearms. Thus, the Ordinance does not criminalize precisely the same acts which are . . . prohibited by statute and is therefore not duplicative.” (citation and quotation marks omitted).)

C. Fiscal Mischaracterizes the Preemptive Effect of Penal Code § 12026

Finally, the *Fiscal* decision would dangerously broaden the preemptive scope of Penal Code section 12026 by suggesting that it not only preempts Proposition H’s local ban on the possession of handguns but, also, any restriction on private handgun possession.

Part of the state’s Dangerous Weapons Control Law (Penal Code §§ 12000 *et seq.*), Section 12026 is one of several provisions which specifically regulate the carrying of concealable firearms (i.e., handguns or other firearms capable of being concealed). But rather than being an affirmative guarantee of the right to unfettered handgun possession as the *Fiscal* court suggests (Slip Op. at 11, 15), Section 12026 is simply a permitting and licensing “carve-out.” That is, after generally proscribing the carrying of concealed firearms (Penal Code § 12025), the Legislature not only created a system of permitting to allow such behavior (Penal Code §§ 12050-12054), it identified in Section 12026 areas for which no such “permit or license . . . shall be required.” (Penal Code § 12026(b).)

This Court has recognized that Section 12026 is part of the Legislature’s effort to regulate the “discrete” area of licensing rather than all aspects of possession or the “entire field of gun control.” (*Great Western, supra*, at 861.) And the Court of Appeal has recognized that “[t]here is no basis for the conclusion that Penal Code section 12026 was intended to create a ‘right’ or to confer ‘authority’ to take any action.” (*California Rifle & Pistol, supra*, at 1324.) Regardless, the *Fiscal* decision would announce a contradictory and expansive vision of Section 12026 by suggesting that the provision



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relates not to just permitting and licensing but, also, would preempt any and all local ordinances which might be seen to “restrict[] handgun possession” on private property (Slip Op. at 8), or place an “impediment[]” on the purchase or possession of a handgun (Slip Op. at 9).

Contrary to *Fiscal’s* assertion otherwise (Slip Op. at 11), neither *Doe v. City and County of San Francisco* (“*Doe*”) (1982) 136 Cal. App. 3d 509, nor Section 12026’s legislative history support such an expansion. This Court did not “approve” *Doe’s* superficial implied-preemption analysis (*see Great Western, supra*, at 863-64 (briefly discussing other aspects of *Doe* as part of a survey of gun law preemption cases)). And the history of the latest substantive amendment to Section 12026, following *Doe*, supports the conclusion that the provision was intended to operate as the carve-out described above.⁸

Thus, not only does the *Fiscal* decision conflict with this Court’s prior interpretation of Section 12026, its overbroad language has the unwarranted potential to chill important local gun regulations related to private ownership or possession.

D. Fiscal Threatens the Ability of Local Governments to Protect Their Citizens

The *Fiscal* decision represents a stark departure from the

⁸ *See, e.g.*, Stats. 1995, ch. 322, § 1, LEXSEE 1995 CA ALS 32, at *0 (after noting that existing law generally made the carrying of concealed weapons a misdemeanor, stating “This bill would provide, instead, that *the above prohibition* [i.e., § 12025] *shall not apply* . . . within or on the described places or property.” (emphasis added)); Analysis of Assembly Bill 92 Prepared for the Assembly Committee on Public Safety, at 2 (This bill “[r]earranges the language found in section 12026 to create two distinct subdivisions. One would address the preemption preventing concealed weapons permits from being required of citizens who possess firearms in their homes and businesses.”); *id.* at 3-4 (recognizing the amendment would likely invite increased preemption litigation even though it would affect no substantive legal change and would only confirm the reasoning of *People v. Barela* (1991) 234 Cal. App. 3d Supp. 15, 19-20).



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previously-settled law of this state. As this Court has made clear, the Legislature has acted consistently to preserve the ability of local governments to reasonably regulate firearms to preserve the public health and safety. “In sum, a review of case law and the corresponding development of gun control statutes in response to that law demonstrate that the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption.” (*Great Western, supra*, at 864.) But after examining the same body of law, the *Fiscal* court reached the opposite conclusion. Repeatedly offering overly-broad interpretations of the Code that conflict with prior judicial interpretations, the *Fiscal* decision concludes with a most unfortunate—and unwarranted—warning: “[W]hen it comes to regulating firearms, local governments are well advised to tread lightly.” (Slip Op. at 24.)

Local governments should feel no need to “tread lightly” in their continued efforts to secure the safety of their citizens. Nor are they required to do so. The Legislature has chosen not to occupy the entire field of firearm regulation and it likely never will. For it has recognized, as has this Court, the great value of local firearm regulation:

It is true today as it was more than 30 years ago . . . [the] problems with firearms are likely to require different treatment in San Francisco County than in Mono County. [T]he need for the regulation or prohibition of the carrying of deadly weapons, even though not concealed, may be much greater in large cities, where multitudes of people congregate, than in the country districts or thinly settled communities, where there is much less opportunity and temptation to commit crimes of violence for which such weapons may be used.

(*Great Western, supra*, at 867 (citation and quotation marks omitted).)

Several times, the Legislature has adopted—for the protection of the entire state—locally-born firearm regulations. Between 1996



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and 2000, fifty-six California municipalities passed ordinances banning the manufacture, import, or sale of particularly dangerous “junk guns.”⁹ Capitalizing on this important first line of local defense, the Legislature soon followed with its own adoption of the UHA, discussed above. In 2004, the Legislature again followed the lead of local communities (San Francisco and Los Angeles both ban large-caliber weapons)¹⁰ by amending Penal Code section 12285 to specifically ban 50-caliber BMG assault rifles.¹¹

Not only do these local-to-state regulations of particularly dangerous firearms belie the *Fiscal* court’s warning (directed not to the appellant City and County of San Francisco but to all of California’s local governments), they offer concrete examples to the Court of the valuable process the decision would unnecessarily endanger. As the recent statistics from *amicus* Los Angeles make clear, the need for local action remains strong.

E. Conclusion

The *Fiscal* decision would create conflict by misinterpreting and misapplying the law of preemption in the important area of local gun violence prevention ordinances. Because its reasoning is overbroad and its recommendations are unwarranted, the danger is real that *Fiscal* would encourage unnecessary litigation by well-funded opponents of gun regulation thus chilling the development by local governments of reasonable—and entirely lawful—ordinances designed to protect the health and safety of their citizens. The Court should review the *Fiscal* decision in order to ensure uniformity in this important area of law. Local governments must retain their ability to respond to local gun-related threats.

⁹ *Regulating Guns in America, supra*, at 222.

¹⁰ San Francisco Police Code, art. 6, § 613.10-1 (banning since 1996 the sale of .50 firearms and ammunition); Los Angeles Mun. Code ch. V, art. 5, § 55.18 (banning since 2003 the sale of .50 rifles).

¹¹ *Regulating Guns in America, supra*, at 35-37.



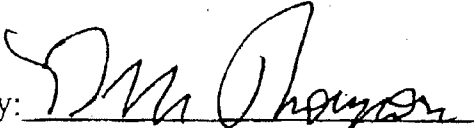
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Accordingly, we respectfully urge the Court to **GRANT** the City and County of San Francisco's Petition for Review in this case.

Very truly yours,

Dated: March 19, 2008

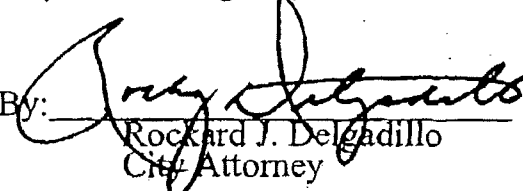
Farella Braun + Martel LLP

By: 
Roderick M. Thompson

Attorneys for Legal Community Against
Violence

Dated: March 19, 2008

City of Los Angeles, California

By: 
Rockard J. Delgadillo
City Attorney

RMT:avd

cc: All Counsel

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)

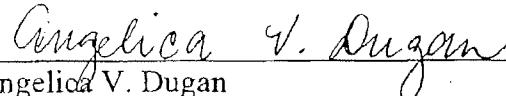
I, Angelica V. Dugan, declare:

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. On March 20, 2008, I served the attached

Letter Brief in Support of San Francisco's Petition

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C.D. Michel, Esq. Don B. Kates, Esq. Trutanich Michel, LLP 180 East Ocean Blvd., Suite 200 Long Beach, CA 90802 Telephone: (562) 216-4444 Facsimile: (562) 216-4445 Attorneys for Paula Fiscal, <i>et al.</i> , Plaintiffs and Respondents	Dennis J. Herrera, Esq. Wayne Snodgrass, Esq. Vince Chhabria, Esq. 1 Dr. Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102 Telephone: (415) 554-4675 Facsimile: (415) 554-4699 Attorneys for City and County of San Francisco, <i>et al.</i> , Defendants and Appellants
<input checked="" type="checkbox"/>	PERSONAL SERVICE -- caused delivery by hand to the addressee set forth below via Specialized Legal Services.
Honorable Paul H. Alvarado San Francisco Superior Court 400 McAllister Street San Francisco, CA 94102	California Court of Appeal First Appellate District, Division Four 350 McAllister Street San Francisco, CA 94102

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 March 20, 2008, at San Francisco, California.



 Angelica V. Dugan