C. D. Michel - SBN 144258
Don B. Kates - SBN 39193
Glenn S. McRoberts - SBN 144852
Thomas E. Maciejewski - SBN 222736
TRUTANICH • MICHEL, LLP
180 East Ocean Blvd.
Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445

Attorneys for Plaintiffs and Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

PAULA FISCAL et al., Plaintiffs and Petitioners, vs. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents.	CASE NO. CPF-05-505960 **MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO CITY'S OPPOSITION TO MOTION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF** Hearing Date: February 15, 2006 Hearing Judge: Warren Time: 9:30 a.m. Location: Dept. 301 Date Action Filed: December 29, 2005 Trial Date: None scheduled

TABLE OF CONTENTS

TABLE OF CONTENTS(CONT.)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES (CONT.)

TABLE OF AUTHORITIES (CONT.)

STATUTES & RULES

INTRODUCTION

Petitioners do not address CITY's policy justification arguments and accompanying declarations in this brief. Petitioners acknowledge the tragic consequences of gun violence, and sympathize with all crime victims' circumstances. Among Counsel for Petitioners and Petitioners themselves are former prosecutors, police officers, soldiers, and crime victims who have personally experienced gun violence. Respectfully, their research and experience leads them to believe that civilian disarmament of the degree compelled by the Ordinance will only exacerbate the problem. Regardless, these policy considerations are not, and should not be, before this Court.

Rather, Petitioners call upon this Court to resolve several purely legal issues. These issues have been narrowed by several key concessions made by CITY in its Opposition brief, and highlighted by CITY's failure to respond to certain arguments at all. CITY concedes that the handgun possession ban in the Ordinance violates Penal Code § 12026, under *Doe v. City & County of San Francisco* (1982) 136 Cal.App.3d 509, 517-518. Thus, unless CITY can avoid section 12026 by proving handgun possession by California residents is "purely a municipal affair," the ban cannot stand. The State's comprehensive regulatory scheme reflects an obvious statewide concern, so that issue, too, is easily resolved.

CITY also concedes that the Section 2 ban on the transfer, sales, or distribution of all firearms and ammunition is not a municipal affair and is not protected by the home rule doctrine. CITY does not dispute that, as noted in Petitioners' opening memorandum, the cases on which CITY heavily relies cite *Doe* with approval.[1] And CITY has made clear its position that the ordinance prohibits the possession of handguns by San Francisco residents even if those residents are expressly authorized by state law to possess and carry handguns. Finally, in discussing Penal Code § 12026, CITY fails to address that the Legislature ratified *Doe* by thrice reenacting 12026 without change to disaffirm its holdings.

For purposes of this Reply, Petitioners have narrowed their legal arguments accordingly.

ARGUMENT

I. THE "HOME RULE" DOCTRINE DOES NOT APPLY TO HANDGUN POSSESSION

CITY wisely concedes that Section 2 of the Ordinance, which bans the sale or transfer of all firearms or ammunition in the City, cannot be saved by the "home rule" argument. But despite glaring

[1] *CRPA v. West Hollywood*, 66 Cal.App.4th 1302, 1316; *Great Western Shows v. Los Angeles* (2002) 27 Cal.4th 853, 863-864.

conflicts with multiple state licensing schemes, CITY claims that the "home rule" doctrine protects the ban on the possession of handguns by San Francisco residents and that the ban is a "purely municipal affair." On its face, CITY's municipal affair argument is untenable. The Legislature's statewide concern is manifest in its comprehensive firearms regulatory scheme. While the preemption debate rightly focuses on whether specific local regulations conflict with that scheme (if one can consider a ban a regulation), it is beyond doubt that the comprehensive regulatory scheme reflects a "statewide concern" to control firearms and deter crime, in part, by insuring handgun possession by civilians and retired peace officers.

A. CITY Inaccurately Characterizes the Municipal Affairs Test & Standard of Review

Several critical clarifications are needed concerning CITY's extensive reliance on two recent California Supreme Court cases to advocate a test for "home rule" protection and the standard of review. (See Opposition at pp. 8-16, extensively citing *California Federal Savings and Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 ["*CalFed*"] and *Johnson v. Bradley* (1992) 4 Cal.4th 389.)

First, although it is true that the courts have made no attempt to formulate an exact definition of "municipal affair" (Opposition at 10:11-13, citing *CalFed, supra*, at p. 16), it is equally true that "[the courts'] decisions have also strived to confine the element of judicial interpretation by hedging it with a decisional procedure intended to bring a measure of certainty to the process, narrowing the scope within which a sometimes mercurial discretion operates." (*CalFed*, at p. 16.)

Second, CITY states correctly that when there is a true conflict between a charter city position and a state statue, it is the duty of the court to "allocate the governmental powers under consideration in the most sensible and appropriate fashion as between the local and state legislative bodies." (Opposition at 13:15-18.) But CITY inappropriately extrapolates from this that "to divest the City of its Constitutional home rule power, statewide concerns implicated by Section 3 must be genuine and *weighty*, not insubstantial or remote." (Opposition at 13:18-20, emphasis added.) CITY does not, because it cannot, cite support for this statement. The proposition was explicitly rejected by the *CalFed* court:

> Although we decline for pragmatic and intellectual reasons to adopt the view urged by Justice Richardson in his concurring opinion in *Weekes v. City of Oakland*, supra, 21 Cal.3d 386, requiring a comparative "weighing" of the competing interests of the state and charter cities in a given area, we are mindful of his caveat that "the sweep of the state's protective measures may be no broader than its interest." (*CalFed*, supra, at p. 25.)

There is no "weighing" of interests involved. Establishing state legislative supremacy requires only a "convincing basis for [state] legislative action" or "a dimension demonstrably transcending identifiable municipal interests." The law does not require a "weighty" state interest, but merely a "demonstrable" state interest in order to "resist[] the invasion of areas which are *of intramural concern* ***only***." (*CalFed*, 54 Cal.3d at p. 17 (emphasis added).)

This is really nothing more than a restatement of prior case law holding that the "home rule"doctrine protects only matters which are "purely municipal affair[s]" – coupled with an explicit requirement that a state interest be shown in order to demonstrate that a matter is not "of intramural concern only." Cases both before and after *CalFed* have noted that the "home rule" doctrine only protects ordinances "relating to matters which are *purely* 'municipal affairs.'" (See, e.g., *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899, 906 (citing *Baggett v. Gates* (1982) 32 Cal.3d 128, 136).)

Moreover, CITY argues that "[t]his Court may not find any extramunicipal effect of Section 3 absent" the type of "detailed Legislative findings, 'congressional reports and studies,' and 'specific recommendations of financial and regulatory experts' to the relevant legislative agencies" that were present in *CalFed*. (Opposition at 16:8-12.) This argument ignores two key points: First, nowhere in *CalFed* or elsewhere do the courts require "detailed Legislative findings" to determine that an area is of "statewide concern" rather than a "municipal affair." This "requirement" is entirely an invention of CITY, which ignores the long line of cases in which matters have been found to be of "statewide concern," apparently without such detailed findings.[2] Second, the reason such "detailed Legislative findings" were necessary in the *CalFed* case was that there was expansive case law suggesting that "charter city tax measures," like the one at issue in *CalFed*, were inflexibly "municipal affairs." (*CalFed*, 54 Cal.3d at pp. 6-7.) The "detailed Legislative findings" were necessary to distinguish the effects of the *CalFed* tax from this well-established body of earlier tax cases.

Nothing cited by CITY changes the standard of review: "[I]f there is a doubt as to whether or not [a] regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state." (*Ex Parte Daniels* (1920) 183 Cal. 636, 639.) The presumption in favor of the legislative

[2] See, e.g., *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364; *Pipoly v. Benson* (1942) 20 Cal.2d 366, 369-70; *In re Shaw* (1939) 32 Cal.App.2d 84, 86.

authority of the state has been reiterated in many cases, both old and new.[3]

B. CITY Mischaracterizes The Subject at Issue

CITY is backward in its identification of the subject at issue here, claiming that it is "handgun possession by San Francisco residents" rather than simply "handgun possession." (Opposition at 19:15-17.) But the starting point is with a determination of the *state's* interest. Preliminarily the court must determine whether the subject "fails to qualify as one of statewide concern" or if the subject *state* statute "is one of statewide concern and that the statute is reasonably related to its resolution." (*CalFed*, 54 Cal.3d at p. 17.) For purposes of "home rule"analysis, "statewide concern" refers to "all matters of more than local concern and thus includes matters the impact of which is primarily regional rather than truly statewide." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.)

The state's interest here is not in firearms regulation *per se*. As reflected throughout the comprehensive statutory scheme regulating the acquisition and possession of firearms in general and handguns in particular, the state's interest is in controlling crime and the criminal misuse of firearms. Part of controlling crime includes determining the circumstances under which it is appropriate to allow law enforcement officers and other professionals to use firearms, and when and how to allow civilians to possess firearms for self defense or for a crime deterrent effect. Penal Code § 12026 and Government Code § 53071 express and reflect the state's policy determination that under certain circumstances armed civilians contribute to the statewide crime prevention effort. The state's interest is in ensuring that, as part of the state's overall crime prevention strategy, civilians are able to deter and fight crime for themselves – with guns when possessed under the circumstances proscribed by the state's statutes.

C. Gun Possession Is Not a "Purely Municipal Affair[]."[4]

The state has an interest in controlling crime by defining the circumstances under which firearms can be possessed uniformly across the state. This state interest is, in fact, one of the most significant and

---

[3] See, e.g., *Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 514; *Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1818, fn. 8; *Bay Cities Transit Co. v. City of Los Angeles* (1940) 16 Cal.2d 772, 777; *Lossman v. City of Stockton* (1935) 6 Cal.App.2d 324, 328.

[4] *Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th 899 and caselaw there cited.

compelling interests that the Legislature addresses.[5] Criminals do not stop at the county line. The criminal gang member that is not stopped by an armed San Francisco resident moves on to chose another victim – perhaps a potential victim passing through San Francisco, perhaps a victim in Marin, Los Angeles, or wherever. So whether San Francisco residents possess handguns to fight crime has a direct impact on people passing through the City and on people victimized by unapprehended San Francisco criminals operating in other cities.

In this respect, firearms regulations are not purely "municipal affairs." The courts have already found these effects to implicate "state-wide" concerns. In *Long Beach Police Officers Assn. v. City Of Long Beach* (1976) 61 Cal.App.3d 364, a local association of police officers brought an action to restrain enforcement of city regulations relating to discharge of firearms by the city's police officers in apprehending felons. The Court ruled that "[j]ust as use of city streets by police and fire vehicles affects not only the municipality's citizens but also transients, and is thus a matter of state-wide concern (citation), so also the firing of guns by Long Beach police officers and the apprehension or escape of felons in Long Beach affects the people of the state generally." (*Id.* at p. 371.)

Unlike San Francisco's position in the 1982 *Doe* case, in *Long Beach* the city did not concede that the ordinance in question was not a municipal affair, but actively argued for home rule protection. (*Id.*) The Legislative Counsel of California specifically pointed to the *Long Beach* case when asked by Senator H.L. Richardson for a legal opinion on whether an ordinance of the type at issue in *Doe* was preempted by state law. (Legislative Counsel of California, letter from Paul Antilla, Deputy Legislative Counsel, to Senator H.L. Richardson, dated March 2, 1982, and attached at Section 4 of Petitioners' accompanying Judicial Notice Request.)[6] On page 8 of its March 2, 1982 opinion, the Legislative Counsel specifically mentioned that the *Long Beach* court found that the City ordinance regulating discharge of police

---

[5] See, for example, 65 Ops.Cal.Atty.Gen. 457, at *9 (1982): "The purpose of firearm regulation is to control the classic instruments often used for criminal purposes. A government has a great interest in minimizing 'the danger to public safety arising from the free access to firearms that can be used for crimes of violence.' Such controls are a valid exercise of the police power of the state for the protection of lives and property of the state's citizens. Such legislative purposes and concerns are not limited to cities, but are statewide, national, and even international in scope. The comprehensive state legislation in the field of firearms possession is evidence of the statewide concern just as the National Firearms Act is evidence of a similar national concern." (Internal citations omitted.)

[6] Legislative Counsel opinions, like those of the Attorney General, are entitled to great weight. *North Hollywood Project Area Com. v. City of Los Angeles* (1998) 61 Cal.App. 4th 719, 724 quoting *California Ass'n. of Psychology Providers v. Rank* (1990) 51 C.3d 1, 21. [*California Ass'n. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 21.]

firearms in the City "affected not only the municipality's citizens but also transients and was thus a matter of state-wide concern." The Legislative Counsel's office went on to opine that "since an area of firearms control so closely related to internal city affairs as was the case in the *Long Beach* situation is not exclusively a municipal affair, it is our opinion that an ordinance relating to the broader area of the sale and possession of concealable firearms *by inhabitants of the city* would not be considered a municipal affair."[7] (*Id.*, emphasis added.)

Note that even though the *Doe* ordinance applied both to residents and non-residents alike, the Legislative Counsel did not find this fact significant, opining that an ordinance regulating possession of "concealable firearms by inhabitants of the city" is nonetheless not a municipal affair.

Similarly, in 1982 the California Attorney General opined that a California city does not have the authority to prohibit the possession of handguns within the city. (65 Ops.Cal.Atty.Gen. 457 [1982 WL 155982].) In its 1982 opinion, the Attorney General, like the California Legislative Counsel, relied on the *Long Beach* opinion in considering whether such a local ordinance could be considered a municipal affair. In comparing a handgun possession ban to the police discharge regulation considered in *Long Beach*, the Attorney General noted that "[t]he use of a firearm within the city would appear to be of greater concern than possession of such weapons in the city." (*Id.* at *9).

The Attorney General concluded that "[i]f such use of firearms is not a municipal affair *a fortiori* neither is the possession of firearms." (*Id.*) Again, in the *Long Beach* case the ordinance in question applied only to Long Beach police officers discharging firearms in Long Beach. Thus the Attorney General's analysis in this regard is equally applicable to a city ordinance banning possession of handguns by residents of that city.

Moreover, that the state places some value on and is concerned about handgun possession by law abiding citizens is evident in the state's regulatory scheme, e.g., in Penal Code §§ 12025.5 and 12031.[8]

---

[7] Webster's Revised Unabridged Dictionary (1913) defines "inhabitant" as follows: "1. One who dwells or resides permanently in a place, as distinguished from a transient lodger or visitor; as, an inhabitant of a house, a town, a city, county, or state. . . .2. (Law) One who has a legal settlement in a town, city, or parish; a permanent resident."

[8] Section 12020.5 provides exceptions to concealed carry of firearms prohibition where person reasonably believes he or she is in grave danger; and 12031(b) provides an exemption from prohibition on possession of loaded firearms for retired peace officers and private persons defending themselves and others, or making arrests or otherwise preserving the peace.

This illustrates the underlying philosophical difference between the State and CITY on firearms regulation and its relationship to crime control. State regulations protecting citizen use of firearms in crime prevention context reflect a State policy authorizing citizen participation in thwarting crime; CITY takes a position, embodied in its Ordinance, that citizens should rely wholly upon police to protect them. Whether the State promotes or merely protects the possession of handguns by civilians to deter crime, it nonetheless evinces a philosophy underlying the state regulatory scheme that conflicts on a fundamental level with CITY's philosophy. That is, the Ordinance thwarts State policy, and is inimical thereto.

CITY in part attempts to make its "home rule" argument by citing *non*-"home rule" cases to the effect that firearms may in some respects be regulated differently in different areas of the state. But those cases involved ordinances that were held *not* to conflict with state law.[9] CITY further cites two cases that upheld the authority of cities to regulate games of chance and boxing matches, respectively. (Opposition at p. 11, citing *In re Hubbard* (1964) 62 Cal.2d 119 and *Porter v. City of Santa Barbara* (1934) 140 Cal.App.130.) But these two cases involved statutes that truly did not implicate any statewide interests, other than perhaps the ability of transients to play games of chance or watch boxing in those cities.

Petitioners' previously mentioned the "Saturday Night Special" and "assault weapon" ordinances that CITY repealed when the City Attorney advised CITY that these conflicted with state law. (Petitioners' Writ Motion at p. 2, fn. 3, lines 20-23.) These, and the other examples given in the Petitioners' opening brief, would all be exempt from preemption if local gun laws could be made "purely municipal affairs" by describing their subjects as, e.g., "possession of assault weapons by City residents." If the fact that an ordinance's effect is limited to city residents somehow renders the subject matter not one of statewide concern, then every locality could easily design ordinances in direct conflict with state law simply by limiting their application to its own residents. For that matter, localities could avoid preemption on a myriad of subjects of state concern completely unrelated to guns by adopting this tactic.

D. The Handgun Possession Ban Will Have Significant Extraterritorial Effects. [10]

The "home rule" doctrine cannot save an ordinance that has extraterritorial effects – even if those

---

[9] *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 863-64; *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853.

[10] *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.

effects are *beneficial* to those outside the municipality.[11]

1. Newly Banned Handguns Will Flood the Market in Nearby Communities

The Ordinance's extraterritorial effects include one *Doe* itself recognized: That a San Francisco handgun ban inevitably affects adjacent areas by flooding them with the handguns that are no longer allowed in San Francisco.[12] Whether or not this assertion in *Doe* was *dictum*, it is obvious that San Franciscans will respond to the ordinance by selling their handguns in other cities and counties rather than have them confiscated without compensation. This effect is so obvious and certain that CITY admitted it would occur back in 1982, and CITY's current claim that the effect is "merely a *hypothetical* extramunicipal ripple effect" is bewildering. (Opposition at 16:6-7, emphasis added.) By CITY's own theory that the availability of handguns increases gun violence, the infusion of tens of thousands of San Francisco handguns into adjacent areas will affect those areas by exacerbating violence there.[13]

2. Nonresidents Will Be Affected Despite the Resident Limitation

CITY argues that Section three of the Ordinance will have no effect on transients because nonresidents will not be subject to the handgun possession ban. But this ignores a host of effects the resident-only ban on handguns will nonetheless have on people who visit the City, and on people outside the City.

Persons passing through San Francisco are currently affected by the number of handguns possessed City residents in their homes and businesses, and possessed in public by certain residents by virtue of state laws authorizing such possession. According to CITY, this effect is primarily negative: persons passing through the City (along with persons who live in or outside the City) are more likely to

---

[11] *City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 247: "Furthermore, the sewage treatment facilities will protect not only the health and safety of petitioner's inhabitants, but the health of *all* inhabitants of the San Francisco Bay Area. Accordingly, the matter is not a municipal affair." [Emphasis by court]

[12] *Doe, supra,* 136 Cal.App.3d at p. 513 (agreeing that San Francisco's 1982 handgun ban was not a municipal affair because it "affect[ed] not just persons living in San Francisco, but transients passing through *and residents of nearby cities where San Francisco's handguns might be sold.*")

[13] Petitioners urge that the sale of those guns to adults who pass the state-required background check will affect the adjacent areas by increasing public safety. CF. JOHN R. LOTT, MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAW (Univ. of Chicago [2d ed.] 2000) (increased victim access to guns greatly deters crime), David B. Mustard, "Culture Affects Our Beliefs About Firearms, But Data Are Also Important," 151 U. Penn. L. Rev. 1387 (2003) (same), JAMES B. JACOBS, CAN GUN CONTROL WORK? (Oxford U. Press, 2003) (guns are used more often to repel crime than by criminals in committing crimes), Lawrence Southwick, "Self-Defense with Guns: The Consequences," 28 J. CRIM. JUSTICE 351-370 (2000) (same), David B. Kopel, "Treating Guns Like Consumer Products," 148 U. OF PA L. REV. 1213, 1229-31 (2000) (same).

be injured by handgun violence than they would be if City residents were not permitted to possess handguns (i.e., the less guns the better). Reducing this perceived risk is the primary reason CITY adopted this Ordinance. (See Proponent's Argument in Favor of Proposition H, included in Exhibit A to City's Request for Judicial Notice.) According to Petitioners (and the State, as reflected in its regulatory scheme) both persons passing through the City and persons who live in and outside the City benefit from the deterrent effect on crime that mere possession of handguns by law-abiding San Francisco residents provides, and further benefit from the ability these handguns afford those who possess them to protect themselves and others, and to arrest criminals.

Either way, CITY's Ordinance involves matters of life or death both for persons passing through the City and for those living in other cities. This is true whether, as CITY contends, non residents are likely to be injured by San Franciscans if they own guns, or whether transients and residents of other cities are likely to benefit from crime deterrence, prevention, and criminal apprehension caused by gun ownership of law-abiding City residents. By removing handguns from the possession of all City residents, for better or worse people from outside the City will be affected by the Ordinance.

This effect on nonresidents is even more pronounced when one considers CITY's position that the Ordinance even deprives City residents who are permitted to possess and carry handguns pursuant to Penal Code § 12027 (see CITY's Answer to Writ Petition, filed January 30, 2005, at ¶ 9) and Penal Code § 12050 (see CITY's Opp. at p. 13) of the ability to possess a handgun. Because of this, a person passing through the City will no longer receive the benefit of crime deterrence or protection from retired state and federal peace officers who live in San Francisco. Even if CITY's rationale for disarming retired officers were correct, people passing through the City are less likely to be injured by gunfire from retired officers.

The Ordinance affects non San Franciscans just as nonresidents were affected by unstopped criminals in the *Long Beach* case. If anything, the effect on transients of Section 3 of CITY's ordinance will be greater. They will be affected by the lack of handguns by all law-abiding City residents, not just by the manner in which the much smaller group of police officers discharge their weapons.

3. Residents Will Be Unlikely to Use Handguns for Recreation, Hunting, or Protecting Themselves or Others Outside the City

A further extraterritorial effect of the Ordinance is that San Francisco residents who currently own handguns will be much less likely to engage in activities involving the use of handguns outside the City.

Although these residents could conceivably store handguns outside the City for use in hunting, target shooting or otherwise, they are more likely not to own handguns altogether due to the cost, inconvenience, and impracticality of remote storage. So current San Francisco residents who hunt or target shoot with handguns at locations outside the City will be far less likely to do so.[14] The 1982 Attorney General opinion referenced above mentioned this very effect as one reason why a city ordinance banning handgun possession could not be a municipal affair: "A firearm may be possessed in one place but used only in another as in the case of the city resident who possesses a firearm used only for hunting in rural areas." (65 Ops.Cal.Atty.Gen 457, *9.) Similarly, as CITY now claims that even CITY residents who are statutorily permitted to carry a concealed firearm under Penal Code § 12025.5, 12026.2, 12027, 12050, or other statutes will not be permitted to possess a handgun within the City, such persons are far less likely to use handguns for the protection of themselves or others while outside the City.

II. THE BAN ON HANDGUN POSSESSION BY CITY RESIDENTS IS PREEMPTED BY STATE HANDGUN LICENSING LAWS AND VIOLATES SECTION 12026 BY CREATING A NEW CLASS OF PEOPLE WHO REQUIRE LICENSES / PERMITS TO POSSESS HANDGUNS.

Although CITY has purportedly conceded that the handgun ban conflicts with State law, we briefly address it here and in Part V, *infra*, because CITY nonetheless contends *Doe* was wrongly decided and does not apply, and the Legal Community Against Violence (LCAV) submitted an amicus brief in support of those contentions. Further, CITY recently clarified that its position on the validity of State permits/licences is they are not valid for San Francisco residents with respect to handgun possession, and not valid for anyone with respect to firearm transfers. That position warrants further analysis, for CITY lacks the power to invalidate State permits/licenses.

Footnote 6 of Petitioners' opening memorandum lists various state laws permitting particular persons, e.g., retired police, to carry handguns. Paragraph 9 of CITY's Answer to our Petition asserts that the Ordinance makes these state permits/licenses worthless in San Francisco. So it is CITY's position that the Ordinance supersedes state permits, statutory authorizations, and licenses to possess handguns.

To the contrary, it is the Ordinance that is invalid. Local law may not prohibit what state law expressly authorizes. (*Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 397.) Moreover, the fact that those having express State license to possess guns *must* be exempted from the

[14] Hunting with handguns is both common and contemplated by state regulations. (See, e.g., 14 California Code of Regulations §§ 311 (l) and 353 (c) and (d).)

Ordinance renders it a permit law contrary to Section 12026 and Government Code § 53071, as articulated in *Doe*. (*See* discussion at pp. 7-8 of Petitioners' opening memorandum.) In sum, Section 3 of the Ordinance necessarily conflicts with State law, either by attempting to prohibit what State law authorizes, or by forcing current handgun owners to obtain special State permits.

III. THE BAN OF THE SALE OR TRANSFER OF ALL FIREARMS IS PREEMPTED

CITY concedes that the home rule doctrine does not apply to Section 2's sales or transfer ban; if the ban conflicts with or is inimical or hostile to the state regulatory scheme, it also must be rejected. Particularly as the ban relates to handguns, it necessarily conflicts with § 12026, by implication if viewed in isolation, and expressly if considered in conjunction with Government Code § 53071 and Penal Code § 12131 (UHA). For § 53071 expressly occupies the entire field of licensing and registration and all local laws "relating" thereto. As with *possession*, § 12026 specifically prohibits any local permit restrictions on *purchases* of state-authorized handguns that "may be sold" throughout California. Thus, the same analysis applied to handgun possession applies with equal force to purchases. The language is identical, and so too should the analysis and result.

A. The Gun Sale -Transfer Ban Conflicts With The Unsafe Handgun Act (UHA)

CITY's preemption analysis of Section 2 of the Ordinance, banning the "sale, distribution, transfer and manufacture of all firearms and ammunition," inappropriately relies on *CRPA* and other pre-UHA cases to support the ban concerning handgun sales. The UHA requires state testing of handguns, declaring that the models that pass "may be sold." (Pen. C. § 12131 (a).) Though this language literally conflicts with the Ordinance, CITY says the UHA has no preemptive effect. (Opp. at 23-24.) This, however, is belied by CITY's own prior conduct as set out in the declaration of C.D. Michel accompanying this memo. In the 1990s CITY and some other cities enacted SNS bans similar to that upheld in *CRPA*. In enacting the UHA, the Legislature recognized that it would appear to preempt any "local [contrary] ordinance, both those already in existence and *any proposed locally in the future*." An attempt was made to insert into the UHA a section preserving local ordinances, but it was not enacted.[15] CITY repealed its SNS ordinance after the enactment of the UHA on the advice of the City Attorney's Office that the UHA preempted the ordinance. (*See*, Michel Declaration.) In sum, the Legislature

[15] See petitioners' Request for Judicial Notice Section 1 (e), which is the Senate Public Safety Committee report on SB15 p. 9 (emphasis added).

recognized – and so has CITY– that the UHA precludes local attempts to ban the sale of the state-tested and registered firearms which Section 12131 (a) declares "may be sold" within the State.

CITY also argues that the Ordinance is not preempted by the UHA because the UHA's purpose is to protect gun owners from unsafe firearms while the Ordinance's purpose is to protect the public from handgun users. One problem with this is that it is factually untrue. The UHA was intended to protect not just buyers but also the general public from injury by unsafe guns. Moreover the UHA is also intended to reduce gun crime by limiting access to cheaply made handguns and making handguns more expensive and so less accessible. Anti-gun advocates have long advocated enactments like the UHA on precisely those grounds.[16] And many UHA supporters extolled it on precisely those grounds, i.e., as a measure that would make handguns more expensive and ban precisely those cheap guns the supporters perceived as most likely to be misused. See Petitioners' Request for Judicial Notice, Section 2 (c).

A second problem with CITY's attempt to distinguish the UHA's purposes is, once again, that the Legislature recognized that the UHA would preempt local SNS sales ban ordinances. Just like the Ordinance challenged here, those SNS ordinances featured findings that banning the sale of the handguns they covered would greatly reduce gun crime.[17] Thus, the Legislature recognized that the UHA's purposes included reducing gun crime and that it preempted local handgun sale bans. The fact that most if not all local governments – including CITY – repealed their SNS handgun sale bans shortly after enactment of the UHA speaks for itself. (*See* Michel Declaration.)

State authorization to purchase UHA-approved handguns and possess them in-home/business without local permits/licenses necessarily contemplates the ability to transport such handguns. This, too, is an area heavily regulated by the State. (*See, e.g.*, Pen. Code § 12026.2, listing twenty circumstances

---

[16] See, e.g., Prof. Philip J. Cook, "The 'Saturday Night Special': An Assessment of Alternative Definitions from a Policy Perspective," 72 J. CRIM. L. & CRIMINOLOGY 1735, 1740 (1981):

> Individuals who would not ordinarily be able to afford an expensive gun commit a disproportionate share of violent crimes. [Increasing handgun prices by imposing a minimum tax on sales] would be an effective means of reducing availability to precisely those groups that account for the bulk of the violent crime problem. . . . The major normative argument against [this] ... is that it is overt economic discrimination.... *[But a] high tax is not the only method of increasing the minimum price for handguns and subtle approaches may be more acceptable politically. One method would establish minimum standards stipulating the quality of metal and safety features of a gun. The effect of this approach would be the same as the minimum tax: to eliminate the cheapest of the domestically manufactured handguns....If sufficiently high standards on safety and metal quality were adopted, the cost to manufacturers of meeting these standards would ensure a high minimum price."* Italics added.

[17] See Michel declaration, paragraph 8 and Petitioners' Request for Judicial Notice Section 2.

where transport is permitted, i.e., exempt from Section 12025.) Similarly, the right[18] to purchase and possess handguns would be illusory without the ability to purchase ammunition. (*See* 77 Ops.Cal.Atty.Gen. 147 (1994) (recognizing, even pre-UHA, that a "local ban on the sale of handgun ammunition would thwart the Legislature's recognition of the right to possess handguns on private property.").)

In sum, CITY's efforts to diminish the impact of the plain language of Sections 12026 and 12131, e.g., claiming they merely "*acknowledge the possibility*" that people will buy handguns, are unpersuasive, even disingenuous. (Opp. at p. 20.) CITY repealed its own SNS ban; that speaks volumes.

B. The Sales-Transfer Ban Violates Penal Code section 12026's Preclusion of Local Laws That Prohibit Purchasing Guns.

Though conceding that Section 12026 prohibits localities from banning handgun possession, CITY nevertheless claims that Section 2 of its Ordinance can ban sales and purchases. But what Section 12026 says is that law abiding responsible adults may "*purchase*, own, *possess*, keep or carry" handguns in their homes and offices (emphasis added). CITY offers no explanation of why that sentence, which it concedes precludes a ban on handgun possession, somehow nonetheless allows an outright ban on handgun sales/purchases. A complete ban on sales necessarily renders the right of law abiding adults to purchase handguns illusory.

Instead, CITY offers only a pun on the word "mandate." It is true, of course, that Penal Code § 12026 does not expressly "mandate" that guns be sold – any more than *Roe v. Wade* expressly "mandates" that abortions be performed. What is mandated is that government entities not preclude people from making the choice to buy guns, or have abortions. Although a gun store or abortion clinic can be regulated (as opposed to eliminated), would CITY claim that it can outright ban abortion clinics despite a woman's right to choose to have one?

C. The Gun "Transfers" Ban Illegally Invalidates Multiple State Licenses.

Petitioners' opening brief pointed out the various ways in which the ban on sales, transfers, or

---

[18] Fundamental to CITY's argument is its denial (p. 17: 7-8) "that Penal Code section 12026 creates a general right for law abiding, responsible adults to have handguns in their homes." That denial is simply wrong. See *Galvan, supra*, stating 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. See also *Sippel v. Nelder* (1972) 24 Cal.App.3d 173, 177, holding that under 12026 law abiding responsible adults are "entitled" to purchase handguns and possess them in home and office.

Regardless, whether it is called a "right," privilege or entitlement, or a "limitation on government" is largely academic. The State protects it. CITY's position is inapposite, regardless of the label applied.

distributions of firearms would conflict with various state regulatory schemes. CITY's apparent answer to this point is to ignore plain English and claim that the word "transfer"only applies to transfers that change the legal status (i.e., ownership) of the property. (Opposition p. 26: 5-7). But that was expressly rejected by *In re Marriage of Barneson* (1999) 69 Cal.App.4th 583, 590, which follows BLACK's and WEBSTER's in seeing a "transfer" as any change of possession and control, however casual, without need of change of legal status.[19] The word "transfer" includes any "pass[ing] or hand[ing] over [of an object] from one to another" and, contrary to the Opposition, does not necessitate any change in the ownership or legal status of the object. (*Barneson, supra*, 69 Cal.App. 4th at 590.) Would CITY be attempting to redefine 'transfer" this way if it were defending a *drug* control ordinance?

CITY's restrictive redefinition of "transfer" would free up criminal justice agencies from the restrictions the Ordinance puts on them, but would free up civilian transfers as well. If it is not a "transfer" for police officers to be "loaned" department guns for periods of time as long as twenty years, then neither is it a transfer for people to "loan" firearms to others, or for gun ranges and stores to rent (not sell) guns to their customers – perhaps for prolonged periods.

D. CITY's Preemption Analysis Is Flawed and Ignores the Difference Between Additional Regulation and a Total Ban

In its analysis of Section 2 (Opp. at 21-25), CITY first claims that the Ordinance does not duplicate or conflict with State laws banning or authorizing the sale or transfer of various types of firearms and ammunition because the Ordinance merely "overlaps" State regulations. In fact, within CITY limits, the Ordinance swallows State regulations whole, whether in terms of the sale and transport of firearms prohibited, e.g., assault weapons, or firearms specifically approved, e.g., handguns (UHA). In terms of prohibited firearms and acts, the Ordinance duplicates State law by doubly banning them; for approved firearms and acts, it conflicts with State law by banning that which is authorized by the State.

The issue ultimately comes down to "how much?" That is, how much intrusion will State law tolerate in a field so heavily regulated? But, here, CITY ignores the fact that it is *not* simply imposing additional restrictions on State laws to accommodate local concerns, but is banning in total the activity at issue. This difference was recognized in *Great Western*, where the Court noted that total bans are not

---

[19] WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE definition # 1 on p. 1504: "To convey or remove from one place, person etc to another: He transferred the package from one hand to the other."

viewed in the same manner as added regulations, and arguably warrant greater scrutiny. (*Id.* at 867-68.)

CITY next imposes the "mandate test," twisting language applied in the context of *some* "direct conflict" analyses to suggest that, unless the State literally *requires* residents to own, possess, sell, transfer or use firearms, local governments may regulate freely in those areas. (Opp. at p. 21 (no conflict because "no state law 'expressly mandates' the sale of firearms or ammunition").) That has never been the test for preemption. Even before the enactment of Section 53071 or the UHA, the Court in *Galvan* clearly would have found invalid (based on direct conflict) a local ordinance requiring a permit for in-home/business handgun possession under Section 12026 – and that section does not *mandate* that California residents possess handguns in their homes. Rather, it protects California residents from local interference with a State-granted right to possess a handgun in the sanctity of one's own home or business, a right this Ordinance violates in full. (*Galvan*, *supra*, 70 Cal.2d at p. 858.)

CITY also attempts to analogize this case to *Great Western*, although the cases are at opposite ends of the spectrum. *Great Western* involved: a limited ban; on county-owned property; on gun sales (effectively banning gun shows), where the State law specifically contemplated some local regulation. (*Id.* at 866 (the state gun show regulations "expressly anticipate the existence of 'applicable local laws.'").) This case involves, *inter alia*: a total ban; on all private and public property; of handgun possession by City residents and of all firearm transfers by anyone, where the State law specifically prohibits any local regulation *relating to* licensing or registration of any firearms, and prohibits requiring a license to possess handguns on private property, or to purchase handguns. As *Doe* said, "[i]t strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." (*Doe*, *supra*, 136 Cal.App.3d 509, 518.) CITY also argues that its sales ban is valid under *CRPA*, even though CITY repealed the same SNS ban at issue in *CRPA* after enactment of the UHA, i.e., CITY relies upon a case that has been vitiated by subsequent legislation.

CITY's analysis of implied preemption can be summed up in three words: it never applies. CITY's argument on this point is that because the State Legislature has not occupied the "entire" field of firearms regulation, only the few expressly preempted areas are off limits for local governments. CITY claims that a law that "outlaws *certain types* of conduct on a statewide basis does not prevent local governments from adopting stricter regulations of that conduct." (Opp. at 25.) CITY, of course, is not

adopting "stricter regulations," it is imposing a total ban. Nonetheless, the ban somehow manages not to conflict with the State's comprehensive and exhaustive firearms regulations, either directly or indirectly, either with prohibited or authorized activities, or even with the implied right to possess a handgun for self defense in your own home.

IV. THE OMISSION OF ALL BUT A VERY NARROW POLICE EXEMPTION FROM THE ORDINANCE APPEARS DELIBERATE, AND CREATES ADVERSE CONSEQUENCES FOR THE CRIMINAL JUSTICE SYSTEM

CITY wants to treat the Ordinance's adverse consequences for the enforcement of state laws (see pp. 18ff. of Petitioners' opening memo) as accidents of inept language which can be cured by redefining "transfer" and "distribute," overlooked, or corrected through the judicial creation of implied exceptions. But the lack of exemption for police agencies seems quite deliberate, as demonstrated by comparing the Ordinance to the express police exemptions carefully included in CITY's now-repealed SNS and assault weapon ban ordinances.[20] These differences cannot be ignored.

> It is a well-settled principle of statutory construction that "'[w]here a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject ... is significant to show that a different intention existed.'" (*Traverso v. People ex rel Department of Transportation* (1993) 6 Cal.4th 1152, 1167).

In any event, courts may not write an exemption into a law that lacks it – especially when that law already has a much more limited exemption.[21]

A underlying difficulty with CITY's analysis is that the City Attorney's office did not write the Ordinance. It was not put through the usual vetting process, and its current defenders have scant knowledge of some of its underlying goals. Petitioners submit that, just as likely as a fatal drafting error, the Ordinance may reflect the American anti-gun movement looking to England for policy guidance. In England, severe limitations on gun possession apply to police as well as the citizenry. What seems absurd to lawyers steeped in American gun traditions and crime prevention policies may seem perfectly

---

[20] These prior ordinances are attached to our request for judicial notice.

[21] *Langsam v. City of Sausalito* (1987) 190 Cal.App.3d 871, 877, 235 Cal.Rptr. 672 ("Under the guise of construction the court will not rewrite a law [citation]; it will not supply an omission."), *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195, 132 Cal.Rptr. 377 ("where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."), *Los Angeles Department v. Superior Court* (2001) 84 C.A. 4th 1161, 1166: "'[T]he statement of limited exceptions excludes others, and therefore the judiciary has no power to add additional exceptions; the enumeration of specific exemptions precludes implying others.'" *Lake v. Reed* (1997) 16 Cal. 4th 448, 466.(same).

sensible to those who want gun laws on the English model. An example is the Ordinance's dictate that police may be armed only on duty instead of the universal American policy that police may be armed at all times and are exempt from many of the laws that apply to civilians. (The last four words of Opposition 27:6 covertly acknowledge that the Ordinance forbids guns to off-duty police: ". . . expressly allows peace officers to possess handguns *to do their jobs*. (Emphasis added.))

V. AMICUS CURIAE LCAV'S ANALYSIS OF SECTION 12026 AND *DOE* IS DIRECTLY CONTRADICTED BY THE AUTHORITIES IT CITES, AND ARGUES A POSITION ALREADY CONCEDED BY THE CITY

CITY has conceded that its Ordinance conflicts with state law and *Doe*. (Opp. p. 12:12-13.) The very purpose of including language in Section 3 of the Ordinance limiting its scope to CITY residents is to invoke the "municipal affairs" doctrine in an effort to avoid that conflict. *Amicus Curiae* Legal Community Against Violence (LCAV), nonetheless, has submitted a brief arguing that there is no conflict between state law and the Ordinance. LCAV's analysis of *Doe*, case law, and subsequent legislation, while superficially persuasive, does not withstand scrutiny.

A. Doe's Holding that CITY'S 1982 Ban on Possession of Handguns on Private Property Was Preempted by Section 12026 Remains Good Law

LCAV attacks *Doe's* implied preemption analysis of Section 12026 as *dicta*, fallacious, and "rejected by later cases." (LCAV Opp. at 4:7-19.) The Court in *Doe*, however, made it reasonably clear that its implied preemption ruling was an alternate holding, first addressing express preemption and then turning to the topic under a separate heading entitled "Implied Preemption."[22] LCAV contends that the brevity of the court's analysis and ruling suggests it is dicta. But given the obvious conflict, nothing more was required. As the court noted, it "strains reason" to suggest that a total ban would be allowed where the State has prohibited *any* local permitting or licensing schemes to restrict in-home/business handgun possession. (*Id.* at 518.) Further, the federal *Great Western* case upon which LCAV relies so heavily specifically addresses *Doe's* implied preemption *holding* when analyzing California's firearms jurisprudence. (*Great Western v. Los Angeles County* (9th Cir. 2000) 229 Fed.3d 1258, 1263; *see also*, *CRPA*, *supra*, 66 Cal.App.4th at 1319.) In short, LCAV and CITY stand alone in their assertion that *Doe's* implied preemption holding was dicta.

[22] 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 [186 Cal.Rptr. 830].)

LCAV then asserts that the court's reasoning is "superficial logic," but does not explain what particular fallacy it finds. And there is none. If a lesser restriction (licensing) conflicts with state law, then a greater restriction (total ban) necessarily does. (A total ban also "relates" to licensing – for one thing, it invalidates existing licenses – and thus violates Government Code § 53071, as well, resulting in express preemption.) Finally, LCAV asserts that *Doe's* implied preemption holding has been rejected by later cases, but it fails to cite any authority for that assertion. Again, there is none. The closest case on this point is *CRPA*, but the Ordinance in that case dealt with sales of specific types of handguns, not handgun possession, and the *CRPA* court distinguished its case from *Doe*, it did not reject *Doe*. Rather, it acknowledged without criticism that *Doe* found the area of "residential handgun possession" a preempted field – and it did not treat that finding as dicta.[23] In short, LCAV's suggestion that *Doe's* implied preemption analysis is dicta, illogical, and rejected by later cases, is unsupported by law or logic.

The fundamental flaw in LCAV's reasoning (and CITY's) is its failure to distinguish between the various types of firearms regulations (use, possession, sale) and whether they seek to regulate in the public or private domain, for some areas are clearly preempted, e.g., *private*, in-home/business *possession* of state-approved handguns,[24] while others are clearly not, e.g., *public use* or discharge of firearms in urban versus rural settings.[25] LCAV's failure to make such distinctions undermines its arguments, as evident in its analysis of and misplaced reliance upon the Supreme Court's ruling in *Great Western.*

B. Great Western Did Not Resolve any "Tension" In Derogation of *Doe*; Rather, It Resolved a Narrow, Certified Issue and Reaffirmed *Doe*

LCAV contends that the Ninth Circuit found tension between *Doe* and the other appellate cases and that *Great Western* resolved that tension against *Doe*. (LCAV Opp. at 5-12.) Aside from LCAV's misplaced reliance upon language in the Ninth Circuit case (which held nothing, nor did it suggest how the tension, if any, should be resolved), its suggestion that *Great Western* resolved that tension in

---

[23] "However, neither *Doe* nor Penal Code section 12026 helps plaintiffs. *Doe* identifies only "residential handgun possession" as a preempted field. The ordinance at issue here does not ban possession, residential or otherwise, of any type of weapon." (*CRPA*, *supra*, 66 Cal.App.4th at 1319.)

[24] "As to the firearms possession at one's residence, business, or other property, state law has also preempted the field. (*Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509, 518; *Sippel v. Nelder* (1972) 24 Cal.App.3d 173, 176-177; 65 Ops.Cal.Atty.Gen. 457, 464 (1982).)" (77 Ops. Cal. Atty. Gen. 147,*2 (1994).)

[25] *See, e.g., Galvan, supra,* 70 Cal.2d at 864, stating: "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." As seen by the cases and statutes cited by the Court in support of that proposition, it generally refers to *public use* or discharge of firearms.

derogation of the alternate holdings in *Doe* is unsupported. In short, while the Ninth Circuit might have raised a number of issues, *Great Western* confined itself to the narrow issues presented.

In *Great Western*, the Court granted the Ninth Circuit's request for certification to address the following narrow question: "Does state law regulating the sale of firearms and gun shows preempt a county ordinance prohibiting gun and ammunition sales on county property?" (*Great Western*, *supra*, 27 Cal.4th 853, 858.) The critical issue in *Great Western* that distinguishes it from the instant case is the context, i.e., the ordinance there dealt with sales on *public*, county-owned property. The Court's ruling was equally narrow, and turned on the public property issue:

> Thus, a county has broad latitude under Government Code section 23004, subdivision (d), to use its property, consistent with its contractual obligations, "as the interests of its inhabitants require." . . . [T]he County is not compelled to grant access to its property to all comers. Nor do the gun show statutes mandate that counties use their property for such shows. If the County does allow such shows, it may impose more stringent restrictions on the sale of firearms than state law prescribes. [¶] For all the above reasons, we conclude that the Ordinance is not preempted by the sale of firearms and/or ammunition on County property. **We do not decide whether a broader countywide ban of gun shows would be preempted.**

(*Id.* at 870 (emphasis added).)

Thus, *Great Western* confined itself to the narrow issue presented, not even venturing beyond that to decide whether banning gun sales or shows on private property would survive a preemption challenge. (*Id.*) Further, in its analysis of preemption cases, the Court cites *Doe* approvingly as an example of a case where preemption was proper, noting the "direct conflict between the statute and the Ordinance." (*Id.* at 866.) If the Court wished to distinguish *Doe*, narrow its scope, or otherwise criticize the case, it had every opportunity to do so. But it did not. Nor, contrary to LCAV's contention, did it adopt the Ninth Circuit's view of "tension" among the appellate courts or resolve any such tension in a manner that diminished the holding in *Doe*.

C. LCAV's Analysis of Subsequent Amendments to § 12026 Conflicts With Standard Rules of Statutory Construction; The Failure to Make Substantive Changes to § 12026 After *Doe* Works in Favor of *Doe*, Not Against It

LCAV relies on the lack of substantive changes in multiple post -*Doe* amendments to Section 12026 as evidence of the Legislature's intent to limit the holding in *Doe*. (LCAV Opp. at 12-13.) That stands the general rule on its head. When the Legislature is displeased with a court ruling (or even dicta that might be construed as a holding), it changes or clarifies the law to make corrections – and usually cites the case at issue. The absence of changes to the language of what is now § 12026(b) in

three amendments following the *Doe* decision indicates the Legislature agrees with (or at least was not offended by) the court's ruling in *Doe*. Morever, the Assembly Bill digest regarding the 1995 amendment to § 12026 that LCAV relies upon merely confirms that the rearrangement of § 12026 into two subsections was for clarification, and not a substantive change. (LCAV Opp. at 12:26-27.) LCAV's argument that if the Legislature approved of *Doe's* holding it would have altered the statute is nonsensical. That the Legislature did not materially alter the statute shows a tacit approval of *Doe*. (*See*, *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 815 [11 Cal.Rptr.3d 298].)

V. CITY'S DISCUSSION OF SEVERABILITY MISSES THE POINT

Here as with many of CITY's arguments, the difficulty is not with the abstract statement of law but with CITY's failure to apply it to the facts of this case. CITY quotes caselaw saying that where part of an initiative is invalidated, in considering severability "the courts must give effect to the intent of the electorate to the greatest extent possible." (Opposition, 28: 7-8, CITY's italics.)

Petitioners' argument is: 1) striking down the section 3 handgun ban, but leaving the section 2 ban on buying rifles and shotguns will inevitably result in persons who want guns buying handguns instead of rifles or shotguns; 2) the fact that the Ordinance bans and confiscates currently owned handguns but only bans sale of new long guns, indicates that the electorate's first priority was getting rid of handguns – a view that is uniformly expressed by anti-gun advocates in general; wherefore, 3) striking down the Section 3 handgun (and the section 2 handgun sales ban) but leaving the Section 2 long gun sale ban would diametrically contradict the voters' intent since by actually promoting the proliferation of handguns.

In short, striking down both section 2 and section 3 would follow the voters' intent to the greatest extent possible. CITY's total failure to address this argument speaks for itself.

Dated: February 8, 2006

Respectfully Submitted,
TRUTANICH • MICHEL, LLP

C. D. MICHEL
Attorney for Petitioners

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On February 8, 2006, I served the foregoing document(s) described as

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO CITY'S OPPOSITION TO MOTION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

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:

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
Fax: (415) 554-4699

___ (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 Long Beach, 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 February 8, 2006, at Long Beach, California.

___ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.

_X_ (VIA OVERNIGHT MAIL As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for overnight delivery by UPS/FED-EX. Under the practice it would be deposited with a facility regularly maintained by UPS/FED-EX for receipt on the same day in the ordinary course of business. Such envelope was sealed and placed for collection and delivery by UPS/FED-EX with delivery fees paid or provided for in accordance with ordinary business practices.
Executed on February 8, 2006, at Long Beach, California.

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

___ (FEDERAL) I declare that I am employed in the office of the member of the bar of this of this court at whose direction the service was made.

CLAUDIA AYALA