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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

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9 COUNTY OF SAN FRANCISCO

10 UNLIMITED JURISDICTION

11 PAULA FISCAL et al.,
 12
 13 Plaintiffs and Petitioners,
 14
 15 vs.

CASE NO. CPF-05-505960
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF MOTION
 FOR WRIT OF MANDATE AND/OR
 PROHIBITION OR OTHER
 APPROPRIATE RELIEF

16 CITY AND COUNTY OF SAN
 FRANCISCO et al.,
 17
 18 Defendants and Respondents.

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

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1 INTRODUCTION

2 The central provision of the ordinance challenged here¹ is substantively indistinguishable from
3 the 1982 San Francisco (hereinafter "CITY") handgun ban invalidated for the same reasons raised here
4 by *Doe v. City & County of San Francisco* (1982) 136 Cal.App.3d 509, 517-518 [186 Cal.Rptr. 380].
5 Thus, the primary issues presented to this Court are whether *Doe* remains good law and, if so, whether
6 the CITY's new ordinance contains any provisions that render *Doe* inapplicable.

7 *Doe* not only remains good law, it has been reaffirmed on multiple occasions by the State
8 Legislature. Significantly, since the *Doe* decision, the law it primarily construed, Penal Code section
9 12026, has been reenacted *three times* – without change to disavow *Doe's* holdings. Moreover, new
10 state laws regulating handgun possession have been expressly qualified and limited so as maintain
11 *Doe's* construction of Section 12026. Further, *Doe* has been cited with approval in cases including
12 *Great Western Shows, Inc. v. Los Angeles County* (2002) 27 Cal.4th 853 [118 Cal.Rptr.2d 746], which
13 have repeatedly cited *Doe* as an example of a case wherein the ordinance regulating firearms conflicted
14 with State law and was properly preempted.

15 When this matter was recently briefed in the court of appeal in an original writ proceeding,²
16 CITY conceded that its Ordinance is inconsistent with Penal Code section 12026, as construed in *Doe*.
17 Instead of arguing against *Doe*, CITY instead attempts to avoid *Doe* by adding a provision purportedly
18 limiting the handgun ban's impact to city residents only. By doing so, CITY hopes to transform the
19 handgun ban into a purely "municipal affair" so that its Ordinance can survive the obvious conflicts
20 with State law. But CITY's "home rule" argument was also raised and considered in 1982, and
21 summarily dismissed in a single paragraph in *Doe* because the handgun ban "affects . . . residents of
22 nearby cities where San Francisco's handguns might be sold." (*Doe, supra*, 136 Cal.App.3d at 513.)

23 ///

24
25 _____
26 ¹ Hereinafter referred to as "the Ordinance." A copy of the Ordinance is attached as Exhibit A.

27 ² *Fiscal v. City and County of San Francisco*, Court of Appeal of the State of California,
28 First Appellate District, Division Four, Case No. A111928. The appellate court declined to exercise original jurisdiction, and so the case was re-filed here.

1 Ironically, CITY’s attempt to save its Ordinance by making it applicable only to San Francisco
2 residents creates additional problems. Specifically, it results in a violation of the Equal Protection
3 clause, e.g., by permitting non-residents to possess handguns in their San Francisco businesses while
4 precluding residents from doing likewise. There is no rational basis to support that distinction.

5 The current Ordinance also bans the “sale, distribution, transfer [etc.],” of all firearms and
6 ammunition. That provision is also preempted by, *inter alia*, the Unsafe Handgun Act (UHA) under
7 which the Department of Justice (DOJ) tests, certifies, and licenses which make and model handguns
8 “may be sold in this state pursuant to this title.” (Pen. Code § 12131(a).) By banning the sale of DOJ-
9 approved handguns, the Ordinance directly conflicts with and is preempted by the language of the
10 UHA.³ The Ordinance is also contrary to Government Code section 53071, which adopts a broad
11 definition of “license” and expressly preempts cities from regulating the licensing or registration of
12 firearms.

13 The Court need not reach these later issues, however, because the Ordinance cannot survive the
14 invalidation of its central provision, *i.e.*, its ban on handgun possession. When a municipal initiative
15 ordinance has been partially invalidated, the remainder should not be upheld if it is “by no means clear
16 that the electorate would have approved” that result. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d
17 129, 174 [130 Cal.Rptr. 465].)

18 In sum, as numerous anti-gun advocates have conceded,⁴ the current Ordinance is more of a
19

20 ³ In fact, following enactment of the UHA, CITY and all but a few other California cities
21 that had them repealed ordinances banning sales of certain *categories* of handguns, e.g., the
22 so-called “Saturday Night Specials,” on their own accord or after being sued. The Legislature
23 was well aware that the UHA would preempt such local handgun ordinances, as were local
24 government entities who sought, unsuccessfully, to include language in the UHA to avoid this
25 preemptive impact.

26 ⁴ See *New York Times* article “San Francisco Gun Vote: Tough Law or Thin Gesture?”
27 November 5, 2005 (quoting Franklin Zimring, the William G. Simon Professor of Law at
28 Boalt Hall, as calling the Ordinance a “triumph of symbolic politics” and a “sure loser” in
state court); *San Francisco Chronicle* article “Will voters deem S.F. a no-guns-allowed city?
Motion seems poised to pass, but firearm fans prepare for fight,” November 5, 2005 (“‘It
clearly will be thrown out,’ said San Francisco Mayor Gavin Newsom on Friday, adding that
he planned to vote for the measure anyway to show his opposition to the proliferation of
handguns. ‘It’s so overtly pre-empted. I’m having a difficult time with it, and that’s my one

1 symbolic gesture than a legislative act. CITY’s previous handgun ban – and its “municipal affair”
2 argument – were both rejected by the court in *Doe*. *Doe* has withstood the test of time, having been
3 reaffirmed by both the State Legislature and the Supreme Court. Accordingly, this Court should apply
4 existing law and, once again, reject CITY’s attempt to ban the possession of handguns by law abiding
5 citizens within the privacy of their own homes and businesses.

6 **ARGUMENT**

7 *Handgun control is a volatile issue of great public importance, invoking complex policy*
8 *considerations. While we are sensitive to the political and social overtones of a case*
9 *such as this, we are here concerned only with the narrow legal question of whether the*
state Constitution and state statutes permit San Francisco to enact such an ordinance
[banning handgun possession]. We conclude that they do not.

10 (*Doe, supra*, 136 Cal.App.3d at 511.)

11 **I. THE *DOE* DECISION IS CONTROLLING**

12 Based on Penal Code section 12026, exclusive state registration and licensing laws, and
13 Government Code section 53071, *Doe* concluded the 1982 handgun ban was preempted on three
14 independent grounds.

15 First, like the current Ordinance, the 1982 ordinance banned handgun possession for all except
16 a special few people (express or *de facto* permittees). So the 1982 ordinance was expressly preempted
17 by Government Code section 53071, declaring state licensing and registration provisions exclusive.

18 Second, and for the same reason, the 1982 ban conflicted with the plain wording of Penal Code
19 section 12026 that “[n]o permit or license . . . shall be required of him.” As *Doe* noted rather
20 pointedly: “‘No permit or license’ means ‘no permit or license.’” (136 Cal.App.3d at 518.)

21 Finally, *Doe* concluded that even if the 1982 ordinance did not impose a “licensing”
22 requirement, the ordinance would still be invalid because Penal Code section 12026 implicitly
23 precludes local handgun bans and preempts any such ordinance:

24 _____
25 caveat. ... It’s really a public opinion poll at the end of the day.”); *San Jose Mercury* article
26 “S. F. Voters Consider Tough Handgun Ban,” November 4, 2005 (“In the wake of the 1978
27 handgun slayings of then Mayor George Moscone and supervisor Harvey Milk, one of Dianne
28 Feinstein's first acts as Moscone's replacement was to enact a handgun ban. It was struck
down a couple of years later, however, by the state Supreme Court. Feinstein, now a U.S.
Senator, is not taking a position on Proposition H, because she feels the state's top court has
already ruled, a spokesman said.”)

1 [W]e infer from Penal Code section 12026 that the Legislature intended to occupy the
2 field of residential handgun possession to the exclusion of local governmental entities.
3 A restriction on requiring permits and licenses necessarily implies that possession is
4 lawful without a permit or license. It strains reason to suggest that the state Legislature
5 would prohibit licenses and permits but allow a ban on possession. (*Id.*)

6 Thus, it is well settled that CITY cannot ban the handguns that its law-abiding responsible
7 adults own pursuant to state law in the privacy of their own homes or businesses.

8 **A. The California Legislature Has Repeatedly Reaffirmed *Doe***

9 The Legislature first reaffirmed *Doe* by three times reenacting Penal Code section 12026
10 without repudiating *Doe*'s conclusions.⁵ The current version of the portion of Section 12026 reads, in
11 pertinent part:

12 (b) No permit or license to purchase, own, possess, keep, or carry, either openly or
13 concealed, shall be required of any citizen of the United States or legal resident over the
14 age of 18 years who resides or is temporarily within this state, and who is not within the
15 excepted classes prescribed by Section 12021 or 12021.1 of this code [related to felons
16 and narcotics addicts] or Section 8100 or 8103 of the Welfare and Institutions Code
17 [related to mental disorders], to purchase, own, possess, keep, or carry, either openly or
18 concealed, a pistol, revolver, or other firearm capable of being concealed upon the
19 person within the citizen's or legal resident's place of residence, place of business, or
20 on private property owned or lawfully possessed by the citizen or legal resident. [Penal
21 Code § 12026(b)]

22 By reenacting section 12026 "without changing the interpretation put on that statute by the
23 courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction
24 of that statute." (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 815 [11 Cal.Rptr.3d
25

26 ⁵ The 1988 and 1989 amendments altered what is now subsection (a) of § 12026 so as to
27 permit householders and shopkeepers carrying their handguns concealed on their persons in
28 their own homes and offices. In contrast, *Doe* expressly dealt with only the language of what
is now subsection (b). (136 Cal. App. 3d at 517.) See Acts of 1988, Ch. 577, § 2 which a
court held inadequate in *People v. Melton* (1988) 206 Cal. App. 3d 580, 593-94 [253 Cal.Rptr.
661] and Acts of 1989, Ch. 958, § 1 which both further altered the language and expressly
repudiated *Melton* for frustrating the purposes of the 1988 amendment.

A 1995 amendment did substantively change the language *Doe* construed, but without
repudiating *Doe*'s implied preemption holding. Acts of 1995, Ch. 322, § 1 clarified that §
12026's guarantee does not give any gun right to persons who have been convicted of violent
misdemeanors. (Felons had always been expressly excluded.)

In addition to the foregoing, amendments to § 12026 have subdivided it into
subsections with the language *Doe* construed being broken out as subsection (b). This change
actually fortifies the *Doe* reading by making it even clearer that the words that are now Penal
Code section 12026 (b) constitute a stand-alone command rather than being an exception to
the § 12025 ban on carrying concealed handguns.

1 298].)

2 The fact that the Legislature has revised the statute without change, not just once but multiple
3 times, emphasizes the presumption that *Doe*'s interpretation of it is one that the Legislature accepts.
4 (*People v. Bouzas* (1991) 53 Cal.3d 467, 475 [279 Cal.Rptr. 847]; *Olmstead, supra*, 32 Cal.4th at 815.)

5 Secondly, the Legislature implicitly reaffirmed *Doe* by enacting Penal Code section 626.9 (h)
6 and (i), providing that "[n]otwithstanding Section 12026" students may not have firearms in college- or
7 university-managed student housing. In so prefacing those new laws, the Legislature further
8 emphasized that Penal Code section 12026 creates a general right for law-abiding, responsible adults
9 to have handguns in their homes. It is from this *general* right and/or statutory protection that Penal
10 Code section 626.9 (h) and (i) represent a special exception. Such references in later laws to an earlier
11 one may not be disregarded. (*People v. Superior Court* (1996) 13 Cal.4th 497, 520 [53 Cal.Rptr.2d
12 789].)

13 **B. *Doe*'s Reasoning Has Been Respected, Not Repudiated, in Subsequent Cases**
14 **Addressing Firearms Law Preemption**

15 The major post-*Doe* firearm preemption case upheld a local ban on sale of a few kinds of
16 handguns defined as "Saturday Night Specials." (*California Rifle & Pistol Assn. v. City of West*
17 *Hollywood* (2nd Dist. 1998) 66 Cal.App.4th 1302 [78 Cal.Rptr.2d 591].) This *CRPA* opinion
18 emphasized its consistency with *Doe*:

19 In *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 [186 Cal.Rptr.
20 380], San Francisco had enacted a ban on possession of handguns. Exempt from the
21 ban, however, were those who possessed licenses under state law either to carry [Penal
22 Code §§ 12050, *et seq.*] or to sell handguns. Thus possession of handguns in the home
23 (which was specifically allowed under Penal Code 12026 without any license or permit)
24 was facially prohibited unless the possessor had a license. The court found that the
25 effect was "to create a new class of persons who will be required to obtain licenses in
26 order to possess handguns." (136 Cal.App.3d at p. 517.) Government Code section
27 53071, however, expressly preempted the whole field of licensing requirements. The
28 court concluded that CITY had in effect created a licensing requirement for handguns in
the home in violation of the express preemption of that field in Government Code
section 53071.

Doe also noted that even if it did not consider the ordinance to contain a *de facto*
licensing requirement, it would nevertheless find the ordinance impliedly preempted on
the theory that Penal Code section 12026 (which preempts local requirements for
permits or licenses to possess concealable weapons in the home) reflected a legislative
intent to occupy the field of "residential handgun possession." However, the *Doe* court
also noted that the decisions "suggest that the Legislature has not prevented local

1 governmental bodies from regulating all aspects of the possession of firearms,” and that
2 “[i]t is at least arguable that the state Legislature’s adoption of numerous gun
3 regulations has not impliedly preempted *all areas* of gun regulation.” (*Doe*, supra, 136
4 Cal.App.3d at pp. 516, 518.) [*CRPA*, supra, 66 Cal.App.4th at 1316 - emphasis by
5 court.]

6 In a footnote, *CRPA* went on to emphasize the differences between the West Hollywood
7 ordinance it upheld and the San Francisco ordinance that *Doe* invalidated:

8 Plaintiffs nevertheless argue that *Doe* requires a finding of express preemption in this
9 case. CITY’s ordinance, however, does not create any *de facto* licensing requirement
10 similar to that involved in *Doe*. Gun dealers in CITY cannot, simply by obtaining a
11 license, avoid the ordinance. Nor is a license required for a person to possess a SNS
12 handgun in the home, place of business, etc. Only the *sale* of SNS’s within CITY is
13 prohibited. [Italics by court.] (*CRPA* at 1316, fn. 5.)

14 Thus, *CRPA* interpreted and accepted *Doe* as precluding exactly the kind of ordinance here
15 challenged.

16 Moreover, a recent California Supreme Court decision also affirmed the rationale and holdings
17 in *Doe*. In *Great Western Shows, Inc. v. Los Angeles County* (2002) 27 Cal.4th 853, the Court
18 considered a dispute between the County and operators of a local gun show that traditionally had been
19 held at the Los Angeles County Fairgrounds. In that case, the County sought to halt the gun shows by
20 banning the sale of guns and ammunition on property owned by the County. (*Great Western*, supra, at
21 859.) *Great Western* cited *Doe* approvingly, noting the handgun ban ordinance in *Doe* impermissibly
22 conflicted with both Government Code section 57031 and Penal Code section 12026.

23 Before the California Supreme Court turned to the specific issue at hand, i.e., whether the Los
24 Angeles ordinance banning sales of ammunition and firearms at gun shows on county-owned property
25 conflicted with the State’s gun show laws, the Court first examined the spectrum of firearms
26 preemption cases. After discussing certain cases where ordinances were found valid, the Court turned
27 to *Doe* as an example of a case where an ordinance *did* conflict with State laws. Further, in its
28 discussion of *Doe*, the Court referenced both statutes that the appellate court relied upon in finding that
San Francisco’s ordinance banning handgun possession conflicted with and was preempted by State
laws. That is, it recognized and approved *Doe*’s alternate holdings based on Government Code section
57031 and Penal Code section 12026 – and without a single word of criticism nor any attempt to limit
the holding in *Doe*. Notably, the Court did *not* treat *Doe*’s alternate holdings as dictum.

1 The California Supreme Court’s respect for *Doe*, using it as an example of a case where
2 preemption was appropriate, comports with the analysis above regarding the reaction of the Legislature
3 to *Doe*. Thus, *Doe* cannot be viewed as an isolated or anomalous appellate case, for both the
4 Legislature and the Supreme Court have examined and approved *Doe*, implicitly in the case of the
5 Legislature and explicitly in the case of the Court, without limitation. It is the law. And any ordinance
6 that would prohibit law abiding citizens from keeping hand guns within the sanctity of their own
7 homes or businesses must be examined based on that law.

8 **II. THE NEW HANDGUN POSSESSION BAN SUFFERS FROM THE SAME FATAL**
9 **FLAWS AS ITS 1982 PREDECESSOR**

10 **A. The Ordinance Creates a Licensing Scheme Since Its Ban Cannot Apply to**
11 **Persons Having Express Permission to Possess Handguns**

12 As noted above, Section Three of the Ordinance is invalid under *Doe*’s third rationale, *i.e.*, that
13 Penal Code section 12026 implicitly precludes handgun bans. But the Ordinance is also invalid under
14 *Doe*’s first and second rationales, since the Ordinance’s effect is to make handgun possession illegal
15 without a license/permit. *Doe* found the 1982 handgun possession ban to be a license/permit law
16 because it expressly allowed handgun possession by persons to whom state permits had been issued,
17 such as under Penal Code section 12050, *et seq.* Thus, the effect of the 1982 ordinance was “to create
18 a new class of persons who will be required to obtain licenses in order to possess handguns.” (136
19 Cal.App.3d at 517.)

20 This Ordinance has exactly the same effect. San Franciscans will be forbidden to have
21 handguns with a few explicit exceptions contained in the Ordinance (which thereby creates an express
22 permit/licensing scheme itself) – plus the inherent exception for all who have a state-authorized
23 license/permit or otherwise have state authority (*i.e.*, “licenses”) to possess handguns.⁶ The Ordinance

24 ⁶ The principal state handgun licensing/permit law, as discussed in *Doe*, remains Penal
25 Code section 12050 under which local chiefs of police or sheriffs issue permits whereby
26 permittees can carry (and thereby possess) concealed handguns in public (“CCW”). But there
27 are numerous other “licenses” created by State law. Penal Code section 12026, 12026.1, and
28 12026.2 for example exempt certain persons or situations for the concealed carry prohibition
of Penal Code section 12025. Penal Code section 12027 provides for sheriffs to issue permits allowing retired California law enforcement officers and retired federal officers to carry. Also Penal Code sections 12025.5 and 12031(j)(2) authorize loaded carry and concealed carry for women (or men) who reasonably believe they are in grave

1 contains no express exception(s) honoring those licenses.

2 The laws authorizing certain people to carry guns under certain circumstances represent the
3 Legislature’s judgment that possessing a handgun serves some valid purpose for the people and
4 situations these laws cover. Petitioners maintain that San Francisco residents authorized to have
5 handguns by these state laws are automatically exempt, as a matter of law, from the Ordinance’s ban
6 on possession of handguns. Even though the Ordinance appears to be intended to disarm them, it
7 cannot do so because it is axiomatic that an ordinance is preempted if its effect is “penalizing conduct
8 which the state law expressly authorizes ...” (*Bravo Vending v. City of Rancho Mirage* (1993) 16
9 Cal.App.4th 383, 397 [20 Cal.Rptr.2d 164].) If that is the case, the Ordinance creates a *de facto*
10 licensing scheme. So the Ordinance’s effect is to ban handgun possession except for those having
11 express or *de facto* permits / licenses – thereby establishing exactly what Penal Code section 12026
12 and *Doe* forbids.

13 CITY may disagree, and contend that the Ordinance invalidates those statutory licenses within
14 CITY. If that is the case, the local ordinance conflicts with the state laws creating those licenses and
15 so is preempted nonetheless.

16 Moreover, as *Doe* further ruled, for CITY to effect a permit requirement, even *de facto*, violates
17 Government Code section 53071, which expressly preempts any local power to “license”⁷ gun
18 ownership or sales.⁸

19 ///

20 _____
21 danger from someone against whom there is a current restraining order based on threat to life
22 or safety.

23 ⁷ “License” has a very broad meaning. “The meaning of ‘license’ . . . is permission or
24 authority to do a particular thing or exercise a particular privilege.” (*Galvan v. Superior Court*
25 (1969) 70 Cal.2d 851, 856 [76 Cal.Rptr. 642] (superseded by statute on other grounds).)
Government Code section 53071 was enacted in response to the *Galvan* decision, and adopted
its language.

26 ⁸ Government Code section 53071 provides, in full, “[i]t is the intention of the Legislature
27 to occupy the whole field of regulation of the registration or licensing of commercially
28 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.”

1
2 **B. The Ordinance Imposes Local Standards for Handgun Possession, Something
Both Implicitly and Explicitly Contrary to Paramount State Law**

3 A host of California laws limit handgun possession to responsible, law-abiding adults.⁹ The
4 Ordinance would impose far more onerous local standards by confining handgun ownership to very
5 limited categories of people. Given that cities have no realistic way to stop handguns from entering
6 their boundaries, establishing statewide standards for those who may legally possess handguns is a
7 matter of statewide importance. The Ordinance falls athwart the cases holding that when state law
8 regulates an area by establishing statewide qualifications, no locality may add its own further or
9 different qualifications.¹⁰

10 The third basis on which *Doe* struck down CITY's 1982 ban is that Penal Code section 12026
11 implicitly precludes localities from banning handguns. To reiterate, as *CRPA* states:

12 *Doe* also noted that even if it did not consider the ordinance to contain a *de facto*
13 licensing requirement, it would nevertheless find the ordinance impliedly preempted on
14 the theory that Penal Code section 12026 (which preempts local requirements for
permits or licenses to possess concealable weapons in the home) reflected a legislative
intent to occupy the field of "residential handgun possession."

15 (*CRPA, supra*, 66 Cal.App. 4th at 1316.)

16 CITY may mischaracterize *Doe*'s alternative holding as both wrong and only *dictum*, though
17 this holding is compelled by the legislative history (discussed *infra*) underlying Penal Code section
18 12026. But to reiterate, all such argument is superfluous. Given the Legislature's multiple
19 ratifications of *Doe*'s analysis, even if *Doe*'s alternative holding were both wrong and *dictum*, those
20 later reenactments render *Doe* both correct and binding. (*See Peltier v. McCloud River R.R. Co.*
21 (1995) 34 Cal.App. 4th 1809, 1821, fn. 6 [41 Cal.Rptr.2d 182] (refusing to consider arguments that a
22 previous case's interpretation of a statute was wrong, given that statute's reenactment without change
23 to the language interpreted).)

24
25 _____
26 ⁹ For example, Penal Code §§ 12021, 12072; Welf & Inst. C. §§ 8100, *et seq.*

27 ¹⁰ *Verner, Hilby & Dunn v. City of Monte Sorreno* (1966) 245 Cal.App. 2d 29, 32 [53
28 Cal.Rptr. 592]: where state has licensed civil engineers and surveyors to operate throughout
state, city may not impose regulation setting out more stringent and additional requirements.
Agnew v. City of Los Angeles (1958) 51 Cal.2d 1, 6 [330 P.2d 385] (LA cannot impose
licensing requirements on state licensed electrical contractor.)

1 **C. The Legislative History of Penal Code Section 12026 Demonstrates its Purpose to**
2 **Assure Law-Abiding, Responsible Adults the Right to Possess Handguns in Their**
3 **Homes and Businesses**

4 To understand statutes, courts must “take into account matters such as context, the object in
5 view, the evils to be remedied, the history of the times, and of legislation upon the same subject....”
6 (*Harry Carian Sales v. Agricultural Labor Relations Board* (1985) 39 Cal.3d 209, 223 [216 Cal.Rptr.
7 688].)

8 Penal Code section 12026 was originally enacted in 1923. To understand its object and the
9 perceived evil it sought to remedy, suffice it to say that the preceding twenty years had seen the
10 enactment of total handgun bans and of handgun permit laws across the nation and the world.¹¹ In
11 turn, these anti-gun laws reflected the tumultuous late Nineteenth and early Twentieth Centuries in
12 which assassins had taken or menaced the lives of the Russian Czar, the Empress of Austria, an
13 Austrian Archduke (which led to WWI) and other luminaries including President McKinley, former
14 President Roosevelt, Oliver Wendell Holmes, Attorney General Palmer, Henry Frick, J.P. Morgan and
15 the Mayors of Chicago and New York.

16 Motivated by fears of political turmoil and labor unrest, gun permit laws appeared in England,
17 Canada, Australia, New Zealand and all through Europe while Germany and a few other nations
18 banned civilian ownership of any kind of firearm.¹² The first such Twentieth Century American law

19 ¹¹ There has never been a federal or state (as opposed to local) handgun possession ban in
20 the United States. Unless otherwise referenced or evident, all facts in this section of the brief
21 derive from: JOYCE LEE MALCOLM, *GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE* 141-47
22 (Harvard, 2002); Stephen P. Halbrook, *Nazi Firearms Law and the Disarmament of the*
23 *German Jews*, 17 *AZ. J. INTL. & COMPAR. LAW* 483-532 (2000); DAVID B. KOPEL, *THE*
24 *SAMURAI, THE MOUNTIE, AND THE COWBOY: SHOULD AMERICA ADOPT THE GUN CONTROL*
25 *OF OTHER DEMOCRACIES?* (1992) (winner of the International Criminology award of the
26 American Society of Criminology); EDWARD LEDDY, *MAGNUM FORCE LOBBY: THE*
27 *NATIONAL RIFLE ASSOCIATION FIGHTS GUN CONTROL* 85-89 (University Press, 1987); Don
28 B. Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82
29 *MICH. L. REV.* 203, 209-210, fn. 23 (1983); DON B. KATES, *History of Handgun Prohibition*
30 *in the United States*, in Kates, *RESTRICTING HANDGUNS* (1979) 14-20, 29-30; and LEE
31 KENNETT & JAMES LAVERNE ANDERSON, *THE GUN IN AMERICA: THE ORIGINS OF A*
32 *NATIONAL DILEMMA* 213 (1976). Lest there be any question of concealment, we note that
33 Prof. Kates is one of petitioners’ counsel.

34 ¹² See, respectively, Malcolm, *supra* at 141-47; Kopel, *supra* 141, 195, and 237; Halbrook,
35 *supra*; and *THE GUN IN AMERICA*, *supra* at 213.

1 was South Carolina's 1903 total ban of handgun sales which the American Bar Association urged other
2 states to emulate. (See ABA JOURNAL (1922) at p. 591.) In 1911, New York enacted the Sullivan Law
3 requiring permits to buy or own a handgun. Over the next twenty years, six more states enacted permit
4 requirements to buy a handgun. Across the nation, total handgun bans or Sullivan-type laws were
5 promoted under the slogan "if nobody had a gun nobody would need a gun." (THE GUN IN AMERICA,
6 *supra*, at 192.)

7 Given this trend, Prof. Leddy writes,

8 It soon became clear that if target shooters and other legal gun owners
9 did not want to see the uses of guns totally banned they must become
10 active politically with a program of [less onerous gun control] laws
11 which would both *protect gun ownership* and reduce crime. This
12 program was the "Uniform Firearms Act" [aka the Uniform Revolver
13 Act]... This act was drafted by Karl T. Frederick, a former president of
14 the National Rifle Association....¹³

15 As the NRA proclaimed, "[t]his law was adopted in 1923 by *California*, North Dakota and
16 New Hampshire."¹⁴ The Uniform Firearms Act ("UFA") contained a host of moderate regulations
17 that form the basis of current California law, such as prohibiting handgun possession by felons and
18 requiring that firearms dealers be licensed, that handguns have serial numbers, that persons carrying
19 them concealed be licensed, etc.

20 Ironically, California's UFA seems to have been initially sponsored by an anti-gun proponent.
21 As introduced, it featured a permit requirement to either buy or possess a handgun.¹⁵ But the outcome
22 was a dramatic triumph for gun owners: Not only was the permit requirement rejected, it was replaced
23 by Penal Code section 12026's preclusion of permit requirements for law-abiding, responsible adults to
24 buy or possess handguns in home or office.

25 Thus, context and history imperatively support *Doe's* conclusion that section 12026 precludes
26 localities from banning home or office handgun ownership by law-abiding, responsible adults. That is
27 further confirmed by the only contemporary comments the Legislative Intent Service could find for us

28 ¹³ MAGNUM FORCE LOBBY *supra* at 87, emphasis added.

¹⁴ *Ibid*; see also THE GUN IN AMERICA, *supra*, at 192-93.

¹⁵ A copy of the Act as introduced appears at 14 AM. INST. CRIM. L & CRIMINOLOGY 135ff. (1923-24). The permit requirement to possess or buy a handgun was the second section set out on p. 135 of the volume.

1 on California’s 1923 adoption of the UFA, including what is now Penal Code section 12026. As the
2 July 15, 1923 San Francisco Chronicle reported, “It was largely on the recommendation of R.T.
3 McKissick, president of the Sacramento Rifle and Revolver Club, that Governor Richardson” signed
4 the 1923 Act.¹⁶ The Chronicle quoted McKissick’s description of the Act as “frankly an effort on the
5 part of those who know something about firearms to forestall the flood of fanatical legislation intended
6 to deprive all citizens of the United States of the right to own and use” handguns. (As to the
7 admissibility of such statements see *Commodore Home Systems, Inc. v. Superior Court* (1982) 32
8 Cal.3d 211, 219, fn. 9 [185 Cal.Rptr. 270] (letter urging that Governor sign the bill); *County of San*
9 *Bernardino v. City of San Bernardino* (1997) 15 Cal.4th 909, 917, 926 [64 Cal.Rptr.2d 814]
10 (supporting letters by advocates of bill); and *People v. Tanner* (1979) 24 Cal.3d 514, 547-549 [156
11 Cal.Rptr. 450] (news article to same effect).)

12 **D. The Language as Well as the Legislative History of Penal Code Section 12026**
13 **Show its Inconsistency With a Ban on Handgun Possession by Law-Abiding,**
14 **Responsible Adults**

14 The forgoing addresses each of the four factors *Harry Carian Sales, supra*, 39 Cal.3d at 223,
15 says courts should take into account to understand statutes: As to “the history of the times,” it was a
16 period in which either bans on handgun possession or sales, or permit requirements to buy or possess
17 handguns, were being proposed, and often enacted, all over the world.

18 As to the context for Penal Code section 12026's preclusion of such legislation, it turns out that
19 Section 12026 was enacted instead of – and in contradiction to – a permit requirement to possess a
20 handgun. As to “the object in view,” that object was to protect gun ownership by law-abiding,
21 responsible adults. And as to “the evil to be remedied,” that evil was proposals to ban handguns or
22 require a permit to buy or to possess them in home or office.

23 Thus, *Doe* rightly concluded that Penal Code section 12026 precludes any local handgun ban –
24 for “[i]t strains reason to suggest that the state Legislature would prohibit licenses and permits but
25 allow a ban on possession.” (136 Cal. App. 3d at 518.)¹⁷

26 _____
27 ¹⁶ “New Firearms Law Effective on August 7” (July 15, 1923) *San Francisco Chronicle*.
A copy of this article is attached as Exhibit B.

28 ¹⁷ Though we rely extensively on *Doe*, the case is somewhat erroneous in deeming Penal
Code section 12026 a “preemption law” in the ordinary sense. As the Attorney General has

1 Note the inconsistency between the Ordinance and the UFA’s rationale as discussed by the
2 National Conference of Commissioners on Uniform State Laws. The Conference promoted the UFA
3 against “the wrong emphasis on more pistol legislation,” *i.e.* laws “aimed at regulating pistols in the
4 hands of law abiding citizen;” in contrast, the UFA’s correct approach is “severely punishing
5 criminals who use pistols.... [with] a program of laws which would both *protect gun ownership* and
6 reduce crime.”¹⁸

7 The conflict between CITY’s Ordinance and the UFA is clear. Section 12026's context and
8 history shows a purpose to safeguard law-abiding, responsible adults against laws that would ban their
9 keeping handguns in homes or offices.

10 **III. THE ORDINANCE VIOLATES EQUAL PROTECTION**

11 **A. The Distinction Between Residents (Who Cannot Possess Handguns in San** 12 **Francisco) and Non-Residents (Who Can) Is Irrational**

13 Only San Francisco residents are forbidden from possessing handguns. The many non-San
14 Francisco residents who have an office or shop in CITY and commute to work are free to keep
15 handguns in CITY for their protection. As the Legislature has taken pains to allow shopkeepers to not
16 only keep handguns on their premises, but to carry them therein on their persons.¹⁹ Hundreds, if not
17

18 pronounced it, section 12026 is “the Legislature’s recognition of the right [of law-abiding,
19 responsible adults] to possess handguns on private property.” (77 Ops.Cal.Atty.Gen. 147, 152
20 (1994).) Section 12026 is not addressed to localities. It creates a right applicable against any
level or agency of government until the Legislature sees fit to alter it.

21 Admittedly, however, section 12026 is a preemption law in the sense of preempting
22 local handgun bans because they are “contradictory to” Penal Code section 12026. (*Sherwin-*
23 *Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898 (local laws preempted if
contrary to state law).)

24 ¹⁸ Leddy, *supra*, quoting the Commissioners’ statement (emphasis added).

25 ¹⁹ The 1988, Penal Code section 12025's prohibition on carrying a concealed handgun
26 could be construed as applicable even to proprietors carrying concealed handguns in their own
27 stores. In 1988, the Legislature amended section 12026 (a) to specifically provide that
28 handguns could be carried in home or office, notwithstanding the section 12025 prohibition.
(Acts of 1988, Ch. 577, § 2.) And when a judicial decision nullified it, the Legislature
formally denounced that decision and clarified that law-abiding, responsible adults may carry
concealed handguns in office or home. (Stats 1989, ch. 958, uncodified sec. 2.) *In and of*
itself, this history suggests that the Ordinance conflicts with state law.

1 thousands, of people who own San Francisco businesses keep protective handguns therein.

2 Various reasons may be imagined for CITY to ban business owners from keeping protective
3 handguns in their businesses. What cannot be imagined, however, is a rational relationship between
4 any of those reasons and a ban that only applies if the shop owner is a San Francisco resident. Are the
5 dangers of handgun possession somehow less if the owner is a non-resident? Could CITY rationally
6 have found, for instance, that its residents *as a class* are worse shots or more likely to shoot
7 unjustifiably than are non-residents? Or in the case of a wrongful shooting will the victim be more
8 injured if the shooter is a resident than a non-resident? Or is it that a wrongful shooting victim's life
9 and welfare is less valuable if the shooter is a non-resident of San Francisco?

10 The irrelevance of the resident/non-resident distinction to any rational purpose is illustrated by
11 the actual effect – or lack thereof – of that distinction. If current San Francisco residents who own a
12 business want to keep a gun in their San Francisco business all they have to do is move across the
13 Golden Gate to reside in Marin County.

14 Even under minimal scrutiny, a classification violates the federal and California equal
15 protection clauses ““unless it rationally relates to a legitimate state [or in this case, city] purpose.””
16 (*Cooper v. Bray* (1978) 21 Cal.3d 841, 847 [148 Cal.Rptr. 148] (quoting prior caselaw)). “[J]udicial
17 review under that standard, though limited, is not toothless.” (*Young v. Haines* (1986) 41 Cal.3d 883,
18 899 [226 Cal.Rptr. 547].)

19 “Under the traditional, rational relationship equal protection standard, what is required is that
20 the court conduct a serious and genuine judicial inquiry into the correspondence between the
21 classification and the legislative goals.” (*Elysium Institute, Inc. v. County of Los Angeles* (1991) 232
22 Cal.App.3d 408, 427-428 [283 Cal.Rptr. 688] (citing *Newland v. Board of Governors* (1977) 19
23 Cal.3d 705, 711 [139 Cal.Rptr. 620]); see also *Daniels v. McMahon* (1992) 4 Cal.App.4th 48 [5
24 Cal.Rptr.2d 404], *People v. Edwards* (1991) 235 Cal.App.3d 1700 [1 Cal.Rptr.2d 631].)

25 A city “may not rely on a classification whose relationship to the asserted goal is so attenuated
26 as to render the distinction arbitrary or irrational.” (*Elysium Institute, supra*, 232 Cal.App.3d at 427-
27 428.) The classification made by the Ordinance cannot withstand scrutiny even under the minimal
28 scrutiny test.

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B. The Distinction the Ordinance Draws Between Non-Resident and Resident Peace Officers Violates Equal Protection

Many San Francisco police officers and deputy sheriffs do not live in San Francisco. But for those who do, the effect of the Ordinance is that they cannot have their duty weapon (or any other handgun) while off duty; cannot leave it in their home or carry it back and forth from home to duty; and cannot carry a “back-up gun.” San Francisco-resident officers and sheriffs may have handguns only as “*required* for professional purposes,” which are specifically defined as being limited to “*carrying out* the functions of his or her government employment....” (Ordinance, sec. 3, emphasis added.)

Note how different this is from state law which allows peace officers to have loaded handguns with them or in their homes at all times, whether on or off duty.²⁰ California and other states allow officers to have handguns while off-duty on the theory that they will not have to go to the station house to pick up their weapon if called to emergency duty, and may run-into and need to defend themselves against criminals they have arrested. But the Ordinance’s extremely narrow wording does not allow that because it is not “required” to perform the officers’ general duties. Being armed while off-duty is clearly not “required” to be a peace officer. Vast numbers of off-duty officers throughout the United States do not carry guns while off duty, or do not regularly do so. Moreover, having dinner off-duty with one’s spouse does not come within the other element of the exception, *i.e.*, that an officer may carry *only* when “carrying out the functions of his or her government employment....”

Likewise, while many on-duty law enforcement officers throughout the U.S. do carry back up guns, many others do not. So, once again, carrying a back up gun does not fit within the narrow exception for situations in which the gun is “required for professional purposes.”

Thus, the Ordinance discriminates between San Francisco-resident law enforcement officers and non-resident officers. This discrimination is just as arbitrary and capricious as the discrimination between civilian San Francisco residents and non-residents as to keeping a handgun in the City.

IV. CITY MAY NOT BAN FIREARM OR AMMUNITION SALES, DISTRIBUTION, AND TRANSFERS

²⁰ Pen. C. §§ 12027, 12031.

1 Section Two of the Ordinance bans any “sale,” “distribution,” or “transfer” whatsoever of any
2 firearm or ammunition in the city. It has no exceptions. The Section Two ban on “transfer” of any
3 kind of firearm or ammunition is separate and distinct from Section Three, discussed above, which
4 does have limited exceptions. So visitors to the city (non-residents) would not be subject to the
5 handgun possession ban, but they are still subject to the sale and transfer ban.

6 **A. Penal Code Section 12026 Protects the Right to Purchase Handguns**

7 To reiterate, in *Doe* this court recognized that Penal Code section 12026 precludes handgun
8 possession bans – an interpretation the Legislature has since affirmed on multiple occasions. Section
9 12026 also expressly protects handgun “purchase[s].” Thus the Ordinance’s ban of firearm sales is
10 invalid at least as applied to handguns.

11 **B. The UHA Preempts Local Bans on Handgun Purchasing**

12 The Unsafe Handgun Act (UHA) covers the entire area of the licensing of handgun sales.
13 *Inter alia*, Penal Code section 12131(a) charges the Department of Justice with conducting handgun
14 testing, creating a roster of handguns that “may be sold in this state pursuant to this title” and granting
15 gun manufacturers a license (and collecting, also, a fee for each licence) for each specific make and
16 model of handgun that can be sold. On its face, the Legislature’s choice of this language precludes
17 CITY from enacting an Ordinance under which handguns so approved by DOJ nevertheless may *not*
18 be sold. Thus, the Ordinance’s ban on the sale of handguns that have been licensed and included on
19 the DOJ roster is invalid since its effect is “penalizing conduct which the state law expressly
20 authorizes.” (*Bravo Vending, supra*, 16 Cal.App. 4th at 397.) Also, *see generally*, Government Code
21 section 53071, which expressly preempts the area of the licensing of firearms sales.

22
23 **C. Bans on Sale of Ammunition Violate Penal Code § 12026, Given its Purpose to
24 Protect the Right to Own and Use Handguns**

25 To an inquiry as to the legality of a municipal ban on sale of ammunition the Attorney General
26 replied:

27 Clearly what the Legislature had in mind when it enacted section 12026 was the
28 possession of a handgun that could be used for its intended purpose. Accordingly, we
conclude that the language of sections 12026 and 12304, construed together, precludes
a local entity from prohibiting the sale of handgun ammunition. [77
Ops.Cal.Atty.Gen.147, 152 (1994)]

1 Besides the deference courts normally accord to Attorney General opinions, this Opinion's
2 authority is supported by the fact that since it was issued Penal Code section 12026 has been
3 reenacted without change to disavow the Opinion. (Stats. 1995, ch. 322.) So, like the *Doe* decision,
4 the Attorney General Opinion enjoys the "presum[ption] that the Legislature was cognizant of the
5 Attorney General's [statutory] construction and would have taken corrective action if it disagreed
6 with that construction." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 104 [61
7 Cal.Rptr.2d 134]; *California Ass'n. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 21 [270
8 Cal.Rptr. 796].)

9 As discussed above, the legislative history indicates the Legislature sought to preclude
10 "legislation intended to deprive all citizens of the United States of the right to own *and use*
11 handguns."²¹ Obviously a ban on sale of ammunition would contravene "what the Legislature had in
12 mind when it enacted section 12026," *i.e.*, ammunition bans would prevent a handgun being "used for
13 its intended purpose" (quoting the Attorney General Opinion, *supra*).

14 **D. As Section 12026 Precludes Handgun Purchase Bans, So Government Code**
15 **Section 53071 Precludes Bans on Purchasing of Any Kind of Firearm**

16 *Galvan v. Superior Court* (1969) 70 Cal.2d 851 [76 Cal.Rptr. 642] held that Section 12026
17 dealt only with handgun bans and did not preclude San Francisco from requiring handgun registration.
18 The Legislature quickly responded with Government Code section 53071 which: (a) abrogated
19 *Galvan* as to registration; and (b) protected long guns. Government Code section 53071 reads:

20 It is the intention of the Legislature to occupy the whole field of regulation of the
21 registration or licensing of commercially manufactured firearms as encompassed by
22 the provisions of the Penal Code, and such provisions shall be exclusive of all local
23 regulations, relating to registration or licensing of commercially manufactured
24 firearms, by any political subdivision as defined in Section 1721 of the Labor Code.
25 Government Code section 53071 preempts and precludes the Ordinance insofar as it seeks to
26 ban the sale of firearms or ammunition for them.

25 **V. SECTION TWO OF THE ORDINANCE DISRUPTS LAW ENFORCEMENT AND**
26 **CRIMINAL JUSTICE OPERATIONS**

27 _____
28 ²¹ Emphasis added; statement of supporter who persuaded governor to sign the Act as
reported in the June 15, 1923 SAN FRANCISCO CHRONICLE. As to the admissibility of such
statements see *Tanner*, 24 Cal.3d at 547-49 and other cases cited with it, *supra*.

1 All law enforcement officers are subject to Section Two’s ban on the transfer of all firearms
2 and ammunition. On the other hand, state statutes regulating firearms are painstakingly crafted to
3 exempt law enforcement operations.²²

4
5 ²² State statutory exceptions for Peace Officers and Agencies include: Pen. Code
6 §12020(b)(12) (With conditions, exempting any federal, state, county, city and county, or city
7 agency charged with enforcement of any law from the §12020(a) prohibition against the
8 purchase of and possession of cane gun, wallet gun, undetectable firearm, firearm not
9 immediately recognizable as a firearm, zip gun, or unconventional pistol); Pen. Code
10 §12002(a) (Exempting peace officers from any prohibition against carrying equipment [short-
11 barreled shotguns, short-barreled rifles, cane gun, wallet gun, undetectable firearm, firearm
12 not immediately recognizable as a firearm, zip gun, or unconventional pistol] authorized for
13 the enforcement of law or ordinance in any city or county.); Pen. Code §12021(c)(2) (With
14 conditions, exempting peace officers convicted of certain misdemeanors from the
15 §12021(c)(1) prohibition against possession of firearms); Pen. Code § 12027(a)(1)(A)
16 (Exempting Peace Officers from the Pen. Code §12025 prohibition against carrying concealed
17 weapons); Pen. Code §12031(b)(1) and (c) (Exempting Peace Officers from the Pen. Code
18 §12031 prohibiting the possession of loaded firearms.); 12035(c)(5) and 12036(e)(5)
19 (Exempting Peace Officers from the Pen. Code §12035(b) and 12036(b) requirements that
20 loaded firearms be kept where child is likely to gain access); Pen. Code §12040 (Exempting
21 Peace Officers from the prohibition against possession of loaded firearms in public places
22 while wearing masks as prohibited by Pen. Code §12040.); Pen. Code §12050 (a)(1)(C) and
23 (a)(2)(B) (Allowing CCWs for Peace Officers.); Pen. Code §12071.4(g) (Exempting Peace
24 Officers from the prohibition against simultaneous possession of both firearms and
25 ammunition at Gun Shows.); Pen. Code §12071.4(i) (Exempting Peace Officers from the
26 requirement that firearms be tagged at Gun Shows.) Pen. Code 12125 (b)(4) exempting law
27 enforcement agencies and sworn members of those agencies from the “Unsafe Handgun Act”
28 prohibitions.) Pen. Code 12230(a) and 12250(a) (Exempting the manufacture, transfer,
transportation, sale and possession of machine guns to permittees/licensees from the §12220
machine gun prohibitions.) Pen. Code §12280(e) (Exempting the Department of Justice,
police departments, sheriffs offices, marshals offices, youth and adult corrections agency, the
Department of California Highway Patrol, District Attorneys’ offices, Department of Fish and
Game, Department of Parks and Recreation, Military forces, Naval forces, and any federal law
enforcement agency from the §12280(a)-(b) “assault weapon” and “.50 BMG rifle”
prohibitions.); Pen. Code §12302 (Exempting peace officers, Army, Navy, Airforce, Marine
Corp., National Guard, and municipalities from the “destructive device” prohibitions of
§12303.); Pen. Code §12002(a) (Exempting special peace officers from any prohibition
against carrying equipment [short-barreled shotguns, short-barreled rifles, cane gun, wallet
gun, undetectable firearm, firearm not immediately recognizable as a firearm, zip gun, or
unconventional pistol] authorized for the enforcement of law or ordinance in any city or
county.); Pen. Code §12020(b)(1) (Exempting Police Department from the §12020(a)
prohibition against the purchase and possession of “short barreled rifles” and “short barreled
shot guns”); Pen. Code §12002(a) (Exempting police officers from any prohibition against
carrying equipment [short-barreled shotguns, short-barreled rifles, cane gun, wallet gun,
undetectable firearm, firearm not immediately recognizable as a firearm, zip gun, or
unconventional pistol] authorized for the enforcement of law or ordinance in any city or

1 The lack of any of the standard law enforcement exemptions in Proposition H that are
2 routinely included in state firearm legislation also means that the ban on “distribution” or “transfers”
3 literally prevents the San Francisco Police and Sheriffs’ Departments from issuing any duty handgun
4 or other firearm to police officer or deputy sheriffs, or from receiving guns from gun stores that those

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9 county.); Pen. Code §12020(b)(1) (With conditions, exempting members of police
10 departments from the §12020(a) prohibition against the possession of “short barreled rifles”
11 and “short barreled shot guns”); Pen. Code §12020(b)(1) (Exempting Marshals Offices from
12 the §12020(a) prohibition against the purchase and possession of “short barreled rifles” and
13 “short barreled shot guns”); Pen. Code §12020(b)(1) (With conditions, exempting members of
14 Marshals Offices from the §12020(a) prohibition against the possession of “short barreled
15 rifles” and “short barreled shot guns”); Pen. Code §12020(b)(1) (Exempting Department of
16 Justice from the §12020(a) prohibition against the purchase and possession of “short barreled
17 rifles” and “short barreled shot guns”); Pen. Code §12020(b)(1) (With conditions, exempting
18 Members of the Department of Justice from the §12001.5 prohibition against the possession
19 of “short barreled rifles” and “short barreled shot guns”); Pen. Code §12020(b)(1) (Exempting
20 Sheriffs Offices from the §12020(a) prohibition against the purchase and possession of “short
21 barreled rifles” and “short barreled shot guns”); Pen. Code §12020(b)(1) (With conditions,
22 exempting members of Sheriffs Offices from the §12001.5 prohibition against the possession
23 of “short barreled rifles” and “short barreled shot guns”); Pen. Code §12020(b)(1) (Exempting
24 California Highway Patrol from the §12020(a) prohibition against the purchase and
25 possession of “short barreled rifles” and “short barreled shot guns”); Pen. Code §12020(b)(1)
26 (With conditions, exempting members of the California Highway Patrol from the §12020(a)
27 prohibition against the possession of “short barreled rifles” and “short barreled shot guns”);
28 Pen. Code §12002(a) (Exempting law enforcement officers from any prohibition against
carrying equipment [short-barreled shotguns, short-barreled rifles, cane gun, wallet gun,
undetectable firearm, firearm not immediately recognizable as a firearm, zip gun, or
unconventional pistol] authorized for the enforcement of law or ordinance in any city or
county.); Pen. Code §12030(b)-(e) (Allowing law enforcement agencies to keep, transfer
seized firearms set to be destroyed.); Pen. Code §12020(b)(18) (With conditions, exempting
Forensic Laboratories from the §12020(a) prohibition against the possession of “short-
barreled rifles,” “short-barreled shotguns,” cane gun, wallet gun, undetectable firearm, firearm
not immediately recognizable as a firearm, zip gun, or unconventional pistol); Pen. Code
§12020(b)(18) (With conditions, exempting authorized agents or employees of Forensic
Laboratories from the §12020(a) prohibition against the possession of “short-barreled rifles,”
“short-barreled shotguns,” cane gun, wallet gun, undetectable firearm, firearm not
immediately recognizable as a firearm, zip gun, or unconventional pistol); Pen. Code
§12027(a)(1)-(3),(Exempting Retired Peace Officers from the Pen. Code §12025 prohibition
against carrying concealed weapons); Pen. Code §§12072.1(a)-(e) and 12031(b)(1)-(3)
(Exempting Retired Peace Officers from the Pen. Code §12031 prohibiting the possession of
concealed and loaded firearms.)

1 departments have purchased to issue to their officers/deputies.²³ Under the Ordinance as written,
2 while an on-duty cop can “possess” a handgun or other firearm, the department cannot issue it to him
3 or her, nor can she/he transfer a firearm to anyone else. And an officer who finds a gun at the scene
4 of a shooting or other violent crime cannot legally hand it in to his/her department, nor can the
5 department hand it over to a criminalist to check for prints or other forensic evidence.²⁴

6 A criminalist in the police lab cannot pass a crime gun on for examination by another
7 criminalist in the same lab, nor can the gun be given to UPS for shipment to the California
8 Department of Justice laboratory or the FBI laboratory for examination.

9 Seized guns cannot be returned to their owners or sold when appropriate.²⁵

10 A prosecutor in a gun crime case can neither receive the crime gun from the police nor transfer
11 it to the court as an exhibit against the defendant. And a defense lawyer cannot put a gun in as an
12 exhibit supporting his defense of the accused. And law enforcement armorers and range-masters

13
14 ²³ Such purchases are made with the consent of the California legislature. For example:
15 Pen.Code §12201(a)-(b) (Exempting the police departments, sheriff’s offices, marshals’
16 offices, district attorneys offices, California Highway Patrol, Department of Justice,
17 Department of Corrections, military and naval forces [and their specified members] from the
18 §12220 machine gun prohibitions against purchase and possession); Pen.Code §12280(e)
19 (Exempting same from the §12280(a)-(b) “assault weapon” and “.50 BMG rifle”
20 prohibitions); Pen. Code §12020(b)(1) (Exempting specified law enforcement agencies from
21 the §12020(a) prohibition against the purchase and possession of “short barreled rifles” and
22 “short barreled shot guns”); and Pen. Code 12125 (b)(4) (Exempting law enforcement
23 agencies and sworn members of those agencies from the “Unsafe Handgun Act” prohibitions).

24 ²⁴ Even possession and transfers to local forensic laboratories would be prohibited, despite
25 state laws authorizing as much. Such laws include, but are not limited to: Pen. Code
26 §12020(b)(18) (With conditions, exempting forensic laboratories from the §12020(a)
27 prohibition against the possession of short-barreled rifles, short-barreled shotguns, cane gun,
28 wallet gun, undetectable firearm, firearm not immediately recognizable as a firearm, zip gun,
or unconventional pistol); and Pen.Code §12094(b)(3) (Exempting forensic laboratories from
the Pen.Code §12094(a) prohibition against the transfer of firearms with altered or removed
markings).

²⁵ State law requires that criminal justice agencies return stolen guns to their legitimate
owners (Pen. C. § 12028(c)), authorizes peace officers to temporarily seize firearms in
domestic disturbances and certain other situations (Pen. C. § 12028.5), and requires the return
of seized firearms in certain situations. (Pen. C. 12021.3; Pen. C. 12028.5; Welfare &
Institutions Code 8102(d); Code of Civ. Proc. § 527.9(e).) The Section Two ban forbids all of
these transfers in San Francisco. Penal Code §12030(b)-(e) permits law enforcement agencies
to keep or transfer seized firearms set to be destroyed to other law enforcement agencies.

1 cannot receive a gun to test, evaluate, or repair it.²⁶

2 These policy choices may seem ridiculous. But the oversight (to the extent it was one, and not
3 an intentional omission of exceptions for fear of creating a prohibited licensing scheme when the
4 Ordinance was drafted) cannot be dismissed as unintended by the author – who did not consult with
5 the police union before promulgating the Ordinance. Nor can the omission be excused because the
6 voters thought they were voting for something different. The Ordinance says what it says. The court
7 cannot rewrite it. Section Two is invalid because its effect is “inimical” to enforcement of state laws
8 and accepted criminal justice procedures. (*Sherwin-Williams, supra*, 4 Cal.4th at 898.)

9 **VI. CITY’S HOME RULE ARGUMENT DEFIES PRECEDENT AND COMMON SENSE**

10 CITY’s brief in the recent court of appeal writ matter conceded that the Ordinance is contrary
11 to state law as construed in *Doe, supra*.²⁷ But as a charter city, CITY claims it may override contrary
12 state law because the Ordinance’s subject is purely one of municipal concern and so is within its
13 home rule powers.

14 Preliminarily, we note that if there is any doubt as to whether a subject is “purely municipal”
15 the doubt is to be resolved in favor of it being a matter of statewide concern instead. (*Abbott v. City*
16 *of Los Angeles* (1960) 53 Cal.2d 674, 681 [3 Cal.Rptr. 158]; *Baggett v. Gates* (1982) 32 Cal.3d at
17 140; *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 106-107 [223
18 Cal.Rptr. 609].)

19 That said, CITY’s “home rule” argument faces two insuperable and fatal obstacles. First, both
20 the handgun ban (Ordinance Section Three) and the sales-transfer ban (Section Two) affect persons
21 and things outside CITY limits. The home rule doctrine does not allow city law to override contrary
22 state law if city law “affects persons outside of the municipality ...” (*Committee of Seven Thousand*
23 *v. Superior Court* (1988) 45 Cal.3d 491, 505 [247 Cal.Rptr. 362]; *Metromedia, Inc. v. City of San*

25
26 ²⁶ The same omission of standard state gun law exemptions means that the military cannot
27 issue firearms to military personnel in the city nor have those firearms examined or repaired
by its armorers.

28 ²⁷ See Respondents’ Opposition to Petition for Writ of Mandate and/or Prohibition or
Other Appropriate Relief, p. 22, filed December 5, 2005, in Case No. A111928, Division Four
of the First Appellate District of the State of California.

1 *Diego*, (1980) 26 Cal.3d 848, 879 [164 Cal.Rptr. 510] (same).²⁸ This first fatal impediment to
2 CITY’s home rule claim is discussed first, below.

3 The second fatal impediment is that the Ordinance’s subject matter, gun possession and
4 misuse, plainly is not a “purely” municipal affair in which the state has no valid interest. The fact that
5 the state has an interest in regulating guns precludes CITY’s claim that the Ordinance is valid by
6 reason of the home rule doctrine, because under that doctrine an ordinance only overrides contrary
7 state law and policy if the subject matter unquestionably is a “purely municipal affair[.]” rather than
8 one in which the state also has an interest. (*Jackson v. City of Los Angeles* (2003) 111 Cal.App.4th
9 899 [4 Cal.Rptr.3d 325] (quoting *Baggett v. Gates* (1982) 32 Cal.3d 128, 136 [185 Cal.Rptr. 232]);
10 *Horton v. City of Oakland* (2000) 82 Cal.App.4th 580, 584-85 [98 Cal.Rptr.2d 371] (“The ‘home
11 rule’ doctrine, reserves to charter cities the right to adopt and enforce ordinances that conflict with
12 general state laws” – but only “provided the subject of the regulation is a ‘municipal affair’ rather
13 than one of ‘statewide concern.’” Emphasis added).)

14 **A. CITY’s “Home Rule” Argument Is Contrary to *Doe*, Which Is Directly on Point**
15 **as to the Extraterritorial Effect of the Section Three Handgun Ban.**

16 A local ordinance that contradicts state law or policy cannot be validated on a “home rule”
17 theory if its effects extend to persons or things that are beyond the locality’s border (extraterritorial
18 effect).²⁹ In invalidating CITY’s 1982 handgun ban *Doe* noted that a municipal handgun ban
19 necessarily has extraterritorial effects which foreclose a “home rule” argument. (*Doe*, 136 Cal.App.
20 3d at 513.) Those effects are inevitable because, rather than surrendering their property for nothing,
21 tens of thousands of San Francisco handgun owners will legally sell them to gun stores in other Bay
22 Area cities. These sales will greatly increase the number of handguns in these other cities and lower

23
24 ²⁸ It bears emphasis that extraterritorial effect precludes a home rule defense for an
25 ordinance even if those effects are **beneficial** to those outside the municipal borders. *City of*
Santa Clara v. Von Raesfeld (1970) 3 Cal.3d 239, 247 [90 Cal.Rptr. 8]:

26 Furthermore, the sewage treatment facilities will protect not only the health and
27 safety of petitioner's inhabitants, but the health of *all* inhabitants of the San
28 Francisco Bay Area. *Accordingly, the matter is not a municipal affair.*”
[Emphasis added.]

²⁹ *Committee of Seven Thousand, supra*, 45 Cal.3d at 505.

1 the price residents thereof will have to pay to acquire a handgun. In the *Doe* decision, the court held
2 that the 1982 handgun ban was not defensible under the home rule doctrine because of its effect on
3 “residents of nearby cities where San Francisco's handguns might be sold.” (136 Cal.App.3d at 513.)

4
5 **B. CITY’s Home Rule Argument Fails as to the Section Two Firearm Transfer and
Sales Ban Because of its Numerous Extraterritorial Effects.**

6 Penal Code section 12026 (b) does not just guarantee the right of law abiding responsible
7 adults to keep guns on their property. It also expressly guarantees the right of law abiding,
8 responsible adults to purchase guns. Section Two of the Ordinance, banning such sales, is
9 presumptively contrary to 12026 and must fall unless it has no effect, either beneficial or negative,
10 outside San Francisco.³⁰ In fact it has multiple extraterritorial effects.

11 **1. The Section Two Sales Ban Affects Non-San Francisco Gun Collectors
12 Who Desire to Buy or Sell Antique, Curio and Relic Firearms Through
San Francisco’s Nationally Prominent Auction Houses.**

13 Gun collectors from throughout the state and nation come to San Francisco auction houses to
14 buy antique, curio or relic guns that are not available anywhere else. Although an ordinary person
15 who just wants to buy, for example, a miscellaneous Colt target pistol can do so in any gun store in
16 the state, if a collector wants to buy a pre-20th Century firearm that is an antique, relic or curio, such
17 is not the case. As a usual matter, collectible firearms can be found in venerable and respected
18 auction houses like Bonham’s and Butterfield’s in San Francisco, but only rarely at gun stores.³¹

19 Moreover, in addition to antique guns in general, there are specific guns that are unique, e.g.,
20 the Spencer rifle President Lincoln tested on the White House lawn and then ordered be bought for

21 _____
22 ³⁰ The home rule doctrine does not apply to “municipal action which affects persons
23 outside of the municipality.” (*Committee of Seven Thousand supra*, 45 Cal.3d at 505;
24 *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321 [118
25 Cal.Rptr. 315] (same).) And *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178
26 Cal.App.3d 90, 106-107 [223 Cal.Rptr 609] holds that

27 If the subject matter is one of general or statewide concern, the Legislature has
28 paramount authority; and if the Legislature has enacted general legislation
covering that matter, in whole or in part, *there must be a presumption that the
matter has been preempted.* [Emphasis added.]

³¹ The facts set out in this subsection of the brief are based on the declaration of an antique
gun dealer, attached hereto as Exhibit C.

1 use in the Civil War. Or the particular pistol carried (illegally) by Dwight Eisenhower when he was
2 President of Columbia University. Or the one Eleanor Roosevelt legally carried all her adult life. If a
3 firearm that is a unique collectors' item like these is available at all, it would only be in an auction
4 house. And if the gun is available at a San Francisco auction house it necessarily is not available
5 anywhere else in the state.

6 So the Ordinance's ban on the sale of all firearms, including curios, relics and other antiques,
7 has the extraterritorial effect that it precludes purchasing (or sales) by gun collectors who come to San
8 Francisco auction houses from elsewhere.

9 **2. The Section Two Ban on Firearms "Transfer" or "Distribution" Affects**
10 **Non-San Francisco Firearm Dealers by Banning Them from Importing**
Firearms Through the Port of San Francisco.

11 Section Two bans not only sales of firearms but any firearm "transfer" or "distribution." That
12 bars any non-San Francisco firearm store from importing popular foreign hunting rifles, like those
13 made by the Chinese Norelco company or the Korean Dae Woo company, through the Port of San
14 Francisco. For longshoremen to unload a shipment of rifles would be a transfer or distribution of the
15 rifles, something which Section Two forbids occurring. It would also be illegal for the longshoremen
16 to turn the rifles over to anyone else in San Francisco, e.g., agents of a non-San Francisco gun store.

17 Thus Section Two extraterritorially affects non-San Francisco firearms dealers. This effect is
18 also an effect on their non-San Francisco customers. These extraterritorial effects doom CITY's
19 claim that Section Two is valid under the home rule doctrine.

20 **3. The Section Two Ban on Firearms Transfers Affects Non-San Francisco**
21 **Movie Makers and Film Personnel by Precluding the Making of "Action"**
Movies and TV Shows in San Francisco.

22 "Action" movies and TV series made in San Francisco involving firearms have included
23 "Bullitt," "48 Hours," the "Dirty Harry" movies, "Ironsides," and "The Streets of San Francisco" to
24 name only the most famous. The Ordinance prohibits these types of productions. Though the Penal
25 Code exempts entertainment armories, prop houses, prop masters and actors from certain state firearm
26 regulations³², the Ordinance contains no such exemption. So movie and TV shows with firearms can
27

28 ³² See Pen. Code §12020(b)(10) (With conditions, exempting authorized participants in motion picture production from the §12020(a) prohibition against the possession of cane gun, wallet gun, undetectable firearm, firearm not immediately recognizable as a firearm, zip gun,

1
2
3 or unconventional pistol); Pen. Code §12026.2(a)(1) (With conditions, excepting any
4 authorized participant in a motion picture from the restriction against §12025 possession of
5 concealed firearms when used as part of the production, or while going to or coming from that
6 production.); Pen. Code §12020(b)(10) (With conditions, exempting agent and employee of
7 producing entity of motion picture production from the §12020(a) prohibition against the
8 possession of cane gun, wallet gun, undetectable firearm, firearm not immediately
9 recognizable as a firearm, zip gun, or unconventional pistol); Pen. Code §12026.2(a)(8) (With
10 conditions, excepting any agent and employee of producing entity of motion picture from the
11 restriction against §12025 possession of concealed firearms when used as part of the
12 production, or while going to or coming from that production.); Pen. Code §12020(b)(10)
13 (With conditions, exempting authorized participants in television production from the
14 §12020(a) prohibition against the possession of cane gun, wallet gun, undetectable firearm,
15 firearm not immediately recognizable as a firearm, zip gun, or unconventional pistol);
16 Pen. Code §12026.2(a)(1) (With conditions, excepting any authorized participant in a motion
17 television production from the restriction against §12025 possession of concealed firearms
18 when used as part of the production, or while going to or coming from that production.); Pen.
19 Code §12020(b)(10) (With conditions, exempting agent and employee of producing entity of
20 television production from the §12020(a) prohibition against the possession of cane gun,
21 wallet gun, undetectable firearm, firearm not immediately recognizable as a firearm, zip gun,
22 or unconventional pistol); Pen. Code §12026.2(a)(8) (With conditions, excepting any agent
23 and employee of producing entity of motion television production from the restriction against
24 §12025 possession of concealed firearms when used as part of the production, or while going
25 to or coming from that production.); Pen. Code §12020(b)(10) (With conditions, exempting
26 authorized participants in video production from the §12020(a) prohibition against the
27 possession of cane gun, wallet gun, undetectable firearm, firearm not immediately
28 recognizable as a firearm, zip gun, or unconventional pistol); Pen. Code §12026.2(a)(1) (With
conditions, excepting any authorized participant in a motion video from the restriction against
§12025 possession of concealed firearms when used as part of the production, or while going
to or coming from that production.); Pen. Code §12020(b)(10) (With conditions, exempting
agent and employee of producing entity of video production from the §12020(a) prohibition
against the possession of cane gun, wallet gun, undetectable firearm, firearm not immediately
recognizable as a firearm, zip gun, or unconventional pistol); Pen. Code §12026.2(a)(8) (With
conditions, excepting agent and employee of producing entity of motion video from the
restriction against §12025 possession of concealed firearms when used as part of the
production, or while going to or coming from that production.); Pen. Code §12020(b)(10)
(With conditions, exempting authorized participants in entertainment event from the
§12020(a) prohibition against the possession of cane gun, wallet gun, undetectable firearm,
firearm not immediately recognizable as a firearm, zip gun, or unconventional pistol);
Pen. Code §12026.2(a)(1) (With conditions, excepting any authorized participant in an
entertainment event from the restriction against §12025 possession of concealed firearms
when used as part of the production, or while going to or coming from that production.);
Pen. Code §12020(b)(10) (With conditions, exempting agent and employee of producing
entity of entertainment event from the §12020(a) prohibition against the possession of cane
gun, wallet gun, undetectable firearm, firearm not immediately recognizable as a firearm, zip
gun, or unconventional pistol); Pen. Code §12026.2(a)(8) (With conditions, excepting agent
and employee of producing entity of entertainment event from the restriction against §12025

1 no longer be filmed in San Francisco since the necessary transfers of the firearm(s) between actors
2 and prop managers are forbidden by Section Two. These extraterritorial effects preclude any claim
3 that Section Two of the Ordinance can be justified under the home rule doctrine.

4 The Section Three handgun ban does not outright preclude movies or TV productions
5 occurring in San Francisco. Such productions could occur, but only if the producers assured that no
6 prop managers and actors who handle handguns are San Francisco residents.³³ And the Section Two
7 firearm transfer ban would bar prop managers from the usual cinematic practice of securing the guns
8 when not in use on the set, and transferring or distributing them to the actors only when actually being
9 used. To comply with the distribution/transfer ban, every actor who was to handle a firearm in the
10 course of the production must have personally brought it into San Francisco and must possess it at all
11 times rather than ever turning it over to the prop managers for safekeeping.

12
13 **C. Independent of its Extraterritorial Effects, the Ordinance Cannot Be Justified**
14 **Under the Home Rule Doctrine Because Gun Possession and Misuse in San**
15 **Francisco Are Not “Purely” Municipal Affairs in Which the State Has No**
16 **Interest.**

17 A further and different problem is that the Ordinance simply does not meet the definition of a
18 “municipal affair” under the home rule doctrine. That doctrine only allows charter city law to
19 override contrary state law if the subject is one of “purely” municipal concern in which the state is *not*
20 *interested*.³⁴

21 possession of concealed firearms when used as part of the production, or while going to or
22 coming from that production.).

23 ³³ This does, however, raise yet another equal protection problem with the Ordinance. Its
24 effect is to exclude San Francisco resident actors and prop managers from employment with
25 movie or TV productions – or the San Francisco Opera, the San Francisco Ballet, ACT and
26 other playhouses – whose plots involve handguns.

27 ³⁴ *Baggett, supra*, 32 Cal.3d at 136 and further cases cited with it to this point, *supra*. See
28 also *American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1251, 23
Cal.Rptr.3d 453 (Charter cities “may adopt and enforce ordinances that conflict with general
state laws, *provided* the subject of the regulation is a ‘municipal affair’ *rather* than one of
‘statewide concern.’” Emphasis added.) Compare *Committee of Seven Thousand supra*, 45
Cal.3d at 505 distinguishing “purely municipal affairs” from matters of “statewide concern,”
and specifying that “‘statewide’ refers to all matters of *more than local* concern” (emphasis
added).

1 The Ordinance’s findings expressly proclaim that its subject is gun possession and misuse. So
2 the claim CITY must make for the Ordinance to come within the home rule doctrine is that the state
3 has no valid interest in gun possession and in regulating it to reduce violent crime. That claim is
4 absurd on its face. Even the most ardent anti-gun advocates admit “Local firearm regulation is
5 unlikely to fall within the unfettered ‘municipal affairs’ power of charter cities.”³⁵

6 The Ordinance must fall because its subject is clearly not “*purely* [a] municipal affair” but
7 rather is a “matter[] of more than local concern.” (*Committee of Seven Thousand, supra*, 45 Cal.3d at
8 505.)

9
10 **D. Accepting CITY’s Absurd Home Rule Claim Would Allow a “Crazy Quilt” of
Local Regulations Overruling Dozens of State Gun Laws.**

11 Dozens of state laws ban, or regulate, civilians having some kinds of firearms – regardless of
12 whether the civilians reside in charter cities. For instance, Penal Code section 12020 bans the wallet
13 gun, a device that conceals a gun, allowing a robbery victim to draw and fire it in the guise of handing
14 over his wallet. What if CITY decided to deter robbery by an ordinance allowing its residents to have
15 wallet guns? If gun possession by San Franciscans really were a purely municipal affair, an ordinance
16 legalizing wallet guns would overrule Penal Code section 12020’s ban on them.

17 Or consider Penal Code section 12230, *et seq.*, banning machine guns except for persons
18 having permits from DOJ (California Department of Justice). What If CITY felt DOJ was issuing too
19 many permits or to unsuitable persons? Under its home rule power, could CITY validly ban machine
20 guns for its residents who have DOJ permits – or require that they acquire an additional permit from
21 the SFPD?

22 Or imagine that a charter city decided that having many of its residents armed with machine
23 guns would powerfully deter crime: Could that city enact an ordinance overruling Penal Code section
24 12230, *et seq.*, by allowing its residents to keep machine guns in their homes and offices?

25 The answer to these hypotheticals must be “yes” if firearms possession by city residents is a
26 purely municipal affair in which the state has no valid interest.

27
28

³⁵ Eric Gorovitz, “California Dreamin’: The Myth of State Preemption of Local Firearm
Regulation” (1996) 30 U.S.F.L.R. 395, 400 (footnote omitted).

1 But hypotheticals are unnecessary, because the history of CITY’s own former gun ordinances
2 is itself pertinent. An attorney fee appeal currently before the First District Court of Appeals
3 originated in a case that CITY settled by repealing its local “assault weapon” ban upon the advice of
4 the City Attorney that it was preempted by the state Assault Weapon Control Act.³⁶ But if CITY’s
5 current home rule argument is correct, CITY was entitled to have the ordinance in derogation of the
6 state Act if that ordinance applied only to San Franciscans.

7 Or consider that in 2004 CITY avoided suit by repealing its “Saturday Night Special” ban
8 which the City Attorney advised was preempted by the enactment of the state Unsafe Handgun Act
9 (UHA - Penal Code §§ 12125-12133).³⁷ Yet here again, CITY would have had sovereign power to
10 legislate in derogation of the state UHA – if firearms possession by city residents really were a
11 “purely” municipal affair.

12 In sum, to accept CITY’s absurd claim that gun possession by its residents is solely a
13 municipal concern would be to invite cities all over the state to enact a crazy quilt of laws ignoring or
14 overruling state law.

15 **E. The Extensive Pattern of State Regulation Demonstrates that Handgun**
16 **Possession is a Matter of Statewide Concern**

17 Penal Code section 12026 (b)’s guarantee for law abiding, responsible adults to possess
18 handguns in their homes and businesses does not stand alone. Numerous other state laws also
19 regulate handgun acquisition and possession.³⁸ Also Penal Code sections 12230, 12276 (c),
20 12276.1(a)(4) and 12286 provide for DOJ to issue permits for possession of pistols that are fully-

22 ³⁶ The former CITY ordinance was Article 35A, section 3500A of the San Francisco
23 Police Code. The case is *California Rifle and Pistol Association v. City and County*, #
A104637.

24 ³⁷ See City and County of San Francisco Master Report, File Number 031932, passed on
25 November 4, 2004 and attached hereto as Exhibit D.

26 ³⁸ See, e.g., Penal Code section 12020 (prohibiting “unconventional pistol[s]”), Penal
27 Code section 12070 (providing that no person shall “sell, lease, or transfer” firearms without a
28 permit), Penal Code section 12071(b)(8) (prohibiting transfer of handguns to persons who do
not present a valid handgun safety certificate, who are not California residents, and who do
not perform a safe handling demonstration), and Penal Code section 12125 (prohibiting sales
of “unsafe handguns”).

1 automatic or “assault weapons.” (Note that Section Three of the Ordinance directly conflicts with
2 these permit provisions by forbidding San Francisco to possess such handguns even if they have
3 state permits under Penal Code section 12230 or 12286.)

4 The very existence of these myriad statutes shows that the Legislature deems gun possession
5 to be a matter of statewide concern rather than a purely municipal affair. While it is not conclusive,
6 the Legislature’s belief that a matter is of statewide rather than purely local concern is entitled to
7 “great weight.” (*Jackson, supra*, 111 Cal.App.4th at 907, citing *Baggett, supra*, 32 Cal.3d at 136.)
8 Moreover, if there be any doubt as to whether a matter is “purely municipal” that doubt is to be
9 resolved in favor of the matter being one of statewide concern. (*Abbott, supra*, 53 Cal.2d at 681 and
10 other cases cited with it, *supra*.)

11 West’s (unannotated) Penal Code has over 100 small print pages of California state gun
12 laws.³⁹ To reiterate, the rule stated in *Northern Cal. Psychiatric Society, supra*, 178 Cal.App.3d at
13 106-107:

14 If the subject matter is one of general or statewide concern, the Legislature has
15 paramount authority; and if the Legislature has enacted general legislation covering
16 that matter, in whole or in part, *there must be a presumption that the matter has been*
preempted. [Emphasis added.]

17 **VII. THE ELECTORATE WOULD NOT HAVE WANTED THE ORDINANCE’S LONG**
18 **GUN SALES OR TRANSFER BAN TO CONTINUE AS A SEPARATE FACET IF**
19 **THIS COURT INVALIDATES THE HANDGUN POSSESSION AND PURCHASING**
20 **BANS**

21 Petitioners anticipate that if this court invalidates the Ordinance’s handgun and handgun sales
22 bans, CITY will argue that its ban on the sales of rifles and shotguns should nevertheless be upheld.
23 But if a municipal initiative ordinance has been partially invalidated the remainder should not be
24 upheld when it is “by no means clear that the electorate would have approved” that result. (*Birkenfeld*
v. City of Berkeley (1976) 17 Cal.3d 129, 174 [130 Cal.Rptr. 465].)

25 Here there is excellent reason to believe the electorate would not want that result.

26 But if this Court invalidates the handgun sales and possession bans, then people who
27
28

³⁹ West’s (unannotated) Penal Code 2006: pp. 1119-1225.

1 ordinarily would buy a long gun will buy handguns instead.⁴⁰ Diverting buyers from long guns to
2 handguns contradicts the electorate's purposes in enacting the Ordinance. If anything is clear, it is
3 that the electorate did *not* want people buying handguns since it approved a ban on handgun
4 possession and sale. So to uphold the long gun sales ban when the handgun provisions are voided
5 would produce the opposite of the effect the electorate wanted. It would likely increase handgun
6 ownership, rather than reduce it.

7 The point becomes even clearer when the context is considered. For over 30 years anti-gun
8 proponents have focused on handguns, arguing that handguns are much more problematic than long
9 guns.⁴¹ So far as we can determine, *no one has ever argued for a ban on the sale of long guns while*
10 *leaving handgun sales untouched.* Yet that would be the anomalous result if this court were to strike
11 down the Ordinance's handgun bans as contrary to Penal Code section 12026 but uphold the long-gun
12 sale ban.

13 In short, the severability clause in Section Seven of the Ordinance cannot save the remaining
14 sections of the Ordinance if the handgun ban is deemed invalid.

15 **CONCLUSION**

16 For the reasons stated, petitioners respectfully request this Court to grant extraordinary writ
17 relief.

18 Dated: January 11, 2006

Respectfully Submitted,
TRUTANICH • MICHEL, LLP

20 
21 C. D. MICHEL
22 Attorney for Petitioners

24 _____
25 ⁴⁰ The substitution of handguns for long guns would occur because the two serve many of
26 the same purposes. (GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 74-75
(1997).)

27 ⁴¹ See, e.g, JERVIS ANDERSON, GUNS IN AMERICAN LIFE 100 (1984) ("anti-gunners,
28 [though desiring to ban handgun ownership or severely regulate it] do not wish to proscribe
the rights of long gun owners."), FRANKLIN ZIMRING & GORDON HAWKINS, THE CITIZEN'S
GUIDE TO GUN CONTROL 38-39 (1987).

EXHIBIT "A"

SAN FRANCISCO
FILED

2004 DEC 14 PM 3:56

DEPARTMENT OF ELECTIONS

[Prohibiting firearms distribution and limiting handgun possession.]

Initiative ordinance prohibiting the sale, manufacture and distribution of firearms in the City and County of San Francisco, and limiting the possession of handguns in the City and County of San Francisco.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Findings

The people of the City and County of San Francisco hereby find and declare:

1. Handgun violence is a serious problem in San Francisco. According to a San Francisco Department of Public Health report published in 2002, 176 handgun incidents in San Francisco affected 213 victims in 1999, the last year for which data is available. Only 26.8% of firearms were recovered. Of all firearms used to cause injury or death, 67% were handguns.
2. San Franciscans have a right to live in a safe and secure City. The presence of handguns poses a significant threat to the safety of San Franciscans.
3. It is not the intent of the people of the City and County of San Francisco to affect any resident of other jurisdictions with regard to handgun possession, including those who may temporarily be within the boundaries of the City and County.
4. Article XI of the California Constitution provides Charter created counties with the "home rule" power. This power allows counties to enact laws that exclusively apply to residents within their borders, even when such a law conflicts with state law or when state law is silent. San Francisco adopted its most recent comprehensive Charter revision in 1996.

5. Since it is not the intent of the people of the City and County of San Francisco to impose an undue burden on inter-county commerce and transit, the provisions of Section 3 apply exclusively to residents of the City and County of San Francisco.

Section 2. Ban on Sale, Manufacture, Transfer or Distribution of Firearms in the City and County of San Francisco

Within the limits of the City and County of San Francisco, the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited.

Section 3. Limiting Handgun Possession in the City and County of San Francisco

Within the limits of the City and County of San Francisco, no resident of the City and County of San Francisco shall possess any handgun unless required for professional purposes, as enumerated herein. Specifically, any City, state or federal employee carrying out the functions of his or her government employment, including but not limited to peace officers as defined by California Penal Code Section 830 et seq. and animal control officers may possess a handgun. Active members of the United States armed forces or the National Guard and security guards, regularly employed and compensated by a person engaged in any lawful business, while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment, may also possess handguns. Within 90 days from the effective date of this section, any resident of the City and County of San Francisco may surrender his or her handgun at any district station of the San Francisco Police Department, or to the San Francisco Sheriff's Department without penalty under this section.

Section 4. Effective Date

This ordinance shall become effective January 1, 2006.

Section 5. Penalties

Within 90 days of the effective date of this section, the Board of Supervisors shall enact penalties for violations of this ordinance. The Mayor, after consultation with the District Attorney, Sheriff and Chief of Police shall, within 30 days from the effective date, provide recommendations about penalties to the Board.

Section 6. State Law

Nothing in this ordinance is designed to duplicate or conflict with California state law. Accordingly, any person currently denied the privilege of possessing a handgun under state law shall not be covered by this ordinance, but shall be covered by the California state law which denies that privilege. Nothing in this ordinance shall be construed to create or require any local license or registration for any firearm, or create an additional class of citizens who must seek licensing or registration.

Section 7. Severability

If any provision of this ordinance or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications of this ordinance which can be given effect without the invalid or unconstitutional provision or application. To this end, the provisions of this ordinance shall be deemed severable.

Section 8. Amendment

By a two-thirds vote and upon making findings, the Board of Supervisors may amend this ordinance in the furtherance of reducing handgun violence.

EXHIBIT “B”

**NEW FIREARMS
LAW EFFECTIVE
ON AUGUST 7**

French Colony Celebrates Fall of the Bastille

Mayor Judge, Cyril W. Coon, Police Vice-Com. James J. A. McNeill, Justice Arthur, Lt. Wm. H. Stangerick, Police Com. Arthur Quaintance, for Police Commissioner of France, Louis L. May, Chairman of the...



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California

Existing Licenses Inoperative After Dec. 31, 1924; Uniform System

IS AIMED AT LAWLESS

Possible Unconstitutionality of Clause Provided for in Drafting

Stringent regulations against carrying concealed firearms or explosives, and prohibition against possession of other deadly weapons become effective on August 7, under the Hayes bill signed by Governor Richardson.

The new measure will install a uniform licensing system for carrying concealed weapons. Licenses now in existence will become inoperative December 31, 1924.

O. K. URGED

Aimed at disarming the lawless, the bill provides exemptions and exceptions to preserve the rights of those using firearms for competition or hunting or for protection in outing trips. It was largely on the recommendation of R. T. McKissick, president of the Sacramento Rifle and Revolver Club, that Governor Richardson approved the measure.

McKissick classed it as a measure that introduces "an element of sanity into firearms legislation, so as to provide adequate punishments upon an increasing scale for the habitual gunman and, at the same time, permit law-abiding citizens to continue to own firearms for home defense and other legitimate uses."

BILLS SIMILAR

The bill, according to McKissick follows almost literally one offered in the United States Senate by Senator Capper and advocated by associations interested in the manufacture, sale and legitimate use of pistols and revolvers, as a model for a uniform bill to be introduced in each State. "It is frankly," he says, "an effort upon the part of those who know something about firearms to forestall the flood of fanatical legislation intended to deprive all citizens of the United States of the right to own and use, for legitimate purposes, firearms capable of being concealed upon the person."

The new measure change existing law by making the carrying of barred weapons such as blackjack, a felony instead of a misdemeanor. The provision against carrying explosive also is new.

ACT EXPLAINED

Possible unconstitutionality of the provision against possession of weapons by non-naturalized residents was admitted in McKissick's letter to the Governor urging signing of the bill, but he pointed out that if this clause should be held invalid the rest of the act will not be affected and that if it can be sustained that it will have a "salutary effect in checking tong wars among the Chinese and vendettas among our people who are of Latin descent."

The provision for additional sentences where weapons are used in committing a felony is one with a sliding scale. The first time the added penalty is from five to ten years; the second from ten to fifteen; the third from 15 to 25 years, and only on the fourth offense it is possible to add more than 25 years to the sentence imposed for the crime itself.

EXHIBIT “C”

DECLARATION OF EXPERT GREG MARTIN IN SUPPORT OF PLAINTIFF-
PETITIONERS MOTION FOR WRIT OF MANDATE

I, Greg Martin, declare and say that if called as an expert I would testify as follows

Regarding the extraterritorial effects of sections 2 and 3 of San Francisco's recently enacted Proposition H ordinance:

(EXPERTISE)

1. I have been involved in the collection, purchase and sale of antique firearms for all the years since I was a teenager in the 1950s. In 1985, I became a director of the gun department of Butterfield's auction house in San Francisco. Butterfield's became the largest firearms auction house in the world and dealt primarily in antique guns, including the more modern firearms which are classified as relics and curios. Now known as Bonham's & Butterfield's in San Francisco, it still deals primarily in antique firearms of all kinds and remains among the largest firearms auction houses in the world.
2. In 2002, I left Butterfield's to found my own San Francisco enterprise, Greg Martin Auctions, Inc., which also deals primarily in antique firearms of all kinds and is among the largest firearms auction houses in the world. I recently sold Greg Martin Auctions to The Escala Group, a worldwide auction group listed on the NASDAQ exchange. I remain with Greg Martin Auctions as its President. We regularly carry in inventory 2,000 or more lots of antique firearms. Greg Martin Auctions has sold numerous antique firearms at world record prices. Examples include an exceptional, rare and important U.S. Martial Colt Walker

revolver that sold for \$421,875, a Colt Model 1849 pocket revolver for \$826,000 and in our last auction, a historic engraved and half gold Winchester Model 1866 Lever Action Rifle for \$181,600. Since Greg Martin Auctions inception in 2002, we have sold over \$35 million, a good majority of which are antique, curio and relic firearms.

(WHAT FIREARMS THE ORDINANCE COVERS)

3. Section 2 of Proposition H bans any sale or transfer of a “firearm”. Section 3 bans the possession of any “handgun”. The Ordinance appears to have been written in complete ignorance of the customary exemptions and exceptions provided by the federal gun law, California law and the law of other states (or, perhaps, the Ordinance was deliberately intended not to have the usual exceptions and exemptions). Under those laws, antique, curio and relic firearms, and all pre-20th Century firearms, are exempt from most or any regulation. In contrast, the Proposition H bans apply to harmless, inoperable centuries old antiques no less than to modern firearms.

(EXTRATERRITORIAL EFFECTS OF SECTIONS 2 AND 3)

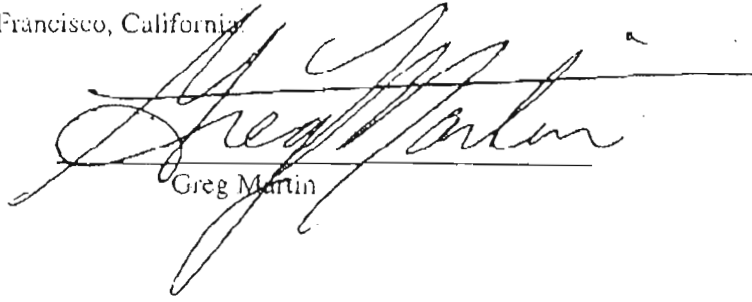
4. Greg Martin Auctions and Bonham’s & Butterfield’s are the only firearm auction houses in California north of Los Angeles and Orange counties. Each year thousands of buyers or prospective buyers come to both auction houses from outside San Francisco, indeed from all over the world. Both auction houses issue catalogues and display their property on the internet, but potential buyers who are

considering spending tens or hundreds of thousands of dollars on antique guns do not buy them sight unseen. Rather, they determine from the internet or catalogue that a particular antique is available and will come to San Francisco to examine the property for themselves.

5. The Proposition H ordinance affects not only San Franciscans but all Californians who collect, or wish to buy or sell, antique, curio or relic firearms. Local gun stores in other counties deal almost exclusively in modern guns or guns that are only a few year old. They may occasionally have a few 19th Century or early 20th Century firearms for sale. But the selection of even such fairly modern firearms available in a local gun store would be very limited. It would never include centuries old antiques. To either purchase or sell such ancient firearms a collector would go to an auction house, not to an ordinary gun store. Collectors desiring to purchase or sell antique, curio or relic firearms come from all over California (and the United States, as well as foreign nations) to Greg Martin Auctions and Bonham's & Butterfield's.
6. In addition, section 2 makes it impossible for San Francisco auction houses to buy and receive antique, curio and relic firearms. Delivery of an antique, curio or relic firearm to a San Francisco auction house would be a forbidden transfer under Proposition H. And section 3 makes it illegal for a San Francisco auction house to even possess such a firearm if it is a handgun.

(VERIFICATION)

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed this ___ day of January, 2006 at San Francisco, California.



Greg Martin

EXHIBIT “D”



City and County of San Francisco
Master Report

City Hall
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

File Number: 031932 **File Type:** Ordinance **Status:** Passed

Enacted: 260-04 **Effective:**

Version: 4 **Reference:** **In Control:** Mayor

File Name: Restricting the sale or transfer of 50 caliber firearms and ammunition, requiring reporting of firearm thefts, and deleting obsolete provisions regulating firearms **Introduced:** 11/25/2003

Requester: **Cost:** **Date Passed:** 11/4/2004

Comment No fiscal impact. **Title:** Ordinance amending the Police Code by deleting Sections 552, 556 and 557, relating to possession of firearms by minors and possession of facsimile firearms in order to conform to state law, amending Section 602 to delete redundant provisions and provisions relating to air guns in order to conform to state law; amending Sections 613.1, 613.10 and 613.10-1 to delete requirements relating to "Saturday Night Specials," restrictions on the sale of large capacity magazines and various other requirements relating to firearms dealers in order to conform to state law and add new requirements in Section 613.10-1 to restrict the sale or transfer of 50 caliber firearms and ammunition; amending Sections 613.2 and 613.3 to require the Chief of Police to conduct a background check on applicants for a firearms dealer license and such applicants' employees; amending Sections 613, 613.10-3, 613.12, 613.16, 613.19, 617 and 618 to make technical and conforming corrections; amending Section 613.10-2, restricting the sale of ultracompact firearms to update findings and exceptions to restrictions on sales, deleting Sections 614 through 616, relating to reporting of firearms sales by dealers in order to conform to state law, renumbering existing Sections 617 and 618 as Sections 614 and 615; and adding a new Section 616, requiring owners of firearms to report the loss or theft of a firearm to the Police Department.

Indexes: **Sponsors:** Gonzalez, Dufty, Daly

History of Legislative File 031932

Ver	Acting Body	Date	Action	Sent To	Due Date	Pass/Fail
1	President	11/25/2003	ASSIGNED UNDER 30 DAY RULE	City Services Committee	12/25/2003	
1	Board of Supervisors	7/13/2004	SUBSTITUTED			
	<i>Supervisor Gonzalez submitted a substitute ordinance bearing new title.</i>					
2	President	7/13/2004	ASSIGNED UNDER 30 DAY RULE	City Services Committee	8/12/2004	
2	Clerk of the Board	7/27/2004	REFERRED TO DEPARTMENT			
	<i>Referred to Youth Commission for comment and recommendation.</i>					
2	Board of Supervisors	9/21/2004	SUBSTITUTED			
	<i>Supervisor Gonzalez submitted a substitute ordinance bearing new title.</i>					
3	President	9/21/2004	ASSIGNED	City Services Committee		

3 City Services Committee 9/30/2004 AMENDED, AN
 AMENDMENT OF
 THE WHOLE
 BEARING SAME
 TITLE

*Heard in Committee. Speakers: Dave Grenell, Legislative Aide to Supervisor Gonzalez; Juliet Leftwich, Managing Attorney, Legal Community Against Violence; David Greenburg, Deputy City Attorney; Tom Boyer, Pink Pistols; Sharon Hewitt, Director, San Francisco State University CLAER Project; Andres Soto, Policy Director, San Francisco Trauma Foundation, San Francisco General Hospital; Lisa Feldstein; Shirley Byrd, San Francisco State University Urban Institute CLAER Project; Lena Gomes.
 (Supervisor Dufty added as a co-sponsor.)*

4 City Services Committee 9/30/2004 RECOMMENDED AS
 AMENDED Passed

4 Board of Supervisors 10/19/2004 PASSED ON FIRST
 READING Passed

Supervisor Daly requested to be added as a co-sponsor.

4 Board of Supervisors 10/26/2004 FINALLY PASSED Passed

4 Mayor 11/4/2004 APPROVED

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF LOS ANGELES

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

6 On January 11, 2006, I served the foregoing document(s) described as

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR**
8 **WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF**

8 on the interested parties in this action by placing

- 9 the original
10 a true and correct copy

10 thereof enclosed in sealed envelope(s) addressed as follows:

11 Wayne K. Snodgrass, Deputy City Attorney
12 Vince Chhabria, Deputy City Attorney
13 SAN FRANCISCO CITY ATTORNEY'S OFFICE
14 #1 Dr. Carlton B. Goodlett Place
15 City Hall, Room 234
16 San Francisco, CA 94102
17 Fax: (415) 554-4699

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

18 Executed on January 11, 2006, at Long Beach, California.

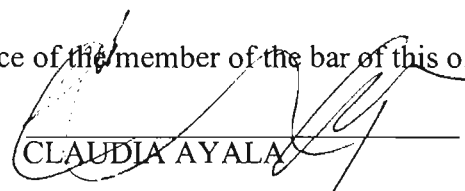
19 _____ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the
20 addressee.

21 _____ (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies
22 with California Rules of Court, Rule 2003, and no error was reported by the machine.
23 Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record
24 of the transmission, copies of which is attached to this declaration.

23 Executed on January 11, 2006, at Long Beach, California.

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

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

28 
CLAUDIA AYALA