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11 COUNTY OF SAN FRANCISCO  
12 UNLIMITED JURISDICTION

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17 FIREARMS RETAILERS, LAW  
ENFORCEMENT ALLIANCE OF  
18 AMERICA, and SAN FRANCISCO  
VETERAN POLICE OFFICERS  
ASSOCIATION,

19 Plaintiffs and Petitioners,

20 vs.

21 CITY AND COUNTY OF SAN  
22 FRANCISCO, SAN FRANCISCO  
POLICE CHIEF HEATHER FONG in her  
23 official capacity and SAN FRANCISCO  
POLICE DEPARTMENT, and Does 1-25,

24 Defendants and Respondents.  
25  
26  
27  
28

**ENDORSED  
FILED**  
San Francisco County Superior Court  
JAN 25 2006  
**GORDON PARK-LI, Clerk**  
By: RONNIE OTERO  
Deputy Clerk

Case No. CPF-05-505960

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
RESPONDENTS' OPPOSITION TO  
MOTION FOR WRIT OF MANDATE  
AND/OR PROHIBITION OR OTHER  
APPROPRIATE RELIEF**

Hearing Date: February 15, 2006  
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## INTRODUCTION

1  
2 One morning in 2005, Deanne Bradford walked her children into school in San Francisco.  
3 When she came out of the school, her husband confronted her with a legally owned handgun and  
4 shot her repeatedly, killing her. He then turned the gun on himself. Deanne's six young children are  
5 now orphans.

6 This tragic story is far from unique in San Francisco, where gun violence is increasingly  
7 killing, maiming, and terrorizing local residents. In the past five years, the number of local firearms  
8 homicides has almost doubled. Gun violence has become so pervasive in some City neighborhoods  
9 that authorities must "lock down" schools to keep children inside and safe when a threat is near.  
10 And gun violence's economic toll – over \$31 million each year for such services as emergency  
11 response, trauma care, and incarceration – is devastating.

12 In November 2005, the City's voters responded to this distinctly local crisis by adopting  
13 Proposition H. That measure bans handgun possession by City residents only, other than peace  
14 officers and others who require them for professional purposes, and other than residents who state  
15 law already bars from possessing a handgun. It also bans the local sale, transfer, manufacture and  
16 distribution of guns and ammunition. The National Rifle Association and others (collectively "the  
17 NRA") have now sued to block the voters' will, claiming that the initiative is preempted by state  
18 law. But the NRA is wrong on multiple grounds.

19 In prohibiting City residents from possessing handguns, the voters properly exercised San  
20 Francisco's Constitutional power to regulate municipal affairs. (Cal. Const. Art. XI, Sec. 5(a)).<sup>1</sup>  
21 This power is granted to charter cities "upon the principle that the municipality itself knew better  
22 what it wanted and needed than the state at large, and to give that municipality the exclusive  
23 privilege and right to enact direct legislation which would carry out and satisfy its wants and  
24 needs[.]" (*Johnson v. Bradley* (1992) 4 Cal.4<sup>th</sup> 389, 395-96 [emphasis omitted].) San Franciscans  
25 have a vital interest in protecting themselves from gun violence, and their decision to forego  
26 handgun possession, by City residents who are not precluded from handgun possession by state law,

27 <sup>1</sup> Unless otherwise specified, references to Articles are to the California Constitution.  
28



1 is of no significant concern to anyone outside the City. That policy choice is a proper exercise of  
2 home rule power, valid without regard to potentially conflicting state statutes. And, contrary to the  
3 NRA's claims, *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 ("*Doe*") does  
4 not bar the voters' exercise of home rule power; that decision reached no holding on that power,  
5 because the extent of home rule authority was not even at issue in the case.

6 Proposition H's ban on the sale, transfer, and distribution of firearms, although not based on  
7 the home rule power, also is not preempted by state law. Neither in the Unsafe Handgun Act  
8 ("*UHA*") or elsewhere has the Legislature sought to fully occupy the field of firearms sales. In fact,  
9 "in view of the Legislature's record of carefully refraining from broad preemptions and instead  
10 dealing with narrow areas of firearms control in statutes of limited scope, there is clear indication of  
11 absence of an intent to preempt" gun sales restrictions. (*California Rifle and Pistol Ass'n v. City of*  
12 *West Hollywood* ["*CRPA*"] (1998) 66 Cal.App.4<sup>th</sup> 1302, 1317-18; *Great Western Shows, Inc. v.*  
13 *County of Los Angeles* (2002) 27 Cal.4<sup>th</sup> 853, 866 ["*Great Western*".]) Because the local sale,  
14 transfer, and distribution ban does not conflict with any "narrow area of firearms control" that the  
15 state's "statutes of limited scope" address, it is not preempted.

16 The NRA's remaining claims barely merit discussion. Its claim that Proposition H will  
17 undermine law enforcement fails because it relies on absurd interpretations of the law that violate  
18 many rules of statutory construction. Its claim that the law's possession ban illegally discriminates  
19 against City residents fails because lawmakers may tackle a problem one step at a time, and also  
20 because the voters limited the ban to City residents precisely *to avoid* possible constitutional  
21 infirmities. And its efforts to sidestep the law's severability clause are simply specious.

22 This Court should uphold the voters' reasoned effort to protect the City by reducing the local  
23 presence and prevalence of firearms. It should deny the NRA's writ motion.

## 24 **FACTUAL BACKGROUND**

### 25 **I. THE DRAMATIC UPSURGE IN GUN VIOLENCE IN SAN FRANCISCO**

26 In recent years, gun violence has increasingly terrorized San Franciscans. The number of  
27 people in the City killed by guns each year has more than doubled in the last five years, from 39  
28 deaths in 2001 to 80 in 2005. (*See* Declaration of Lt. John Hennessey at ¶2.) And guns also are

1 accounting for an ever-increasing *share* of homicide victims. In 2001, 61% of homicides involved  
2 firearms; in 2005, that figure was 83%. (*Id.*) As the officer in charge of the San Francisco Police  
3 Department ("SFPD")'s Homicide Detail put it, in recent years "there has been a dramatic increase  
4 in the use of firearms during the commission of a homicide." (*Id.* at ¶6.)

5 Of all guns, handguns present the greatest threat to public safety, because they are far more  
6 prevalent than long guns and are more easily used to commit crimes because of their concealability.  
7 As the SFPD reports, "the vast majority of firearms homicides over the past three years involved the  
8 use of a handgun." (Hennessey Dec. at ¶ 7.) A 2002 study by the City's Department of Public  
9 health found that two-thirds of gun incidents in 1999 involved handguns. (Respondents' Request  
10 for Judicial Notice ["RFJN"], Exh. 2 at p. 157.)<sup>2</sup>

11 The toll exacted by gun violence is worst in a few neighborhoods: Bayview/Hunter's Point,  
12 Visitacion Valley, Ingleside, the Mission, South of Market, and Potrero Hill. These six  
13 neighborhoods comprise only 35.5% of the City's geographic area, and contain only 33.6% of its  
14 population. (Declaration of Vince Chhabria, Exh. 1.) Yet between 1999 and 2001, residents of  
15 these six neighborhoods were the victims of 336 firearms homicides and injuries – 68% of the  
16 citywide total in that period. (RFJN, Exh. 3 at p. 46; Hennessey Dec. at ¶ 8.)

17 Gun violence is now so pervasive that police and school officials regularly must "lock  
18 down" schools in these neighborhoods, closing off the entrances and exits to schools to keep  
19 children inside when a threat is near. (*See* Declaration of Lt. Colleen Fatooh at ¶¶ 2-3.) Since the  
20 start of the current school year, the authorities have already been forced to lock down at least ten  
21 schools. (*Id.*, ¶ 4.) Very recently, seven Visitacion Valley-area schools – including five elementary  
22 schools – were locked down after authorities learned of an armed homicide suspect in a nearby  
23 park. (*Id.*, ¶5.) A week earlier, the Burnett Child Development Center in Bayview was locked  
24 down because of a gunman across the street, forcing authorities to divert approximately 25 buses

25 <sup>2</sup> Guns also devastate San Franciscans' lives through non-fatal firearms injuries and firearms  
26 suicides. (*See* Declaration of Vince Chhabria, Exh. 3; RFJN, Exh. 2 at p. 157 [San Francisco Dept.  
27 of Public Health and San Francisco Injury Center, *San Francisco Firearm Injury Reporting System  
Annual Report* (February 2002) ("2002 DPH Study")]; *see also* RFJN, Exh. 3 at p. 46 [Dept. of  
28 Public Health, *Local Data for Local Violence Prevention* (Spring 2005) ("2005 DPH Report").])

1 full of children who were on their way to the Center for an after-school program. (*Id.*, ¶6.) And  
2 even in 2006, authorities have been shot at by gun-toting students, and have found illegal guns in  
3 the possession of school children. (*Id.*, ¶7.)

## 4 II. THE HUMAN COSTS OF THE CITY'S GUN VIOLENCE EPIDEMIC

5 The tragic stories of Deanne Bradford, Brian Williams and Roger Young – described in the  
6 accompanying Declarations of Diane Bradford, Cathy Tyson, and Kathy Hood, respectively – show  
7 how the City's gun crisis is brutally upending and destroying local residents' lives.

8 Deanne Bradford. Deanne Bradford, who had recently separated from her husband, Roger  
9 Johnson, was taking care of her six minor children by herself. On July 5, 2005, Deanne drove her  
10 children to William Cobb School in San Francisco. (Bradford Dec., ¶¶ 2, 8.) She walked her  
11 children into the school, then walked out. Johnson was waiting for her outside with a legally owned  
12 handgun. (*Id.*, ¶9.) He repeatedly shot Deanne, killing her at the school. (*Id.*) Later that day,  
13 Johnson used the same handgun to kill himself. (*Id.*, ¶10.) Deanne's six children – all between two  
14 and twelve years old – are now being raised separately. (*Id.*, ¶12.) They still talk about their  
15 mother every day. (*Id.* at ¶14.) They also talk about Roger, remembering "how badly he treated  
16 their mother. Sometimes they even say they wish they could kill Roger." (*Id.* at ¶15.)

17 Brian Williams. At about 9:00 p.m. on December 31, 2000, Cathy Tyson got a phone call  
18 from her mother, who had looked out her window in response to gunshots only to see Cathy's son,  
19 Brian Williams, lying on the street. (Tyson Dec. at ¶2.) Cathy drove to San Francisco General  
20 Hospital with her six-year old grandson, Brian Williams Junior, who was also no stranger to gun  
21 violence, having required major surgery less than a year earlier after being hit by a stray bullet  
22 while he lay in bed. (*Id.*, ¶15.) About an hour later, Cathy learned that her son was going to die.  
23 (*Id.*, ¶¶ 7-8.) When Cathy told her grandson of his father's killing, "he was devastated and wanted  
24 to know why God kept taking away the people he loved. Later, Brian Junior told me that his chest  
25 hurt him. When I asked him if it was something he ate, he said, "no, I don't think I have a heart  
26 anymore." (*Id.* at ¶¶ 9-10.) To compound the family's tragedy, Cathy later learned that her son had  
27 been the innocent victim of bullets intended for someone else. (*Id.* at ¶11.)

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28 Roger Young. Roger Young planned to be married on July 25, 2004. But on July 24, 2004,

1 he became the City's 57<sup>th</sup> homicide victim of that year. (Hood Dec. at ¶¶ 1, 10.) Young went to a  
2 friend's house in Ingleside and found a robbery taking place. (*Id.*, ¶9.) The robbers shot and killed  
3 Roger's friend, and also shot another resident, leaving her permanently disabled. (*Id.*) They shot  
4 Roger twice in the head with a handgun, possibly while he was trying to run away. (*Id.*, ¶10.) More  
5 than a year later, Roger's three-year old daughter, Kelani, still asks for her father. (*Id.*, ¶12.)

### 6 III. THE ECONOMIC COSTS OF SAN FRANCISCO'S GUN VIOLENCE EPIDEMIC

7 San Francisco's gun crisis also imposes dramatic economic costs on the City's taxpayers.  
8 (*See* Declaration of Controller Edward Harrington.) Each year, the City's Department of Public  
9 Health must provide hospital care to gunshot victims, costing almost \$6.2 million. (*Id.* at ¶6 & Att.  
10 A.) The Sheriff's Office must spend \$3.6 million to incarcerate firearms offenders. (*Id.*) The  
11 Police and Fire Departments must spend \$17.4 million responding to firearm-related crimes. (*Id.*)  
12 In all, gun violence costs the City at least \$31.2 million per year (*id.*) – even excluding major  
13 expenses such as foster care for children orphaned in firearms deaths. (*Id.* at ¶8.)

### 14 LEGAL BACKGROUND

#### 15 I. CALIFORNIA LAW ALLOWS LOCAL SOLUTIONS TO GUN VIOLENCE

16 California courts have long recognized that gun violence needs local solutions. In *Galvan v.*  
17 *Superior Court* (1969) 70 Cal.2d 851, the Court held that because "licensing" is distinct from  
18 "registration," a local law that required gun registration was not preempted by Penal Code Section  
19 12026, which only addressed "permit" or "license" requirements. (*Id.*, 70 Cal.2d at p. 856.)  
20 Weapons control, the Court held, was not a matter of "paramount state concern which will not  
21 tolerate further or additional local requirements":

22 The issue of 'paramount state concern' also involves the question 'whether  
23 substantial geographic, economic, ecological or other distinctions are  
24 persuasive of the need for local control, and whether local needs have been  
25 adequately recognized and comprehensively dealt with at the state level.' . . . .  
*That problems with firearms are likely to require different treatment in San  
Francisco County than in Mono County should require no elaborate  
citation of authority.*

26 (*Id.* at pp. 863-64 [emphasis added].) Similarly, just three years ago the Court again held that the  
27 need for gun regulation "may be much greater in large cities, where multitudes of people  
28 congregate, than in the country districts or thinly settled communities, where there is much less

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1 opportunity and temptation to commit crimes of violence for which such weapons may be used."  
2 (*Great Western*. at p. 867; *see also CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1318 [citing need to "permit local  
3 governments to tailor firearms legislation to the particular needs of their communities"].)

4 San Francisco is California's most densely populated county, with 776,733 people living  
5 within 46.7 square miles. (Chhabria Dec., Exh. 2.)<sup>3</sup> And San Francisco suffers far more gun  
6 violence than do sparsely populated rural counties. Between 1991 and 2003 – when 1,844 San  
7 Francisco residents were hospitalized for non-fatal firearms injuries – *only three* Mono County  
8 residents were hospitalized for such injuries. And in Alpine County there was only *one* such injury  
9 during the same period. (Chhabria Dec., Exh. 3.)

10 The Legislature, too, has consistently been respectful of local regulatory authority, declining  
11 to preempt local law any more broadly than necessary to accomplish its narrow legislative purposes.

- 12 • In response to *Galvan*, the Legislature adopted what is now Government Code Section  
13 53071, expressly "occupy[ing] the whole field of registration or licensing of . . .  
14 firearms." But "[d]espite the opportunity to include an expression of intent to occupy the  
15 entire field of firearms, the legislative intent was limited to registration and licensing."  
16 (*Great Western*, 27 Cal.4<sup>th</sup> at p. 862.)
- 17 • Thereafter, the Court of Appeals upheld a local law that barred parents from allowing  
18 their minor children to possess or fire BB guns. (*Olsen v. McGillicuddy* (1971) 15  
19 Cal.App.3d 897, 900.) In response, the Legislature enacted Government Code Section  
20 53071.5, expressly occupying only the "field of regulation of the manufacture, sale, or  
21 possession of *imitation* firearms . . ." (*Id.* [emphasis added].) "[O]nce again the  
22 Legislature's response was measured and limited, extending state preemption into a new  
23 area . . . but at the same time carefully refraining from enacting a blanket preemption of  
24 all local firearms regulation." (*Great Western*, 27 Cal.4<sup>th</sup> at p. 863.)
- 25 • Since the First District decided *Suter v. City of Lafayette* (1997) 57 Cal.App.4<sup>th</sup> 1109 –  
26

27 <sup>3</sup> In comparison, Marin County's 247,289 residents live within 308.4 square miles, and  
28 Mono County's 12,853 residents live within 3,044.4 square miles. (Chhabria Dec., Exh. 3.)

1 holding that Penal Code Section 12071, addressing licenses to *sell* firearms, "does not, in  
2 general, exclude local agencies from imposing additional restrictions on the licensing of  
3 firearms dealers" (*id.* at p. 1125) – the Legislature has not enacted any statute  
4 preempting local regulations of firearms sales. Indeed, earlier this year, it amended  
5 Section 12071 without disturbing that law's narrow preemptive effect. [RFJN, Exh. 4].)

- 6 • In 1999 the Legislature enacted the Unsafe Handgun Act ("UHA"), now codified at  
7 Penal Code Section 12131.1. The UHA, a consumer protection measure designed to  
8 protect handgun users from defective products, requires the Department of Justice to test  
9 handguns and to maintain a roster of handguns that are not "unsafe." (*Id.*, §12131.1(a)-  
10 (f).) Again, rather than broadly occupying areas of firearms regulation, the Legislature  
11 made no mention of preemption – limiting the UHA's reach to consumer protection.

## 12 II. THE 1982 *DOE* DECISION

13 Virtually alone amid the many decisions consistently upholding local gun regulations  
14 against preemption challenges, *Doe* held that a 1982 San Francisco law that prohibited all persons  
15 from possessing handguns in the City was preempted. Because the law expressly exempted from its  
16 possession ban "any person authorized to carry a handgun by Penal Code section 12050," it  
17 "create[d] a new class of persons who will be required to obtain licenses in order to possess  
18 handguns," making it "at least a local regulation relating to licensing," and as such expressly  
19 preempted by Government Code Section 53071 and by Penal Code Section 12026. (*Id.* at pp. 516-  
20 18.) In dicta, the court also stated that the law was impliedly preempted by Penal Code Section  
21 12026, from which the court "inferred ... that the Legislature intended to occupy the field of  
22 residential handgun possession to the exclusion of local [regulation]." (*Id.* at p. 518.)

23 Because San Francisco conceded its law did not regulate a municipal affair (*id.* at p. 513),  
24 the scope of municipal affairs power was not at issue, and the court reached no holding on that  
25 question. But it agreed with the City's concession, noting that the local law "prohibit[ed]  
26 possession by both residents and those passing through San Francisco." (*Id.*)

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## 27 III. THE VOTERS' RESPONSE TO SAN FRANCISCO'S GUN VIOLENCE CRISIS

28 In November 2005 the City's voters approved Proposition H, which contains two substantive

1 provisions. Section 2 bans the sale, manufacture, transfer or distribution of ammunition and  
2 firearms in the City, while Section 3 bars City residents from possessing handguns in the city,  
3 except peace officers and others who need guns for professional purposes. (RFJN, Ex. A, p. 101, §§  
4 2, 3.)<sup>4</sup>

5 The measure expressly invokes the City's home rule power with regard to Section 3,  
6 explaining that the measure is not intended to affect "any resident of other jurisdictions with regard  
7 to handgun possession, including those who may temporarily be within the boundaries of the City  
8 and County." (*Id.*, §1.) The initiative also states that because it is not intended to duplicate state  
9 law, "any person currently denied the privilege of possessing a handgun under state law shall not be  
10 covered by this ordinance." (*Id.*, §6.) It also contains a severability clause. (*Id.*, §7.)

#### 11 ARGUMENT

#### 12 I. SECTION THREE IS A VALID EXERCISE OF HOME RULE AUTHORITY

13 The NRA argues at length that Section 3 of Proposition H is preempted by State law.  
14 (Memorandum of Points and Authorities ["MPA"] at 3-13.) But in adopting Section 3, the voters  
15 expressly relied on the City's home rule power, the broad Constitutional power of charter city self-  
16 determination. Article XI, Section 5 grants charter cities exclusive authority over their own  
17 municipal affairs, making such cities "supreme and beyond the reach of legislative enactment" in  
18 that domain. (*California Federal Savings and Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d  
19 1, 12 ["*CalFed*"]; Art. XI, §5(a).)<sup>5</sup> Under Section 5(a), a charter city "gain[s] exemption, with  
20 respect to its municipal affairs, from the 'conflict with general laws' restrictions of section 11 of

21 <sup>4</sup> San Francisco's handgun possession ban is far from novel. In 1976, Washington, D.C.  
22 banned civilian handguns, reportedly causing significant declines in local homicides and suicides by  
23 firearms. (C. Loftin, et al., *Effects of restrictive licensing of handguns on homicide and suicide in*  
24 *the District of Columbia*, 325 *New England Journal of Medicine*, 1615-1620 (Dec. 5, 1991)  
[Chhabria Declaration, Exh. 4].) Several Illinois communities also have banned handguns. (*See*  
*Quilici v. Village of Morton Grove*, (7th Cir. 1982) 695 F. 2d 261, 270 [upholding ban against  
Second Amendment challenge].)

25 <sup>5</sup> "It shall be competent in any city charter to provide that the city governed thereunder may  
26 make and enforce all ordinances and regulations in respect to municipal affairs, subject only to  
27 restrictions and limitations provided in their several charters and in respect to other matters they  
28 shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede  
any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent  
therewith." (Art. XI, §5(a).)

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1 article XI." (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.) Because charter city measures  
2 regulating municipal affairs are not subject to preemption, Section 5(a) articulates "the general  
3 principle of self-governance" for charter cities. (*Johnson*, 4 Cal.4<sup>th</sup> at p. 398.)

4 The voters appropriately used the broad Constitutional home rule power to adopt Section 3.  
5 Handgun violence exacts an enormous toll on the City, leaving death, shattered lives, and very  
6 significant financial costs in its wake. By reducing the number of handguns in the City, Section 3  
7 seeks to lessen those awful consequences – a matter of vital local concern. And by not preventing  
8 any non-City resident from possessing a handgun, and by allowing peace officers, other public  
9 employees, and security guards to possess handguns as needed for their professional duties, Section  
10 3 is narrowly tailored to San Francisco's interests, and raises no significant extramunicipal concerns  
11 that could exceed the City's home rule authority. Whether local voters choose to restrict the City's  
12 residents from possessing handguns is of no significant concern to anyone outside the City.

13 **A. San Francisco Enjoys Exclusive Authority Over Its Municipal Affairs.**

14 **1. Charter cities' broad home rule powers.**

15 Under California's original 1849 Constitution, "the Legislature had power to enlarge or  
16 restrict city powers." (*Johnson*, 4 Cal.4<sup>th</sup> at pp. 394-95 [internal quotes omitted].) Although the  
17 1879 Constitution "manifestly" sought to reduce Legislative control over cities, it inadvertently  
18 "continue[d] to subordinate charter city legislation to general state laws." (*Id.* at p. 395.)

19 In response, California's voters amended the Constitution in 1896 to expressly provide for  
20 charter city home rule power. The voters sought to grant broad self-rule power to charter cities, and  
21 to grant those cities equally broad protection against conflicting state legislation. They intended

22 to enable municipalities to conduct their own business and control their own  
23 affairs to the fullest possible extent in their own way. [The amendment] was  
24 enacted upon the principle that the municipality itself knew better what it  
25 wanted and needed than the state at large, and to give that municipality the  
26 exclusive privilege and right to enact direct legislation which would carry out  
27 and satisfy its wants and needs[.]

28 (*Johnson*, 4 Cal.4<sup>th</sup> at pp. 395-96 [emphasis original, ellipses omitted]; *Ex parte Braun* (1903) 141  
Cal. 204, 208-09.) Soon after 1896, the high court confirmed the breadth of the home rule power,  
holding that the words "municipal affairs" are "words of *wide import – broad enough to include all*



1 powers appropriate for a municipality to possess." (*Ex parte Braun*, 141 Cal. at p. 209 [emphasis  
2 added].) It reaffirmed that holding in 1991. (*CalFed*, 54 Cal.3d at p. 12.) The "comprehensive  
3 nature of the [home rule] power" is beyond dispute. (*Bishop*, 1 Cal.3d at p. 62.)<sup>6</sup>

4 In 1914 the voters again acted to solidify the breadth of charter cities' home rule powers,  
5 amending the Constitution to allow charter cities to invoke full authority over municipal affairs  
6 without the need to specifically invoke particular powers. (*Sato, Municipal Affairs in California*  
7 (1972) 60 Cal.L.Rev. 1055, 1056-57.) As a result, a city that adopts a charter for self-governance  
8 assumes the full sovereign powers of the State over municipal affairs. It is presumed to have  
9 granted itself the broadest possible authority over municipal affairs, unless the charter expressly  
10 limits that authority. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4<sup>th</sup> 161, 170.)

11 "No exact definition of the term 'municipal affairs' can be formulated and the courts have  
12 made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give  
13 it meaning in each controverted case." (*CalFed*, 54 Cal.3d at p. 16.) Rather than employing a  
14 "static and compartmentalized description of 'municipal affairs,'" courts must "allocate the  
15 governmental powers under consideration in the most sensible and appropriate fashion as between  
16 local and state legislative bodies." (*Id.* at pp. 13, 17.)

## 17 2. Charter cities' home rule powers encompass the police power.

18 The Supreme Court has long held that the municipal affairs power is "broad enough to  
19 include all powers appropriate for a municipality to possess." (*Ex parte Braun*, 141 Cal. at p. 209.)  
20 One such appropriate, and in fact "indispensable[,] prerogative of sovereignty" is the police power.  
21 (*Miller v. Board of Public Works of the City of Los Angeles* (1925) 195 Cal. 477, 484.)<sup>7</sup> Therefore,  
22

23 <sup>6</sup> The 1896 addition of those provisions caused "a fundamental reallocation of political  
24 powers between the legislature and a chartered city." (*Sato, Municipal Affairs in California* (1972)  
25 60 Cal.L.Rev. 1055, 1058.) Charter cities' "power of complete autonomous rule with respect to  
26 municipal affairs represents a vast residuum of power ... giving to a charter city a potentially much  
27 greater range of power than that available to the general law cities." (Grodin et al., *The California*  
28 *State Constitution: A Reference Guide* (1993 Ed.), at 189.)

<sup>7</sup> The Constitutional grant of police power to all cities in 1896 was materially  
indistinguishable from that found at Article XI, Section 7 today. (*Compare* Article XI, §7 and  
former Article XI, §11 as quoted in *Ex parte Lacey* (1895) 108 Cal. 326, 327-28.)

1 the municipal affairs power must be broad enough to encompass the police power.<sup>8</sup>

2 More recently, the courts have repeatedly held that a charter city may use its home rule  
3 power to regulate private conduct within the municipality to promote the public welfare. *In re*  
4 *Hubbard* (1964) 62 Cal.2d 119 held that a charter city could enforce its own ordinance prohibiting  
5 games of chance – a classic regulation of private conduct serving general welfare – notwithstanding  
6 general state anti-gambling statutes. The ordinance was enforceable because it was “a regulation of  
7 a municipal affair” as to which charter cities enjoy “the exclusive right ... to regulate,” and it would  
8 have no adverse effect on transient citizens. (*Id.*, 62 Cal.2d at pp. 127, 128.)

9 Similarly, in *Porter v. City of Santa Barbara* (1934) 140 Cal.App. 130, the court upheld a  
10 charter city ordinance that banned boxing contests, even though the plaintiff had been issued a  
11 license from a state athletic commission purporting to allow such events. As the court held, the

12 acceptance, or nonacceptance by a city, of such a business and of the  
13 conditions which go with such a business, presents essentially a local  
14 question, involving locally special and peculiar interests, not affecting the  
15 state at large. These facts drive directly to the conclusion that the matter of  
16 local prohibition of the business is a 'municipal affair,' concerning which the  
17 city ordinance, and not the general law, must prevail.

18 (*Id.*, 140 Cal.App. at p. 132.) And most recently, the Court in *CalFed* confirmed that the municipal  
19 affairs doctrine is applicable to “charter city regulatory measures.” (*Id.*, 54 Cal.3d at p. 14.)<sup>9</sup>

### 20 3. The *CalFed* analysis.

21 *CalFed* and cases following it describe the approach that courts facing home rule issues  
22 must follow. As a threshold matter, the court will not resolve a putative conflict between a state

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23 <sup>8</sup> One contemporary academic commentator recognized that home rule power must logically  
24 extend to local health and safety enactments, and criticized the claim that “no police or health  
25 measures can be municipal affairs” as “absurd.” (Jones, “*Municipal Affairs*” in the *California*  
26 *Constitution* (1913) 1 Cal.L.Rev. 132, 144.)

27 <sup>9</sup> See also *Ex parte Braun*, 141 Cal. at p. 211 [citing with approval New Jersey case holding  
28 state statute requiring charter city to restrict, limit or extend racing interfered with city's municipal  
29 affairs]; Article XII, Section 8 [excluding city powers “relating to the making and enforcement of  
30 police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter” from  
31 powers granted to Public Utilities Commission]; *City of Oakland v. Williams* (1940) 15 Cal.2d 542,  
32 549 [charter cities that agreed to jointly study sewage problems “possess the necessary police  
33 power, both under constitutional grant and under their respective charters, to abate nuisances, to  
34 preserve the health of their inhabitants and to construct and maintain sewers”].

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1 statute and a charter city measure unless two "preliminary considerations" are satisfied. The local  
2 measure must "implicate[] a municipal affair," and – to avoid sensitive constitutional law issues  
3 where possible – the it must "pose[] a genuine conflict with state law." (*CalFed*, 54 Cal.3d at p.  
4 17.) If these requirements are met, "the question of statewide concern is the bedrock inquiry  
5 through which the conflict between state and local interests is adjusted." Only where a genuine  
6 statewide concern is implicated, and where the state law is narrowly tailored to resolve that concern,  
7 can the state statute take precedence over the conflicting charter city measure. (*Id.*)

8       Significantly, a court may not lightly assume that a matter implicates statewide interests.  
9 Rather, in order to "resist[] the invasion of areas which are of intramural concern only, preserving  
10 core values of charter city government," *CalFed* "requir[es], as a condition of state legislative  
11 supremacy, a dimension demonstrably transcending identifiable municipal interests." (*Johnson*, 4  
12 Cal.4<sup>th</sup> at pp. 399-400 [emphasis original].) And it is for the courts, not the Legislature, to decide  
13 whether a given local law address a municipal affair or statewide concern. Even if the Legislature  
14 has declared a subject to be of statewide concern, such declarations "do not ipse dixit make it so; we  
15 exercise our independent judgment as to that issue." (*CalFed*, 54 Cal.3d at p. 24, fn. 21.)

16       **B. Section 3's Prohibition Addresses A Municipal Affair.**

17       **1. Section 3 implicates a municipal affair.**

18       As an initial matter, Section 3 "implicate[s] a municipal affair," one of *CalFed's* two  
19 "preliminary considerations" that must be satisfied to before a state/local conflict will be resolved.

20       The NRA appears to concede this point, and wisely so. Section 3 addresses an urgent  
21 municipal concern: handgun violence and its effect on San Franciscans. Handgun violence exacts a  
22 profound human and emotional toll on the lives of local residents, many of whom have been killed,  
23 injured, or robbed of their loved ones by handguns. It also imposes huge financial costs on the City,  
24 which must provide emergency response, medical care, social services, and other services in  
25 response to handgun violence, and must pass the costs of those services on to its taxpayers.

26       San Francisco must be able to respond to these problems. When state laws "may not be  
27 adequate to meet the demands of densely settled municipalities...it becomes proper, *and even*  
28 *necessary*, for municipalities to add to state regulations provisions adapted to their special

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1 requirements." (*Galvan*, 70 Cal.2d at p. 864 [emphasis added].) And handgun violence is a  
2 particularly compelling example of a problem that charter cities must have authority to address,  
3 because it is not adapted to a "one size fits all" state regulation: "problems with firearms are likely  
4 to *require* different treatment in San Francisco County than in Mono County." (*Id.* [emphasis  
5 added].) The power to address such a pressing local threat to public safety and the public fisc is  
6 certainly a "power appropriate for a municipality to possess." (*CalFed*, 54 Cal.3d at p. 12.)

7 **2. Section 3 conflicts with Penal Code Section 12026 as construed by *Doe*.**

8 *CalFed's* second "preliminary consideration" – a conflict with state law – also is present.  
9 Section 3 conflicts with Penal Code Section 12026(b), as *Doe* interpreted that subsection. *Doe*  
10 "infer[red] from Penal Code Section 12026 that the Legislature intended to occupy the field of  
11 residential handgun possession to the exclusion of local government entities." (*Id.*, 136 Cal.App.3d  
12 at p. 518.) Section 12026, as thus interpreted, cannot be reconciled with Section 3, which prohibits  
13 most City residents from possessing a handgun within city limits, including in their homes.<sup>10</sup>

14 **3. Allowing a charter city to prohibit only its own residents from possessing  
15 handguns does not implicate any significant statewide interests.**

16 Because Section 3 implicates a municipal affair and conflicts with state law, the Court must  
17 adjust the conflict between any state and local interests that are involved in that local provision,  
18 "allocat[ing] the governmental powers under consideration in the most sensible and appropriate  
19 fashion as between the local and state legislative bodies." (*CalFed*, 54 Cal.3d at p. 17.) And to  
20 divest the City of its Constitutional home rule power, statewide concerns implicated by Section 3  
21 must be genuine and weighty, not insubstantial or remote. The Court must uphold Section 3's  
22 prohibition as a municipal affair unless it finds "a *convincing basis* for [state] legislative action

23 <sup>10</sup> To be clear, San Francisco believes that *Doe's* interpretation of Penal Code §12026 was  
24 legally unsound. For present purposes, however, the City does not contest that §3 of Proposition H  
25 conflicts with *Doe's* "inference" that the Legislature intended Penal Code §12026(b) to occupy the  
26 field of residential handgun possession by implication. However, contrary to the NRA's claims, §3  
27 does not conflict with *Doe's* holdings as to express preemption under Penal Code §12026(b) and  
28 Government Code §53071. Unlike the ordinance in *Doe*, §3 does not "exempt from the general ban  
on possession any person authorized to carry a handgun pursuant to Penal Code section 12050"  
(*Doe*, 136 Cal.App.3d at p. 516-17), either expressly or by implication. It thus does not "create a  
new class of persons who will be required to obtain licenses in order to possess handguns," which  
was the basis on which *Doe* held the 1982 ordinance to be expressly preempted. (*Id.* at p. 517.)

1 originating in extramunicipal concerns, one justifying legislative supersession based on *sensible*,  
2 *pragmatic considerations.*" (*Johnson*, 4 Cal.4<sup>th</sup> at p. 405 [emphases added].)

3 a. Section 3's prohibition applies only to local residents.

4 As the NRA admits, whether a local law implicates statewide interests turns, in great part,  
5 on whether the law has meaningful impacts outside the jurisdiction that has adopted it.

6 In *Ex parte Braun*, for example, the Court held that a charter city tax measure was a  
7 municipal affair, explaining that it was "confined in operation to the city of Los Angeles, and affects  
8 none but its citizens and taxpayers and those doing business within its limits." (*Id.*, 141 Cal. at p.  
9 210.) The local law was "peculiarly for the benefit of the inhabitants of the city, and not directly for  
10 the benefit of any one else." (*Id.*) The concurring opinion echoed this key point, upholding the law  
11 as a home rule measure because it "appl[ies] only to the territory of the city and the inhabitants  
12 thereof, and no other person being affected thereby." (*Id.* at p. 214 [McFarland, J., concurring].) To  
13 the same effect is *Fisher v. County of Alameda* (1993) 20 Cal.App.4<sup>th</sup> 120, which held that a charter  
14 city's real estate transfer tax regulates a municipal affair because it "has no impact outside the limits  
15 of the taxing municipality but rather 'is purely local in its effects.'" (*Id.* at pp. 130-31.)

16 In *CalFed*, by contrast, the Court – relying on an unusually detailed record of express  
17 Legislative findings and reports – held that a charter city ordinance taxing financial institutions was  
18 a matter of extramunicipal, and thus statewide, concern. *Ex parte Braun* was distinguishable, the  
19 Court held, because it had involved a garden-variety tax measure that "was entirely local," affecting  
20 only citizens, taxpayers, and businesses in Los Angeles, while the law in *CalFed* implicated "a  
21 widespread fiscal crisis across the state." (*Id.* at p. 12.) Notably, the Legislature had expressly  
22 found a need for "tax rate parity" to create a level playing field among different types of financial  
23 institutions, and its findings were supported by extensive legislative and regulatory reports,  
24 developments in federal law, and "the increasingly vulnerable financial condition of the savings and  
25 loan industry throughout the decade of the 1970's and beyond." (*Id.*, 54 Cal.3d at pp. 18-24.) This  
26 elaborate record, the Court held, was sufficient to oust the charter city of the home rule authority it  
27  
28

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normally would enjoy over its local tax laws.<sup>11</sup>

Like the ordinances in *Ex parte Braun* and *Fisher*, Section 3's handgun possession ban has purely local consequences, affecting "none but its citizens." (*Ex parte Braun*, 141 Cal. at p. 210.)<sup>12</sup> It has no effect on transient, non-resident citizens who travel to or pass through San Francisco. Nor does it affect residents of neighboring cities who operate businesses in San Francisco, and keep handguns at such businesses. Nor does it have any material effect on gun dealers, operators of shooting ranges, or other firearms-related businesses located outside of San Francisco. Section 3 creates no extramunicipal concerns that could take it outside San Francisco's home rule power.

**b. Doe does not defeat the voters' exercise of home rule power.**

The NRA erroneously claims that the *Doe* court "held that the 1982 handgun ban was not defensible under the home rule doctrine because of its effect on 'residents of nearby cities where San Francisco's handguns might be sold.'" (MPA at 23.) But this Court should not be misled.

First, *Doe* contains no holding on home rule power. Because the City there expressly conceded that its 1982 ordinance – which prohibited non-residents and residents alike from possessing handguns – did not regulate municipal affairs (136 Cal.App.3d at p. 513), the scope of home rule authority was not at issue.<sup>13</sup> While the court opined that the 1982 ordinance implicated statewide interests, its musings were entirely unnecessary to the decision. As such, they are pure dicta that have no precedential value, and do not bind this Court. (*Trope v. Katz* (1995) 11 Cal.4<sup>th</sup> 274, 287 ["only the ratio decidendi of an appellate opinion has precedential effect"]; *Camarillo v. Vaage* (2003) 105 Cal.App.4<sup>th</sup> 552, 565.)<sup>14</sup>

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<sup>11</sup> *Accord, Pacific Tel. & Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, 773 [maintenance of telephone lines in city was matter of statewide concern, because if lines were removed, "people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so"].

<sup>12</sup> Section 3 also does not affect the manner in which peace officers or security guards in the City may possess and use handguns to perform their professional duties. It thus will not alter the level of police or private security protection available to non-City residents within the City.

<sup>13</sup> That 1982 concession does not prevent the City's voters, 23 years later, from relying on the home rule power to adopt §3. The City's 1982 concession did not, and could not, purport to address a handgun prohibition that applies to residents only.

<sup>14</sup> Even if *Doe's* statements on municipal affairs had precedential value, they would support the City more than the NRA. The *Doe* court opined that the 1982 ordinance was not a municipal  
(continued on next page)

1 Second, *Doe's* views about possible effects on residents of nearby cities do not accurately  
2 reflect the law of municipal affairs. In assessing possible extramunicipal effects, "no city acts in  
3 isolation," and "there are external consequences in whatever a city does. The issue is one of  
4 substantiality." (Sato, 60 Cal.Rev. at p. 1103.) And the cases require "a *convincing basis* for [state]  
5 legislative action originating in extramunicipal concerns," based on a "dimension *demonstrably*  
6 transcending identifiable municipal interests" – not merely a hypothetical extramunicipal ripple  
7 effect – to justify ousting a charter city of its home rule power. (*CalFed*, 54 Cal.3d at pp. 17, 18  
8 [emphases added].) *CalFed* is instructive: the Court held that a charter city tax law implicated  
9 statewide concerns only because such effects were documented in detailed Legislative findings,  
10 "congressional reports and studies," and "specific recommendations of financial and regulatory  
11 experts" to the relevant legislative agencies. (*Id.*, 54 Cal.3d at pp. 10, 20 at fn. 16, 24.)<sup>15</sup> This  
12 Court may not find any extramunicipal effect of Section 3 absent similarly convincing proof.

13 **c. There is no state policy favoring handgun possession.**

14 Section 3's prohibition also does not run afoul of any statewide concerns because California  
15 has no state policy favoring handgun possession, or promoting wider handgun availability.

16 Neither the federal nor the state Constitution contains any such policy. Indeed, there is no  
17 individual constitutional right to possess a handgun or other firearm. (*Kasler v. Lockyer* (2000) 23  
18 Cal.4<sup>th</sup> 472, 481 [state assault weapons prohibition "does not burden a fundamental right under  
19 either the federal or the state Constitutions"]; *Galvan*, 70 Cal.2d at p. 866 [handgun registration  
20 requirement does not implicate Second Amendment].)

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22 (footnote continued from previous page)  
23 affair primarily because it "prohibits possession by both residents and those passing through San  
24 Francisco," and thus "affects not just persons living in San Francisco, but transients passing  
25 through[.]" (*Id.*) That statement neatly underscores why *Doe* does not control here, and why §3 of  
26 Proposition H, being limited to City residents, is a valid exercise of home rule power.

27 <sup>15</sup> If the mere chance that a charter city law might have some slight extramunicipal  
28 consequence made the law a matter of statewide concern, then local tax measures – which logically  
will affect persons outside the jurisdiction, because they make the jurisdiction a more or less  
attractive place in which to live or do business – would address matters of statewide concern. But  
of course, that is not the law. (*Ex parte Braun*, 141 Cal. at p. 213 [business license tax is municipal  
affair]; *Traders Sports, Inc. v. City of San Leandro* (2001) 93 Cal.App.4<sup>th</sup> 37, 47 [same].)

1 Nor does any state statute create a policy favoring handgun possession, or promoting wider  
2 handgun availability. To the contrary, the Legislature and the courts have concluded that "free  
3 access to firearms" creates a "danger to public safety." (*People v. Bell* (1989) 49 Cal.3d 502, 544  
4 [holding that "the clear intent of the Legislature" in adopting Dangerous Weapons Control Act was  
5 to reduce that danger]; *People v. Scott* (1944) 24 Cal.2d 774, 782.)

6 Seeking to manufacture a statutory handgun possession right, the NRA mistakenly argues  
7 that Penal Code Section 12026 "creates a general right for law-abiding, responsible adults to have  
8 handguns in their homes." (MPA at 5.) It bases this claim on completely impermissible and  
9 irrelevant "legislative history," which this Court should disregard. It also relies on Penal Code  
10 Section 626.9(h) and (i), which, according to the NRA, prohibit students in University-managed  
11 housing from possessing guns. (*Id.*) But in fact, Penal Code Section 626.9, subsections (h) and (i),  
12 allow students to possess firearms in student housing, if they have "written permission" from  
13 university authorities (*id.*) – in other words, a license. By authorizing such university licensing  
14 schemes "notwithstanding Section 12026," the Legislature was merely recognizing Section 12026  
15 generally bars local laws that condition residential handgun possession upon a license.

16 The NRA also strives to support its claim that Penal Code Section 12026 creates a "right of  
17 handgun possession" by relying on a 1994 opinion by then-Attorney General Lungren. (MPA at  
18 12-13, fn. 17.) But an Attorney General opinion "is not controlling legal authority," particularly  
19 "where ... there is case authority in existence interpreting the statute at issue." (*Dept. of Alcoholic*  
20 *Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4<sup>th</sup> 1066,  
21 1075.) Here, the one court to address the issue has expressly rejected the NRA's claim, holding  
22 instead that Penal Code Section 12026 does *not* create an affirmative right to possess a handgun:

23 *[T]here is no basis for a conclusion that Penal Code section 12026 was*  
24 *intended to create a "right" or to confer the "authority" to take any action ...*  
25 *for which a license or permit may not be required. The words of the statute*  
*are words of proscription and limitation upon local governments, not words*  
*granting a right or authority to members of the public.*

26 (*CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1324 [emphasis added].)

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27 As *CRPA* makes clear, the courts have not enunciated any policy of promoting handgun  
28 ownership. As noted above, the high court has recognized that far from promoting public safety,



1 free access to firearms affirmatively *endangers* public safety. (*People v. Bell*, 49 Cal.3d at p. 544.)  
2 It also has held that firearms, and specifically handguns, create significant problems that are likely  
3 to require legislative attention. (*Galvan*, 70 Cal.2d at pp. 864, 866.)

4 **d. There is no state policy requiring uniform access to handguns.**

5 Section 3 also implicates no statewide concerns because California has no state policy  
6 requiring that all residents have uniform access to handguns.

7 Notably, even where the Legislature identifies an interest in uniformity of regulation, such a  
8 "bare interest of uniformity," without a persuasive logical reason why it is essential, does not justify  
9 allowing state law to supercede charter city home rule power. This is "because, standing alone, [a  
10 bare interest in uniformity] reveals no 'convincing basis for legislative action originating in  
11 extramunicipal concerns.'" (*Johnson*, 4 Cal.4<sup>th</sup> at p. 406 [holding that state voters' desire for  
12 uniform system of campaign finance throughout state does not justify treating charter city campaign  
13 finance law as matter of statewide concern, rather than as municipal affair].) Therefore, while a  
14 legislative decision to occupy a particular field gives rise to preemption, it does not necessarily  
15 show any statewide interest that will strip charter cities of their home rule power over that field.

16 Nonetheless, it is telling that neither in Penal Code Section 12026, nor in any other statute  
17 cited by the NRA, has the Legislature even *attempted* to identify any statewide concern that would  
18 warrant overriding local charter city regulations. Nor has the Legislature mentioned charter cities.  
19 There is no statutory policy of uniformity that could supercede charter city home rule power.

20 Nor is there any judicial basis for such a policy. To the contrary, as noted above, the  
21 Supreme Court has repeatedly recognized that handgun violence is not susceptible to uniform, one-  
22 size-fits-all regulations, holding that the scope of gun-related problems, and thus the appropriate  
23 solution, will likely be different in "densely populated municipalities" than in sparse rural portions  
24 of the state. (*Great Western*, 27 Cal.4<sup>th</sup> at p. 867; *Galvan*, 70 Cal.2d at pp. 864, 866.)

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25 **e. Petitioners' claims of a statewide interest in establishing  
26 standards for handgun possession are unsupported and illogical.**

27 The NRA argues that because "cities have no realistic way to stop handguns from entering  
28 their boundaries, establishing statewide standards for those who may legally possess handguns is a  
matter of statewide importance." (MPA at 9.) But this claim cannot justify treating Section 3 as a

1 matter of statewide concern. As an initial matter, the NRA's purported statewide concern has  
2 never been expressed by Constitutional framers, voters, the Legislature, or any court; it is wholly  
3 petitioners' own invention. And in any event, the NRA's argument is simply inapposite here.  
4 Section 3 expressly *allows* non-San Francisco residents to bring handguns into the City. The NRA  
5 offers no reason why the handgun possession prohibition that Section 3 *does* impose – upon San  
6 Franciscans, by San Franciscans, for San Franciscans – implicates any statewide concerns.

7 The NRA also argues that Section 3 cannot regulate a municipal affair because if charter  
8 cities could prohibit their own residents from possessing handguns, the result would be a “crazy  
9 quilt’ of local regulations overruling dozens of state gun laws.” (MPA at 27-28.) Similarly, it  
10 argues that the large number of state laws *restricting* gun possession shows that Section 3’s  
11 prohibition implicates statewide concerns. (MPA at 28-29.) But these claims fail because they  
12 simply misstate what is at issue here. As the NRA’s own cases explain, a charter city regulation is  
13 valid notwithstanding conflicting state statutes “provided *the subject of the regulation* is a municipal  
14 affair[.]” (*American Financial Services Ass’n v. City of Oakland* (2005) 34 Cal.4<sup>th</sup> 1239, 1251  
15 [emphasis added].) And the subject of Section 3, for purposes of home rule analysis, is not  
16 “firearms possession,” or even “handgun possession. “Rather, it is *handgun possession by San*  
17 *Francisco residents who are not denied the privilege of handgun possession under state law.*  
18 Because Proposition H carefully avoids regulating handgun possession by persons prohibited from  
19 possessing handguns under state law, upholding Section 3 as a valid home rule ordinance will not  
20 lead to a crazy quilt of local laws flouting state-imposed prohibitions. And because state laws that  
21 prohibit handgun possession by certain classes of persons or under certain circumstances, by  
22 definition, do not overlap with Section 3’s prohibition, they do not show that prohibition implicates  
23 any statewide interest.<sup>16</sup>

24  
25  
26 <sup>16</sup> For example, a state statute that prohibited handgun possession by convicted felons would  
27 not show Section 3 concerns any statewide interest, because Section 3 would not apply to convicted  
28 felons.

1 **II. PROPOSITION H'S SALES BAN IS NOT PREEMPTED**

2 The NRA contends that Section 2 is preempted by state law.<sup>17</sup> It argues that because statutes  
3 like Penal Code Sections 12026 and 12131 *acknowledge the possibility* that people will buy  
4 firearms in California, the Legislature *intended to promote* firearms sales and therefore to preclude  
5 local governments from outlawing these sales. (MPA at 16.) This argument fundamentally  
6 misstates preemption law. Mere Legislative acknowledgment of the existence of conduct does not  
7 preclude cities from prohibiting that conduct within their boundaries. (*Great Western*, 27 Cal.4<sup>th</sup> at  
8 p. 866.) The Legislature has gone out of its way to avoid preempting local power to regulate sales.

9 **A. Petitioners Fundamentally Misunderstand The Law Of Preemption.**

10 Under Article XI, section 7, "[a] county or city may make and enforce within its limits all  
11 local, police, sanitary, and other ordinances and regulations not in conflict with general laws."  
12 Because a ban on firearms sales falls within the City's police power, "[t]he question as to  
13 preemption is whether the State Legislature has *removed* the constitutional police power of the  
14 City" to ban firearms sales within its borders. (*CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1309 [emphasis in  
15 original].) In answering this question, the Court must "presume the validity" of the local ordinance.  
16 (*Water Quality Association v. City of Escondido* (1997) 53 Cal.App.4<sup>th</sup> 755, 762.)

17 Any inquiry into the Legislature's intent with respect to local regulation of firearms and  
18 ammunition sales must begin with an examination of the history of preemptive actions it has taken  
19 in the area of gun control generally. "[T]he Legislature has chosen not to broadly preempt the local  
20 control of firearms," and instead has only "targeted certain specific areas for preemption." (*Great*  
21 *Western*, 27 Cal.4<sup>th</sup> at p. 864.) "That state law tends to concentrate on specific areas, leaving  
22 unregulated other substantial areas relating to the control of firearms, indicates an intent to permit  
23 local governments to tailor firearms legislation to the particular needs of their communities."  
24 (*Suter*, 57 Cal.App.4<sup>th</sup> at p. 1119.)

25  
26  
27 <sup>17</sup> The NRA also argues that Section 2 addresses statewide concerns, not municipal affairs.  
28 (MPA at 23-26.) This is puzzling, because the City has never suggested otherwise.

1           **B. Local Bans On Firearms or Ammunition Sales Are Not Preempted**

2           Local legislation is preempted only if it "conflicts" with state law, that is, if it "duplicates,  
3           contradicts, or enters an area fully occupied by general law," either expressly or by implication.

4           (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4<sup>th</sup> 893, 897 [quotations omitted].)

5                   **1. The sales ban does not "duplicate" state law**

6           "Local legislation is 'duplicative' of general law when it is coextensive therewith." (*Id.*  
7           [citation omitted].) This occurs only when the local provision prohibits "precisely the same acts" as  
8           are prohibited by state law. (*Great Western Shows*, 27 Cal.4<sup>th</sup> at p. 865.) Proposition H's sales ban  
9           does not duplicate state law, because there is no state statute that bans the sale of firearms or  
10           ammunition. Although the ban overlaps somewhat with the UHA and with Penal Code Section  
11           12304, which precludes the sale of *certain types* of ammunition statewide, such mere overlap does  
12           not render the sales ban duplicative of state law.

13                   **2. The sales ban does not "contradict" state law**

14           "Local legislation is 'contradictory' to general law when it is inimical thereto." (*Sherwin-*  
15           *Williams*, 4 Cal.4<sup>th</sup> at p. 898 [citation omitted].) A local law contradicts state law only if it  
16           "mandate[s] what state law expressly forbids," or "forbid[s] what state law expressly mandates."  
17           (*Great Western*, 27 Cal.4<sup>th</sup> at p. 866.) But no state law "expressly mandates" the sale of firearms or  
18           ammunition. There is merely a law requiring permits to sell firearms (Section 12071), a law  
19           banning the sale of certain handguns deemed by the Department of Justice to be unsafe to  
20           consumers (Section 12131.1), a law restricting the sale of certain types of assault weapons (Section  
21           12275 *et seq.*), and a law banning the sale of certain types of ammunition (Section 12304).

22           In this regard, the sales ban is similar to the ordinance prohibiting gun shows on county  
23           property upheld in *Great Western*. There, the Court recognized that although state law regulates  
24           gun shows in a number of ways – such as by exempting gun shows from the usual requirement that  
25           sales be conducted only in the buildings designated in the seller's license (Penal Code  
26           §12071(b)(1)(B)), by requiring gun show vendors to possess a state-issued certificate of eligibility  
27           (*id.*, §12071.1(a)), and by imposing various disparate requirements on vendors (*id.*, §12071.4) –  
28           such regulations do not mean that state law "expressly mandates" gun shows:

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1 Although the gun show statutes regulate, among other things, the sale of guns  
2 at gun shows, and therefore *contemplate* such sales, the statutes do not  
3 *mandate* such sales, such that a limitation of sales on county property would  
4 be in direct conflict with the statutes. [*Id.* at p. 866 (emphasis added).]

5 The sales ban is also similar to the local ordinance banning the sale of Saturday Night  
6 Specials upheld in *CRPA*. Rejecting the argument that Penal Code Section 12026 prohibits local  
7 regulation of firearms sales, the court firmly held that conduct allowed by that state law may still be  
8 forbidden by local law: "[n]o authority has been cited for the proposition that a statute prohibiting a  
9 permit requirement can be construed as intended to create a broad enforceable right to purchase any  
10 type of handgun not specifically outlawed by state law." (*Id.* 66 Cal.App.4<sup>th</sup> at p. 1324.)

11 **3. The sales ban does not enter an area "fully occupied" by state law**  
12 **a. Express preemption**

13 The NRA claims that several statutes expressly preempt Section 2's sales ban. First, it  
14 argues that Section 12026 "expressly protects" handgun purchases, thus rendering the sales ban  
15 preempted, "at least in application to handguns." (MPA at 16.) Second, it argues that Government  
16 Code Section 53071 preempts the sales ban, apparently expressly. (*Id.* at 17.) Third, it argues that  
17 the UHA, Penal Code Section 12131.1, expressly occupies the field of handgun sales. It is wrong on  
18 all counts.

19 **i. Penal Code Section 12026/Government Code Section**  
20 **53071.**

21 The NRA's Penal Code Section 12026 and Government Code Section 53071 express  
22 preemption claims were squarely rejected in *CRPA*, which upheld a local law prohibiting the sale of  
23 Saturday Night Specials against these and other preemption attacks. The court held that Penal Code  
24 Section 12026(b) – which provides that "no permit or license" to purchase or own a handgun for  
25 possession on private property shall be required beyond what state law already contemplates – does  
26 not expressly preempt local regulations of firearms sales:

27 The fact that the Legislature limited the coverage of this statute to permits or  
28 licenses for possessing a weapon at home, in a place of business, or on  
private property shows a Legislative intent not to preempt other areas of  
firearms regulation, at least not in this statute.

(*Id.*, 66 Cal.App.4<sup>th</sup> at pp. 1311-12.) And Government Code Section 53071 – in which the  
Legislature expressly occupied "the whole field of regulation of the registration or licensing of

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1 commercially manufactured firearms" – does not even mention the sale of firearms or ammunition;  
2 it discusses only registration or licensing. "The fact that the Legislature expressly limited its  
3 preemption in this statute to 'registration and licensing' shows a Legislative intent not to preempt  
4 other areas of firearms regulation, at least not in this statute." (*Id.* at p. 1311.) And while the  
5 Legislature has expressly occupied the field of regulation of the sale of "imitation firearms"  
6 (Gov.Code §53071.5), that statute "demonstrates that the Legislature made a distinction, for  
7 whatever policy reason, between regulating the sale of real firearms and regulating the sale of  
8 imitation firearms." (*CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1312 [quoted favorably in *Great Western Shows*,  
9 27 Cal.4<sup>th</sup> at p. 863]; *Suter*, 57 Cal.App.4<sup>th</sup> at p. 1124 [finding "no ... Legislative declaration of  
10 intent fully to occupy the whole field of regulation of the sale of non-imitation firearms"].)

11 **ii. The Unsafe Handgun Act.**

12 The NRA's claim of express preemption under the UHA (Penal Code Section 12131.1) is  
13 equally meritless. The UHA requires the Department of Justice to maintain a roster of handguns  
14 that "may be sold in this state." (*Id.*) But in so requiring, the statute simply *contemplates* the sale of  
15 the types of handguns listed by the DOJ. Such contemplation of sales does not mean that the  
16 Legislature sought to bar local jurisdictions from regulating such sales. (*Nordyke v. King* (2002) 27  
17 Cal.4<sup>th</sup> 875, 884 [statute that "exempts gun shows from the state criminal prohibition on possessing  
18 guns in public buildings," and thus allows gun shows, "does not *mandate* that local government  
19 entities permit such a use"] [emphasis original]; *see also Great Western*, 27 Cal.4<sup>th</sup> at pp. 866, 868.)  
20 Particularly given the Legislature's use of the permissive phrase "*may be sold*," rather than any  
21 mandatory language, the UHA simply acknowledges the sale of handguns on the DOJ's roster,  
22 without expressing any intent to preclude stricter local regulation of such sales.<sup>18</sup>

23 The NRA's UHA preemption argument also fails because the UHA has an entirely different

24  
25 <sup>18</sup> The single case the NRA cites in its discussion of the UHA, *Bravo Vending v. City of*  
26 *Rancho Mirage* (1993) 16 Cal.App.4<sup>th</sup> 383, supports the City. The court there *upheld* a local law  
27 that regulated cigarette sales more strictly than state law. While state law merely criminalized the  
28 sale of cigarettes to minors, the local ordinance added a prohibition against the sale of cigarettes  
through vending machines. Because the law did not "prohibit what the statute commands or  
command what it prohibits," it was not preempted. (*Id.* at p. 397.)

regulatory purpose than Section 2's sales ban. (*Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1474-75 [state civil rights statute did not preempt local law prohibiting discrimination on the basis of HIV status, because the latter was enacted for separate public health purpose of removing barriers to HIV testing].) As the UHA's title shows, and its legislative history confirms, the UHA is a consumer protection law designed to ensure the safety of handgun *users*, by subjecting handguns to "quality standards" designed to ensure that they are "reliable for self-defense." (Analysis of Senate Bill 15, Assembly Committee on Public Safety [RFJN, Exh. 5 at p. 2].) In contrast, Proposition H, on its face, is designed to protect the *victims* of firearms violence – not the person pulling the trigger. The UHA regulates in a wholly different field (and makes no mention of any intent to occupy even that field). It does not preempt Section 2.

**b. Implied preemption.**

The NRA is less than clear about whether some of its preemption claims assert express or implied preemption. To the extent the NRA relies on the latter theory, its claims fail.

Claims of implied preemption "must be approached carefully." (*CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1317.) "Since preemption depends upon *legislative intent*, such a situation necessarily begs the question of why, if preemption was legislatively *intended*, the Legislature did not simply say so, as the Legislature has done many times in many circumstances." (*Id.* [emphasis original].) And "to rule that the Legislature *implicitly* intended to preempt, notwithstanding the clear record that the Legislature has *expressly avoided* preemption by the careful wording of its enactments, would be to disregard the Legislature's own pronouncements." (*Id.* at p. 1318 [emphasis added].)<sup>19</sup>

<sup>19</sup> The three settled "indicia of intent" for implied preemption "reinforce[] the conclusion of no preemption" with respect to firearms sales. (*CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1318.) First, the subject matter of firearms sales has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern." (*Sherwin-Williams*, 4 Cal.4<sup>th</sup> at p. 898.) That the Legislature has acted to regulate firearms sales on several different occasions does not show an intent to fully occupy that field. (*Great Western*, 27 Cal.4<sup>th</sup> at p. 861; *Galvan*, 70 Cal.3d at p. 860.) To the contrary, "[t]he general fact that state legislation concentrates on specific areas, and leaves related areas untouched (as has been done here), shows a legislative intent to permit local governments to continue to apply their police power according to the particular needs of their communities in areas not specifically preempted." (*CRPA*, 66 Cal.App.4<sup>th</sup> at p. 1318.)

Second, statutes regulating firearms sales are not couched "in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." (*Sherwin-Williams*, 4 Cal.4<sup>th</sup> at p. 898.) Courts "are reluctant to find such a paramount state concern, and (continued on next page)

1 Implicitly acknowledging that its implied preemption claim finds no support in the statutes  
2 and caselaw relating to firearms sales, the NRA attempts to fall back on a 1994 opinion of then-  
3 Attorney General Daniel Lungren, which concluded that state law impliedly preempts local bans on  
4 ammunition sales. (MPA at 16-17.) But as both *CRPA* and *Suter* recognized, this non-binding  
5 opinion is fundamentally flawed. The opinion cites two statutes that purportedly show an intent to  
6 preempt local restrictions on ammunition sales: Penal Code Section 12304 (outlawing the sale of  
7 ammunition with a power of greater than .60 caliber) and Penal Code Section 12026 (limiting  
8 permitting and licensing requirements). (77 Ops.Cal.Atty.Gen. 147 (1994) [1994 WL 323316 at \*5].)  
9 But absent a clear indication of legislative intent to the contrary, a law such as Section 12304 that  
10 outlaws *certain types* of conduct on a statewide basis does not prevent local governments from  
11 adopting stricter regulations of that conduct. (See *Great Western*, 27 Cal.4<sup>th</sup> at pp. 866, 868.) And  
12 because Section 12026 does not occupy the field of firearms sales, it is doubly absurd to claim it  
13 nonetheless occupies the field of *ammunition* sales – without even mentioning ammunition. A local  
14 ammunition sales ban does not interfere with Section 12026's permitting scheme any more than does  
15 a local ban on gun sales.

### 16 III. THE NRA'S OTHER CHALLENGES ARE CLEARLY WITHOUT MERIT

#### 17 A. Proposition H Will Have No Effect On Criminal Law Enforcement.

18 Taking an absurdly literalist view of Proposition H, the NRA argues it is "inimical" to and  
19 will "disrupt" criminal law enforcement, such as by preventing the SFPD from issuing firearms to  
20 its officers and preventing guns from being introduced as evidence in court proceedings. (MPA at  
21 17-21.) These claims violate multiple canons of statutory construction, and are simply unfounded.

22  
23 (footnote continued from previous page)

24 therefore implied preemption, 'when there is a significant local interest to be served that may differ  
25 from one locality to another.'" (*Great Western*, 27 Cal.4<sup>th</sup> at 866.)

26 Third, it can hardly be argued that the subject of firearms sales "is of such a nature that the  
27 adverse effect of a local ordinance on the transient citizens of the state outweighs the possible  
28 benefit to the locality . . . ." (*Sherwin-Williams*, 4 Cal.4<sup>th</sup> at p. 898.) "Laws designed to control the  
29 sale, use or possession of firearms in a particular community have very little impact on transient  
30 citizens, indeed, far less than other laws that have withstood preemption challenges." (*Great  
31 Western*, 27 Cal.4<sup>th</sup> at p. 867 [quoting *Suter*, 57 Cal.App.4<sup>th</sup> at p. 1119].)

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1 First, a court must "construe a statute to promote its purpose, render it reasonable, and avoid  
2 absurd consequences." (*Ford v. Gouin* (1992) 3 Cal.4<sup>th</sup> 339, 348.) It "will not presume that the  
3 lawmakers (here, the voters) intended the literal construction of a law if that construction would  
4 result in absurd consequences." (*Woo v. Superior Court* (2000) 83 Cal.App.4<sup>th</sup> 967, 976.)

5 Proposition H does not define its terms "transfer" and "distribute." However, a "transfer" is  
6 commonly understood to mean a conveyance of property or an interest in property – not merely the  
7 physical passing of an item from one person's hands to another's. And "distribution" ordinarily  
8 refers to the act of apportioning or dividing, not simply of providing in the sense in which a police  
9 department provides its officers with necessary equipment.<sup>20</sup> Because the NRA's interpretation of  
10 Section 2's terms leads to clear absurdities, which the voters could not have intended, the measure's  
11 terms "transfer" and "distribution" reasonably can and must be interpreted not to apply to the  
12 acquisition and internal handling of firearms and ammunition by police agencies, officers and  
13 personnel, or district attorneys and others employed or functioning within the justice system.<sup>21</sup>

14 Second, a "statute will not be construed to impair or limit the sovereign power of the state  
15 to act in its governmental capacity and perform its governmental functions in behalf of the people in  
16 general, unless such intent clearly appears." (*People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703-  
17 04; *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4<sup>th</sup> 1512, 1533.) The NRA's  
18 interpretation would impair the ability of the SFPD, other police agencies, and the courts to perform  
19 some of their most basic sovereign duties: preserving public peace and prosecuting lawbreakers.  
20 Yet Proposition H's legislative history show that the voters sought to curb violence due to firearms  
21 in private hands, not block "those who protect us" from doing their jobs. (RFJN, Ex. 1 at p. 96.)

22 Third, in construing a statute, a court does not "consider the statutory language in isolation,"  
23

24 <sup>20</sup> One widely used dictionary defines a "transfer" as follows: "1a: conveyance of right, title,  
25 or interest in real or personal property from one person to another b: removal or acquisition of  
26 property by mere delivery with intent to transfer title . . . ." (Merriam-Webster's Collegiate  
Dictionary (10<sup>th</sup> Ed. 2001) at p. 1249.) The same dictionary defines "distribution" as "the act or  
27 process of distributing," which, in turn, means "1: to divide among several or many: APPORTION .  
28 . . . ." (*Id.* at pp. 337-338.)

<sup>21</sup> It is absurd to argue that the voters – who adopted Proposition H to further public safety –  
nonetheless sought to hamstring law enforcement agencies, or bring criminal prosecutions to a halt.

1 but rather "look[s] to the *entire substance of the statute* in order to determine the scope and purpose  
2 of the provision. That is, we construe the words in question in context, keeping in mind *the nature*  
3 *and obvious purpose of the statute.*" (*People v. Murphy* (2001) 25 Cal.4<sup>th</sup> 136, 142 [internal cites,  
4 quotes, and ellipses omitted; emphasis added].) The NRA's claims are apparently based largely on  
5 the fact that Section 2 lacks any exemption for peace officers; but Section 2 must be harmonized  
6 with Section 3, which expressly allows peace officers to possess handguns to do their jobs.  
7 Interpreting Section 2 as the NRA urges would undermine the ability of peace officers and other  
8 public employees to obtain and use firearms, an ability that Section 3 shows the voters sought to  
9 preserve. The NRA's myopic interpretation of Section 2 fails.

10 **B. Proposition H Does Not Violate Equal Protection Guarantees.**

11 The NRA contends that Section 3's distinction between residents and non-residents violates  
12 federal and state equal protection guarantees. (MPA at 13-15.) But under the rational basis test, a  
13 legislative classification is entitled to great deference by the courts. It may only be struck down if  
14 "the varying treatment of different groups or persons is so unrelated to the achievement of any  
15 combination of legitimate purposes that [the court] can only conclude" that the classification is  
16 irrational. (*City and County of San Francisco v. Flying Dutchman Park, Inc.* (2004) 122  
17 Cal.App.4<sup>th</sup> 74, 83.) The law must be upheld "if there is any conceivable state of facts that could  
18 provide a rational basis for the classification," even if the Legislature never articulated any such  
19 basis. (*Warden v. State Bar of California* (1999) 21 Cal.4<sup>th</sup> 628, 644 [emphasis original].)

20 Here, voters could rationally have concluded that because people are often harmed by  
21 handguns in the home, handgun possession by City residents presents the greatest risk of violence.  
22 (*Id.* [under rational basis scrutiny, lawmakers "properly may limit a regulation to those classes of  
23 persons as to whom the need for regulation is thought to be more crucial or imperative"];  
24 *Williamson v. Lee Optical of Okla.* (1955) 348 U.S. 483, 489.) And the voters also could rationally  
25 have concluded that limiting Section 3's handgun possession ban to City residents was necessary to  
26 properly invoke home rule power, and thus *to avoid* the potential infirmities identified in *Doe*. It  
27 cannot be "irrational discrimination" to legislate in a manner that respects legal limits by ensuring  
28 that Section 3 only applies to City residents, not those residing elsewhere.

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1 IV. ANY INVALID PROVISIONS OF PROPOSITION H WOULD BE SEVERABLE

2 The NRA argues that if Proposition H's handgun sales and possession bans were invalidated,  
3 the remainder of the measure should not take effect. (MPA at 29.) The NRA apparently assumes  
4 that if Section 3's prohibition on handgun *possession* were invalidated, Section 2's prohibition on  
5 *sales* must also be invalidated as applied to handguns – which is simply not true.<sup>22</sup> But even if the  
6 NRA were correct that a ruling striking down Section 3 would also affect local laws regulating the  
7 *sale* of handguns, its argument fails. Where portions of an initiative cannot be enforced, the courts  
8 “must give effect to the intent of the electorate *to the greatest extent possible*[.]” (*City of*  
9 *Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 631 [emphasis added].) This is  
10 particularly true where, as here, the law contains a severability clause. “[T]he general presumption  
11 of constitutionality, fortified by the express statement of a severability clause, normally calls for  
12 sustaining any valid portion of a statute unconstitutional in part.” (*Santa Barbara School Dist. v.*  
13 *Superior Court* (1975) 13 Cal.3d 315, 330.) Presumably those “who favor the proposition would be  
14 happy to achieve at least some substantial portion of their purpose[.]” (*Id.* at p. 332.)

15 Proposition H's sales and possession bans are “grammatically, functionally, and volitionally  
16 separable” from the rest of the measure. (*Hotel and Restaurant Employees Int'l Union v. Davis* (1999)  
17 21 Cal.4<sup>th</sup> 585, 613.) Far from seeking solely to reduce *handgun* availability, the voters' overall aim  
18 was to reduce gun violence by restricting the amount of *all* firearms and ammunition in the City. In  
19 Proposition H's text and the ballot materials, the law's ban on the “manufacture, distribution, sale and  
20 transfer of firearms and ammunition” is entirely separate from its ban on handgun possession; both are  
21 different means to achieve a common result. At least “some substantial portion of [the voters']  
22 purpose” was to make long guns and ammunition less available. (*Gerken v. FPPC* (1993) 6 Cal.4<sup>th</sup>  
23 707, 715.) The Court must implement that purpose to the greatest extent possible.

24 Nothing in *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 changes this result. There, the  
25 Court struck down a rent control law because it forced the City to use a cumbersome administrative

26 <sup>22</sup> As the City has shown, gun *sales* is legally distinct from gun *possession*. If this Court  
27 were to invalidate Section 3 of Proposition H, Section 2 would remain valid in its entirety, including  
28 as applied to handguns, for the reasons discussed in cases such as *Great Western* and *CRPA*.

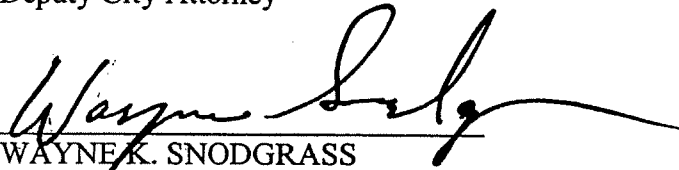
1 process to approve rent increases, "making inevitable the arbitrary imposition of unreasonably low rent  
2 ceilings." (*Id.* at p. 169.) The Court invalidated the entire law because severing its illegal provisions  
3 would leave the law with *no* rent increase mechanism, and the Court was powerless to draft a  
4 replacement mechanism. (*Id.* at p. 173.) In contrast, any invalid part of Proposition H could be severed  
5 and the rest of the law given effect without the need for any judicial legislative drafting.

6 **CONCLUSION**

7 The NRA's petition for writ of mandate should be denied.

8 Dated: January 25, 2006

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12 By:   
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