SUPREME COURT OF THE STATE OF CALIFORNIA

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| CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE CHIEF HEATHER FONG in her official capacity and SAN FRANCISCO POLICE DEPARTMENT,<br><br>Defendants/Appellants,<br><br>vs.<br><br>PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER, DANA DRENKOWSKI, JOHN CANDIDO, ALAN BYARD, ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF FIREARMS RETAILERS, LAW ENFORCEMENT ALLIANCE OF AMERICA, and SAN FRANCISCO VETERAN POLICE OFFICERS ASSOCIATION,<br><br>Plaintiffs/Respondents. | Case No. S<br><br>First Appellate District Court No. A115018<br><br>(S.F. Superior Court No. 505-960) |

# PETITION FOR REVIEW

The Honorable Paul H. Alvarado

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## TABLE OF CONTENTS


TABLE OF AUTHORITIES ..... iii

QUESTIONS PRESENTED FOR REVIEW ..... 1

INTRODUCTION ..... 2

BACKGROUND ..... 4

I. GUN VIOLENCE IN SAN FRANCISCO AND ELSEWHERE ..... 4

II. SAN FRANCISCO VOTERS ADOPT PROPOSITION H ..... 5

III. HISTORY OF THIS LITIGATION ..... 5

A. The Court's Interpretation of Penal Code Section 12026. ..... 6

B. The Court's Interpretation of Government Code Section 53071. ..... 7

C. The Court's Interpretation of The Unsafe Handgun Act. ..... 8

ARGUMENT ..... 8

I. CALIFORNIA'S FIREARMS PREEMPTION JURISPRUDENCE ..... 8

A. General Standards of Preemption. ..... 9

1. The Constitutional police power. ..... 9

2. The presumption against preemption. ..... 10

B. The Development of Firearms Preemption in California. ..... 10

1. The *Galvan* Decision. ..... 11

2. The Legislature's limited response. ..... 12

3. This Court's *Great Western* and *Nordyke* decisions. ..... 15

II. THE DECISION BELOW CONFLICTS WITH OTHER CALIFORNIA FIREARMS PREEMPTION CASES, AND LEAVES IMPORTANT QUESTIONS OF LOCAL REGULATORY POWER UNSETTLED ..... 18

A. Government Code Section 53071 ..... 18

1. Where state law allows possession in specified circumstances, does it thereby create a "license" within the meaning of Section 53071? ..... 18

2. Does Section 53071 preempt local laws that have no connection to licensing of firearms, but relate to licensed firearms dealers? ..... 20

B. Penal Code Section 12026 ..... 22

C. The Unsafe Handgun Act. ..... 24

CONCLUSION ..... 27

CERTIFICATE OF COMPLIANCE ..... 28

## TABLE OF AUTHORITIES

### State Cases

*Action Apartments Association, Inc. v. City of Santa Monica*
(2007) 41 Cal.4th 1232 .....9, 10

*American Financial Services Ass'n v. City of Oakland*
(2005) 34 Cal.4th 1239 .....2, 4

*Big Creek Lumber Co. v. County of Santa Cruz*
(2006) 38 Cal.4th 1139 .....10

*California Rifle & Pistol Association v City of West Hollywood*
(1998) 66 Cal.App.4th 1302 .....12, 13, 15, 18, 23, 25, 26

*Candid Enterprises, Inc. v. Grossmont Union High School District*
(1985) 39 Cal.3d 878 .....9

*Doe v. City and County of San Francisco*
(1982) 136 Cal.App.3d 509 .....14, 15, 23

*Galvan v. Superior Court*
(1969) 70 Cal.2d 851 .....11, 12

*Great Western Shows, Inc. v. County of Los Angeles*
(2002) 27 Cal.4th 853 .....*passim*

*Nordyke v. King*
(2002) 27 Cal.4th 875 .....16, 19, 25

*Olsen v. McGillicuddy*
(1971) 15 Cal.App.3d 897 .....12, 13

*Sherwin-Williams Co. v. City of Los Angeles*
(1993) 4 Cal.4th 893 .....9, 10

*Suter v. City of Lafayette*
(1997) 57 Cal.App.4th 1109 .....*passim*

### Federal Cases

*Great Western Shows, Inc. v. Los Angeles County*
(9th Cir. 2000) 229 F.3d 1258 .....15

**State Statutes & Codes**

Government Code
§ 53071 ..... *passim*
§ 53071.5 ..... 13, 25

Labor Code
§ 1721 ..... 7

Penal Code
§ 12026(b) ..... *passim*
§ 12050 ..... 16
§ 12071 ..... 1, 21
§ 12071(a)(6) ..... 22
§ 12071(b)(1)(B) ..... 26
§ 12071.4(b) ..... 16
§ 12125 *et seq.* ..... 1, 8, 24
§ 12131(a) ..... 8, 24, 25

**San Francisco Statutes, Codes & Ordinances**

Proposition H
§ 2 ..... 6, 8, 20, 24
§ 3 ..... 5, 6, 18

**Constitutional Provisions**

California Constitution
Article XI, § 7 ..... 9

**Other References**

"Boy Shot During Piano Lesson in North Oakland,"
*San Jose Mercury News*, January 12, 2008
(available at http://www.mercurynews.com/crime/ci_7953605) ..... 3

"Northern Illinois University Shooting Leaves 6 Dead, 16 Wounded,"
*Los Angeles Times,* February 14, 2008
(available at http://www.latimes.com/news/nationworld/nation/la-na-shooting15feb15,0,3655394.story ..... 3

## QUESTIONS PRESENTED FOR REVIEW

1. Penal Code Section 12026(b), by its terms, preempts local laws that require one to obtain a "permit or license" to purchase or possess a handgun on private property. Did the court below err in interpreting Section 12026(b) to preempt all local "impediments on" or "regulations" of handgun possession on private property, and in holding San Francisco's Proposition H – including its prohibition on local gun sales, which does not impose any "permit or license" requirement – to be preempted?

2. Government Code Section 53071 states that it preempts "local regulations, relating to registration or licensing of commercially manufactured firearms." The Legislature has elsewhere made it clear that cities may license firearms *dealers*, and may otherwise "restrict or regulate the sale of firearms." (Pen.Code §12071.) Did the court below err in holding that Government Code Section 53071 preempts local laws, such as Proposition H, that affect the operations of licensed firearms dealers, but do not require or relate to the registration or licensing of any firearms?

3. Did the court below err in holding that Proposition H's ban on local firearms sales is preempted by California's Unsafe Handgun Act (Pen.Code §12125 *et seq.*), which does not purport to occupy any regulatory field or restrict local authority, based solely on that Act's statement that only those handguns that pass reliability and safety tests administered by the Department of Justice "may be sold"?

## INTRODUCTION

This case concerns the authority of our local governments to protect local health and safety by restricting access to firearms. This subject is of urgent importance to California residents, and, unfortunately, its importance will likely increase as gun violence continues to tear through our communities, schools, and workplaces.

In a large state such as California, possessing both densely populated urban centers and large rural expanses, problems of gun violence are often not amenable to a one-size-fits-all, statewide remedy. As this Court has repeatedly noted, "[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 862.) Because gun violence often requires local solutions, the Legislature "has been cautious about depriving local municipalities of aspects of their constitutional police power to deal with local conditions" in this area. (*American Financial Services Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239, 1255.) And the courts, in recent decades, have "uniformly construe[d] state regulation of firearms narrowly, finding no preemption of areas not specifically addressed by state statute." (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 fn. 2.)

The court below abandoned this cautious approach to firearms preemption. In its place, the court applied a grudging and reluctant view of local power, describing local gun ordinances as "encroachment[s]" that at best are "tolerated" by the courts. (Slip Opinion ["Slip Op."] at 24.) In rejecting San Francisco's Proposition H – a voter initiative that seeks to address San Francisco's gun violence epidemic by prohibiting most City

residents from locally possessing handguns, and by prohibiting local firearms sales – the court expansively interpreted multiple state statutes, magnifying their preemptive effect. Its interpretations of those laws ignore statutory text, conflict with prior decisions, and threaten to greatly erode local regulatory power over firearms.

If left undisturbed, the published decision below will cause significant uncertainty among cities and counties as to the extent of their ability to protect their inhabitants by adopting firearms regulations tailored to the needs of their local communities. Gun violence, to put it mildly, remains a persistent problem. Even in the few weeks since the Court of Appeal issued its opinion in this case, for example, Californians have been shocked to see the latest mass shooting of college students, this time in Illinois.[1] Closer to home, we have seen a 10-year old boy be hit by a stray bullet that pierced the wall of the North Oakland music school where he was having a piano lesson, leaving him unlikely to walk again.[2] In the face of such tragedies, Californians will expect their local representatives, as much as their state government, to take necessary measures to protect them.

The decision below, however, will chill and deter exercises of local legislative power in this area. Indeed, the court below apparently intended its opinion to have that effect. Notwithstanding this Court's recent recognition that it is *the Legislature* that "has chosen to legislate narrowly"

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[1] See "Northern Illinois University Shooting Leaves 6 Dead, 16 Wounded," *Los Angeles Times,* February 14, 2008 (available at http://www.latimes.com/news/nationworld/nation/la-na-shooting15feb15,0,3655394.story).

[2] *See* "Boy Shot During Piano Lesson in North Oakland," *San Jose Mercury News*, January 12, 2008 (available at http://www.mercurynews.com/crime/ci_7953605).

with respect to preemption in the area of gun control (*American Financial Services Ass'n, supra,* 34 Cal.4th at p. 1255), the court below urges that "when it comes to regulating firearms, *local governments* are well advised to tread lightly." (Slip Op. at 24 [emphasis added].) This "advice" turns California law on its head, and local governments and their citizens will suffer for it.

The opinion below creates significant conflict and confusion in the law of preemption of local regulatory power over firearms. The City and County of San Francisco respectfully requests this Court to grant review to resolve that confusion, and to restore the important principle that local governments retain significant, meaningful police power to protect their residents against gun violence.

## BACKGROUND

### I. GUN VIOLENCE IN SAN FRANCISCO AND ELSEWHERE

In recent years, San Francisco has suffered increasing rates of gun violence. From 2001 to 2005, the number of homicides in San Francisco climbed each year, rising by 50%. (Appellants' Appendix ["AA"] 119.) The city's homicides are increasingly gun-related. The percentage of killings committed with firearms jumped from 61% in 2001 to 83% in 2005, while the total number of firearms killings more than doubled during those five years. (*Id.*)

This epidemic of gun violence has particularly ravaged the City's less affluent neighborhoods and minority communities. It also has had particular impact on children attending public schools, some of which regularly must be "locked down," with the schoolchildren kept inside the building for their own protection, when an armed individual is nearby. (AA 123.)

San Francisco's gun violence also imposes dramatic economic costs on the City's taxpayers. Each year, gun violence costs the City at least $31.2 million, including costs of hospital care, incarceration of gun offenders, and police and fire response to gun-related crimes. (AA 599, 602.)

## II. SAN FRANCISCO VOTERS ADOPT PROPOSITION H

In November 2005 the City's voters approved an initiative ordinance known as Proposition H. (Slip Op. at 2.) It contains two substantive provisions. Section 2 states that within City limits "the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited." (*Id.*) Section 3 prohibits City residents from possessing handguns within City limits, except peace officers and others needing guns for professional purposes. The measure includes a severability clause. (*Id.* at 3.)

Proposition H states that Section 3 is not intended 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." (Slip Op. at 2; AA 143.) It also states that "nothing in this ordinance is designed to duplicate or conflict with California state law," and that any person barred from possessing a handgun under state law would not be subject to the local prohibition. (Slip Op. at 3.) The measure also states that "[n]othing in this ordinance shall be construed to create or require any local license or registration for any firearm[.]" (*Id.*)

## III. HISTORY OF THIS LITIGATION

On December 29, 2005, the National Rifle Association and several other organizations and individuals filed a petition for writ of mandate in San Francisco Superior Court, alleging that Proposition H is preempted by

state law and is otherwise invalid. (Slip Op. at 3.) The trial court held the measure to be preempted. The City appealed.

The court of appeal, in a published decision filed on January 9, 2008, affirmed. It found the initiative preempted under three state statutes.

**A. The Court's Interpretation of Penal Code Section 12026.**

First, the court of appeal held Proposition H to be preempted under Penal Code Section 12026(b) ("Section 12026"), which states that "[n]o permit or license" shall be required "to purchase, own, possess, keep, or carry" any concealable firearm within one's "place of residence [or] place of business" or on private property.[3] The court interpreted Section 12026 broadly, opining that by barring local permit or licensing requirements, Section 12026 "preclude[s] local public entities from adopting *impediments*" against qualified citizens buying or possessing handguns. (Slip Op. at 9 [emphasis added].) Section 12026 deprives cities and counties of "any power to regulate handgun possession on private property," and constitutes a "guarantee" that City residents can purchase, own, possess, keep, or carry handguns at their homes and businesses. (Slip Op. at 11, 15.)

Section 3 of Proposition H, banning local handgun possession by most City residents, and Section 2, banning local sales of firearms and ammunition, are undoubtedly "impediments" to handgun purchases and

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[3] Section 12026 states, in relevant part, that "[n]o permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state ... to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person" in such person's home or business or on his or her private property. (*Id.*, §12026(b).)

possession. They also interfere with what the court called Section 12026's "guarantee" of handgun availability. The court thus held both sections of the measure to be preempted by Section 12026. (Slip Op. at 12, 15.)

### B. The Court's Interpretation of Government Code Section 53071.

The court also held both substantive provisions of Proposition H to be preempted by Government Code Section 53071 ("Section 53071"). That statutes states that the Legislature has occupied the "whole field of regulation of the registration or licensing of commercially manufactured firearms," and has prohibited "all local regulations, relating to registration or licensing of commercially manufactured firearms ...."[4]

First, the court held that Section 53071 preempts Section 3's ban on most local handgun possession. The court based this ruling on its apparent conclusion that where state law *does not prohibit* particular classes of persons from possessing handguns in particular circumstances, the state has granted "licenses" for such possession within the meaning Section 53071. According to the court below, any local law that prohibits handgun possession by such persons under such circumstances "revok[es] or invalidat[es]" such "existing state licenses," and thus is preempted by Section 53071's prohibition against local laws that "'relate[]' to the state's regulatory scheme of licensing firearms." (Slip Op. at 13-14.)

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[4] Section 53071 states, in its entirety, that "[i]t is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code." (*Id.*)

Second, the court held that Section 53071 preempts Proposition H's Section 2, which prohibits local firearms sales, but does not require any firearm to be registered or licensed. The court based this holding on its apparent view that Section 53071 bars not only local license requirements for *firearms*, but also local license requirements for firearms *dealers*. As the court stated, "San Francisco currently has gunshops, pawnshops, and auction houses that hold valid state licenses specific to their firearms transactions....Section 2 effectively cancels all of those licenses. Clearly, therefore, in adopting Section 2, San Francisco has entered the preempted field of firearms registration and licensing in express derogation of Government Code Section 53071." (Slip Op. at 15 [cites omitted].)

### C. The Court's Interpretation of The Unsafe Handgun Act.

The court below also held that Section 2's firearms sales ban is impliedly preempted by the Unsafe Handgun Act (Penal Code §§ 12125-13133), which directs the state's Department of Justice to perform a variety of quality and reliability tests on handguns, and to compile a list of handguns that pass those tests and "may be sold in this state pursuant to this title." (Penal Code §12131(a).) (Slip Op. at 15-19.) The court acknowledged that the Unsafe Handgun Act leaves "room ... for some quantum of local handgun sales regulation," but stated that the Act only permits local laws that are "in synergy with state law." (Slip Op. at 19.) Proposition H's sales ban, in the court's view, is not such a law, because it imposes "a total ban on an activity state law allows." (*Id.*)

## ARGUMENT

## I. CALIFORNIA'S FIREARMS PREEMPTION JURISPRUDENCE

The state statutes that the decision below relied on to find Proposition H preempted – particularly Sections 12026 and 53071 –

delineate the fundamental boundaries between state and local regulatory authority over firearms. The lower court's interpretations of these statutes cannot be reconciled with multiple decisions of this Court and other courts, which have held these statutes to have only a narrow preemptive scope, consistent with their express terms. To understand how the court below misinterpreted and greatly expanded these statutes' preemptive reach, we must examine the way in which courts have applied preemption principles to preserve considerable local regulatory power over firearms.

### A. General Standards of Preemption.

#### 1. The Constitutional police power.

Under Article XI, section 7 of the California Constitution, "[a] city or county may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (*Id.*) So long as this police power is exercised within local territorial limits and subordinate to state law, it "is as broad as the police power exercisable by the Legislature itself." (*Candid Enterprises, Inc. v. Grossmont Union High School District* (1985) 39 Cal.3d 878, 885)

"If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (*Action Apartments Association, Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1242.) "A conflict exists if the local legislation duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication." (*Id.* [internal quotes omitted].) "Local legislation is 'duplicative' of general law when it is coextensive therewith." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) "Similarly, local legislation is 'contradictory' to general law when it is inimical thereto." (*Id.*, 4 Cal.4th at p. 898.) "Finally, local legislation enters an area that is 'fully occupied' by general law when

the Legislature has expressly manifested its intent to 'fully occupy' the area, or when it has impliedly done so" in light of recognized indicia of intent. (*Id.*, 4 Cal.4th at pp. 898 [cites omitted].)[5]

**2. The presumption against preemption.**

"The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) Courts thus follow a "presumption against preemption." (*Id.*) Courts are "particularly reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another." (*Big Creek Lumber Co., supra,* 38 Cal.4th at p. 1149.) "Absent a clear indication of preemptive intent from the Legislature, we presume that local regulation in an area over which the local government traditionally has exercised control is not preempted by state law." (*Action Apartments Association, Inc., supra*, 41 Cal.4th at p. 1242; *Big Creek, supra*, 38 Cal.4th at p. 1149.)

**B. The Development of Firearms Preemption in California.**

Courts have consistently applied these principles to hold that local governments retain considerable authority to regulate firearms. As this

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[5] Implied preemption will be found where "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefits to the' locality." (*Sherwin-Williams Co., supra,* 4 Cal.4th at p. 898.)

Court has long recognized, because "the costs and benefits of making firearms more available ... to the populace of a heavily urban county ... may well be different than in rural counties," there "is a significant local interest to be served" in gun regulation "that may differ from one locality to another." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 867 ["*Great Western*"].) In the area of gun regulation,

> [w]e are persuaded .... that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities, so that it becomes proper, and even necessary, for municipalities to add to state regulations provisions adapted to their special requirements.

(*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 864.)

For that reason, courts are "reluctant to find ... implied preemption" of local gun control laws. (*Great Western, supra*, 27 Cal.4th at p. 867.) Instead, "the cases uniformly construe state regulation of firearms narrowly, finding no preemption of areas not specifically addressed by state law." (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 fn. 2.)

**1. The *Galvan* Decision.**

This Court's *Galvan* opinion is the "seminal case" to hold that the Legislature has preempted local power to regulate firearms only in discrete and limited areas. (*Great Western, supra*, 27 Cal.4th at p. 861.) In *Galvan*, the Court held that Section 12026, prohibiting local permit or license requirements to purchase or possess a handgun on private property, did not preempt a local law that required firearms to be registered. *Galvan* "distinguished between licensing, which signifies permission or authorization, and registration, which entails recording 'formally and exactly,' and therefore declined to find" express preemption. (*Great Western, supra*, 27 Cal.4th at p. 861.) This Court also rejected implied

preemption, explaining "[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority." (*Id.*, 27 Cal.4th at p. 862; *Galvan, supra*, 70 Cal.2d at pp. 863-64.) *Galvan* "thus gave section 12026's expression of Legislative intent the *narrowest possible construction*." (*Suter, supra,* 57 Cal.App.4th at p. 1120 fn.3 [emphasis added].)[6]

**2. The Legislature's limited response.**

*Galvan* prompted only a limited legislative response: the adoption of what became Section 53071, which expressly occupies "the whole field of regulation of the registration or licensing of commercially manufactured firearms." (*Id.*)

Significantly, "the Legislature did not respond to *Galvan*, as it could have, by expressly stating its intent to preempt all local regulation of firearms, or all local regulation of handgun sales, but instead expressly limited its preemption to registration or licensing only." (*California Rifle & Pistol Association v City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1315 ["*CRPA*"].) In adopting what became Section 53071, "the legislative intent was *limited to registration and licensing*." (*Great Western, supra,* 27 Cal.4th at p. 862 [emphasis added].)

Soon thereafter, the court in *Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897 held that a local law prohibiting parents from allowing

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[6] The decision below, in contrast, states that "*Galvan* interpreted [Section 12026's] 'no permit or license ... shall be required' language *broadly*," not narrowly. (Slip Op. at 9 [emphasis added].) This further illustrates that the decision below interprets firearms statutes and preemption principles in a way that is fundamentally in conflict with prior caselaw on the subject.

minors to possess or fire BB guns was not preempted. (*Id.*, 15 Cal.App.3d at p. 902.) Again, the Legislature responded cautiously by adopting Government Code Section 53071.5, which expressly occupies the field of regulation of the manufacture, possession, and sale – but only with respect to *imitation* firearms.[7] Section 53071.5 "shows the language that the Legislature can be expected to use if it intends to 'occupy the whole field.'" (*CRPA*, *supra,* 66 Cal.App.4th at p. 1312.) And Section 53071.5's "express preemption of local regulation of sales of imitation firearms, but not sales of real firearms, demonstrates that the Legislature has made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms." (*Great Western, supra*, 27 Cal.4th at p. 864.)

In 1998, the *CRPA* court held that a local law prohibiting the sale of handguns popularly known as "Saturday Night Specials" was not preempted. (*Id.*, 66 Cal.App.4th at p. 1312.) Pointing to the imitation firearms statute, Government Code Section 53071.5 – which "shows the Legislature's view of 'sale' as a separate area of regulation," distinct from licensing – the court held that Sections 12026 and 53071 preempt only local registration and licensing requirements, but did not preempt the outright sales ban at issue. (*Id.* at pp. 1314, 1311.) Similarly, in 1997 the court in *Suter, supra,* held that "state law does not preempt the broad field of sales of firearms," and thus did not preempt a local law that confined firearms

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[7] Government Code Section 53071.5 states, in relevant part, that "[t]he Legislature occupies the whole field of regulation of the manufacture, sale, or possession of imitation firearms ... and that section shall preempt and be exclusive of all regulations relating to the manufacture, sale, or possession of imitation firearms[.]" (*Id.*)

dealers to certain areas, required dealers to obtain specific local permits, and required that guns be sold with accompanying safety devices. (*Id.*, 57 Cal.App.4th at pp. 1122, 1126-27.)[8]

Virtually the only exception to this marked trend of narrow, circumscribed preemption is *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509, which invalidated a San Francisco ordinance that prohibited all persons from possessing handguns within city limits. The court held that because the local law "exempt[ed] licensed persons from the ban" on handgun possession, it "implicitly create[d]" a licensing requirement, making it "at least a local regulation *relating to licensing*," and thus expressly preempted by Section 53071. (*Id.*, 136 Cal.App.3d at p. 517 and fn. 1.) For the same reason, the court held the local law was expressly preempted by Section 12026, under which possession of a handgun at home may not be conditioned on a permit or license. (*Id.* at p. 518.) In a single, conclusory paragraph, the court also stated that even if it "were to find ... no 'licensing' requirement," it would interpret Penal Section 12026 to have an implied preemptive effect beyond the statute's terms. The court "infer[red]" that by enacting Section 12026, "the Legislature intended to occupy the field of residential handgun possession," even apart from any licensing and permitting mandate, because it "strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." (*Id.*) The court cited no legal authority for its brief statement,

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[8] The court in *Suter* held that a single aspect of the local law, relating to gun dealers' security measures for firearms storage, was preempted because the Legislature had enacted detailed storage requirements for dealers. (*Id.*, 57 Cal.App.4th at p. 1125.)

and also did not mention, much less follow, the settled tests of implied preemption required by *Galvan* and other cases. (*Id.*)

**3. This Court's *Great Western* and *Nordyke* decisions.**

In 2000 the Ninth Circuit, reviewing a preemption challenge to a local law prohibiting sales of firearms and ammunition on county property, noted the "tension" between *Doe*'s implied preemption dictum and *CRPA*, which "appears to have disavowed the logic underlying" *Doe*. (*Great Western Shows, Inc. v. Los Angeles County* (9th Cir. 2000) 229 F.3d 1258, 1262.) Referring to the *Doe*, *CRPA*, and *Suter* decisions, the Ninth Circuit observed that California courts "have responded in seemingly conflicting ways" to firearms preemption claims, and noted that "there is tension in the reasoning underlying several decisions of the Courts of Appeal of the State of California[.]" (*Id* at pp. 1261-63.) It therefore certified to this Court "questions of law concerning the possible state preemption of local gun control ordinances." (*Id.* at p. 1259.)

This Court granted the certification request, and in 2002 issued its *Great Western* decision. There, the Court first traced the development of California's gun preemption law, emphasizing the Legislature's consistent deference to local authority and reaffirming that local firearms problems require different solutions in different jurisdictions. (*Id.*, 27 Cal.4th at p. 867.) This Court then discussed just one case that found a local ordinance preempted: *Doe*. (*Id.*, 27 Cal.4th at p. 863.) The Court described *Doe*'s preemption holding as being that "the ordinance directly conflicted with Government Code section 53071 and Penal Code section 12026, the former explicitly preempting local licensing requirements, the latter exempting from licensing requirements gun possession in residences and places of business." (*Id.*, 27 Cal.4th at p. 864.) Significantly, the Court was silent

about *Doe*'s one-paragraph implied preemption discussion. (*See id.* at pp. 863-864, 865-67.) The Court concluded its overview of the law by noting that "the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption." (*Great Western, supra,* 27 Cal.4th at pp. 861-64.)

Next, the Court held that the local ordinance before it – which, by prohibiting all sales of firearms and ammunition on county property, effectively banned gun shows – was not preempted. As it explained, state law allows counties to exercise control over their own property, and expressly empowers local governments to regulate "the possession and transfer of firearms." (*Id.*, 27 Cal.4th at p. 865 [citing Penal Code §12071.4(b)].) And the county's sales prohibition did not conflict with state law, because the Legislature's decision to expressly *authorize* certain conduct – in this case, firearms sales at gun shows – does not show that the Legislature intends to prevent local governments from prohibiting that conduct:

> [A]lthough the gun show statutes regulate, among other things, the sale of guns at gun shows, and therefore contemplate such sales, the statutes do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes.

(*Id.*, 27 Cal.4th at p. 866.)

In *Nordyke v. King* (2002) 27 Cal.4th 875, the companion case to *Great Western,* the Court held that a local law prohibiting the possession of guns and ammunition on county property was not preempted. That law expressly exempted from its prohibition certain classes of persons holding state-issued licenses – such as "persons holding valid firearms' licenses pursuant to Penal Code section 12050" – while banning gun possession

even by certain other classes of persons who were authorized by state law to possess firearms, such as animal control officers and retired federal law enforcement officers. (*Id.*, 27 Cal.4th at pp. 881, 884.) As the Court explained, state law that generally prohibits gun possession in public buildings, yet permits gun shows in public buildings, that statute simply *allows* local governments to authorize gun shows, without "*mandat[ing]* that local government entities permit such a use." (*Id.* at p. 883-84 [emphasis original].)

Moreover, that the local law was concededly "more restrictive than state statutes," and banned local gun possession even by some persons permitted by state law to possess firearms, did not make it invalid. (*Id.*, 27 Cal.4th at p. 884.) Echoing the theme of local authority it sounded in *Great Western,* this Court held that "the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property." (*Id.*) Moreover, even if "in at least some cases the Legislature meant to preempt local governments from criminalizing the possession of firearms by certain classes of people, that would establish at most that the Ordinance is *partially* preempted with respect to those classes. Partial preemption does not invalidate the Ordinance as a whole." (*Id.* [emphasis original].)

As these decisions show, California law is remarkably protective of local power to regulate firearms. Courts have upheld local laws restricting or prohibiting sales or possession of firearms and ammunition, even as to conduct that the state has exempted from its own prohibitions, and even as to persons whom the state has authorized to engage in such conduct. Courts also have recognized that the Legislature "has no intention of

preempting areas of weapons laws not specifically addressed by state statute." (*CRPA, supra,* 66 Cal.App.4th at p. 1316.) "That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities." (*Suter, supra,* 57 Cal.App.4th at p. 1119.)

## II. THE DECISION BELOW CONFLICTS WITH OTHER CALIFORNIA FIREARMS PREEMPTION CASES, AND LEAVES IMPORTANT QUESTIONS OF LOCAL REGULATORY POWER UNSETTLED

The decision below substantially conflicts with these precedents. It is inconsistent with their protective approach to local regulatory power, and it also conflicts with the specific holdings of these cases, and the narrow ways in which they have interpreted state firearms statutes. This Court should grant review to resolve these conflicts, which leave California firearms law significantly unsettled, and which will create significant uncertainty on the part of local governments as to the types of firearms regulations they may enact to protect their citizens.

### A. Government Code Section 53071.

#### 1. Where state law allows possession in specified circumstances, does it thereby create a "license" within the meaning of Section 53071?

First, the lower court's conclusion that Section 53071 preempts Proposition H's ban on local handgun possession conflicts with this Court's decisions in *Nordyke* and *Great Western*. According to the court below, where state law allows certain classes of persons to possess firearms, it thereby creates "licenses," and a law – such as Proposition H's Section 3 – that bars those persons from possessing a firearm thereby "relates to" gun licensing and is preempted by Section 53071. (Slip Op. at 13-14.)

But in *Nordyke*, as explained above, this Court held that even where state law authorized gun possession by specific groups of persons (there, animal control officers and retired law enforcement personnel) to carry firearms, an Alameda County law prohibiting gun possession on county property that contained no exemption for such persons was not thereby preempted:

> [T]he fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property.

(*Nordyke, supra*, 27 Cal.4th at p. 884.) Moreover, "even if ... in at least some cases the Legislature meant to preempt local governments from criminalizing the possession of firearms by certain classes of people, that would establish at most that the Ordinance is partially preempted with respect to those classes. Partial preemption does not invalidate the Ordinance as a whole." (*Id.*) Likewise, in *Great Western, supra*, this Court held that a county ordinance prohibiting the sale of guns and ammunition on county property was not preempted, even though state statutes authorized such sales and – to use the terminology adopted by the decision below – the local prohibition obviously "invalidated a state-issued license" created by the state's authorization. (*Id.*, 27 Cal.4th at p. 866.)

The decision's overbroad interpretation of "licensing" will create substantial uncertainty about the extent of local regulatory power over firearms. If every state legislative decision as to which circumstances or persons should and should not be covered by a state gun-related prohibition created "state-created licenses" with respect to the persons or circumstances not covered, then every state firearms statute would automatically occupy the entire field in which it regulated, unless it expressly provided otherwise.

And every local ordinance that went beyond the scope of the state's restrictions – in other words, that prohibited or restricted anything that the Legislature had not prohibited or restricted – might thereby invalidate such supposed "licenses," and thus run afoul of Section 53071. This expansive interpretation of Section 53071, therefore, threatens to strip local governments of their police power to regulate firearms subject only to preemptive state law, and to instead leave local governments only with whatever authority the Legislature *expressly* delegates to them.

The holding below threatens to substantially erode local power to regulate all manner of firearms-related conduct. For this reason, this Court should grant review to resolve the scope of the preempted field of "licensing" under Section 53071.

**2. Does Section 53071 preempt local laws that have no connection to licensing of firearms, but relate to licensed firearms dealers?**

Proposition H's sales ban, found in Section 2 of the initiative, does not require or have any relation to the registration or licensing of any *firearm*. Nonetheless, the court below held that Section 53071 preempts Section 2's sales prohibition, because by prohibiting gun sales, the ban "effectively cancels" the licenses of firearms *dealers* – that is, "gunshops, pawnshops, and auction houses that hold valid state licenses ..." (Slip Op. at 15.)

As a textual matter, this holding was clearly wrong. Even under its "relating to" prong, Section 53071 preempts only local laws having a relation to registration or licensing of firearms – that is, the weapons themselves – not registration or licensing of the dealers who sell such weapons.

More significantly, however, this holding conflicts with other gun preemption cases. For example:

- By entirely prohibiting gun shows on county property, the local law that this Court upheld in *Great Western Shows, supra*, clearly interfered with the activities of persons holding state-issued licenses, such as gun dealers and gun show organizers and promoters licensed under Penal Code Section 12071. (*See Great Western Shows, supra*, 27 Cal.4th at p. 864-65.) But in rejecting the plaintiff's preemption challenge, this Court hardly found it necessary to consider Section 53071. The simple fact that Section 53071's "legislative intent was limited to registration and licensing" (*id.* at p. 862) made the statute irrelevant there.
- In *Suter, supra*, the First District held that neither Section 53071 nor other firearms statutes preempted a local law that imposed a variety of permitting and zoning requirements on firearms dealers. (*Id.*, 57 Cal.App.4th at pp. 1119-21.) As the First District noted, Penal Code Section 12071 "expressly provides for" local licensing requirements for dealers, "and further provides that in the event of certain conflicts between local requirements and state requirements, state requirements should give way." (*Id.*, 57 Cal.App.4th at pp. 1120-21.) *Suter*'s holding cannot be reconciled with the holding of the court below that Section 53071 preempts local laws that do not require or relate to licensing or registration of any firearm, but instead impact the sales activities of firearms dealers.

Equally important, the court below's expansive interpretation of Section 53071, if left undisturbed, will cause significant uncertainty over the breadth of local regulatory power. The Legislature has affirmatively empowered cities and counties to require gun dealers to obtain local business licenses, as well to "otherwise restrict or regulate the sale of firearms," (Penal Code Section 12071(a)(6)), and local governments' ability to exercise such power is important to public safety. Yet as cities and counties contemplate regulating such matters as where state-licensed gun dealers can operate, which firearms they may sell, and the conditions under which they conduct business, the decision below will cast substantial uncertainty on the extent to which such regulations are permissible. This Court should grant review to resolve the conflicts between the decision below and such cases as *Great Western Shows* and *Suter*, and to settle the important question of Section 53071's preemptive reach.

**B. Penal Code Section 12026**

The court below interpreted Section 12026 in a way that is equally at odds with prior decisions, and that, absent this Court's review, will similarly cause considerable confusion about the extent of local regulatory authority over handguns.

As noted above, the decision below broadly interprets Section 12026 as precluding far more than the "permit or license" requirements preempted by that statute's plain text. According to the court, Section 12026 preempts local "impediments" on citizens' ability to purchase and possess handguns, "guarantee[s]" that City residents will be able to purchase or possess handguns, and bars local ordinances that "substantially burden[] the purchasing and possession" of handguns. (Slip Op. at 9, 15.) Based on this expansive view of Section 12026, the court below held that that statute

preempts not only Proposition H's ban on local handgun possession, but also its sales ban, at least with respect to sales of handguns. (Slip Op. at 15.)

This breathtaking broad interpretation of Section 12026 conflicts with *CRPA*, which held that Section 12026 did not preempt a local law that prohibited sales of a specified class of handguns. (*Id.*, 66 Cal.App.4th at pp. 1311, 1317-20.) As the court there held, Section 12026 did not preempt West Hollywood's ban on sales of Saturday Night Specials, because that statute "preempts a narrowly limited field of firearms regulation," and "prohibits only local 'permit or license' requirements, and does not deal with sales." (*Id.*, 66 Cal.App.4th at p. 1319.) The local sales ban, in contrast, "creates no permit or license requirement, and instead regulates only sales." (*Id.* at p. 1319.) According to the *CRPA* court, any claim that Section 12026 expressly preempts a local Saturday Night Special sales prohibition would "stretch[] the words of [Section 12026] beyond their literal meaning," and would thus be simply untenable. (*Id.*, 66 Cal.App.4th at p. 1313.)

The respondents will likely argue that the broad interpretation of Section 12026 adopted by the decision below follows *Doe, supra*, which "infer[red] from Penal Code section 12026 that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities." (*Id.*, 136 Cal.App.3d at p. 518.) But even this portion of *Doe* – which, as the Ninth Circuit's certification to this Court in *Great Western* recognizes, is in palpable tension with more recent firearms preemption cases – does not go nearly so far as does the decision below. *Doe* did not consider a prohibition on handgun sales, much less find such a prohibition preempted. Moreover, the *Doe* court did not suggest, as the

court below does, that Section 12026 preempts even mere "impediments" or "burdens" on the ability to purchase or possess handguns. In expanding Section 12026's preemptive scope to extend far into fields of regulation ranging from purchasing and sales of handguns to the possession and carrying of such firearms, the decision below blazes wholly new territory, substantially unsupported by any prior case authority.

The far-reaching nature of the Section 12026's preemption, as described in the decision below, will cause substantial uncertainty among local governments as to their ability to adopt many types of firearms regulations. This Court should grant review to resolve the conflicts between the manner in which the court below and other courts have interpreted Section 12026, and to settle the important question of how broadly that statute's preemptive reach extends.

**C. The Unsafe Handgun Act.**

The court below held that Section 2 of Proposition H is impliedly preempted, at least with respect to handgun sales, by the Unsafe Handgun Act (Pen.Code §12125 *et seq.*; "UHA"). (Slip Op. at 15-19.) This holding, however, is at best inconsistent with this Court's *Great Western* decision, and with the settled notion that the preemptive scope of California's firearms statutes is interpreted narrowly.

The court based its UHA ruling on Penal Code Section 12131(a), which directs the California Department of Justice to subject handguns to a series of reliability and safety tests, and to compile a list of models that, having passed such tests, "have been determined not to be unsafe handguns, and may be sold in this state pursuant to this title." (*Id.*) But neither the UHA's term "may" nor any other provision in the statute expressly or impliedly occupies the whole field of handgun sales. Notably, the UHA is

completely silent on the subjects of local regulatory power, preemption, or the occupation of any field.

In this respect Penal Code Section 12131(a) stands in stark contrast to statutes such as Government Code Section 53071.5, in which the Legislature has plainly stated that it "occupies the whole field of regulation of the ...sale... of imitation firearms," and which expressly states that it shall "preempt and be exclusive of all regulations" relating to that subject. (*Id.*) Section 53071.5 "shows the language that the Legislature can be expected to use if it intends to 'occupy the whole field.'" (*CRPA, supra,* 66 Cal.App.4th at p. 1312.) The fact that the Legislature chose not to employ even remotely similar language in Penal Code Section 12131(a) strongly suggests that it did not intend to occupy the field of handgun sales.

Nor does Section 2's sales ban contradict the UHA. Section 12131(a) 's phrase "may be sold" is permissive, but is hardly mandatory. The statute merely defines the circumstances under which the Legislature has and has not sought to prevent handgun sales. In this respect the UHA is like California's gun show statutes, which "regulate ... the sale of guns at gun shows, and therefore contemplate such sales," but "do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes." (*Great Western, supra,* 27 Cal.4th at p. 866; *Nordyke,* 27 Cal.4th at p. 884 [statute that "exempts gun shows from the state criminal prohibition on possessing guns in public buildings," and thus allows guns shows, "does not *mandate* that local government entities permit such a use"] [emphasis original].) While it is "impeccably true that something that is not prohibited by state law is lawful under state law," such "a tautological observation ... is hardly a firm foundation for an

analysis" of whether the Legislature sought to preempt local authority. (*CRPA*, *supra,* 66 Cal.App.4th at p. 1323.)

Indeed, the court below's attribution of preemptive intent to the statutory term "may" conflicts with this Court's *Great Western* decision, in which a statutory reference to gun sales conduct that "may" occur did not preempt local power to prohibit that conduct. In *Great Western* this Court examined the preemptive effect of several statutes regulating gun sales and gun shows, and began by quoting Penal Code Section 12071(b)(1)(B)'s statement that a licensed gun dealer "*may* take possession of firearms and commence preparation of registers for the sale, delivery, or transfer of firearms at gun shows or events." (*Great Western, supra*, 27 Cal.4th at p. 864 [emphasis added].) The Court held that the quoted terms merely "contemplate" that guns can be sold at gun shows, but "do not mandate such sales, such that a limitation of sales on county property would be in direct conflict with the statutes." (*Id.*, 27 Cal.4th at p. 866.)

The UHA uses the term "may" in the same permissive way. It contemplates sales of handguns found not to "unsafe," but it does not mandate such sales. Proposition H's prohibition against sales of handguns on the UHA roster, therefore, does not "forbid what state law expressly mandates," and does not conflict with the UHA. (*Great Western, supra*, 27 Cal.4th at p. 866.)

The extent to which the UHA preempts local regulatory authority presents an important issue for local governments. As technology advances, cities and counties may wish to restrict or prohibit sales of specific types of handguns, such as those composed of materials that are invisible to metal detectors, or those of an unusually high caliber. And the court below, by holding that the UHA preserves "room … for some

quantum of local handgun sales regulation" in "synergy" with state statutes, but prohibits Proposition H's sales ban, has muddled rather than clarified this important question of law. This Court should grant review to resolve the conflicts between the decision's UHA holding and this Court's *Great Western* decision, and to settle the important question of the UHA's preemptive scope.

## CONCLUSION

For the foregoing reasons, the City and County of San Francisco respectfully urges this Court to grant review.

Dated: February 19, 2008

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 7,391 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on February 19, 2008.

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Filed 1/9/08

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

| | |
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| PAULA FISCAL et al.,<br>Plaintiffs and Respondents,<br>v.<br>CITY AND COUNTY OF SAN FRANCISCO et al.,<br>Defendants and Appellants. | A115018<br><br>(San Francisco County Super. Ct. No. CPF05505960) |

## I.
## INTRODUCTION

In 2005, the voters of the City and County of San Francisco (City), a home rule charter city, passed Proposition H, a local ordinance prohibiting: (1) virtually all City residents from possessing handguns; and (2) all City residents, without exception, from selling, distributing, transferring and manufacturing firearms and ammunition. A legal challenge to the ordinance resulted in the trial court holding that key aspects of the ordinance were preempted by state law. Based on its further determination that the invalid portions of the ordinance were not severable from the arguably valid portions, the court found that the ordinance was preempted in its entirety. Lastly, the trial court held that the City's home rule power under the California Constitution, article XI, section 5, subdivision (a) (municipal home rule for charter cities) did not override state preemption because the field being regulated was one of statewide, rather than local, concern. We agree with the trial court's conclusions, and affirm the judgment in all respects.

## II.

## FACTS AND PROCEDURAL HISTORY

This appeal concerns Proposition H (Prop H or ordinance), a municipal ordinance enacted by the City's voters in November 2005. The "Findings" section of Prop H states that "[h]andgun violence is a serious problem in San Francisco," accounting for 67 percent of injuries or deaths caused by firearms in the City in 1999. These findings also state that Prop H is not intended to affect residents from other jurisdictions with regard to handgun possession. Therefore, "the provisions of Section 3 [banning handgun possession in the City] apply exclusively to residents of the City and County of San Francisco." Section 1 also invokes the City's "home rule" power and describes that power as allowing "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."

Prop H contains two substantive provisions, Section 2 and Section 3. Section 2 is entitled "Ban on Sale, Manufacture, Transfer or Distribution of Firearms in the City and County of San Francisco." It states, in its entirety, that "[w]ithin the limits of the City and County of San Francisco, the sale, distribution, transfer and manufacture of all firearms and ammunition shall be prohibited." There are no exceptions to this section.

Section 3 is entitled "Limiting Handgun Possession in the City and County of San Francisco." It states that within City boundaries, "no resident of the City and County of San Francisco shall possess any handgun unless required for professional purposes, as enumerated herein." Section 3 contains narrow exemptions to the City's ban on possession of handguns for government employees carrying out the functions of government employment, active members of the United States armed forces or the National Guard, and security guards "while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment . . . ." Section 3 indicates that any City resident may surrender his or her handgun "without penalty" at any district station of the San Francisco Police Department or to the San Francisco Sheriff's Department within 90 days after Section 3 becomes effective.

The City's board of supervisors is charged with enacting penalties for violation of the ordinance.

Section 6 is entitled "State Law." It provides that "[n]othing in this ordinance is designed to duplicate or conflict with California state law" or 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." Additionally, the ordinance does not apply to "any person currently denied the privilege of possessing a handgun under state law . . . ."

Finally, Section 7 of the ordinance contains a severability clause that provides "[i]f 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 or [*sic*] 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."

After Prop H passed, Paula Fiscal, several retired law enforcement and military personnel, two law enforcement associations, and several firearms rights groups (collectively, petitioners) sought a writ of mandate declaring Prop H invalid. Among other arguments, petitioners challenged the ordinance on the grounds that it was preempted by state law.

The trial court granted petitioners' request for writ of mandate, finding Prop H unenforceable, primarily because it was preempted by three separate state laws regulating firearms. Specifically, the court determined that the key provisions of Prop H, prohibiting the sale of firearms and possession of handguns by City residents, were preempted by Penal Code section 12026, subdivision (b) [prohibiting localities from restricting handgun possession in an individual's home, business, or private property], Government Code section 53071 [indicating an express intent by the Legislature to occupy the whole field of firearms licensing and registration] and the Unsafe Handgun Act, Penal Code sections 12125-12233 [establishing a protocol for designating which handguns may be sold in California] (UHA). Finally, the trial court found that any residual portions of Prop H arguably valid were not severable because the court could not

disentangle the various bans without exceeding its powers by deleting and adding words, i.e., rewriting the ordinance. The court further concluded that the subject of Prop H "dealing with the possession and use of handguns" is one of statewide concern and therefore controlled by the applicable state law. This appeal followed.

## III.

## DISCUSSION

### A. Introduction

Before addressing the issues raised in this case, we briefly note what is not at issue in this appeal. This case is not about the public policy choices that the voters in San Francisco have made by enacting Prop H. Thus, we need not, and do not, pass judgment on the merits of Prop H, or engage ourselves in the sociological and cultural debate about whether gun control is an effective means to combat crime. (Compare Ayres & Donohue, *Shooting Down the "More Guns, Less Crime" Hypothesis* (2003) 55 Stanford L.Rev. 1193; Comment, *Confirming "More Guns, Less Crime"* (2003) 55 Stanford L.Rev. 1313.) Similarly, the question of whether California citizens do or do not enjoy a constitutional right to own or possess firearms, or if it exists, whether that right can be limited by local gun control legislation has not been raised or argued by the parties to this case. (See generally *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481 [no mention made in California Constitution of right to bear arms].) Our task is simply to determine whether Prop H is preempted by state law.

### B. California Preemption Analysis and Standard of Review

In *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061 (*O'Connell*), our Supreme Court recently restated the guiding principles for determining whether a local ordinance is displaced by a state measure. The court explained, " 'Under article XI, section 7 of the California Constitution, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general [state] laws." [¶] "If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." [Citations.] [¶] "A conflict exists if the local legislation ' "*duplicates, contradicts,* or *enters an area fully occupied* by general

law, either expressly or by legislative implication." ' " [Citations.]' (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897 . . . , italics added, fn. omitted (*Sherwin-Williams*); see also *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251 . . . (*American Financial*).)" (*O'Connell, supra*, 41 Cal.4th at p. 1067.)

The *O'Connell* court explained the italicized terms as follows: "A local ordinance *duplicates* state law when it is 'coextensive' with state law. (*Sherwin-Williams, supra*, 4 Cal.4th at pp. 897-898, citing *In re Portnoy* (1942) 21 Cal.2d 237, 240 . . . [as 'finding "duplication" where local legislation purported to impose the same criminal prohibition that general law imposed'].)

"A local ordinance *contradicts* state law when it is inimical to or cannot be reconciled with state law. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898, citing *Ex Parte Daniels* (1920) 183 Cal. 636, 641-648 . . . [as finding ' "contradiction" ' in a local ordinance that set the maximum speed limit for vehicles below that set by state law].)

"A local ordinance *enters a field fully occupied* by state law in either of two situations—when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field. (*Sherwin-Williams, supra*, 4 Cal.4th at p. 898; see also 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p. 551 ['[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field . . . municipal power [to regulate in that area] is lost.'].)" (*O'Connell, supra*, 41 Cal.4th at pp. 1067-1068.)

The *O'Connell* court went on to say: "When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when ' "(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a

local ordinance on the transient citizens of the state outweighs the possible benefit to the locality." (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.)' " (*O'Connell*, *supra*, 41 Cal.4th at p. 1068.))

Because the City in this case is a charter city, the home rule doctrine also comes into play. Article XI, section 5, subdivision (a) of the California Constitution reserves to charter cities the right to 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." (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 398-399.) " 'Because the various sections of article XI fail to define municipal affairs, it becomes necessary for the courts to decide, under the facts of each case, whether the subject matter under discussion is of municipal or statewide concern. This question must be determined from the legislative purpose in each individual instance.'. . ." (*City of Santa Clara v. Von Raesfeld* (1970) 3 Cal.3d 239, 246, quoting *Professional Fire Fighters, Inc. v. City of Los Angeles* (1963) 60 Cal.2d 276, 294.)

A trial court's decision invalidating a local ordinance on grounds of preemption is reviewed de novo. (See *City of Watsonville v. State Dept. of Health Services* (2005) 133 Cal.App.4th 875, 882; *Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 889.) Similarly, where a charter city ordinance is challenged on preemption grounds and is defended as a permissible exercise of the city's home rule power, the challenge also presents a question of law which must be decided on a case-by-case basis. (*Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 100 (*Northern Cal. Psychiatric Society*).)

### C. Overview of Parties' Arguments

The preemption doctrine outlined above frames the parties' arguments. Petitioners contend the ordinance contains multiple provisions that trespass into fields of regulation that the state has either expressly or impliedly fully occupied. According to petitioners, state law has so thoroughly and pervasively covered the subjects covered by Prop H, and the subjects are so in need of uniform state treatment, that the City's most recent effort to

restrict its citizens' ability to purchase, own, and possess firearms, at home and at their businesses, is clearly preempted.

In rebuttal, the City points out that the Legislature has never made clear its intention to preempt local regulation of firearms, and therefore this court should not infer preemption. The City stresses San Francisco is besieged by violent crime, which often involves firearms, and the state Legislature has failed to enact laws that would effectively address the gun violence that "has particularly ravaged the City's less affluent neighborhoods and minority communities." In light of the Legislature's inaction, the City claims it is essential that it be able to enact its own local ordinance restricting access to firearms in order to provide for the safety and welfare of its citizens.

The City is correct to the extent it argues that the Legislature has never expressed an intent to preempt the entire field of firearm regulation to the exclusion of local control. The Legislature, instead, has chosen to preempt "discrete areas of gun regulation." (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 861 (*Great Western*).) "That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities. [Citation.]" (*Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 (*Suter*).)

We therefore turn to the state statutory scheme to determine whether any of the provisions of Prop H duplicate or contradict state law, or whether its subject matter invades a field that the state has fully occupied, either expressly or implicitly. (*O'Connell*, *supra*, 41 Cal.4th at pp. 1067-1068.) In undertaking a preemption analysis, we examine the myriad of subjects covered by the ordinance section-by-section, starting with Section 3's handgun ban. Despite the fact that no other court has been called upon

to consider a local firearms ban of this scope[1], this court, when considering the power of the City to legislate in this area, is by no means writing on a blank slate.

**D. Section 3 of Prop H entitled "Limiting Handgun Possession in the City and County of San Francisco" is Preempted by State Law**

With narrow exceptions, Section 3 of Prop H bans the *possession* of handguns by San Francisco residents, including handgun possession within the sanctity of homes, businesses, and private property.[2] The trial court identified two state statutes, "each of which specifically preempts a narrowly limited field of firearms regulation," which the trial court found preempted Section 3. (*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1318 (*CRPA*).) These two code sections are Penal Code section 12026, subdivision (b) [prohibiting localities from restricting handgun possession in an individual's home, business, or private property] and Government Code section 53071 [indicating an express intent by the Legislature to occupy the whole field of firearms licensing and registration]. The trial court's conclusion is supported by the legislative history and subsequent judicial interpretation of these provisions.

In its current form, Penal Code section 12026, subdivision (b), reads that if a California resident suffers no legal impediment to handgun ownership, "[n]o permit or license" shall be required "to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private

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1 In a recent law review article, counsel for petitioners have characterized Proposition H as "the most extreme gun ban ever enacted in the United States, except for the confiscation of all firearms enacted by the seceding state of Tennessee during the Civil War." (Kate & Michel, *Local Gun Bans in California: A Futile Exercise* (2007) 41 U.S.F. L.Rev. 333, 334, fn. omitted (*Local Gun Bans*).)

2 Section 3 prohibits possession of only handguns, so presumably other types of firearms, such as rifles or shotguns, are outside its scope.

property owned or lawfully possessed by the citizen or legal resident."[3] Penal Code section 12026 was enacted in 1923 as part of the Uniform Firearms Act. By barring the imposition of any permit or licensing requirement, Penal Code section 12026 served to preclude local public entities from adopting impediments on legally qualified citizens wishing to "purchase, own, possess, keep, or carry" a concealable firearm in their homes or businesses.

In *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 855 (*Galvan*) our Supreme Court held that Penal Code section 12026 did not prohibit San Francisco from passing an ordinance requiring the registration of most firearms within city limits. (*Id.* at pp. 855, 859.) The Supreme Court held that the San Francisco ordinance did not contradict section 12026 because "registration" has an entirely different meaning than "licensing," and registration and licensing, by their very nature, seek to achieve different goals. (*Id.* at pp. 856-858.) Significantly, in discussing Penal Code section 12026, *Galvan* interpreted the "no permit or license . . . shall be required" language broadly, as indicating a legislative intent "that the right to possess a weapon at certain places could not be circumscribed by imposing any requirements . . . ." (*Id.* at p. 858.)

In response to *Galvan*, the Legislature enacted former Government Code section 9619 (Stats. 1969, ch. 1428, § 1. pp. 2932-2933), later re-codified at Government Code section 53071 (Stats. 1971, ch. 438, § 95, pp. 119-121) (Government Code section 53071). This section expressly preempts all local laws which attempt to regulate either

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[3] Currently, Penal Code section 12026, subdivision (b) reads in full: "No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required of any citizen of the United States or legal resident over the age of 18 years who resides or is temporarily within this state, and who is not within the excepted classes prescribed by Sections 12021 or 12021.1 of this code [relating to certain persons convicted of crimes and to narcotics addicts] or Section 8100 or 8103 of the Welfare and Institutions Code [relating to persons with mental disorders], to purchase, own, possess, keep, or carry, either openly or concealed, a pistol, revolver, or other firearm capable of being concealed upon the person within the citizen's or legal resident's place of residence, place of business, or on private property owned or lawfully possessed by the citizen or legal resident." Hereafter, we will simply refer to this section as Penal Code section 12026.

licensing or registration of firearms, by declaring "the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms" while expressly prohibiting "all local regulations, relating to registration or licensing of commercially manufactured firearms . . . ."[4]

After Government Code section 53071 was enacted, San Francisco passed an ordinance requiring anyone seeking to purchase a concealable firearm within the City first to get a permit from the City's police chief. This permit requirement was easily struck down by the court in *Sippel v. Nelder* (1972) 24 Cal.App.3d 173 as running afoul of both Penal Code section 12026 and Government Code section 53071. (*Id.* at p. 177.) The court concluded that, with the passage of Government Code section 53071, "the Legislature resolved any possible doubt as to its intent to fully occupy the field of firearm control, both in terms of registration and licensing." (*Ibid.*) The court also held that the plaintiff was "entitled, under Penal Code[] section 12026, to possess a concealed firearm at his residence without obtaining a license or permit of any kind." (*Id.* at p. 177.)

Ten years later, in *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 (*Doe*), Division Three of this court was called upon to examine a San Francisco ordinance banning the possession of handguns within City limits. Exempted from the ordinance were persons possessing a state license to carry a concealed firearm under Penal Code section 12050. (*Id.* at p. 512.)

The *Doe* court found the ordinance preempted by employing multiple, alternative analyses. Most important to our analysis of Prop H, the court concluded that section 12026 was intended to occupy the field of residential firearm possession. (*Doe*, *supra*, 136 Cal.App.3d at p. 518.) "It is at least arguable that the state Legislature's adoption of numerous gun regulations has not impliedly preempted *all areas* of gun regulation. . . .

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4 Government Code section 53071, reads in full: "It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations, relating to registration or licensing of commercially manufactured firearms, by any political subdivision as defined in Section 1721 of the Labor Code."

However, we infer from Penal Code section 12026 that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities. A restriction on requiring permits and licenses necessarily implies that possession is lawful without a permit or license. It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." (*Id.* at p. 518.)

In our view, *Doe* correctly interpreted Penal Code section 12026 as depriving local entities of any power to regulate handgun possession on private property. The City claims *Doe*'s "finding of a legislative intent to occupy the field of residential handgun possession" was based on "faulty reasoning." It argues that *Doe* interpreted Penal Code section 12026 too broadly because when read literally, section 12026 does nothing more than preempt local governments from imposing a requirement "that gun owners obtain a permit [or license] to purchase a handgun or to keep a handgun in their home or business . . . ." However, they cite to no subsequent case which has overruled, disapproved of, or even sought to limit or clarify, the *Doe* decision. In fact, *Doe* has been cited with approval by our Supreme Court. (*Great Western*, *supra*, 27 Cal.4th at p. 864.)

Also, " 'the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them.' [Citation.]" (*Barajas v. City of Anaheim* (1993) 15 Cal.App.4th 1808, 1814-1815.) Given the presumption of the Legislature's awareness of *Doe* during the three times it has reenacted Penal Code section 12026 since the *Doe* decision,[5] it is reasonable to assume that if the Legislature intended to reopen this area of regulation to local units of government, it would have addressed the issue specifically by repealing or amending Penal Code section 12026. (*Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 815.) Because it did not do so, we conclude that the Legislature intended to maintain the prohibitions

[5] Stats. 1995, ch. 322, § 1, p. 1803; Stats. 1989, ch. 958, § 1, p. 3372; Stats. 1988, ch. 577, § 2, pp. 2128-2129. The one noteworthy change is that Penal Code section 12026 is now subdivided. See Stats. 1988, ch. 577, § 2, pp. 2128-2129; Stats. 1989, ch. 958, § 1, p. 3372; Stats. 1995, ch. 322, § 1 & subd. (b), p. 1803.

placed on local government that are contained in Penal Code section 12026, as interpreted by the *Doe* decision. (*Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1821 [refusing to consider arguments that a previous case's interpretation of a statute was wrong, given that the statute was reenacted without change to the language interpreted].)[6]

Therefore, insofar as Section 3 of the ordinance operates to prohibit and punish handgun possession by City residents on private property, e.g., in their homes and businesses, it is impliedly preempted by Penal Code section 12026. We agree with *Doe* that it can be readily "infer[red] from Penal Code section 12026 that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities." (*Doe*, *supra*, 136 Cal.App.3d at p. 518.)

While we have thus far focused on the relationship between state law and Section 3's ban on handgun possession on one's private property, it is important to note that Section 3 regulates in a much broader field than just private property. Section 3 prohibits both *public and private* handgun possession and thus effectively displaces numerous state laws allowing private citizens to possess handguns for self-protection and other lawful purposes. As the trial court noted, "[t]he statute books contain almost one hundred pages of unannotated state gun laws that set out a myriad of statewide licensing schemes, exceptions, and exemptions dealing with the possession and use of handguns." We provide a brief overview of just a few of the state statutes dealing with public handgun possession.

Penal Code section 12050 provides that, upon a showing of good cause, any law-abiding, responsible adult can obtain a license to carry a concealed handgun. Even without a license, Penal Code sections 12025.5 and 12031, subdivision (j)(2) create special exceptions whereby people who have been threatened and who have obtained restraining orders may carry loaded and concealed handguns. Penal Code sections

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6 One can easily infer from how expeditiously the Legislature moved to enact what is now Government Code section 53071 after the *Galvan* case was decided that our lawmakers have an acute awareness of, and an abiding interest in, firearms regulation.

12027, subdivision (a) and 12031, subdivision (b)(1) allow civilians to possess concealed and loaded handguns when summoned by police to assist police in making an arrest or to preserve the peace. Penal Code section 12031, subdivision (k) permits possession of a loaded gun when making a citizen's arrest. Penal Code section 12031, subdivision (j)(1) allows possession of a loaded firearm when a person has a reasonable belief that he or she is in immediate grave danger and the firearm is necessary to protect person or property.

Certain classes of persons, while engaged in legitimate activities, are exempted from the operation of most of the statutory prohibitions governing handgun possession, including law enforcement agencies and officers (see, e.g., Pen. Code, §§ 12027, subd. (a)(1)(A); 12201, subds. (a), (b); 12287, subds. (a)(4), (5); 12302; 12031, subd. (b), including retired peace officers (Pen. Code, §§ 12027, subd. (a)(1)(A)), and the military (Pen. Code, § 12280, subds. (e), (f)(1)).

Additionally, special exemptions and licenses are granted to certain individuals in the private sector, including the private security industry (Pen. Code, §§ 12031, subds. (b)(7), (d)(1)-(6)), entertainment industry professionals (Pen. Code, §§ 12072, subd. (a)(9)(B)(vi), 12026.2, subds. (a)(1), (8); 12305, subd. (a)), members of gun clubs (Pen. Code, § 12027, subd. (f), § 12026.2, subd. (a)(2)), and private investigators (Pen. Code, § 12031, subd. (d)(3)). Any legal firearm may be possessed in public for hunting or shooting at a target range, or going to or from these places, one's home and business, and certain other recognized activities (Pen. Code, § 12026.2, subds. (a)(3), (9).)

The broad language of Government Code section 53071, prohibiting "all local regulations, *relating* to registration and licensing" of firearms, indicates that the state has an interest in statewide uniformity of handgun licensing. (Italics added.) In finding Government Code section 53071 expressly preempted Prop H, the trial court pointed out that the ordinance had the practical effect of "revoking or otherwise invalidating existing state licenses," including those permitting the possession of handguns. The trial court went on to conclude that "[a] local regulation that invalidates existing licenses, but does not affirmatively create new licensing schemes, 'relates' to the state's regulatory scheme

of licensing firearms" and, consequently, is expressly preempted by Government Code section 53071. We agree.

While the City emphatically argues that Prop H is a proper response to crime because it is aimed at criminals who use handguns in the commission of their unlawful acts, the City's arguments fail to acknowledge that the ordinance will affect more than just criminals. It will also affect every City resident who has not, through some demonstration of personal disability or irresponsibility, lost his or her right to possess a handgun. Although a precise assessment of the impact of this ordinance is difficult to gauge because the ordinance has never been enforced, at a minimum, Section 3 of Prop H would invalidate all licenses possessed by City residents to carry a concealed weapon issued under Penal Code section 12050, and it would prohibit the possession of handguns by City residents even if those residents are expressly authorized by state law to possess handguns for self-defense or other lawful purposes.

If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature. Section 3 of Prop H stands as an obstruction to the accomplishment and execution of the full purposes and objectives of the legislative scheme regulating handgun possession in this state. For that further reason, it is preempted. (*Sherwin-Williams*, *supra*, 4 Cal.4th at pp. 897-898 [local legislation is preempted if it is "inimical" to accomplishment of the state law's policies].)

**E. Section 2 of Prop H entitled "Ban on Sale, Manufacture, Transfer or Distribution of Firearms in the City and County of San Francisco" is Preempted by State Law**

Section 2 of the ordinance provides in full: "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." Unlike Section 3, there are no exceptions contained in Section 2. Presumably, if Section 2 were enforced, there would be no sales of firearms or ammunition in the City. Storefront firearms dealers in the City would immediately go out of business. Other businesses that deal in the sale of firearms, such

as auction houses that offer collectible firearms for sale, would also be adversely affected. The impact of the "transfer" and "distribution" bans are more difficult to gauge. A literal interpretation of the transfer/distribution ban could lead to absurd results, such as prohibiting law enforcement agencies from distributing firearms and ammunition to their officers.

We first note that the key provision of Section 2, banning the sale of all firearms within City limits, runs into many of the same preemption obstacles as does Section 3. First, it is at odds with Penal Code section 12026's guarantee that City residents be able "to *purchase*, own, possess, keep, or carry" firearms at their homes, and businesses. (Italics added.) As the trial court recognized, "[a] local ordinance that substantially burdens the purchasing and possession of handguns by banning their sale is just as contrary to section 12026 as was the possession ban struck down by *Doe*."

Secondly, we agree with the trial court that Section 2 contravenes Government Code section 53071, which expressly preempts any local enactments "relating to" the licensing or registration of commercially manufactured firearms. As noted by the trial court, "San Francisco currently has gunshops, pawnshops, and auction houses that hold valid state licenses specific to their firearm transactions. . . . Section 2 effectively cancels all of these licenses." (See Pen. Code, §§ 12070, subd. (a); 12071; 12072; 12078.) Clearly, therefore, in adopting Section 2, San Francisco has entered the preempted field of firearms registration and licensing in express derogation of Government Code section 53071.

Lastly, we agree with the trial court that Section 2's City-wide ban on the sale of firearms is impliedly preempted due to its duplication of, and contradiction with, the UHA (Pen. Code, §§ 12125-12233). The UHA was enacted in 1999 in response to the proliferation of local ordinances banning low cost, cheaply made handguns known as "Saturday Night Specials," which called to the Legislature's attention the need to address the issue of handguns sales in a more comprehensive manner. (See Stricker, *Gun Control 2000: Reducing the Firepower* (2000) 31 McGeorge L.Rev. 293, 313 (*Gun Control 2000*).)

The UHA uniformly bans the sale of Saturday Night Specials in California, but it also includes provisions applicable to *all* handguns sold in the state, including those of higher quality. (Pen. Code, § 12125, subd (a).) For example, the UHA requires that all models of handguns meet certain quality assurance tests and other standards before being approved for sale in this state, including specified standards relating to the safe firing of the handgun and the ability to drop the handgun without it firing accidentally. (Pen. Code §§ 12126, 12127, subd. (a).) The UHA charges the California Department of Justice with testing and compiling a list of handguns that "may be sold in this state pursuant to this title." (Pen. Code, § 12131, subd. (a).) There are criminal penalties for violating the UHA (for instance, selling a Saturday Night Special) with potential imprisonment for up to one year in a county jail. (Pen. Code § 12125, subd. (a).)

The trial court held that Section 2's wholesale ban on the sale of firearms within City limits, including all handguns, was impliedly preempted by the UHA. In reaching its conclusion, the trial court pointed out that, with respect to unsafe UHA-prohibited handguns, Section 2 "duplicates state law by doubly banning them." For UHA-approved handguns, Section 2 conflicts with state law because it has the effect of banning the sale of every single handgun which the UHA indicates "may be sold" in California. (Pen. Code, § 12131, subd. (a).)[7]

In challenging this conclusion, the City first claims the UHA has no applicability to resolving the preemption question posed in this case because this legislation was simply a consumer measure unrelated to the regulation of firearms as a response to crime. (See *Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 868-869,

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[7] The theory of implied preemption relied upon by the trial court has been explained as follows: "A local government cannot adopt a regulation which duplicates state law because to do so would create a conflict of jurisdiction between the locality and the state in cases of violation. . . . Nor can a local government adopt a regulation which contradicts, or 'is inimical to,' state law. . . . In either of these circumstances, the invalidity of local law arises not from any specific intention of the state legislature that local governments be barred from regulating, but from the effect that the local action would have on the state's ability to exercise its sovereignty." (See Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation* (1996) 30 U.S.F. L.Rev. 395, 401, fns. omitted (*California Dreamin'*).)

disapproved on other grounds in *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1191-1192 [where local legislation serves local purposes, and state legislation that appears to be in conflict actually serves different, statewide purposes, preemption will not be found].) While the UHA was primarily enacted to "protect legitimate owners and innocent bystanders from a product that may inadvertently injure them," the UHA also has the effect of "eliminating a type of firearm from criminals' arsenals." (*Gun Control 2000, supra*, 31 McGeorge L.Rev. at p. 316, fns. omitted.)

Petitioners offer legislative history of the UHA, of which we take judicial notice, showing that one of the goals of the UHA included curbing handgun crime, as well as promoting gun safety.[8] We have also taken judicial notice of Assembly Bill No. 1471, entitled "the Crime Gun Identification Act of 2007," which was signed into law by Governor Arnold Schwarzenegger on October 12, 2007, and became effective January 1, 2008. (See Stats. 2007, ch. 572, § 2; Pen. Code, § 12126.) Assembly Bill No. 1471 amends the UHA by requiring that all semi-automatic handguns sold in California after January 1, 2010, be equipped with an array of characters identifying the make, model, and serial number of the handgun. These characters must be embossed onto the pistol's firing pin and interior surfaces, which will then be imprinted on each cartridge case when the handgun is fired. This new technology, identified as micro-stamping, will provide important investigative leads in solving gun-related crimes by allowing law enforcement personnel to quickly identify information about the handgun from spent cartridge casings found at the crime scene. There can be no doubt that this newly enacted amendment to the UHA deals with crime prevention and criminal apprehension. We therefore reject the City's argument that the UHA can have no preemptive effect because it is a consumer protection statute that operates in a different regulatory field than does Section 2.

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[8] This legislative history shows that: 1) banning cheaply made guns has been advocated as a means of reducing gun availability to criminals; 2) the first two times the Legislature enacted the UHA it was vetoed by then-Governor Pete Wilson because it would deprive the poor of needed protection by outlawing the purchase of the only firearm they could afford; and 3) cities and groups supporting the passage of the UHA wrote the Legislature that the UHA would ban certain guns used by criminals, and thereby reduce gun crime.

The legislative history of the UHA also reveals that the issue of preemption was specifically raised with respect to the existing local bans on the sale of Saturday Night Specials as well as any future attempts by local governments to ban handgun sales more broadly. A report by the Senate Committee on Public Safety concluded that "[t]his bill would appear to preempt any such local ordinance, both those already in existence and any proposed locally in the future." (Sen. Com. on Public Safety, Firearms—Restrictions on 'Unsafe Handguns,' Rep. on Sen. Bill No. 15 (1999-2000 Reg. Sess.) as amended April 5, 1999, p. 9.) In apparent response to this concern, a subsequent amended version of the April 5, 1999 version of the proposed bill addressed the question of preemption directly by including language expressly preserving the power of local governments to place "more stringent requirement upon the manufacture, importation, transfer, sale, or possession of handguns." (Assem. Amend. to Sen. Bill No. 15 (1999-2000 Reg. Sess.) June 2, 1999.) Had the UHA been enacted with this quoted language, the City's position, at least with regard to Section 2 of Prop H, would have more persuasive bite. However, when the Legislature ultimately enacted the UHA, this language was deleted. (Assem. Amend. to Sen. Bill No. 15 (1999-2000 Reg. Sess.) June 16, 1999.)

Our Supreme Court has cautioned courts not to read too much into deletions from bills when ascertaining legislative intent. (See *American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1261-1262.) However, following passage of the UHA, cities, including San Francisco, repealed their own Saturday Night Special ordinances. We agree with the trial court's conclusion that these repeals were in recognition of "the UHA's preemptive effect on the topic;" and indeed, the City has offered no other explanation for its action.

The City next challenges the trial court's finding that the UHA impliedly preempts Section 2 by arguing there can be no conflict with state law because the UHA simply provides that handguns not found to be unsafe "*may* be sold" in the state. (Pen. Code, § 12131, subd. (a), italics added.) The City contends that the italicized language means only that the UHA allows the sale of those handguns; it does not mandate that local governments permit such sales. Consequently, the mere fact that the Legislature has

sanctioned certain handguns for sale does not prohibit a municipality from imposing additional requirements.

We acknowledge courts have found, in the absence of express preemptive language, that a city or county may make additional regulations, different from those established by the state, if not inconsistent with the purpose of the general law. (See, e.g., *Suter*, *supra*, 57 Cal.App.4th at p. 1116 [finding an ordinance enacted by the City of Lafayette requiring persons seeking to sell, transfer or lease weapons to obtain local land use and police permits was not preempted by state law]); *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 704-709; *Northern Cal. Psychiatric Society*, *supra*, 178 Cal.App.3d at p. 106.) We further acknowledge that, in spite of the UHA's enactment, room has been left by the Legislature for some quantum of local handgun sales regulation. (See, e.g., *Great Western*, *supra*, 27 Cal.4th at p. 868 [upholding a Los Angeles County ordinance prohibiting the sale of firearms at gun shows on county property against a preemption challenge even though the UHA permits the type of sale barred by the ordinance].)

But, this case is not one where a local entity has legislated in synergy with state law. To the contrary, here the state and local acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. (*Water Quality Assn. v. City of Escondido* (1997) 53 Cal.App.4th 755, 765, citing *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.) As the trial court recognized, Section 2's ban on the sale of handguns does not merely overlap with the UHA; instead, it "swallows the state regulations whole." The City is not simply imposing additional restrictions on state law to accommodate local concerns; but instead, it has enacted a total ban on an activity state law allows. This difference was recognized in *Great Western*, which noted that total bans are not viewed in the same manner as added regulations, and justify greater scrutiny. (*Great Western*, *supra*, 27 Cal.4th at pp. 867-888.) Therefore, we agree that with the passage of the UHA, the Legislature has impliedly preempted local ordinances, such as Section 2, which completely bans the sale of all handguns.

**F. Cases Addressing Local Regulation of Firearm Sales**

We next consider several cases the City claims have "resoundingly upheld local laws that prohibit gun sales, or otherwise restrict access to firearms." The first of these cases, *CRPA*, *supra*, 66 Cal.App.4th 1302, was decided shortly before the UHA was enacted, and indeed, concerned one of the local ordinances that was the precursor to its passage. In *CRPA*, the Second Appellate District held that a local ordinance which banned, within city limits, the sale of any handgun which the city classified as a Saturday Night Special was not preempted by Government Code section 53071 or Penal Code section 12026. (*Id.* at p. 1302.)

The court declined to extend the reasoning of *Doe* to handgun sales, instead finding that "*Doe* identifies only 'residential handgun possession' as a preempted field," and that "[t]he ordinance at issue here creates no permit or license requirement, and instead regulates only sales." (*CRPA*, *supra*, 66 Cal.App.4th at p. 1319.) Additionally, the opinion concluded that the ban of one specific type of handgun does not conflict with Government Code section 53071's express preemption of the field of registration and licensing. (*Id.* at p. 1322.)

Thus, *CRPA* concluded that cities had some leeway to ban the sale of one particular type of gun deemed to present dangers to a local community above and beyond the dangers presented by handguns generally. However, that decision does not stand for the principle that municipalities are free to ban the sale of *all* firearms. The *CRPA* court was careful to make this distinction, emphasizing that "[t]he ordinance involved in the instant case does not ban possession of any handgun, but instead bans the sale of a limited category of handguns within city limits." (*CRPA*, *supra*, 66 Cal.App.4th at pp. 1321-1322.) That clearly is inapposite to the facts of this case.

Moreover, at the time *CRPA* was decided there was " 'no [statutory] prohibition on, nor any express authorization for, the sale of Saturday night specials or other concealable firearms' " that would pose a potential conflict with a local ordinance prohibiting the sale of Saturday Night Specials. (*Id.* at p. 1322.) Shortly after *CRPA* was decided, the regulatory landscape relating to handgun sales was significantly altered

when the Legislature passed the UHA. Thus, the court that decided *CRPA* had no opportunity to determine to what extent the UHA preempts local authority in the area of handgun sales, rendering *CRPA*'s analysis of dubious precedential value.

Finally, we consider a brace of recent cases decided by our Supreme Court which the City argues supports its authority to ban the sale of firearms and ammunition. Answering questions certified from the United States Court of Appeals for the Ninth Circuit, the California Supreme Court held in two companion cases that a county ordinance that prohibited the sale of firearms and ammunition at gun shows held on county property was not preempted by state law. (*Great Western*, *supra*, 27 Cal.4th 853; *Nordyke v. King* (2002) 27 Cal.4th 875 (*Nordyke*).) Unlike the broader preemption question here, the question addressed by the Supreme Court was whether the Legislature intended to occupy the entire field of gun show regulation, including controlling the venues for such shows. The court answered this question in the negative, perceiving nothing in state law that expressly or impliedly prohibited a county from withdrawing its property from use for gun shows, based on its own calculation of the costs and benefits of permitting such use. The court emphasized that California law regulating activities at gun shows did not "mandate that counties use their property for such shows." (*Great Western*, *supra*, 27 Cal.4th at p. 870; *Nordyke*, *supra*, 27 Cal.4th at p. 884.)

The Supreme Court also held that, contrary to the claims of the gun show promoters, the local ordinances did not contradict state firearms law by promoting something prohibited by the state or by prohibiting something promoted by the state. "[T]here is no evidence in the gun show statutes [Penal Code sections 12071, 12071.1 and 12071.4,] or, as far as we can determine, in their legislative history, that indicates a stated purpose of promoting or encouraging gun shows." (*Great Western*, *supra*, 27 Cal.4th at p. 868.) The court went on to hold that "[T]he overarching purpose of [the Penal Code sections] appears to be nothing more than to acknowledge that such shows take place and to regulate them to promote public safety." (*Ibid.*) The court also pointed out that the statutes governing gun shows contemplate that firearm dealers at gun shows will be subject to applicable local regulations. (See Pen. Code, § 12071.4 [subjecting gun

shows to local regulation].) (*Great Western*, *supra*, 27 Cal.4th at p. 865.) Accordingly, the county had the authority to prohibit the operation of gun shows held on its property and, at least to that extent, could "impose more stringent restrictions on the sale of firearms than state law prescribes." (*Id.* at p. 870.)

These cases are palpably distinguishable from the case before us. In deciding *Great Western* and *Nordyke*, our Supreme Court was careful to confine its preemption analysis to the question of whether state law authorizing gun shows necessarily compelled counties to allow their property to be used for this purpose. (*Great Western*, *supra*, 27 Cal.4th at p. 858; *Nordyke*, *supra*, 27 Cal.4th at p. 884.) The court found that there was acceptable interplay between the local government's exercise of its power to control the use of its property and the state government's regulation of gun shows to permit local governments to ban the sale of firearms and ammunition at gun shows on county-owned public property. (*Great Western*, *supra*, 27 Cal.4th at p. 869; *Nordyke*, *supra*, 27 Cal.4th at p. 885.) Neither case can be properly read to extend that limited preemption inquiry to a case such as this one involving a local government's attempt to enact an absolute and total ban of firearm and ammunition sales on all property, public and private, within its geographic jurisdiction.

In conclusion, we find the situations presented in *CRPA*, *supra*, 66 Cal.App.4th 1302, *Great Western*, *supra*, 27 Cal.4th 853, and *Nordyke*, *supra*, 27 Cal.4th 875, are so different from those presented in this case as to make them inapposite here.

**G. Statewide Concern or Municipal Affair?**

Despite having found preemption, the City can nevertheless escape petitioners' challenge if Prop H relates to a purely "municipal affair," because its city charter includes a "home rule" provision. (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.) But "[a]s to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation (the preemption doctrine). [Citations.]" (*Id.* at pp. 61-62.)

Our Supreme Court also addressed this issue in its recent *O'Connell* case. There, the City of Stockton argued that even if its ordinance authorizing forfeiture of vehicles used in the commission of certain criminal acts was preempted by state law, it was lawful because the subject matter of the ordinance constituted a "municipal affair," and did not involve a matter of "statewide concern." (*O'Connell*, *supra*, 41 Cal.4th at pp. 1075-1076.) The Supreme Court summarily rejected that argument in *O'Connell*, noting that the illegal activities at issue, prostitution and trafficking in controlled substances, had been "comprehensively addressed through various provisions of this state's Penal and Vehicle Codes, leaving no room for further regulation at the local level," and therefore were "matters of statewide concern." (*Id.* at p. 1076.)

We likewise have reason to reject summarily the City's argument that Prop H addresses only a municipal affair. When looked at as a whole, the Penal Code presents a comprehensive montage of firearms possession, sale, licensing, and registration laws complete with detailed exceptions and exemptions. These laws of statewide application reflect the Legislature's balancing of interests—on the one side the interest of the general public to be protected from the criminal misuse of firearms, on the other, the interests of law-abiding citizens to be able to purchase and use firearms to deter crime, to help police fight crime, to defend themselves, and for hunting and certain recreational purposes. If every city and county were able to opt out of the statutory regime simply by passing a local ordinance, the statewide goal of uniform regulation of handgun possession, licensing, and sales would surely be frustrated. Clearly, the creation of a *uniform* regulatory scheme is a matter of statewide concern, which should not be disrupted by permitting this type of contradictory local action. (See *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364.)

**H. Conclusion**

We, therefore, affirm the trial court's conclusion that Prop H is invalid as preempted by state law. As the City repeatedly emphasizes, the statutes governing firearms have been "carefully worded to avoid any broad preemptive effect." (*CRPA*, *supra*, 66 Cal.App.4th at p. 1314.) Nevertheless, the sheer breadth of Prop H makes it

vulnerable to a preemption challenge. As already noted, Section 2 of Prop H bans the "*sale*, manufacture, transfer or distribution" of ammunition and firearms in the City, without exception. (Italics added.) With narrow exceptions, Section 3 bans the *possession* of handguns by San Francisco residents, including possession within the sanctity of homes, businesses, and private property. (Italics added.)[9]

We wish to stress that the goal of any local authority wishing to legislate in the area of gun control should be to accommodate the local interest with the least possible interference with state law. As we have seen, while courts have tolerated subtle local encroachment into the field of firearms regulation (*CRPA*, *Great Western*, *Nordyke*), laws which significantly intrude upon the state prerogative have been uniformly struck down as preempted (*Doe*, *Sippel*). Therefore, when it comes to regulating firearms, local governments are well advised to tread lightly. (See *California Dreamin'*, *supra*, 30 U.S.F. L.Rev. 395.)

## IV.

## DISPOSITION

The judgment is affirmed. Petitioners are entitled to their costs on appeal.

Ruvolo, P. J.

We concur:

Reardon, J.

Sepulveda, J.

[9] Section 7 of the ordinance contains a severability clause, and the City asks that we parse the ordinance to save what we can. Specifically, the City claims that Prop H's ban on the sale and possession of rifles and shotguns, which is intermingled with the ban on handguns, can survive. The ordinance at issue requires extensive revision if there is any hope of bringing it in conformance with state law, and the rewriting is more appropriately done by the City than by this court. (See *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 173.)

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|---|---|
| Trial Court: | San Francisco County Superior Court |
| Trial Judge: | Hon. Paul H. Alvarado<br>Hon. James L. Warren |
| Counsel for Appellants: | Dennis J. Herrera<br>San Francisco City Attorney<br><br>Wayne Snodgrass<br>Vince Chhabria<br>Deputy City Attorneys |
| Counsel for Respondents: | Trutanich•Michel, C. D. Michel,<br>Don B. Kates, Glenn S. McRoberts and<br>Thomas E. Maciejewski |
| Counsel for Amicus Curiae on Behalf of Respondents: | Michael S. Hebel for The San Francisco Police Officers Association as Amicus Curiae on behalf of Plaintiffs and Respondents<br><br>Law Office of Donald Kilmer, Donald E. Kilmer, Jr. for Gun Owners of California, Senator H. L. Richardson (ret.), and The Madison Society as Amici Curiae on behalf of Plaintiffs and Respondents<br><br>Law Office of Donald Kilmer, Donald E. Kilmer, Jr. for California Rifle & Pistol Association as Amicus Curiae on behalf of Plaintiffs and Respondents<br><br>Law Offices of Bruce Colodny, Bruce Colodny for American Entertainment Armories Association as Amicus Curiae on behalf of Plaintiffs and Respondents |

## PROOF OF SERVICE

I, DIANA QUAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On February 19, 2008, I served the following document(s):

**PETITION FOR REVIEW**

on the following persons at the locations specified in the manner indicated below:

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☒ **BY OVERNIGHT DELIVERY**: I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

Honorable Paul H. Alvarado
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

California Court of Appeal
First Appellate District, Division Four
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San Francisco, CA 94102

☒ **BY PERSONAL SERVICE**: I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed February 19, 2008, at San Francisco, California.

DIANA QUAN