SUPREME COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE CHIEF HEATHER FONG in her official capacity and SAN FRANCISCO POLICE DEPARTMENT, Defendants/Appellants, vs. 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, Plaintiffs/Respondents.	Case No. S160968 First Appellate District Court No. A115018 (S.F. Superior Court No. 505-960)

REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

The Honorable Paul H. Alvarado

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INTRODUCTION

Gun violence is of vital concern to all Californians. But as this Court has recognized, the problems that firearms present for residents of dense metropolitan areas are different from those presented in rural counties. (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866-67.) Before the published Opinion, therefore, this Court and lower appellate courts had established, as a guiding principle of firearms preemption, that the Legislature's enactments are intended to have only modest preemptive effect, in recognition of the need to allow local governments to tailor firearms regulations to local conditions. The Opinion, however, substantially undermines this rule. It interprets multiple statutes in unprecedented ways that greatly undermine local authority.

In their answer to the San Francisco's petition for review, respondents strive to assure the Court, as they must, that the published Opinion below correctly applied preemption principles in a manner that is consistent with other firearms preemption decisions. But to do this, respondents are forced to distort the meaning of existing precedents; to invent rationales and arguments never voiced by the court below; and to simply sidestep issues the City raised in its review petition. The end result of respondents' efforts is to highlight and confirm the Opinion's flaws.

By introducing conflict into the decisional law, the Opinion will sow confusion among local governments, concerned residents, and the courts. The City and County of San Francisco respectfully urges this Court to grant review to clarify the extent to which local governments may exercise their police powers in this vital area to protect their residents from gun violence.

ARGUMENT

I. THE OPINION'S INTERPRETATION OF GOVERNMENT CODE SECTION 53071 IS INCONSISTENT WITH EXISTING LAW, AND CREATES UNCERTAINTY ON MATTERS OF SIGNIFICANT PUBLIC IMPORTANCE

As the City explained in its petition, the Opinion erroneously interprets Government Code Section 53071 ("Section 53071") in a manner that greatly increases that statute's preemptive effect over local firearms ordinances. Section 53071 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[.]"

As this Court stressed in *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, the Legislature intended Section 53071 to have only a limited preemptive effect. Rather than seeking to broadly strip local governments of their police powers to regulate firearms, "the legislative intent was limited to registration and licensing." (*Id.* at p. 862.) But the Opinion's interpretation of Section 53071 converts that statute into an expansive enactment that places vast areas within the regulatory field of firearms control out of local reach.

A. The Opinion's Overbroad Interpretation of "Licensing" Threatens To Convert Each Gap In State Prohibitions Into A "License."

First, the Opinion interprets Section 53071's term "licensing" extraordinarily broadly, concluding that where the Legislature generally prohibits certain firearms-related conduct, but does not apply its prohibition to certain circumstances, the Legislature thereby automatically "licenses" that conduct under the circumstances it has not seen fit to include within its prohibition. The Opinion uses Section 53071's term "licensing" to describe not only actual licenses, such as those that "any law-abiding, responsible

adult can obtain ... to carry a concealed handgun" under Penal Code Section 12050 (Opinion at 12), but also to describe circumstances where state law does not prohibit the possession of guns, but the person possessing the weapons does not receive or hold any actual license, in the ordinary sense of that word.

As a matter of common sense, this expansive view of licensing presents obvious problems. Under this view, for example, one's legal ability to drive a car is governed by a license, because the state affirmatively conditions the privilege of driving upon receipt of a driver's license, but one's legal ability to ride a bicycle is equally "licensed," because the state has not prohibited bicycle riding, and thus has allowed that conduct to occur.

Nonetheless, the Opinion interprets "licensing" to include conduct that the Legislature has simply declined to prohibit. According to the Opinion, "licensing" encompasses, for example:

- "exemptions" from generally applicable prohibitions "granted to certain individuals in the private sector, including the private security industry, entertainment industry professionals, members of gun clubs, and private investigators" (Opinion at 13 [cites omitted]); and
- the possession of "any legal firearm ... 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," because state law does not prohibit such possession. (*Id.*)

The Opinion thus concludes that Section 53071 preempts Proposition H's Section 3 – which bars most San Francisco residents from

locally possessing handguns – because in addition to invalidating genuine licenses, such as concealed weapons permits issued under Penal Code Section 12050, Section 3 also "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." (Opinion at 14.) Such "express authorization," of course, does not consist of a license issued to local residents, but rather lies in the mere fact that state law does not prohibit them from possessing guns.

In trying to defend the Opinion's overbroad view that "licensing" encompasses the latter category of gun possession, respondents instead confirm the Opinion's error. Respondents admit that the Opinion invalidates Proposition H in part because that measure invalidates "automatically-created licenses" – that is, the metaphysical "licenses" supposedly created by the mere existence of an exemption within an otherwise generally applicable state prohibition. (Answer at 11-12.) But the Opinion is nonetheless correct, say respondents, because Proposition H also invalidates actual concealed weapons permits issued under Penal Code Section 12050. (Answer at 12 [stating that there "can be no reasonable dispute that a concealed carry permit issued pursuant to Penal Code section 12050 is a 'license'"].) But by expressly acknowledging that the Opinion embraces the dubious concept of "automatic licenses," and regards gaps in the state's prohibitions (that is, conduct that the Legislature has elected, as a matter of state law, not to prohibit) as affirmatively giving rise to licenses, respondents do not refute the City's point. Instead, they bolster it.

Respondents claim this overbroad view of "licensing" is legitimate under *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 856, a case that did not interpret, and in fact predated, Section 53071. (Answer at 12.) There,

this Court stated that the general notion of licensing refers to "permission or authority to do a particular thing or exercise a particular privilege," to distinguish it from registration. But even assuming it has any relevance here, *Galvan's* nonstatutory reference to "permission or authority" only begs the question of whether the Legislature's choice to apply its prohibition in some circumstances but not in others reflects an affirmative desire to *authorize* the conduct in the circumstances not prohibited – or, alternatively, merely shows the Legislature's view that no statewide prohibition in such circumstances is necessary. As a logical matter, the fact that the state has allowed certain conduct to occur does not necessarily show the state has determined that such conduct may not be prohibited by local legislation. "[I]t is no doubt tautologically true that something that is not prohibited by state law is lawful under state law," but "whether the Legislature intended to strip local governments of their constitutional police power to ban" certain conduct is quite another matter. (*California Rifle & Pistol Association v City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1324.) Yet respondents – and the Opinion – erroneously treat the two inquiries as one and the same.

This error has grave consequences for local regulatory authority. Under the tautological interpretation of Section 53071 adopted by the court below, the Legislature effectively has two choices in regulating gun-related conduct: either prohibit it, or allow it to continue without state prohibition – in which case it is "automatically licensed" and, therefore, is beyond the reach of local regulation. Under such a scheme of presumptive preemption, the losers are local government entities and their citizens, whose police powers are effectively nullified, unless the Legislature takes the highly

unusual step of affirmatively stating that local regulatory authority still exists.

Respondents claim this expansive approach does not conflict with *Nordyke v. King* (2002) 27 Cal.4th 875, and *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, because the local ordinances held not preempted in those cases involved county property. (Answer at 11.) But before this Court began its analysis of the particular ordinances at issue in those decisions, it first conducted a comprehensive "review of case law and the corresponding development of gun control statutes," and explained the principles of preemption that applied not only to the specific ordinances at issue, but in firearms preemption cases generally. (*Great Western, supra,* 27 Cal.4th at p. 864; *Nordyke, supra*, 27 Cal.4th at p. 882.) This Court's holdings and statements of the principles of firearms preemption, therefore, cannot be disregarded here.

If Section 53071's term "licensing" were as broad as the Opinion states, both *Great Western* and *Nordyke* would have turned out quite differently. Respondents do not, and cannot, explain why, if "licensing" has the meaning the Opinion ascribes to it, this Court held in *Great Western* that a local ordinance banning gun shows was not preempted, even though that ordinance obviously "invalidated the licenses" of gun show dealers. Nor can they explain why this Court held in *Nordyke* that a local ordinance banning possession of guns on county property was not preempted, even though it obviously "invalidated the licenses" of persons whom state law authorized to possess firearms at gun shows. As this Court explained in *Nordyke*, a state statute that "merely exempts gun shows from the state criminal prohibition on possessing guns in public buildings, thereby permitting local government entities to authorize such shows," does "not

mandate that local government entities permit such a use[.]" (*Id.*, 27 Cal. 4th at p. 884.) This Court's holding that a lack of state prohibition does not automatically imply preemption of local power to prohibit cannot be squared with the Opinion's interpretation of Section 53071.

This inconsistency is of considerable importance to local governments. The Legislature regulates much firearms-related conduct, but its regulations are riddled with exemptions and areas of only partial coverage, and thus are far from universal or comprehensive. Are these gaps in state law automatically off limits to local regulatory power? The confusion about the meaning of "licensing" that the Opinion will generate will make it harder for cities and counties to enact a wide variety of ordinances regulating aspects of firearms-related conduct that the Legislature has not itself restricted. It will lead to greater uncertainty on the part of local legislative bodies, more unfounded challenges to local laws, and erroneous rulings by the courts. This Court should grant review to clarify what constitutes a "license" within the meaning of Section 53071.

B. The Opinion's Overbroad Interpretation of Section 53071 Threatens To Preempt Local Licensing of Firearms Dealers.

Another way in which the Opinion conflicts with existing law lies in the Opinion's statement that Section 2 of Proposition H, which bans local sales and transfers of firearms and ammunition, is preempted by Section 53071 because it "effectively cancels" the licenses held by gunshops, pawnshops, and other licensed gun dealers. (Opinion at 15.) The Opinion thus interprets Section 53071 – which, by its express terms, provides only that the state has occupied the field of licensing and registration of firearms – to also preempt local licensing of firearms *dealers*. No other published decision has construed Section 53071 to preempt dealer regulation.

Moreover, as the City explained in its petition, such a construction is inconsistent with cases such as *Great Western* and *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, which upheld local ordinances that undeniably interfered with the activities of persons holding state-issued licenses issued under Penal Code Section 12071, such as gun dealers and the organizers and promoters of gun shows. And this aspect of the Opinion also conflicts with Penal Code Section 12071(a)(6), which affirmatively recognizes that cities can "restrict or regulate the sale of firearms," and thus can regulate and license dealers. (*Id.*)

Respondents offer two arguments in an attempt defend this aspect of the Opinion, but neither argument is persuasive.

First, respondents spin out a fanciful theory about "handgun safety certificates" and background checks, asserting that "the State requires firearms dealers to act as quasi-State agents by issuing and administering licenses" related to both guns and gun buyers. (Answer at 13.) But this argument reads far too much into the Opinion, which does not even mention background checks or safety certificates, and contains no discussion about dealers acting as quasi-state agents. And, equally important, respondents' theory proves too much. If a local ordinance that prohibited the operations of any gun dealer impermissibly "affected the administration of licenses" that the dealer issued at the state's behest, then any local ordinance that prohibited gun sales in any location or circumstance would be preempted, as it would therefore "cancel" such licenses. For example, an ordinance prohibiting gun shows would impermissibly "cancel" the licenses that gun show dealers administer in their transactions. But *Great Western* and *Suter* demonstrate that that is not the case.

Second, respondents strive to minimize *Suter*'s import, claiming the decision merely holds that "local governments may require firearms dealers to obtain the same sorts of business permits that they require of other businesses," and "can regulate firearms businesses like any other business." (Answer at 14.) But *Suter* is not so limited. Far from holding that gun dealers can be regulated like any other business, the *Suter* court held "that local governments are not generally excluded by state law from imposing *additional licensing requirements* on firearm dealers." (*Id.*, 57 Cal.App.4th at p. 1116 [emphasis added].) The court also specifically held that the local ordinance at issue did not violate equal protection even though it "discriminate[d] between firearms dealers and other businesses selling products that can and do cause injury," because "there are several rational reasons for *distinguishing firearms dealerships from sellers of other products*." (Id., 57 Cal.App.4th at p. 1135 [emphasis added].) Respondents' assertion that *Suter* holds that "cities can regulate firearms businesses like any other business" is an outright fiction.

The Opinion will create conflict and uncertainty as to whether Section 53071 preempts local laws that do not require or relate to licensing of firearms, but, instead, affect the operations of firearms dealers. This Court should grant review to clarify the degree to which cities and counties may seek to protect their inhabitants by adopting such laws.

II. THE OPINION'S INTERPRETATION OF PENAL CODE SECTION 12026 IS INCONSISTENT WITH EXISTING LAW, AND RAISES QUESTIONS OF CONSIDERABLE PUBLIC IMPORTANCE

The Opinion also conflicts with existing law in its interpretation of Penal Code Section 12026 ("Section 12026"). Section 12026 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. The Opinion describes Section 12026 in terms that make it potentially preemptive of virtually every local law affecting any kind of handgun-related conduct. The Opinion states that by barring local permit or license requirements, Section 12026 precludes any local "impediments" against the purchase or possession of handguns, deprives local governments of "any power to regulate handgun possession on private property," and "guarantees" the ability to purchase, own, possess, keep, or carry handguns at one's home or business. (Opinion at 9, 11, 15.)

Respondents argue that such a broad interpretation of Section 12026 is nothing new, because the court in *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 held that Section 12026 preempted a local ordinance that banned handguns, and the Legislature subsequently reenacted Section 12026 without comment. (Answer at 15.) But *Doe*, which respondents portray as justifying virtually every aspect of the Opinion, in fact does not support its overbroad statutory interpretations. Because the ordinance in *Doe* banned handguns, that court's views as to Section 12026's effect on local laws that regulate but do not ban handguns – that is, its statement that Section 12026 "occup[ies] the field of residential handgun possession" – are unnecessary dicta. The court's actual holding was, at most, that Section 12026 preempted the local *ban*. And because the Legislature must be presumed to understand the distinction between the holding of a decision and mere dictum, its subsequent reenactments of Section 12026 cannot elevate *Doe's* unnecessary dicta to an actual holding.

And even *Doe* did not go so far as to suggest that Section 12026 "guarantees" access to handguns, or prevents cities and counties from enacting a law that merely "impedes" a person's ability to buy or possess a

handgun. Under that standard, it is very possible that *no* local regulation of the sale or possession of handguns could survive, since virtually any such regulation could impede, restrict, or otherwise hamper someone's ability to purchase or possess a handgun under at least some circumstances. The Opinion's expansive characterization of Section 12026, like its overbroad interpretation of Section 53071, converts a state law of modest preemptive scope into an virtual blanket of preemption.

Respondents strive to defend this result by asserting that Section 12026 creates a general "right to possess handguns" in the home. (Answer at 16.) But to the extent the Opinion is construed to recognize any such "right," that aspect of the Opinion, too, creates a conflict in the decisional law, and leaves an important question of law unsettled. In *California Rifle & Pistol Association, supra,* the court expressly rejected this very claim, holding that there is "no basis for a conclusion that Penal Code section 12026 was intended to create a 'right' or to confer the 'authority' to take any action ... for which a license or permit may not be required. The words of the statute are words of proscription and limitation upon local governments, not words granting a right or authority to members of the public." (*Id.*, 66 Cal.App.4th at p. 1324.) Respondents' claim that the *California Rifle & Pistol Association* decision is "entirely consistent" with the Opinion, therefore, is flatly false. The Opinion treats Section 12026 as preventing local "impediments" to the ability to purchase handguns (Opinion at 9), while the court in *California Rifle & Pistol Association* held that Section 12026 merely prevents local governments from requiring a license or permit to purchase a handgun.

The Opinion will create substantial uncertainty on the part of local legislative bodies about whether they can adopt many kinds of local

regulations of handgun sales or possession, even regulations that fall well short of absolute bans. Would local laws that regulate the manner in which handguns must be stored in the home, in order to reduce accidental shootings, be preempted? What about local laws that limit the amount of handgun ammunition a person may buy at one time? Or local laws that require gun dealers to obtain additional liability insurance, adding to dealers' costs of doing business? This Court should grant review to resolve the degree to which Section 12026 preempts local laws that regulate handgun sales or possession.

CONCLUSION

For the reasons set forth above, as well as in the City and County of San Francisco's petition, the City respectfully urges this Court to grant review.

Dated: March 20, 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 3,250 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 March 20, 2008.

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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 March 20, 2008, I served the following document(s):

PETITION FOR REVIEW

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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.

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☒ **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 March 20, 2008, at San Francisco, California.

DIANA QUAN