

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PAULA FISCAL, LARRY P. BARSETTI,  
RECECCA KIDDER, DANA K. DRENKOWSKI,  
JOHN CANDIDO, ALAN BYARD, ANDREW  
SIRKIS, NATIONAL RIFLE ASSOCIATION,  
SECOND AMENDMENT FOUNDATION,  
CALIFORNIA ASSOCIATION OF FIREARM  
RETAILERS, LAW ENFORCEMENT  
ALLIANCE OF AMERICA, and SAN  
FRANCISCO VETERAN OFFICERS  
ASSOCIATION,

Case No. A115018

(San Francisco Superior  
Court No. 505960)

Plaintiffs/Respondents,

vs.

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

Defendants/Appellants.

**FILED**

JUN 13 2007

Court of Appeal - First App. Dist.  
DIANA HERBERT

By \_\_\_\_\_  
DEPUTY

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**REQUEST FOR RECONSIDERATION OF ORDER DENYING  
APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE  
BRIEF AND RESPONSE TO RESPONDENT'S OPPOSITION TO  
APPLICATION FOR PERMISSION TO FILE AMICUS  
BRIEF OF LEGAL COMMUNITY AGAINST VIOLENCE  
IN SUPPORT OF APPELLANTS**

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Roderick M. Thompson (S.B. No. 096192)  
Grace Won (S.B. No. 178258)  
Cory Mason (S.B. No. 240987)  
**FARELLA BRAUN & MARTEL LLP**  
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*Attorneys for Amicus Curiae  
Legal Community Against Violence*

## I. INTRODUCTION

On June 6, 2007, Respondents served by mail an "Opposition to Application of Legal Community Against Violence For Permission To File Amicus Brief." As evidenced by the proof of service attached to the Opposition, Respondents failed to serve Legal Community Against Violence ("LCAV") with a copy of this Opposition. (See Exhibit A, Declaration of Roderick M. Thompson, attached). LCAV did not learn of the Opposition until the afternoon of June 11, 2007 when a copy was faxed to LCAV's counsel by the City Attorney's Office of San Francisco. *Ibid.*

On June 13, 2007, this Court issued an Order denying LCAV's application to file an amicus brief. LCAV respectfully requests that the Court reconsider its Order, particularly in light of the fact that LCAV was never served with the Opposition.

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## II. ARGUMENT

### A. Respondents Failed To Serve Its Opposition On LCAV

California Rule of Court 8.54 requires that motions before the court must be served. Here, LCAV was not served with a copy of Respondents' opposition to its application for permission to file an amicus brief. The proof of service attached to the opposition states it was sent by U.S. Mail on June 6, 2007. LCAV only learned of the brief on June 11, 2007 when a

fax of the opposition was faxed to counsel for LCAV at approximately 2:13 p.m. (Exhibit A: Thompson Declaration, attached).

Because LCAV was not served with the opposition and because the Court ruled on LCAV's application prior to LCAV submitting a reply, LCAV respectfully requests that the Court reconsider its order denying LCAV's application.

**B. Respondents' Opposition Misapprehends The Law.**

Respondent's opposition only cites to a single case, *Conerly v. State Personnel Bd.* (2006) 37 Cal. App. 4<sup>th</sup> 1169. In *Conerly*, the Supreme Court rejected a claim that an amicus curiae which leaped into the breach to direct litigation where the State chose not to mount a vigorous defense of a particular statute should be responsible for attorneys' fees. It found that the amicus curiae in that case was not an opposing party for purposes of the attorneys' fees statute and also noted that amicus curiae provide a valuable service to the court because they are nonparties who often hold different perspectives from the actual litigants. *Id.* at 1179-80 (noting the "availability of such diverse views through amicus curiae participation enriches the judicial decision making process.")

Nothing in *Conerly* militates in favor of finding that LCAV's application to file an amicus brief should be denied. First, LCAV is not a party to the litigation below. Second, that LCAV may have provided

consulting assistance to the City does not make LCAV a real party in interest under Code of Civil Procedure Section 367. A real party's direct interest must be a "special interest to be served or some particular right to be protected over and above the interest held in common with the public at large." *Conerly, supra*, at p. 1179.

That LCAV advocates upholding the City's authority to enact and enforce Proposition H does convert its status from amicus curiae to that of a real party. LCAV's interest in this litigation is much broader than its relationship with the City -- LCAV consults with cities and counties across the state (and indeed the nation) on a wide range of gun violence prevention measures. The Court's ruling here may affect existing/future local laws. As a public law center devoted to preventing gun violence, LCAV has a natural interest in seeing Proposition H upheld and to that end, LCAV also filed an amicus brief for the court below. (ER: Tab 16, Vol. III, p. 0501). LCAV's position on these issues is "no different in kind from that of the typical amicus curiae and no different in substance from like-minded members of the general public." *Ibid.* at p. 1180.

Moreover, by filing an application pursuant to Rule of Court 8.200(b), LCAV made its position on the issue of gun control legislation transparent. (See CRC 8.200(b) requiring potential amicus curiae to file application stating party's interest). Indeed, "[a]micus curiae almost by definition have a particular ideological or policy focus that motivates them

to participate in certain litigation, notwithstanding the lack of a direct interest in the litigation's outcome." *Conerly, supra, at 1179*.

Here, LCAV's amicus brief, which provides legal analysis that establishes Proposition H is not preempted, offers the court with just the type of assistance the Supreme Court has declared to be valuable to the judiciary. "Amicus curiae presentations assist the court by broadening its perspective on issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions. For these reasons, we are inclined, except in cases of obvious abuse of the amicus curiae privilege, not to employ orders to strike as means of regulating their contents." (*Bily v. Arthur Young* (1992) 3 Cal.4th 370, 405 fn. 14). The courts' "rules and our practice accord wide latitude to interested and responsible parties who seek to file amicus curiae briefs." *Id.*

The NRA's argument that allowing the LCAV to file its amicus brief would effectively permit the City to have two briefs (and thereby avoid the 14,000 word count limit) would apply equally to every amicus—including the three amici who have been allowed to file briefs *in support* of the NRA.

**III. CONCLUSION**

Thus, for the reasons set forth above, LCAV respectfully requests that the Court reconsider its Order denying LCAV's application to file an amicus curiae brief.

Respectfully submitted,

Dated: June 13, 2007

FARELLA BRAUN & MARTEL LLP

By:



Roderick M. Thompson  
Attorneys for Amicus Curiae  
Legal Community Against Violence

# EXHIBIT A

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**DECLARATION OF RODERICK THOMPSON, ESQ.**

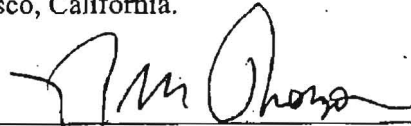
I, Roderick M. Thompson, declare as follows:

1. I am an attorney licensed to practice law in the State of California and admitted to practice before this Court. I am a partner with Farella, Braun & Martel, LLP, attorneys of record for amicus curiae the Legal Community Against Violence ("LCAV").

2. On June 11, 2007, I learned, for the first time, that Respondents had filed an Opposition to LCAV's application to file an amicus brief. Neither LCAV nor our offices were served with this Opposition. I learned about the Opposition and received a copy of it from the City Attorney's Office which faxed me a copy. See Exhibit 1, Fax of Opposition Brief.

3. I have personal knowledge of the foregoing facts and, if called upon to do so, could and would testify competently thereto.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct and that this Declaration was executed this 13th day of June 2007 in San Francisco, California.



Roderick M. Thompson  
Attorneys for Amicus Curiae  
Legal Community Against Violence



# EXHIBIT 1

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JUN-11-2007 14:12

SF CITY ATTORNEY'S OFFICE

415 554 4699 P.01/08

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DENNIS J. HERRERA  
City Attorney

WAYNE SNODGRASS  
Deputy City Attorney

DIRECT DIAL: (415) 554-4675  
E-MAIL: wayne.snodgrass@sfgov.org

**FACSIMILE COVER SHEET**

**Monday, June 11, 2007; Time: 2:06 PM**

**TO:** Roderick M. Thompson  
Fax: 415-954-4480

**FROM:** Wayne Snodgrass, DCA

**RE:** *Fiscal, et al., v. CCSF, et al., CA Court of Appeal No. A115018*

**MESSAGE:** Please see attached Respondents' Opposition to Application of Legal Community Against Violence For Permission to File Amicus Brief

We are transmitting a total of 8 pages, including this cover sheet. If you did not receive all of the pages or there is another problem, please call me or Holly Tan at (415) 554-6759.

**CONFIDENTIALITY NOTE**

THIS AND ANY ACCOMPANYING PAGES CONTAIN INFORMATION FROM THE SAN FRANCISCO CITY ATTORNEY'S OFFICE WHICH IS CONFIDENTIAL AND PRIVILEGED. THE INFORMATION IS INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, THEN BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THE ACCOMPANYING DOCUMENT (OR THE INFORMATION CONTAINED IN IT) IS PROHIBITED. IF YOU HAVE RECEIVED THIS FACSIMILE TRANSMISSION IN ERROR, PLEASE NOTIFY OUR OFFICES IMMEDIATELY SO THAT WE CAN ARRANGE FOR RETRIEVAL AT NO COST TO YOU.

CITY HALL - 1 DR. CARLTON B. GOODLETT PLACE, ROOM 234 - SAN FRANCISCO, CALIFORNIA 94102  
RECEPTION: (415) 554-4700 - FACSIMILE: (415) 554-4699

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JUN-11-2007 14:12

SF CITY ATTORNEY'S OFFICE

415 554 4699 P.02/08

COURT OF APPEAL  
STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER,  
DANA K. DRENKOSKI, JOHN CANDIDO, ALAN BYARD,  
ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND  
AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF  
FIREARM RETAILERS, LAW ENFORCEMENT ALLIANCE OF  
AMERICA, SAN FRANCISCO VETERAN POLICE OFFICERS  
ASSOCIATION

No.:A115018

Plaintiffs-Respondents,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO  
POLICE CHIEF HEATHER FONG in her official capacity, SAN  
FRANCISCO POLICE DEPARTMENT

Defendants-Appellants.

County of San Francisco Case No.: CPF05505960  
The Honorable James Warren

RESPONDENTS' OPPOSITION TO APPLICATION OF  
LEGAL COMMUNITY AGAINST VIOLENCE  
FOR PERMISSION TO FILE AMICUS BRIEF

C. D. Michel- S.B.N. 144258  
Thomas E. Maciejewski - 222736  
TRUTANICH • MICHEL, LLP  
180 East Ocean Blvd., Suite 200  
Long Beach, CA 90802  
Telephone: 562-216-4444  
Facsimile: 562-216-4445

JUN-11-2007 14:12

SF CITY ATTORNEY'S OFFICE

415 554 4699 P.03/08

Although Respondents ordinarily do not oppose submissions from "friends of the court," Respondents must oppose the application of the Legal Community Against Violence ("LCAV") to file an amicus brief in support of Appellants ("the City"). Respondents recently learned from the City itself that the City retained the LCAV to provide legal advice to the City in this litigation. LCAV is therefore not a true "amicus curiae."

Through a Public Records Act request, counsel for Respondents recently asked the City to provide "[a]ll communications including but not limited to e-mails (including attachments) or other correspondence from or to the Legal Community Against Violence." The City responded on May 18, 2007. A copy of the response is attached as Exhibit A. In that response the City revealed that "[t]hrough the City Attorney's Office, the City retained the Legal Community Against Violence as a consultant in matters related to the litigation filed against Prop H . . ." Because of that relationship, the City asserted that "[a]ny correspondence . . . between the City and the Legal Community Against Violence is related [the Prop H litigation]" and is therefore "covered by the attorney work product doctrine, the attorney client privilege, or both."

As noted by the California Supreme Court, the role of a party to the litigation and the role of amicus curiae are mutually exclusive. (*Connerly v.*

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415 554 4699 P.04/08

*State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) "Amici curiae, literally 'friends of the court,' perform a valuable role for the judiciary *precisely because they are nonparties* who often have a different perspective from the principal litigants." (*Id.* (emphasis added).)

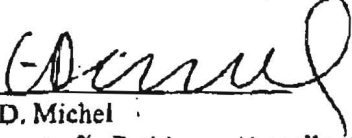
By retaining the LCAV to provide counsel to the City in this case, the City either made LCAV a party to this case, or a law firm with the City as a client. Neither can be an "amicus curiae."

Allowing the LCAV to file an "amicus" brief would effectively permit the City to file two Opposition briefs contrary to California Rules of Court, rule 8.204 (c), which limits the length of a party's brief to 14,000 words.

The court should not approve LCAV's Application.

DATED: 6/14/07

TRUTANICH • MICHEL, LLP

  
C. D. Michel  
Attorney for Petitioners/Appellants

JUN-11-2007 14:12

SF CITY ATTORNEY'S OFFICE

415 554 4699 P.05/08

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**EXHIBIT A**

JUN-11-2007 14:13

SF CITY ATTORNEY'S OFFICE

415 554 4699 P. 06/08

Office of the Mayor  
City & County of San Francisco



Gavin Newsom

May 18, 2007

Mr. Clint Monfort  
Trutanich-Michel LLP  
180 Ocean Boulevard  
Suite 200  
Long Beach, CA 90802  
Fax: 562-216-4445

COPY

Dear Mr. Monfort:

This letter responds to your Public Records Act Request for: "All communications including but not limited to e-mails (including attachments) or other correspondence from or to the Legal Community Against Violence."

Through the City Attorney's Office, the City retained the Legal Community Against Violence as a consultant in matters related to the litigation filed against Prop H by your office. Any correspondence in the possession of the Mayor's Office between the City and the Legal Community Against Violence is related to that litigation. Accordingly, those communications are covered by the attorney work product doctrine, the attorney client privilege, or both.

Sincerely,

Joe Arellano  
Deputy Communications Director  
Office of Mayor Gavin Newsom

JUN-11-2007 14:13

SF CITY ATTORNEY'S OFFICE

415 554 4699 P.07/08

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

On June 6, 2007, I served the foregoing document(s) described as

**RESPONDENTS' OPPOSITION TO APPLICATION OF  
LEGAL COMMUNITY AGAINST VIOLENCE  
FOR PERMISSION TO FILE AMICUS BRIEF**

on the interested parties in this action by placing

the original

a true and correct copy

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

**"SEE ATTACHED SERVICE LIST"**

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

Executed on June 6, 2007, at Long Beach, California.

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

  
\_\_\_\_\_  
CLAUDIA AYALA



JUN-11-2007 14:13

SF CITY ATTORNEY'S OFFICE

415 554 4699 P.08/08

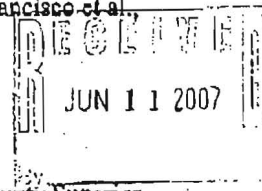
PAULA FISCAL et al.,  
v.  
CITY AND COUNTY OF SAN FRANCISCO et al.,  
CASE NO.: A115018

C. D. Michel  
Glenn McRoberts  
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Attorneys for Paula Fiscal et al.,

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Vince Chhabria, Deputy City Attorney  
San Francisco City Attorney's Office  
#1 Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102

Attorneys for City and  
County of San Francisco et al.



Hon. Paul H. Alvarado  
San Francisco County Superior Court  
400 McAllister St.  
San Francisco, CA 94102

San Francisco County Superior  
Court Judge

California Supreme Court  
350 McAllister St.  
San Francisco, CA 94102

**DECLARATION OF SERVICE**

Case Name: *Paula Fiscal, et al. v. The City and County of San Francisco, et al.*  
Case Nos.: Court of Appeal; First Appellate Dist., No. A115018  
(San Francisco County Superior Court Case No. 505960)

I, Angelica V. Dugan, declare:

I am employed at Farella Braun & Martel LLP, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at Farella, Braun & Martel LLP for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the office of Farella Braun & Martel LLP is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 13, 2007, I served the attached

**REQUEST FOR RECONSIDERATION OF ORDER DENYING  
APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF  
AND RESPONSE TO RESPONDENT'S OPPOSITION TO APPLICATION  
FOR PERMISSION TO FILE AMICUS BRIEF OF LEGAL COMMUNITY  
AGAINST VIOLENCE IN SUPPORT OF APPELLANTS**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the office of Farella Braun & Martel LLP at 235 Montgomery Street, San Francisco, CA 94104, and addressed as follows:

C.D. Michel, Esq.  
Don B. Kates, Esq.  
Trutanich Michel, LLP  
180 East Ocean Blvd., Suite 200  
Long Beach, CA 90802  
Telephone: (562) 216-4444  
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Attorneys for Paula Fiscal, *et al.*,  
Plaintiffs and Respondents

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Vince Chhabria, Esq.  
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San Francisco, CA 94102  
Telephone: (415) 554-4675  
Facsimile: (415) 554-4699  
Attorneys for City and County of  
San Francisco, *et al.*,  
Defendants and Appellants

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 13, 2007, at San Francisco, California.

Angelica V. Dugan  
\_\_\_\_\_  
Typed Name

*Angelica V. Dugan*  
\_\_\_\_\_  
Signature