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 L. Warren

RESPONDENTS' BRIEF

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Court of Appeal
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First Appellate District

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INTRODUCTION

This appeal concerns Proposition H (Prop H), the so-called "Gun Control Initiative" sponsored by four members of the Board of Supervisors of San Francisco, passed by the voters in November 2005, and declared invalid by the trial court in June 2006. Prop H contains two substantive provisions, Sections 2 and 3. Section 2 bans the "sale, manufacture, transfer

or distribution" of ammunition or firearms in the city and county of San Francisco. There are no exceptions to this section. Section 3 bans the possession of handguns by all San Francisco residents within in the city and county. Section 3 contains narrow exemptions for possession of handguns by law enforcement, military, and security personnel, but only while engaged in their duties. One particularly striking result of Prop H's handgun ban would be that no San Francisco residents, including police officers, federal agents, military, et al. (active or retired), would be permitted to possess a handgun, even within the privacy of their own homes or businesses, for self defense or other lawful purposes, in contravention of Penal Code section 12026. They would be forced to sell their handguns, store them outside the county, surrender them to the City, or risk confiscation and prosecution.

After Prop H passed, Paula Fiscal, several retired law enforcement and military personnel, two law enforcement associations, and several firearms rights groups (collectively, "Respondents" or "Petitioners," below) sought a writ of mandate declaring Prop H invalid.[1] The trial court

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[1] Paula Fiscal was one of the successful petitioners in *Doe*, where this Court struck down San Francisco's last attempt to ban handgun possession. She is a businesswoman living and having an office in San Francisco, in which locations she keeps handguns for protection. For a complete description of individuals and organizations that comprise Petitioners – who Appellants collectively refer to as "the NRA"– see Petition for Writ of Mandate, found in Volume I, Tab 1, pages

granted the Petitioners' motion for writ of mandate, finding Prop H's handgun possession ban unenforceable because it conflicted with Penal Code section 12026 and Government Code section 53071 and implicated an issue of statewide concern. (V AA 44:0941, 0945-0957.) The trial court similarly found Prop H's total ban on sales, transfers, and distribution of firearms and ammunition unenforceable on preemption grounds, noting conflicts with Section 12026, Government Code section 53071, and the Unsafe Handgun Act. (V AA 44: 0957-0965.) Finally, the trial court found that any leftover 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. Moreover, the trial court determined that, absent the preempted handgun provisions, it was unclear whether voters would have passed Prop H's restrictions on long guns insofar as doing so would likely have resulted in more handguns in contravention of Prop H's main goal. (IV AA 44:0966-0968.)

On appeal, Appellants, the City and County of San Francisco, et al. (the "City"), claim at the outset of their opening brief ("AOB") that the trial court's decision was not merely wrong, but " misread or overlooked

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0003-0005 of Appellants' Appendix, hereinafter cited as, e.g., I AA 4:0003-05.

multiple, controlling decisions that have found broad local power to regulate firearms, and have construed the scope of statutory preemption narrowly. If upheld, the trial court's ruling would effect a seismic shift in our state's gun preemption laws." (AOB at 1).

On the contrary, far from representing a "seismic shift" in firearms jurisprudence, the trial court's decision follows this Court's decision in *Doe* regarding private handgun possession, the opinions of several attorneys general, and acknowledges the acceptance of *Doe* by both the Legislature and Judiciary over the past 25 years, including most recently by the Court in *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 863-864.

Also, while Appellants correctly point out that the *entire* field of firearms regulation has not been occupied by the State – as noted by this Court in *Doe* and later cases – their argument that such observations mean almost *no* fields are occupied is a non sequitur. Further, Appellants' failure to distinguish between areas within the field of firearms regulation is a recurring and fatal flaw in their arguments. For example, courts often note "[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." (*Galvan v. Superior Court* (1969) 70 Cal.2d 851,

864.) What should also require no elaborate citation to authority is that the *Galvan* Court was referring generally to *public* possession of loaded firearms and *public discharge* of firearms – not possession of firearms within the privacy of one's own home or business. (*Id.*, and cases cited therein in support of the "Mono County" quote so often cited – out of context – by the City.)

Appellants' argument that private firearms possession and attendant activities are not matters of state-wide concern specifically addressed by the Legislature is similarly unpersuasive. As discussed below and at length in the trial court's Statement of Decision (V AA 44:0940), both the plain language and history of Section 12026, along with the express preemptive intent of Government Code section 53071 prohibiting local regulations *relating* to firearms licensing, not to mention the comprehensive state statutory scheme regulating and often sanctioning civilian firearm possession, indicate the State's decision to occupy the area of handgun possession by responsible adults within the privacy of their own homes and businesses, to the exclusion of local government regulation. (*See Doe v. City & County of San Francisco* (1st App. Dist. 1982) 136 Cal.App.3d 509, 518.)[2]

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[2] While this brief focuses on the most obvious conflict between Prop H's handgun ban and state law, i.e., the conflict between the ban on handgun

STATEMENT OF FACTS

The relevant facts in this case consist mainly of the language of Prop H and the state's comprehensive regulatory regime regarding firearms with which it conflicts, including laws specifically addressed to state-wide concerns regarding licenses for in-home/business possession of state-approved handguns. We begin with Proposition H.

I. PROPOSITION H

Prop H contains two substantive provisions, Sections 2 and 3. Section 2 bans the "sale, manufacture, transfer or distribution" of ammunition and firearms in the City, without exception. Sections 3 bans the *possession* of handguns by San Francisco residents, including possession within the sanctity of their own homes, businesses, or on their private property. Section 3 contains narrow exemptions for "any City, state or federal employee *carrying out the functions of his or her government employment*, including but not limited to peace officers as defined by California Penal Code Section 830, et seq., and animal control officers" and a separate exception for "[a]ctive members of the United States armed forces or the National Guard and security guards, regularly employed and

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possession in one's home or business and Penal Code section 12026, it is important to note that Prop H's handgun ban covers both public and private possession and is inimical to numerous state laws outlined below in Part II of the Statement of Facts.

compensated by a person engaged in any lawful business, *while actually employed and engaged in protecting and preserving property or life within the scope of his or her employment . . .*" (Prop H § 3 (emphasis added).)

The exceptions for government employees, military personnel, security guards, et al., do not address off-duty possession, e.g., for transporting handguns to and from work, or for other legal purposes such as assisting on-duty personnel in stopping criminal activity, or the myriad of other legal purposes briefly outlined below in our review of existing state firearms regulations regarding, *inter alia*, handgun possession. Nor does Prop H section 3 include exceptions for retired officers, the entertainment industry, private investigators, and certain other classes and individuals that state law allows (i.e. "licenses") to possess handguns under certain circumstances.

In an attempt to avoid the invalidation of section 3 of the ordinance under the preemption doctrine, section 1 of the measure seeks to invoke the City's home rule power with regard to section 3, explaining that the measure 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."[3]

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[3] A copy of the ordinance can be found at I AA 4:064-66.

II. THE STATE REGULATORY SCHEME

In describing his efforts at interpreting certain sections of Title 2 (commencing with Section 12000) of Part 4 of the Penal Code entitled "Control of Deadly Weapons" (hereinafter referred to as "Title 2") Justice Bedford noted that:

> At first blush, the statutes seem impenetrable. Reading them is hard, writing about them arduous, reading about them probably downright painful. The similarity of the section numbers and the fact each section has a particular subdivision which requires discussion in conjunction with other similarly denominated subdivisions makes for tough sledding. As Alfred North Whitehead wrote of rationalism, the effort is, itself, "an adventure in the clarification of thought." (Whitehead, Process and Reality (1929) pt. I, ch. 1, § 3.) The reader who is not inclined to such adventure and who is fortunate enough not to confront these statutes is probably well-advised to forego this opinion.
>
> (*Rash v. Lungren* (1997) 59 Cal.App.4th 1233, 1235.)

Although Justice Bedford was referring to Penal Code section 12021, by and large the majority of Title 2 suffers from similar infirmities. Section titles often do not accurately describe the section's contents, cross-references abound, similar subject matter is regulated under different sections or subsections, and exceptions are common - although not always directly under the restriction being exempted from.[4]

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[4] The Legislature recognized this last session, and instructed the California Law Review Commission to rewrite the entire Dangerous Weapons Control Act by passage of Resolution AR 73. The CRLC is in the process of doing so.

Nonetheless, although the nomenclature of the statutes is confusing, their provisions, when carefully considered, reflect a clear legislative intent to achieve certain policy objectives through the statutory approach taken.

Although some provisions of Title 2 are designed to reduce the probability of gun accidents and encourage responsibility by gun owners,[5] for the most part Title 2 attempts to prevent the misuse of firearms in crime. It seeks to accomplish this by limiting the type of people who can possess firearms, the types of firearms that may be possessed, the locations where firearms may be possessed, and the state in which they may be possessed. In many cases, these approaches overlap.

Title 2 regulates who may not possess firearms and, in some situations, who may possess certain firearms. The most obvious class of persons prohibited from possessing firearms is convicted felons, but there are over twenty-eight additional classes of individuals whose ability to possess firearms is restricted. [6]

Title 2 also regulates the types of firearms that may be sold in California. Because criminals prefer concealable firearms, handguns are

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[5] See Pen. Code §§ 12087, *et seq.*; 12125, *et seq.*; 12800, et seq.; 12020.3; 12035 and 12036.

[6] See Pen. Code §§ 12001.6, 12021, 12021.1, and Health and Welfare Code § 8100, *et seq.*

more heavily regulated than "long guns," i.e., rifles and shotguns. Short-barreled rifles and shotguns,[7] assault weapons[8], machine guns,[9] cane and wallet guns,[10] zip guns,[11] guns over .60 caliber,[12] "unsafe" handguns,[13] large capacity magazines,[14] silencers,[15] multiburst trigger activators,[16] sniperscopes,[17] and .50 BMG rifles,[18] among others, are generally prohibited.

The State also restricts the type of ammunition that can be used.

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[7] Pen. Code § 12020(a).

[8] Pen. Code § 12275, *et seq.*

[9] Pen. Code § 12200, *et seq.*

[10] Pen. Code § 12020(a), (c)(4), and (c)(5).

[11] Pen. Code § 12020(a), (c)(12); 18 U.S.C. §§922(a)(4), 924(a).

[12] Pen. Code § 12301, *et seq.*

[13] Pen. Code § 12125, *et seq.*

[14] Pen. Code § 12020(a)(2) and (c)(25).

[15] Pen. Code § 12500, *et seq.*; Pen. Code section 12520.

[16] Pen. Code § 12020(a) and (c)(23).

[17] Pen. Code § 468.

[18] Pen. Code § 12275, *et seq.*

Flechette darts,[19] tracer ammunition,[20] armor piercing bullets,[21] and ammunition over .60 caliber[22] are generally prohibited.

In addition to regulating the types of persons and the types of firearms possessed, the state statutory scheme also regulates where and how firearms may be possessed.[23] In approaching these place and manner restrictions, the state scheme takes into account the type of firearm being possessed.

In a person's home or business, the regulations on possession and concealed or loaded carry are relaxed. And in fact, with respect to possessing a handgun in one's home or business, Section 12026, as will be discussed below, affords protection from local restrictions on handguns possessed in private homes, businesses, and on private property.

The restrictions increase as one crosses one's threshold and goes into public. Title 2 distinguishes between carrying handguns and long guns in

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[19] Pen. Code § 12020(a) and (c)(6).

[20] Pen. Code §§ 12320-12325.

[21] Pen. Code § 12320, *et seq.*

[22] Pen. Code §§ 12304 and 12311.

[23] Pen. Code §§ 12021.5; 12022; 12022.3; 12022.5; 12022.53; 120.22.55; 12024; 12025; 12026; 12026.1; 12026.2; 12030; 12031; 12032; 12033; 12040;12101; 12280; 12285, and 12290. This list is not all-inclusive, but is designed to enumerate a broad selection of sections that regulate the places and uses of firearms.

public as opposed to on private property, and between carrying firearms concealed or loaded. Generally, long guns cannot be possessed loaded in public, and a handgun cannot be possessed in public if loaded or concealed. But there are a myriad of exceptions to all the above general restrictions with particular significance to this case.

Certain classes of persons receive special treatment. Most obviously, courts,[24] law enforcement agencies and or officers,[25] including retired officers,[26] and the military[27] are exempted from most prohibitions. Penal Code section 12027 provides that retired police and sheriffs, and certain retired federal officers, may qualify for a certificate to carry concealed and/or loaded handguns. (The fact that retired federal officers only qualify if they served in California makes it clear that this privilege is based on the states's interest in protecting such officers from retaliatory attack by criminals whom they may have angered during their service in California and that these former officers should be allowed guns for self-defense.)

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[24] Pen. Code §§ 12027(i) and 12031(b)(8).

[25] Pen. Code §§ 12002(a); 12020(b)(1), (12), and (18); 12021(c)(2); 12027(a)(1)(A); 12030(b)-(e); 12031(b)(1) and (c); 12035(c)(5) and 12036(e)(5); 12040; 12050 (a)(1)(C) and (a)(2)(B); 12071.4(i); 12125 (b)(4); 12230(a) and 12250(a); 12280(e); and 12302.

[26] Pen. Code §§ 12027(a)(1)-(3), 12072.1(a)-(e) and 12031(b)(1)-(3).

[27] Pen. Code §§ 12020(b)(1) and 12027(c).

Additionally, in the private sector the private security industry,[28] entertainment industry professionals,[29] common carriers,[30] members of shooting clubs,[31] and private investigators[32] are also granted special exemptions and licenses.

With respect to possession of firearms in public by civilians (who have not somehow lost their right to have a gun), long guns can generally be possessed in public without a license if unloaded. Any gun 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.[33]

Significantly, Penal Code section 12050, *et seq.*, provides that, upon a showing of good cause, any law-abiding, responsible adult can obtain a license to carry a concealed or loaded handgun (CCW) in public. Even without a CCW, Penal Code §§ 12025.5 and 12031(j)(2) create special

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[28] Pen. Code §§ 12027(e); 12031(b)(7) and (d)(1)-(6); 12071.4(g); and 12071.4(i).

[29] Pen. Code §§ 12020(b)(10) and 12026.2(a)(1) and (8).

[30] Pen. Code § 12027(e).

[31] Pen. Code § 12026.2(a)(2).

[32] Pen. Code § 12031(d)(3).

[33] Pen. Code § 12026.2(a)(9).

exceptions whereby people who have been threatened and obtained a restraining order may carry loaded and concealed handguns. Sections 12027(a) and 12031(b)(1) allow civilians to possess concealed and loaded handguns when summoned by police to assist police in making an arrest or preserving the peace. Penal Code § 12031(k) permits possession of a loaded gun when making a citizen's arrest. Penal Code § 12031(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 gun is necessary to protect person or property. Though brandishing a firearm is illegal, Penal Code § 417 provides that brandishing in self-defense is not a crime. As interpreted by our Supreme Court, even an otherwise prohibited felon may temporarily possess a firearm for self defense. (*People v. King* (1978) 22 Cal.3d 12, 24-25.) These laws provide a decisive backdrop to Section 12026 (b)'s declaration that adults may possess handguns in their homes and offices – *without a permit or license* – and to Government Code section 53071's ban on local regulations *relating* to licensing and registration of firearms.

Firearm sales also are heavily regulated. Penal Code § 12070(a) prohibits persons from selling, leasing, or transferring firearms *unless* they have a license, and Penal Code § 12070, *et seq.*, establishes a licensing

mechanism whereby persons can apply for and receive licenses to transfer firearms to the general public. Penal Code § 12271(a)(1) defines a "licensee" as any person who has been issued: (A) a valid federal firearms license; (B) any regulatory or business licenses, or licenses required by local government; (C) a valid seller's permit issued by the State Board of Equalization; (D) a certificate of eligibility issued by the California Department of Justice; (E) a city, county or city and county license in a specified format and limiting the term of the license to one year; (F) and the person is listed on the state's centralized list of gun dealers. An even higher statutory licensing scheme has been created for persons desiring to sell the more heavily regulated firearms, such as "assault weapons," "short barrel rifles / shotguns," "machine guns," ".50 BMG Rifles," and "firearms greater than .60 caliber."[34]

It is undeniable that one class benefitted by the statutory scheme is private citizens who have not, through some demonstration of personal disability or irresponsibility, lost their right to own a gun. If limiting access to criminals or preventing gun accidents were its only goal, Title 2 could be drastically simplified by banning civilian firearms possession outright. Tellingly, the Legislature declined to take that approach. Rather, as

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[34] Pen. Code §§ 12275, *et seq.*; 12020(b)(2); 12230 and 12250; and 12301, *et seq.*

illustrated by the examples above, Title 2 painstakingly sets out comprehensive licensing regulations in the form of permits, exceptions, and exemptions to its prohibitions. These licenses benefit particular people in particular places for particular firearms under particular circumstances, and they reflect a 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 legitimate interests of certain segments of the private sector, and of individual law abiding citizens to be able to use guns to deter crime, to help police fight crime, and to defend themselves. In balancing these interests, the legislature has clearly recognized that certain firearms, including handguns, are appropriate for certain private citizens to have, at least in certain places under certain circumstances.

Simply put, the state has taken a two-pronged approach to respond to the state-wide problem of the criminal misuse of firearms: 1) To deny access to firearms for those deemed most likely to misuse them, and; 2) to grant access to firearms to law-abiding citizens, active and retired law enforcement, and others so that they may purchase, own, possess and use firearms to deter to crime, defend themselves, or for other lawful purposes. Moreover, the state impliedly or expressly protects that access under certain circumstances, thus giving rise to a state right or entitlement to such access.

As discussed below, such is the case with the statutes at issue in this case. For example, in describing the purpose and effect of Section 12026, the Supreme Court found "[t]he Legislature intended that the *right* to possess a weapon at certain places could not be circumscribed by imposing any permit requirements . . .." (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 858 (emphasis added).) Similarly, the Appellate Court in *Sippel v. Nelder* (1972) 24 Cal.App.3d 173, 177, found that under Section 12026 responsible adults were "entitled" by state law to purchase handguns and possess them in the privacy of their own homes and offices.

This partial review of the State's comprehensive firearms regulations is intended to serve two purposes: to illustrate that, on its face, Prop H conflicts with and is inimical to the State's comprehensive regulatory regimen and its underlying public policy rationale, and that the state-wide concern regarding the particular subject matter of Prop H is manifest in that regimen, i.e., the subject matter is more than merely a "municipal affair."

STATEMENT OF THE CASE

Petitioners, seeking a writ of mandate and declaratory and injunctive relief, filed this action in San Francisco Superior Court on December 29, 2005. (I AA 1:0001-0019.) Petitioners filed a motion for writ of mandate on January 11, 2006. (I AA 4:0026.) The City responded to Petitioners'

motion on January 25, 2006. (III AA 14:0462.) In its response, the City conceded that Section 3 of Prop H conflicted with state law, but argued it was protected from state preemption because its ban was a "municipal affair." (III AA 14:0481, lines 7-13.) Petitioners filed a reply brief on February 8, 2006. (IV AA 27:0630-0656.)

On February 23, 2006, San Francisco Superior Court Judge James L. Warren heard Petitioners' writ motion. On June 12, 2006, Judge Warren issued a Statement of Decision and Order Granting Motion for Writ of Mandate and/or Prohibition or Other Appropriate Relief. (V AA 44:0940.) The trial court entered judgment in favor of Petitioners on June 22, 2006. (V AA 44:0979.) On June 30, 2006, the trial court issued a peremptory writ of mandate enjoining the City from enforcing Proposition H. (V AA 47:0977.) The City appealed Judge Warren's decision on July 20, 2006. (V AA 49:0984.)

STANDARD OF REVIEW

The City argues that because this case raises solely legal issues, this Court must review the trial court's decision *de novo*. (AOB at 10, Section I.) The City also argues that the burden is on Respondents to show that Prop H is preempted. (AOB at 10, Section II.A.1.) These statements ignore two key points.

First, it is a basic tenet of appellate review that an appealed judgment is presumed to be correct, and "[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and the error must be affirmatively shown." (*Denham v. Superior Ct.* (1970) 2 Cal.3d 557, 564.) This is true even when an appellate court properly reviews a matter *de novo*. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466.)

Second, the trial court did make some factual findings, and these findings should be reviewed with deference to the trial court. An appellate court reviews "the record de novo except where the trial court made foundational factual findings, which are binding on appeal if supported by substantial evidence." (*City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1409.)

The trial court found that the home rule doctrine did not protect Section 3 of Proposition H from state-law preemption. (V AA 44:0945-0954.) In support of this legal determination, the trial court made the following foundational findings of fact:

- "a San Francisco handgun ban inevitably affects adjacent counties by flooding them with the handguns that are no longer allowed in San Francisco." (V AA 44:0952.)
- "if this ordinance were to go into effect, some San Franciscans would respond by selling or otherwise disposing

of their handguns in other counties rather than give them to San Francisco police or have them confiscated without compensation. (V AA 44:0952.)

- "San Francisco residents who currently own handguns may be effectively prohibited from participating in activities involving the use of those guns outside the city." (V AA 44:0953)

- "Although residents could conceivably store handguns outside of San Francisco for use in hunting, target shooting or other legal activities, they are more likely to secrete their handguns within city limits, thus placing themselves in violation of the law, or surrender their handguns altogether due to the cost and inconvenience of remote storage." (V AA 44:0953-54.)

While the court's factual findings are by necessity largely based on personal experience, logic, and inference (as Prop H was never enforced), they are nonetheless entitled to deference under the substantial evidence rule. More specifically, such findings are subject to the "conflicting inference rule," pursuant to which appellate courts will indulge all reasonable inferences that may be deduced from the facts in support of the party who prevailed in the proceedings below. (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1622-23.) In short, Appellants assertion that all burdens of proof and persuasion must be borne by Respondents on appeal ignores the results of the trial; Appellants lost at trial, and it is their burden to prove the trial court committed prejudicial error.

LEGAL DISCUSSION

I. SUMMARY OF ARGUMENT

The substantive provisions of Prop H conflict with and are inimical to State firearms regulations in almost every respect, including the primary provision affecting possession of handguns on private property that this Court found preempted 25 years ago in *Doe*. The City conceded the latter point at trial and cannot credibly dispute that point on appeal inasmuch as *Doe* remains good law, and the "no license or permit . . . shall be required" language of Section 12026 remains unchanged. Nor can the City plausibly claim that the Legislature has not manifested the State's concern over *possession* of handguns on *private* property, including in one's home or business, given the plain language of Section 12026 and its legislative history. Notably, the City has failed to provide an alternate explanation for that plain language, nor any legislative history that might raise questions about the otherwise plain meaning of the words chosen by the Legislature.

Viewed in context, the correctness of the trial court's decision is readily apparent. On the one hand, Prop H is far more severe in its limitations on firearms generally, and handguns in particular, than the ordinance rejected by this Court in *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509. The City seeks through Prop H to

enter into and take control over (including complete bans) a much larger area of the field of firearms regulation than it did in 1982. On the other hand, during the 25-year period since *Doe*, that case and its interpretation of then-existing statutes has been ratified by both the Legislature and the Courts. Moreover, the Legislature has enacted additional regulations which further conflict with Prop H's provisions, most notably the Unsafe Handgun Act (Pen. Code §§ 12125-12133).

Simply stated, the City seeks greater control now than it did in 1982 of an area that is more heavily regulated by the State now than it was then – when this Court rejected the City's last attempt to ban handguns. Consequently, the City's legal arguments today are less tenable now than they were in 1982, and should be rejected, as they were by the trial court. To rule otherwise would be to overturn *Doe* and dramatically alter decades of "municipal affair" jurisprudence which, in turn, would open a pandora's box of local firearms laws – in either direction, from no access to unlimited access, if the court finds firearms possession is a municipal affair, only.

As noted above, there are still areas of firearms regulation over which local governments have control; which firearms one may possess in the privacy of one's home is simply not one of them.

II. PROP H'S BAN ON HANDGUN POSSESSION IS PREEMPTED BY STATE LAW

In the trial court, the City conceded that Section 3 of Prop H conflicted with Section 12026 as construed by *Doe*. (III AA 14:0481.) On appeal, Appellants argue that this Court should reverse its earlier determination in *Doe* that Section 12026 conflicts with a complete ban on handgun ownership. (AOB at 28-34.) Absent a compelling justification, this Court cannot make such a reversal.[35] Mere disagreement with an earlier decision is not a "compelling reason." (*People v. Opsal* (1991) 2 Cal.App.4th 1197, 1203-1204.)

Here, the City has presented no compelling argument for this Court to overrule *Doe*. The City argues that *Doe* should be overruled because "*Doe's* approach to preemption is fundamentally at odds with subsequent cases." (AOB at 30.) As shown below, this argument is fallacious; the City has failed to cite a single case that has repudiated or even criticized *Doe*.

In 1923 the California Legislature enacted Section 12026, protecting the rights of law abiding, responsible adults to possess handguns in the sanctity of their own homes or businesses.

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[35] *See People v. Bolden* (1990) 217 Cal.App.3d 1591, 1596-1598 (holding that the court would not "overrule a decision rendered by another panel of this court *except for compelling reasons*.")

> In 1923, the provision prohibiting carrying concealed firearms without a license was changed . . . and a paragraph added – substantially, Penal Code section 12026, that "no permit or license' could be required to possess a firearm at one's residence or place of business. . . .[¶] The Legislature intended that the right to possess a weapon at certain places could not be circumscribed by imposing any requirements, such as "good moral character" (except the exclusions in Pen. Code § 12025) upon the person possessing the weapon.

(*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 858.)

In its current form Section 12026(b) provides:

> (b) 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 § 12021 or 12021.1 of this code or § 8100 or 8103 of the Welfare and Institutions Code, 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.

Almost sixty years later, San Francisco attempted to ban handgun possession in direct contravention of the plain language of Section 12026 (b), as well as the later-enacted Government Code section 53071, which expressly barred local governments from enacting regulations *relating* to firearms licensing – something banning handgun possession most certainly does. Section 53071 provides:

> 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 § 1721 of the Labor Code.

In 1982, this Court reviewed San Francisco's handgun ban and found it preempted under the state Constitution and state statutes, stating:

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

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

California Attorney General Opinions, at the time and subsequently, came to the same conclusion regarding possession of firearms, including handguns:

> As to the firearms possession at one's residence, business, or other property, state law has also preempted the field. (*Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509, 518; *Sippel v. Nelder* (1972) 24 Cal.App.3d 173, 176-177; 65 Ops.Cal.Atty.Gen. 457, 464 (1982).)

(77 Ops.Cal.Atty.Gen. 147 [1994 WL 323316, *2] (1994).)

Later appellate court opinions, including one heavily relied upon by Appellants, recognized the continuing validity of *Doe*, regarding both express and implied preemption of local regulations relating to possession of handguns in one's home or business:

> The [*Doe*] court concluded that the city had in effect created a licensing requirement for handguns in the home in violation of the express preemption of that field in Government Code section 53071. *Doe* also noted that even if it did not consider the ordinance to contain a de facto licensing requirement, it would nevertheless find the ordinance impliedly preempted on the theory that Penal Code section 12026 (which preempts local requirements for permits or licenses to possess concealable weapons in the home) reflected a legislative intent to occupy the field of "residential handgun possession."

(*California Rifle & Pistol Assn. v. City of West Hollywood* (1998) 66 Cal.App.4th 1302, 1315-16 ("*CRPA*").)

Finally, in 2002 the California Supreme Court cited *Doe* approvingly in *Great Western, supra,* 27 Cal.4th at 863-64. After reviewing cases where courts rejected preemption challenges to local regulations (primarily adding *restrictions* on the sale, use or possession of firearms in *public*), the Court turned to the other end of the spectrum, i.e., regulations concerning *bans* on firearms possession on *private* property, citing *Doe* as an example of a case where a local law was properly preempted:

> On the other hand, a restrictive San Francisco firearm

> ordinance was held to be preempted in *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509, 186 Cal.Rptr. 380 (*Doe*). The ordinance outlawed the possession of handguns within the city but exempted those persons who obtained a license to carry a concealed weapon under Penal Code section 12050. Reviewing *Galvan* and *Olsen*, the court acknowledged that "these decisions suggested the Legislature has not prevented local government bodies from regulating all aspects of the possession of firearms." (*Doe*, supra, 136 Cal.App.3d at p. 516, 186 Cal.Rptr. 380.) Nonetheless, 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. Thus, the effect of the San Francisco ordinance "is to create a new class of persons who will be required to obtain licenses in order to possess handguns" in residences and places of business (*Doe*, supra, 136 Cal.App.3d at p. 517, 186 Cal.Rptr. 380), which the two statutes forbid (*id.* at pp. 517-518, 186 Cal.Rptr. 380).

(27 Cal.4th at 863-64.)

Finally, the City conceded that its handgun ban provision directly conflicted with state statutes as interpreted by this Court in *Doe*, both in its trial briefs (III AA 41:0481) and at oral argument (R.T. at p. 21, line 22 to p. 22, line 10). The City confirmed that it was relying on its "municipal affair" argument to save that provision. The trial court rejected the City's "municipal affair" argument on multiple grounds using the test set forth in *California Federal Savings and Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1 ("*CalFed*").[36] As summarized in the following section, the

[36] V AA 44:0945-0954.

trial court found residential handgun possession a matter of statewide concern.

III. HANDGUN POSSESSION BY CALIFORNIANS WITHIN THE PRIVACY OF THEIR OWN HOMES – AND IN PUBLIC – IS A MATTER OF STATEWIDE CONCERN THAT HAS BEEN DIRECTLY ADDRESSED BY THE LEGISLATURE; IT CANNOT BE TRANSFORMED INTO A "MUNICIPAL AFFAIR" BY THE CITY'S UNILATERAL ACT

As shown in the Statement of Facts, above, the State has expressed its concern regarding firearms possession in multiple ways, most of which conflict with Prop H. For purposes of clarity, however, we will focus on the plain language of Section 12026 to dispense with the City's municipal affairs gambit. Section 12026 manifests a statewide concern over local licensing and permitting schemes that might interfere with the ability of responsible Californians to possess handguns within their own homes and businesses – Section 12026 precludes such local regulations. As this Court observed in *Doe*, there is no ambiguity in Section 12026's proscription against local regulations requiring a permit or license to possess a handgun in one's home or business: "'No permit or license' means 'no permit or license.'" (*Doe*, *supra,* Cal.App.3d at 518.) Nor is there any doubt that prohibiting local restrictions on private possession of handguns necessarily prohibits banning possession: "It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on

possession." (*Id.*)

Thus, it is simply not plausible to argue that the state is not concerned about law-abiding Californians – *including those who reside in San Francisco* – being able to possess state-approved handguns in the privacy of their own homes or businesses, for self defense or other lawful purposes. Nor is it plausible to argue that the Legislature has not addressed this statewide concern directly in Section 12026. The only question remaining, then, is whether the City can somehow extinguish that statewide concern by unilateral action, in this case, Prop H. The question answers itself.

A "statewide concern" exists independent of regulations that any local board or council might concoct. The state has either expressed its concern or it has not; it has either enacted legislation to address the concern or it has not. Here, the state has expressed its concern and enacted legislation in the form of Section 12026, and elsewhere. Nothing in Prop H can alter that fact.

A. The *CalFed* Analysis

Where, as here, the matter implicates a "municipal affair" and poses a genuine conflict with state law, "the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests

is adjusted." (*CalFed, supra*, 54 Cal.3d 1, 17.) As the trial court noted, the first two elements are easily satisfied; the City – *any city* – has an interest in preventing gun violence, and the City's solution, Prop H, clearly conflicts with state law. (V AA 44:0946-0947.) Thus, the analysis focuses on the existence of a statewide concern.

Where a statewide concern is implicated, and where the state law is reasonably related to the statewide concern and tailored to resolve that concern, the state statute takes precedence over the conflicting charter city measure.[37] (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 399 (citing *CalFed.*).) The Court must determine whether the subject "fails to qualify as one of statewide concern" or if the subject state statute [or in this case statute*s*] "is one of statewide concern and that the statute is reasonably related to its resolution." (*CalFed*, 54 Cal.3d at 17.) "Statewide concern" refers to "all matters of more than local concern and thus includes matters the impact of which is primarily regional rather than truly statewide." (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505.)

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[37] As *Doe* found, the purpose of Penal Code § 12026 was to guarantee that trustworthy adults would not be deprived of handguns in their homes and offices. The City has not suggested how Section 12026 could be more narrowly tailored to serve that interest other than the way in which it is written. Nor has the City provided an alternate explanation for Section 12026's purpose.

As *CalFed* and numerous other cases note, there is no strict definition of what is a "municipal affair." There are however some definite guidelines as to what things are *not* municipal affairs but instead implicate a state concern. One that is imperatively applicable to this case is that state law may be overruled by a local ordinance only if the state has no substantial interest in the subject, i.e., what the ordinance concerns is a "*purely* municipal affair[]." (*Jackson v. City of Los Angeles* (2003) 111 Cal.App. 4th 899, 906 (emphasis added); see also *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 505 (distinguishing "*purely* municipal affairs" from matters of "statewide concern," and specifying that "statewide" refers to all matters of *more than local* concern") (emphasis added).)

It bears emphasis that the existence and relative strength of any municipal interest in the subject is irrelevant. Courts do not *weigh* the state interest against the municipal one – for if there is any demonstrable state interest in a subject at all the home rule doctrine is inapplicable and state law prevails over any contrary local ordinance.[38] Finally, "if there is a doubt as to whether or not [a] regulation is a municipal affair, that doubt must be resolved in favor of the legislative authority of the state." (*Ex*

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[38] *CalFed, supra*, 54 Cal.3d 1, 17.

Parte Daniels (1920) 183 Cal. 636, 639; see also *Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 514.)

B. Proposition H Addresses Areas of Statewide Concern; It is Therefore Not Protected by the Municipal Affairs Doctrine

The City's claim to protection under the "municipal affairs" doctrine fails, for it is self-evident that firearms regulation is not a "purely municipal" matter in which the state has no interest. Prop H's findings expressly proclaim the subject to be gun possession and misuse.[39] So to validate Section 3's handgun ban as a home rule matter, what the City must show is that the state has no interest in handgun possession and in controlling guns to reduce violent crime. Obviously no such showing could be made, *inter alia*, because so extensive is the state interest in controlling guns that it has prompted a profusion of legislation that takes up over 100 small print pages of the unannotated Penal Code.

This brings us to two further principles guiding application of the home rule doctrine. First:

> If the subject matter [of an ordinance] is one of general or statewide concern, the Legislature has paramount authority; and if the Legislature has enacted general legislation covering that matter, in whole or in part, *there must be a presumption*

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[39] Prop H, section 1. (I AA 4:0064.)

that the matter has been preempted.[40]

Second, the Legislature's enactment of a vast body of gun control legislation manifests its belief that the area is one of statewide interest. "While it is not conclusive, the Legislature's belief that a matter is of statewide rather than purely local concern is entitled to 'great weight.'"[41]

In sum, the combination of the profusion of state gun laws with the principles governing the home rule doctrine makes it almost inconceivable that that doctrine could validate any local gun ordinance which contradicts any of those state laws. Moreover, as noted at the outset of this section, this court's interpretation of the plain language in Section 12026 makes a municipal affairs defense of Prop H's handgun ban altogether implausible.

The City has attempted to define the issue at hand narrowly. Namely, the City argues that the subject at issue is handgun possession by San Francisco residents not already prohibited from possessing handguns under state law. But this mischaracterization only confuses the issues. Cities have no interest in banning handguns *per se.* Their interest is in preserving the health, safety and welfare of their residents – which interest this City believes it is furthering by banning handguns.

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[40] *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 106-107 (emphasis added).

[41] *Jackson, supra*, 111 Cal.App.4th at 907.

But the state has a paramount interest in preserving the health, safety, and welfare of all its residents, including San Franciscans. Pursuant to that interest, the state has created a connected pattern of statutes recognizing the legitimacy of guns for self-defense, capped by Section 12026 (b) guaranteeing that its residents may have guns in their homes and offices. *CalFed* holds that "[i]f the court is persuaded" that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution, then *the conflicting charter city measure ceases to be a "municipal affair" pro tanto* and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments." (54 Cal.3d at p.17 (emphasis added).)

In other words, the City's minimizing characterization of the issue here cannot reduce matters like violence and gun control, which are of obvious statewide significance, to municipal affairs in which the state has no significant interest simply by unilaterally declaring the City's belief to that effect.

This is supported by the case *City of Watsonville v. State Department of Health Services* (2005) 133 Cal.App.4th 875, where the court upheld a state law that mandated fluoridation of water supplies serving more than a minimum number of users. In that case, the court recognized that city and

state had diametrically opposite views of which policy would best preserve the health, welfare and safety of the public, but ruled that in such a situation the state policy must prevail because "citizens throughout the state are entitled to the assurance that the water they receive conforms to all current public health standards" and "[a] patchwork of inconsistent local measures cannot provide that assurance." (*Id.* at 888.) The parallel is obvious to the present case with its diametrically opposite state and local policies each intended to protect the public against crime.

1. Regulating guns is traditionally a matter of state rather than local interest

The City attempts, in the face of overwhelming evidence to the contrary, to argue that guns laws are traditionally an area of local rather than state regulation. (AOB at 10-11.) The City relies upon and quotes extensively from *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149, to suggest that firearms regulation is a matter of local rather than state regulation. But *Big Creek* is a land use case concerning permissible locations for timber operations; it had nothing to do with firearms law. (*Id.* at 1145.) To the contrary, from the colonial period on gun regulation has always been a matter for colonial or state (rather than local) law. The earliest local gun law Respondents have been able to find

dates from 1905.[42]

In 1982, the California Attorney General explicitly opined that the purposes of firearms regulation are not local in nature, but rather are statewide, national, and even international in scope:

> "The purpose of firearm regulation is to control the classic instruments often used for criminal purposes. A government has a great interest in minimizing 'the danger to public safety arising from the free access to firearms that can be used for crimes of violence.' Such controls are a valid exercise of the police power of the state for the protection of lives and property of the state's citizens. *Such legislative purposes and concerns are not limited to cities*, but are statewide, national, and even international in scope. The comprehensive state legislation in the field of firearms possession is evidence of the statewide concern just as the National Firearms Act is evidence of a similar national concern." (Internal citations omitted.)

(65 Ops.Cal.Atty.Gen. 457 (1982), 1982 WL 155982, *9.)

In sum, not only does the state have a paramount interest in gun law, but the regulation of guns has always been primarily the business of states. Thus, given that regulation of guns is primarily a state matter, and the state has specifically addressed possession in Section 12026 (with which Prop H conflicts), the City's municipal affair defense of Prop H is strained. It is further strained when one considers the extraterritorial impacts and absurd results discussed below.

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[42] *City of Salina v. Blaksely* (1905) 83 P. 619.

2. Extraterritorial Impacts

An ordinance does not fall within the municipal affair doctrine if the ordinance "affects persons outside of the municipality. . . . '" (*Committee of Seven Thousand, supra,* 45 Cal.3d 491, 505) It bears emphasis that the home rule doctrine is inapplicable if an ordinance has *any* extraterritorial effect at all – even an extraterritorial effect that benefits those outside the municipal borders. Thus the California Supreme Court held in *City of Santa Clara v. Von Raesfeld*:

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

(3 Cal.3d 239, 247 (1970) (emphasis added).)

The City argues that, Section 3's handgun possession ban has purely local consequences, affecting "none but its citizens." (AOB at 39.) But the ordinance does have multiple extraterritorial effects, including one that *Doe* itself recognized: a San Francisco handgun ban inevitably affects adjacent areas by flooding them with the handguns that are no longer allowed in San Francisco and driving the price down as supply exceeds demand. *Doe* said, under the heading, "Municipal Affair:"

> The City and County of San Francisco (hereafter sometimes City and County) concedes that "it cannot be argued that the regulation of

> firearms is a municipal affair within the meaning of Article XI, Section 5, subdivision (a)," of the state Constitution. We agree. Clearly, the Handgun Ordinance, which prohibits possession by both residents and those passing through San Francisco, legislates in an area of statewide concern. (See *Professional Fire Fighters, Inc. v. City of Los Angeles*, supra, 60 Cal.2d at pp. 293-294, 32 Cal.Rptr. 830, 384 P.2d 158, and cases cited therein; *Long Beach Police Officers Assn. v. City of Long Beach*, supra, 61 Cal.App.3d at p. 371, 132 Cal.Rptr. 348.) It affects not just persons living in San Francisco, but transients passing through and residents of nearby cities where San Francisco's handguns might be sold.

(*Doe, supra,* 136 Cal.App.3d at 513.)

Whether or not this assertion in *Doe* was *dictum*, it is obvious that San Franciscans would respond to the ordinance by selling their handguns in other cities and counties rather than turn them in to police or have them confiscated without compensation. The theories on which Prop H was enacted would predict that this infusion of San Francisco handguns into adjacent areas would cause a an increase of violence therein.[43] Respondents uphold an opposite viewpoint. Regardless, if Section 3 has any effect, beneficial *or* harmful, on areas outside San Francisco, it cannot qualify as a municipal affair.

In addition to flooding neighboring gun markets, Section 3 will have a host of other effects on people who visit the City, and on people outside

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[43] Prop. H, section 1 finds as fact that "[t]he presence of handguns poses a significant threat to the safety of San Franciscans." (I AA 4:0064.) A fortiori the infusion of thousands of handguns into adjoining areas would pose a significant threat to the safety of people in those areas.

the City.

As Petitioners argued in the trial court, as a result of the absence of firearms in the City, people passing through the City will be will be either more or less likely to be harmed by gun violence or protected from gun violence, depending on whose view of gun-control policy is correct. (IV AA 27:0643-0644.) The appellate courts, the Attorney General, and the Legislative Counsel have already found these types of effects to implicate "statewide" concerns.

In *Long Beach Police Officers Assn. v. City Of Long Beach* (1976) 61 Cal.App.3d 364 – a case cited by *Doe* on the issue of extraterritorial effects – a local association of police officers brought an action to restrain enforcement of city regulations relating to discharge of firearms by the city's police officers in apprehending felons. In contrast to San Francisco's position in the 1982 *Doe* case, in *Long Beach* the city insisted that the ordinance in question was a municipal affair, and actively argued for home rule protection. (*Id.*) This court rejected the arugment, reasoning that "[j]ust as use of city streets by police and fire vehicles affects not only the municipality's citizens but also transients, and is thus a matter of state-wide concern [citation], so also the firing of guns by Long Beach police officers and the apprehension or escape of felons in Long Beach affects the people

of the state generally." (*Id.* at 371.)

The Legislative Counsel of California specifically pointed to the *Long Beach* case when asked by Senator H.L. Richardson for a legal opinion on whether an ordinance of the type at issue in *Doe* was preempted by state law. (IV AA 29:0771-0778.) On page 8 of its opinion, the Legislative Counsel specifically mentioned that the *Long Beach* court found the City ordinance regulating discharge of police firearms in the City "affected not only the municipality's citizens but also transients and was thus a matter of state-wide concern." (IV AA 29:0778.) The Legislative Counsel's office went on to opine that "since an area of firearms control so closely related to internal city affairs as was the case in the *Long Beach* situation is not exclusively a municipal affair, it is our opinion that an ordinance relating to the broader area of the sale and possession of concealable firearms *by inhabitants of the city* would not be considered a municipal affair." (*Id.* (emphasis added).) Even though the *Doe* ordinance applied both to residents and non-residents, the Legislative Counsel did not find this fact significant, opining that an ordinance regulating possession of "concealable firearms by inhabitants of the city" is nonetheless not a municipal affair.

Similarly, in 1982 the California Attorney General opined that a

California city does not have the authority to prohibit the possession of handguns within the city. (65 Ops.Cal.Atty.Gen. 457 [1982 WL 155982].) In its 1982 opinion, the Attorney General, like the California Legislative Counsel, relied on the *Long Beach* opinion in considering whether such a local ordinance could be considered a municipal affair. In comparing a handgun possession ban to the police discharge regulation considered in *Long Beach*, the Attorney General noted that "[t]he use of a firearm within the city would appear to be of greater concern than possession of such weapons in the city." (*Id.* at *9). The Attorney General concluded that "[i]f such use of firearms is not a municipal affair *a fortiori* neither is the possession of firearms." (*Id.*)

The handgun ban endangers non-San Franciscans who visit the city just as nonresidents were affected by the Long Beach ordinance's restrictions on using firearms to apprehend criminals. If anything, the effect of Section 3 on non-San Franciscans will be greater. They will be affected by the deprivation of handguns from all law-abiding city residents, not just by the manner in which the much smaller group of police officers discharge their weapons.

A further extraterritorial effect noted by the trial court is that San Francisco residents who currently own handguns would be effectively

prohibited from using those handguns outside the City. (V AA 44:0953-0954.) The 1982 Attorney General opinion referenced above mentioned this very effect as one reason why a city ordinance banning handgun possession could not be a municipal affair. (65 Ops.Cal.Atty.Gen 457, *9.)

Similarly, as the City claims that even City residents who are statutorily permitted to carry a concealed firearm under Penal Code §§ 12025.5, 12026.2, 12027 (retired officers), 12050 (CCW holders), or other statutes mentioned above will not be permitted to possess a handgun within the City, such persons are far less likely to possess, and therefore be able to use, handguns for the protection of themselves or others while outside the City.

Far from being "purely municipal," the issues in the present case are of statewide interest – which interest applies in San Francisco County no less than every other county in California. Unquestionably, the state has a substantial interest in the physical safety of its law abiding adult residents and in their being able to defend their families against violators of its laws. That interest is not limited to areas outside the boundaries of a charter city. Likewise the state has a substantial interest in the possession of guns by its residents no matter where they live in the state.

3. The City's Argument Is Absurd on its Face and Portends Consequences That Are Both Illimitable and Catastrophic.

To accept that the home rule doctrine validates Proposition H this court would have to hold that firearms possession by the City's residents "is a 'municipal affair' *rather* than one of 'statewide concern.'"[44] Consider the implications of such a finding on the state gun laws. Literally dozens of these laws ban or regulate possession of various kinds of firearms throughout the state – including in charter cities. All these laws could be nullified by charter cities if it were held that gun possession by local residents is solely the concern of those cities and none of the state's.

For instance, Penal Code section 12020 (a)(1) bans the wallet gun, a device that conceals a gun so as to allow a robbery victim to draw and fire it in the guise of handing over his wallet. What if the City decided to deter robbery in San Francisco by an ordinance allowing residents to possess wallet guns in the City notwithstanding the state ban? If guns in San Francisco really were a "purely municipal" affair, this court would have to hold that in San Francisco such an ordinance would prevail over the state ban.

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[44] *American Financial Services Ass'n*, supra, 34 Cal.4th at 1251, emphasis added *Baggett, supra*, 32 Cal.3d at 136.

4. The City cites irrelevant caselaw to evade the principles that govern application of the municipal affairs doctrine.

The City cited various cases purportedly holding that "'free access to firearms creates a danger to public safety."[45] (AOB at 41.) But what those cases actually involved and upheld were state laws forbidding *felons* possessing guns – and so the danger to public safety these cases actually referred to is gun possession *by felons*. Those cases are irrelevant to Prop H, which specifies that it bans guns to responsible law abiding adults only, not to felons, juveniles, the mentally disturbed or anyone else whom state law already prohibits from owning guns.[46]

Furthermore, public policy is made not by courts but by the Legislature, which has repeatedly rejected any notion that gun possession by law abiding responsible adults is, on balance, a danger to public safety. (See, *e.g.*, Penal Code sections 12025.5 (law abiding, responsible adults on whose behalf a court has issued "stay away" order are ipso facto entitled to carry concealed, loaded handgun without need of permit); 12026(b) (law

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[45] Quoting *People v. Bell* (1989) 49 Cal.3d 502, 544, and the line of cases which it culminated.

[46] Proposition H, section 6, specifying that Proposition H does not apply to those barred by state laws such as Penal Code § 12021 (a) (gun possession illegal for convicted felons and drug addicts); Penal Code §§ 12021, 12021.1 (c) (same as to persons convicted of certain misdemeanors); Welfare & Institutions Code § 8103 (same as to persons with certain indicia of mental disorder). (I AA 4:0066.)

abiding, responsible adults entitled to possess handgun in home or office); 12027 (honorably retired police officers entitled to carry concealed, loaded firearm); 12031 (law abiding, responsible adults entitled to carry loaded firearms in certain situations); 12050 et seq (law abiding, responsible adult having good cause may be issued license to carry concealed, loaded handgun).) These and numerous other laws show that California public policy accepts the possession of firearms for protection of self, home, and family. Further, many laws exhibit the Legislature's judgment that in certain circumstances firearms possession by law abiding, responsible adults promotes public safety. (See Statement of Facts, Part II, above.)

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

The City asserts that "whatever the force of *Doe* with respect to bans on the *possession* of firearms, [later cases] have made it abundantly clear that state law does not preempt local laws that outlaw *sales*." (AOB at 42 (emphasis in original).) One case the City cites, *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, recognizes that state law authorizes cities to regulate gun store operations – but says nothing about outlawing gun sales entirely. *CRPA*, another case cited, is discussed below.

The City's main claim, however, is that local sales bans were endorsed in *Great Western*, *supra*, 27 Cal.4th 853 and *Nordyke v. King*

(2002) 27 Cal.4th 875. But these cases dealt only with the power of counties to regulate firearms *at gun shows* held *on county property*. (*See Great Western, supra,* at 859; *Nordyke*, *supra*, at 880-881.)

Thus, both *Great Western* and *Nordyke* stand for the narrow proposition that State gun show regulations do not preclude local governments from banning the sale or possession of firearms and ammunition at gun shows on county-owned property. Neither case addressed the validity of such laws beyond the limited context of the facts presented. Indeed, the court in both cases went out of its way to disabuse anyone of that notion. (*Great Western*, *supra*, at 870; *Nordyke*, supra, at 885.)[47] In sum, Appellants exaggerate the relevance of *Great Western* and *Nordyke*.[48]

A. Government Code Section 53071 Preempts Section 2

As held by the trial court, Government Code section 53071, which

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[47] For a more extensive discussion of the limited applicability of *Great Western* and *Nordyke*, see Amicus Brief of Senator H.L. Richardson at V AA 21:0568-0572.

[48] Appellants also distort the Court's analysis by stating "the Legislature has expressly empowered local governments to regulate 'the possession and transfer of firearms.'" (AOB at 16.) What the court actually said – citing a statute that governs gun shows only – was *"Penal Code, section 12071.4, subdivision (b), refers to gun show vendors' acknowledgment of local laws dealing with* the possession and transfer of firearms." (*Great Western*, *supra*, at 865 (emphasis added).)

expressly preempts any local enactment "relating to registration or licensing of commercially available firearms," preempts Section 2's sales ban. (V AA 4:0961-0962.) This is because, as found in *Doe*, 136 Cal.App.3d at 517, even if the regulation at issue were not a "direct licensure requirement, [it] is at least a local regulation relating to licensing." (5 AA 4:0961.) Importantly, the court noted that Section 2 relates to licensing because the state licenses held by City gunshops, pawnshops, and auction houses related to their firearms transactions would all be canceled by Section 2. (V AA 4:0962, fn. 5.)

In an attempt to avoid preemption under Section 53071, the City argues that *Great Western* and *CRPA* undermine the trial court's determination. (AOB at 20.) As noted above, *Great Western* is easily distinguishable as it concerns the ability of localities to regulate firearms sales only on their own property.

CRPA is also distinguishable. In *CRPA*, the Fourth District Court of Appeal upheld a local ban on the *sale* of a specific subclass of handguns that the ordinance defined as "Saturday Night Specials." (66 Cal.App.4th 1302.) *CRPA* interpreted Section 53071 to not apply to local *sales* bans if the ordinance banned only the *sale* of *certain kinds* of guns, but not others. (*Id.* at 1321-1322.)

Notably, *CRPA* in no way, either expressly or implicitly, purported to overrule the *Doe*. Rather, it acknowledged *Doe*, but distinguished that case, and Sections 12026 and 53071, on the ground that they dealt with bans on the *purchase and possession* of all handguns, not with bans on the *sale* of only specific types of handguns. For example, in listing discrete areas of regulation *fully preempted* by state law, *CRPA* stated:

> "In summary, the Legislature has expressly declared that the City may not require the licensing or registration of firearms. (Gov. Code § 53071.) The Legislature has also declared that the City may not require permits or licenses to purchase, own, possess, keep, or carry a pistol, revolver, or other firearm capable of being concealed within a place of residence, place of business, or on private property owned or lawfully possessed. (Pen. Code § 12026.)"

(*Id.* at 1313.)

Given *Doe*, *Galvan*, *Sippel*, and § 12026's express guarantee of an entitlement to purchase handguns, the most that can be said is that at the time it was decided *CRPA* left cities some leeway to ban the sale of a subset of guns deemed to present dangers to public safety above and beyond the dangers presented by handguns generally.

B. Section 12026 Preempts Section 2

The trial court also held that Section 12026 prohibits localities from banning handgun sales and purchases. (V AA 44:0962-0963.) Section 12026 expressly provides that "[n]o permit or license to *purchase*,

own, possess, keep or carry . . . shall be required. . . ." (Emphasis added.) As *Doe* found that "[a] restriction on requiring permits or licenses [to possess handguns] necessarily implies that possession is lawful . . ." (136 Cal.App.3d at 518), it follows that Section 12026's restriction on requiring permits or licenses to purchase handguns implies that sales are lawful without a local license or permit. In an attempt to avoid this clear corollary of *Doe*, the City again relies on *Great Western* and *CRPA*. These cases are no more helpful to the City with respect to Section 12026 than they are with respect to Section 53071, as discussed above.

The City also attempts to avoid preemption of Section 2 by arguing that Section 12026 does not create a "right" to own and use handguns in the home. (AOB at 22-23.) In making its argument, the City argues that the1994 Attorney General opinion supporting this interpretation of Section 12026 should be disregarded. (AOB at 23, fn. 8.) But even if this opinion were the only authority on the subject, it would be entitled to special deference from the courts. (*Phyle v. Duffy* (1948) 334 U.S. 431, 440; *Fischer v. Los Angeles Unified Sch. Dist.* (1999) 70 Cal.App. 4th 87, 101.)

Moreover this Opinion's authority is supported by the fact that since it was issued Section 12026 has been reenacted without change to disavow the Opinion. (Stats. 1995, ch. 322.) So the Opinion enjoys the

"presum[ption] that the Legislature was cognizant of the Attorney General's [statutory] construction and would have taken corrective action if it disagreed with that construction." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 104.) Indeed, such reenactment is deemed implicit ratification of the Opinion by the Legislature. (*Orange County Employees Assn. Inc. v. County of Orange* (1993) 14 Cal.App.4th 575, 582-83.)

The Attorney General Opinion is also consistent with the legislative history of Section 12026, as evidenced by Exhibits 1 through 7 of Respondents' accompanying judicial notice request. In particular: an Attorney General's analysis of the 1988 amendment to Section 12026 referred to an "expanded right to carry loaded and concealed handguns at business and residence locations" (Exhibit 3); a Legislative Counsel opinion of 1989 amendments to section 12026 implies that section 12026 creates a right to possess handguns within the home (Exhibit 4); the 1995 amendments to Section 12026 imply that Section 12026 creates a right (Exhibits 5 and 6); and a 1995 Report of the Senate Committee on Criminal Procedure to the 1995 amendments notes that Section 12026 "specifically allow[s]" possession of handguns in one's home (Exhibit 7).

Even more telling, the California Supreme Court in *Galvan*

specifically referred to Section 12026 as creating a "right to possess a weapon at certain places . . ." (*Galvan, supra*, 70 Cal.2d at 858; see also *Sippel v. Nelder* (1972) 2 Cal.App.3d 173, 177, in which the court struck down a San Francisco ordinance banning handgun sales and found that responsible adults are "entitled" to purchase and possess handguns under Section 12026).) In sum, Section 12026 guarantees the right to "purchase" handguns as well as the right to "possess" them.

C. Section 2 is Preempted by the Unsafe Handgun Act

In 1999, the Legislature enacted the UHA, now Penal Code §§ 12125-12233. This establishes a detailed program to certify which handguns may be sold in the State. The UHA charges Cal-DOJ (California Department of Justice) with overseeing the testing of handguns to be sold in the state, collecting a licensing fee, and issuing to handgun manufacturers a separate license for each specific make and model handgun that passes the tests.

Cal-DOJ issues a roster of handgun makes and models that have passed the tests. The UHA provides that those handguns "may be sold in this state pursuant to this title." (Pen. Code § 12131 (a).) On its face, the Legislature's choice of these words precludes local ordinances by which Cal-DOJ-certified handguns nevertheless may *not* be sold in the locality.

(Cf. *Great Western*, *supra,* 27 Cal.4th at 866 (local ordinance invalid if it forbids what state law expressly allows; *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 397 (ordinance invalid if its effect is "penalizing conduct which the state law expressly authorizes ...").)

The City tries to evade the effect of this UHA language by claiming that the UHA has a wholly different concern than does Prop H; specifically, that Prop H involves crime prevention whereas the UHA's only purpose is preventing gun accidents. (AOB at 25-26.) The City offered no legislative history to verify its claim, and it could not do so because the claim is false.

The legislative history of the UHA shows that one purpose of the UHA was to prevent crime – a purpose in common with Prop H. At the trial court, Petitioners offered the following evidence that the UHA's dual concerns included crime prevention: 1) banning cheaply made handguns has long been advocated as a means of reducing gun availability to criminals (IV AA 29:0748); 2) the first two times the Legislature enacted the UHA it was vetoed by then-Governor Wilson because it was not simply a gun safety measure but also sought to ban sale of handguns which the Legislature (but not the Governor) saw as specially prone to criminal misuse (IV AA 29:0712-0722); and 3) cities and groups supporting the UHA wrote the Legislature that by banning certain guns the UHA would reduce handgun

crime (IV AA 29:0747-0760).[49]

Furthermore, during its enactment it was generally acknowledged that the UHA would preempt local firearms bans. The Legislature was expressly informed by one city that its ordinance banning sales of certain handguns would be preempted if the UHA was enacted. (IV AA 29:0695.) In response a Senate committee report noted that if enacted the UHA would or might preempt any "local [contrary] ordinance, both those already in existence and *any proposed locally or in the future*."[50] The UHA's author responded by offering language to allow local ordinances. But when the

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[49] See also Exhibits 8-18 of accompanying judicial notice request, showing that the (1) the City of San Jose, recognizing that its own Saturday Night Special Ordinance would be preempted, proposed a non-preemption amendment that was not included in the final bill (Exhibits 8-13); (2) the Senate Committee on Public Safety recognized that local ordinances would be preempted (Exhibit 14); (3) the City of San Francisco, which recognized the crime prevention purpose of its SNS ordinance, repealed its ordinance in light of the passage of the UHA (Exhibits 15-16), and letters from various cities and organizations recognized the crime prevention purposes of each version of the UHA (Exhibits 17-18.); the Declaration of C.D. Michel and accompanying exhibits submitted to the trial court (IV AA 28:0657-0659) provide further evidence of the preemptive effect of the UHA.

[50] See Petitioners' Request for Judicial Notice § 1 (e), which is the Senate Public Safety Committee report on SB15 p. 9 (emphasis added). (4 AA 29:0712.) See *People v. Cruz* (1996) 13 Cal.4th 764, 774, fn. 5: "it is well established that reports of legislative committees and commissions are part of a statute's legislative history and may be considered when the meaning of a statute is uncertain."

UHA was eventually enacted, this language was stripped out.[51]

The City references *CRPA*'s ordinance banning sale of certain handguns the ordinance described as being accident-prone, unusually attractive to criminals, and susceptible to criminal misuse. Until the UHA was enacted, *CRPA* might have been seen as allowing localities some power to ban sale of handguns the locality found to be extraordinarily problematic – though not of all handguns. Now, however, the Legislature has addressed the field, and has recognized that the UHA precludes local attempts to ban the sale of the state-tested and registered firearms which § 12131 (a) declares "may be sold" within the State.

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

All law enforcement officers are subject to Section 2's ban on the transfer of all firearms and ammunition. On the other hand, state statutes regulating firearms are painstakingly crafted to exempt law enforcement operations. As the trial court found, the lack of any of the standard law enforcement exemptions in Prop H that are routinely included in state firearm legislation also means that the ban on "distribution" or "transfers"

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[51] For the original version of the UHA bill see Exhibit 10 to accompanying Judicial Notice Request; for the proposed provision see Exhibit 11; for the final version see Exhibit 13.

literally prevents the San Francisco Police and Sheriffs' Departments from issuing any duty handgun or other firearm to police officers or deputy sheriffs, or from receiving guns from gun stores that those departments have purchased to issue to their officers/deputies. (V AA 44:0963-0965.)

The City argues that this court must interpret Section 2 to avoid an absurd result. (AOB at 26-28.) But, the Ordinance says what it says. In order to arrive at the City's interpretation, the court would be required to rewrite the ordinance, which it cannot do. (V AA 44:0965.) Section 2 is invalid because its effect is "inimical" to enforcement of state laws and accepted criminal justice procedures. (*Sherwin-Williams*, *supra*, 4 Cal.4th at 898.)[52]

VI. SECTION 2 OF PROP H IS NOT SEVERABLE AS TO LONG GUNS

The City's entire severance argument – that if even if Section 3 were declared invalid, Section 2's ban on the sale and transfer of long guns should survive (AOB at 42-45) – rests on a false premise. That premise is that even if localities cannot ban handgun possession, they can ban sales –

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[52] For further discussion of Section 2's effects on law enforcement, see trial court Amicus Brief of San Francisco Police Officers Association. (IV AA 25:0613-0614.) Section 2 would likewise have a devastating effect on the entertainment industry, as was shown in Petitioners' trial brief (I AA 4:0056-0058) and the trial court amicus brief of the American Entertainment Armorers Association (III AA 22:0574-0585).

and so Prop H's sales ban is valid and can be severed from its invalid possession ban. This premise is wrong for two reasons already discussed: First, Section 12026 (b) guarantees the right "to *purchase*, own, possess, keep, or carry" a handgun (emphasis added). Second, the UHA precludes local bans on the sale of handguns. (By the same token, localities cannot ban the sale of handgun ammunition.) So the severance issue is whether, given that the handgun portions of Prop H's Section 2 sales ban are invalid, the long gun sales portions are severable.

Prop H's severability clause says the invalidation of any "provision" of Proposition H does not affect the validity of other provisions. But here we are concerned with only one provision – Section 2. To save the long gun sales bans would require not severing one provision from another but dividing one whole provision into multiple separate parts. That is not contemplated by Prop. H's severability clause. (I AA 4:0066.)

A. No Part of Section 2 is Mechanically or Grammatically Separable, and Saving Section 2 would Require Rewriting the Section – Something the Courts May Not Do

As correctly noted by the trial court, in order for a provision of an ordinance to be severable, that provision must be "mechanically" severable from the invalid provision; i.e., the saved portion must be "'complete in itself and'" not "'so connected with the rest of the statute as to be

inseparable.'" (V AA 44:0966 (quoting *McMahan v. City and County of San Francisco* (2005) 127 Cal.App.4th 1368, 1374). But Section 2's, rifle, shotgun, and ammunition sale bans are not complete in themselves, nor are they separable from the handgun and handgun ammunition sales ban. Rather, all these sets of bans are inseparably linked in one sentence that treats them as a unitary whole. (V AA 44:0966.) That sentence reads: "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." (I AA 4:0065.)

The only way of saving Section 2's long gun sale ban would be for this court to excise the phrase "all firearms and ammunition," and substitute therefor "non-handgun firearms and ammunition." But to "insert additional language into [section 2] . . ." would "violate the cardinal rule of statutory construction that courts must not add" to, or delete from, laws they are construing.[53] Compare a case in which the Supreme Court struck down an entire rent control initiative ordinance which could not be saved without judicial excision and substitution of words. (*Birkenfeld v City of Berkeley*

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[53] *People v. Guzman* (2005) 35 Cal.4th 577, 587; *Langsam v. City of Sausalito* (1987) 190 Cal.App.3d 871 ("what the city asks us to do is to add a requirement which is not contained in the ordinance. This we cannot do.....Under the guise of construction the court will not rewrite a law it will not supply an omission [Citations omitted.]")

(1976) 17 Cal.3d 129, 173.)

The City' citation to the "partial preemption" discussion in *Nordyke* is to no avail. (AOB at 45.) First, as *Nordyke* court itself makes clear, the case's partial preemption discussion is dictum. (*Nordyke*, *supra*, 27 Cal.4th 875, 884 (noting "we decline to address whether the Ordinance is partially preempted . . .").) Second, *Nordyke* involved an ordinance prohibiting firearm possession on County property. (*Id.* at 880-881.) In that case, the plaintiffs had argued that the ordinance was preempted because state statues provided more exceptions to the general prohibition on firearms possession than provided in the ordinance. (*Id.* at 884.) Had the *Nordyke* court considered plaintiffs' preemption argument, it might have determined that the ordinance was preempted as to those persons exempted under state law, but still upheld the ordinance. But in doing so, the *Nordyke* court would not have been required to engage in judicial drafting of the prohibitory portion of the ordinance. It would simply have been impliedly adding the state's exemptions to the list of the ordinance's express exemptions.

In this case, in contrast, section 2 of Prop H contains no exemptions. Section 2 clearly indicates an intention to ban the sale, distribution, transfer, and manufacture of *all firearms and ammunition* – with no exceptions. Interpreting Section 2 to be consistent with state law would necessarily

involve impermissibly rewriting the section to prohibit the transfer of only "rifles, shotguns, and rifle and shotgun ammunition" or to an even more convoluted form: "Within the limits of the City and County of San Francisco, the sale, distribution, transfer, and manufacture of all firearms and ammunition – with the exception of handguns and handgun ammunition – shall be prohibited." This court cannot do.

B. The Electorate Would Not Have Wanted the Ordinance's Long Gun Sales or Transfer Ban to Continue as a Separate Facet If this Court Invalidates the Handgun Possession and Purchasing Bans

If a municipal initiative ordinance has been partially invalidated, the remainder should not be upheld when it is "by no means clear that the electorate would have approved" that result. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 174.) Here, there is excellent reason to believe the electorate would not want that result. "The test is whether it can be said *with confidence* that the electorate's attention was sufficiently focused upon the parts to be severed so that *it would have separately considered and adopted them* in the absence of the invalid portions." (*Gerken v. Fair Political Practices Com.* (1993) 6 Cal.4th 707, 714.) This court can make no such determination that the electorate would have chosen to ban the sale of long guns even if it knew that handgun sales would continue.

If this court invalidates the handgun sales and possession bans, then

people who ordinarily would buy a long gun will buy handguns instead.[54] Diverting buyers from long guns to handguns contradicts the electorate's purposes in enacting the Ordinance. If anything is clear, it is that the electorate did not want people buying handguns since it approved a ban on handgun possession and sale. So to uphold the long gun sales ban when the handgun provisions are voided would produce the opposite of the effect the electorate wanted. It would likely increase handgun ownership, rather than reduce it.

The point becomes even clearer when the context is considered. For over thirty years anti-gun proponents have focused on handguns, arguing that handguns are more problematic than long guns.[55] So far as we can determine, no one has ever argued for a ban on the sale of long guns while leaving handgun sales untouched. Yet that would be the anomalous result if this court were to strike down Prop H's handgun bans as contrary to Section 12026 but uphold the long-gun sales ban.

The City denies that the long gun sales ban is a mere adjunct to the

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

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

Section 3 handgun ban-confiscation provision. Rather, it claims, the electorate's "paramount goal was to make *all types* of guns and ammunition less available in the City." (AOB at 3 (emphasis added).) This is, however, refuted by the simple fact that Prop H contains two discrete sections, one of which bans possession of handguns while the other bans sales of guns and ammunition of any type. Had the electorate not deemed that different firearms should be treated differently it would instead have enacted a single provision. The City just baldly asserts that the "paramount goal" was to rid the area of *all* guns. But no support is offered for this.

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

CONCLUSION

As the trial court methodically outlined in its Statement of Decision, Proposition H conflicts with and is inimical to the State's comprehensive firearms regulations in multiple ways. The most obvious of which is the direct conflict with the plain language of Sections 12026 and 53071 and this Court's analysis of those sections 25 years ago in *Doe*. Moreover, every post-*Doe* case cited by the City acknowledges *Doe's* continuing validity, including the State Supreme Court's recent reaffirmation of *Doe* in *Great*

Western.

Finally, the City's "municipal affairs" defense is an attempt to ignore the statewide concern for firearms regulation and crime prevention, generally, and the specific concern regarding regulations evident in the state statutes at issue herein. Even a cursory review of Penal Code section 12026 and Government Code section 53071 reveals that the "municipal affairs" defense is without merit, on its face. These state statutes are reasonably related to statewide concerns and tailored to resolve those concerns. Thus, they take precedence over Proposition H, the conflicting charter city measure.

In sum, the trial court correctly found Proposition H preempted by state law, and its judgment should be upheld, in full.

Dated: May 1, 2007

Respectfully Submitted,
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 13,978 words as counted by the Corel WordPerfect version 12 word-processing program used to generate the brief.

Dated: May 1, 2007

Respectfully Submitted,
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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, County of Los Angeles, 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 May 1, 2007, I served the foregoing document(s) described as,

RESPONDENTS' BRIEF

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

"SEE 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 May 1, 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

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

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