

1 MICHAEL S. HEBEL S.B.N. - 57262  
2 SAN FRANCISCO POLICE OFFICERS ASSOCIATION  
3 800 Bryant Street  
4 San Francisco, CA 94103  
5 Telephone: (415) 861-5060  
6 Facsimile: (415) 552-5741

7  
8 Attorneys for Amicus  
9 San Francisco Police Officers Association

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11 COUNTY OF SAN FRANCISCO  
12 UNLIMITED JURISDICTION

13 PAULA FISCAL et al.,

14 Plaintiffs and Petitioners,

15 vs.

16 CITY AND COUNTY OF SAN  
17 FRANCISCO et al.,

18 Defendants and Respondents.

) CASE NO. CPF-05-505960

) **SAN FRANCISCO POLICE OFFICER'S**  
) **ASSOCIATION AMICUS BRIEF IN**  
) **SUPPORT OF PETITIONERS**

) Hearing Date: February 15, 2006

) Hearing Judge: Warren

) Time: 9:30 a.m.

) Location: Dept. 301

) Date Action Filed: December 29, 2005

) Trial Date: None scheduled

TABLE OF CONTENTS

Page(s)

1

2

3 INTEREST OF AMICI ..... 1

4 BENEFIT TO THE COURT OF THIS BRIEF ..... 1

5 ARGUMENT ..... 2

6 I. **UNARMED OFF DUTY OR RETIRED OFFICERS HAVE NO RIGHT**

7 **TO POLICE PROTECTION** ..... 2

8 II. **SECTION THREE OF THE ORDINANCE DEPRIVES LAW ENFORCEMENT**

9 **OFFICERS OF THE STATE SANCTIONED ABILITY TO DEFEND**

10 **THEMSELVES OR OTHERS WHILE OFF-DUTY, OR ONCE RETIRED** ..... 3

11 III. **DISARMING OFF-DUTY AND RETIRED LAW ENFORCEMENT**

12 **OFFICERS IS CONTRARY TO POLICIES CONSISTENTLY ADOPTED**

13 **BY STATE LAW.** ..... 4

14 IV. **THE ORDINANCE ALSO INTERFERES WITH THE STATE’S**

15 **EXISTING LICENSING SCHEME FOR PRIVATE SECURITY**

16 **COMPANIES AND GUARDS** ..... 5

17 V. **SECTION TWO OF THE ORDINANCE DISRUPTS LAW ENFORCEMENT**

18 **AND CRIMINAL JUSTICE OPERATIONS** ..... 7

19 VI. **YOU GET WHAT YOU VOTE FOR** ..... 8

20 A. **The Section Three Exceptions From the Handgun**

21 **Possession Ban Do Not Apply To The Section Two**

22 **Firearms Transfer Ban** ..... 9

23 B. **Since the Ordinance Contains One Exemption, Courts**

24 **“May Not Imply [An] Additional Exemption[]...” Into**

25 **the Ordinance.** ..... 10

26 VII. **THE LIMITED POWER TO AMEND THE ORDINANCE IS**

27 **SUBSTANTIALLY IRRELEVANT** ..... 11

28 VIII. **DISARMING LAW ABIDING RESPONSIBLE ADULTS ERASES A**

**DISTINCTION CONSISTENTLY MADE BY STATE LAW AND**

**VALIDATED BY CRIMINOLOGICAL DATA.** ..... 12

**CONCLUSION** ..... 15

**TABLE OF AUTHORITIES**

**Page(s)**

**FEDERAL CASES**

DeShaney v. Winnebago County Dept. of Social Services,  
(1989) 489 U. S. 189 ..... 2

**STATE CASES**

BP Alaska Exploration, Inc. v. Superior Court,  
(1988), 199 Cal.App.3d 1240, 1250, 245 Cal.Rptr. 682 ..... 10

Davidson v City of Westminster,  
32 C.3d 197, 185 Cal. Rptr. 252, 649 P.2d 894 (S. Ct. Cal. 1982) ..... 2

Doe v. City & County of San Francisco,  
(1982) 136 Cal.App. 3d 509 ..... 10

Great Lakes Properties, Inc. v. City of El Segundo,  
(1977) 19 Cal.3d 152, 155, 137 Cal.Rptr. 154, 561 ..... 10

Lake v. Reed,  
(1997) 16 C. 4th 448, 466 ..... 10

Langsam v. City of Sausalito,  
(1987) 190 Cal.App.3d 871, 877, 235 Cal.Rptr. 672 ..... 11

Leshner Communications, Inc. v. City of Walnut Creek,  
(1990) 52 C.3d 531, 543 ..... 10

People v. Guzman,  
(2005) 35 Cal.4th 577, 587, 25 Cal.Rptr.3d 761 ..... 11

People v. Woodhead,  
(1987) 43 C.3d 1002, 1010 ..... 9

People v. Zamudio,  
(2000) 23 C.4th 183, 192 ..... 10

Rojas v. Superior Court,  
(2004) 33 Cal.4th 407, 424, 15 Cal.Rptr.3d 643 ..... 10

Sierra Club v. State Bd. of Forestry,  
(1994) 7 Cal.4th 1215, 1230, 32 Cal.Rptr.2d 19, 876 P.2d 505 ..... 10

Stone v State,  
106 C.A.3d 924, 165 Cal. Rptr. 339 (Cal. Ct. of Ap. 1980) ..... 2

Traverso v. People ex rel Department of Transportation,  
(1993) 6 C. 4th 1152, 1167 ..... 9

TABLE OF AUTHORITIES (Cont.)

Page(s)

**STATUTES & RULES**

1		
2		
3	<b><u>STATUTES &amp; RULES</u></b>	
4	California Government Code section 845 .....	2
5	California Government Code section 53071 .....	11
6	California Penal Code section 12025 .....	2
7	California Penal Code section 12026 .....	6
8	California Penal Code section 12027 .....	3
9	California Penal Code section 12027(i) .....	3
10	California Penal Code section 12027(e) .....	6
11	California Penal Code section 12027(a)(1)-(3) .....	2
12	California Penal Code section 12028 .....	11
13	California Penal Code section 12028(c) .....	8
14	California Penal Code section 12020(b)(1) .....	7
15	California Penal Code section 12030(b)-(e) .....	8
16	California Penal Code section 12031 .....	2, 6
17	California Penal Code section 12031(b)(8) .....	2
18	California Penal Code section 12035(b) .....	4
19	California Penal Code section 12050 .....	3
20	California Penal Code section 12071.4(g) .....	6
21	California Penal Code section 12071.4(i) .....	6
22	California Penal Code section 12072.1(a)-(e) .....	2
23	California Penal Code section 12094(b)(3) .....	7
24	California Penal Code section 12125 .....	7
25	California Penal Code section 12201(a)-(b) .....	7
26	California Penal Code section 12807(a) .....	2
27	California Penal Code section 12280(e) .....	7

28

1 **INTEREST OF AMICI**

2 The San Francisco Police Officer’s Association (SFPOA) is the professional union of the more  
3 than 2,200 sworn officers of San Francisco Police Department. SFPOA represents those officers and  
4 supports the San Francisco community through charitable giving and the promotion of programs that  
5 enhance public safety. The SFPOA also represents some retired San Francisco officers and is active in  
6 protecting their interests, particularly their interest in being able to defend themselves from the criminals  
7 they have arrested throughout their careers, as well as protecting their interests in post-retirement  
8 employment.

9 **BENEFIT TO THE COURT OF THIS BRIEF**

10 The SFPOA, on behalf of its members, opposes Proposition H on both legal and policy grounds.  
11 Proposition H has significant impact on current and retired law enforcement officers, and would violate  
12 state statutes that regulate and protect public law enforcement and private security companies by  
13 licensing them the ability to possess firearms to defend themselves and others.

14 The private security industry has grown exponentially in California in the wake of 9/11,  
15 providing much needed security for society that cannot be provided by overwhelmed public police  
16 agencies. Many active and retired officers are involved in this industry. Proposition H will have an  
17 adverse impact on the rights of active and retired officers, and well as on both private security company  
18 employers and employees, and will interfere with the way security companies and guards conduct  
19 business.

20 The Petitioner’s brief does not address the problems that Proposition H would create for law  
21 enforcement or California's private security industry. Understanding the state regulatory scheme  
22 concerning law enforcement officers, and retired officers, and understanding how Proposition H  
23 nullifies, interferes, and conflicts with the state scheme will assist the court in determining Proposition  
24 H’s legality.

25 Accordingly, amicus curiae respectfully moves that this Court grant leave to file the brief of the  
26 amicus curiae submitted concurrently with this motion.

1  
2 **ARGUMENT**

3 **I. UNARMED OFF DUTY OR RETIRED OFFICERS HAVE NO RIGHT**  
4 **TO POLICE PROTECTION**

5 Although subject to greater risk because of their profession, police officers, like other potential  
6 victims, have no right to police protection. In *DeShaney v. Winnebago County Dept. of Social Services*  
7 (1989) 489 U. S. 189, the United States Supreme Court held that the state has no constitutional  
8 obligation to protect victims from private violence. Nor does the State of California provide any such  
9 right. California Government Code section 845 states, in part: “Neither a public entity nor a public  
10 employee is liable for failure to establish a police department or otherwise to provide police protection  
11 service or, if police protection service is provided, for failure to provide sufficient police protection  
12 service.” See, e.g., *Stone v State*, 106 C.A.3d 924, 165 Cal. Rptr. 339 (Cal. Ct. of Ap. 1980), *Davidson v*  
13 *City of Westminster*, 32 C.3d 197, 185 Cal. Rptr. 252, 649 P.2d 894 (S. Ct. Cal. 1982)

14 At least in part in recognition of this, state legislators have been very careful to exempt off duty  
15 and retired law enforcement from being subject to state firearm restrictions.<sup>1</sup> This approach serves two  
16 purposes: first, it maximizes the likelihood that armed, trained persons will be available to defend  
17 victims of crime. Second, allowing off duty and retired officers to have precautionary handguns  
18 recognizes the special dangers police face for retaliation by criminals against whom they have enforced  
19 the law.

20 Contrary to the purposes of these provisions of state law, Proposition H strips off-duty and  
21 retired police of these “licenses,” and of the ability to defend themselves or others in the process.

---

22 <sup>1</sup> Exceptions for retired law-enforcement include, but are not limited to: Pen. Code §12027(a)(1)-(3)  
23 (Exempting retired peace officers from the Pen. Code §12025 prohibition against carrying concealed  
24 weapons); Pen. Code §§12072.1(a)-(e) and 12031(b)(1)-(3) (Exempting retired peace officers from the Pen.  
25 Code §12031 prohibiting the possession of concealed and loaded firearms); Pen. Code §12027(i)(Exempting  
26 honorably retired agents of federal law enforcement (Federal Bureau of Alcohol, Tobacco, and Firearms,  
27 Federal Bureau of Investigation, Secret Service, United States Customs Service, the Federal Bureau of  
28 Narcotics, Drug Enforcement Administration, United States Boarder Patrol, and Internal Revenue Service)  
from the Pen. Code §12025 prohibition against carrying concealed weapons); Pen. Code §12031(b)(8)  
(Exempting same from the Pen. Code §12031 prohibition against the possession of concealed and loaded  
firearms); and Pen. Code §12807(a) (Exempting retired peace officers, retired federal officers and law  
enforcement, reserve officers, and others specified persons from the §12801(b) Handgun Safety Certificate  
requirement).

1 **II. SECTION THREE OF THE ORDINANCE DEPRIVES LAW ENFORCEMENT**  
2 **OFFICERS OF THE STATE SANCTIONED ABILITY TO DEFEND THEMSELVES OR**  
3 **OTHERS WHILE OFF-DUTY, OR ONCE RETIRED**

4 Section three of the ordinance prohibits all San Francisco residents, including even law abiding,  
5 responsible adults, from possessing any handgun. They have 90 days from January 1, 2006 to relinquish  
6 their property.<sup>2</sup> Peace officers and some others are exempt from section three of Proposition H, but that  
7 exemption is limited. They are exempt *only* while “carrying out the functions of his or her government  
8 employment.” This appears to mean that San Francisco police officers, retired police officers, and F.B.I.  
9 agents or retired agents living in San Francisco would be forced to leave their weapons at the police  
10 station or office upon the completion of their shift.

11 It also means that officers who live in San Francisco but work for law enforcement agencies  
12 *other* than San Francisco, will not be able to bring home their duty firearms, nor to have personally  
13 owned firearms in their San Francisco residence.

14 Despite a comprehensive state statutory scheme that grants retired officers the ability to carry  
15 concealed handguns, as well as other privileges relating to firearms possession (laid out in more detail  
16 below), there is no exemption in section three for retired officers.<sup>3</sup> Retired local, state, and federal law  
17 enforcement officers living in San Francisco would be unable to possess handguns, even in their own  
18 homes.

---

19 <sup>2</sup> The role members of the police department, represented by the SFPOA, might be forced to play in any  
20 door-to-door gun confiscation scheme is cause for concern. Nearly 22,000 handguns have been purchased by  
21 residents since 1996, according to the state attorney general’s office. But there is no way to determine how  
22 many total guns exist because local governments are forbidden under state law from requiring firearms to be  
23 registered or licensed. It is unclear what database the city would utilize to track San Franciscans who have  
24 lawfully purchased handguns.

25 <sup>3</sup> One example of these statutory privileges is that, quite apart from the concealed carry permitting (CCW)  
26 process set forth in California Penal Code § 12050, there are several classes of retired law enforcement  
27 personnel who may be authorized to carry loaded firearms throughout California without a CCW permit. See  
28 California Penal Code §§ 12027 and 12031. So an honorably retired agent of the Federal Bureau of  
Investigation, who has the approval of the sheriff in his county, is not required to have a permit under  
California Penal Code § 12050 in order to carry a concealed and loaded firearm throughout the State of  
California. See California Penal Code §§ 12027(i) and 12031(b)(8). But this hypothetical retired FBI agent  
could face prosecution under the ordinance: (a) his handgun is no longer required for professional purposes,  
and (b) he is no longer a government employee and so no longer carries out functions of such employment.  
The state statutes which grant statewide authority for a retired FBI agent (and a host of other exempted  
classes) to carry a concealed/loaded firearm absent a CCW, are effectively nullified by the county ordinance.

1 The danger to the very lives of these officers and their families that this situation presents cannot  
2 be overstated.

3 **III. DISARMING OFF-DUTY AND RETIRED LAW ENFORCEMENT OFFICERS IS**  
4 **CONTRARY TO POLICIES CONSISTENTLY ADOPTED BY STATE LAW.**

5 As a legal matter, Proposition H is contrary to state laws which promote public safety by  
6 maximizing the likelihood that trained, armed off-duty or retired officers will be present to protect  
7 civilians, and will have firearms to protect themselves. State law takes pains to exempt law enforcement  
8 officers, including off-duty and retired officers, from most state firearm restrictions.

9 In addition to the examples cited in footnotes 1, 3-4 above, some of the states measures to  
10 facilitate law enforcement officers include, but are not limited to the following Penal Code sections:

11 §12002(a) (With conditions, exempting peace officers from any prohibition against carrying  
12 equipment [short-barreled shotguns, short-barreled rifles, cane gun, wallet gun, undetectable firearm,  
13 firearm not immediately recognizable as a firearm, zip gun, or unconventional pistol] authorized for the  
14 enforcement of law or ordinance in any city or county); §12021(c)(2) (With conditions, exempting peace  
15 officers convicted of certain misdemeanors from the §12021(c)(1) prohibition against possession of  
16 firearms); §12027(a)(1)(A)(Exempting Peace Officers from the§12025 prohibition against carrying  
17 concealed weapons); §12031(b)(1) and (c) (Exempting Peace Officers from the§12031 prohibiting the  
18 possession of concealed and loaded firearms); §§12035(c)(5) and 12036(e)(5) (Exempting Peace  
19 Officers from the Pen. Code §12035(b) and 12036(b) requirements that loaded firearms be kept where  
20 child is likely to gain access); §12040 (Exempting Peace Officers from the prohibition against  
21 possession of loaded firearms in public places while wearing masks as prohibited by §12040); §12050  
22 (a)(1)(C) and (a)(2)(B) (Allowing CCWs for Peace Officers);§12071.4(g) (Exempting Peace Officers  
23 from the prohibition against simultaneous possession of both firearms and ammunition at Gun Shows);  
24 §12071.4(i) (Exempting Peace Officers from the requirement that firearms be tagged at Gun Shows);  
25 §12125 (b)(4) (Exempting law enforcement agencies and sworn members of those agencies from the  
26 “Unsafe Handgun Act” prohibitions); §12302 (Exempting peace officers, Army, Navy, Airforce, Marine  
27 Corp., National Guard, and municipalities from the “destructive device” prohibitions of §12303).

28 Prop. H substitutes for this state policy a local policy of disarming off-duty and retired officers,



1 thereby depriving them of their ability to protect themselves and the public. While Proposition H  
2 effectively deprives civilians of freedom of choice to own a handgun for family defense or sport, it  
3 purports to add nothing to existing state laws banning guns to criminals, juveniles, and the mentally  
4 unstable. Nor does it address the deeper cultural issues of crime and violence.

5 Random or targeted acts of violence personally affect the law enforcement community, and the  
6 families of officers. Those dedicated to public service understand that we need to support any reasonable  
7 effort to stem the tide of violent encounters threatening citizens and law enforcement alike. Good  
8 intentions, however, don't necessarily make good law. Disarming either the police or law-abiding people  
9 is not the answer.

#### 10 **IV. THE ORDINANCE ALSO INTERFERES WITH THE STATE'S EXISTING** 11 **LICENSING SCHEME FOR PRIVATE SECURITY COMPANIES AND GUARDS**

12 The ordinance provides that private security guards "may also possess handguns," but only while  
13 "actually employed and engaged in protecting and preserving property or life . . . ," etc. ("Active  
14 members of the United States armed forces or the National Guard and security guards, regularly  
15 employed and compensated by a person engaged in any lawful business, while actually employed and  
16 engaged in protecting and preserving property or life within the scope of his or her employment, may  
17 also possess handguns.").

18 Aside from practical issues,<sup>4</sup> there are at multiple potential problems/issues, unique to the private  
19 security industry, with this wording, three of which are cited for illustration below.

20 First, under existing state law, a BSIS "Permitted" private security guard<sup>5</sup> may legally "possess" a  
21 handgun while traveling to and from his/her place of employment/deployment. The guard may actually  
22

---

23 <sup>4</sup> Guards and security company employees work hard protecting their clients, and are often paid relatively  
24 little in relation to the security and peace of mind they provide. These employees don't need more unnecessary  
25 laws to get in the way of their making a honest living. Armed guards must buy the tools of their trade, (a  
26 reasonably effective and safe handgun, a safe retention holster, spare magazines/speed loaders, belt gear, etc.).  
27 This represents a substantial investment (in the range of \$700.00). Also, most guards have to pay for their own  
pre-hire BSIS Permit training (around \$250.00), and for their six-month re-qualification shoots (around \$50  
per caliber). That adds up fast for a working guard making \$20/\$30 an hour.

28 <sup>5</sup> A "Permit for Exposed Firearm" is required by California's Bureau of Security and Investigative Services  
("BSIS") for "civilians" (i.e., non-law enforcement) to work as armed security guards.

1 wear/carry the handgun (loaded and holstered) while in transit, provided the guard is in uniform. See  
2 Penal Code section 12027(e).<sup>6</sup> If the guard is not in uniform, the handgun must be transported in  
3 "civilian" fashion, e.g., unloaded and locked in a vehicle's trunk, etc. See Penal Code section 12026 et  
4 seq. Either way, the handgun is in the "possession" of the guard throughout.

5 The SF law conflicts with this statutory right of transport the firearm to and from work, because  
6 the guard is not "actually employed or engaged in protecting and preserving," etc. during this transport.  
7 (If the guard was "actually employed" during this transport, they would be covered by the wage and hour  
8 laws, by the employer's insurance, etc. -- none of which is the case.)

9 Second, under existing state law, a "Permitted" private security guard must pass a proficiency test  
10 every six months (for a total of four such re-qualifications during the Permit's two-year term). Under  
11 existing law, the transit to/from the range for such re-qualifications is subject to the same carry  
12 requirements, i.e., the guard may wear/carry the weapon if in uniform, but must comply with "civilian"  
13 transport restrictions otherwise.

14 Again, Proposition H conflicts with this right to transport to and from a qualifying range, because  
15 the guard is not "actually employed or engaged in protecting and preserving," etc. during this state-  
16 required process. (The wage and hour laws, and employer's insurance, do not cover this required  
17 proficiency/re-qualification time.)

18 Third, the BSIS Permit is "caliber specific," e.g., a guard must qualify (and requalify) separately  
19 with each caliber of firearm to be carried on-the-job. Thus, each time the Permit holder must separately  
20 "shoot" their rated caliber(s) (.38 cal./357 mag./9mm/.40 cal./45 cal.). If the guard cannot bring his or  
21 her own firearm to a range for a required six-month re-qualification, the range might not have the  
22 necessary calibers available (via rental or "loaner," etc.). The ordinance thus creates a barrier to the  
23 state-required, six-month re-qualification.

---

24  
25 <sup>6</sup> In addition to Pen. Code §12027(e), the state has addressed private guards in the following sections, which  
26 are affected by Proposition H ban on possession: Pen. Code §12031(b)(7) and (d)(1)-(6) (Exempting armored  
27 vehicle guards, uniformed security guards, private patrol operator employees, and private investigators from  
28 the Pen. Code §12031 prohibiting the possession of concealed and loaded firearms); Pen.Code §12071.4(g)  
(Exempting Private Security Guards from the prohibition against simultaneous possession of both firearms  
and ammunition at Gun Shows); and Pen.Code §12071.4(i) (Exempting Private Security Guards from the  
requirement that firearms be tagged at Gun Shows).

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

3 Section two Proposition H bans any “transfer” or “distribution” whatsoever of any firearm or  
4 ammunition in the city. No exceptions. The section two ban on “transfer” of any kind of firearm or  
5 ammunition is separate and distinct from section three, discussed above, which does have limited  
6 exceptions. Section two has none whatsoever. Visitors to the city (non-residents) would not be subject to  
7 the handgun possession ban but they are still subject to the sale and transfer ban. *All* law enforcement  
8 officers are subject to section two.

9 So under the ordinance while an on-duty cop can “possess” a handgun or other firearm, the  
10 department apparently cannot “transfer”/ issue it to him or her, nor can she/he transfer a firearm to  
11 anyone else.

12 The lack of any of the exemptions in Proposition H that are standard in state firearm legislation  
13 also means that the ban on “transfers” literally prevents the San Francisco Police and Sheriffs’  
14 Departments from issuing any duty handgun or other firearm to police officer or deputy sheriffs, or from  
15 receiving guns from gun stores that those departments have purchased to issue to their officers/deputies.<sup>7</sup>

16 It also means that an officer who finds a gun at the scene of a shooting or other violent crime  
17 cannot legally hand it in to his/her department, nor can the department hand it over to a criminalist to  
18 check for prints or other forensic evidence.<sup>8</sup> A criminalist in the police lab cannot pass a crime gun on  
19

---

20 <sup>7</sup> Such purchases are made with the consent of the California legislature. For example: Pen.Code  
21 §12201(a)-(b) (Exempting the police departments, sheriff’s offices, marshals’ offices, district attorneys  
22 offices, California Highway Patrol, Department of Justice, Department of Corrections, military and naval  
23 forces [and their specified members] from the §12220 machine gun prohibitions against purchase and  
24 possession); Pen.Code §12280(e) (Exempting same from the §12280(a)-(b) “assault weapon” and “.50 BMG  
25 rifle” prohibitions); Pen. Code §12020(b)(1) (Exempting specified law enforcement agencies from the  
§12020(a) prohibition against the purchase and possession of “short barreled rifles” and “short barreled shot  
guns”); and Pen. Code 12125 (b)(4) (Exempting law enforcement agencies and sworn members of those  
agencies from the “Unsafe Handgun Act” prohibitions).

26 <sup>8</sup> Even possession and transfers to local forensic laboratories would be prohibited, despite state laws  
27 authorizing as much. Such laws include, but are not limited to: Pen. Code §12020(b)(18) (With conditions,  
28 exempting forensic laboratories from the §12020(a) prohibition against the possession of short-barreled rifles,  
short-barreled shotguns, cane gun, wallet gun, undetectable firearm, firearm not immediately recognizable as a  
firearm, zip gun, or unconventional pistol); and Pen.Code §12094(b)(3) (Exempting forensic laboratories from  
the Pen.Code §12094(a) prohibition against the transfer of firearms with altered or removed markings).

1 for examination by another criminalist in the same lab, nor can the gun be given to UPS for shipment to  
2 the California Department of Justice laboratory or the FBI laboratory for examination. A prosecutor in a  
3 gun crime case can neither receive the crime gun from the police nor transfer it to the court as an exhibit  
4 against the defendant. And a defense lawyer cannot put a gun in as an exhibit supporting his defense of  
5 the accused. And law enforcement armorers and range-masters cannot receive a gun to test, evaluate, or  
6 repair it.<sup>9</sup>

7 Further, the effect of this non-exemption policy choice is to prevent two things which are  
8 authorized by state law. One is that police agencies which, or officers who acquire new guns may help  
9 defray the cost thereof by selling their old guns to firearms dealers for resale. Further, the lack of  
10 exemption prevents police agencies from selling guns they have confiscated from criminals to firearms  
11 dealers for resale to the law abiding public as authorized by Penal Code section 12028(c) or to other law  
12 enforcement agencies.<sup>10</sup>

13 These may be oversights. But the oversight (to the extent it was one, and not an intentional  
14 omission of exceptions for fear of creating a prohibited licensing scheme) cannot be dismissed as  
15 unintended by the author--who did not consult with the police union before promulgating the ordinance.  
16 Nor should the Court strain to find a way to fix the problem. The ordinance says what it says.

## 17 **VI. YOU GET WHAT YOU VOTE FOR**

18 However ill-considered Prop. H is, the voters voted for it nonetheless. To try to downplay or  
19 prevent some of Proposition H's results, the City may argue that "transfer" as used in the ordinance  
20 doesn't mean what it does when used in the Penal Code, or that the very narrow exemption in section  
21 three of the Ordinance refers back to, and provides an exemption from, the section two ban on transfer of  
22 firearms and ammunition. The City may also argue that a broader exemption can and should be judicially  
23 implied into (i.e., created from thin air) sections two and three. Neither argument works.

24 ///

---

26 <sup>9</sup> The same omission of standard state gun law exemptions means that the military cannot issue firearms to  
27 military personnel in the city nor have those firearms examined or repaired by its armorers.

28 <sup>10</sup> Pen. Code §12030(b)-(e) permits law enforcement agencies to keep, transfer seized firearms set to be  
destroyed to other law enforcement agencies.

1                   **A.     The Section Three Exceptions From the Handgun Possession Ban**  
2                   **Do Not Apply To The Section Two Firearms Transfer Ban**

3                   Section two of Proposition H, which bans the distribution or transfer of *any* gun between any  
4 persons or entities, is wholly different from section three, which deals only with the *possession* of  
5 *handguns* by *San Franciscans*. The very narrow exemption in section three is expressly limited to  
6 *handgun possession* by *San Franciscans*. Its wording cannot apply to the section two ban on transfers –  
7 even of handguns, much less or other kinds of firearms – between or by any persons or entities.

8                   The section three exception is limited to handgun possession “required for professional purposes,  
9 as enumerated herein. Specifically, any City, state or federal employee carrying out the functions of his  
10 or her government employment ....”

11                  The section three exemption exempts only individuals, not SFPD, SFPOA members, or other  
12 criminal justice agencies. It does not need to cover non-human entities, because the section three  
13 handgun possession ban only applies to humans (“residents”). Thus that section does not bar SFPD from  
14 buying and keeping handguns.

15                  But the firearm and ammunition ban in section two does prohibit *every* sale, transfer or  
16 distribution of firearms. In contrast to the state laws regulating firearms, which again painstakingly  
17 create exceptions for law enforcement throughout the statutory scheme [only a fraction have been cited  
18 in this Brief], section two of the ordinance applies as much against criminal justice agencies and their  
19 employees as against gun stores. So even if the section three exemption could be deemed applicable to  
20 section two transfers, it would still not allow criminal justice agencies to either purchase or receive  
21 firearms, nor to distribute them to their employees.

22                  And in any event, it cannot be applied this way. The fact is section three of the ordinance  
23 contains an exception (whose terms apply only to what section three bans), while section two has no  
24 exception speaks for itself. *Traverso v. People ex rel Department of Transportation* (1993) 6 C. 4th  
25 1152, 1167 (“Where a statute with reference to one subject contains a given provision, the omission of  
26 such provision from a similar statute concerning a related subject ... is significant to show that a different  
27 intention existed.”). [W]hen the drafters of a statute have employed a term in one place and omitted it in  
28 another it should not be inferred where it has been excluded." *People v. Woodhead* (1987) 43 C.3d 1002,

1 1010.

2 In sum, the section three exemption does not apply to the section two ban.’

3  
4 **B. Since the Ordinance Contains One Exemption, Courts “May Not Imply [An] Additional Exemption[]....” Into the Ordinance.**

5 Nor can any other or different kind of exemption be implied into section two. *Rojas v. Superior*  
6 *Court* (2004) 33 Cal.4th 407, 424, 15 Cal.Rptr.3d 643, quoting *Sierra Club v. State Bd. of Forestry*  
7 (1994) 7 Cal.4th 1215, 1230, 32 Cal.Rptr.2d 19, 876 P.2d 505.

8 There are multiple reasons for this. First is “the maxim of statutory construction, *expressio unius*  
9 *est exclusio alterius*,” the expression of one thing (exception) implies the exclusion of others. *Rojas* and  
10 *Sierra Club, supra*. An enactment's mention of some exceptions necessarily excludes the existence of  
11 unmentioned ones. *Lake v. Reed* (1997) 16 C. 4th 448, 466 and cases there cited.

12 Where “the statute is clear, the Legislature is presumed to have meant what it said and the plain  
13 meaning of the language governs.” *BP Alaska Exploration, Inc. v. Superior Court* (1988), 199  
14 Cal.App.3d 1240, 1250, 245 Cal.Rptr. 682 citing *Great Lakes Properties, Inc. v. City of El Segundo*  
15 (1977) 19 Cal.3d 152, 155, 137 Cal.Rptr. 154, 561 P.2d 244, *Leshner Communications, Inc. v. City of*  
16 *Walnut Creek*(1990) 52 C.3d 531, 543 (“Absent ambiguity, we presume that the voters intended the  
17 meaning apparent on the face of an initiative measure.”) and *People v. Zamudio* (2000) 23 C.4th 183,  
18 192 (“If there is no ambiguity in the language of the statute "then the Legislature is presumed to have  
19 meant what it said....”).

20 The language of section two clearly and unambiguously contains no exceptions at all, even for  
21 police agencies. While the lack of some exception to section two may seem odd, it makes sense under  
22 three possible scenarios: One, it is a simple drafting error - the type that results when an inexperienced  
23 drafter does not consult with the police department or the city attorney before finalizing an ordinance - as  
24 happened here. Two, all exceptions were intentionally omitted in order to avoid creating the “licenses”  
25 found fatal in *Doe v. City & County of San Francisco*, (1982) 136 Cal.App. 3d 509. Three, having no  
26 exceptions furthers the anti-gun/anti-self defense purposes of the ordinance. Providing an exception to  
27 the section two transfer ban for law enforcement agency practices would have allowed practices deplored  
28 by the gun control movement such as reselling used police guns (often at a premium because their police

1 markings make them specially desirable to collectors) or seized firearms as authorized by Penal Code  
2 section 12028 (c).

3       Regardless, to imply a non-existent exception into section two contradicts the principles this  
4 court recognized in *Langsam v. City of Sausalito* (1987) 190 Cal.App.3d 871, 877, 235 Cal.Rptr. 672:

5               what the city asks us to do is to add a requirement which is not contained in the  
6 ordinance. This we cannot do. "In construing a statute the function of the judge is simply  
7 to ascertain what in terms or substance is already there and not to insert what has been  
8 omitted or omit what has been inserted. (Code Civ.Proc., § 1858.) Under the guise of  
construction *the court will not rewrite a law [citation]; it will not supply an omission*  
[Emphasis added]

9       Compare *People v. Guzman* (2005) 35 Cal.4th 577, 587, 25 Cal.Rptr.3d 761 ("as we have often  
10 explained, "insert[ing]" additional language into a statute "violate[s] the cardinal rule of statutory  
11 construction that courts must not add provisions to statutes.[Citations.]").

12       Moreover, judicially creating any such exception(s) would create a local licensing scheme--  
13 something expressly preempted by Government Code § 53071. Again, you get what you vote for. The  
14 court should rule on the legality of the ordinance in the format approved by the voters.

## 15 **VII. THE LIMITED POWER TO AMEND THE ORDINANCE IS SUBSTANTIALLY** 16 **IRRELEVANT**

17       Proposition H allows that "by a two-thirds vote and upon making findings, the Board of  
18 Supervisors may amend this ordinance in the furtherance of reducing handgun violence."

19       Some of the problems mentioned above can be fixed by amendment. But many others cannot,  
20 because the amendment power is limited. Any amendment must be one that is: "in the furtherance of  
21 reducing handgun violence."

22       An amendment that allows police and sheriffs to receive handguns from their departments would  
23 qualify. But not an amendment that allows military personnel to be transferred firearms, especially long  
24 guns. How does that help reduce *handgun* violence?

25       Or consider a situation in which a murder is committed with a *shotgun* or *rifle* (collectively  
26 referred to as long guns) which is left at the scene of the crime. How can an amendment that allows  
27 police to seize that long gun and transfer it to their department, which in turn transfers it to the  
28 prosecutor who in turn transfers it to the court as an exhibit - reduce *handgun* violence?

1 **VIII. DISARMING LAW ABIDING RESPONSIBLE ADULTS ERASES A**  
2 **DISTINCTION CONSISTENTLY MADE BY STATE LAW AND**  
3 **VALIDATED BY CRIMINOLOGICAL DATA.**

4 The proposed handgun ban initiative states: “[T]he presence of handguns poses a significant  
5 threat to the safety of San Franciscans.” In reality, the danger stems from the presence of *criminals* in  
6 possession of *any* firearm. Guns are nothing more than a tool that, if in the wrong hands, will hurt  
7 innocent people. 9/11, the worst terrorist attack on American soil, proved that box cutters and deadly  
8 intentions could be as dangerous as almost any weapon in a military arsenal.

9 Proposition H nullifies the distinction between law abiding, responsible adults, on the one hand,  
10 and criminals, juveniles and the insane on the other. This distinction is validated by the whole corpus of  
11 social science research. It shows that violent crimes committed by ordinary law abiding, responsible  
12 adults is virtually non-existent. As Professor Elliott notes, studies uniformly show that murderers  
13 “almost always have a long history of involvement in criminal behavior;” and, as to murder, rape and  
14 robbery, “the vast majority of persons involved in life-threatening violence have a long criminal record  
15 with many prior contacts with the justice system.”<sup>11</sup> In the rare cases where a murderer has no prior

---

16 <sup>11</sup> Delbert S. Elliott, *Life Threatening Violence is Primarily a Crime Problem: A Focus on Prevention*, 69  
17 COLO. L. REV. 1081-1098 at 1089 and 1093 (1998) (collecting studies), emphasis added. To the same effect  
18 see Anthony A. Braga, et al., “*Understanding and Preventing Gang Violence*,” forthcoming in 8 *Police*  
19 *Quarterly* # 3 (2005)(study by Kennedy School at Harvard: “Some 95% of homicide offenders, 82% of  
20 aggravated gun assault offenders, 47% of homicide victims, and 29% of aggravated gun assault victims were  
21 arraigned at least once in Massachusetts courts before they committed their crime or were victimized.”); Linda  
22 Langford, et al. “*Criminal and Restraining Order Histories of Intimate Partner-Related Homicide Offenders*  
23 *in Massachusetts, 1991-95*” in Paul H. Blackman, et al., *The Varieties of Homicide and its Research*  
24 (Quantico, VA, F.B.I. Academy, 2000); Anthony Braga, et al. “*Youth Homicide in Boston: An Assessment of*  
25 *the Supplementary Homicide Report Data*,” 3 *Homicide Studies* 277, 280, 283-84 (1999) (Kennedy School  
26 study of Boston homicide by and of youth conducted with ad hoc group consisting of Boston gang and  
27 homicide officers, probation and youth workers and the Kennedy School. “At the outset of the project the[se]  
28 practitioners felt strongly that the youth homicide problem was almost entirely a gang problem, that  
essentially all youth homicide offenders were gang members” But further analysis showed that many of the  
murders – though all committed by gang members -- were not “gang-related” in that it did not at all involve  
the gang, e.g., a gang member beating his girlfriend to death ); David M. Kennedy, et al., “*Homicide in*  
*Minneapolis: Research for Problem Solving*,” 2 *Homicide Studies* 263, 269 (1998). (“Homicide offenders are  
likely to commit their murders in the course of long criminal careers consisting primarily of nonviolent crimes  
but including larger than normal [for other criminals] proportions of violent crimes.”); Thomas B. Marvell &  
Carlisle E. Moody, “*The Impact of High Out-of-State Prison Population on State Homicide Rates*,” 36  
*Criminology* 513, 517 (1998) (“most murderers differ little from other major criminals.”); Paige Hall-Smith,  
et al “*[Domestic] Partner Homicide in Context*,” 2 *Homicide Studies* 400-421, (1998) at 410 and 411 (of  
those intimate partner homicides where there was sufficient background evidence for the authors to determine  
the matter, “A history of domestic violence was present in 95.8%. The overriding theme to emerge from these



1 official criminal record, he turns out to have other indicia of extreme aberrance, e.g., restraining orders,  
2 mental deformity, or animal torture.<sup>12</sup>

3 In sum, criminological research consistently shows that *the likelihood of ordinary, law abiding;*  
4 *responsible adults committing a violent felony is trivial*, whether they possess guns or not. Rather,  
5 studies of homicide uniformly find almost all murderers differ markedly from ordinary people in having  
6 life histories of violence, felony, psychopathology, substance abuse, restraining orders and so forth.

---

7  
8 cases was that partner homicide is most often the final outcome of chronic women battering.”), David M.  
9 Kennedy, *Pulling Levers, Chronic Offenders, High Crime Settings, and A Theory of Prevention*, 31  
10 VALPARAISO L. REV. (1997) (“...domestic violence offenders, at least those who come to the attention of the  
11 criminal justice system, tend to have robust [prior] offending histories.”) (collecting studies); Gerald D.  
12 Robin, *Violent Crime and Gun Control* (Cincinnati, Academy of Criminal Justice Sciences: 1991) at p. 46;  
13 FBI, *Uniform Crime Report-1975* at 42ff. (Over a five year period, nationally: arrested murderers had adult  
14 criminal records showing an average prior criminal career of at least six years duration including four major  
15 felony arrests.); Senate Sub-committee to Investigate Juvenile Delinquency, 79th Congress; see *Hearings,*  
16 *Second Session 75-6.*(FBI data reported to the subcommittee that the average murderer in Washington, D.C.  
had six prior arrests, two for felonies, one violent.); D. Mulvihill, et al. *Crimes of Violence: Report of the*  
*Task Force on Individual Acts of Violence* (Gov’t. Printing Office, 1969) at 532 (table showing that 74.7% of  
murder arrestees nationally over a four year period in the early 1960s had priors for violent crime or burglary);  
Roger Lane, *Murder in America: a History* (Ohio U. Press, 1997) p. 259 (data on Philadelphia homicides from  
the 1950s through the early 1960s showed, “Victims as well as offenders, finally, tended to be people with  
prior police records, usually for violent crimes such as assault, and both had typically been drinking at the  
time of the fatal encounter.”).

17 <sup>12</sup> *Robins*, supra at 47-48 (Data reflecting only official crime records greatly under represent murderers'  
18 true histories of prior serious crimes. For instance, such data “substantially underestimate” the incidence  
19 among those who murder relatives or acquaintances of a “real history of assaultive behavior because their  
20 [prior] victims [we]re less like to press charges and the police [we]re loathe to interfere in a family matter. A  
21 study of police responding to domestic disturbance calls in Kansas City (Missouri) found that 90 percent of all  
22 the family homicides were preceded by previous disturbances at the same address, with a median of 5 calls per  
23 address. Thus homicide -- [whether] of a stranger or [of] someone known to the offender -- is usually part of a  
24 pattern of violence, engaged in by people who are known ... as violence prone.” See, also, Langford, et al.  
25 supra, (“Forty percent of [domestic homicide] perpetrators had a history of having been under a restraining  
26 order at some time prior to the homicide, taken out by the victim or some other person.”), Wade C. Myers &  
27 Kerrilyn Scott, “*Psychotic and Conduct Disorder Symptoms in Juvenile Murderers*,” 2 *Homicide Studies* 160  
28 (1998) (psychological studies of juvenile murderers find 80-100% are psychotic or have psychotic symptoms),  
R. Holmes & S. Holmes, *Murder in America* 8-9, 28 (London, Sage: 1994) (animal torture and other prior  
aberrance of juveniles who murder, and of spouse murderers, respectively); Sheilagh Hodgins, “*Mental*  
*Disorder, Intellectual Deficiency, and Crime*,” 49 *Arch. Gen. Psychi.* 476 (1992) (collecting studies from  
Canada and Europe, as well as the U.S., showing that persons suffering major mental disorder, persons with  
sub-par I.Q. and substance abusers are each several times more likely to engage in violent crime than are  
ordinary people.), Pekka Santilla & Jaana Haapasalo, “*Neurological and Psychological Risk Factors Among*  
*Young Homicidal, Violent, and Nonviolent Offenders in Finland*,” 1 *HOMICIDE STUDIES* 234 (1997)  
(summarizing American and foreign studies on the extensive psychiatric histories of murderers), Per  
Lindkvist, “*Criminal Homicide in Northern Sweden, 1970-1981: Alcohol Intoxication, Alcohol Abuse and*  
*Mental Disease*,” 8 *Int’l. J. Law and Psychi.* 19-37 (1986).

1 So to believe that the proposed handgun ban would have an impact on handgun violence, one  
2 would have to assume that criminals and the insane would actually abide by the new law. Considering  
3 the very definition of a criminal, it would be hard to imagine that such enlightenment would occur. In  
4 fact, both reason and empirical research suggest that most criminals are attracted to places where they  
5 meet less resistance. Such studies show that guns in civilian hands deter crime<sup>13</sup> and allow victims to  
6 defend against it. A recent Oxford University Press book by Prof. James Jacobs, Director of New York  
7 University's Center for Research in Crime and Justice summarizes the studies:

8 criminologist Gary Kleck found that Americans defend themselves [with guns] 2.5  
9 million times per year by warding off threats to their persons and property. Phil Cook and  
10 Jens Ludwig put the number of defensive gun uses at 1.3 million per year. Hemenway and  
11 Azrael's national survey, sponsored by the National Institute of Justice, found 1.5 million  
defensive gun uses per year. All these surveys reveal a great deal of self-defensive gun  
use of firearms; in fact, *more defensive gun uses than crimes committed with firearms.*"<sup>14</sup>

12 Proactive law enforcement targeting crime-infested neighborhoods has been the most effective  
13 method in curbing the violence. The S.F.P.D., in conjunction with federal authorities, has established a  
14 gun task force known as "Triggerlock II." A police department bulletin explains: "'Triggerlock II' is  
15

---

16 <sup>13</sup> National Institute of Justice surveys among prison inmates find large percentages saying fear that a victim  
17 might be armed deterred them from confrontation crimes. "[T]he felons most frightened 'about confronting an  
18 armed victim' were those from states with the greatest relative number of privately owned firearms." James D.  
19 Wright & Peter Rossi, *Armed and Dangerous: a Survey of Felons and Their Firearms* (1986) at 151; Joseph  
F. Sheley & James D. Wright; *In the Line of Fire: Youth, Guns and Violence in America* (Aldine 1995) a 63.

20 A series of studies have concluded that much of the 1990s drop in violent crime (and increase in non-  
21 confrontation crime) is attributable to the deterrent effect on violent criminals of 38 states enacting laws  
22 providing for licensing law abiding, responsible adults to carry concealed handguns. See John R. Lott Jr.,  
23 *More Guns, less Crime: Understanding Crime and Gun Control Law* (U. Chi., 2000). This conclusion is  
24 highly controversial and has many critics who are opposed to gun ownership. There are also critics who have  
25 no ideological agenda. Interestingly, several of these have now replicated Lott's work using added or different  
data, additional control variables or new or different statistical techniques they deem superior to those Lott  
used. It bears emphasis that the replications all confirm Lott's general conclusions; some even find that Lott  
*underestimated* the crime-reductive effects of allowing good citizens to carry concealed guns. A new book,  
John R. Lott Jr., *The Bias Against Guns* (Washington, Regnery, 2003) reiterates, extends and defends his  
findings. This book bears endorsements by three Nobel laureates

26 <sup>14</sup> Jacobs, *Can Gun Control Work* (Oxford, 2003), p. 14. To the same effect see Jungyeon Tark & Gary  
27 Kleck, "Resisting Crime: The Effects of Victim Actions on the Outcomes of Crimes," 42 *Criminology* 861-909  
28 (2004), Lawrence Southwick, "Self-Defense with Guns: The Consequences," 28 *J. Crim. Justice* 351-370  
(2000), and Marvin E. Wolfgang, "A Tribute to a View I Have Opposed", 86 *J. Crim. L. & Criminol.* 188  
(1995).

1 committed to disarming violent criminals and reducing gun violence by identifying the most dangerous  
2 offenders and referring them for prosecution under state and federal firearm violations.” SFPD officials  
3 credit Triggerlock as actively working to reduce violence.

4 **CONCLUSION**

5 When we disarm honest, law-abiding citizens, we contribute to empowering criminals and  
6 endangering society-at-large. The San Francisco Police Officers Association supports the right of our  
7 members (active and retired), neighbors, and law-abiding citizens in this city to choose reasonable means  
8 of self-defense, including handguns, while in their homes or businesses.

9 SFPOA urges the Court to recognize that the statutory exceptions in state law which exempt law  
10 enforcement officers cannot coexist with Proposition H. Either those exceptions remain valid and are  
11 incorporated into Proposition H, thereby making it a local licensing scheme, or Proposition H cancels  
12 out of state law thereby destroying the licensing scheme which the legislature devised, those exemptions,  
13 frustrating the intentions of the state legislature, and violating the preemption doctrine in the process.

14 Date: February \_\_\_\_\_, 2006

Submitted By:

15  
16  
17 Michael S. Hebel  
18 Attorneys for Amicus  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA

3 COUNTY OF SAN FRANCISCO

4 I, Michael S. Hebel, am employed in San Francisco, San Francisco County, California. I am over  
5 the age eighteen (18) years and am not a party to the within action. My business address is 800 Bryant  
Street, San Francisco, California 94103.

6 On February 7, 2006, I served the foregoing document(s) described as

7 **SAN FRANCISCO POLICE OFFICER'S ASSOCIATION**  
8 **AMICUS BRIEF IN SUPPORT OF PETITIONERS**

9 on the interested parties in this action by placing

10  the original  
 a true and correct copy

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

11 C. D. Michel  
12 TRUTANICH - MICHEL, LLP  
13 180 East Ocean Blvd.  
Suite 200  
14 Long Beach, CA 90802  
(Attorney for Petitioners)

Vince Chhabria  
OFFICE OF THE CITY ATTORNEY  
1 Dr. Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102  
(Attorney for Respondents)

15 X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and  
16 processing correspondence for mailing. Under the practice it would be deposited with the U.S.  
17 Postal Service on that same day with postage thereon fully prepaid at San Francisco, 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.

18 Executed on February 7, 2006, at San Francisco, California.

19     (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the  
addressee.

20     (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies with  
21 California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to  
22 Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the  
transmission, copies of which is attached to this declaration.

23 Executed on February 7, 2006, at San Francisco, California.

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

25     (FEDERAL) I declare that I am employed in the office of the member of the bar of this of this  
26 court at whose direction the service was made.

27 \_\_\_\_\_  
Michael S. Hebel