IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CALGUNS FOUNDATION INC., et al, Plaintiffs and Appellants, **v.** **COUNTY OF SAN MATEO,** Defendants and Respondents.	Case No. A136092

San Mateo County Superior Court, Case No. CIV 509185
The Honorable V. Raymond Swope, III, Judge

APPLICATION OF NATIONAL RIFLE ASSOCIATION TO FILE AMICUS CURIAE BRIEF;
[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CALGUNS FOUNDATION, INC., et al.

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APPLICATION OF NATIONAL RIFLE ASSOCIATION TO FILE AMICUS CURIAE BRIEF

To the Honorable James J. Marchiano, Presiding Justice of the Court of Appeal of the State of California, First Appellate District: The National Rifle Association respectfully applies for permission, pursuant to California Rules of Court, Rule 8.200, subdivision (c), to file the accompanying amicus curiae brief in support of Appellants Calguns Foundation Inc., et al.

I. THE APPLICANTS' INTEREST

The National Rifle Association (NRA) was formed in 1871 by Union veterans Col. William C. Church and Gen. George Wingate. The NRA began as a promoter of rifle shooting and marksmanship in the Northeast and has grown tremendously over the last nearly 150 years to include members in all fifty states, working as an advocate of rifle shooting, marksmanship, training, and education.

In 1934, the NRA formed the Legislative Affairs Division in response to repeated attacks on Second Amendment rights, and it formed the Institute for Legislative Action (ILA) in 1975 after recognizing the critical need for a political defense of the Second Amendment. Since its

formation, the NRA has been widely recognized as a political force and defender of Second Amendment rights, providing resources, cultivating members, and advocating for legal recognition of Second Amendment rights.

The NRA has extensive experience litigating firearms-related cases, both at the national and state level. The NRA has been both party to and amicus curiae for many cases addressing various firearms issues, and as such, can inform the court on issues of public importance as well as serve as an advocate for Appellants in this case.

II. HOW THE AMICUS BRIEF WILL ASSIST THE COURT

The NRA has been actively litigating California gun owners' rights cases for years. The NRA has worked hand-in-hand with other gun rights organizations to develop and implement the California Legal Action Project (LAP), which seeks to advance the rights of firearms owners in California. As a result, the NRA has decades of experience in California litigating complex constitutional issues, including preemption and Second Amendment civil rights from a national and local perspective.

Counsel for amicus represented the NRA as a party in *Fiscal v. City*

and County of San Francisco (2008) 158 Cal.App.4th 895, a case which specifically addressed the preemption by state law of a local law limiting handgun possession within the City and County of San Francisco. As such, counsel for amicus are uniquely positioned to act as an advocate for Appellants by providing this Court with a thorough and scrupulous analysis of preemption doctrines.

The accompanying proposed amicus brief will assist the Court by identifying issues of preemption that the parties do not fully address, but which are critical to a complete understanding of the issues presented by the challenged ordinance.

III. RULE 8.200(C)(3) CERTIFICATION

No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than Amicus, their members, or their counsel, contributed money to fund the preparation or submitting of this brief.

Dated: April 2, 2013

MICHEL & ASSOCIATES, P.C.

By: _____
C. D. MICHEL
Attorney for Amicus Curiae

[PROPOSED] AMICUS CURIAE BRIEF

INTRODUCTION

Amicus agrees with Appellants' argument that San Mateo County ("the County") Ordinance section 3.68.080, which prohibits firearms from being carried in county parks, is expressly preempted by Government Code section 53071. Amicus writes to address the ways in which the challenged ordinance also contradicts state law and is impliedly preempted by the broad state scheme governing the carrying of concealed firearms in public.

First and foremost, because the County's ordinance clearly contradicts state law, it must be stricken as preempted. The California Penal Code authorizes Appellant Hoffman to carry a concealed firearm in the County and throughout the state without restriction. But the County's ordinance completely prohibits Appellant from carrying a handgun pursuant to that license in county parks. Prohibiting what the state expressly allows, the County's ordinance conflicts with state law and is preempted.

Second, the challenged ordinance is preempted because the state has fully occupied the field. And it has done so both expressly and impliedly.

As Appellants argue, California law expressly prohibits local

governments from interfering with firearms licensing. California Government Code section 53071 proclaims the Legislature's express intent to prevent any local laws even relating to the licensing of firearms – an unequivocal state mandate ignored by the County's ordinance. Not only does the challenged ordinance regulate Appellant's carry license by imposing additional restrictions, the challenged ordinance effectively nullifies his license by prohibiting him from carrying handguns pursuant to that license in local parks. Entering a field fully and expressly occupied by state law, the County's ordinance must be invalidated.

Even had the Legislature not expressly preempted the County's ordinance, it did so by implication. Seventeen different statutes govern the issuance of concealed carry licenses, providing a comprehensive and uniform statewide licensing scheme. Any restriction on the license must statutorily come from the sheriff or police chief, not the local government. And a spate of state laws expressly allow licensees to carry firearms in state-recognized "sensitive places." As California law leaves no room for local regulation of carry licensing, the County's ordinance is impliedly preempted.

Amicus requests this Court find San Mateo County Ordinance section 3.68.080 preempted by state law for each of these reasons.

PROCEDURAL HISTORY

Amicus curiae adopts the Procedural History set forth in Appellants' Opening Brief.

STATEMENT OF FACTS

Appellants challenge San Mateo County Ordinance section 3.68.080 that prohibits all dangerous weapons, including firearms, from being carried in its parks.[1] Subsection (o) provides:

> Firearms and Dangerous Weapons. Except as provided in subsection (p) and subsection (q), no person shall have in his possession within any County Park or Recreation area, or on the San Francisco Fish and Game Refuge, and no person shall fire or discharge, or cause to be fired or discharged, across, in, or into any portion of any County Park or Recreation area, or on the San Francisco Fish and Game Refuge, any gun or firearm, spear, bow and arrow, cross bow, slingshot, air or gas weapon or any other dangerous weapon.

(San Mateo County, Cal., Ordinance 3.68.080, subd. (o) (July 31, 1990).)

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[1] On appeal, Appellants argue that County Ordinance section 3.53 *et seq.*, which prohibits possession of firearms on all County property and which was enacted after section 3.68.080, impliedly repealed 3.68.080. Amicus takes no position on the issue of implicit repeal.

There is no exception in the challenged ordinance for persons who have been issued a license to carry a concealed firearm by a County Sheriff, pursuant to California Penal Code Section 26150. In short, the Ordinance prohibits what the state law allows.

Although California generally prohibits the possession of loaded firearms in public, state law does establish a uniform process for obtaining a license to carry concealed, loaded handgun in public places ("Carry License") from the sheriff or chief of police of one's respective city, city and county, or county ("issuing authority"). (See Pen. Code, §§ 25850, 26150 *et seq.*)

Penal Code sections 26150 and 26155 provide that any law-abiding, responsible adult may obtain a Carry License, provided they demonstrate (1) that they are of "good moral character," (2) that "good cause exists for issuance of the license," and (3) that they reside within the jurisdiction in which they apply.[2] (Pen. Code, §§ 26150, 26155.) The issuing authority

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[2] An applicant might also establish that he or she spends a substantial amount of time at his or her business or principal place of employment within the issuing authority's jurisdiction. (Pen. Code, § 26150, subd. (a)(3).)

must also require the applicant to complete a statutorily approved training course of the issuing authority's choosing. (Pen. Code, §§ 26150, 26165.) It may also charge limited fees to recover the actual cost of processing the application. (Pen. Code, § 26190.)

California law allows the issuing authority – which is statutorily limited to the sheriff or chief of police – to impose "reasonable restrictions or conditions," including "restrictions as to the time, place, manner, and circumstances under which the licensee may carry" a handgun. (Pen. Code, § 26200, subd. (a).) But any restrictions imposed *"shall be indicated on any license issued."* (Pen. Code, § 26200, subd. (b), emphasis added.)

Further, California Government Code section 53071 expressly preempts all local regulations "relating to registration or licensing" of firearms. Section 53071 states in its entirety:

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

The individual Appellant in this case has been granted a Carry

License by the Sheriff in San Mateo County. His Carry License contains no restriction on carrying his firearm in County parks and Appellant is therefore authorized by state law to carry his firearm without unlawful restrictions imposed by local ordinances.

As explained below, because San Mateo's local ordinance does not provide an exception for licensed concealed carry pursuant to the Penal Code, it directly contradicts state law. Moreover, the Ordinance attempts to regulate a field expressly and impliedly occupied by the state.

ARGUMENT

I. CALIFORNIA PREEMPTION ANALYSIS: AN OVERVIEW

"If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067, quoting *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, and citing *Am. Fin. Servs. Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1251.) Legislation is said to "conflict with" state law if it "*duplicates, contradicts*, or *enters an area fully occupied* by general law, either expressly or by legislative implication." (*Ibid.*)

"A local ordinance *duplicates* state law when it is 'coextensive' with state law." (*O'Connell*, *supra*, 41 Cal.4th at p. 1067.) It "*contradicts* state law when it is inimical to or cannot be reconciled with state law." (*Id.* at p. 1068.) And it "*enters a field fully occupied* by state law in either of two situations – when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field." (*Ibid.*, quoting *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898, and citing 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 986, p. 551.) The Legislature has *impliedly* preempted a field when:

> (1) [T]he subject matter has been so fully and completely covered by general law as to clearly indicate that is has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

(*O'Connell*, *supra*, 41 Cal.4th at p. 1068.)

II. THE COUNTY'S BAN ON CARRYING FIREARMS IN COUNTY PARKS IS PREEMPTED BY STATE LAW

A. The County's Ban Contradicts State Law

Amicus believes the most glaring problem with the challenged ordinance, which Appellants do not address, is that it contradicts state law authorizing holders of Carry Licenses to carry firearms in public.

Local ordinances contradicting state law are preempted and void. (*O'Connell*, *supra*, 41 Cal.4th at pp. 1067-1068.) To command with a local ordinance that which a state statute prohibits – *or to prohibit locally that which a state statute commands* – tramples on the constitutional mandate that counties govern subordinate to state law. (*Sherwin-Williams*, *supra*, 4 Cal.4th at p. 902; Cal. Const. art. XI § 7.) When inimical to state statute, local legislation is simply stricken as preempted. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 903; *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 103-104 [local ordinance prohibiting electroshock therapy preempted under state law allowing such treatment when strict requirements were met].) Here, the County's ordinance prohibits Appellant from carrying a firearm pursuant to

his valid *state* issued and regulated license while in certain local areas. A patent contradiction with California law, the ordinance is preempted and void.

With few and very limited exceptions, California generally makes it illegal to carry firearms in most public places, whether loaded or unloaded, or concealed or in plain view. (Pen. Code, §§ 258400, 25850, subd. (a), 26350.) State law, however, authorizes sheriffs and police chiefs to issue licenses allowing their residents to generally carry a concealed, loaded handgun in most public places, but only upon the issuing authority confirming a potential licensee's eligibility and need for such a license. (Pen. Code, §§ 26150, 26155.)

Other than a few specific locations, such as "sterile areas" of airports, Penal Code section 171.5, the Penal Code does not geographically limit the validity of a Carry License. This means that "[issuing authorities have] the power to grant a license which conveys *a right exercisable throughout the state and thus has a statewide effect.*" (*Scocca v. Smith* (N.D. Cal. Dec. 17, 2012, No. 11-1318) 2012 WL 6569359 at *7, emphasis added.) Issuing authorities may impose reasonable time, place, or manner

restrictions on a licensee, but any such restriction *must* be indicated on the physical license. (Pen. Code, § 26200.)

Consequently, state law confers on Appellant the right to carry a firearm in San Mateo County, including within its parks and recreation areas, pursuant to his Carry License. And the only the issuing sheriff is statutorily authorized to prohibit Appellant from carrying a firearm pursuant to his license in San Mateo County parks or recreational areas by so indicating on the license. (Pen. Code, § 26200). As to Appellant's License, the Sheriff did not impose such a restriction.

The effect of the County's ordinance is to place an unauthorized geographic restriction on Appellant's otherwise statewide-valid license. Because the challenged ordinance prohibits Appellant from enjoying his license in these local areas, the ordinance is preempted by state law and thus void.

The County's ordinance is analytically no different than the multitude of local laws struck down as preempted for imposing additional restrictions on a state contractor's license. (See, e.g., *Agnew v. City of Culver City* (1956) 147 Cal.App.2d 144; *Agnew v. City of Los Angeles*

(1952) 110 Cal.App.2d 612; *Lynch v. City of Los Angeles* (1952) 114 Cal.App.2d 115; *Horwith v. City of Fresno* (1946) 74 Cal.App.2d 443.) In *Agnew v. City of Culver City*, for example, a local ordinance prohibited a state-licensed contractor from taking contracting work within the city unless he paid a $100 city-license fee. (147 Cal.App.2d at p. 147.) The plaintiff argued that the ordinance contradicted state law because it imposed additional restrictions not contained in the state licensing scheme for contractors. (*Ibid.*) The Court of Appeal agreed, finding that rights conferred by a state license cannot be "circumscribed by local authorities." (*Id.* at p. 149.)

Critically, the court recognized that state law "authorizes contractors licensed by the board to engage in their occupations *anywhere in the state*. The requirement for the payment of a fee and the obtaining of a permit nullifies the permission given a contractor by the general law to conduct his business at any place in the state." (*Agnew*, *supra*, 147 Cal.App.2d at p. 151, emphasis added.) And a "municipality may not impose a more stringent or additional requirement than imposed by the general law." (*Ibid.*)

Like a contractor's license, a Carry License is valid statewide under *state* law. Thus, the County's ordinance nullifies the permission given to Appellant by the general law to carry a firearm in any place in the state that is not verboten by general law or by restrictions prescribed by the issuing authority. That, as the *Agnew* Court explains, the County Board of Supervisors is not authorized to do. For, while a local government might be allowed to require Carry License holders to comply with rules when carrying a firearm in its parks, the County may not prohibit Appellant from carrying a firearm pursuant to his state-issued license in local areas altogether.[3]

That Carry License issuing authorities are sheriffs and chiefs of police does not change this. To the contrary, the Legislature specifically naming them as the sole issuing authorities demonstrates that it envisioned autonomy from local governing bodies. For, the Legislature generally uses

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[3] Amicus recognizes that local governments may require state license holders to submit to inspections related to the exercise of the right pursuant to a state license. (See, e.g., *Horwith v. City of Fresno*, *supra*, 74 Cal.App.2d at p. 449.) Hence, it is arguably permissible for the County to, for example, require Appellant to notify a park ranger that he will be entering a county park with a firearm.

the term "local" when it contemplates allowing additional municipal regulation. (See, e.g., Pen. Code, §§ 26805, subd. (b)(1); 27305, subd. (b); 26700, subd. (b); 26705, subd. (d); 26890, subd. (b); and 26915 subds. (c), (d), (f)).

In any event, while issuing authorities are not always state actors, "when making [their] decisions on granting or denying [Carry] licenses," they are acting as representatives of the state, and not of their locales. (*Scocca, supra*, 2012 WL 6569359 at *8; see also *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 826 [holding that sheriffs act on behalf of the state when performing law enforcement activities]; *County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1178 [concluding that sheriffs are state actors in setting policies concerning release of persons from county jail].) As such, their decisions concerning Carry Licenses are state, not local actions. Thus, any local action contradicting their decisions, which is the case with the challenged ordinance, is preempted and void.

B. The County's Ban Improperly Enters an Area of Law Fully Occupied by State Law

1. Government Code Section 53071 Expressly Preempts the County's Ban

The broad language of Government Code section 53701, which expressly prohibits " 'all local regulations *relating* to registration or licensing' of firearms, indicates that the state has an interest in statewide uniformity of handgun licensing." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 910.) When a local regulation effectively " 'invalidates existing licenses, but does not affirmatively create new licencing schemes, [it] "relates" to the state's regulatory scheme of licensing firearms' and, consequently, is expressly preempted by Government Code section 53071." (*Id.* at p. 910.)

In *Fiscal*, this court invalidated a local law "limiting handgun possession in the City and County of San Francisco" as expressly preempted by state law. (158 Cal.App.4th at p. 901.) The court recognized that Proposition H, at a minimum, "would invalidate all licenses possessed by City residents to carry a concealed weapon issued under Penal Code section 12050 [26150], and it would prohibit the possession of handguns by City residents even if those residents are expressly authorized by state law to

possess handguns for self-defense or other lawful purposes." (*Id.* at p. 911.) The *Fiscal* court concluded that such a regulation "related" to the licensing of firearms and was thus expressly preempted by section 53701. (*Id.* at pp. 910-911.)

Similarly, the County's ban on firearms possession in public parks, at the very least, serves to suspend all licences to carry a concealed firearm pursuant to Penal Code section 26150 held by park goers. As in *Fiscal*, such "relates" to the licensing of firearms, an area occupied expressly and fully by state law.

The County tries to distinguish *Fiscal* on the grounds that it dealt with a total ban on handgun ownership, whereas San Mateo's ordinance restricts possession only in certain circumstances. (R.B. at p. 13.) But section 53701 does not merely "evince an intent to preempt regulation that *totally bans* handgun ownership." (See R.B. at p. 13, emphasis added.) Rather, section 53701 expressly preempts any local regulation even *relating* to the licensing of firearms. And so, on its face, section 53701 operates to preempt far more than just total bans on firearms possession.

And contrary to the County's assertion, R.B. at page 13, the *Fiscal*

court did *not* rely on the fact that Proposition H served as a total ban on all handguns, but on the fact that it served as a "total ban on an activity state law allows," 158 Cal.App.3d at page 915. The same is true here. The challenged ordinance serves as a "total ban" on carrying of firearms in the County's parks and wilderness spaces, even by those expressly authorized by the state to carry statewide pursuant to a valid Carry License.

Further confirming section 53701's intent to deprive cities of any power to ban the possession of guns by Carry License holders is Governor Reagan's press release on the signing of section 53701 into law. Therein, he described what he was signing as:

> legislation which will insure uniform regulations on their [firearms'] use throughout the state. . . . in much the same way as the state establishes uniform regulations governing such things as traffic safety on highways throughout California.
>
> Gov. Reagan said, "Without this legislation, sportsmen might well be confronted in the future by a *chaotic maze of differing local firearm licensing regulations* each time they entered another local jurisdiction to go hunting.
>
> "Imagine driving along a freeway from one county to another, not knowing from one mile to the next if traffic regulations had changed and, if so, in what way," he said. He noted that California now has a comprehensive Deadly

> Weapons Control Act which provides for statewide regulation of firearms.

(Press Release, Office of the Governor, Governor Ronald Reagan (Sept. 10, 1969), emphasis added, on file with author.) This explanation of section 53701 is irreconcilable with the ordinance at issue here.

The challenged ordinance, together with similar bans in the 24 other counties identified in Appellants' Opening Brief, A.O.B. at pp. 13-14, establish that "chaotic maze" of city and county ordinances under which handgun possession pursuant to a Carry License will be legal at some times and in some places, but banned at other times and in other places, depending on the whims of individual local governments. This is exactly what section 53701 was intended to eliminate. Its purpose was to "insure uniform regulations" on the licencing of firearms, Press Release, Office of the Governor, Governor Ronald Reagan, *supra*, by placing that subject exclusively within the authority of a state scheme. Local regulation that would serve to frustrate the state goal of uniformly licensing concealed carry of firearms, including local laws that effectively suspend or nullify Carry Licenses, is directly preempted by the state's express intention to

occupy the entire field of firearms licensing and registration.

2. The State Carry License Permitting Scheme Impliedly Preempts the County's Ban

Having established the County's ordinance is expressly preempted by state law, Amicus agrees that the Court need not conduct an implied preemption analysis to rule in Appellants' favor. Amicus parts ways with Appellants, however, to the extent they "would concede that they have no chance of prevailing under a theory of implied preemption," if they cannot prevail on a theory of express preemption. (Reply Br. at p. 10.) Amicus sees no reason why the absence of an express intention to fully occupy the field of Carry License regulation would foreclose the finding of an implied intention to do so, especially in light of the state's broad regulatory scheme governing the carrying of firearms pursuant to state licenses.

Recall, if the Legislature has not expressly stated its intent to preempt local regulation, "courts look to whether it has impliedly done so." (*O'Connell*, *supra*, 41 Cal.4th at p. 1068.) It may do so if:

> (1) [T]he subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in

> such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

(*Ibid.*, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at p. 898.)

California law establishes a process in Penal Code sections 26150 through 26225 for obtaining a Carry License from the sheriff or chief of police of one's respective city, city and county, or county. This broad and comprehensive Carry Licensing scheme, detailed in the Statement of Facts and in Part II.A above, is strong evidence that the state intended to occupy the field of Carry License regulation, foreclosing further local action.

Once issued, a Carry License insulates its holder from prosecution under the general law prohibiting the carrying of concealed handguns in public places. (Pen. Code, § 16360.) More importantly, it allows its holder to take handguns into those "sensitive places" where guns are specifically prohibited by state law, including: School zones, Penal Code section 626.9,[4]

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[4] The County wrongly states that California's Gun-Free School Zones Act of 1995 contains no exception for those who carry concealed firearms pursuant to a Carry License. (R.B. at p. 17.) It certainly does. (Pen. Code, § 626.9.)

subdivision (l), any state or *local* public building or public meeting, Penal Code section 171b, subdivision (b)(3), the State Capitol, Penal Code section 171c, subdivision (b)(2), and the Governor's Mansion, Penal Code section 171d. (See also Michel, California Gun Laws: A Guide to State and Federal Firearm Regulations (2012) p. 132.) State law does *not* provide an exception for Carry License holders in airport "sterile areas" or passenger vessel terminals, Penal Code section 171.5, while picketing or at protest events, Penal Code section 17510, or at polling places, Elections Code section 18544. Any further restriction on the time or place of carrying pursuant to a valid Carry License *must* be made by the issuing authority (i.e., county sheriff or city or city and county chief of police) and it *must* be indicated on the license issued. (Pen. Code, § 26200.)

The seventeen different statutes governing Carry License regulation provide a broad and comprehensive plan that licenses issued pursuant to state law shall be the only licences to carry firearms in California. And the comprehensive scheme regarding those places where firearm possession is prohibited and its attendant exceptions indicates that restrictions on those licenses shall be uniform – or otherwise included on the face of the license.

If every city and county were able to opt out of this statutory regime simply by passing a local ordinance, the statewide goal of uniform regulation of handgun possession would surely be frustrated. "Clearly, the creation of a uniform regulatory scheme is a matter of statewide concern, which should not be disrupted by permitting this type of contradictory local action." (*Fiscal, supra*, 158 Cal.App.4th at p. 919, citing *Long Beach Police Officers Assn. v. City of Long Beach* (1976) 61 Cal.App.3d 364.) For, "[i]f the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (*Id.* at p. 911.)

What's more, the Legislature recently adopted Senate Bill 610, which amended the Carry Licensing requirements to bring more clarity to the law for issuing authorities, while further limiting their discretion to deviate from the state's uniform regulatory scheme. (S.B. 610, 2011-2012 Reg. Sess. (Ca. 2011).)[5] When the Legislature undertook this overhaul in

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[5] Specifically, Senate Bill 610 revised state law to require that issuing authorities: (1) publish a written policy explaining their criteria for issuing a Carry License, Penal Code section 26160; (2) provide specific written notice to each Carry License applicant with written notice of the authority's determination of the applicant's "good cause," Penal Code

2011, it was presumably aware [6] of this Court's 2008 conclusion in *Fiscal* that local governments cannot enact restrictions prohibiting the possession of handguns by those expressly authorized to carry them pursuant to a valid Carry License because such action effectively nullifies those Licenses. (158 Cal.App.4th at p. 911 ["[A]t a minimum, Section 3 of Prop. H would invalidate all licenses possessed by City residents to carry a concealed weapon issued under Penal Code section 12050 [i.e., Carry Licenses]. . . ."].) And its decision not to amend section 26200 to authorize local governments to enact time, place, and manner restrictions on Carry Licenses, opting instead to retain its delegation of that authority to sheriffs and police chiefs alone is significant. Given the presumption that the Legislature was aware of *Fiscal* when it amended its Carry Licensing

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section 26202; and (3) provide written notice to each applicant denied a license of which statutory criteria he or she failed to satisfy, *ibid.* The amendments also clarified that no training fee can be required of any applicant until written notice of "good cause" is provided and that no issuing authority may require applicants to obtain liability insurance as a condition to obtaining a license. (Pen. Code, §§ 26165, 26190, subd. (g).)

[6] See *Fiscal, supra*, 158 Cal.App.4th at p. 909 [for proposition that "Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in light of such decisions as have a direct bearing upon them"].

scheme, "it is reasonable to assume that if the Legislature intended to reopen this area of regulation to local units of government, it would have addressed the issue specifically by repealing or amending Penal Code section" 26200. (See 158 Cal.App.4th at pp. 908-909.)

The County attempts to quickly dispose of the first two implied preemption factors (i.e., "general law occupying the field" and "legislation couched in terms indicating no tolerance of local regulation"), by citing *Great Western* for the simple proposition that the Legislature has not preempted the entire field of gun control. (R.B. at pp. 10-11.) But the question is *not* whether the Legislature has preempted the broad field of gun control. Certainly, it has not. (See *Great Western*, *supra*, 27 Cal.4th at pp. 861-864.) The state has, however, "targeted certain specific areas for preemption," such that local intrusion into *those* areas is preempted and unlawful. (See *id.* at p. 864.)[7]

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[7] The County devotes almost an entire page to a string cite of cases in which the court found that local firearm regulation is not preempted. (R.B. at p. 12.) This is odd because the question here is *not* whether local governments can ever regulate firearms, but whether they can further regulate the times and places where Carry License holders can carry their firearms pursuant to a valid, state issued and regulated license.

Having found that the Legislature did not intend to occupy the entire field of gun regulation generally, the *Great Western* court went on to consider whether it intended to occupy the more narrow field of gun *show* regulation (See 27 Cal.4th at p. 866.) The court ultimately determined the Legislature had not preempted that field because "the conduct of business at such [gun] shows [was expressly] subject to 'applicable local laws.' " (*Ibid.*, citing Pen. Code, §§ 12071, subd. (b)(1)(B), 12071.4, subd. (b)(2), emphasis added.)

Here, the area of general law that operates to preempt the County's ban on firearms in County parks without exception for Carry License holders is Carry License regulation, an area that is heavily, if not entirely, regulated by a comprehensive state scheme. And, as described below, that scheme does *not* contemplate further municipal regulation.

Arguing that the Carry License scheme is not "couched in terms" that do not tolerate further local action, the County points to Penal Code section 26200, which authorizes issuing authorities to place "reasonable restrictions or conditions" on Carry Licenses. (R.B. at p. 11.) The County cavalierly states that "[i]t would make no sense to allow" a county sheriff to

prohibit Carry License holders from carrying in county parks, but to prohibit a county board of supervisors from doing the same. (R.B. at p. 11.) But really, it makes perfect sense.

An issuing authority, like a sheriff or police chief, is better positioned to determine the varying needs of specific licensees; for example, whether they need to carry a firearm in all versus in only select locations. Because the County Board of Supervisors cannot be so adaptive, it makes sense for the Legislature to do it this way. This is why the Legislature also entrusts the issuing authority to determine whether a Carry License applicant has "good cause" or is of sufficiently "good moral character" for such a license.

What does not make sense is the County's suggestion that the Legislature would have couched the state's Carry License issuance scheme in terms providing the "sheriff" or the "chief of police" complete control to evaluate applicants' eligibility for a Carry License under those state criteria or to impose restrictions on a license, if it intended to permit municipal intervention – especially when, as explained on page 16, the Legislature knows how to clearly allow municipal regulation of a field.

Simply put, the *state* Legislature did *not* delegate the power to place restrictions on *state* Carry Licenses to local boards of supervisors or city councils. It expressly delegated that power only to sheriffs and chiefs of police, Penal Code section 26200, subdivision (a) – who, for the purpose of issuing Carry Licenses, are *state* (not local) actors.[8] As such, the County's observation that section 26200 "specifically contemplates *local* restrictions on concealed weapons licenses" is inaccurate. (See R.B. at p. 11, emphasis added.) Because the issuing authority is a *state* actor and because only the issuing authority can impose further restrictions on Carry Licenses, any further restrictions imposed are more precisely considered *state* restrictions. As such, the state Carry Licensing scheme does not contemplate additional *local* regulation in the way that state gun show laws do. (Compare to *Great Western*, *supra*, 27 Cal.4th at p. 866, and *Nordyke*, *supra*, 27 Cal.4th at p. 875 [where both cases considered the preemptive effects of state gun show regulations that affirmatively authorized further local regulation of the field].)

Further, any restriction imposed on a Carry License *must* be

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[8] See pp. 15-16, *supra*.

indicated on the issued license. (Pen. Code, § 26200, subd. (b).) The requirement that restrictions appear on the license preclude the imposition of restrictions appearing elsewhere. Restrictions, like the challenged ordinance, passed by local governments exist in the massive code books of each individual locality, separate and apart from the issued Carry Licenses.

The third category of implied preemption – the adverse effect of local regulation on transient citizens – likewise establishes the Legislature's implicit manifestation of its intent to fully occupy the area of Carry License regulation to the exclusion of further local action. Specifically, the challenged ordinance, and the many others like it, bar the possession of firearms in county parks and wilderness spaces – places that *attract* citizens from around the state to camp, hike, bike, ride horses, and photograph or watch wildlife. These are public places that because of dangerous animals and other threats often necessitate the carry of firearms for self-protection.

If local governments, rather than issuing sheriffs or chiefs of police, are permitted to enact further restrictions or conditions on Carry Licenses, visiting Carry License holders will be confronted by a patchwork quilt of different firearm restrictions each time they enter another jurisdiction to

enjoy the county parks. (Cf. *Great Western*, *supra*, 27 Cal.4th at p. 867 [where court found prohibiting sales of arms on county-owned fairgrounds had "very little impact on transient citizens"].) To prevent widespread confusion, any time, place, and manner restriction must be on the face of the issued Carry License, Penal Code section 26200, subdivision (b), not simply within the code books of the various cities and counties. That way, each licensee knows precisely which restrictions affect his or her Carry License.

For the foregoing reasons, the state has impliedly occupied the entire field of Carry License issuing and regulation and County Ordinance section 3.68.080 is thus preempted by state law.

III. THE COUNTY OVERSTATES THE IMPORTANCE OF THE CASE LAW IT RELIES ON TO SUPPORT ITS CLAIM THAT COURTS ARE PARTICULARLY RELUCTANT TO FIND LOCAL FIREARMS REGULATIONS PREEMPTED

The County relies heavily on two cases to support its claim that courts are reluctant to find local regulations preempted "*especially* in the area of gun regulation." (R.B. at p. 7, citing *Great Western*, *supra*, 27 Cal.4th at p. 861; *Nordyke v. King* (2002) 27 Cal.4th 875, 880, 883 fn.1.)

But the County overstates the importance of both decisions.

In *Great Western Shows v. County of Los Angeles*, the county sought to halt the gun shows by banning the sale of guns and ammunition at the Los Angeles County Fairgrounds. (27 Cal.4th at p. 859.) In *Nordyke v. King*, the county sought to ban possession of firearms at gun shows held at its fairgrounds. (27 Cal.4th at pp. 880-881.)The specific and narrow issues were stated unambiguously by the California Supreme Court at the outset of both opinions.

The issues in *Great Western* were defined as follows:

1. Does state law regulating the sale of firearms and gun shows preempt a county ordinance prohibiting gun and ammunition *sales* on county property?

2. May a county, consistent with article XI, section 7 of the California Constitution, regulate the *sale* of firearms on its property located in an incorporated city within the borders of the county?

(27 Cal.4th at p. 858, emphasis added.) The Court sharply rephrased the first question: "Does state law *compel* counties to allow their property to be used for *gun shows* at which guns and ammunition are sold?" (*Ibid.*, second emphasis added.)

The California Supreme Court's holding in *Great Western* was concomitantly narrow. As the opinion stated:

> [A] county has broad latitude under Government Code section 23004, subdivision (d), to use its property, consistent with its contractual obligations, "as the interests of its inhabitants require." . . . the County is not compelled to grant access to its property to all comers. Nor do the gun show statutes mandate that counties use their property for such shows. If the County does allow such shows, it may impose more stringent restrictions on the sale of firearms than state law prescribes.
>
> For all the above reasons, we conclude that the Ordinance is not preempted by the sale of firearms and/or ammunition on County property. We do not decide whether a broader countywide ban of gun shows would be preempted.

(*Great Western*, *supra*, 27 Cal.4th at p. 870.) The court in *Great Western* based its decision not only on the county's discretion to use its property for commercial purposes to suit its needs, but also on language in the state gun show statutes *expressly contemplating additional local regulation.* (*Id.* at p. 866 [noting that state gun show regulations "expressly anticipate the existence of 'applicable local laws' "].)

As in *Great Western*, the court in *Nordyke* was faced with a narrow issue of first impression. The question certified for review was stated by the California Supreme Court at the outset of that opinion as follows: "Does

state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" (*Nordyke*, *supra*, 27 Cal.4th at p. 880.) As it did in *Great Western*, the court in *Nordyke* relied heavily upon the county's statutorily recognized authority to regulate commercial activities on its property. (*Id.* at p. 882.) The court answered the narrow issue presented with the following equally narrow holding:

> We further conclude that under California Government Code section 23004, subdivision (d), a county is given substantial authority to manage its property, including the most fundamental decision as to how the property will be used, and that nothing in the gun show statutes evince an intent to override that authority. The gun show statutes do not mandate that counties use their property for such shows. . . . In sum, whether or not the Ordinance is partially preempted, Alameda County has the authority to prohibit the operation of gun shows held on its property and, *at least to that extent*, may ban possession of guns on its property.

(*Id.* at pp. 882-885, emphasis added.) To the extent *Nordyke* considers the preemptive effects of Penal Code section 26150, it is little more than footnoted dicta. (*Id.* at p. 883, fn. 1.) Indeed, the *Nordyke* court recognized that the local ordinance at issue there included an exception allowing possession by persons issued Carry Licences pursuant to section 26150 –

precisely the relief Appellants seek here. (*Id.* at p. 881.)

In short, both *Great Western* and *Nordyke* stand only for a narrow proposition that state gun show regulations – *which expressly contemplate additional local regulation* – do not preclude local governments from banning the sale or possession of firearms and ammunition *at gun shows* on county-owned public property. Neither case addressed the validity of such laws beyond the limited context of the facts presented. And neither stands for the very broad propositions that courts should be particularly loath to find local firearms regulations preempted or that the Legislature intended *not* to preempt local firearms regulation. (R.B. at p. 8.)[9] Such would be antithetical to the express provisions of California state law (i.e., Penal Code section 25605 and Government Code section 53071) and would make little sense in light of this Court's analysis in *Fiscal* and its admonition that:

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[9] It is inaccurate to claim, as the County does, that "the Legislature specifically intended NOT to preempt local regulation." (R.B. at p. 8.) Indeed, there is more than one express statement by the Legislature indicating its intention to preempt certain gun regulations. As recognized in *Fiscal*, "the Legislature has never expressed an intent to preempt the *entire field* of firearm regulation to the exclusion of local control," but it *has* "chosen to preempt 'discrete areas of gun regulation.' " (158 Cal.App.4th at p. 905, quoting *Great Western*, *supra*, 27 Cal.4th at p. 861, emphasis added.)

> [W]hile courts have tolerated subtle local encroachment into the field of firearms regulation (*CRPA, Great Western, Nordyke*), laws which significantly intrude upon the state prerogative have been uniformly struck down as preempted (*Doe [v. City and County of San Francisco* (1982) 136 Cal.App.3d 509], *Sippel [v. Nelder]* (1972) 24 Cal.App.3d 173]). Therefore, when it comes to regulating firearms, *local governments are well advised to tread lightly.*

(158 Cal.App.4th at p. 19, citing *California Dreamin'* (1996) 30 U.S.F. L.Rev. 395, emphasis added.)

CONCLUSION

The County, like all localities, is constitutionally mandated to legislate subordinate to state law. In this case, it has not. By prohibiting Appellant from carrying a firearm in local areas pursuant to his state license, the County purports to impose its own restrictions on state Carry Licenses and disregard nearly twenty state statutes that evince it cannot. The Legislature has sought to prevent local governments from interfering with licenses related to firearms – but the County's ordinance does just that.

Accordingly, Appellants have stated a viable claim and the granting of a demurrer by the lower court was improper. As such, Amicus asks this Court to reverse the lower court's decision and remand for further proceedings.

Dated: April 2, 2013

MICHEL & ASSOCIATES, P.C.

By: C. D. Michel

C. D. MICHEL
Attorney for Amicus Curiae
National Rifle Association

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204, subdivision (c)(1), of the California Rules of Court, I hereby certify that the attached Amicus Curiae Brief is double-spaced, typed in Times New Roman proportionally spaced 13-point font, and the brief contains 6700 words of text, including footnotes, as counted by the WordPerfect word-processing program used to prepare the brief.

Dated: April 2, 2013

MICHEL & ASSOCIATES, P.C.

By: C. D. Michel

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

On April 2, 2013, I served the foregoing document(s) described as **APPLICATION OF NATIONAL RIFLE ASSOCIATION TO FILE AMICUS CURIAE BRIEF; [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CALGUNS FOUNDATION, INC., et al.** 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:

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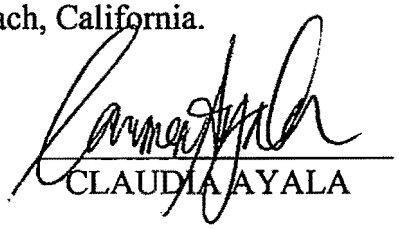
X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on April 2, 2013, at Long Beach, California.



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