No. A136092

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

CALGUNS FOUNDATION, INC., ET AL.

Plaintiffs and Appellants

v.

COUNTY OF SAN MATEO

Defendant and Respondent

Appeal from the Superior Court for the County of San Mateo,
No. CIV509185 (Hon. V. Raymond Swope)

RESPONDENT'S BRIEF

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I. INTRODUCTION

Since 1934, the County of San Mateo has had an Ordinance (now Section 3.68.080 of the County Ordinance Code) that prohibits possession of dangerous weapons in its parks, including firearms. Appellants claim that this Ordinance is invalid because it does not have an exception for persons who have been issued, by a County Sheriff, a license to carry a concealed firearm pursuant to Section 12050 of the Penal Code (re-numbered as of January 1, 2012 as Section 26150). They are mistaken.

The legal basis for Appellants' position has been something of a moving target. Initially, they alleged that the Ordinance is preempted by Section 12050 of the Penal Code. Superior Court Record at 3 (Verified Complaint at ¶ 2). In opposition to Demurrer, Appellants conceded that Section 12050 did not preempt the County Ordinance. Superior Court Record at 100 (Opposition to Demurrer at 1). Instead, Appellants asserted that the Ordinance is preempted by Section 53071 of the Government Code. Both of these arguments were addressed below in the trial court. The County argued and the trial court agreed that neither section preempts the Ordinance because the legislature has expressly indicated its intent not to preempt reasonable time, place or manner regulations of firearms, including regulations like the one at issue here. Put another way, by enactment of Section 53071 the legislature only preempted the field of firearms licensing and Ordinance Code Section 3.68.080 is not a licensing provision and does not invalidate a single license.

Now Appellants argue, for the first time on the appeal, that a different County Ordinance (Section 3.53.030) impliedly repealed Section

3.68.080. Because it was not raised below, this issue was waived. But even were it preserved, the two Ordinances are not in conflict. Section 3.68.030 is specific and deals only with County parks. Section 3.53.030 is a general section that deals with all County property.

II. STATEMENT OF THE CASE & PROCEDURAL HISTORY

Appellant Gene Hoffman is a resident of the County of San Mateo who has been issued a license by the San Mateo County Sheriff to carry a concealed firearm. Superior Court Record at 1 (Verified Complaint ¶¶ 4, 11). Gene Hoffman is the Chairman of the entity Appellant, Calguns Foundation, Inc., which describes its mission to be "supporting the California firearms community." Id. at ¶ 5.

Appellants filed their lawsuit in October 2011 and seek solely a declaration "that the San Mateo Ordinance forbidding possession of guns in its parks and recreational areas, to the extent that it does not provide an exception for persons licensed to carry a firearm under Penal Code § 12050, is preempted by state law and therefore void" and "injunctive relief consistent with the declaratory judgment[] granted above. Remedies would include but [sic.] be limited to a moratorium on enforcement of the ordinance and/or certain provisions. Superior Court Record at 1 (Verified Complaint ¶¶ 17, 19).

The County filed a demurrer to the Complaint on December 15, 2011, with a Request for Judicial Notice. Superior Court Record at 25 (Demurrer), 40 (Request for Judicial Notice). As described above, the Demurrer was based on the County's position that its Ordinance is not preempted. Plaintiff filed a brief opposition on April 5, 2012. Superior Court Record at 100 (Opposition). As described above, Appellants raised a

new theory of preemption (Section 53071) not found in its Complaint. The County filed a reply on April 17, 2012. Superior Court Record at 162 (Reply Brief). As indicated above, on July 10, 2012 the trial court sustained the Demurrer and entered a judgment dismissing the action on the ground that Section 3.68.080 is not preempted as a matter of law. Superior Court Record at 198 (Order Sustaining Demurrer), 201 (Judgment of Dismissal).

III. FACTUAL STATEMENT

As noted above, the individual plaintiff/appellant, Gene Hoffman, is "licensed under state law to carry a loaded and concealable firearm on [his] person pursuant to the California Penal Code § 12050." Superior Court Record at 3 (Complaint ¶ 4). He claims to regularly enjoy San Mateo County parks. *Id.* He is the Chairman of the entity defendant/appellant, Calguns Foundation, Inc. *Id.*

As referenced above, Appellants challenge County Ordinance Section 3.68.080, which does generally prohibit possession of all dangerous weapons in County Parks. Section 3.68.080(o) provides as follows:

> 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.

Superior Court Record at 40 (Request for Judicial Notice Exhibit A) (Title 3 Public Safety, Morals & Welfare, Chapter 3.68 County Park & Recreation Rules, Section 3.68.080 General Protective Regulations).[1] A prohibition substantively identical to that of Section 3.68.080(o) was first adopted by the County of San Mateo back in 1934. Superior Court Record at 40 (Request for Judicial Notice Exhibit E) (Ordinance 415).[2] It is of note that Section 3.68.080(o) is not limited to firearms—it prohibits all dangerous weapons—and makes no express reference to concealed weapons. Further it is of note that while Appellants observe in their Complaint that violation of Section 3.68.080 is a misdemeanor they do not allege that they or any other person has ever been charged with a violation of it. Finally, this prohibition on firearms is not uncommon—similar ones can be found in many other jurisdictions. *See, e.g.*, Superior Court Record at 40 (Request for Judicial Notice Exhibits B, C & D) (Santa Clara County Ordinance Code Sec. B14-31.1. - Firearms and Weapons; Los Angeles County Ordinance Code 17.04.620 - Firearms and Other Weapons; Daly City Ordinance Code 12.36.050 - Prohibited Acts.).[3]

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[1] Subsections (p) and (q) address shooting ranges and archery ranges. There are other additional exceptions not relevant to this litigation.

[2] Ordinance 415 (1934) provided that in County recreation areas, "[i]t shall be unlawful for any person to have firearms in their possession." It is interesting that the earliest version of Section 12050/26150 of the Penal Code was enacted almost 20 years later. The County has filed a request for judicial notice of Ordinance 415 concurrently herewith.

[3] A review of Appellants' appendix, the validity of which the County has not verified, indicates that more than half the counties in California have Ordinances that would be invalid if the Court of Appeal adopts Appellants' position.

IV. ARGUMENT

The Supreme Court succinctly set-out the standard governing review of demurrers in *Blank v. Kirwan* as follows:

> In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. We also consider matters which may be judicially noticed. Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. The burden of proving such reasonable possibility is squarely on the plaintiff. 39 Cal.3d 311, 318 (1985) (quotations and citations omitted)

A. Section 26150 Provides For Issuance Of A License To Carry A Concealed Firearm

Section 26150 of the Penal Code gives any county sheriff and municipal police chiefs (located within a county with a population exceeding 200,000) extremely broad discretion whether to issue licenses to carry a concealed firearm. *Gifford v. City of Los Angeles*, 88 Cal.App.4th 801 (2001); Section 26150. The Sheriff "may" issue a license if the person has completed a course of training and demonstrates that they are of good moral character and that there is good cause for issuance. Section 12050(a). A license may "include any reasonable restrictions or conditions

which the issuing authority deems warranted, including restrictions as to the time, place, manner, and circumstances under which the person may carry a pistol, revolver, or other firearm capable of being concealed upon the person." Section 26200. There is no language within Sections 26150, *et. seq.*, which remotely suggests an intent by the Legislature to preempt local regulation by legislative bodies of additional "time, place, manner" restrictions on concealed weapons.

Section 53071 is an express preemption clause within a comprehensive registration and licensing of firearms scheme that is silent with respect to the carrying of concealed weapons.

B. Courts Are Reluctant To Find Local Regulations Preempted

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. Art. XI, § 7. Whether a local regulation is in conflict, *i.e.*, preempted by state law is a pure question of law. *Jason Browne v. County of Tehama*, --- Cal.Rptr.3d ----, 2013 WL 441604 at p. 6 (February 6, 2013). The California Supreme Court in *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853 (2002) (holding that an ordinance sale of firearms on county property, even property within a City, is not preempted by California law) succinctly summarized the general principles governing preemption analyses as follows:

> If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith.

> Similarly, local legislation is contradictory to general law when it is inimical thereto.
>
> Finally, local legislation enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the 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.

Id. at 860-61 (quotations omitted).

The Court must presume, "absent a clear indication" to the contrary, that a local regulation is not preempted. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1149 (2006). And, the Courts are reluctant to find local regulations preempted, especially impliedly and especially in the area of gun regulation. *Garcia v. Four Points Sheraton LAX*, 188 Cal.App.4th 364, 374 (2010); ("We are reluctant to invoke the doctrine of implied preemption. Since ***preemption depends upon legislative intent***, such a situation necessarily begs the question of why, if preemption was legislatively intended, the Legislature did not simply say so, as the Legislature has done many times in many circumstances… Indeed, preemption will not be implied where local legislation serves local

purposes, and the general state law appears to be in conflict but actually serves different, statewide purposes.") (emphasis added); *Nordyke v. King*, 229 F.3d 1266 (9th Cir. 2000) ("The California cases teach that when examining the preemption issue in the field of gun control, courts are to look narrowly at the specific conduct at issue."). Finally, the party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. *Jason Browne v. County of Tehama*, --- Cal.Rptr.3d ----, 2013 WL 441604 at p. 6 (February 6, 2013).

It was unclear from the Complaint, and Appellants, to date, have not indicated what theory of preemption they are advancing so all of the factors considered by the courts will be addressed briefly below. However, it is of note that courts have repeatedly explained that, with respect to firearms, the Legislature specifically intended NOT to preempt local regulation. *Great Western*, 27 Cal.4th at 861. More important, only one case has ever directly addressed the preemptive effects of Section 12050/26150. In that case, *Nordyke v. King*, the Supreme Court addressed a question certified to it by the Ninth Circuit Court of Appeals: "Does state law regulating the possession of firearms and gun shows preempt a municipal ordinance prohibiting gun possession on county property?" 27 Cal.4th 875, 880 (2002). The Supreme Court held that the ordinance was not preempted. *Id.* In so holding, it specifically concluded that Section 12050/26150 does not prevent local public entities from prohibiting possession of firearms on public property.[4] It explained:

[4] The Supreme Court's analysis of this issue is arguably *dicta*. Earlier in the opinion, the Supreme Court observed that the ordinance at issue had a "carve-out" for persons issued licenses pursuant to Section 12050/26150 of the Penal Code. *Nordyke*, 27 Cal.4th at 881 (2002)

> The dissent contends that Penal Code sections 12031, 12050, and 12051 conflict with the Ordinance, apparently based on the presumption that these and other state statutes preempt the field of gun possession to such an extent that they impliedly prohibit counties from regulating gun possession on their own property. As explained more fully in *Great Western*, however, the Legislature has not indicated an intent to so broadly preempt the field of gun regulation. (See also Pen.Code, § 12050, subd. (b) [gun licensing subject to reasonable local time, place, and manner restrictions).

Nordyke, 27 Cal.4th at 883 n.1.

1. Section 3.68.080 does not duplicate or contradict Penal Code Section 53071

A local ordinance can only duplicate or contradict state law if it addresses the exact same subject matter of the state law. *Great Western*, 27 Cal.4th at 860 & 861 & 866 (discussing *Galvan v. Superior Court*, 70 Cal.2d 851 (1969) and explaining that in *Galvan* "we distinguished between licensing, which signifies permission or authorization, and registration, which entails recording 'formally and exactly' and therefore declined to find express conflict between the statute and the ordinance.") (explaining that in order to contradict state law a regulation ***must*** "***mandate what state law expressly forbids, [or] forbid what state law expressly mandates.***") (emphases added). Section 3.68.080 addresses a completely different and more general subject than Section 12050/26150 of the Penal Code and Section 53071 of the Government Code—weapons in parks. Section 53071, as described above, relates to licensing generally. With respect to Section 12050/26150, it sets out a process, by which local law enforcement official can issue licenses to carry concealed weapons.

Section 3.68.080 has nothing to do with licensing. It does not prevent individuals from obtaining licenses. Nor does it prevent a law enforcement official from issuing a license. Nor does it purport to create new or different requirements for obtaining a license. All it does is prohibit non-public officials from bringing dangerous weapons onto specific County property: parks. As the Supreme Court in *Nordyke* explained: "[t]he Ordinance does not duplicate the statutory scheme. Rather, it criminalizes possession of a firearm on county property, whether concealed, loaded or not, and whether the individual is licensed or not. Thus, the Ordinance does not criminalize precisely the same acts which are prohibited by statute." *Nordyke*, 27 Cal.4th at 883-84 ("the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property."); s*ee also Great Western*, 27 Cal.4th 869 ("Government Code section 23004, subdivision (d), gives a county the authority to manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require. To "manage" property must necessarily include the fundamental decision as to how the property will be used.").

2. Section 12050/26150 of the Penal Code and Section 53071 of the Government Code do not impliedly preempt Section 3.68.080

In upholding the County of Los Angeles' prohibition against gun sales on county property, the *Great Western* case also provides significant guidance on why implied preemption should be rejected in our case. First, it quickly disposed of the first and second implied preemption factors ("general law occupying the field" and "legislation couched in terms

indicating no tolerance of local regulation"), extensively reviewing the precedential history and legislative history of gun regulation and explaining that "[a] review of the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun regulation rather than the entire field of gun control." *Great Western*, 27 Cal.4th at 861. Like the gun possession legislation addressed in *Great Western*, Section 12050/26150 is not a general law and does not speak to regulation of dangerous weapons on public property. Section 12050/26150 is also not "couched in terms" that indicate that the Legislature would not tolerate local action. Rather, the inclusion of Section 12050(b)/26200, is directly to the contrary. As the Supreme Court observed in *Nordyke*, that sub-section specifically contemplates local restrictions on concealed weapons licenses. Section 12050(b)/26200 ("a license may include any reasonable restrictions or conditions…including restrictions as to the time, place, manner and circumstances under which the person may carry a pistol"). It would make no sense to allow a local law enforcement official in Sacramento issuing licenses to prohibit licensees to carry concealed weapons in Sacramento County parks, but not allow the County of San Mateo Board of Supervisors to include a similar prohibition with respect to County parks.

The Supreme Court's analysis of the third (and final) category of implied preemption (adverse effect on transients) is also dispositive. *See Great Western*, 27 Cal.4th at 867 (explaining that with respect to gun regulation, "there is a significant local interest to be served that may differ from one locality to another.") ("laws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges.").

Great Western's analysis, and that of the prior precedent it approved, is no doubt why almost every case that has addressed arguments of California law preemption has concluded that local firearm regulation is not preempted. *Galvan*, 70 Cal.2d 851 (holding that a firearm local regulation requiring firearm registration was not preempted by California gun laws) (superseded by statute); *Olsen v. McGillicuddy*, 15 Cal.App.3d 897 (1971) (holding that a prohibition on possession of "BB" guns by minors was not preempted by California gun laws) (superseded by statute); *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal.App.4th 1302 (1998) (holding that a local regulation banning "Saturday Night Specials" was not preempted by California gun laws) ("[T]he Legislature has studiously avoided comprehensive preemption of such local laws despite several legislative opportunities to enact a complete preemption."); *Suter v. City of Lafayette*, 57 Cal.App.4th 1109 (1997) (holding that local regulation limiting where gun stores could locate was not preempted by California gun laws)[5]; *Olsen v. McGillicuddy*, 15 Cal.App.3d 897 (1971). This is especially true of regulation like that here, which is focused on county property because, as the Supreme Court in *Nordyke* recognized, counties have been given almost unlimited discretion to regulate activity on their own property.

The County has located only two somewhat recent cases that have found local firearm-related regulation to be preempted and both are easily distinguishable because both deal with complete prohibitions of firearms that had the effect of invalidating licenses. In *Doe v. City and County of*

[5] A very small portion of the regulation at issue in *Suter* (dealing with firearm storage) was found to be preempted.

San Francisco, 136 Cal.App.3d 509 (1982) the Court of Appeal found preemption of a city regulation that prohibited firearms possession unless the person first obtained a Penal Code Section 12050 license. The Court of Appeal concluded that this regulation was expressly preempted by Section 53071 of the Government Code and 12026 of the Penal Code because those Sections prohibited local licensing of firearms and forbid requiring a license for someone to have a firearm in their home or business. *Doe* is distinguishable both because our Section 3.68.080 is not a licensing requirement and because it does not affect the right of a person to have a firearm in their home or business. In *Fiscal v. City and County of San Francisco*, 158 Cal.App.4th 895 (2008) the Court of Appeal found preemption of a city regulation that prohibited possession and sale of handguns within the City. *Id.* at 906 ("With narrow exceptions, Section 3 of Prop. H bans the possession of handguns by San Francisco residents, including handgun possession within the sanctity of homes, businesses, and private property."). Again, the Court of Appeal found the complete prohibition of possession preempted by Section 12026 and Section 53071 for functionally the same reasons, *i.e.*, Section 12026 and 53071 evince an intent to preempt regulation that totally bans handgun ownership, rejecting the city's argument that *Doe* was wrongly decided. Accordingly, *Fiscal* is similarly easily distinguished. *Id.* at 915, 908 ("The City is not simply imposing additional restrictions on state law to accommodate local concerns; but instead, it has enacted a total ban on an activity state law allows. This difference was recognized in *Great Western*, which noted that total bans are not viewed in the same manner as added regulations, and justify greater scrutiny.") ("Given the presumption of the Legislature's awareness of *Doe* during the three times it has reenacted Penal Code

section 12026 since the *Doe* decision, 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 12026.").

Finally, the recent amendment to Section 12050 is significant. As Plaintiff alleges in the Complaint, Penal Code Section 12050 has been repealed as of January 1, 2012 and replaced with Section 26150. The Legislature, presumably aware of the Supreme Court's conclusion in *Nordyke* back in 2002 that Section 12050 did not preempt prohibitions of firearms on public property and the numerous public entities that have prohibitions on firearms in parks, could easily have taken the opportunity when recodifying the Section to explicitly preempt such regulations. Its failure to do so is a strong indication that it did not intend to (impliedly) preempt them. *Great Western*, 27 Cal.4th 862 (explaining that the legislature's failure to explicitly preempt gun regulation when given an opportunity to do so, further undermines an argument for implied preemption) ("Thus once again the Legislature's response was measured and limited, extending state preemption into a new area in which legislative interest had been aroused, but at the same time carefully refraining from enacting a blanket preemption of all local firearms regulation.") (*citing Olsen, supra*).

C. The County Did Not "Implicitly Repeal" Section 3.68.080

As referenced above, Appellants now argue for the first time on appeal that the County impliedly repealed Section 3.68.080 by enacting Section 3.53.030, which deals generally with County property. This theory was not raised below, even in passing; accordingly it has been waived.

Nelsen v. Legacy Partners Residential, Inc., 207 Cal.App.4th 1115, 1136 (2012) ("[A]s a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal.) (citation omitted).

In addition, Appellants do not cite any cases that support the proposition, that one municipal ordinance can impliedly repeal another. *Compare City of Irvine v. Irvine Citizens Against Overdevelopment*, 25 Cal.App.4th 868, 878 (1994) (suggesting that ordinances cannot be impliedly repealed in the referendum context) (citing *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531 (1990) for the proposition that "Implied amendments or repeals by implication are disfavored in any case[.]")). The only case cited by Appellants on their implied repeal theory is *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal.4th 783, 805 (2012), which deals with implied repeal of state statutes.

In any event, the County did not impliedly repeal Section 3.68.080. The Court of Appeal in *Pacific Palisades* provided the standard for finding implied repeal of state statutes as follows:

> A court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. This rule applies although one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject. Thus, when two codes are to be construed, they must be regarded as blending into each other and forming a single statute. Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof. Further, all presumptions are against a repeal by implication. Absent an express declaration of legislative intent, we will find an implied repeal only when there is no

> rational basis for harmonizing two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. *Id.* 805.

Section 3.68.080 as described above, is part of a regulatory scheme dealing solely with County parks and prohibits all dangerous weapons in County parks. In contrast, Section 3.53.010 deals generally with firearms on other County property. The two can be harmonized easily by interpreting Section 3.53.010 not to apply to activity in County parks. *Lake v. Reed*, 16 Cal.4th 448, 464 (1997) ("a more specific statute controls over a more general one"); *see also Gray v. County of Madera*, 167 Cal.App.4th 1099, 1129-1130 (2008) (noting that counties are entitled to deference to their interpretation of their own ordinances). The Board of Supervisors might have rationally concluded that concealed firearms are more dangerous in County parks then in County buildings. For example, a person who has an irrational fear of mountain lions and a concealed handgun might shoot at the sign of rustling leaves (caused either by the wind or by children playing or by hikers concealed from view) in a park and hit an innocent bystander. That risk does not exist in a County building. Alternatively, the Board of Supervisors might have been rationally concerned that animal poachers might carry concealed weapons into parks and claim that the weapons are for protection when confronted by authorities. Similarly, the Board of Supervisors might have concluded that the risk of unauthorized discharge of concealed firearms, generally, is much higher in its parks than in other public spheres.

It is of note that Appellants imply that the County's prohibition of dangerous weapons in parks, without an exception for concealed weapons,

is irrational because California's Gun-Free School Zones Act of 1995 has certain exceptions. This argument is misleading. That Act does not have the exemption that Appellants claim the County should have in Chapter 3.68. That Act has exemptions for those transporting weapons as part of a firearms business (Penal Code Section 25615), parades (Penal Code Section 25625), guards for common carriers who are transporting valuable goods (Penal Code Section 25630) and firearms transporters (Penal Code Section 25645). The Gun-Free School Zones Act of 1995 does not have an exemption for anyone who has a concealed weapons permit and the exemptions the Act does have make perfect sense in a school context.

Finally, Appellants make passing referring to "fundamental rights" and the Second Amendment, without explain how or why the Second Amendment affects the argument that the County impliedly repealed its own Ordinance. Appellants' Opening Brief at 16. Appellants have been clear that they are not attacking the Constitutionality of Section 3.68.080. Appellants' Opening Brief at 8. So it appears that Appellants are arguing that the County must have intended to impliedly repeal Section 3.68.080 because the County must have known that Section 3.68.080 would be vulnerable to attack under the Second Amendment. But as the County is unaware of any California or Ninth Circuit case that even remotely suggests that a person has a fundamental right to carry a concealed weapon wherever he or she wants to, including public parks, and as Chapter 3.53 (the Chapter that Appellants claim impliedly repeals Section 3.68.080) was adopted in 2002 (six years before *Heller* (holding that the Second Amendment was a personal right) and eight years before *McDonald* (holding that the Second Amendment is applicable to the States)) this argument makes absolutely no sense.

V. CONCLUSION

For the foregoing reasons, the County asks that the decision of the Superior Court, sustaining the County's demurrer, be affirmed.

Dated: March 1, 2013

Respectfully submitted,

JOHN C. BEIERS, COUNTY COUNSEL

By: _____

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COUNTY OF SAN MATEO

BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.360(b)(1) OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.360(b)(1) of the California Rules of Court I certify that Defendant and Respondent, County of San Mateo's Respondent's Brief is proportionately spaced, has a typeface of 13 points or more and contains 4,666 words.

Dated: March 1, 2013

David A. Silberman, Deputy

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PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On March 1, 2013, I served the following document(s):

RESPONDENT'S BRIEF AND RESPONDENT'S REQUEST FOR JUDICIAL NOTICE AND PROPOSED ORDER

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

[X] (BY FEDERAL EXPRESS) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with this office's practice. I am readily familiar with this office's practice for processing correspondence for delivery the following day by Federal Express.

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

MARTA R. HERNANDEZ

Calguns Foundation, Inc., et al. v. County of San Mateo –
Case No. A136092

NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

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