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October 10, 2013

Honorable Tani Cantil-Sakauye, Chief Justice
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797
VIA HAND DELIVERY

Re: Amicus Curiae in Support of Review (Cal. Rules of Court, Rule 8.500, subd. (g))
Calguns Foundation, Inc. v. County of San Mateo,
Supreme Court Case No. S212356, Court of Appeal Case No. A136092

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.500(g), the National Rifle Association ("NRA") as Amicus Curiae, submits this letter in support of the petition for review of *Calguns Foundation, Inc., et al. v. County of San Mateo*, Court of Appeal Case No. A136092 ("the Opinion"). A copy of the Court of Appeal's published decision in this case is attached.

Should the Petition for Review be denied, the NRA respectfully asks this Court to grant Appellant Calguns Foundation's request for depublication of the Opinion.

I. INTEREST OF THE NRA

The National Rifle Association was formed in 1871 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. 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. 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 constitutional rights concerning self-defense.

The NRA has extensive experience litigating firearms-related cases at both the national and state levels and monitors relevant litigation in order to address various firearms issues and to inform the courts on matters of public importance as amicus curiae. The NRA, having identified this case as

being of particular concern in interpreting the current licensing system of firearm possession in California and its handling of the state preemption doctrine, submitted an amicus curiae brief in the court below that was heavily and inaccurately addressed in the Opinion. As such, the NRA has a particular interest in the posture of this case.

II. THE COURT SHOULD GRANT REVIEW OR, ALTERNATIVELY, DEPUBLISH THE COURT OF APPEAL'S OPINION

The Court of Appeal held that no state law preempts the ordinance, either expressly or impliedly, thereby upholding the County's total ban on the possession of firearms in county parks and recreation areas. (Op. at p. 4, July 15, 2013.) However, the Opinion's incomplete analysis misapplies existing preemption doctrine, purports to address principle arguments raised by amicus but ultimately ignores them, misconstrues existing case law, and ultimately frustrates the intent of the Legislature with regard to the licensing of public firearm possession.

For these reasons, discussed further below, the Court should grant review or, alternatively, grant Appellants' request for depublication of the Court of Appeal's opinion in this matter.

A. The Opinion Muddles the Preemption Analysis

The California Constitution explicitly notes that a county or city must take care not to fall "in conflict with general laws." (Cal. Const. Art. XI,§ 7.) Courts have long interpreted this as a limitation on local government's ability to interfere with the proper operation of state law through local legislation. (*Agnew v. City of Los Angeles* (1958) 51 Cal.2d 1.) In doing so, courts have looked into whether a local ordinance "*duplicates*, *contradicts*, *or enters an area fully occupied* by general law, either expressly or by legislative implication." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.)

In misapplying the above analysis, and in direct conflict with the decision in *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 903 (*Fiscal*), the Opinion holds that San Mateo County Ordinance section 3.68.080 ("the Ordinance"), which totally bans the carrying of firearms pursuant to a properly issued license in county parks, is not preempted by state law. This conclusion defies state law governing the licensing and carrying of firearms in California, which necessitates a finding that the Ordinance is preempted by state law.

For this reason, and for the additional reasons discussed in detail below, the Court should grant review or depublication.

1. The Opinion Misapplies the Express Preemption Analysis Laid Out in *Fiscal v. City and County of San Francisco*

"[W]here the Legislature has manifested an intention, expressly or by implication, wholly to occupy the field . . . municipal power [to regulate in that area] is lost." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 904, quoting *O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1067 [*O'Connell*].)

Government Code section 53071 employs broad language to expressly prohibit all local regulations "*relating to* registration or licensing of commercially manufactured firearms."[1] *Fiscal* is helpful in defining the way section 53071 limits the power of local governments to regulate firearms. There, the Court of Appeal held that a local law prohibiting handgun possession in San Francisco would have the minimum effect of invalidating "all licenses possessed by City residents to carry a concealed weapon issued under Penal Code section 12050 [26150], and [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, emphasis added.)

The Opinion, in the present case, while noting that the ordinance in *Fiscal* was clearly preempted by state law because it "related" to the state's regulatory scheme of licensing the carrying of firearms, purports to distinguish the cases. (Opinion at pp. 13-17.) The Opinion finds that the total ban on handgun possession by patrons of San Mateo public parks challenged here is a "subtle, local encroachment" not equivalent to San Francisco's city-wide ban on handgun possession that would "completely frustrate a broad, evolutional statutory regime enacted by the Legislature." (Opinion at p. 14, quoting *Fiscal*, 158 Cal.App.4th at pp. 910-11, 919). Ultimately, the Opinion notes that it is within a local government's power to control the use of its property, and that the public park ban falls within "an area of significant local interest that differs from one locality to another, such as land use regulations." (*Id.* at p. 5.)

This mischaracterization of the Ordinance, however, is where the Opinion first falters. The Ordinance is not merely a land use regulation, but a command that effectively bars licensees from engaging in conduct they are affirmatively authorized to engage in under state law. Indeed, its total ban on possession of handguns on park property is as absolute and straightforward as San Francisco's total ban on handguns within city limits, albeit somewhat more limited in scope.

By enacting a total ban on handgun possession in parks, even for those individuals who have met the stringent licensing requirements of state law and have been licensed to carry firearms in public, the County is not merely regulating the use of its land, it is suspending any and all state licenses to carry a concealed firearm by park-goers. That the licenses may be enjoyed elsewhere does not change the analysis. The *Fiscal* court held as it did even though San Francisco residents' licenses remained valid outside the city. (See Section II.C., *infra*.)

In any event, because section 53071 expressly preempts any local regulation even *relating* to the licensing of firearms, it necessarily operates to preempt far more than just total bans on firearm possession. As the *Fiscal* court correctly noted, any " 'local regulation that invalidates existing licenses, but does not affirmatively create new licensing schemes, "relates" to the state's regulatory scheme of licensing firearms' and, consequently, is expressly preempted by Government Code section

[1] Government Code 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."

53071." (*Fiscal*, *supra*, 158 Cal.App.4th at p. 910.) The Ordinance directly affects a firearm license issued pursuant to Penal Code section 26150 or 26155 by rendering it void while in any County public park. By definition, any restriction on where a license can be enjoyed "relates" to the license. Because it relates to a firearm license, the Ordinance is expressly preempted by Government Code section 53071.

The Opinion, in direct conflict with the analysis and outcome of *Fiscal*, disagreed. In so holding, the Opinion creates confusion both for local governments in formulating and passing new firearm ordinances and for lower courts in weighing the preemptive effect of section 53071 on those laws. The Court should grant review of the Opinion and reaffirm the importance of section 53071 in protecting the state's superior interest in all firearm licensing matters, an interest which was correctly recognized in *Fiscal*.

2. The Opinion Sows Confusion Regarding the "Contradiction Preemption" and "Implied Field Preemption" Arguments

The Court should grant review in order to resolve the Opinion's confusing treatment of the "contradiction preemption" and "implied field preemption" arguments raised by the NRA's amicus brief.

It is well established that local ordinances contradicting state law are preempted and void. (*O'Connell*, *supra*, 41 Ca1.4th at pp. 1061, 1067-1068.) The NRA argued extensively that the County's ordinance contradicted California's handgun-carry-license scheme by restricting license holders from engaging in activity that state law expressly authorizes them to engage in. (NRA Amicus Br. at pp. 11-16.) In fact, this was the NRA's primary argument. (See *id.* at pp. 4, 11 ["First and foremost, because the County's ordinance clearly contradicts state law, it must be stricken as preempted." "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."].)

Despite the NRA expressly and repeatedly making "contradiction preemption" the focus of its argument, the appellate court inaccurately described "NRA's principal argument" as one of "implied field preemption." (Opinion at p. 11.)[2] The court ultimately ignored the NRA's actual main argument, while nevertheless summarily rejecting it. This conflation of doctrines, if allowed to stand, is likely to confuse future courts faced with such an argument and invites the issue to be re-litigated for clarification.

Curiously, while ignoring the NRA's principal argument, the Opinion focused heavily on

[2] The *Fiscal* court held that, in addition to San Francisco's ordinance banning handgun possession being preempted because it entered a field of regulation both expressly and implicitly occupied by state law, it also stood "as an obstruction to the accomplishment and execution of the full purposes and objectives of the legislative scheme regulating handgun possession. For that *further* reason, it is preempted." (*Fiscal*, *supra*, 158 Cal.App4th at p. 911, citing *Sherwin-Williams*, *supra*, 4 Cal.4th at pp. 897-898, emphasis added.) Contradiction preemption is thus a separate and distinct doctrine from "field occupation preemption."

rejecting the NRA's secondary arguments, including its "implied field preemption" argument. Notwithstanding that the appellate court's analyses were erroneous, its dispositive rulings on the NRA's arguments were improper in light of well-accepted notions of judicial restraint.

Significantly, neither party raised the issues of contradiction preemption or implied preemption at the trial court, opting to focus on express preemption by Government Code section 53071. As a result, the trial court had no opportunity to consider and weigh the merits of those arguments. And, although both issues were raised in the NRA's amicus brief on appeal, neither party gave the contradiction or implied preemption analyses fair consideration in their briefs. Such was a reasonable strategic decision for the parties to make, but the appellate court, having neither argument properly before it, should have refrained from definitively deciding those issues in a published opinion, binding on other courts that may have the issues genuinely before them.

Appellate courts are generally not supposed to consider arguments from amici that were not raised by the parties. (*Cal. Assn. for Safety Ed. v. Brown* (1994) 30 Cal.App.4th 1264.) Yet, the appellate court went out of its way to address arguments the NRA made as an amicus and to foreclose them for future parties, even though those arguments were not presented by a party in this case.

The case being an appeal of a demurrer granted without leave to amend, the NRA Amicus Brief was submitted with the intent to inform the Court of Appeal that there were valid arguments that should have been considered by the trial court. There being alternative arguments to consider, Calguns Foundation should have been given, at minimum, an opportunity to amend its complaint to cure any perceived defect and allow the trial court to try those alternate theories. The Court of Appeal needlessly ruled on Amicus's substantive arguments without the benefit of full briefing on the issues. It should not have. The Opinion was simply not the proper avenue to attempt to hammer out the contours of California's contradiction or implied preemption doctrines.

B. The Opinion Misapplies and Misinterprets Carefully Circumscribed Case Law

The Opinion's emphasis on the County's right to regulate the use of their lands with regards to firearms, a power this Court has upheld in *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853 and *Nordyke v. King* (2002) 27 Cal.4th 875, misses the thrust of the Ordinance. The Opinion inaccurately equates the specific and narrow issue of a city's power to regulate the use of its land with the County's attempt, here, to nullify state-issued carry licenses held by visitors to County lands. Contrary to the Opinion's mischaracterizations, the types of regulations at issue in *Great Western* and *Nordyke* are starkly different from the Ordinance at issue here.

The Opinion no doubt focuses on these cases because they both touch upon firearms and issues of preemption. But that is where their similarities with *Calguns* end. Indeed, "[t]hese cases are *palpably* distinguishable from the case before us." *Fiscal*, *supra*, 158 Cal.App.4th at p. 917, emphasis added.

The ordinance challenged in *Great Western* prohibited the sale of firearms and ammunition on county property. (27 Cal.4th at p. 860.) The Court addressed a very narrow set of questions and held only that "State law does not preempt a county ordinance prohibiting gun and ammunition *sales* on county property," and "[a] county may regulate the *sale* of firearms on its property located in an

incorporated city within the borders of the county." (*Id*. at p. 873, emphasis added.) Importantly, the relevant state law expressly contemplated additional local regulation of firearms sales. (*Id.* at p. 866.) In this case, nothing in state law suggests that local governments have the power to enact further regulation affecting state-issued licenses to carry handguns in public. Indeed, Government Code section 53071 expressly prohibits it.

In *Nordyke*, the challenged ordinance made it a misdemeanor to bring or possess loaded or unloaded firearms or ammunition on county property. (*Nordyke*, *supra*, 27 Cal.4th at pp. 880-881.) The effect of the law was to prohibit gun shows from operating on the county's lands. (*Id.* at p. 882.) The only question the *Nordyke* court answered was "whether a county can prohibit possession of guns at gun shows held on its property." (27 Cal.4th at p. 884.) The court *expressly* declined to address any argument that section 26150 partially preempted the ordinance. (*Ibid.*) Interestingly, the challenged ordinance specifically exempted from the prohibition those persons holding valid firearms licenses pursuant to Penal Code section 26150. (*Id.* at p. 881.) This is precisely the sort of exception the *Calguns* Appellants complain the Ordinance lacks, which omission renders it preempted.

This Court in both cases was careful to confine its analysis to the specific preemption question before it – whether state law *authorizing* gun shows required that counties allow their property to be used for such purposes. (*Fiscal*, *supra*, 158 Cal.App.4th at pp. 917-918.) In its extensive discussion of *Great Western* and *Nordyke*, the Opinion ignores these vital factual and analytical distinctions , poisoning the appellate court's analysis. These cases, in fact, have very little in common with *Calguns* and should not have dictated its outcome.

The Opinion also cites two decisions cited favorably in *Great Western*: *California Rifle & Pistol Association v. City of West Hollywood* (1998) 66 Cal.App.4th 1302 (*CRPA*) and *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109 (*Suter*). While both cases "rejected claims that state law preempted local ordinances regarding gun control," the importance of these cases in guiding the analysis of *this* challenge to local gun control is overstated. (Op. at p. 6, fn 8.) These cases upheld the local power to restrict the sale of certain types of firearms (in *CRPA*) and to zone firearms businesses could (in *Suter*). Neither involved laws affecting state-issued licenses relating to firearms, and neither involved a prohibition on conduct the state expressly authorized the laws' challengers to engage in.

Moreover, the appellate court rejected the NRA's reliance on state licensing cases for support of its "contradiction preemption" argument because those cases did not involve firearm licenses, but state contractor licenses. (Op. at p. 11.) It then chastised the NRA for not addressing *Great Western* and *Nordyke* in its analysis. (*Ibid.*)[3] Certainly, the NRA brief did not analyze either case in its

[3] The appellate court also questioned the NRA's citation of *O'Connell*, *supra*, 41 Cal.4th 1061 and *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893 in its section laying out the guiding principles for analyzing preemption in California. (Op. at p. 11.) The NRA's choice to cite those watershed cases rather than *Great Western* and *Nordyke*, as the appellate court apparently would have preferred, is not really notable. Those cases, being two of the leading preemption authorities, are perfectly appropriate to cite for the simple recitation of preemption rule statements. Indeed, *Great Western*, *Nordyke*, and *Fiscal* all rely on *Sherwin-Williams* in doing the same.

"contradiction preemption" section, as neither concerned that issue.[4] The state contractor cases, on the other hand, do deal with contradiction preemption and, though the regulated subject matter differs, the effect of the state licensing scheme on local regulation should have been the same. The Opinion's insistence on applying the preemption analyses of only firearm-related cases, no matter how factually or doctrinally different, simply because firearms are involved, rather than applying the analyses of the more compatible state licensing cases, is puzzling.

C. The Opinion Subverts the Legislature's Clear Intent to Limit the Imposition of Carry License Restrictions

A carry license "conveys a right exercisable throughout the state and thus has a statewide effect." (*Scocca v. Smith* (2012) 912 F.Supp.2d 875, 883.) Other than a few specific locations, such as "sterile areas" of airports, Penal Code section 171.5, the Penal Code does not expressly limit the geographic validity of a carry license. Issuing authorities, expressly designated by statute as the various sheriffs and chiefs of police, may alone impose reasonable time, place, or manner restrictions on a licensee, but any such restriction *must* be indicated on the face of the physical license. (Pen. Code, § 26200.) The Opinion either wholly ignores or attaches little importance to these very clear declarations of legislative intent. (Opinion at pp. 9-10.)

Importantly, when sheriffs and chiefs of police exercise their discretion to issue a carry license and/or impose time, place, or manner restrictions on said license, they are acting as representatives of the state, not their particular locales. (*Scocca*, *supra*, 912 F.Supp.2d at p. 884.)[5] As such, their decisions concerning carry licenses, including whether to impose a restriction on carry in public parks, are state, not local, actions. The County, through the challenged ordinance, purports to usurp the authority explicitly bestowed upon sheriffs and chiefs of police by the state to issue and modify the terms of carry licenses.

The Opinion, without citation to authority, brushes the issue aside, stating simply that the County, as "the employer and supervisor of the sheriff . . . also has the authority to provide, via its legislative process, for exceptions and conditions to when and where an issued "Carry License" may be validly used." (Opinion at pp. 9-10.) This is an inaccurate statement of the law.

Neither section 26150 nor any relevant provision of state law suggests that the "employer" or "supervisor" of the sheriff may supersede the sheriff's specifically delegated authority to issue or impose restrictions on a carry license whether by legislative enactment or by any other means. The *sole* body authorized to issue and restrict carry licenses in California are those expressly designated by state law – namely, the sheriff or chief of police. There are countless opinions concerning the discretion

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[4] The NRA brief *did* address both *Great Western* and *Nordyke* in a section dedicated to field preemption and one focused on distinguishing those very cases from *Calguns*. (NRA Amicus Br. at pp. 26-27, 31-36.)

[5] 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).

sheriffs and chiefs of police to issue and restrict carry licenses;[6] the Opinion stands alone in suggesting that some other body shares that authority.

Additionally, the Legislature specifically naming sheriffs and chiefs of police – and no other body – as the sole issuing authorities demonstrates that it envisioned autonomy from local governing bodies in the issuing and regulation of carry licenses. Certainly the Legislature knows how to craft state law indicating otherwise, for it generally uses 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)).

The Opinion also simply disregards Penal Code section 26200, subdivision (b), which requires that any imposed restrictions "shall be indicated on any license issued." The requirement that restrictions appear on the face of the license preclude the imposition of restrictions appearing elsewhere. The parks restriction imposed by the Ordinance exists in the County's code books, separate and apart from the issued carry licenses. The Opinion, relegating the issue to a footnote, never clarifies how the County's broad restriction on carry licenses in public parks can satisfy the requirement that any restriction be noted on the individual license itself. (Op. at p. 9, fn.12.)

The Legislature never intended to allow local governing bodies to have the authority to issue carry licenses or to impose localized restrictions on carry licenses. To allow the County to sidestep the Legislature's statutorily created safeguards and subsume the authority of a sheriff or a chief of police, acting on behalf of the state, as its own makes the applicable state statutes and licenses subservient to the whims of any local body. Allowing this Opinion to stand undermines the Legislature's intent, as well as the authority of hundreds of state actors working under the weakened authority of their statutory powers. It also perpetuates multiple statements of the law that are plainly wrong, regardless of which preemption analysis ultimately rules the day.

III. CONCLUSION

For the foregoing reasons, the NRA respectfully urges the Court to grant review of *Calguns Foundation, Inc., et al. v. County of San Mateo*. Alternatively, and for the same reasons, we ask this Court to grant Appellants' request for depublication, filed on September 3, 2013.

Respectfully submitted,
Michel & Associates, P.C.

C. D. Michel

CDM/amb

[6] See, e.g., *Gifford v. City of Los Angeles* (2001) 88 Cal.App.4th 801; *Nichols v. County of Santa Clara* (1990) 223 Cal.App.3d 1236; *Salute v. Pitchess* (1976) 61 Cal.App.3d 557; *Erdelyi v. O'Brien* (9 th Cir. 1982) 680 F.2d 61, 63.

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 October 10, 2013, I served the foregoing document(s) described as

AMICUS CURIAE IN SUPPORT OF REVIEW
(CAL. RULES OF COURT, RULE 8.500, SUBD. (G))

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
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Executed on October 10, 2013, at Long Beach, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on October 10, 2013, at Long Beach, California.

Claudia Ayala