COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

PAULA FISCAL, LARRY P. BARSETTI, REBECCA KIDDER, DANA K. DRENKOWSKI, JOHN CANDIDO, ALAN BYARD, ANDREW SIRKIS, NATIONAL RIFLE ASSOCIATION, SECOND AMENDMENT FOUNDATION, CALIFORNIA ASSOCIATION OF FIREARM RETAILERS, and LAW ENFORCEMENT ALLIANCE OF AMERICA, Petitioners, vs. THE CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE CHIEF HEATHER FONG, in her official capacity and SAN FRANCISCO POLICE DEPARTMENT, and DOES 1-25, Respondents.	Case No. A111928

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; SUPPORTING DECLARATIONS

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INTRODUCTION

One morning earlier this year, Deanne Bradford walked her children into the William Cobb School in San Francisco. When she came out, her husband confronted her outside the building with a legally owned handgun. He shot Deanne multiple times, killing her. He then turned the handgun on himself. Deanne's six young children are now orphans.

This tragic story is hardly unique. While firearms-related deaths and injuries are rare in California's rural counties, San Franciscans are being increasingly terrorized by gun violence. In the past five years, the number of local firearms homicides has almost doubled. Gun violence has become so pervasive in some City neighborhoods that authorities have begun "locking down" schools to keep children inside when a threat is near. The economic costs of gun violence are increasingly devastating, with the taxpayers paying over $31 million annually for such services as emergency response, trauma care, and incarceration.

On November 8, 2005, San Francisco's voters reacted to this distinctly local crisis with a targeted response. They enacted Proposition H, which bans handgun possession by City residents, other than peace officers and others who require them for professional purposes, and which also bans the local sale, transfer, manufacture and distribution of all guns and ammunition. The next day, the National Rifle Association and others (collectively "the NRA") sued to block the voters' will, claiming that Proposition H is preempted by state law.

The NRA is wrong on multiple grounds. In prohibiting City residents from possessing handguns, the voters properly exercised San Francisco's Constitutional power to regulate municipal affairs. (Cal. Const.

Art. XI, Sec. 5(a)). This power is granted to charter cities "upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs[.]" (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 395-96 [emphasis omitted].) The City's voting public – which "knew better what it wanted and needed" than did state officials (*id.*) – has a vital interest in adopting a tailored policy response to the current crisis. The voters' decision to forego handgun possession by City residents is of no significant concern to anyone outside San Francisco, and is a proper exercise of the City's home rule power. The voters' policy choice is valid without regard to potentially conflicting state statutes.

Proposition H's ban on the sale, transfer, and distribution of firearms, although not based on the home rule power, also is not preempted by state law. While the Legislature has regulated guns in several respects, it *has not* attempted to fully occupy the field of firearms sales. (*Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853, 866 ["*Great Western*"] [emphasis added]; *California Rifle and Pistol Association v. City of West Hollywood* ["*CRPA*"] (1998) 66 Cal.App.4th 1302, 1318.) To the contrary, "in view of the Legislature's record of carefully refraining from broad preemptions and instead dealing with narrow areas of firearms control in statutes of limited scope, there is clear indication of *absence* of an intent to preempt" firearms sales restrictions. (*CRPA* at pp. 1317-18.) Because San Francisco's ban on sales, transfers, and distribution does not conflict with any of the "narrow areas of firearms control" addressed by the Legislature's "statutes of limited scope," it is not preempted.

The NRA's remaining arguments barely deserve mention. Its claim that Proposition H will have catastrophic effects on law enforcement fails because it relies on an absurd interpretation of the measure that contravenes many rules of statutory construction. Its claim that the law's possession ban illegally discriminates against City residents fails because lawmakers may tackle a problem one step at a time, and also because limiting the ban to City residents was necessary precisely *to avoid* potential constitutional infirmities.

Faced with a distinctly local gun violence epidemic, the voters made an appropriate decision to protect the City by reducing the local presence and prevalence of firearms. This Court should reject the NRA's attempt to thwart the will of the voters and deny the NRA's petition.

FACTUAL BACKGROUND

I. THE DRAMATIC UPSURGE IN GUN VIOLENCE IN SAN FRANCISCO

In recent years, gun violence has increasingly terrorized San Franciscans. In 2001, 39 people in the City were killed by guns. (*See* Declaration of Lt. John Hennessey ["Hennessey Declaration"] at ¶2 [attached as Exhibit 2].) In 2002, that number increased to 40; in 2003, it jumped again to 49. (*Id*.) In 2004, 63 people were murdered with firearms. *Id*. And in 2005, 77 people already have been killed by guns. (*Id*. at ¶¶ 2, 6.) Since 2001, the number of people killed by guns in the City has almost doubled.

This surge in gun deaths is not due merely to an increase in the overall number of homicides. Rather, guns are accounting for an ever-increasing share of the victims. In 2001, 61% of homicides involved firearms; in 2005, that figure is 85%. (*Id*.) As the officer in charge of the San Francisco Police Department ("SFPD")'s Homicide Detail put it, "there

has been a dramatic increase in the use of firearms during the commission of a homicide" during the past several years. (*Id*. at ¶6.)

Homicides are not the only way gun violence devastates San Franciscans' lives. According to the state, between 1991 and 2003 1,844 San Franciscans were hospitalized for non-fatal firearms injuries. (*See* Declaration of Vince Chhabria ["Chhabria Declaration"], Exh. 3.) And each year numerous residents commit suicide using firearms. (Respondents' Request for Judicial Notice ["RFJN"], Exh. 2 at p. 157 [San Francisco Department of Public Health and San Francisco Injury Center, *San Francisco Firearm Injury Reporting System Annual Report* (February 2002) ("2002 DPH Study")]; *see also* RFJN, Exh. 3 at p. 46 [Department of Public Health, *Local Data for Local Violence Prevention* (Spring 2005) ("2005 DPH Report")].)

Although all firearms violence threatens public safety, the greatest threat comes from handguns, which are far more prevalent than long guns and are more easily used to commit crimes because of their concealability. As the SFPD reports, "the vast majority of firearms homicides over the past three years involved the use of a handgun." (Hennessey Declaration at ¶ 7 [Exh. 2, attached].) The 2002 DPH Study found that two-thirds of firearms incidents in 1999 involved handguns. (RFJN, Exh. 2 at p. 157.)

The impact of gun violence is greatest in a handful of neighborhoods: Bayview/Hunter's Point, the Mission, South of Market, Visitacion Valley, Ingleside and Potrero Hill. Between 1999 and 2001 residents of these six neighborhoods were the victims of 336 firearms homicides and injuries – 68% of the citywide total in that period. (RFJN, Exh. 3 at p. 46; Hennessey Declaration at ¶ 8 [Exh. 2, attached].) These six

neighborhoods comprise only 35.5% of the City's geographic area, and contain only 33.6% of its population. (Chhabria Declaration, Exh. 1.)

Gun violence is now so pervasive that the authorities regularly must "lock down" schools in these neighborhoods to protect children from firearms. Through this "lockdown" program, which was instituted by local authorities three years ago, police and school officials close off the entrances and exits to schools to prevent children from going outside when a threat is near. (*See* Declaration of Lt. Colleen Fatooh in Support of City's Opposition to Petition for Writ of Mandate ["Fatooh Declaration"] at ¶¶ 2-3 [Exh. 3, attached].). In just over the past three months, the authorities have already been forced to lock down at least ten schools. (*Id*. at ¶ 4.)

Very recently, seven Visitacion Valley-area schools – including five elementary schools – were locked down after authorities learned of an armed homicide suspect in a nearby park. (*Id*. at ¶5.) A week earlier, the Burnett Child Development Center in Bayview was locked down because of a gunman across the street, forcing authorities to divert approximately 25 buses full of children who were on their way to the Center for an after-school program. (*Id*. at ¶6.)

II. THE HUMAN COSTS OF THE CITY'S GUN VIOLENCE EPIDEMIC

The stories of Deanne Bradford, Brian Williams and Roger Young show how the City's gun crisis is destroying San Franciscan's lives.

* * *

Deanne Bradford had recently separated from her husband, Roger Johnson, and was taking care of her six minor children by herself. On July 5, 2005, Deanne drove to William Cobb School in San Francisco to drop off her children. (Declaration of Diane Bradford ["Bradford Declaration"]

at ¶¶ 2, 8 [Exh. 4, attached].). She walked her children into the school, then walked out. Johnson was waiting for her outside with a legally-owned handgun. (*Id*. at ¶9.) He repeatedly shot Deanne, killing her at the school. (*Id*.) Later that day, Johnson used the same handgun to kill himself. (*Id*. at ¶10.) As Deanne's mother explained: "Even though I did not see Deanne die, I have a repeated image in my mind of her being shot. Over and over again, I see Roger sneaking up behind her at the school and shooting her." (*Id*. at ¶13.)

Because of Deanne's death, her six children – all between two and twelve years old – are being raised separately. (*Id*. at ¶ 12.) Some of her children are in grief counseling, while others are trying to find counseling. (*Id*. at ¶ 16.) The children still talk about Deanne every day. (*Id*. at ¶ 14.) They also talk about Roger, remembering " how badly he treated their mother. Sometimes they even say they wish they could kill Roger." (*Id*. at ¶ 15.)

* * *

At about 9:00 p.m. on December 31, 2000, Cathy Tyson got a phone call from her mother. Her mother said that she had heard gunshots outside her home, and had looked outside the window to see Cathy's son, Brian Williams, lying on the street. (Declaration of Cathy Tyson ["Tyson Declaration"] at ¶ 2 [Exh. 5, attached].). With her six-year old grandson, Brian Williams Junior, Cathy drove to her mother's house, and from there to San Francisco General Hospital. When Cathy got there she learned that Brian was in surgery. About an hour later, Cathy learned that her son was going to die. (*Id*. at ¶¶ 7-8.)

Cathy described telling her grandson of his father's killing:

> Just two years earlier, Brian Junior's mother had died in a car accident . . . . When I told him [about his

> father], he was devastated and wanted to know why God kept taking away the people he loved. Later, Brian Junior told me that his chest hurt him. When I asked him if it was something he ate, he said, "no, I don't think I have a heart anymore." [*Id*. at ¶¶ 9-10].

Six year old Brian Junior was no stranger to gun violence. Less than a year before his father died, Brian Junior was laying in bed at his godmother's house when a stray bullet came through the window, hitting his foot. He was hospitalized for a week, and required major surgery. (*Id*. at ¶ 15.)

Later, Cathy learned that her son had been the innocent victim of bullets intended for someone else. An acquaintance, Curtis Layne, had asked him for a ride. While they were walking towards Brian's car, two people approached and shot at Curtis. Tragically, Brian was hit as well. (*Id*. at ¶ 11.)

* * *

On July 24, 2004, Roger Young became that year's 57th homicide victim in San Francisco. (Declaration of Kathy Hood ["Hood Declaration"] at ¶ 1 [Exh. 6, attached].). Young went to a friend's house in Ingleside and found a robbery taking place. (*Id*. at 9.) The robbers shot and killed Roger's friend, and also shot another resident, rendering her permanently disabled. (*Id*.) The robbers shot Roger twice in the back of the head with a handgun, possibly while he was trying to run away. (*Id*. at ¶ 10.)

Roger was supposed to be married on July 25, 2004 – the day after he was killed. (*Id*.) His daughter, Kelani, is now three years old. More than a year later, she and is still asking for her father. (*Id*. at ¶ 12.)

Roger's mother describes the impact of his death:

> His death has changed my entire life. I often feel paranoid and have difficulty being in crowds. . . . [¶] Since my son's death, I have had terrible difficulties at work, and have been forced to change jobs several times. [*Id*. at ¶¶ 13-14.]

III. THE ECONOMIC COSTS OF SAN FRANCISCO'S GUN VIOLENCE EPIDEMIC

Gun violence also imposes dramatic economic costs on the City's taxpayers. (*See generally* Declaration of Controller Edward Harrington ["Harrington Declaration"] [Exh. 7, attached].) Each year, the City's Department of Public Health must provide hospital care to gunshot victims, costing almost $6.2 million. (*Id*. at ¶6 & Att. A.) The Sheriff's Office must spend $3.6 million to incarcerate firearms offenders. (*Id*.) The Medical Examiner must spend $156,000 performing autopsies on victims. (*Id*.) And the Police and Fire Departments must spend $17.4 million responding to firearm-related crimes. (*Id*.) In all, gun violence costs the City at least $31.2 million per year. (*Id*.) And this does not include major expenses such as foster care for children orphaned by firearms deaths. (*Id*. at ¶8.) While the pain inflicted by gun violence is particularly acute in certain neighborhoods, the crisis profoundly affects all City residents.

IV. SAN FRANCISCO'S FIREARMS CRISIS IS A DISTINCTLY LOCAL ONE THAT REQUIRES A LOCAL SOLUTION

The courts have long recognized the need for local solutions to gun violence. In *Galvan v. Superior Court* (1969) 70 Cal.2d 851, the Court considered a local law that required firearms to be registered. The plaintiffs claimed the law was preempted by Penal Code Section 12026, which only addressed "permit" or "license" requirements. (*Galvan*, 70 Cal.2d at p. 856.) The Court disagreed, because gun licensing (governed by state law) was distinct from gun registration. (*Id*.) The Court concluded that weapons control was not a matter of "paramount state concern which will not tolerate further or additional local requirements." (*Id*. at 863.)

> The issue of 'paramount state concern' also involves the question 'whether substantial geographic, economic, ecological or other distinctions are persuasive of the need for local control, and whether

> local needs have been adequately recognized and comprehensively dealt with at the state level.' . . . . That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.

(*Id*. at pp. 863-64.) Just three years ago, the Court recognized that the need for gun regulation "may be much greater in large cities, where multitudes of people congregate, than in the country districts or thinly settled communities, where there is much less opportunity and temptation to commit crimes of violence for which such weapons may be used." (*Great Western*. at p. 867; *see also CRPA,* 66 Cal.App.4th at p. 1318 [citing need to "permit local governments to tailor firearms legislation to the particular needs of their communities"].)

San Francisco is the most densely populated county in California, with 776,733 people living within 46.7 square miles. (Chhabria Declaration, Exh. 2.)[1] While San Francisco is not the only county to experience gun violence, there is a vast difference between levels of gun violence in San Francisco and in sparsely populated rural counties. As the state reports, between 1991 and 2003, 1,844 San Francisco residents were hospitalized for non-fatal firearms injuries. (Chhabria Declaration, Exh. 3.) During that period, *only three* Mono County residents were hospitalized for such injuries. In Alpine County there was only *one* such injury during the same period. (*Id*.)

Presumably because gun violence is locally variable and requires local responses, the Legislature has consistently been respectful of local

[1] In comparison, Marin County's 247,289 residents live within 308.4 square miles, and Mono County's 12,853 residents live within 3,044.4 square miles. (Chhabria Declaration, Exh. 3.)

gun regulatory power, declining to preempt local law any more comprehensively than necessary to accomplish its narrow legislative purposes.

For example, in response to the *Galvan* decision, the Legislature adopted what is now Government Code Section 53071, expressly "occupy[ing] the whole field of registration or licensing of . . . firearms." But "[d]espite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent was limited to registration and licensing." (*Great Western*, 27 Cal.4th at p. 862.)

Thereafter, the Court of Appeals upheld a local ordinance that prohibited parents from allowing their minor children to possess or fire BB guns. (*Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897, 900.) In response, the Legislature enacted Government Code Section 53071.5, expressly occupying only the "field of regulation of the manufacture, sale, or possession of *imitation* firearms . . . ." (*Id*. [emphasis added].) "[O]nce 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." (*Great Western*, 27 Cal.4th at p. 863.)

Suter v. City of Lafayette (1997) 57 Cal.App.4th 1109 considered Penal Code Section 12071, which addresses licenses to *sell* firearms. It held that Section 12071 "does not, in general, exclude local agencies from imposing additional restrictions on the licensing of firearms dealers . . ." (*Id*. at p. 1125.) Not only has the Legislature not enacted any statute preempting local laws governing firearms sales since *Suter*, but earlier this

year, it amended Section 12071 without disturbing that statute's narrow preemptive effect. (AB 1060 (2005-2006 Reg. Sess.) [RFJN, Exh. 4].)

In 1999 the Legislature enacted the Unsafe Handgun Act ("UHA"), now codified at Penal Code Section 12131.1. The UHA, a consumer protection measure designed to protect handgun users from defective products, requires the Department of Justice to test handguns and to maintain a roster of handguns that are not "unsafe." (*Id.*, §12131.1(a)-(f).) In this statute, again, the Legislature could have broadly occupied areas of firearms regulation. Instead, it made no mention of preemption – limiting the UHA's reach to the area of consumer protection.

V. THE VOTERS' RESPONSE TO SAN FRANCISCO'S GUN VIOLENCE CRISIS

On November 8, 2005, the City's voters approved Proposition H. Proposition H contains two substantive provisions. Section 2 bans the sale, manufacture, transfer or distribution of firearms and ammunition in San Francisco, while Section 3 prohibits City residents from possessing handguns within city limits, except peace officers and others requiring guns for professional purposes. (Exh. 1, attached [§3].) As the measure's Proponent stated, Section 3 "limits handgun possession to those who protect us . . . ." (RFJN, Exh. 1 at p. 96.)[2] The measure also contains a severability clause. (*Id*. [§6].)

[2] San Francisco's handgun possession ban is far from novel. In 1976, Washington, D.C. banned civilian handguns, reportedly causing significant declines in local homicides and suicides by firearms. (C. Loftin, et al., *Effects of restrictive licensing of handguns on homicide and suicide in the District of Columbia,* 325 New England Journal of Medicine, 1615-1620 (Dec. 5, 1991) [Chhabria Declaration, Exh. 4].). Several Illinois communities also have banned handguns,. (*See Quilici v. Village of Morton Grove*, (7th Cir. 1982) 695 F. 2d 261, 270 [upholding ban against Second Amendment challenge].)

The voters who adopted Proposition H had before them the 2002 DPH report, cited in Section 1 of the measure, which analyzed in great detail the firearm incidents in San Francisco in 1999. (*See generally* RFJN, Exh 2.) This report indicated that in 1999 there were 176 firearm-related injuries and deaths in the City, involving approximately 194 firearms and 213 victims. (*Id*. at p. 157.) Two-thirds of these incidents involved handguns (*id*. at p. 158), and only 26.8% of the firearms were recovered. (*Id*. at p. 156.)

VI. THE 1982 DOE DECISION

The voters were aware of *Doe v. San Francisco* (1982) 136 Cal.App.3d 509, which held preempted a 1982 San Francisco law that prohibited *all* persons from possessing handguns in the City. (RFJN, Exh. 1.) Because the law expressly exempted from its possession ban any person authorized to carry a handgun by Penal Code section 12050," it "create[d] a new class of persons who will be required to obtain licenses in order to possess handguns." (*Id*.at pp. 516-17.) The ordinance thus was "at least a local regulation relating to licensing," and was expressly preempted by Government Code Section 53071 and by Penal Code Section 12026. (*Id*. at pp. 517, 518.) In dicta, the court stated that the law was also impliedly preempted by Penal Code Section 12026, from which the court "inferred … that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local [regulation]." (*Id*. at p. 518.)

Because San Francisco conceded its law did not regulate a municipal affair (*id*. at p. 513), the court reached no holding on that question. But it agreed with the City, because the law "prohibit[ed] possession by both residents and those passing through San Francisco." (*Id*.) In adopting Proposition H, the voters took *Doe* into account by limiting the measure's

possession ban to San Francisco residents and by expressly relying on the home rule power.

ARGUMENT

I. RESPONDENTS DO NOT OPPOSE PETITIONERS' REQUEST THAT THIS COURT EXERCISE ITS ORIGINAL JURISDICTION

Relying only on *Doe*, the NRA asks this Court to take original jurisdiction of this matter. The City stands ready to litigate this matter in the Superior Court, if this Court rejects the NRA's request. However, if this Court concludes that the importance of the issue merits original resolution of this action at the appellate level, the City is fully prepared to present its case directly to this Court.

II. SECTION THREE ADDRESSES A "MUNICIPAL AFFAIR" AND SUPERCEDES ANY CONFLICTING STATE LAW

The NRA argues at length that Section 3 of Proposition H is preempted by State law. (Petition at ¶¶ 37-39; Memorandum of Points and Authorities ["Mem."] at 18-31.) But in adopting Section 3, the voters expressly relied on the City's home rule power, the broad Constitutional power of charter city self-determination. Article XI, Section 5 grants charter cities exclusive authority over their own "municipal affairs, making such cities "'supreme and beyond the reach of legislative enactment"'in that domain. (*California Federal Savings and Loan Ass'n v. City of Los Angeles* (1991) 54 Cal.3d 1, 12 ["*CalFed*"]; Cal.Const., Art. XI, §5(a) Under Section 5, a charter city "gain[s] exemption, with respect to its municipal affairs, from the 'conflict with general laws' restrictions of section 11 of article XI." (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 61.) Charter city measures that regulate municipal affairs are thus not subject to preemption.

The voters have appropriately used the broad Constitutional home rule power to adopt Section 3. Handgun violence exacts an enormous toll on the City, leaving death, shattered lives, and very significant financial costs in its wake. By reducing the number of handguns in the City, Section 3 seeks to lessen those awful consequences – a matter of vital local concern. And by not preventing any non-City resident from possessing a handgun, and by allowing peace officers and other government employees, to possess handguns as needed for their professional duties, Section 3 is narrowly tailored to San Francisco's interests, and raises no significant extramunicipal concerns that could exceed the City's home rule authority. Whether local voters choose to restrict the City's residents from possessing handguns is of no significant concern to anyone outside the City.

A. San Francisco Enjoys Exclusive Authority Over Its Municipal Affairs.

Article XI, Section 5 of the California Constitution creates charter cities' home rule powers. Subdivision (a) of Section 5 grants such cities complete authority over "municipal affairs," without qualification or limitation, and thus "articulates the general principle of self-governance" for charter cities. (*Johnson*, 4 Cal.4th at p. 398.)[3]

[3] "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." (Cal.Const., Art. XI, §5(a).)

1. The charter cities' broad home rule powers.

Under California's original 1849 Constitution, "the Legislature had power to enlarge or restrict city powers." (*Johnson,* 4 Cal.4th at pp. 394-95 [internal quotes omitted].) Although California adopted a new Constitution in 1879, which "manifestly" sought to reduce Legislative control over cities, the 1879 Constitution "continue[d] to subordinate charter city legislation to general state laws." (*Id*. at p. 395.)

In response, California's voters in 1896 amended the Constitution to expressly provide for charter city home rule power. In doing so, the voters sought to grant broad powers of self-rule to charter cities, and to grant those cities equally broad protection against conflicting state legislation. In the words of the Supreme Court, they intended

> to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. [The amendment] *was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs[.]* [The home rule amendment] was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws[.]

(*Johnson, supra,* 4 Cal.4th at pp. 395-96 [emphasis original, ellipses omitted]; *accord, Ex parte Braun* (1903) 141 Cal. 204, 208-09.)

Shortly after 1896, the Supreme Court confirmed the broad purpose of the home rule power, holding that the words "municipal affairs" are "words of *wide import – broad enough to include all powers appropriate for a municipality to possess*." (*Ex parte Braun, supra,* 141 Cal. at p. 209 [emphasis added].) It reaffirmed that broad statement in 1991. (*CalFed, supra,* 54 Cal.3d at p. 12.) The “comprehensive nature of the [home rule] power" is beyond dispute. (*Bishop, supra,* 1 Cal.3d at p. 62.)

As one influential law review article noted, the 1896 addition of those provisions caused "a fundamental reallocation of political powers between the legislature and a chartered city." (Sato, *Municipal Affairs in California* (1972) 60 Cal.L.Rev. 1055, 1058.) Charter cities' "power of complete autonomous rule with respect to municipal affairs represents a vast residuum of power … giving to a charter city a potentially much greater range of power than that available to the general law cities." (Grodin, Massey and Cunningham, *The California State Constitution: A Reference Guide* (1993 Ed.), at 189.)

In 1914 the voters again acted to solidify the breadth of charter cities' home rule powers, amending the Constitution to allow charter cities to invoke full authority over municipal affairs without the need to specifically invoke particular powers. (Sato, *supra,* 60 Cal.L.Rev. at pp. 1056-57.) As a result, local voters in a city who elect to adopt a charter for their own governance assume the full sovereign powers of the State over municipal affairs. The city is presumed to have granted itself the broadest possible authority over municipal affairs, unless the charter expressly limits that authority. (*Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 170.)

"No exact definition of the term 'municipal affairs' can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case." (*CalFed, supra,* 54 Cal.3d at p. 16.) Indeed, the fact that the Constitution does not define "municipal affairs" is hardly an accident; the concept of a home rule charter embodied in the 1896 and 1914 Constitutional amendments was inconsistent with any specified limitation on municipal power. For this reason, the high court has cautioned against a

"static and compartmentalized description of 'municipal affairs' in favor of a more dialectical one." (*Id.* at p. 13.) In adjudicating home rule issues, the courts must "allocate the governmental powers under consideration in the most sensible and appropriate fashion as between local and state legislative bodies." (*Id*. at p. 17.)

2. Home rule power extends to health and welfare regulations of private conduct.

Consistent with the elasticity of the home rule power, the courts have repeatedly held that a charter city may exercise that power to regulate private conduct within the municipality to promote the public welfare.[4]

At the time of the 1896 home rule amendments, the Constitutional grant of police power to all cities was materially indistinguishable from that today found at Article XI, Section 7.[5] And in 1903, the Court held that the municipal affairs power is "broad enough to include all powers appropriate for a municipality to possess." (*Ex parte Braun, supra*, 141 Cal. at p. 209.) Because it is "an indispensable prerogative of sovereignty" (*Miller v. Board of Public Works of the City of Los Angeles* (1925) 195 Cal. 477, 484), the police power is an appropriate and necessary power for any municipality. Nonetheless, after the 1896 amendment, the courts did not immediately address whether a charter city could employ that authority to adopt a police power regulation promoting health and safety.

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[4] Indeed, the 1896 amendment was adopted to overturn cases that had deprived cities of the ability, *inter alia*, to adopt local health and safety measures conflicting with state statutes. (*See Ex parte Braun, supra,* 141 Cal. at pp. 208-09, and cases cited therein].)

[5] *Compare* Article XI, §7 and former Article XI, §11 as quoted in *Ex parte Lacey* (1895) 108 Cal. 326, 327-28.)

However, at least one early academic commentator recognized that the home rule power must logically extend to local health and safety enactments. (Jones, *"Municipal Affairs" in the California Constitution* (1913) 1 Cal.L.Rev. 132, 144.) Indeed, that commentator criticized the notion that "no police or health measures can be municipal affairs" as "absurd":

> There is ever present in the minds of the lawyers of the State, especially of such as are concerned in the drafting of charters, whether a police or health regulation by being explicitly provided for in the charter may not be taken over into the category of "municipal affairs" and so placed beyond the possibility of being superseded by general law. Cases which have been adverted to already seem to lend countenance to such a view. If such is not a fact, then no police or health measures can be municipal affairs, – a result which seems absurd.

(*Id*.)

Since then, the courts have confirmed that a local regulation of private conduct, promoting health and safety, may be a municipal affair. In *In re Hubbard* (1964) 62 Cal.2d 119, the Court held that a charter city could enforce its own ordinance prohibiting games of chance – a classic regulation of private conduct serving general welfare – notwithstanding general state anti-gambling statutes. The local ordinance was enforceable, the high court held, because it is "a regulation of a municipal affair" as to which charter cities enjoy "the exclusive right … to regulate," and the ordinance would have no adverse effect on transient citizens. (*Id*., 62 Cal.2d at p. 127, 128.)

Similarly, in *Porter v. City of Santa Barbara* (1934) 140 Cal.App. 130, the court upheld a charter city ordinance that banned boxing and wrestling exhibitions, even though the plaintiff had been issued a license from a state athletic commission purporting to allow such exhibitions. As

the court held, the presence or absence of such activities raised peculiarly local concerns, and thus constituted a municipal affair:

> The acceptance, or nonacceptance by a city, of such a business and of the conditions which go with such a business, presents essentially a local question, involving locally special and peculiar interests, not affecting the state at large. These facts drive directly to the conclusion that the matter of local prohibition of the business is a "municipal affair," concerning which the city ordinance, and not the general law, must prevail.

(*Id*., 140 Cal.App. at p. 132;]; *see also Ex Parte Braun*, *supra*, 204 Cal. at pp. 210-11 [citing with approval New Jersey case holding state statute requiring home rule city to restrict, limit or extend racing interfered with city's municipal affairs].)

Other authorities also confirm that home rule powers and police powers are not mutually exclusive. In 1974, when the voters added Article XII, Section 8 to the Constitution to limit local power over matters within the Public Utilities Commission's control, they preserved charter cities' authority, using language that demonstrates the overlapping relationship between the municipal affairs power and the police power:

> A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [Public Utilities] Commission. This section does not affect power over public utilities relating to *the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter* existing on October 10, 1911, unless that power has been revoked by the city's electors[.]

(Cal.Const., Art. XII, §8 [emphasis added]; see also *City of Oakland v. Williams* (1940) 15 Cal.2d 542, 549 [charter cities that agreed to jointly study sewage problems, "possess the necessary police power, both under constitutional grant and under their respective charters, to abate nuisances, to preserve the health of their inhabitants and to construct and maintain

sewers"]; *see also CalFed, supra,* 54 Cal.3d at p. 14 [holding that municipal affairs doctrine is as applicable to “charter city regulatory measures” as to local tax measures].)

3. The *CalFed* Analysis.

CalFed and cases following it have prescribed an analytical approach that courts adjudicating home rule issues must follow. As a threshold matter, the court will not resolve a putative conflict between a state statute and a charter city measure" unless two "preliminary considerations" are satisfied. The local measure must "implicate[] a municipal affair," and – to avoid sensitive constitutional law issues where possible – the it must "pose[] a genuine conflict with state law." (*CalFed, supra,* 54 Cal.3d at p. 17.) If these requirements are met, "the question of statewide concern is the bedrock inquiry through which the conflict between state and local interests is adjusted."

In assessing statewide concerns, the court "*focus[es] on extramunicipal concerns* as the starting point for analysis. *By requiring, as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal interests, the phrase [e.g. 'statewide concern'] resists the invasion of areas which are of intramural concern only, preserving core values of charter city government*." (*Id*. at pp. 399-400 [emphasis original].)

It is for the courts, not the Legislature, to determine whether a given subject is a municipal affair or a matter of statewide concern. Even where the Legislature has expressly declared a subject to be of statewide concern, such declarations "do not ipse dixit make it so; we exercise our independent judgment as to that issue." (*CalFed,* 54 Cal.3d at p. 24, fn. 21.)

B. Section 3's Prohibition Addresses A Municipal Affair.

1. Section 3 implicates a municipal affair.

As an initial matter, Section 3 "implicate[s] a municipal affair," one of the two "preliminary considerations" that must be satisfied before the Court evaluates the balance between local and statewide interests. (*CalFed,* 54 Cal.3d at p. 17.)

Section 3 addresses an urgent municipal concern: handgun violence and its effect on San Franciscans. Handgun violence exacts a profound human and emotional toll on the lives of local residents, many of whom have been killed or injured, or have had their loved ones killed or injured, by handguns. And it also imposes very significant financial costs on the City, which must provide emergency response, medical care, social services, and a host of other services in response to handgun violence, and must pass the associated costs of those services on to its taxpayers.

San Francisco must be able to respond to these problems. When state laws "may not be adequate to meet the demands of densely settled municipalities…it becomes proper, *and even necessary*, for municipalities to add to state regulations provisions adapted to their special requirements." (*Galvan v. Superior Court* (1969) 70 Cal.2d 851, 864 [emphasis added].) And handgun violence is a particularly compelling example of the importance of the municipal affairs power to address problems that are not adapted to a "one size fits all" state regulation: as *Galvan* held, "problems with firearms are likely to *require* different treatment in San Francisco County than in Mono County." (*Id*. [emphasis added].) The ability to address such a pressing local threat to public safety and the public fisc is certainly one of the "powers appropriate for a municipality to possess." (*CalFed, supra,* 54 Cal.3d at p. 12.)

2. Section 3 conflicts with Penal Code Section 12026, at least as construed by *Doe*.

CalFed's second "preliminary consideration" – a genuine conflict with state law – also is present here. Section 3 conflicts with Penal Code Section 12026(b), as this court interpreted that subsection in *Doe*. *Doe* "infer[red] from Penal Code Section 12026 that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local government entities." (*Id*., 136 Cal.App.3d at p. 518.) Penal Code Section 12026, as thus interpreted, cannot be reconciled with Section 3, which prohibits most City residents from possessing a handgun within city limits, including in their homes.[6]

3. Allowing a charter city to prohibit only its own residents from possessing handguns does not implicate any significant statewide interests.

Because Section 3 implicates a municipal affair and conflicts with state law, the Court must adjust the conflict between the state and local interests that are involved in that local provision, "allocat[ing] the

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[6] To be clear, San Francisco believes that *Doe's* interpretation of Penal Code Section 12026 was legally unsound. For present purposes, however, the City does not contest that Section 3 of Proposition H conflicts with *Doe's* "inference" that by adopting Penal Code Section 12026(b), the Legislature impliedly intended to occupy the field of residential handgun possession.

However, contrary to the NRA's claims, Section 3 does not conflict with *Doe's* holdings as to express preemption under Penal Code Section 12026(b) and Government Code Section 53071. Unlike the ordinance in *Doe*, Section 3 does not "exempt from the general ban on possession any person authorized to carry a handgun pursuant to Penal Code section 12050" (*Doe*, *supra*, 136 Cal.App.3d at p. 516-17), either expressly or by implication. It thus does not "create a new class of persons who will be required to obtain licenses in order to possess handguns," which was the basis on which the *Doe* court held the 1982 ordinance to be expressly preempted. (*Id*. at p. 517.)

governmental powers under consideration in the most sensible and appropriate fashion as between the local and state legislative bodies." (*CalFed, supra,* 54 Cal.3d at p. 17.) To divest the City of its Constitutional home rule power, statewide concerns implicated by Section 3 must be genuine, not insubstantial or implausible. The Court must uphold Section 3's prohibition as a municipal affair unless it finds "a *convincing basis* for [state] legislative action originating in extramunicipal concerns, one justifying legislative supersession based on *sensible, pragmatic considerations*." (*Johnson, supra,* 4 Cal.4th at p. 405 [emphases added].)

a. Because Section 3's prohibition applies only to San Francisco residents, it raises no significant extramunicipal or statewide concerns.

Most importantly, Section 3's prohibition is carefully crafted to apply only to the City's residents. As numerous cases show, whether a local measure implicates statewide interests depends, in considerable part, on whether the measure has meaningful impacts outside of the jurisdiction that has adopted it.

Doe illustrates the great degree to which the presence or absence of statewide concerns, for purposes of home rule analysis, turns on whether the local law applies to or excludes transient citizens and other persons not residing in the jurisdiction. The *Doe* court stated that the ordinance before it addressed a matter of statewide concern, not a municipal affair, because that ordinance "prohibits possession [of handguns] by both residents *and those passing through San Francisco*." (*Id.*, 136 Cal.App.3d at p. 513 [emphases added].) As a result, *Doe* stated, the ordinanced affected "not just persons living in San Francisco, *but transients passing through*" and residents of nearby cities. (*Id.* [emphases added].) *Doe's* statements about

statewide concerns, in other words, were expressly focused and premised on the fact that the ordinance before the *Doe* court affected transient citizens, not merely residents.[7]

Numerous other cases prove the same point. For example:

- In *Ex parte Braun, supra*, the Supreme Court held that a local charter city tax measure was a municipal affair, explaining that the measure was "peculiarly for the benefit of the inhabitants of the city, and not directly for the benefit of any one else. It is confined in operation to the city of Los Angeles, and affects none but its citizens and taxpayers and those doing business within its limits." (*Id*., 141 Cal. at p. 210; *see also id*. at p. 214 (McFarland, J., concurring) [ordinance is within home rule power because, *inter alia*, it "appl[ies] only to the territory of the city and the inhabitants thereof, and no other person being affected thereby"].)
- In *CalFed*, in contrast, the Supreme Court held that municipal taxation of financial institutions was a matter of extramunicipal, and thus statewide, concern. The high court so held because the Legislature had expressly found that it was necessary to achieve "tax rate parity" to create a level playing field among different types of financial institutions,

[7] San Francisco's concession in 1982 that the ordinance in *Doe* did not concern a municipal affair does not prevent the City's voters from relying on the home rule power to adopt Section 3 23 years later. The City's concession did not, and could not, purport to address a handgun prohibition that applies to residents only: as *Doe* makes clear, for purposes of the home rule doctrine, a residents-only prohibition is materially different from the blanket prohibition that was at issue in *Doe*.

and because that Legislative finding was supported by extensive legislative and regulatory reports, developments in federal law, and "the increasingly vulnerable financial condition of the savings and loan industry throughout the decade of the 1970's and beyond." (*Id*., 54 Cal.3d at pp. 18-24.) The high court distinguished *Ex parte Braun* on the ground that it had not involved "a widespread fiscal crisis across the state," and the tax measure at issue there "was entirely local," affecting only citizens, taxpayers, and businesses in Los Angeles. (*Id*. at p. 12; *see also Fisher v. County of Alameda* (1993) 20 Cal.App.4th 120, 130-31 [notwithstanding contradictory state statute, charter city's real estate transfer tax regulates a municipal affair because it "has no impact outside the limits of the taxing municipality but rather 'is purely local in its effects'"].)

- In *Pacific Telephone and Telegraph Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766, the high court held that the construction and maintenance of telephone lines in San Francisco's streets was a matter of statewide concern, because the presence of those lines affected telephone service for customers and businesses far beyond the city limits. If those local lines were removed, "the people throughout the state, the United States, and most parts of the world who can now communicate directly by telephone with residents in the city could no longer do so. In addition, the more than 300,000 residents of San Mateo County would be cut off from all long distance telephone communication." (*Id*. at p. 773.)

Like the ordinances at issue in *Ex parte Braun* and *Fisher*, Section 3's handgun possession prohibition has purely local consequences, affecting "none but its citizens." (*Ex parte Braun, supra*, 141 Cal. at p. 210.) The prohibition has no effect on a transient, non-resident citizen who travels to, or passes through, San Francisco. Nor does it affect a resident of a neighboring community who operates a business in San Francisco, and keeps a handgun at that business. Nor does it have any material effect on gun dealers, operators of shooting ranges, or other firearms-related businesses located outside of San Francisco.

Moreover, as Proposition H's text makes clear, Section 3 also does not affect the manner in which San Francisco police officers, other peace officers, or security guards within the City may possess and use handguns to perform their professional duties. The measure thus will not alter the level of police or private security protection available to non-San Francisco residents entering the City.

Section 3, in sum, has no meaningful effects outside of San Francisco. It creates no extramunicipal or statewide concerns that could justify divesting San Francisco of its home rule power to enact such a prohibition.

b. California has no state policy favoring handgun possession.

Section 3's prohibition also does not run afoul of any statewide concerns because California has no state policy favoring handgun possession, or promoting wider handgun availability.

Neither the federal nor the state Constitution contains any such policy. Indeed, there is no individual constitutional right to possess a handgun or other firearm. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481

[state assault weapons prohibition "does not burden a fundamental right under either the federal or the state Constitutions"]; *Galvan, supra,* 70 Cal.2d at p. 866 [handgun registration requirement does not implicate Second Amendment].)

Nor does any state statute create a policy favoring handgun possession, or promoting wider handgun availability. To the contrary, the Legislature, and the courts, have concluded that "free access to firearms" creates a "danger to public safety." (*People v. Bell* (1989) 49 Cal.3d 502, 544 [holding that "the clear intent of the Legislature" in adopting Dangerous Weapons Control Act was to reduce that danger]; *People v. Scott* (1944) 24 Cal.2d 774, 782.)

Relying on a 1994 Attorney General Opinion, the NRA claims that Penal Code Section 12026 recognizes a "right of law-abiding, responsible adults to possess handguns on private property." (Mem. at 31, gn. 14.) But as this Court has held, an opinion of the Attorney General "is not controlling legal authority," and "this is particularly true where … there is case authority in existence interpreting the statute at issue." (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1066, 1075.) Here, the one court to address the issue has expressly held that Penal Code Section 12026 does *not* create an affirmative right to possess a handgun:

> *[T]here is no basis for a conclusion that Penal Code section 12026 was intended to create a "right" or to confer the "authority" to take any action … for which a license or permit may not be required*. The words of the statute are words of proscription and limitation upon local governments, not words granting a right or authority to members of the public.

(*CRPA, supra,* 66 Cal.App.4th at p. 1324 [emphasis added].)

The California courts also have not enunciated any policy of promoting handgun ownership, or of ensuring that handguns are uniformly available to the residents of each city. As noted above, the high court has recognized that far from promoting public safety, free access to firearms affirmatively *endangers* public safety. (*People v. Bell, supra,* 49 Cal.3d at p. 544.) The high court also has held that firearms, and specifically handguns, create significant problems that are likely to require legislative attention. (*Galvan, supra*, 70 Cal.2d at pp. 864, 866.)

c. California has no state policy requiring that all residents have uniform access to handguns.

Section 3 also does not implicate any statewide concerns because California has no state policy requiring that all residents have uniform access to handguns.

Notably, even where the Legislature identifies an interest in uniformity of regulation, such a "bare interest of uniformity," without a persuasive logical reason why it is essential, does not justify allowing state law to supercede charter city home rule power. This is "because, standing alone, [a bare interest in uniformity] reveals no 'convincing basis for legislative action originating in extramunicipal concerns.'" (*Johnson, supra*, 4 Cal.4th at p. 406 [holding that state voters' desire for uniform system of campaign finance throughout state does not justify treating charter city campaign finance law as matter of statewide concern, rather than as municipal affair].) As a matter of law, therefore, a legislative decision to occupy a particular field, for purposes of preemption, does not amount to a statewide interest for purposes of home rule analysis.

Here, it is telling that neither in Penal Code Section 12026, nor in any other the other statutes cited by the NRA, has the Legislature even

attempted to identify any statewide concern that would warrant overriding local charter city regulations. Nor has the Legislature mentioned charter cities. There is no statutory basis for a statewide policy of uniformity that could supercede charter cities' home rule power.

Nor is there any judicial basis for such a policy. To the contrary, as noted above, the Supreme Court has repeatedly recognized that handgun violence is not susceptible to uniform, one-size-fits-all regulations, holding that the scope of gun-related problems, and thus the appropriate solution, will likely be different in "densely populated municipalities" than in sparse rural portions of the state. (*Great Western,, supra*, 27 Cal.4th at p. 867; *Galvan, supra*, 70 Cal.2d at pp. 864, 866.) Far from calling for uniformity in the regulation of handguns, therefore, the courts have expressly rejected the claim that uniformity is necessary.

d. Petitioners' claims of a statewide interest in establishing standards for handgun possession are entirely unsupported and illogical.

As part of their claims that Section 3 is preempted by state law, petitioners argue that because "cities have no realistic way to stop handguns from entering their boundaries, establishing statewide standards for those may legally possess handguns is a matter of statewide importance." (Mem. at 25.) But this claim is insufficient to justify treating Section 3 as a matter of statewide concern.

First, the purported statewide concern petitioners describe has never been expressed by any Constitutional framers or voters, by the Legislature, or by any court. It is wholly petitioners' own invention.

Second, petitioners' argument is simply inapposite here. Section 3 expressly does not seek to prevent non-San Francisco residents from

bringing handguns into the City. Moreover, petitioners offer no reason why the handgun possession prohibition that Section 3 *does* impose – upon San Franciscans, by San Franciscans, for San Franciscans – implicates any statewide concerns.

Section 3's prohibition has no meaningful effect outside of San Francisco, and the decision by the City's voters to impose that prohibition on themselves is of no practical concern to anyone other than the City's residents. Nor does Section 3 threaten or run counter to any statewide policy. For that reason, Section 3 implicates no extramunicipal or other statewide concerns that could justify stripping San Francisco of its home rule power to adopt the measure.

Because the subject of Section 3 "fails to qualify as one of statewide concern, [it] is a 'municipal affair' and 'beyond the reach of legislative enactment.'" (*CalFed, supra*, 54 Cal.3d at p. 17.) Section 3 is therefore not preempted by state law.

III. THE SALES BAN IS NOT PREEMPTED

The NRA contends that Section 2 is preempted by state law. Their argument is essentially that because statutes like Penal Code Section 12026 and Penal Code Section 12131 *acknowledge the possibility* that people will buy firearms in California, the Legislature *intended to promote* firearms sales and therefore to preclude local governments from outlawing these sales. (Mem. at 38-39.) This argument fundamentally misstates preemption law. Mere Legislative acknowledgment of the existence of conduct does not preclude local jurisdictions from prohibiting that conduct within their boundaries. (*Great Western*, 27 Cal.4th at p. 866.) Far from preempting local sales bans, the Legislature has gone out of its way to avoid infringing on this local prerogative.

A. Petitioners Fundamentally Misunderstand The Law Of Preemption

Under Article XI, section 7 of the California Constitution, "[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." It is undisputed that a ban on firearms sales falls within the City's police power. Accordingly, "[t]he question as to preemption is whether the State Legislature has *removed* the constitutional police power of the City" to ban firearms sales within its borders. (*CRPA*, 66 Cal.App.4th at p. 1309 [emphasis in original].) In answering this question, the Court must "presume the validity" of the local ordinance. (*Water Quality Association v. City of Escondido* (1997) 53 Cal.App.4th 755, 762.)

A local law is only preempted if it actually "conflicts" with state law. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Id*. [citations, quotations omitted].)

"Local legislation is 'duplicative' of general law when it is coextensive therewith." (*Id.* [citation omitted].) Mere "overlap" does not render the local provision "duplicative." (*Great Western Shows*, 27 Cal.4th at p. 865.) Rather, the local provision duplicates general law only if it prohibits "precisely the same acts" that are prohibited by state statute. (*Id*.)

"Local legislation is 'contradictory' to general law when it is inimical thereto." (*Sherwin-Williams*, 4 Cal.4th at p. 898 [citation omitted].) A local provision contradicts state law only if it "mandate[s] what state law expressly forbids," or "forbid[s] what state law expressly mandates." (*Great Western*, 27 Cal.4th at p. 866.)

"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 . . . ." (*Sherwin-Williams*, 4 Cal.4th at p. 898 [citation omitted].) A finding of implied preemption requires the court to hold that, even though the Legislature did not expressly state an intention to occupy the field, evidence of such intent can be found in one of three ways:

> (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.* (citations and quotations omitted).]

The Legislature cannot be found to have occupied a field based the mere existence of a state law that regulates conduct *less strictly* than local legislation. For example, *Sherwin-Williams* considered the preemptive effect of state laws that prohibited sales of aerosol paint to a minor and required retailers to post specified signs. (*Id*. at pp. 898-99.) It ruled that a stricter local law – restricting retailers' displays of aerosol paint products – was not preempted. (*Id*. at p. 905.) Mere legislative acknowledgment of conduct by the citizens of the state does mean that the Legislature intended to "promote" that conduct. (*Great Western*, 27 Cal.4th at p. 868.) There must be much stronger evidence of Legislative intent to occupy the field for a court to find implied preemption.

Any inquiry into the Legislature's intent with respect to local regulation of firearms and ammunition sales must begin with an

examination of the history of preemptive actions it has taken in the area of gun control generally. "[T]he Legislature has chosen not to broadly preempt the local control of firearms," and instead has only "targeted certain specific areas for preemption." (*Great Western*, 27 Cal.4th at p. 864.) "That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities." (*Suter*, 57 Cal.App.4th at p. 1119.) It is against this backdrop that the Court must decide whether the Legislature has demonstrated an intent to preempt San Francisco's local sales ban.

B. The Legislature Did Not Preempt Local Bans On Firearms or Ammunition Sales

1. The sales ban does not "duplicate" state law

Proposition H's sales ban does not duplicate state law, because there is no state statute that bans the sale of firearms or ammunition. Although the ban overlaps somewhat with the Unsafe Handgun Act and with Penal Code Section 12304, which precludes the sale of *certain types* of ammunition statewide, mere overlap does not render local legislation duplicative of state law. (*See Great Western Shows*, 27 Cal.4th at p. 865.)

2. The sales ban does not "contradict" state law

A local law does not contradict state law unless it "forbid[s] what state law expressly mandates." (*Great Western* 27 Cal.4th at p. 866.) But no state law "expressly mandates" the sale of firearms or ammunition. There is merely a law requiring permits to sell firearms (Section 12071), a law banning the sale of certain handguns deemed by the Department of Justice to be unsafe to consumers (Section 12131.1), a law restricting the

sale of certain types of assault weapons (Section 12275 *et seq*.), and a law banning the sale of certain types of ammunition (Section 12304).

In this regard, the sales ban is similar to the ordinance prohibiting gun shows on county property that was upheld in *Great Western*. There, the Court recognized that state law regulated gun shows in a number of ways. For example, Penal Code Section 12071(b)(1)(B) specifies that gun shows are not subject to the standard requirement that sales be conducted only in the buildings designated in the seller's license. (*Id.*, 27 Cal.4th at p. 864.) Section 12071.1(a) requires all gun show vendors to possess a certificate of eligibility from the Justice Department. (*Id*.) And Section 12071.4 imposes numerous disparate requirements on vendors, including the requirements that vendors wear name tags, certify that they will not incite hate crimes, and make sure that all firearms at the show are unloaded. (*Id*. at p. 865.) But this does not mean that state law "expressly mandates" gun shows:

> Although the gun show statutes regulate, among other things, the sale of guns at gun shows, and therefore *contemplate* such sales, the statutes do not *mandate* such sales, such that a limitation of sales on county property would be in direct conflict with the statutes. [*Id*. at p. 866 (emphasis added).]

The sales ban is also similar to the local ordinance banning the sale of Saturday Night Specials that the court upheld *CRPA*, *supra*. Rejecting the argument that Penal Code Section 12026 prohibited local regulation of firearms sales, the court firmly held that conduct allowed by state law may nonetheless be forbidden by local law. (*Id*., 66 Cal.App.4th at p. 1324.) "No authority has been cited," the court held, "for the proposition that a statute prohibiting a permit requirement can be construed as intended to

create a broad enforceable right to purchase any type of handgun not specifically outlawed by state law." (*Id.*)

State law does not promote or mandate the sale of firearms and ammunition. San Francisco's sales ban thus does not contradict state law.

3. The sales ban does not enter an area "fully occupied" by state law

a. Express preemption

There are only three statutes "from which an express preemption argument might be constructed." (*CRPA*, 66 Cal.App.4th at p. 1312.) First, in Government Code Section 53071, the Legislature expressly occupied "the whole field of regulation of the registration or licensing of commercially manufactured firearms . . . ." (*Id.*) But this statute does not even mention the sale of firearms or ammunition; it discusses only registration or licensing. "The fact that the Legislature expressly limited its preemption in this statute to 'registration and licensing' shows a Legislative intent not to preempt other areas of firearms regulation, at least not in this statute." (*CRPA*, 66 Cal.App.4th at p. 1311.)

Second, Penal Code Section 12026(b) provides that "no permit or license" to purchase or own a handgun for possession on private property shall be required beyond what state law already contemplates. But "[t]he fact that the Legislature limited the coverage of this statute to permits or licenses for possessing a weapon at home, in a place of business, or on private property shows a Legislative intent not to preempt other areas of firearms regulation, at least not in this statute." (*Id.*, 66 Cal.App.4th at pp. 1311-12.)

Third, the Legislature has expressly occupied "the whole field of regulation of the manufacture, sale, or possession of *imitation* firearms . . .

including regulations governing the manufacture, *sale*, or possession of BB guns and air rifles . . . ." (Gov. Code § 53071.5 [emphasis added].) But

> [t]his statute is expressly limited to *imitation* firearms, thus leaving real firearms still subject to local regulation. The express preemption of local regulation of *sales* of *imitation* firearms, but not sales of real firearms, demonstrates that the Legislature made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms.

(*CRPA*, 66 Cal.App.4th at p. 1312 [emphasis original] [quoted favorably in *Great Western Shows*, 27 Cal.4th at p. 863]; *see also Suter*, 57 Cal.App.4th at p. 1124 ["[t]here is no comparable Legislative declaration of intent fully to occupy the whole field of regulation of the sale of non-imitation firearms . . . ."].)

Completely ignoring *CRPA* and *Great Western Shows*, the NRA persists in contending that the Legislature has expressly occupied the field of firearms sales. It is simply wrong.

i. Penal Code Section 12026.

First, the NRA contends that Section 12026 "expressly protects" handgun purchases, thereby rendering the sales ban preempted, "at least in application to handguns." (Mem. at 38.) But the *CRPA* court has already held that the statute contains "no express preemption covering the field of handgun sales." (66 Cal.App.4th at p. 1314; *see also Great Western*, 27 Cal.4th at p. 863.)[8]

[8] Nor does Section 12026 impliedly occupy the field of firearms sales. "Penal Code section 12026 prohibits only local 'permit or license' requirements, and does not deal with sales. The ordinance at issue … creates no permit or license requirement, and instead regulates only sales." (*CRPA*, 66 Cal.App.4th at p. 1319.)

ii. The Unsafe Handgun Act.

The NRA also contends that the Unsafe Handgun Act, Penal Code Section 12131.1, expressly occupies the field of handgun sales. The NRA makes much of the fact that the UHA requires the Department of Justice to maintain a roster of handguns that "may be sold in this state." (Mem. at 38.) "On its face," the NRA argues, "the Legislature's choice of this language precludes CITY from enacting an Ordinance under which handguns so approved by DOJ nevertheless may *not* be sold." (*Id*.)

This is precisely the type of faulty reasoning that the courts repeatedly have rejected. The mere fact that state law *contemplates* the sale of the types of handguns listed by the DOJ does not mean that the Legislature wishes to bar local jurisdictions from regulating such sales. (*Nordyke v. King* (2002) 27 Cal.4th 875, 884 [Penal Code provision that "exempts gun shows from the state criminal prohibition on possessing guns in public buildings," and thus allows guns shows, "does not *mandate* that local government entities permit such a use"] [emphasis original]; *see also Great Western*, 27 Cal.4th at pp. 866, 868.) Particularly given the Legislature's use of the permissive phrase "*may* be sold," rather than any mandatory language, the UHA simply acknowledges the sale of handguns on the DOJ's roster, without expressing any intent to preclude stricter local regulation with respect to such sales.[9]

[9] The single case the NRA cites in its discussion of the UHA, *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, supports the City. The court there *upheld* a local law that regulated cigarette sales more strictly than state law. While state law merely criminalized the sale of cigarettes to minors, the local ordinance added a prohibition against the sale of cigarettes through vending machines. Because the law did not "prohibit what the statute commands or command what it prohibits," it was not preempted. (*Id*. at p. 397 [quoting *Sherwin-Williams*, 4 Cal.4th at p. 902].)

More fundamentally, as the title of the Unsafe Handgun Act shows, and as confirmed by the legislative history, the UHA is a consumer protection law designed to ensure the safety of handgun *users*, by subjecting handguns to "quality standards" designed to ensure that they are "reliable for self-defense." (Analysis of Senate Bill 15, Assembly Committee on Public Safety [RFJN, Exh. 5 at p. 2].) This is in direct contrast to Proposition H, which, on its face, is designed to protect the *victims* of firearms violence. Because the UHA regulates in an entirely different field, it does not preempt Proposition H. (*See Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1474-75 [state civil rights statute did not preempt local law prohibiting discrimination on the basis of HIV status, because the latter was enacted for separate public health purpose of removing barriers to HIV testing].)

Even with respect to consumer safety, the area in which it does regulate, the UHA makes *no mention whatsoever* of an intent to occupy the field. It therefore cannot possibly be read to show an implied Legislative intent to occupy the entirely different field of gun control.

In sum, none of the statutes relating to firearms sales expresses "a legislative intent to divest the City generally of its police power to regulate the sale of handguns . . . ." (*CRPA*, 66 Cal.App.4th at pp. 1312-13.) Accordingly, Proposition H's sales ban is not expressly preempted.

b. Implied preemption.

Claims of implied preemption "must be approached carefully." (*CRPA*, 66 Cal.App.4th at p. 1317.) "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." (*Id*. [emphasis original].)

As *CRPA* has already held, there is no indication that the Legislature impliedly intended to occupy the field of firearms sales. To the contrary, "to rule that the Legislature *implicitly* intended to preempt, notwithstanding the clear record that the Legislature has *expressly avoided* preemption by the careful wording of its enactments, would be to disregard the Legislature's own pronouncements." (*Id*. at p. 1318 [emphasis added].)

The three "indicia of intent" for implied preemption "reinforce[] the conclusion of no preemption" with respect to firearms sales. (*Id*.) First, the subject matter of firearms sales has not been "so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern." (*Sherwin-Williams*, 4 Cal.4th at p. 898.) Even though the Legislature has acted to regulate firearms sales on several different occasions, the mere fact that the Legislature has touched distinct parts of a field does not demonstrate an intent to fully occupy that field. (*Great Western*, 27 Cal.4th at p. 861; *Galvan*, 70 Cal.3d at p. 860.) To the contrary, "[t]he general fact that state legislation concentrates on specific areas, and leaves related areas untouched (as has been done here), shows a legislative intent to permit local governments to continue to apply their police power according to the particular needs of their communities in areas not specifically preempted." (*CRPA*, 66 Cal.App.4th at p. 1318.)

Second, the Legislature has not couched its firearms sales legislation "in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." (*Sherwin-Williams*, 4 Cal.4th at p. 898.) As the Supreme Court has stated, "we are reluctant to find such a paramount state concern, and therefore implied preemption, 'when there is a

significant local interest to be served that may differ from one locality to another'." (*Great Western*, 27 Cal.4th at 866.)

Third, it can hardly be argued that the subject of firearms sales "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 . . . ." (*Sherwin-Williams*, 4 Cal.4th at p. 898.) "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*, 27 Cal.4th at p. 867 [quoting *Suter*, 57 Cal.App.4th at p. 1119].)

Implicitly acknowledging that its implied preemption claim finds no support in the statutes relating to firearms sales or in the case law interpreting those statutes, the NRA attempts to fall back on a 1994 opinion of then-Attorney General Daniel Lungren, which concluded that state law impliedly preempts local bans on firearms and ammunition sales. (Mem. at 39-40.) But as both *CRPA* and *Suter* recognized, the reasoning contained in this non-binding opinion is fundamentally flawed.

First, although the Attorney General was asked only to opine on whether a proposed local ordinance banning the sale of certain types of *ammunition* was preempted, he reached out to opine on local regulation of the sale of *firearms*:

> Regarding the area of firearms sales, we find that the Legislature has enacted a comprehensive and detailed regulatory scheme . . . which requires the licensing of firearms dealers, places numerous restrictions on firearms sales, and mandates the furnishing of identification information by each purchaser. The state has so thoroughly occupied this field that we have no doubt that regulating firearms sales is beyond the reach of local governments. [1994 WL 323316 at *3 (Cal. A.G.)].

As shown above, this approach to preemption in the area of gun control has been utterly discredited. As *CRPA* held, the "unpersuasive *dicta*" of the Attorney General's opinion failed to explain "how an implied preemption of regulation of firearms sales can be found in the face of the record discussed above, which demonstrates a careful legislative avoidance of such a preemption." (66 Cal.App.4th at p. 1325; *see also Suter*, 57 Cal.App.4th at p. 1121.)

The portion of the opinion dealing with ammunition sales suffers from the same analytical defect. The opinion cites two statutes that purportedly show an intent to preempt local restrictions on ammunition sales: Penal Code Section 12304 (outlawing the sale of ammunition with a power of greater than .60 caliber) and Penal Code Section 12026 (limiting permitting and licensing requirements). (1994 WL 323316 at *5.) But, with respect to Section 12304, a law that outlaws *certain types* of conduct on a statewide basis does not – absent a clear indication of legislative intent to the contrary – prevent local governments from adopting stricter regulations of that conduct. (*See Great Western*, 27 Cal.4th at pp. 866, 868; Subsections A-B, *supra*.) And Section 12026, which does not occupy the field of firearms sales, cannot nonetheless occupy the field of ammunition sales. A local ban on the sale of ammunition does not interfere with Section 12026's permitting scheme any more than does a local ban on the sale of firearms. This Court should decline the NRA's invitation to ignore the established precedent in favor of a non-binding, unpersuasive Attorney General opinion.

IV. THE NRA'S OTHER CHALLENGES TO PROPOSITION H ARE CLEARLY WITHOUT MERIT

A. Proposition H Will Have No Effect On Criminal Law Enforcement.

Taking an absurdly literalist view of Proposition H, the NRA argues that the measure is "inimical" to, and will have "catastrophic" effects on, criminal law enforcement. (Mem. at 32-34.) According to the NRA, Proposition H will bar the SFPD from purchasing guns or ammunition and having them shipped into the City, and from providing firearms or ammunition to its officers. (Mem. at 32-33.) The NRA also claims the measure will prevent guns from being introduced as evidence in judicial proceedings, from being handled by court personnel, counsel, or witnesses. (Mem. at 33-34.)

1. The Court most construe Proposition H to avoid absurd results.

"Rules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 348.) Courts

> will not presume that the lawmakers (here, the voters) intended the literal construction of a law if that construction would result in absurd consequences.

(*Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 976; *People v. Broussard* (1993) 5 Cal.4th 1067, 1071.)

It is absurd to argue that the City's voters – who adopted Proposition H to further public safety – intended to accomplish this goal by hamstringing law enforcement agencies, or by bringing criminal prosecutions to a halt. It flies in the face of reason to claim that the voters intended Section 2's ban on "transfers" to prevent the SFPD from acquiring guns and ammunition, from providing guns and ammunition to its officers, and from training officers how to use guns and ammunition properly. And

it is equally absurd to argue that the voters wanted to bar the SFPD from maintaining its officers' guns or from receiving guns recovered from crime scenes, or wanted to prevent guns from being tested, examined, and used as evidence in judicial proceedings.

Proposition H does not define the terms "transfer" and "distribute." However, a "transfer" is commonly understood to mean a conveyance of property or an interest in property – not merely the physical passing of an item from one person's hands to another's. "Distribution," similarly, ordinarily refers to the act of apportioning or dividing, not simply of providing in the sense in which a police department provides its officers with necessary equipment.[10]

Accordingly, the terms "transfer" and "distribution" must be interpreted not to apply to the acquisition and internal handling of firearms and ammunition by police agencies, officers and personnel, or district attorneys and others employed or functioning within the criminal justice system.

2. The Court must avoid construing Section 2 to impair the sovereign power of the City and other governmental agencies.

"A statute will not be construed to impair or limit the sovereign power of the state to act in its governmental capacity and perform its governmental functions in behalf of the people in general, unless such

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[10] One widely used dictionary defines a "transfer" as follows: "**1a:** conveyance of right, title, or interest in real or personal property from one person to another **b**: removal or acquisition of property by mere delibery with intent to transfer title . . . ." (Merriam-Webster's Collegiate Dictionary (10th Ed. 2001) at p. 1249.) The same dictionary defines "distribution" as "the act or process of distributing," which, in turn, means "**1**: to divide among several or many: APPORTION . . . . " (*Id*. at pp. 337-338.)

intent clearly appears." (*People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703-04; *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1533.) In addition to being absurd, the NRA's interpretation would impair the ability of the City's peace officers, other governmental police agencies and officers, and the judicial system to perform some of its most basic sovereign duties: the preservation of public peace and the prosecution of lawbreakers. For that reason, and because the text and legislative history of Proposition H shows that the voters sought to curb gun violence arising from firearms in private hands, not to block "those who protect us" from doing their jobs (RFJN, Exh. 1 at p. 96), the NRA's overbroad construction of Section 2 must be rejected.

3. The Court must construe Proposition H as a whole.

The NRA's claims about "catastrophic" results of Proposition H are based almost solely on the fact that Section 2 itself "lacks any exemption for peace officers or criminal justice agencies." (Mem. at 32-34.) But

> in construing a legislative enactment, the Court does not "consider the statutory language in isolation. Rather, we look to the *entire substance of the statute* in order to determine the scope and purpose of the provision. That is, we construe the words in question in context, keeping in mind *the nature and obvious purpose of the statute*.

(*People v. Murphy* (2001) 25 Cal.4th 136, 142 [internal cites, quotes, and ellipses omitted; emphasis added].)

Section 2 must be harmonized with Section 3 – which expressly allows peace officers to possess handguns to carry out their employment functions. Interpreting Section 2 as the NRA urges would effectively undermine the ability of peace officers and other public employees to obtain and use firearms, which the voters obviously sought to preserve in Section 3. The NRA's myopic interpretation of Section 2 must be rejected.

B. Proposition H Does Not Violate Equal Protection Guarantees.

The NRA contends that Section 3's distinction between residents and non-residents violates federal and state equal protection guarantees. (Mem. at 34-36; Petition at ¶¶ 48, 52-54.) It contends that the voters' decision to apply the handgun possession ban only to San Francisco residents constitutes irrational discrimination.

Under the rational basis test, a legislative classification is entitled to tremendous deference by the courts. It may only be struck down if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude" that the classification is irrational. (*City and County of San Francisco v. Flying Dutchman Park, Inc.* (2004) 122 Cal.App.4th 74, 83.) The legislature need not articulate any "rational basis" for the classification; rather, the classification "must be upheld against equal protection challenge *if there is any conceivable state of facts that could provide a rational basis for the classification*." (*Warden v. State Bar of California* (1999) 21 Cal.4th 628, 644 [emphasis in original].)

Here, voters could rationally have concluded that because people are often harmed by handguns in the home, handgun possession by City residents presents the greatest risk of violence to San Franciscans. (*Warden v. State Bar* (1999) 21 Cal.4th 628, 644 [under rational basis scrutiny, lawmakers "properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative"]; *Williamson v. Lee Optical of Okla*. (1955) 348 U.S. 483, 489.)

Second, the voters could rationally have concluded that limiting Section 3's handgun possession prohibition to City residents was necessary to properly invoke home rule power, and thus *to avoid* the potential

infirmities identified in *Doe*. It cannot be "irrational discrimination" to legislate in a manner that respects legal limits by ensuring that Section 3 only applies to City residents, and not to people who live outside San Francisco's jurisdictional boundaries.[11]

C. Proposition H Does Not Conflict With State Hunting Policy.

The NRA also claims that Proposition H conflicts with what it labels the state's "Hunting Policy," citing Section 1801 of the California Fish & Game Code, which focuses on the "conservation and maintenance of wildlife and resources," and a 30 year-old publication of the Department of Fish & Game, entitled "Plan for California Deer," which expresses the goal that deer populations be neither too high nor too low for their natural habitat.

Deer overpopulation is not a problem in San Francisco. The City does not even fall within a "deer zone" in which deer may be hunted under state law.[12] Nor does Proposition H hinder anyone from buying firearms to hunt, and from actually hunting, elsewhere in the state.

V. PROPOSITION H IS SEVERABLE

The NRA argues that if Proposition H's handgun sales and possession bans were invalidated, the remainder of the measure should not take effect. (Mem. at pp. 43-44.) As a preliminary matter, the NRA

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[11] The NRA also complains that Section 3's distinction between residents and non-residents will impact peace officers who reside in San Francisco. But because the distinction is rational, its application to peace officers provides no basis to challenge it. In any event, as noted above, both current and retired peace officers are permitted to possess concealed firearms by federal statute.

[12] See California Department of Fish & Game, "Statewide Deer Zone Map" (available at http://www.fgc.ca.gov/html/regs.html).

apparently assumes that if Section 3's prohibition on handgun *possession* were invalidated, Section 2's prohibition on firearms *sales* must also be invalidated as applied to handguns. But as the City has shown, the subjects of sales and possession of firearms are legally distinct from each other. If this Court were to conclude that Section 3 of Proposition H is invalid, Section 2 would remain valid in its entirety (including as applied to handguns), for the reasons discussed in cases such as *Great Western* and *CRPA*.

In any event, even if the NRA were somehow correct that a ruling striking down Section 3 would somehow also affect local laws regulating the *sale* of hanguns, its argument fails. Where portions of an initiative cannot be enforced, the courts "must give effect to the intent of the electorate *to the greatest extent possible*[.]" (*City of Westminster v. County of Orange* (1988) 204 Cal.App.3d 623, 631 [emphasis added].) This is particularly true given the measure's severability clause.[13] "[T]he general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part." (*Santa Barbara School Dist. v. Superior Court* (1975) 13 Cal.3d 315, 330.) Where the voters have included a severability clause, "it seems eminently reasonable to suppose that those who favor the proposition would be

[13] "If any provision of this ordinance or the application thereof to any person or circumstances is held invalid or unconstitutional, such invalidity or unconstitutionality shall not affect other provisions or applications o[f] this ordinance which can be given effect without the invalid or unconstitutional provision or application. To this end, the provisions of this ordinance shall be deemed severable." (Prop. H, §7 [Exh. 1, attached].)

happy to achieve at least some substantial portion of their purpose[.]" (*Id.*, 13 Cal.3d at p. 332.)

Proposition H's bans on the local possession and sale of handguns are "grammatically, functionally, and volitionally separable" from the rest of the measure. (*Hotel Employees and Restaurant Employees Int'l Union v. Davis* (1999) 21 Cal.4th 585, 613.) Far from seeking solely to reduce the availability of handguns, the voters' overall aim was to reduce gun violence by restricting the amount of *all* firearms and ammunition in the City. Both in the text of the measure and in the ballot materials, the voters were presented with Proposition H's ban on the "manufacture, distribution, sale and transfer of firearms and ammunition" as entirely separate provisions from its ban on handgun possession; both were simply different means to achieve a common result. Because restricting the availabity of long guns and ammunition was at least "some substantial portion of their purpose" (*Gerken v. FPPC* (1993) 6 Cal.4th 707, 715), the Court must implement that purpose to the greatest extent possible.

Nothing in *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 changes this result. There, the Supreme Court held that a rent control initiative was unconstitutional because the sole method by which it allowed the City to approve rent increases was a cumbersome administrative adjudication process, "making inevitable the arbitrary imposition of unreasonably low rent ceilings." (*Id.*, 17 Cal.3d at p. 169.) The Court invalidated the entire initiative, because severing its illegal provisions would leave the initiative with *no* rent increase mechanism, and the Court was powerless to craft a replacement mechanism. (*Birkenfeld, supra,* 17 Cal.3d at p. 173.)

No such problem is present here. If any portion of Proposition H were invalidated, it could be severed and the rest of the measure given effect without the need for any judicial legislative drafting.

CONCLUSION

The NRA's petition for writ of mandate should be denied.

Dated: December 5, 2005

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By:_____
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Attorneys for Respondents CITY AND COUNTY OF SAN FRANCISCO,

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 13,933 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 5, 2005.

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PROOF OF SERVICE

I, MONICA QUATTRIN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, #1 Dr. Carlton B. Goodlett Place – City Hall, Room 234, San Francisco, CA 94102.

On December 5, 2005, I served the attached:

- **RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF; SUPPORTING DECLARATIONS**
- **DECLARATION OF VINCE CHHABRIA IN SUPPORT OF CITY'S OPPOSITION TO PETITION FOR WRIT OF MANDATE**
- **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CITY'S OPPOSITION TO PETITION FOR WRIT OF MANDATE, VOLS I & II**

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows:

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California Supreme Court
350 McAllister Street
San Francisco, CA 94102
(*5 copies via Hand Delivery)*

and served the named document in the manner indicated below:

☒ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the office(s) of the addressee(s).

☒ **BY ELECTRONIC MAIL**: I caused a copy of *Respondents' Opposition to Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief (without Supporting Declarations)* to be transmitted via electronic mail in Portable Document Format ("PDF") Adobe Acrobat from the electronic address: *monica.quattrin@sfgov.org*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed December 5, 2005, at San Francisco, California.

MONICA QUATTRIN