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Legal Community Against Violence

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

PAULA FISCAL, et al.,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants and Respondents.

Case No. CPF-05-505960

AMICUS BRIEF OF LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF RESPONDENTS' OPPOSITION TO WRIT OF MANDATE

Hearing Date:	February 15, 2006
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I. INTRODUCTION

Amicus Curiae Legal Community Against Violence ("LCAV"), although not involved in drafting Proposition H, has extensive experience with California local gun ordinances. It has assisted many counties and municipalities in crafting a variety of local regulations to fit community needs. Nationwide, local communities have been willing to advance and test aggressive policies in their attempts to address the problem of gun violence – policies that may not be viable on a statewide or national level. In addition to limitations on handgun possession,[1] some communities prohibit the manufacture and/or sale of firearms, ammunition or both. LCAV is called upon by governmental entities and advocacy organizations to provide legal assistance for the development and implementation of these and other policies.

The policy issue of whether handguns should be banned, as opposed to regulated, is a topic of debate inside, as well as outside, the gun violence prevention movement. LCAV supports the rights of state and local governments to adopt regulations tailored to address most effectively the epidemic of gun violence that plagues their communities. In particular, LCAV supports the legal authority of the City and County of San Francisco ("City") and its residents to enact Proposition H. LCAV files this brief to assist the Court in its evaluation of the important state preemption law issues raised.

II. FACTUAL AND PROCEDURAL BACKGROUND

In response to an increasingly severe epidemic of gun violence within the City, on November 8, 2005, the voters of San Francisco passed Proposition H, by a margin of 58% to 42%. Proposition H is a courageous effort by the City to do something at the local level about a pressing local problem – the tragic consequences of gun violence.[2]

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[1] Since 1976, Washington D.C. has banned the possession of civilian handguns. (See *Seegars v. Ashcroft* (D.C. Cir. 2005) 396 F.3d 1248, cert. den. (2006) 2006 U.S. Lexis 1049 [rejecting challenge to the D.C. ban on standing grounds].) A number of Illinois communities, including Morton Grove, have also enacted ordinances prohibiting the possession and sale of handguns. (See *Quilici v. Village of Morton Grove* (7th Cir. 1982) 695 F.2d 261, 271 [upholding law against Second Amendment challenge].)

[2] Section 1 of the ordinance contains the findings of the people of San Francisco, including that: (1) handgun violence is a serious problem in their city and (2) handguns pose a threat to their safety. (Legal Text of Proposition H, Exhibit ["Exh."] A to Declaration of Roderick M. Thompson ["Thompson Decl."] in Support of Amicus LCAV's Request for Judicial Notice.) The Proponent's Argument in Favor of Proposition H notes that "access to handguns can transform heated exchanges or emotional moments into lifelong injury or death." (Thompson Decl., Exh. A.) While no "single strategy will solve San Francisco's

(footnote continued on next page)

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The ordinance has two substantive sections. First, Section 2 bans within the limits of the City "the sale, distribution, transfer and manufacture of all firearms and ammunition." (Legal Text of Proposition H, Thompson Decl., Exh. A.) Second, Section 3 is entitled "Limiting Handgun Possession in the City . . . ." (*Ibid.*) Unlike Section 2, it applies only to City residents, who shall not "possess any handgun unless required for specified professional purposes." (*Ibid.*) Among residents not covered are all state and federal peace officers, active members of the armed forces and security guards who are protecting and preserving property or life within the scope of their employment. (*Ibid.*)

The day after the election, November 9, 2005, Petitioners (led by the National Rifle Association (the "NRA")) posted on the Internet and filed a 45-page petition seeking original relief from the First District Court of Appeal in the form of a writ of mandate/prohibition to block implementation of the local ordinance. After receiving briefing from the City and LCAV, the court of appeal denied the writ on December 9, 2005 on the grounds that Petitioners had failed to demonstrate the requisite "exceptional circumstances" needed for the court to exercise its original jurisdiction. The NRA refiled the Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief ("Petition" or "Petn.") in this Court on December 29, 2005.

This memorandum addresses and refutes the main assertion in Petitioners' motion, that the 1982 decision in *Doe v. City and County of San Francisco* (1982) 136 Cal.App.3d 509 (*Doe*) is both the definitive authority on the preemption of local gun regulation and should be controlling here. The Supreme Court's 2002 companion decisions in *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal.4th 853 (*Great Western)* and *Nordyke v. King* (2002) 27 Cal.4th 875 (*Nordyke*), not *Doe*, are together the controlling authority on the issue of state preemption of local gun regulation. Under these decisions, and for the reasons that will be set out in the City's Opposition, Section 2 of Proposition H is not preempted by state law. As explained below, when analyzed under the *Great*

(*footnote continued from previous page*)
epidemic of violence," less guns in the flow of commerce should make it more difficult to obtain one. (*Ibid.*) "It limits handgun possession to those who protect us, and ends firearm sales." (*Ibid.*)

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Western/Nordyke standard, Section 3 is also not preempted by state law.[3]

III. ARGUMENT

Petitioners rely almost exclusively on the 1982 court of appeal decision in *Doe* in arguing that any local ordinance banning possession of handguns is impliedly preempted by state law. This sweeping assertion is based on two sentences of dicta in *Doe*. Petitioners fail to advise this Court, however, that the Supreme Court in *Great Western/Nordyke* specifically resolved the conflict between this dicta in *Doe* and later appellate court decisions in favor of the later decisions. In its exhaustive survey of state law preemption as applied to gun control, the Court conspicuously omitted any mention of the dicta relied upon by Petitioners. The *Great Western* Court endorsed only *Doe*'s holding that state law preempts local licensing or permitting of handgun possession. In addition, and contrary to Petitioners' assertions, subsequent legislative action has also confined *Doe* to its narrow holding.

A. The *Doe* Decision Is Distinguishable and Is Not Controlling Here.

The 1982 San Francisco ordinance invalidated in *Doe* barred handgun possession by both residents and nonresidents, and explicitly "exempt[ed] 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 pp. 516-17.) Because of that exemption, the *Doe* court held, the ordinance's effect was to create a new class of persons who "must obtain licenses" under the section 12050 procedure "or relinquish their handguns," something expressly preempted by Government Code section 53071 and in conflict with Penal Code section 12026. (*Id.* at pp. 517, 518.) *Doe* therefore struck down the ordinance because it created a licensing requirement in contravention of state law.

Petitioners build their first argument on a false premise--that Section 3 of Proposition H is "substantively indistinguishable" from the ordinance at issue in *Doe*. (Mem. of P. & A. in Supp. of Mot. for Writ of Mandate and/or Prohibition or Other Appropriate Relief, filed January 11, 2006 ["Memorandum" or "Mem."], p. 1.) In fact, Section 3 applies only to residents (not nonresidents), and, most importantly, contains no exemption for concealed weapons licensees. Unlike the 1982

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[3] Alternatively, for the reasons to be explained in the City's Opposition, even if a conflict were found with state law, because the handgun possession ban in Proposition H is directed to a municipal affair, it would still be valid and enforceable under the City's home rule authority.

ordinance, Section 3 does not create a licensing or permitting requirement and is therefore not expressly preempted by state law. In their Petition, Petitioners specifically recognize this distinction, alleging "that CITY deems that its Ordinance prohibits possession of handguns by City residents, **regardless of whether they have obtained a permit**" under any state statute. (Petn., at ¶ 9, bold emphasis added.)[4] *Doe*, which addressed an ordinance explicitly establishing an exception for permit holders, is inapposite.

Doe also contains one paragraph of dicta entitled "Implied Preemption." (*Doe*, *supra*, 136 Cal.App.3d at p. 518.) This cursory treatment of the subject forms the basis for Petitioners' main arguments. The *Doe* court stated that even if there had been no licensing "requirement within the express wording of" sections 53071 and 12026, the court would still have found the ordinance preempted under "the theory of implied preemption."[5] (*Ibid.*) The court then "infer[red]" from section 12026 "that that the Legislature intended to occupy the field of residential handgun possession to the exclusion of local governmental entities." (*Ibid.*) This bald conclusion is not supported by citation to cases, legislative history or anything else. It relies entirely on the superficial logic of the next two sentences: "A restriction on requiring permits and licenses necessarily implies that possession is lawful without a permit or a license. It strains reason to suggest that the state Legislature would prohibit licenses and permits but allow a ban on possession." (*Ibid.*) These two sentences of *Doe*, upon which Petitioners' arguments are built, have since been specifically examined and their reasoning rejected by later cases.

In the same paragraph the *Doe* court begrudgingly acknowledged that "[i]t is at least arguable"

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[4] Petitioners' argument in their Memorandum that Proposition H contains an "inherent exception" for certain licensees and thus creates a *de facto* licensing scheme (Mem., pp. 7-8.) can therefore be ignored as contradicted by own their verified factual allegations.

[5] Petitioners mislabel *Doe's* cursory implied preemption discussion as an "alternative holding." (Mem., p. 9.) "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citations.]" (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) To this end, "[w]hatever may be said in an opinion that is *not necessary* to a determination of the question involved is to be regarded as mere dictum," and "[t]he statement of a principle *not necessary* to the decision will not be regarded either as a part of the decision or as a precedent that is required by the rule of *stare decisis* to be followed." (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61-62, italics added.) Finding a licensing requirement, not finding implied preemption under an assumed set of facts, was the essential part of the decision. The *Doe* court's discussion of implied preemption, therefore, is non-binding dicta. Petitioners appear to concede as much elsewhere in their Memorandum. (See pp. 11-12, below.)

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that the Legislature "has not impliedly preempted all areas of gun regulation," citing the Supreme Court in *Galvan v. Superior Court* (1969) 70 Cal.2d 851, 860 (*Galvan*). (*Ibid.*) The *Doe* court failed, however, to discuss or apply the three-pronged implied preemption framework set forth in *Galvan*, which has since been reaffirmed by the Court in *Great Western*, a decision that discusses implied preemption of local gun regulations at length while ignoring *Doe*'s treatment of that subject entirely.

B. The Ninth Circuit Found *Doe*'s Reasoning To Be in Conflict With Later Court of Appeal Decisions on the Scope of Implied State Preemption of Local Gun Control Regulations.

In 2000, the Ninth Circuit reviewed preemption challenges to two county gun control ordinances in *Great Western Shows, Inc. v. Los Angeles County* (9th Cir. 2000) 229 F.3d 1258 (*Great Western Shows*) and *Nordyke v. King* (9th Cir. 2000) 229 F.3d 1266. The petitioner in *Great Western Shows* challenged a Los Angeles County ordinance outlawing sales of firearms and ammunition on county property, while the petitioners in *Nordyke v. King* challenged an Alameda County ordinance prohibiting the possession of firearms on county property. (*Great Western Shows, supra*, 229 F.3d at p. 1261; *Nordyke v. King, supra*, 229 F.3d at p. 1268.) Both bans covered the county fairgrounds where the respective petitioners had held their gun shows for many years. (*Great Western Shows, supra*, 229 F.3d at p. 1260; *Nordyke v. King, supra*, 229 F.3d at p. 1267.)

In each case, the court noted that several state laws were clearly relevant to the sale of firearms and to the possession of firearms, respectively, at gun shows. (*Great Western Shows, supra*, 229 F.3d at p. 1261; *Nordyke v. King, supra*, 229 F.3d at p. 1269.) The court considered reasoning adopted by the district court in one of the cases below, that because the Legislature expressly permits gun sales and possession at gun shows, it necessarily follows that local ordinances may not ban such sales and possession. (*Ibid.*) The Ninth Circuit found support for this argument in *Doe*'s implied preemption discussion, which "'inferred from the legislature's restriction on local handgun permit requirements an intent to foreclose local laws banning possession citywide.'" (*Great Western Shows, supra*, 229 F.3d at p. 1262; *Nordyke v. King, supra*, 229 F.3d at p. 1269 [both quoting *Doe's* two sentences].) The Ninth Circuit also noted that an Opinion of the Attorney General adopted this same reasoning, explicitly relying on *Doe*. (*Ibid.* [citing 77 Ops.Cal.Atty.Gen 147 (1994)].)

On the other hand, the Ninth Circuit noted that more recently, the court of appeal in *California*

Rifle and Pistol Ass'n, Inc. v. City of West Hollywood (1998) 66 Cal. App. 4th 1302 (*California Rifle*) "appears to have disavowed the logic underlying the district court's conclusion and the pertinent part of *Doe*." (*Great Western Shows*, *supra*, 229 F.3d at p. 1262; *Nordyke v. King*, *supra*, 229 F.3d at p. 1269.) The court explained why it believed the reasoning of *Doe* and *California Rifle* were in tension:

> [T]he [*California Rifle*] court confronted the argument that because under state law sales of firearms are regulated, but legal, a city cannot ban the sale of certain types of firearms. [Citation.] The court rejected this reasoning as tautological: "Again, it is no doubt tautologically true that something that is not prohibited by state law is lawful under state law, but the question here is whether the Legislature intended to strip local governments of their constitutional power to ban the local sale of firearms which the local governments believe are causing a particular problem within their borders." [Citation.] **This reasoning appears to be at tension with the reasoning of *Doe*.**

(*Ibid.*, bold emphasis added [quoting *California Rifle*, *supra*, 66 Cal.App.4th at p. 1324].)

Referring to *Doe* and *California Rifle*, the Ninth Circuit determined that "[t]he Courts of Appeal of the State of California have responded in seemingly conflicting ways to this type of argument in the area of local gun regulation preemption." (*Great Western Shows*, *supra*, 229 F.3d at p. 1261-62; *Nordyke v. King*, *supra*, 229 F.3d at p. 1269.) The Ninth Circuit concluded "[i]n sum, there is tension in the reasoning underlying several decisions of the Courts of Appeal of the State of California and an Opinion of its Attorney General." (*Great Western Shows*, *supra*, 229 F.3d at p. 1263; *Nordyke v. King*, *supra*, 229 F.3d at p. 1270.) Mindful that "[t]he area of gun control regulation is a sensitive area of local concern," the court suggested that "[a] clear statement by the California Supreme Court would provide guidance to local governments with respect to the powers they may exercise in passing local gun control regulations." (*Ibid.*) For this reason, pursuant to then California Rule of Court 29.5, it certified to the "California Supreme Court questions of law concerning the possible state preemption of local gun control ordinances." (*Great Western Shows*, *supra*, 229 F.3d at p. 1259; *Nordyke v. King*, *supra*, 229 F.3d at p. 1267.)

C. The Supreme Court in *Great Western/Nordyke* Set Forth the Standard in California for Preemption Analysis of Local Gun Regulations.

The Supreme Court granted the Ninth Circuit's requests for certification. (*Great Western*, *supra*, 27 Cal.4th at p. 858; *Nordyke*, *supra*, 27 Cal.4th at 880.) In April, 2002 it provided the suggested "clear statement" in the *Great Western* decision; in *Nordyke* the Court applied to a gun

possession ban the "[g]eneral preemption principles . . . recapitulated in *Great Western*." (*Nordyke*, *supra*, 27 Cal.4th at pp. 881-82.)

1. The Supreme Court Granted Certification in 2002 and Clarified the Law on State Preemption of Local Gun Control Ordinances.

Under the heading "*State Law Preemption in General and as Applied to Gun Control*," the *Great Western* Court carefully and exhaustively traced the development of the law on preemption of local gun regulation through the principal cases. (*Great Western*, *supra*, 27 Cal.4th at pp. 861-64.) It found that "[a] review of the gun law preemption cases indicates that the Legislature has preempted discrete areas of gun regulation rather than the entire field of gun control." (*Id.* at p. 861.) The Court started its review of the cases with "the seminal case to advance this proposition" – its unanimous decision in *Galvan*. (*Ibid.*) That case involved an earlier San Francisco ordinance that made it "unlawful for any person within San Francisco to own, possess or control an *unregistered* firearm." (*Galvan*, 70 Cal.2d at p. 855, fn. 1, italics added.)[6] The issue raised in *Galvan*, the *Great Western* Court explained, concerned the requirement that "all firearms within San Francisco, with certain exceptions . . . be registered" with the City. (*Great Western*, *supra*, 27 Cal.4th at p. 861.)

The Court first briefly described its conclusion in *Galvan* that the registration requirement was not expressly preempted by the licensing prohibition in Penal Code Section 12026, distinguishing between "licensing, which signifies permission or authorization, and registration, which entails recording." (*Great Western*, *supra*, 27 Cal. 4th at p. 861.) The *Great Western* Court next discussed and summarized for three paragraphs the lengthy *Galvan* implied preemption analysis under its three-part test. (*Id.* at pp. 861-62.)

"In *Galvan*" the Court "found the San Francisco ordinance did not meet the first test, i.e., that the subject matter had been so fully and completely covered by general law as to clearly indicate that it

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[6] The City's power to ban possession of firearms generally does not appear to have been directly questioned or addressed in *Galvan*. The *Galvan* Court did swiftly reject challenges to the ordinance as violative of the Second Amendment ("It is . . . settled in this state that regulation of firearms is a proper police function") and due process-notice (because "the penalty is imposed upon the possession of unregistered firearms" and "Galvan does not contend that the law violates due process because one might unknowingly possess a firearm"). (*Galvan*, *supra*, 70 Cal.2d at pp. 866, 868.) Petitioners here do not contend that the Second Amendment or due process are at issue.

had become exclusively a matter of state concern." (*Great Western*, *supra*, 27 Cal. 4th at p. 861.) This finding was based on a determination that despite the many state statutes relating to weapons, there were "'various subjects that the legislation deals with only partly or not at all.'" (*Id.* at p. 861 [quoting *Galvan*, *supra*, 70 Cal.2d at p. 860].) Further, the *Great Western* Court quoted *Galvan*'s conclusion that "'there are some indications that the Legislature did not believe that it had occupied the entire field of gun or weapons control'" in the context of the implied reach of Penal Code section 12026: "'[T]he Legislature has expressly prohibited requiring a license to keep a concealable weapon at a residence or place of business. (Pen. Code, § 12026.) Such a statutory provision would be unnecessary if the Legislature believed that all gun regulation was improper.'" (*Id.* at pp. 861-62 [quoting *Galvan*, *supra*, 70 Cal.2d at p. 860].)

Second, the *Great Western* Court explained, *Galvan* found no implied preemption under part two of the implied preemption test because partial legislative coverage of the area did not indicate that any paramount state concern "would not tolerate further or additional local action":

> "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.' [Citation.] **[¶] 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** . . ."

(*Great Western*, *supra*, 27 Cal.4th at p. 862, bold emphasis added [quoting *Galvan*, *supra*, 70 Cal.2d at pp. 863-64].) The *Great Western* Court repeated the highlighted language from *Galvan* later in the opinion in performing its own implied preemption analysis, noting that the statement "is true today [2002] as it was more than 30 years ago." (*Id.* at p. 867.)

Third, the *Great Western* Court noted *Galvan*'s conclusion on the last prong of the implied preemption analysis, i.e., that the ordinance in question placed no undue burden on non-San Franciscans who were given seven days to register their guns. (*Great Western*, *supra*, 27 Cal.4th at p. 862.) Once again, the *Great Western* Court specifically endorsed and reaffirmed *Galvan*'s reasoning on this point in applying the third test to its own facts: "As for the third test, we agree with previous cases that '[l]aws 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

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preemption challenges.'" (*Id.* at p. 867 [quoting *Suter v. City of Lafayette* (1997) 57 Cal.App.4th 1109, 1119 (*Suter*) and citing *Galvan*, *supra*, 70 Cal.2d at pp. 864-65].)

The *Great Western* Court next turned to the legislative reaction to *Galvan*. Here the Court used the court of appeal's decision in *Olsen v. McGillicuddy* (1971) 15 Cal.App.3d 897 (*Olsen*) to explain that the Legislature had enacted a narrow preemption statute, "Government Code section 53071, which made clear an 'intent "to occupy the whole field of registration or licensing of . . . firearms."'" (*Great Western*, *supra*, 27 Cal.4th at p. 862 [quoting *Olsen*, *supra*, 15 Cal.App.3d at p. 902, italics omitted].) Noting "*Galvan's* strong statement concerning the narrowness of state law firearms preemption," the *Great Western* Court quoted the *Olsen* court on the significance of "the Legislature's limited response to *Galvan*":

> "Despite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent was limited to registration and licensing. We infer from this limitation that the Legislature did not intend to exclude [localities] from enacting further legislation concerning the use of firearms."

(*Id.* at pp. 862-63 [quoting *Olsen*, *supra*, 15 Cal.App.3d at p. 902].) *Olsen* upheld the validity of a local ordinance prohibiting a parent from allowing a minor child to posses or fire a BB gun. (*Id.* at p. 863.)

Great Western traced the legislative reaction to *Olsen*, section 53071.5 of the Government Code, "'which expressly occupies the field of the manufacture, possession, or sale of *imitation* firearms.'" (*Great Western*, *supra*, 27 Cal.4th at p. 863 [quoting *California Rifle*, *supra*, 66 Cal.App.4th at p. 1315].) Here, quoting *California Rifle*, the Court explained:

> ["]Thus once again the Legislature's response was measured and limited, extending state preemption into a new area in which legislative interest had been aroused, but at the same time carefully refraining from enacting a blanket preemption of all local firearms regulation." (Italics added.) As the court further explained: "This 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 has made a distinction, for whatever policy reason, between regulating the sale of real firearms and regulating the sale of imitation firearms."

(*Ibid.* [quoting *California Rifle*, *supra*, 66 Cal.App.4th at p. 1312, italics omitted].) The Court also noted that *Suter* had upheld a city's authority to confine firearms dealers to specified commercial zones, but struck down part of the ordinance "regarding firearms storage covered by" Penal Code

Section 12071. (*Ibid.*)

Finally, in its survey of the developing case law on preemption, the *Great Western* Court turned, "[o]n the other hand" to the only decision it discussed finding a local gun ordinance preempted – *Doe*. (*Great Western*, *supra*, 27 Cal.4th at p. 863.) It described the San Francisco ordinance there as "outlaw[ing] the possession of handguns within the city but exempt[ing] those persons who obtained a license to carry a concealed weapon under Penal Code section 12050." (*Ibid.*) The Court was cryptic in its description of *Doe*. It noted *Doe*'s acknowledgement that *Galvan* and *Olsen* "'suggested the Legislature has not prevented local government *bodies from regulating all aspects of the possession of firearms.*' [Citation.]" (*Id.* at pp. 863-64, original italics [quoting *Doe*, *supra*, 136 Cal.App.3d at p. 516].) The Court then described *Doe*'s preemption holding:

> Nonetheless, the ordinance directly conflicted with Government Code section 53071 and Penal Code section 12026, the former explicitly preempting local licensing requirements, the latter exempting from licensing requirements gun possession in residences and places of business. Thus, the effect of the San Francisco ordinance "is to create a new class of persons who will be required to obtain licenses in order to possess handguns" in residences and places of business [citation], which the two statutes forbid [citation].

(*Id.* at p. 864 [quoting and citing *Doe*, *supra*, 136 Cal.App.3d at pp. 517, 517-18].)

Significantly, the Court said nothing about *Doe*'s one-paragraph discussion under the heading "Implied Preemption," which had not utilized the three-part test described at length, endorsed and applied by the *Great Western* Court. (See *Id.* at pp. 863-64, 865-67.)

The Court summarized its "review of case law and the corresponding development of gun control statutes in response to that law" as demonstrating "that the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption." (*Great Western*, *supra*, 27 Cal.4th at p. 864.) The Court proceeded to apply this structure for its analysis of the issues presented and upheld both the Los Angeles County and Alameda County ordinances. (*Great Western*, *supra*, 27 Cal.4th at p. 873; *Nordyke*, *supra*, 27 Cal.4th at 886.)

2. The Supreme Court's Treatment of *Doe* in *Great Western* Confines *Doe* to Its Narrow Holding that State Statutes Preempt Local Licensing and Registration Schemes.

Petitioners mischaracterize *Great Western's* treatment of *Doe*, stating that *Great Western* cited *Doe* "approvingly," "reaffirmed" *Doe* and that *Doe* has therefore "withstood the test of time." (Mem.,

pp. 3, 6.) The Supreme Court merely recited *Doe's* narrow **express** preemption holding. The Court specifically described the *Doe* holding in these terms: "local law may not impose additional licensing requirements when state law specifically prohibits such requirements." (*Great Western, supra*, 27 Cal.4th at p. 866.) Although exhaustively describing and applying the case law on **implied** preemption of local gun regulations, the Supreme Court never mentioned, let alone approved, *Doe's* cursory implied preemption discussion which underlies Petitioners' arguments here. (Mem., pp. 1, 9.) Yet these few sentences of *Doe* had been singled out by the Ninth Circuit as in conflict with the later decisions endorsed by the *Great Western* Court. As a result, *Great Western* necessarily confined *Doe* to its narrow holding that state statutes expressly preempt local licensing and registration schemes.

Great Western's treatment of *Doe* is especially significant because its reason for accepting certification from the Ninth Circuit was "'the settlement of important questions of law.'" (*Great Western, supra*, 27 Cal.4th at p. 859 [quoting Cal. Rules of Ct., Rule 29(a)].) The Ninth Circuit had requested certification because it found "tension" among the courts of appeal regarding the *Doe* implied preemption reasoning. It pointed to *California Rifle* as "appear[ing] to have disavowed the logic underlying . . . the pertinent part of *Doe*." (*Great Western Shows, supra*, 229 F.3d at p. 1262.) Given the Court's goal to resolve the tension identified by the Ninth Circuit regarding *Doe's* implied preemption reasoning and its extensive discussion and endorsement of the reasoning of other cases on implied preemption, its utter silence on *Doe*'s reasoning is tantamount to disapproval.[7]

Indeed, in one place in their Memorandum, Petitioners admit that the *Great Western* Court recognized two "alternate holdings" in *Doe*, describing only the express preemption holdings based on Government Code section 53071 and Penal Code section 12026, and making no mention of *Doe's* treatment of implied preemption. (Mem., p. 6.) Elsewhere in their Memorandum, while paying lip service to the argument that the two *Doe* sentences on implied preemption qualify as an "alternative

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[7] In any event, even putting aside the significance of the Rule 29.5 certification, "it is settled that the authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it." (*Fujii v. State* (1952) 38 Cal.2d 718, 728.) The trend of decision since the 1982 *Doe* case has been to construe state firearms statutes narrowly as targeting only "certain specific areas for preemption" of local gun control regulations. (*Great Western, supra*, 27 Cal.4th at p. 864.) *Doe's* implied preemption finding of a legislative intent "to occupy the field of residential handgun possession" (*Doe, supra*, 136 Cal.App.3d at p. 518) is contrary to the trend in later decisions.

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holding," Petitioners eventually retreat to the assertion that "even if *Doe's* alternative holding were both wrong and *dictum*" it can be saved by later legislative pronouncements. (Mem., p. 9.) Petitioners are wrong. Their argument that later amendments are ratifications of the *Doe* dicta is unsupportable.

D. The Legislature Has Consistently Construed Section 12026 Narrowly as Limited to a Prohibition on Licensing and Permitting of Handguns at the Local Level.

Petitioners badly misread post-*Doe* amendments to section 12026 as showing a legislative endorsement of Petitioners' broad and inaccurate reading of *Doe*. To the contrary, the cited amendments demonstrate both on their face and in the pertinent legislative history that the Legislature intended the preemptive effect of section 12026 to be limited to the field of licensing and permitting of handguns.

Petitioners argue that because section 12026 was amended after *Doe*, the Legislature is deemed to have acquiesced in the *Doe* holding. (Mem., pp. 4-5.) But those amendments show that, contrary to Petitioners' broad reading of *Doe,* the Legislature intended the section to be read more narrowly as creating only: (1) an exception to section 12025's prohibition on concealed weapons; and (2) a preemption of local licensing or permitting of concealed weapons. As summarized in the Assembly in 1995, as "existing law":

> Section 12026 of the Penal Code provides for [1] a **preemption of the concealed weapons permit requirement** to United States citizens under certain conditions (possession of firearm at place of residence, business, etc.). It also provides for [2] **an exemption from the concealed weapon permit** requirements that might otherwise be imposed on United States citizens under the same conditions (place of residence, business etc.).

(Assembly Third Reading Analysis, Thompson Decl., Exh. B., bold emphasis added.)

The 1995 amendment clarified this dual limited purpose of section 12026, by "Rearrang[ing] the language found in Section 12026 to create two distinct subdivisions. One subdivision would address the pre-emption preventing concealed weapons permits from being required of citizens who possess firearms in their homes and businesses. The other subdivision would address the exemption . . ." (Assembly Third Reading Analysis, Thompson Decl., Exh. B.) The Legislature considered this amendment to be only a "technical change in language [that] would have no substantive effect." (*Ibid.*) The result is the current version of section 12026, which has subpart (a) addressed to the reach

of section 12025 ("Section 12025 shall not apply") and subpart (b), addressed to the preemption of local laws requiring a permit or license ("No permit or license to purchase, own, possess, keep, or carry, either openly or concealed, shall be required . . . ."). (Pen. Code, § 12026.) Subpart (b) is a legislative codification of the narrow holding of *Doe*, as preempting only laws directed at permitting or licensing.

If the Legislature had agreed with Petitioners' broad reading of *Doe*, it could have and would have clarified section 12026 to so provide. Instead, it preserved the narrow preemptive scope of that section to only permitting and licensing of handguns. As the court in *Suter* recognized two years after the 1995 amendment, "[a]lthough the *Doe* court, like the courts in the earlier cases, essentially invited the Legislature to state an intent to preempt local legislation in the area of firearm control, the Legislature has not responded to that invitation." (*Suter*, *supra*, 57 Cal.App.4th at p.1120, fn. 3.) Thus, the fact that section 12026 has been amended three times since *Doe* without substantive change is confirmation that the Legislature did not intend any broadening of section 12026's narrow preemptive reach.[8]

In sum, since *Doe* the Legislature has consistently treated section 12026 as preempting the licensing and permitting of handguns in the home or place of business. Its actions cannot be twisted into an endorsement of a general right of handgun possession. More restrictive measures, such as Proposition H, that do not create new or different licensing requirements are entirely consistent with the Legislature's desire to promote public safety through section 12026, one of the provisions of the Dangerous Weapons Control Act.[9] The Memorandum ignores the purpose stated in the title of the act

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[8] Petitioners also point to the reference "[n]otwithstanding Section 12026" in another Penal Code section, section 626.9(h) and (i), part of the "Gun-Free School Zone Act." (Mem., p. 5.) They incompletely describe this statute as barring students from "hav[ing] firearms in college" housing and argue the cross-reference to section 12026 confirms that it created a "general right" to possess handguns. (*Ibid.*) Sections 626.9(h) and (i) do not, in fact, ban all possession. They allow only those with "written permission" from the university or college to bring or possess a firearm on campus or university grounds. Pen. Code §§ 626.9(h), (i). By creating an express exception for those obtaining "written permission," the statute adopted a licensing scheme. This exemption from the possession ban of section 626.9(h)(i), like the exemption for section 12050 permit holders in *Doe*, could be construed as a new licensing scheme in conflict with section 12026. Therefore the "notwithstanding Section 12026" reference is logically necessary to avoid the exemption/preemption language of section 12026.

[9] Section 12026 is part of the "Dangerous Weapons Control Act," Penal Code sections 12000 et seq., originally enacted in 1917. (*Galvan*, *supra*, 70 Cal.2d at p. 858; *Doe*, *supra*, 136 Cal.App.3d at p. 513;

(*footnote continued on next page*)

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– to control dangerous weapons – and instead relies on a one-sided and entirely inadmissible discussion of "Legislative History." (Mem., pp. 10-12.) It asserts, in essence, that based on an inadmissible newspaper article, the Legislature adopted the amendment to section 12026 in 1923 because of the recommendation of an NRA supporter who intended to create a right of gun ownership.[10] This assertion is both dubious historically and immaterial to the issue at hand. The legislative intent behind the 1995 amendment, not the one from 1923, is the relevant legislative history to section 12026(b), which was intended to preempt local licensing and permitting of handguns.

E. Under the *Great Western* Standard, Section 3's Possession Ban on Some Local Residents Creates No Licensing or Permitting Requirement, and, Therefore, Is Not Preempted Expressly or Impliedly by State Law.

The *Great Western* Court[11] set out the preemption standard used in *Galvan* and reaffirmed in its recent cases: local legislation enacted under the Constitutional police power (Article XI, Section 7) is valid unless in conflict with state law; a conflict exists if the ordinance contradicts, duplicates, or enters an area occupied by general law, either expressly or by legislative implication. (*Great Western*, *supra*, 27 Cal.4th at p. 860 [citing *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897-98, fn. omitted (*Sherwin-Williams*)].)

Petitioners not only fail to apply this preemption analysis mandated by *Great Western*, but also

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(*footnote continued from previous page*)
People v. Mills (1992) 6 Cal.App.4th 1278, 1288, fn. 3.) "The clear intent of the Legislature in adopting the weapons control act was to limit as far as possible the use of instruments commonly associated with criminal activity [citation] and, specifically, 'to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence.' [Citation.]" (*People v. Bell* (1989) 49 Cal.3d 502, 544.)

[10] Petitioners rely upon a 1923 article from the San Francisco Chronicle which they assert contains "statement of supporter who persuaded governor to sign the Act." (Mem., p. 17, fn. 21.) A less admissible piece of evidence of legislative intent is hard to imagine. Preliminarily, the statements in the newspaper article do not even purport to have been made to the governor, let alone a legislator. Even if they had been communicated in writing to the governor and assuming that Petitioners had produced an authenticated copy from the governor's office indicating actual receipt of such a letter, it still would be entirely irrelevant to establishing *the Legislature's purpose*. A letter to a governor urging signature is not admissible as evidence of legislative intent. (*California Teachers Ass'n. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 701, fn.1; *Kauffman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 37.) Petitioners' cases do not lend any support for the cited "evidence." For example, the "news articles" cited in *People v. Tanner* (1979) 24 Cal.3d 514, 547-49 were not related to legislative intent at all, but were the comments in a concurring opinion, noting the "hullabaloo" of publicity after the Supreme Court decided to accept review of the issue under discussion.

[11] Home rule authority was not an issue in *Great Western*. Los Angeles County is distinct, geographically and legally, from the City of Los Angeles. In *Great Western*, Los Angeles was acting as a *county*, not as a city. Therefore it could not invoke charter city home rule authority (as San Francisco did in enacting Section 3 of Proposition H).

completely ignore *Nordyke*, a noteworthy omission given that *Nordyke* upheld a possession ban. When tested under the Supreme Court's preemption analysis, Section 3 should be upheld as a valid exercise of local police power not in conflict with state law.

1. State Law Does Not Expressly Preempt Section 3.

Petitioners do not appear to argue that state law has expressly preempted the field of handgun possession regulation. Nor could they. In *Great Western*, the Supreme Court concluded "a review of case law and the corresponding development of gun control statutes in response to that law demonstrates that the Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific areas for preemption." (*Great Western*, *supra*, 27 Cal.4th at p. 864.) In particular, the Court held "the Legislature has declined to preempt the entire field of gun regulation, instead preempting portions of it, such as licensing and registration of guns and sale of imitation firearms." (*Id.* at p. 866.) Section 3's prohibition on residents possessing handguns does not fall in any of those targeted areas.

This conclusion is mandated by the plain language of the express preemption statutes. "It is the intention of the Legislature to occupy the whole field of *regulation of registration or licensing*" of firearms. (Gov. Code, § 53071, italics added.) There is no mention of the broader field of possession of handguns. Nor could this omission have been accidental. When the Legislature decided to occupy the field of imitation handguns, it stated its intent to occupy "the whole field of regulation of *the manufacture, sale, or possession* of imitation firearms." (Gov. Code, § 53071.5, italics added.) If it intended to occupy the field of "regulation of the manufacture, sale, or possession" of real guns, the Legislature would have said so.

2. Section 3 Is Not Duplicative of State Law.

An ordinance is duplicative if it is coextensive with state law. (*Sherwin-Williams, supra*, 4 Cal.4th at pp. 897-98.) Section 3 provides that no San Francisco resident "shall possess any handgun" within City limits (except for specified law enforcement and related purposes). (Legal Text of Proposition H, Thompson Decl., Exh. A.) It does not create a licensing or registration requirement to allow possession. It simply bans all possession by those residents covered by the ordinance.

The Supreme Court in *Nordyke*, *supra*, 27 Cal.4th at page 883 addressed the same issue in the

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context of an Alameda county ordinance that made it a misdemeanor to "bring[] onto or possess[] on county property a firearm, loaded or unloaded, or ammunition for a firearm." After reviewing the same Penal Codes sections relied upon by Petitioners here (12025, 12031, 12050 and 12051) the Court found "the state statutes, read together, make it a crime to possess concealed or loaded firearms without the proper license." (*Ibid.*) Comparing the effect of the state statutes and the local possession ban ordinance, the *Nordyke* Court concluded there was no conflict, in reasoning equally applicable here:

> The Ordinance does not duplicate the statutory scheme. Rather, it criminalizes possession of a firearm on county property, whether concealed, loaded or not, and whether the individual is licensed or not. Thus, the Ordinance does not criminalize "'precisely the same acts which are . . . prohibited'" by statute.

(*Ibid.*)

San Francisco's ordinance differs from the Alameda ordinance in that it applies to a more narrow class – only county residents – and a narrower category of firearms – only handguns – but covers a larger area, city limits as opposed to only county property. None of these differences, however, makes *Nordyke* legally distinguishable. Just like the Alameda ordinance at issue in *Nordyke*, Section 3 "does not duplicate the statutory scheme. Rather, it criminalizes possession of a [handgun] . . . whether the individual is licensed or not." (*Nordyke*, *supra*, 27 Cal.4th at p. 883.) *Nordyke* is controlling; Section 3 is not duplicative of state law.

3. Section 3 Does Not Contradict State Law.

"An ordinance contradicts state law if it is inimical to state law; i.e., it penalizes conduct that state law expressly authorizes or permits conduct which state law forbids." (*Suter, supra*, 57 Cal.App.4th at p. 1124.) There is no state law mandating possession of handguns. The purpose of the Dangerous Weapon Control Act was to curtail crime by limiting the free availability of firearms (see pages 13-14, footnote 9, above). Among other things, it contains a prohibition against carrying concealed weapons (Pen. Code, § 12025) and provides for licenses and permits allowing handguns to be "carried concealed" (Pen. Code, § 12050). The state laws prohibiting local permitting of guns possessed in the home contemplate that some citizens may want to possess a handgun in their homes, but they do not mandate such possession. Section 12026(b) provides that no license or permit will be

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required for handguns in the home or a place of business. "There 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." (*California Rifle*, *supra*, 66 Cal.App. at p. 1324 ["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."].)

Section 3's prohibition on possession of handguns does not conflict with state law. "The Ordinance does not mandate what state law expressly forbids, nor does it forbid what state law expressly mandates." (*Great Western, supra*, 27 Cal.4th at p. 866 [citing *Doe*, *supra*, 136 Cal.App.3d at p. 509, for the proposition that "local law may not impose additional licensing requirements when state law specifically prohibits such requirements"].) Section 3 is more restrictive than, but not contradictory to, state licensing law requirements. It neither mandates anything forbidden by state law nor forbids anything mandated by that law.

Doe found a conflict based on the express exception in the 1982 ordinance that "exempt[ed] 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 pp. 516-17.) By its terms, section 12050 allowed then, as it does today, licenses "to carry concealed" a handgun. The ordinance's effect, the *Doe* court held, was to create a new class of persons who "must obtain licenses or relinquish their handguns." (*Id.* at p. 517.) Proposition H's possession ban, in contrast, contains no such exception. Its effect is to bar possession of handguns by San Francisco residents (outside of law enforcement and the other enumerated classes). No permits or licenses are involved. As the Petition concedes, residents subject to the ban cannot avoid it by obtaining a permit to carry a concealed weapon under section 12050. (The ordinance prohibits possession of handguns by City residents, "regardless of whether they have obtained a permit." [Petn., at ¶ 9.]) They are still subject to the ban whether or not they have a permit to carry a concealed weapon.

As noted, section 12026 has two parts. Subpart (a) provides an exception to section 12025's sanction for carrying a concealed weapon. It states "Section 12025 shall not apply" to a person (except felons and other enumerated classes) who carries at the person's residence or business. The reach of section 12025 is immaterial here. It criminalizes the act of concealing a weapon, and the exception of

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section 12026(a) applies only to that act of concealing, as that is all that is criminalized by section 12025. Section 3 of Proposition H, in contrast, criminalizes possession of handguns by San Francisco residents within its borders – whether or not concealed. It has no effect on whether a person who conceals a weapon is or is not in violation of section 12025.

Subpart (b) of section 12026 prohibits requiring a "permit or license to purchase, own, possess, keep or carry" a concealable firearm in the person's residence or business. Once again, Section 3 poses no conflict. It does not require any permit or license. It prohibits possession. Indeed, Proposition H expressly states in Section 6 that it is not "designed to duplicate or conflict with California state law" and that it shall not be "construed to create or require any local license or registration for any firearm, or create an additional class of citizens who must seek licensing or registration." (Legal Text of Proposition H, Thompson Decl., Exh. A.)

4. Finally, Section 3 Is Not Impliedly Preempted.

The *Great Western* Court explained its three-part test for implied preemption by quoting from its decision in *Sherwin-Williams*, *supra*, 4 Cal.4th at pages 897-98, footnote omitted:

> ["][L]ocal legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area [citation], or when it has impliedly done so in light of one of the following indicia of intent: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality. [Citations.]"

(*Great Western*, *supra*, 27 Cal.4th at pp. 860-61.) Using the three-part test from *Great Western* (but not mentioned or used in *Doe*), Proposition H is plainly not preempted. Each of the three parts examines the extent of state regulation in the area. Because the Supreme Court's thorough treatment of this issue in *Galvan* (ban on possession of unregistered handguns), *Great Western* (ban on sales on county property) and *Nordyke* (ban on possession on county property) discussed the relevant state law, they are largely dispositive and need not be repeated here in detail.

a. Handgun Possession Regulation Has Not Been So Fully and Completely Covered by State Law to Indicate That It Is Exclusively a Matter of State Concern.

The Supreme Court's decision in *Nordyke* – which upheld a possession ban on county property – necessarily rejected this argument and is also controlling here. (See e.g., *Nordyke, supra*, 27 Cal.4th at p. 884 [noting that the fact that "certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property"].) The various state statutes related to possession are limited to specific classes of people or other specific situations. They do not cover the field.

b. Gun Possession Regulation Is Not Partially Covered by State Law in Such Terms as to Indicate That It Is an Issue of Paramount State Concern.

Great Western's discussion on this point is apt:

> [W]e 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." (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707 [209 Cal. Rptr. 682, 693 P.2d 261].) It is true today as it was more than 30 years ago when we stated it in *Galvan*, "[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County." (*Galvan, supra*, 70 Cal.2d at p. 864.)

(*Great Western, supra*, 27 Cal.4th at pp. 866-67.)

As shown above, gun violence is of significant local interest to the citizens of San Francisco. Indeed, and unfortunately, the gun homicide rate has increased in each of the years since the *Great Western* Court's recognition that San Francisco's firearms problems may require different legislative treatment than those of other localities.

c. Section 3 Is Narrowly Drawn To Minimize Adverse Effects on Citizens of Other Counties and Towns, Which Plainly Do Not Outweigh Its Benefits.

Once again, the Supreme Court's decision in *Great Western* addressed this issue in terms equally applicable here: "[W]e agree with previous cases that '[l]aws 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, supra*, 27 Cal.4th at p. 867 [quoting *Suter, supra*, 57 Cal.App.4th at p. 1119; *Galvan, supra*, 70 Cal.2d at pp. 864-65].) Section 3, which applies only to San Francisco residents, will have less effect on outsiders

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than the ordinances upheld in *Galvan, Suter* and *Great Western.*

F. To the Extent State Law Has Partially Preempted the Field, the Remainder of Proposition H Should Be Upheld.

It may be that one or more of the specific areas treated by state law could be found to be included within the literal reach of Section 3 of Proposition H. As the Supreme Court recognized in *Nordyke*, however, this possibility that local ordinances might theoretically conflict with one or more very specific state laws directed to gun regulation would result in partially preempting but not invalidating the ordinance:

> We first note that the fact that certain classes of persons are exempt from state criminal prosecution for gun possession does not necessarily mean that they are exempt from local prosecution for possessing the gun on restricted county property. But even if we accept the Nordykes' argument that in at least some cases the Legislature meant to preempt local governments from criminalizing the possession of firearms by certain classes of people, that would establish at most that the Ordinance is *partially* preempted with respect to those classes. Partial preemption does not invalidate the Ordinance as a whole.

(*Nordyke, supra*, 27 Cal.4th at p. 884 [citation omitted].) Section 7 of Proposition H makes manifest San Francisco's intent that if any part of the ordinance is held invalid, it "shall not affect other provisions or applications of this ordinance." (Legal Text of Proposition H, Thompson Decl., Exh. A.) Petitioners ignore this clear statement of the San Francisco electorate.

IV. CONCLUSION

Reasonable minds may differ as to the wisdom of particular local solutions to gun violence prevention, including some of the provisions of Proposition H. But under the *Great Western* standard, Section 3 of the City's ordinance is not preempted by state law.

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