

In the Court of Appeal of the State of California
Second Appellate District
Division 1

CALIFORNIA RIFLE AND PISTOL ASSOCIATION INC., et al.,
Petitioners,

vs.

CITY OF WEST HOLLYWOOD, CITY OF WEST HOLLYWOOD CITY COUNSEL,
LOS ANGELES COUNTY SHERIFF SHERMAN BLOCK (in his official capacity) and
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,
Respondents,

BRIEF AMICUS CURIAE OF CENTER TO PREVENT HANDGUN
VIOLENCE, CALIFORNIA POLICE CHIEFS' ASSOCIATION, CALIFORNIA
PEACE OFFICERS ASSOCIATION, HISPANIC-AMERICAN POLICE COMMAND
OFFICERS ASSOCIATION, THE LEGAL COMMUNITY AGAINST VIOLENCE,
AND THE TRAUMA FOUNDATION IN SUPPORT OF RESPONDENT CITY OF
WEST HOLLYWOOD

From An Order of the Superior Court of Los Angeles County
Case No. BC144600

The Honorable David Horowitz

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INTEREST OF AMICI CURIAE

Amici, the Center to Prevent Handgun Violence, the California Police Chiefs' Association, the California Peace Officers' Association, the Hispanic-American Police Command Officers Association, the Legal Community Against Violence and the Trauma Foundation, support the validity of West Hollywood Municipal Code Section 4122 ("Section 4122"), which bans the sale of "Saturday Night Special" handguns, and respectfully ask the court to uphold the lower court's grant of summary judgment. The widespread availability of Saturday Night Specials poses a direct and immediate threat to the health and safety of our citizens, particularly in urban areas such as the City of West Hollywood (the "City"). The questions at issue in this case are of vital interest to the public generally and to the personal safety of police officers in particular. Moreover, the subject matter of this litigation, the power of municipalities to regulate the sale of inherently dangerous firearms, deeply affects each of the Amici.

The Center to Prevent Handgun Violence, chaired by Sarah Brady, is a non-profit organization working to reduce handgun deaths and injuries through education, research and legal advocacy. The Center's Legal Action Project, through direct assistance to victims of gun violence and amicus curiae filings, advocates legal principles aimed at reducing the accessibility of dangerous firearms to those likely to misuse them. The principle at stake in this case -- the ability of local governments to design effective laws to protect the health and safety of their citizens from the sale of low quality, highly concealable handguns -- is fundamental to the mission of the Center.

The Center is joined on this brief by three police organizations whose members are charged with protection of the public safety:

-- The California Police Chiefs' Association consists of virtually all the police chiefs in the State of California, and has more than 400 members;

-- The California Peace Officers' Association consists of over 4,000 members, including rank and file police officers, police chiefs and sheriffs in the State of California; and

-- The Hispanic-American Police Command Officers Association (HAPCOA) comprised of nearly 400 law enforcement command officers in federal, state and municipal agencies from throughout the nation, including Chiefs of Police, Sheriffs, Police Superintendents and Police Commissioners.

Because their members are on the front line of the battle against crime and violence in California and face the dangers posed by Saturday Night Specials every day, these organizations have a direct and immediate interest in reasonable efforts by local governments to prevent the sale of these dangerous weapons.

In addition, the Center is joined by Legal Community Against Violence (LCAV), a project of the San Francisco Foundation Community Initiative Funds, consisting of a network of law firms and attorneys throughout California dedicated to reducing gun violence through public education, litigation and legislation. Created in the wake of the July 1, 1993 shootings at 101 California Street, San Francisco, in which eight people were murdered and six more wounded, LCAV has over 400 active members statewide who work toward a common goal of effective firearms regulation. LCAV operates a clearinghouse for information about local firearms regulations through its Local Ordinance Project, designed to assist

California city and county officials in determining whether their gun violence prevention policies are legally sound.

Lastly, the Center is also joined by the Trauma Foundation. The Trauma Foundation is a non-profit organization located at San Francisco General Hospital and dedicated to the prevention of traumatic injury. The Trauma Foundation responds to requests for technical assistance from policymakers and opinion leaders at every level of government interested in reducing injuries due to violence and other causes. It also produces and disseminates educational materials about the causes of injury and ways to prevent them. The ability of local governments to respond to locally-relevant problems of injury and violence is paramount to a sound public health approach to injury prevention, and therefore is central to the Trauma Foundation's organizational goals.

INTRODUCTION

Handgun violence is an epidemic ravaging urban communities throughout this state. The California Department of Health Services reported that in 1993, guns killed more Californians under the age of 24 than motor-vehicle injuries, AIDS, heart disease, and cerebrovascular disease combined. See Legal Comm. Against Violence, "Addressing Gun Violence Through Local Ordinances," 2 (1995) [Hereinafter "Gun Violence"].¹ In 1994, 1,436 people died in gun related homicides in Los Angeles County, and another 472 used guns to commit suicide. Emergency Preparedness and Injury Control Branch, Cal. Dep't of Health, "Injury Deaths and Rates (per 100,000) by County and Mechanism of Injury:

¹ An earlier draft of this work is included in the appellate record. See "Gun Violence: a Local Solution," (1995 draft) (App. 229). Amici request that the Court take judicial notice of the final draft of the report, a true and correct copy of which is attached to the Appendix to this brief as Exhibit A.

California 1994" (June 3, 1995) (hereinafter "California Death Rates") (Joint Appendix in Lieu of Clerk's Transcript (hereinafter "App.") 1202). In addition, another 3,260 individuals were hospitalized from assaults involving guns. Emergency Preparedness and Injury Control Branch, Cal. Dep't of Health, "Hospitalized Nonfatal Injuries and Rates (per 100,000) by County and Mechanism of Injury: California 1994" (June 3, 1995) (hereinafter "California Injury Rates") (App. 1205).

Gun violence poses a particular threat to children. According to the National Center for Health Statistics, an average of fourteen U.S. children under the age of 19 are killed each day as a result of handgun homicides, suicides and unintentional shootings. See Gun Violence, supra, at 1.²

The class of weapons known as Saturday Night Specials plays a large role in the ongoing violence problem. While the Appellants would have the Court believe otherwise, Saturday Night Specials are extremely popular among criminals, both in California and elsewhere. Between 1991 and 1993, 62 percent of the guns seized at crime scenes and traced by the BATF were handguns made by one of the "Ring of Fire" companies.³

² Many Saturday Night Specials will soon pose special risks to children as compared to other handguns. On October 9, 1997, eight of the nation's largest handgun manufacturers agreed to provide child safety locks with their firearms as a part of a pact with the Clinton administration. However, three of the largest producers of Saturday Night Specials, Lorcin Engineering, Bryco Arms and Phoenix Arms (all of whom produce weapons contained on the City's roster) failed to sign onto the pact. See "8 Gun Makers Agree to Provide Trigger Locks," L.A. Times, Oct. 10, 1997 at A1, col. 6 and A20, Cols. 1-3. Amici ask that the Court take judicial notice of this article, a true and correct copy of which is attached to the Appendix to this brief as Exhibit B.

³ The term "Ring of Fire" refers to six handgun manufacturer located in Southern California. These manufacturers are responsible for the production of the vast majority of Saturday Night Specials sold in the United States.

Wintemute, GJ, "Ring of Fire: The Handgun Makers of Southern California," (Violence Prevention Research Program, Univ. of Cal. Davis, 1994) [hereinafter "Ring of Fire"] (App. 546). By 1993, Ring of Fire manufacturers produced 8 of the 10 handguns most frequently confiscated by police in California. *Id.* In 1994, four of the seven gun types most frequently traced at the request of police agencies by the Bureau of Alcohol, Tobacco and Firearms ("BATF") were Saturday Night Specials specifically listed on the City's roster of banned guns. *See* Bureau of Justice Statistics, U.S. Dep't Justice, Selected Findings No. 5, Guns Used in Crime (July 1995) [hereinafter "Guns Used In Crime"] (App. 918); City of West Hollywood Roster of Saturday Night Specials (App. 1156). In 1995, the most recent year for which statistics are available, the top three handguns traced to crime nationwide were Saturday Night Specials made by Ring of Fire companies. *See* Wintemute, GJ, "Gun Confiscations: A Case Study of the City of Sacramento in 1995," (Violence Prevention Research Program, Univ. of Cal. Davis 20 (1997)) (citing BATF data).⁴ These findings are echoed in California, where a study of crime guns seized in Sacramento in 1995 found that 41% of the crime guns among the top ten were Saturday Night Specials. *Id.* at 19. Moreover, in a new BATF study of crime guns from 17 cities nationwide, Saturday Night Specials frequently ranked at the top of the list as weapons of choice, especially among juveniles. *See* "Crime Gun Trace Analysis Reports: "The Illegal Youth Firearms Market in 17 Communities," BATF Youth Crime Gun Interdiction Initiative (1997).⁵ However, perhaps the most telling statistic with regard to the disproportionate use of Saturday Night Specials in crimes is that the gun used in the greatest number of police homicides (per

⁴ Amici ask that the Court take judicial notice of the Wintemute study, a true and correct copy of which is attached to the Appendix to this brief as Exhibit C.

⁵ Amici ask that the Court take judicial notice of the introduction to the BATF study, a true and correct copy of which is attached to the Appendix to this brief as Exhibit D.

number of guns in circulation), was the .32 caliber pistol. In 1992, nearly 90 percent of these guns were produced by Ring of Fire manufacturers. See Ring of Fire, *supra*, at App. 550.

While popular with criminals, Saturday Night Specials are a poor choice for the law-abiding citizen looking for a reliable self-defense weapon. First, short barreled handguns are notoriously inaccurate, decreasing the chance of hitting the intended target and increasing the danger to innocent bystanders. Second, to keep prices down, these weapons are typically constructed from inferior metal alloys and lack many of the safety features routinely found on higher-quality weapons. See e.g. South Carolina Law Enforcement Division Regulatory Services, Prohibited Handgun List For Licensed Pistol Dealers (April 1, 1995) (App. 948-964). A large number of the handguns listed on the City's Roster have die cast metal alloy frames or receivers which will melt at temperatures of less than 800 degrees Fahrenheit. Id. This poor construction means the guns often misfire and may be more likely to be involved in unintended shootings.⁶

The City's concern over the potential for proliferation of these handguns within its borders is well-founded. The six handgun manufacturers responsible for producing more than 80 percent of all the .25, .32 and .38 caliber (ACP) pistols⁷ made in the United States are located within 50 miles of the City of West Hollywood. See Ring of Fire, *supra*, at App. 499.

⁶ Additionally, the fact that California has no training or instruction requirement prior to purchasing a handgun means that these already inaccurate weapons have the potential to become more dangerous in the hands of an untrained user.

⁷ Along with .22 caliber pistols, these weapons predominate the class of handguns routinely referred to as "Saturday Night Specials."

Section 4122, which bans the sale of Saturday Night Specials, was enacted as a public health and safety measure. Ordinance No. 95-453 § 1 (Jan. 16, 1996) (App. 111).⁸ The West Hollywood City Council enacted the ordinance after making specific findings that because of their poor quality and lack of minimal safety features, Saturday Night Specials are dangerous, unreliable, easily concealable, and disproportionately employed in homicides and other crimes. In acting to meet an urgent threat to the public peace, health and safety, the City exercised its plenary police powers under the California Constitution.⁹

Appellants challenge the authority of the City of West Hollywood to protect the safety and health of its citizens and law enforcement officials through a ban on the sale of Saturday Night Specials. Appellants contend that gun control involves only statewide issues, not matters of local concern, and further that the state has preempted the field of handgun sales. Appellants are wrong on both counts.

⁸ A copy of the ordinance is included in the record on appeal (App. 111). A roster of the specific handguns banned for sale is also included (App. 1156).

⁹ Appellants' conclusory assertion that Saturday Night Specials bans are racist and elitist is absurd. The Ordinance was passed to protect the public from the hazards of poorly made weapons which are commonly used by criminals. Appellants surely cannot be arguing that the City Council cannot regulate for the health and safety of the public by taking a dangerous, though inexpensive, product off the market.

By extension, the government would be prevented from mandating any safety regulation because it would increase the price of products available to the consumer. This reasoning is tantamount to contending that dangerous but inexpensive products must remain on the market so that all persons will have access to them. Surely safety regulations imposed on automobile manufacturers are valid even though they make cars less affordable. This appeal concerns a non-discriminatory ordinance that protects persons of all economic circumstances against a dangerous consumer product.

The City's brief demonstrates the validity of Section 4122. By the instant brief, Amici wish to amplify aspects of the chief focus of respondents' argument -- the issue of preemption -- and to bring to the Court's attention matters of public policy and additional legal authority that support the City's enactment of Section 4122.

I. MUNICIPALITIES HAVE A SIGNIFICANT LOCAL INTEREST IN THE REGULATION OF FIREARM SALES

California grants each city the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with the general laws." Cal. Const. Art. XI § 7. Unless its regulations conflict with state law, the City's plenary powers to regulate health and safety within its borders "is as broad as the police power exercisable by the Legislature itself." Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140 (1976). In general:

[t]he common thread of the cases is that if there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against that attack of state preemption.

Gluck v. County of Los Angeles, 93 Cal. App. 3d 121, 133 (1979).

Local governments are well suited to deal with health and safety concerns through the exercise of their police powers. First, health and safety issues may vary from one geographic region to another. Second, municipal governments can react quickly to changing local conditions, particularly at times when urgency is required. What is true generally is

true with regard to regulating sales of dangerous, yet accessible weapons like Saturday Night Specials.

A. GUN VIOLENCE IMPOSES A DISPROPORTIONATELY ADVERSE IMPACT ON THE SAFETY, HEALTH AND WELFARE OF URBAN COMMUNITIES

Violent crime involving handguns is profoundly more severe in urban areas than in rural areas. On the issue of gun control, the California Supreme Court has long recognized "[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County." Galvan v. Superior Court, 70 Cal. 2d 851, 863-864 (1969); see also, Suter v. City of Lafayette, 57 Cal. App. 4th 1109, 97 Daily Journal D.A.R. 11940, 11941 (September 18, 1997). A review of the statistics dramatically proves this truism.

In 1994 the overall rate of homicide by gunfire in Los Angeles County was nearly 60% higher than the rate statewide, which gave Los Angeles County the dubious distinction of having the highest per capita death-by-homicide rate in the state. See (California Death Rates, supra, at App. 1202. Los Angeles County, which has roughly 30% of the state's population, accounted for more than 49% of the total gun-related homicides in California. Id. By comparison, the 20 most rural counties combined, representing 2.36% of the total population, accounted for only .48% of the total homicides. Id. In the same year, over half of all the non-fatal firearms assault hospitalizations in California occurred in Los Angeles County. See California Injury Rates, supra, at App. 1205.

This discrepancy between rural and urban counties extends to the toll handgun violence takes on children. The 1989 national firearm homicide rate among all 15-19 year olds in metropolitan counties was

nearly five times the rate in non-metropolitan counties. Lois A. Fingerhut, et al., Firearm and Nonfirearm Homicide Among Persons 15 Through 19 Years of Age, 267 J. Am. Med. Ass'n, No. 22 at 3050 (June 10, 1992) (App. 1221). Increasing the likelihood of serious harm or death among teenagers, juvenile offenders are more likely to carry a handgun to a crime scene than an adult offender. See Guns Used in Crime, *supra*, at App. 918. As one intercity New York high school student put it, "Here where I live, every young kid has a .22 or a .25. It's like their first Pampers." Ring of Fire, *supra*, at 546 (quoting from A. Freedman, "Fire Power: Behind the Cheap Guns Flooding the Cities is a California Family," Wall Street J., at A1 (Feb. 28, 1992)) (App. 546).

Given the disproportionate adverse impact of gun violence in urban areas, it is appropriate that cities be given latitude in crafting measures to deal with the unique problems they face. The California Supreme Court has often reaffirmed the legitimate need for local communities to address their unique health, safety and welfare concerns:

Obviously, every municipality is unique. 'The state in its law deals with all of its territory and all of its people. The exactions which it prescribes operate . . . upon the people of the state, urban and rural, but it may often, and does often happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it become proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements.'

Cohen v. Board of Supervisors, 40 Cal. 3d 277, 298 (1985) (quoting In re Hoffman, 155 Cal. 114, 118 (1909)). It is clear that Saturday Night Specials do not pose the same problems in California's rural counties that

they do in cities like West Hollywood and counties like Los Angeles where the vast majority of these handguns are manufactured. Faced with critical health and safety issues resulting from the widespread availability of Saturday Night Specials, the City enacted Section 4122 to protect its citizens and its law enforcement officers. Health and safety measures such as Section 4122 are a legitimate exercise of police powers under California's Constitution.

B. MUNICIPALITIES ARE WELL-SUITED TO ADDRESS URGENT HEALTH AND SAFETY ISSUES

Because local governments are closer to the health and safety concerns of their own communities, they can respond quickly and effectively to protect their citizens from newly emerging dangers:

It has long been settled that [municipal police] power extends to objectives in the furtherance of the public peace, safety, morals, health and welfare and 'is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life.'

Fisher v. City of Berkeley, 37 Cal. App. 644, 676 (1984) (quoting Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 160 (1976)).

In the absence of action by the state legislature, not only must communities suffer the physical destruction caused by handguns, but local governments are often forced to absorb the high cost of health care and police enforcement resulting from gun violence. And this is no insignificant amount. The average cost for a hospitalization for a gunshot

wound is \$33,000, of which eighty percent is borne by the taxpayers. See Gun Violence, supra, at 2. One study estimated that the total cost of firearm-related violence was \$703 million in 1993. Id., n.11. As a result of this kind of fiscal burden, local governments lose revenue and become even more frustrated in their ability to control the gun violence epidemic in their communities.

II. MUNICIPAL REGULATION OF FIREARMS SALES IS NOT PREEMPTED BY STATE LAW

Given that Section 4122 is a public health and safety measure within the plenary police powers of the City, it is valid unless it conflicts with, and is thus preempted by, state law. Local legislation conflicts with state law if it (1) duplicates state law; (2) contradicts state law; (3) is expressly preempted; or (4) is preempted by implication. Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 897 (1993).

A. SECTION 4122 DOES NOT DUPLICATE OR CONTRADICT STATE LAW

Section 4122 does not duplicate state law. The State Attorney General, in his Amicus Brief in support of the Appellants, argues that Sections 12020 and 12280 of the Penal Code¹⁰ overlap with the City's ordinance.¹¹ He is incorrect. Indeed, the "example" the Attorney General uses to demonstrate the duplicativeness of Section 4122, is based on a

¹⁰ Penal Code section 12020 involves the sale of unconventional weapons such as wallet guns, plastic firearms, zip guns, lipstick case knives, etc. Penal Code section 12080 bans the sale of assault weapons, as defined in section 12276. Neither provision is applicable in this case.

¹¹ See Amicus Brief of the State Attorney General at 4.

factual error concerning the guns affected by the West Hollywood ordinance.

The Attorney General states in part that the sale of "an Intratec TEC 9 would be punishable by imprisonment in state prison for four, six or eight years pursuant to section 12280" and goes on to state in the accompanying footnote that, "[a]lthough language in the ordinance appears to exempt Assault Weapons from the definition of Saturday Night Specials, the list of firearms identified by the city manager as Saturday Night Specials includes 'Intratec: category nine,' which is an Assault Weapon within the meaning of section 12276(b)(4)." (Attorney General's Amicus Brief, at 5).

The Attorney General's incorrectly equates the Intratec TEC 9 assault weapon with the Intratec: Category 9 pistol subject to the West Hollywood City Ordinance. The Intratec Category 9 on West Hollywood's roster of weapons is an **entirely different weapon** from the Intratec TEC 9 assault weapon in Penal Code section 12276. The Intratec Category 9 pistol is a nine millimeter pistol with a three inch barrel and a 7-shot magazine. The Intratec TEC-9, on the other hand, is a nine millimeter pistol with a five inch barrel and a 32-round magazine.¹² The Attorney General cites no other "evidence" of duplication.¹³

¹² The vast difference between a TEC-9 and a Category 9 pistol can be seen in the physical aspects of the guns themselves. Amici request that the Court take judicial notice of a picture of a TEC-9 which is attached to the Appendix to this brief as Exhibit E, and a picture of a Category 9 pistol which is attached as Exhibit F.

¹³ Even should such "overlap" exist, Section 4 of 4122 provides that should preemptive legislation declare or render any portion of the ordinance invalid, the remainder shall remain in full force and effect.

Nor does Section 4122 contradict state law. "[L]ocal legislation is 'contradictory' to general law when it is inimical thereto." Sherwin-Williams Co., 4 Cal. 4th at 898. Although the Attorney General in his amicus brief sets forth several arguments in support of the proposition that the City's ordinance conflicts with state law, these arguments all share a common flaw; that state law provides an affirmative right to sell Saturday Night Specials. Simply put, this position already assumes that the State has preempted the entire field of firearm sales, which is the very issue before the Court in the instant case.

**B. STATE LAW DOES NOT EXPRESSLY PREEMPT
REGULATION OF HANDGUN SALES**

Appellants also argue that Section 4122 amounts to an attempt by the City to "license" the sale of Saturday Night Specials, which, they believe, is expressly preempted by the language of Section 53071 of the Government Code. While it is true that Section 53071 expressly preempted local ordinances in the area of the licensing and registration of firearms, the California legislature has never expressly preempted local regulation of handgun sales, nor have California courts ever held that the legislature has expressly preempted the entire field of deadly weapons sales. See Doe v. City and County of San Francisco, 136 Cal. App. 3d 509, 516 (1982) ("Despite the opportunity to include an expression of intent to occupy the entire field of firearms, the legislative intent [of § 53071] was limited to registration and licensing" (emphasis in original)). Indeed, as recently as last month, a California appellate court reaffirmed the proposition that the legislature did not intend to preempt the entire field of weapons control. In Suter v. City of Lafayette, 97 Daily Journal D.A.R. 11940, 11941 (September 18, 1997), the court stated:

Support for the conclusion that the Legislature has intended to preempt only narrow areas of firearms control has been found in the fact that statutes such as Penal Code section 12026 would be redundant if the state had intended to preempt the entire field of weapons' control. (Citation omitted). 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. (Citation omitted).

Clearly then, the Legislature has expressly preempted only the areas of handgun registration and licensing, not sales.

C. THE STATE HAS NOT IMPLICITLY PREEMPTED THE FIELD OF HANDGUN SALES

Nor has the Legislature impliedly preempted the entire field of deadly weapons control. Courts that have considered the issue have held that, notwithstanding the enactment of several statutes concerning firearms and other dangerous weapons, the state has not impliedly preempted the entire field of gun control. See Galvan, 70 Cal. 2d at 861; Olsen v. McGillicuddy, 15 Cal. App. 3d 897, 901 (1971). Only one court has suggested, in dicta, that there might be an implied preemption by state law in the narrow field of residential firearm possession. Doe, 136 Cal. App. 3d at 518. Even if this Court were inclined to agree with the Doe court's dicta -- which it should not -- that decision would not effect the instant case. A right to possess guns in one's home or business is fundamentally different from prohibiting commercial firearms sellers from selling a narrowly tailored class of poorly manufactured and dangerous handguns. Borrowing for Doe, "[i]t strains reason to suggest" the privilege to possess a firearm in one's home necessarily allows a person to be able to

purchase any firearm one desires -- regardless of whether that firearm's sale is banned.¹⁴

There are three tests to establish preemption by implication: "(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 municipality." In re Hubbard, 62 Cal. 2d 119, 128 (1964).

Applying these tests in turn to Section 4122, there is no implied preemption under the first Hubbard prong. The state's general laws do not so fully and completely cover the field of gun sales, as to make it an exclusive area of state concern. Penal Code §§ 12070-79 regulate some aspects of the sale of firearms. However, these provisions do not fully and completely cover the field of gun sales. In fact, as it concerns the sale of firearms, Penal Code § 12071(a)(2) explicitly grants discretion to a local licensing entity to determine the scope of a firearm sellers license.

¹⁴ Penal Code § 12026 was amended in 1995. The amendment changes, among other things, the language setting forth the prohibition against permitting or licensing requirements concerning concealed firearms in one's residence or business. The old language prohibited such requirements for "any" concealable firearm. The new language only prohibits such requirements concerning "a" concealable firearm. This change, though subtle, is significant because it evinces an intent on the Legislature's part to permit narrowly tailored local regulations on specific types of guns, so long as individuals retain the ability to possess some type of gun at their residence or business. See Eric Gorovitz, "California Dreamin': The Myth of State Preemption of Local Firearm Regulations," 30 U.S.F.L. Rev. 395, 413-414 (1996).

Section 12071(a)(2) provides that "a city . . . may grant, licenses permitting, licensees to sell firearms within the city." (emphasis added). Indeed, the recent Suter decision, expressly citing to the provisions of 12071, states that, "[t]hese provisions would be meaningless if local agencies have no authority to require their own regulatory or business licenses, or otherwise to restrict or regulate the sale of firearms. There can be no implied preemption of an area where state law expressly allows supplementary local legislation." 97 Daily Journal D.A.R. at 11942 (Citation omitted).¹⁵

For the same reasons, the provisions in Penal Code §§ 12070-79 do not satisfy the second Hubbard prong by "clearly indicat[ing] that a paramount state concern will not tolerate further or additional local action." The explicit delegation of discretion to local authorities in licensing those selling guns precludes a finding that the legislature will tolerate no additional local action. As discussed above, the California Supreme Court has recognized that in the area of firearms control different regions of the state may have different interests. Galvan, 70 Cal. 2d at 863-864. Since the Galvan decision, the legislature has had numerous occasions to clearly indicate an intent that gun control issues are of such statewide concern that no additional local regulation is allowed. The legislature has declined to do so. As the Suter court put it, "[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 at 11942.

¹⁵ Interestingly, the Suter court also found the State Attorney General's preemption position in Suter, that the regulation of firearm sales was beyond the reach of local governments, was "unpersuasive dicta". Suter, Daily Journal D.A.R. at 11942.

In numerous cases the courts have upheld local health and safety regulations, even though state law may have partially occupied the relevant field. See, e.g. Sherwin-Williams Co., 4 Cal. 4th 893 (1993) (upholding local ordinance regulating retail display of aerosol paint, despite state law penalizing furnishing of aerosol paint to minors); Cohen, 40 Cal. 3d 277 (upholding local ordinance requiring escort services to pay a fee and obtain a permit); Bravo Vending v. City of Rancho Mirage, 16 Cal. App. 4th 383 (1993) (upholding local law prohibiting cigarette sales through vending machines, even though state law already penalized cigarette sales to minors); Bamboo Bros. v. Carpenter, 133 Cal. App. 3d 116 (1982) (upholding ordinance regulating the manufacture, possession and advertisement of drug paraphernalia when coupled with intent to use such devices, even though state law regulated use of controlled substances). Likewise, Section 4122 is valid, in the absence of a clear legislative intent to treat gun sales as a matter of statewide concern.

Finally, under the third prong of Hubbard, Section 4122 cannot be said to impose a burden on transient citizens of the state that outweighs the possible benefit to the City. Section 4122 regulates sellers of Saturday Night Specials, who must be licensed, Penal Code § 12070(a), and who are limited to making sales "in the buildings designated in the license." Penal Code § 12071(b)(1)(A). Where the ordinance "deals only with business people, we assume that they will not be moving their establishments from place to place with great ease." Bamboo Bros. v. Carpenter, 133 Cal. App. 3d 116, 125 (1982). Nor will any sellers who might be licensed to sell guns in other locations in addition to West Hollywood be burdened by Section 4122. Such dealers "might reasonably be expected to inquire about existing ordinances in planning their activities." Robins v. County of Los Angeles, 248 Cal. App. 2d 1, 10 (1966). Moreover, any concern that Section 4122 impacts transient gun purchasers is mitigated by the fact that the burden "is shared by transients

and residents of the city alike." Cohen, 40 Cal. 3d at 300. This ordinance simply does not meet the Hubbard standard. As the court in Suter stated, "[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." Suter, 97 Daily Journal D.A.R. at 11942 (Citation omitted).

CONCLUSION

At issue in this case is whether California cities, which are disproportionately impacted by the injury, death, and accompanying costs associated with handgun violence, can act to protect their citizens by banning the sale of the most dangerous and unreliable of these weapons. The answer can only be yes.

Amici urge the court to uphold the validity of Section 4122 and to uphold the lower court's grant of summary judgment. The City Council has determined that Saturday Night Specials pose an imminent danger to the health, safety and welfare of the City's residents and law enforcement officers. In the absence of conflicting state law, the City is entitled to pass health and safety regulations. Despite repeated opportunities to preempt the entire field of gun control, the Legislature has never done so. Moreover, the Legislature has not -- either expressly or impliedly -- preempted the field of gun sales. In the meantime, the proliferation of unreliable, inherently dangerous Saturday Night Specials has become a plague in many of the state's urban areas. Section 4122 fills

a legislative vacuum and is a valid measure to protect the health and safety of the citizens of the City, as well as its law enforcement officers.

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