No. 99-56605

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREAT WESTERN SHOWS, INC., a Texas corporation Plaintiffs/Appellees, vs. THE COUNTY OF LOS ANGELES, Defendant/Appellant.	No. 99-56605 (United States District Court No. CV 99-09661 RAP)

AMICUS BRIEF ON BEHALF OF CITY AND COUNTY OF SAN FRANCISCO; CITIES OF ALAMEDA, BERKELEY, INGLEWOOD, LOS ANGELES, OAKLAND, SAN LUIS OBISPO, AND WEST HOLLYWOOD; COUNTIES OF ALAMEDA, CONTRA COSTA AND SAN MATEO; LEGAL COMMUNITY AGAINST VIOLENCE; WOMEN AGAINST GUN VIOLENCE; AND ORANGE COUNTY CITIZENS FOR THE PREVENTION OF GUN VIOLENCE IN SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF LOS ANGELES AND IN SUPPORT OF REVERSAL OF DISTRICT COURT'S ORDER GRANTING PRELIMINARY INJUNCTION

On Appeal from the United States District Court
for the Central District of California
The Honorable Richard A. Paez

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INTERESTS OF THE AMICI

The City and County of San Francisco; the cities of Alameda, Berkeley, Inglewood, Los Angeles, Oakland, San Luis Obispo and West Hollywood; and the counties of Alameda, Contra Costa and San Mateo; all have enacted, or are considering enacting, legislation that regulates the sale of firearms within their respective jurisdictions. These amici are concerned that if the district court's preemption analysis is allowed to stand, it could call into question some or all local regulation of firearm sales. These amici are also concerned that the district court concluded that Los Angeles County does not have the ability to regulate property it owns within the territorial boundaries of another local government.

The Legal Community Against Violence ("LCAV") is a nonprofit organization 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.

Women Against Gun Violence ("WAGV") is a coalition of individual members and over 100 supporting organizations representing thousands of women and men throughout California. WAGV develops and communicates strategies for reducing gun violence, particularly as it affects women. Part of WAGV's mission is to raise awareness about the human,

public health and financial costs of the epidemic of gun violence, while taking concrete positive steps toward reducing violence and stopping the unfettered proliferation of firearms.

Orange County Citizens for the Prevention of Gun Violence ("OCCPGV") is a non-profit 501(c)(3) corporation founded in 1995 to work for the prevention of gun violence through education and advocacy utilizing the public health model. OCCPGV works in coalition with many organizations in Orange County as well as with regional, state and national groups in order to impact a broad range of issues associated with the prevention of gun violence.

SUMMARY OF ARGUMENT

The County of Los Angeles passed an ordinance ("the Ordinance") that prohibits the "sale of firearms and/or ammunition on County property." County's Excerpts of Record ("ER") 2 at 6:12-14. In concluding that state law preempts the Ordinance, the district court employed an analysis directly at odds with California preemption law in general, and the recent decisions of two California Courts of Appeal in particular. Those two decisions teach that state law generally permits local regulations of firearms sales, and is careful not to preempt such local regulations except in a few, narrow, specific circumstances. *California Rifle and Pistol Association, Inc. v. City of West Hollywood*, 66 Cal.App.4th 1302, *rev. denied* (1998); *Suter v. City of Lafayette*, 57 Cal.App.4th 1109, *rev. denied* (1997).

Because the district court's decision cannot be squared with this uncontradicted state court precedent, it must be reversed. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1206-1207 (9th Cir. 1998).

In addition, the district court concluded that the County did not have the power to prohibit the sale of guns and ammunition on property the County owned because that property is within the territorial jurisdiction of the City of Pomona. This unsound result has no support in California law. A local government, as landowner, has the power to control the use of property it owns, even if the property is within the territorial jurisdiction of another local government. *See* California Government Code section 23004; *Air Cal, Inc. v. City and County of San Francisco*, 865 F.2d 1112, 1117-1118 (9th Cir. 1989).

ARGUMENT

Two recent decisions of state Courts of Appeal have affirmed principles that are at least 30 years old in California: state law generally permits local regulation of firearms; it preempts local measures only in "limited subfields of the universe of firearms regulation." *West Hollywood*, 66 Cal.App.4th at 1311; *see Suter*, 57 Cal.App.4th at 1119; *Galvan v. Superior Court*, 70 Cal.2d 851, 856 (1969). Employing an analysis that departs dramatically from the analysis of these state courts, the district court found the state law preempts a local government from prohibiting the sale of firearms and ammunition on its own property.

Although the district court's decision does not track conventional California law preemption principles, it appears that the court concluded that state law expressly preempts the Ordinance. The court does not appear to have concluded that state law preempts the Ordinance by implication. Nonetheless, we explain below why state law does not preempt the Ordinance either expressly or impliedly.

I. STATE LAW DOES NOT EXPRESSLY PREEMPT LOCAL JURISDICTIONS FROM BANNING THE SALE OF FIREARMS AND AMMUNITION ON GOVERNMENT-OWNED PROPERTY.

Express preemption essentially involves three questions: (1) does the local measure duplicate state law; (2) does the local measure contradict state law; and (3) does the local measure enter an area expressly occupied by state law. *Sherwin Williams Co. v. City of Los Angeles*, 4 Cal.4th 893, 897 (1993). The answer to each of these questions is a resounding "no" when addressing a local measure that prohibits the sales of firearms and ammunition on County property.

First, a local measure "duplicates" state law if it is "coextensive" with state law. *Id.* at 902. Neither the district court nor the plaintiffs contend that the Ordinance here is coextensive with state law.

Second, a local measure "contradicts" state law if it "prohibit[s] what the statute commands or command[s] what it prohibits." *Id.* Again, neither the district court nor the plaintiffs contend that state law "commands" that firearms and ammunition be sold on property owned by a local government.

Finally, neither the district court nor the plaintiffs contend that the California legislature has "expressly manifested its intent to 'fully occupy' the area" of firearms and ammunition sales on property owned by local government. *See id.* at 898. In fact, far from occupying this field, the legislature has been careful not to preempt a local government's ability to "tailor firearms legislation to the particular needs of their communities." *Suter*, 57 Cal.App.4th at 1118; *see West Hollywood*, 66 Cal.App.4th at 1306 ("Although it is clear that the Legislature could preempt all local ordinances regarding handgun sales, it is equally clear that the Legislature has not done so.") Thus, state law does not expressly preempt the Ordinance.

The district court avoids this straightforward conclusion by focusing on the Ordinance's effect on gun shows held on County property. The district court concluded that because state law permits the sale of firearms and ammunition at gun shows, the Ordinance conflicts with state law because the Ordinance bans such sales at gun shows held on County property.

There are at least five problems with the district court's analysis. First, the Ordinance does not prohibit the sale of firearms or ammunition at gun shows in Los Angeles County; it prohibits the sale of firearms and ammunition on County-owned property. Thus, even if state law "commanded" that guns be sold at gun shows within the County, the Ordinance would not conflict with state law. Gun shows at which guns are sold can still take place in Los Angeles County, just not on property owned by the County. Moreover, gun shows can still take place on County-owned property, but those gun shows cannot include the sale of firearms or ammunition.[1]

Second, even if the Ordinance banned the sale of firearms and ammunition at gun shows throughout the County, the Ordinance would not be preempted. The very statute on which the district court bases its conclusion contemplates local regulation of the sale of firearms at gun shows. Penal Code section 12071(b)(1)(B) permits a person to sell firearms at gun shows under limited circumstances, "provided that the person complies with . . . all applicable local laws, regulations, and fees, if any." If

[1] As the district court recognized, much more than the sale of firearms and ammunition occurs at gun shows, and could continue to occur under the County's Ordinance. ER 2 at 4:5-9. The plaintiff acknowledged that it would go forward with a scheduled gun show even if the Ordinance was in effect and sales of firearms and ammunition were banned. *Id.* at 4:10-14.

the California Legislature had intended to "fully occupy" the area of sales at gun shows, it would not have permitted local regulation of such sales. "There can be no implied [much less express] preemption where state law expressly allows supplementary local legislation." *Suter*, 57 Cal.App.4th at 1121.[2]

Third, no fair reading of section 12071(b)(1)(B) could result in the conclusion that the statute confers on gun dealers a right to sell firearms and ammunition at gun shows. The statute merely explains the narrow circumstances under which a gun dealer is permitted to sell firearms at a location other than the dealer's licensed place of business. By explaining the circumstances under which the state will allow gun dealers to sell at gun shows, the Legislature has hardly manifested an intent to require that such gun shows occur or that guns be sold at such shows. To paraphrase this court's holding in a case involving federal preemption, "lest we lose sight of the forest for the trees, [state law] does not require what it barely permits." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 709 (9th Cir. 1997).

Fourth, if the Legislature intended to prohibit local regulation of sales at gun shows it would have said so. The Legislature has clearly stated its intent to preempt certain specific forms of local regulation involving

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[2] The district court relied on *Northern Cal. Psychiatrist Society v. City of Berkeley*, 178 Cal.App.3d 90 (1986) ("*NCPS*"), in support of the court's conclusion that the Ordinance conflicted with state law. *NCPS* involved a Berkeley ordinance banning the use of electroconvulsive therapy ("ECT"). The Legislature had passed laws regulating the use of ECT, recognized that "ECT may be 'a lifesaving treatment' in certain instances," and "guarantee[d] to all mentally ill persons [] a 'right to treatment services.'" *Id.* at 103-104. The *NCPS* court found a conflict between Berkeley's prohibition of a form of treatment, and the Legislature's guarantee of a right of treatment. No such conflict exists here. Moreover, unlike Penal Code section 12071, the state statutes at issue in *NCPS* did not allow supplementary local legislation.

firearms. For example, in Government Code section 53071, the Legislature stated: "It is the intention of the Legislature to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms. . . ." In addition, in Government Code section 53071.5, the Legislature stated: "By the enforcement of this section, the Legislature occupies the whole field of regulation of the manufacture, sale or possession of imitation firearms." These sections show "the language that the Legislature can be expected to use if it intend to 'occupy the whole field.'" *West Hollywood*, 66 Cal.App.4th at 1312. Since the Legislature chose not to use such language regarding the sale of firearms at gun shows, it is unreasonable to conclude that Legislature intended to occupy that field.

Fifth, with respect to the question of ammunition sales, the district court's decision relies exclusively on one opinion of the California Attorney General. In that opinion, the Attorney General analyzed an ordinance which would have prohibited throughout a city the sale of .22 to .45 caliber ammunition, which the Attorney General stated was "the basic ammunition for semi-automatic handguns, single shot weapons, and some rifles." 77 Ops.Cal.Atty.Gen. 147, 152 n.4. The Attorney General found that state law recognizes "the right of an individual 'to purchase, own, possess, keep or carry'" certain firearms. *Id.* at 152. The Attorney then concluded that a ban on ammunition sales "would thwart the Legislature's recognition of the right to possess handguns," because it would interfere with the ability of a gun owner to use a gun for its intended purpose. *Id.*

While the Attorney General's reasoning is flawed, as courts have recognized,[3] even were the reasoning sound it would not support the district court's conclusion here. Rather than banning ammunition sales throughout a city, the Ordinance merely bans such sales on County property. There is no reason to believe that ammunition is not – and would not continue to be – readily available elsewhere in Los Angeles County.

For all these reasons, state law does not expressly preempt the Ordinance.

II. STATE LAW DOES NOT IMPLIEDLY PREEMPT LOCAL JURISDICTIONS FROM BANNING THE SALE OF FIREARMS AND AMMUNITION ON GOVERNMENT-OWNED PROPERTY.

The district court did not address the issue of implied preemption. Under California law, the Legislature can be found to have impliedly preempted local regulation if:

> (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.

Sherwin-Williams, 4 Cal.4th at 898.

The Ordinance easily passes these tests.

First, the Legislature has not covered at all, much less "fully and completely covered," the subject of the Ordinance: the sale of firearms and

[3] *See, e.g., West Hollywood*, 66 Cal.App.4th at 1325; *Suter*, 57 Cal.App.4th at 1121-1122.

ammunition on government property. Even if one were to recharacterize the subject of the Ordinance as the sale of firearms and ammunition at gun shows, the Legislature has not "fully and completely covered" that subject. Rather the Legislature has established some requirements governing gun shows, while at the same time recognizing that local regulations may control gun shows as well. Penal Code §12071(b)(1)(B). Thus, the Legislature has not "clearly indicated" that the sale of firearms and ammunition on government property, or the sale of firearms and ammunition at gun shows is "exclusively a matter of state concern." In fact, as the California Supreme Court recognized thirty years ago, regulation of firearms obviously is a matter of local concern: "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." *Galvan*, 70 Cal.2d at 864.

Second, and for the same reasons, state law does not partially cover these subjects "in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action." *Sherwin-Williams*, 4 Cal.4th at 898. In fact, state law explicitly provides for further or additional local action.

Finally, "[l]aws designed to control the sale . . . 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*, 57 Cal.App.4th at 1119.

Accordingly, state law does not preempt the Ordinance by implication.

III. THE DISTRICT COURT ERRED BY NOT FOLLOWING STATE COURT PRECEDENT INTERPRETING THE SAME BODY OF STATE LAW.

The district court's decision simply cannot be squared with California preemption principles in general, or the *West Hollywood* decision in particular. The ordinance at issue in *West Hollywood* banned the sale of handguns classified as "Saturday Night Specials." State law generally permits gun dealers to sell firearms, including "Saturday Night Specials," if the dealers satisfy the requirements of Penal Code section 12071. However, section 12071 recognizes that local governments might impose other restrictions on the sale of firearms. The *West Hollywood* court held that state law did not preempt West Hollywood's "Saturday Night Special" ban given that section 12071 "expressly allows supplementary local legislation." 66 Cal.App.4th at 1319-1320. Had the *West Hollywood* court taken the district court's approach to preemption, it would have reached the opposite conclusion and found that "[i]t would be nonsensical to pass a law expressly permitting [the sale of 'Saturday Night Specials'] and then require compliance with a local ordinance that prohibits such sales." ER 2 at 11:5-8.

As this Court had repeatedly held, the district court was not free to disregard the reasoning or the holding of *West Hollywood.*

> When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. However, where there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.

Nelson v. City of Irvine, 143 F.3d 1196, 1206-1207 (9th Cir. 1998), *quoting*, *In re Bartoni-Corsi Produce, Inc.*, 130 F.3d 857, 861 (9th Cir. 1997) (emphasis added).

Here there is no convincing evidence the California Supreme Court would decide the preemption issues differently from the *West Hollywood* or *Suter* courts. The Supreme Court denied petitions for review in both cases. Moreover, both decisions are grounded in preemption cases decided by the Supreme Court. Finally, *West Hollywood* is just the most recent of several California cases over the past three decades that "uniformly construe state regulation of firearms narrowly." *West Hollywood*, 66 Cal.App.3d at 1313.

Thus, the district court was required to follow *West Hollywood* and find that the Legislature has not preempted the Ordinance.[4]

IV. A LOCAL GOVERNMENT HAS THE POWER TO RESTRICT ACTIVITIES ON PROPERTY IT OWNS OUTSIDE ITS TERRITORIAL LIMITS.

The district court also found that the plaintiff "has raised a substantial question regarding the County's authority to prohibit certain conduct on its own land that is located within the territorial limits of the City of Pomona." ER 2 at 17:11-16. The district court's conclusion is contrary to state law and defies common sense.

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[4] The fact that *West Hollywood* is not directly on point (i.e., it deals with the sale of a particular type of handgun sold throughout a community, rather than the sale of guns at particular locations) does not alter this conclusion. *See Bartoni-Corsi*, 130 F.3d at 861 ("Although there is no California case law directly on point," federal court follows closely analogous decision of California Court of Appeal); *American Triticale, Inc. v. NYTCO Services, Inc.*, 664 F.2d 1136, 1143 ("Although we are unaware of an Oklahoma Court of Appeals decision which has addressed specifically the question at issue, . . . that court has addressed an issue so close on point that we find it to be dispositive. . . .").

Government Code section 23004 describes the general powers of counties. It states: "A county may: . . . (d) Manage, sell, lease, or otherwise dispose of its property as the interests of its inhabitants require."[5] It does not appear that the district court or the plaintiff disputes – nor could they – that a local government has the power to own land outside the government's boundaries. *See Air Cal. Inc. v. City and County of San Francisco,* 865 F.2d 1112, 1117 (9th Cir.1989) ("a municipality's right to acquire or own property beyond its corporate limits for legitimate municipal purposes is well-established"); *see also,* Calif. Const., Art. XIII, §11 (providing for taxation of land owned by a local government outside its boundaries).

Thus, quite apart from the question of whether the County could exercise police power over property the County owns within the City of Pomona, it is clear that as a property owner the County has the power to "manage" the property it owns. *See Air Cal,* 865 F.2d at 1117; *Air Transport Association of American v. City and County of San Francisco,* 992 F.Supp. 1149, 1159 (N.D.Cal. 1998). As the California Supreme Court stated in addressing a similar, self-evident proposition:

> [I]t requires no great meditation to realize how strange an anomaly it would be to say that the city might own an airport adjoining its boundaries, and yet be without the power to regulate the manner of its use.

Ebrite v. Crawford, 215 Cal. 724, 729 (1932)

The district court discusses, without distinguishing, a California Attorney General Opinion that addresses a strikingly similar issue. The

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[5] See also, Government Code section 25353 which states that a county board of supervisors "may purchase . . . real or personal property necessary for the use of the county for any county buildings, public pleasure grounds . . . and other public purposes. . . . The board [of supervisors] may . . . manage, and control the property."

question presented to the Attorney General was: "May a county enact an ordinance which bans smoking in all county buildings and enforce the ordinance against members of the public in county buildings within incorporated territory [of a city]?" 74 Ops.Cal.Atty.Gen. 211. The Attorney General concluded that the power granted to counties in Government Code section 23004 permits a county "to enact an ordinance prohibiting smoking in any or all county buildings wherever situated." *Id.* at 212.

Just as a county can prohibit smoking in buildings it owns within a city's territorial boundaries, a county can prohibit the sale of firearms on land it owns within a city. Moreover, just as nothing would prohibit a private business or individual that operated an auditorium in Pomona from banning the sales of guns in the auditorium, no principle in California law prohibits the County – as a property owner – from banning the sale of guns on its property.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's Order Granting Preliminary Injunction.

DATED: December 27, 1999 Respectfully submitted,

MOSCONE, EMBLIDGE & QUADRA, LLP

By: _____
G. SCOTT EMBLIDGE

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is not subject to the type-volume limitations because it is no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

DATED: December 27, 1999

G. SCOTT EMBLIDGE

PROOF OF SERVICE

I, Norma Butler, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action.

On December 27, 1999, I served the attached:

AMICUS BRIEF ON BEHALF OF CITY AND COUNTY OF SAN FRANCISCO; CITIES OF ALAMEDA, BERKELEY, INGLEWOOD, LOS ANGELES, OAKLAND, SAN LUIS OBISPO, AND WEST HOLLYWOOD; COUNTIES OF ALAMEDA, CONTRA COSTA AND SAN MATEO; LEGAL COMMUNITY AGAINST VIOLENCE; WOMEN AGAINST GUN VIOLENCE; AND ORANGE COUNTY CITIZENS FOR THE PREVENTION OF GUN VIOLENCE IN SUPPORT OF DEFENDANT AND APPELLANT COUNTY OF LOS ANGELES AND IN SUPPORT OF REVERSAL OF DISTRICT COURT'S ORDER GRANTING PRELIMINARY INJUNCTION

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I served the attached document(s) in the manner indicated below:

X **BY MAIL:** I caused true and correct copy(ies) of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) named above and, following ordinary business practices, placed said envelope(s) at the Law Offices of Moscone, Emblidge & Quadra, LLP, 180 Montgomery, Ste. 1240, San Francisco, California, 94104, for collection and mailing with the United States Postal Service and there is delivery by the United States Post Office at said address(es). In the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed December 27, 1999, at San Francisco, California.

Norma Butler

Norma Butler