

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL ALLEN NORDYKE and SALLIE
ANN NORDYKE, dba TS TRADE SHOWS

Plaintiffs/Appellants,

vs.

MARY V. KING, GAIL STEELE, WILMA
CHAN, KEITH CARSON, SCOTT HAGERTY,
THE COUNTY OF ALAMEDA, AND THE
COUNTY OF ALAMEDA BOARD OF
SUPERVISORS,

Defendants/Appellees.

No. 99-17551

(U.S. District Court No. C
99-4389 MJJ)

**REVISED AMICUS BRIEF ON BEHALF OF CITY AND COUNTY OF
SAN FRANCISCO; CITIES OF ALAMEDA, BERKELEY,
INGLEWOOD, LAFAYETTE, LOS ANGELES, OAKLAND,
PLEASANTON, SACRAMENTO, SAN CARLOS, SAN JOSE, SAN
MATEO, SANTA ROSA AND WEST HOLLYWOOD; COUNTIES OF
LOS ANGELES, MARIN AND SAN MATEO; LEGAL COMMUNITY
AGAINST VIOLENCE; EAST BAY PUBLIC SAFETY CORRIDOR,
INC. AND YOUTH ALIVE! IN SUPPORT OF DEFENDANTS AND
APPELLEES AND IN SUPPORT OF AFFIRMANCE OF DISTRICT
COURT'S ORDER DENYING TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

On Appeal from the United States District Court
for the Northern District of California
The Honorable Martin J. Jenkins

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INTERESTS OF THE AMICI

The City and County of San Francisco, the Cities of Alameda, Berkeley, Inglewood, Lafayette, Los Angeles, Oakland, Pleasanton, Sacramento, San Carlos, San Jose, San Mateo, Santa Rosa and West Hollywood, and the Counties of Los Angeles, Marin and San Mateo all have enacted, or are considering enacting, legislation that regulates firearms within their respective jurisdictions. These amici are concerned that if the District Court's preemption analysis and holding is overturned, it could call into question some or all local regulation regarding firearms. These amici are also concerned that their continuing ability to adopt firearm regulations, including local ordinances relating to firearm possession, on their property may be jeopardized should this Court overturn the District Court's Order in this case.

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 supporters 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.

The East Bay Public Safety Corridor Partnership is a collaborative effort of 26 communities within the Counties of Alameda and Contra Costa to create practical solutions to the problems of crime, drug dependence and

violence within those communities, which include Alameda, Albany, Ashland, Berkeley, Cherryland, Castro Valley, Crockett, El Cerrito, El Sobrante, Emeryville, Fairview, Fremont, Hayward, Hercules, Kensington, Newark, North Richmond, Oakland, Piedmont, Pinole, Richmond, Rodeo, San Leandro, San Lorenzo, San Pablo and Union City. Key action areas for the Corridor Partnership's programs and strategies include youth violence prevention, domestic violence prevention and support for local law enforcement.

Youth ALIVE! is a non-profit public health agency dedicated to preventing youth violence and generating youth leadership in California communities. Headquartered in Oakland, California, Youth ALIVE! seeks to educate youth in violence prevention/intervention, and to inform decision makers, community leaders, their peers, and others about options to prevent youth violence, particularly gun related. Youth ALIVE! operates the *East Oakland Partnership to Reduce Juvenile Gun Violence* program, which works to reduce the availability of guns, minimize risk factors for illegal gun use, and mobilizes residents of East Oakland to take action to reduce gun violence in that community.

The three non-profit entities each are concerned that their programs and goals will be negatively affected should this Court not affirm the District Court's ruling respecting the ability of local municipalities to enact local regulations and ordinances concerning firearms.

SUMMARY OF ARGUMENT

In September 1999, the County of Alameda enacted an Ordinance providing that "[e]very person who brings onto or possesses on County property a firearm, loaded or unloaded, or ammunition for a firearm is guilty of a misdemeanor." Alameda County Ordinance No. 9.12.120(b), Appellees' Appendix ("AA") at 010. The Ordinance defines County property as "real property, including any buildings thereon, owned or leased by the County of Alameda . . . , and in the County's possession, or in the possession of a public or private entity under contract with the County to perform a public purpose, including but not limited to . . . the Alameda County Fairgrounds in the City of Pleasanton, but does not include any 'local public buildings' as defined in Penal Code Section 171b(c)" *Id.*, 9.12.120(c), AA at 010. The District Court below correctly denied Plaintiffs and Appellants Russell Allen Nordyke and Sallie Ann Nordyke's Motion for Temporary Restraining Order and Preliminary Injunction, determining that the Nordykes had failed to establish a fair likelihood of success as to their contentions that the ordinance is preempted by state law or violative of the First Amendment. Amici submit this brief to address two points concerning the state law preemption issue.

First, the District Court's order correctly tracks and conforms to the most recent decision of the California Courts of Appeal on the issue of state law preemption within the context of firearms, *California Rifle and Pistol Association, Inc. v. City of West Hollywood*, 66 Cal.App.4th 1302, *rev. denied* (1998) [hereafter cited as *West Hollywood*]. This decision follows a long line of both Court of Appeal decisions and Supreme Court decisions establishing the related propositions (a) that state law generally permits local regulations of firearms and (b) that the Legislature has been careful not to

preempt such local regulations except in a few, narrow, specific subfields. *See, e.g., Suter v. City of Lafayette*, 57 Cal.App.4th 1109, 1119, *rev. denied* (1997); *Galvan v. Superior Court*, 70 Cal.2d 851, 856 (1969).

Second, an independent basis exists for upholding the District Court's Order, namely the authority of the County *qua* landowner to prohibit the possession of firearms and ammunition on its own property. Like all landowners, the County has the power to control the use of property it owns. Indeed, the California Government Code expressly authorizes the County to manage its property. California Government Code section 23004(d); *see also Air Cal, Inc. v. City and County of San Francisco*, 865 F.2d 1112, 1117-1118 (9th Cir. 1989).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOLLOWED STATE LAW IN FINDING NO PREEMPTION.

Recently, the California Court of Appeal affirmed that state law generally permits local regulation of firearms and preempts local measures only in "limited subfields of the universe of firearms regulation." *West Hollywood*, 66 Cal.App.4th at 1311. This decision follows a long line of cases reaching similar conclusions. *See, e.g., Suter, supra; Galvan, supra.* Significantly, these cases frame the issue of preemption not in terms of whether the Legislature has authorized the County to act in the circumstances in question but whether the Legislature has removed the otherwise inherent police power possessed by the County. *West Hollywood*, 66 Cal.App.4th at 1310 (article XI, section 7 of the California Constitution grants California municipalities a police power coextensive with that of the Legislature as long as that power is exercised "not in conflict with general

laws.") Here, the District Court correctly analyzed the Alameda County ordinance in light of these principles.

The District Court tracked the conventional California law preemption analysis as set out in *West Hollywood*. First, the District Court correctly framed the "pertinent inquiry" as "whether the Legislature has taken away the County's power to regulate weapons in the manner provided by the Ordinance." Order at 14 (citing *West Hollywood*, 66 Cal.App.4th at 1310). Second, the District Court addressed and rejected the notion that state law expressly preempts the Ordinance. *Id.* at 15-19. Third, the District Court considered and rejected the contention that state law preempts the Ordinance by implication. *Id.* at 19-20. As explained further below, the District Court's approach and conclusions on the preemption issue are correct and should be affirmed: state law does not preempt the Ordinance either expressly or impliedly.

A. The State's Gun Control Laws Do Not Expressly Preempt the Ordinance

The California Legislature has very carefully established the borders of those areas where it has expressly preempted local gun control ordinances and those areas where local governments may enact legislation. There are but three preempted areas: 1) registration and licensing of firearms (Government Code section 53071); 2) possession of firearms in the home and private business property (Penal Code section 12026); and 3) imitation firearms (Government Code section 53071.5). *West Hollywood*, 66 Cal.App.4th at 1313. "This, however, is the extent of the fully preempted fields." *Id.*; see also *Suter*, 57 Cal.App.4th at 1118 (the legislature has been careful not to preempt a local government's ability to "tailor firearms legislation to the particular needs of their communities.").

The District Court correctly followed the reasoning and 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 evidence to suggest that the California Supreme Court would decide the preemption issues differently from the *West Hollywood* or *Suter* courts. In fact, the Supreme Court denied petitions for review in both cases. Moreover, both decisions are grounded in preemption cases decided by the Supreme Court, including *Galvan v. Superior Court*, 70 Cal.2d 856 (1969). 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.

Given these points, the District Court correctly relied upon *West Hollywood* both in terms of setting out the appropriate preemption analysis and in its application. The District Court's conclusion that the Ordinance is not preempted follows naturally from *West Hollywood*, particularly because that case addressed the legal arguments made by the Nordykes below as well as the statutes cited by the Nordykes.

The Nordykes attempt to circumvent this straight-forward conclusion regarding lack of preemption by asserting a putative "duplication" of state law by the Ordinance. *See* Appellants' Brief at 13-15. The Nordykes contend that the Ordinance overlaps with existing state laws regarding possession of firearms at polling places, school buildings and the like. There are three flaws with this argument.

First, state law does not address the question of possession of firearms on publicly owned property as a category. *Compare* Penal Code section 12026 (precluding local regulation regarding possession of firearms in the home or private business property). The Ordinance prohibits possession of firearms only on "County property", a specifically defined term that includes real property owned or leased by the County, but excludes "local public buildings" within the meaning of Penal Code section 171b(c). Significantly, none of the state statutes cited by the Nordykes concern possession of firearms on County property as so defined. *See* Appellants' Opening Brief [hereinafter "Appellant's Brief"] at 14 (citing Election Code §18544 (polling places); Penal Code §171b (local public buildings); Penal Code §171c (location of Legislative meeting); and Penal Code §§626.9 and 626.95 (school premises)). Thus, the Ordinance is not duplicative of any state law. *Compare In Re Portnoy*, 21 Cal.2d 237, 240-41 (1942) (City ordinance duplicative where it used substantially the same terms used in the state statute and used the same elements to find liability).

Second, the record does not support the alleged overlap of the Ordinance with state law. For example, the Nordykes presented no evidence establishing that there is a school located on County-owned or County-leased property. The Nordykes' speculation that there conceivably could be

such a school or a polling place upon County property cannot overcome this lack.

Similarly, there is no evidentiary support for the Nordykes' contention that the County Fairgrounds are local public buildings within the scope of Penal Code section 171b(c). As the Nordykes concede, a significant element in determining whether a building falls within section 171b(c) is whether state or local employees are regularly present for the performance of their official duties. However, the Nordykes' evidence on this point, the Declaration of William Eastman and the occurrence of Satellite Horse Racing and Parimutuel Wagering on the site, does no more than establish that at certain discrete and disparate intervals an occasional state employee or local law enforcement officer may be temporarily present at the site. *See* Appellants' Brief at 15-16. This is not the type of regular presence sufficient to characterize the County Fairgrounds as a local public building under section 171b(c).

Third, none of the statutes the Nordykes cite are in any way applicable to the case at hand. In sum, the putative "duplication" of state law is a red herring without legal or factual support.

The Nordykes' argument that the Ordinance contradicts state law is equally unpersuasive. Appellants' Brief at 15-31. The Nordykes base this argument on the Ordinance's lack of any exemption for possession of firearms at gun shows. *Id.* at 20. However, the District Court correctly rejected the contention that possession of firearms is necessary to a "gun-show." *See* Order at 12-13. Equally significantly, this argument only makes sense if one presumes that state law mandates Counties to hold gun shows on their property. State law contains no such mandate.

Indeed, although the Nordykes cite numerous provisions of A.B. 295, the recently enacted state legislation regarding gun shows effective January 1, 2000,¹ that legislation does not require that a public entity hold gun shows on its property. Additionally, nothing in that legislation suggests that if a public entity did allow a gun show to be held on its property, the public entity would thereby lose its authority to regulate or control the use of its property.

To the contrary, A.B. 295 contemplates local regulations that have an impact on activities at gun shows. For example, Penal Code section 12071.4(b)(2) requires that vendors certify that "they are responsible for knowing and complying with all applicable federal, state and *local laws dealing with the possession and transfer of firearms.*" (Emphasis added.) Similarly, Penal Code section 12071(b)(1)(B), which permits licensed firearm dealers to sell firearms at gun shows, allows such sales only where the dealer "complies with . . . all applicable local laws, regulations, and fees, if any."

The language of these sections undermines the Nordykes' contention that A.B. 295 preempts the Ordinance. If the Legislature intended to prohibit all local regulation of gun shows, it would have said so. As noted by the California Court of Appeal in *West Hollywood*, the Legislature knows what words to use when "it intends to 'occupy the whole field.'" *West Hollywood*, 66 Cal.App.4th at 1312. Because the Legislature chose not to use language limiting the County's authority to preclude possession of firearms on its property, and indeed chose to express the exact opposite

¹ A.B. 295 amended California Penal Code sections 171b and 12071.1 and added section 12071.4.

intention, the District Court correctly concluded that the Legislature did not intend to preclude local regulation of gun shows when enacting of A.B. 295. Order at 17.

The Legislature has not expressly preempted the County's ability to ban the possession of firearms on County property.

B. The State's Gun Control Laws Do Not Impliedly Preempt the Ordinance

The District Court also correctly applied California law in determining that state law did not preempt the Ordinance by implication. Again, the most recent state case addressing this issue is *West Hollywood*. As with the issue of express preemption, the *West Hollywood* Court summarized and followed California law, including the leading case of *Sherwin-Williams v. City of Los Angeles*, 4 Cal. 4th 893 (1993), *supra*.

Under and *Sherwin-Williams*, implied preemption exists where:

(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; *West Hollywood*, 66 Cal.App.4th at 1317. The District Court correctly applied the *Sherwin-William* factors in determining that there was no implied preemption here. Order at 19-20.

First, the Legislature has not covered at all, much less “fully and completely covered,” the subject of the Ordinance: the possession of firearms on government property. Thus, the Legislature has not “clearly indicated” that the possession of firearms on government property 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, as noted above, state law explicitly provides for further or additional local action. “There can be no implied preemption where state law expressly allows supplementary local legislation.” *Suter*, 57 Cal.App.4th at 1121.

Finally, the Ordinance at issue has no substantive impact upon transient citizens such as to warrant preemption. As the *Suter* Court held with respect to local bans on gun sales, “[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.” *Id.* at 1119.

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

II. THE COUNTY'S POWER AS LANDOWNER INDEPENDENTLY SUPPORTS AFFIRMANCE OF THE DISTRICT COURT'S ORDER

Government Code section 23004 states: “A county may: . . . (d) Manage, sell, lease, or otherwise dispose of its property as the interests of its

inhabitants require.”² By its terms, section 23004(d) permits Alameda County not simply to buy and sell property, but to "manage" it like an ordinary property holder. The County's actions here, specifically its prohibition on possession of firearms on its property, fall within the parameters of managing its property. *See Attorney General Opinion 91-79*, 74 Ops.Cal.Atty.Gen. 211 (1991) (concluding Los Angeles County had authority to ban smoking within buildings owned by it). 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). Accordingly, Government Code section 23004(d) provides an independent basis upon which this Court should affirm the District Court's Order.

Moreover, A.B. 295 does not curtail the scope and reach of Government Code section 23004(d). First and foremost, A.B. 295 does not address the subject of the County's authority to ban possession of firearms on its property. The failure of the Legislature to expressly repeal or amend a prior statute when the subject matter is before it is construed as indicative of an intent not to change existing law. *Lambert v. Conrad*, 185 Cal.App.2d 85, 95 (1960).

Indeed, repeal of a statute by a later statute is disfavored. To the contrary, "all presumptions are against a repeal by implication." *Flores v.*

² *See also* Government Code section 25353 (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.").

Workmen's Comp. Appeals Bd., 11 Cal.3d 171, 176 (1974). "The presumption against implied repeal is so strong that, 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant and so inconsistent that the two cannot have concurrent operation.'" *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal.3d 408, 419 (1989) (citing *Penziner v. West American Finance Co.*, 10 Cal.2d 160, 176 (1937)). Moreover, "implied repeal should not be found unless ' . . . the later provision gives *undebatable evidence* of an intent to supercede the earlier" *Id.* at 420 (citing *Penziner*) (emphasis added by *Western Oil & Gas Assn.*).

The same holds true for amendment by implication. "Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases nor when they raise constitutional questions. The legislature will not be held to have changed a law it did not have under consideration when enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together." 1A Sutherland: Statutory Construction (5th ed. 1993) §22.13 at 215; *see Lambert, supra*, 185 Cal.App.2d at 93.

Moreover, A.B. 295 and Government Code section 23004(d) can and should be read as to harmonize with each other. "The courts are bound to maintain the integrity of both the later and preexisting statutes if there is any possibility of concurrent operation. *Sanford v. Garamendi*, 233 Cal.App.3d 1109, 1124 (1991). A.B. 295, and specifically Penal Code section 12071.4(b)(2), expressly acknowledge the ongoing role of "local laws dealing with the possession and transfer of firearms" with respect to guns shows. Thus with respect to the Ordinance at issue, there is no conflict between Government Code section 23004(d) and A.B. 295.

In Government Code section 23004(d), the Legislature authorized the County to manage its property. The Ordinance is a valid exercise of that power. State law does not preempt what it expressly authorizes.

CONCLUSION

For the foregoing reasons, this Court should affirm the District Court's Order denying the Motion for Temporary Restraining Order and Preliminary Injunction.

DATED: May 8, 2000

Respectfully submitted,

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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: May 8, 2000



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PROOF OF SERVICE

I, **ROSEMARY MENDOZA**, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Fifth Floor, San Francisco, CA 94102.

On May 8, 2000, I served the attached:

REVISED AMICUS BRIEF ON BEHALF OF CITY AND COUNTY OF SAN FRANCISCO; CITIES OF ALAMEDA, BERKELEY, INGLEWOOD, LAFAYETTE, LOS ANGELES, OAKLAND, PLEASANTON, SACRAMENTO, SAN CARLOS, SAN JOSE, SAN MATEO, SONOMA, SANTA ROSA AND WEST HOLLYWOOD; COUNTIES OF LOS ANGELES, MARIN AND SAN MATEO; LEGAL COMMUNITY AGAINST VIOLENCE; EAST BAY PUBLIC SAFETY CORRIDOR, INC. AND YOUTH ALIVE! IN SUPPORT OF DEFENDANTS AND APPELLEES AND IN SUPPORT OF AFFIRMANCE OF DISTRICT COURT'S ORDER DENYING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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

Donald E. Kilmer, Esq.
1261 Lincoln Avenue, Suite 108
San Jose, CA 95125

Sayre Weaver, Esq.
RICHARDS, WATSON & GERSON
44 Montgomery Street, Suite 960
San Francisco, CA 94104

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920 Arlene Way
Novato, CA 94947

C.D. Michell, Esq.
TRUTANICH & MICHELL
407 North Harbor Blvd
San Pedro, CA 90731

and served the named document in the manner indicated below:

- BY MAIL:** I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in envelope(s) addressed to the addressee(s), at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, City and County of San Francisco, California, 94102, for collection and mailing with the United States Postal Service, and 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 May 8, 2000, at San Francisco, California.


ROSEMARY MENDOZA