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May 20, 2019

REPORT TO PUBLIC SAFETY AND LIVABLE NEIGHBORHOODS COMMITTEE
LEGAL ANALYSIS OF PROPOSED FIREARM SAFE STORAGE ORDINANCE

INTRODUCTION

On June 5, 2019, the Public Safety and Livable Neighborhoods Committee is expected to consider a proposed Firearm Safe Storage Ordinance (Safe Storage Ordinance) that would make it unlawful for a person to keep a firearm within any residence¹ within the City of San Diego (City) unless the firearm is stored in a locked container or disabled with a trigger lock. The proposed Safe Storage Ordinance would allow for certain exceptions. A firearm may be kept within a residence if the firearm is carried on the body of the person who is an authorized user² of a firearm, or the firearm is in the immediate control of that person so that they can readily retrieve and use the firearm as if carried on their body. This report addresses whether the proposed Safe Storage Ordinance would be constitutional under the Second Amendment to the United States Constitution and whether the City is preempted by federal or state law from regulating firearms.

QUESTIONS PRESENTED

1. Does an ordinance regulating the storage of firearms in a residence violate the Second Amendment?
2. Is a City ordinance regulating the storage of firearms in a residence preempted by either federal law or state law?

SHORT ANSWERS

1. No. Under current legal precedent, although the proposed ordinance regulates conduct within the scope of the Second Amendment, it does not impose a substantial burden on firearm owners and is substantially related to an important government interest in firearm safety.
2. No. A local ordinance regulating the storage of a firearm in a residence, which is not regulated under federal or state law, is not preempted.

¹ For purposes of the proposed Safe Storage Ordinance, residence means any structure intended or used for human habitation, including without limitation houses, condominiums, apartments, and mobile homes.

² For purposes of the proposed Safe Storage Ordinance, an authorized user is a person who is not prohibited from owning or possessing a firearm.

ANALYSIS

I. UNDER CURRENT LEGAL PRECEDENT, THE PROPOSED SAFE STORAGE ORDINANCE IS CONSTITUTIONAL UNDER THE SECOND AMENDMENT.

The Second Amendment to the United States Constitution, applicable to states and cities through the Fourteenth Amendment, protects “an individual right to keep and bear arms” and “the inherent right of self-defense.” *Jackson v. City and County of San Francisco*, 746 F.3d 953, 959 (9th Cir. 2014) cert. denied 135 S.Ct. 2799 (2015), (citing *District of Columbia v. Heller*, 554 U.S. 570, 595, 628 (2008)). Firearm regulations that substantially burden this right are unconstitutional. *Id.*

Recently, the Ninth Circuit upheld a San Francisco ordinance (San Francisco Police Code section 4512) requiring handguns inside the home to be stored in locked containers or disabled with a trigger lock when not being carried on the person. *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014).³ Although the Court found that the ordinance made it more difficult for a person to use a firearm for the lawful purpose of self-defense, the Court found that this burden was not substantial as it only affected the way responsible firearm owners store their firearms in the home when not carried on their person. *Jackson*, 746 F.3d at 964 (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). The Court found that the ordinance only indirectly burdens the ability to use a handgun and does not constitute a complete ban, either on its face or in practice. *Jackson*, 746 F.3d at 964.

The Court distinguished the San Francisco ordinance from an ordinance that was found unconstitutional by the U.S. Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the ordinance at issue barred the possession of handguns both inside and outside the home, and required other firearms to be kept unloaded and disassembled or with a trigger lock. *Jackson* 746 F.3d at 959 (citing *Heller*, 554 U.S. at 575). The *Heller* court determined this ordinance unduly burdened an individual’s Second Amendment rights. In contrast, the Court held that the San Francisco ordinance regulates only gun storage, not the carrying of a handgun, and thus allows an individual to retain his or her right to immediate self-defense within the home. *Jackson*, 746 F.3d at 964.

Because the San Francisco ordinance only regulates the manner in which a person can exercise their Second Amendment rights, the Court analyzed the regulation under an intermediate scrutiny standard of review. *Jackson*, 746 F.3d at 964-65 (such an ordinance does not impose the sort of severe burden that requires the higher level of scrutiny applied by other courts in this context). “[T]he first prong of intermediate scrutiny review [is] whether the government’s stated objective is significant, substantial, or important.” *Id.* at 965. Second, the enactment must be substantially related to the important objective. *Id.* at 966.

³ The matter before the court was an appeal for the denial of a motion for preliminary injunction.

The Court found that “[i]t is self-evident’ that public safety is an important government interest,” and reducing “gun-related injury and death” promotes public safety. *Jackson*, 746 F.3d at 965 (quoting *Chovan*, 735 F.3d at 1139). It also found that requiring “persons [to] store handguns in a locked storage container or with a trigger lock when not carried on the person is substantially related to the important government interest of reducing firearm-related deaths and injuries.” *Jackson*, 746 F.3d at 966.

Here, the proposed Safe Storage Ordinance explains the City’s important interests in reducing the number of firearm-related suicides, preventing children and persons prohibited from owning or possessing firearms access to firearms, and preventing firearms from being stolen and used in criminal activity. Additionally, a person can have a fully operable firearm on their person or within their immediate control while in the home, which addresses the self-defense concern in *Heller*. *Heller*, 554 U.S. at 576. Therefore, under current legal precedent, the proposed Safe Storage Ordinance is permissible under the Second Amendment.

II. FEDERAL LAW DOES NOT PREEMPT A LOCAL REGULATION OF THE STORAGE OF FIREARMS IN A RESIDENCE.

Article VI of the United States Constitution declares that laws of the United States “shall be the supreme Law of the Land . . . anything in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI. “In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, [] or if federal law so thoroughly occupies a legislative field “as to make reasonable the inference that Congress left no room for the States to supplement it.” *Cipollone v. Liggett*, 505 U.S. 504, 516 (1992) (citations omitted).

However, Congress may expressly allow local government to simultaneously regulate in specific areas. Such is the case here, where Congress has elected to allow states to regulate firearms simultaneously with the federal government. Specifically, the United States Code regulating firearms has a provision expressing Congress’ intent not to occupy the entire field of firearms regulation, but rather, to allow local regulation:

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C.A. § 927.

This simultaneous regulation is illustrated in the transportation of firearms, where both the federal government and the California state legislature require a firearm to be kept in the trunk or a locked container. 18 U.S.C.A. § 926A, Cal. Penal Code § 25610. Conversely, federal law contains no regulations specifically pertaining to the storage of firearms in a residence.⁴ The absence of federal residential firearm storage regulations in this area leaves the field open to state or local regulation, as proposed in the proposed Safe Storage Ordinance.

Based on the express granting of Congressional authority for local firearms regulation, and the absence of any conflicting or comprehensive federal residential firearms storage legislation, the proposed Safe Storage Ordinance is not preempted by law.

III. STATE LAW DOES NOT PREEMPT THE LOCAL REGULATION OF THE STORAGE OF FIREARMS IN A RESIDENCE.

Generally, a city may “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const. art. XI, § 7. This constitutional power is commonly referred to as a municipality’s “police powers.” *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302, 1310 (1998). However, “[i]f an otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 860 (2002) (citing *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893 (1993)). “A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication” *Great Western Shows*, 27 Cal. 4th at 860.

Like federal laws, state laws regulate certain areas of gun regulation but not the entire field of gun control. Here, the State Legislature has regulated in several areas of firearm storage. Therefore, the question is whether federal or state law conflicts with or was intended to occupy the legislative field, such that the proposed Safe Storage Ordinance is preempted.⁵

A. Express Preemption

The legislature may expressly indicate an intent to fully occupy an area. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006). Conversely, the legislature may clearly indicate an intent to allow local regulation. Generally, as to local control of firearms, the legislature has not expressly indicated a desire to occupy the entire field; rather, it has targeted certain specific areas for preemption and has not broadly preempted local regulation. *Great Western*, 27 Cal. 4th at 864, *Nordyke*, 27 Cal. 4th 875, 882 (2002) (“[T]here are significant

⁴ The only federal laws regulating storage of firearms are applicable only to licensed firearm dealers, and have no application in this context. 18 U.S.C.A. § 922(z)(1), 18 U.S.C.A. § 923(d)(1)(G).

⁵ Currently the California Legislature is considering a bill that would require a firearm owner to securely store any firearm against theft or unauthorized access with Department of Justice-approved safety devices anytime they are outside their residence. Assem. Bill 276 (2019-2020 Reg. Sess.) introduced by Assemb. Friedman on Jan. 28, 2019. Firearms: storage. The current version of AB 276 states that it will not preclude or preempt a local ordinance that imposes additional penalties or requirements in regard to safe storage of firearms.

local interests in gun regulation that the Legislature has not sought to override except in specific areas... .”)

A local ordinance may also be expressly preempted if it conflicts with or contradicts state law by prohibiting an act that the state law expressly authorizes, or authorizing an act that the state law expressly prohibits. *Sherwin-Williams Co.*, 4 Cal. 4th at 902. Local regulations that do not criminalize precisely the same acts that are prohibited by state statute are not duplicative of state law, and thus are not preempted. *Nordyke v. King*, 27 Cal. 4th 875 (2002) (county ordinance prohibiting possession of a firearm on county property found not to be preempted by state firearms statutes because state law did not expressly preempt regulation of gun shows nor did it duplicate or contradict such statutes).

The proposed Safe Storage Ordinance does not conflict with or duplicate state law. For example, state law allows a person to carry an open or concealed firearm within their residence. Cal. Pen. Code § 25605, exempting application of Cal. Pen. Code § 25400, concealed firearm regulations. The proposed Safe Storage Ordinance allows a firearm to be carried on the body of the person who is the lawfully authorized user of the firearm in accordance with all applicable laws, either openly or concealed. State law also allows a person to have a loaded firearm within the person’s place of business. Cal. Penal Code § 26035. The proposed Safe Storage Ordinance allows for a firearm to be loaded at a person’s residence, regardless if the residence is also used as their place of business.

Additionally, the state regulates the storage of firearms when a person living at a residence is prohibited from possessing a firearm. Cal. Pen. Code § 25135.⁶ In contrast, but not inconsistently, the proposed Safe Storage Ordinance applies to all persons in a residence regardless of whether a person prohibited from possessing a firearm also resides in the residence.

Finally, the state regulates keeping a loaded firearm within any premises where it might be accessible to children or a person prohibited from possessing a firearm. Cal. Pen. Code § 25100. The statute makes it a crime if a person prohibited from possessing a firearm or a child obtains access to the firearm and causes injury, and the owner of the firearm knows or reasonably should know that a prohibited person or a child, without the permission of the child’s parent or legal guardian, is likely to gain access to the firearm. Cal. Pen. Code § 25100 (a)-(b). It also makes it a crime for a person to negligently store or leave a loaded firearm in a location where the person knows or reasonably should know that a child or a person prohibited from possessing a firearm is likely to gain access to it. Cal. Pen. Code § 25100(c). However, no

⁶ State law makes it unlawful for certain persons to own and/or possess firearms, for example, any person who is: convicted of a felony or a violent offense enumerated in California Penal Code sections 29900 or 29905; ordered to not possess firearms as a condition of probation; convicted of a misdemeanor listed in California Penal Code section 29805; subject to a temporary restraining order or an injunction issued pursuant to California Code of Civil Procedure sections 527.6 or 527.8, a protective order as defined in California Family Code section 6218, a protective order issued pursuant to California Penal Code sections 136.2 or 646.91, or a protective order issued pursuant to California Welfare and Institutions Code section 15657.03; or found by a court to be a danger to himself, herself, or others because of a mental illness pursuant to California Welfare and Institutions Code section 8103.

penalty applies if the firearm is kept in a locked container, is carried on the person, or within close enough proximity so the individual can readily retrieve and use the firearm as if carried on the person, or is locked with a locking device. Cal. Pen. Code § 25105(a), (c), (d).

Unlike the state statutes, the proposed Safe Storage Ordinance regulates the storage of a loaded and unloaded firearms in a residence, and the ordinance is violated regardless of whether a child or prohibited person actually gains access and obtains the firearm or has the ability to access it. Thus, the proposed Safe Storage Ordinance does not conflict with or contradict state law; it does not prohibit an act that the state law expressly authorizes; and it does not authorize an act that the state law expressly prohibits. It also does not duplicate state law as it does not criminalize the same acts prohibited by the state law.

B. Implied Preemption

Local regulation in an area of law may also be preempted when the Legislature impliedly manifests its intent to fully occupy the area. *Great Western Shows*, 27 Cal. 4th at 860-61. Implied preemption will apply when: “(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.” *Great Western Shows*, 27 Cal. 4th at 861 (quoting *Sherwin-Williams Co.*, 4 Cal. 4th at 897-98).

Regarding the first factor, whether state law completely covers the subject matter, the California Supreme Court has previously held that, “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.” *Great Western Shows*, 27 Cal. 4th at 861. State firearm regulations “do not show that the entire area of gun or weapons control has been so fully and completely covered by general law ... ‘as to clearly indicate that [the subject] has become exclusively a matter of state concern.’” [Citation.] *Great Western Shows*, 27 Cal. 4th at 861-62 (quoting *Galvan v. Superior Court*, 70 Cal. 2d 851, 860 (1969)) (alterations in the original). The Court went on to point out a Penal Code section where the Legislature expressly prohibited requiring a license to keep a concealable weapon at a residence or place of business and noted that “‘[s]uch a statutory provision would be unnecessary if the Legislature believed that all gun regulation was improper.’” *Great Western Shows*, 27 Cal. 4th at 861-62 (quoting *Galvan*, 70 Cal. 2d at 860) (alterations in the original). Here, the Legislature has decided to regulate storage of firearms in particular circumstances, leaving the field open to other local regulation.

The second factor, whether state law is couched in terms to clearly indicate that local action is not permitted, has not been addressed by the courts regarding firearm storage. However, the existing firearm storage regulations noted above prohibit very specific behavior and nothing

in the language indicates an intent to foreclose additional local regulations. Additionally, the Legislature's consideration of broader firearm storage regulation in 2013, Senate Bill 108 (2013-2014 Reg. Sess.), evidences an understanding that local regulations were accommodated within the existing regulatory scheme. Senate Bill 108, as originally proposed, would have required that firearms stored at a residence must be stored in one of certain specified secured manners when the owner was away.⁷ The bill was subsequently amended to only direct the California Department of Justice "to study, among other things, the effectiveness of the San Francisco ordinance⁸ in preventing instances of unintentional firearm injury and death, self-inflicted gunshot wounds, firearm theft, and the unauthorized use of firearms which resulted in a crime."⁹ The bill was eventually made inactive after it was retained in committee without further action.

Finally, the third factor, whether the nature of firearm storage regulations is such that the local benefit would be outweighed by its adverse effect on transient citizens, weighs against implied preemption. Firearm storage regulations, by their nature, have limited effects on transient citizens. Regulations that control how firearms are stored within the City's jurisdiction would impose minimal, if any, burden on transient citizens since it would mostly control the conduct of residents. "Laws designed to control the sale, use or possession of firearms in a particular community have very little impact on transient citizens, indeed, far less than other laws that have withstood preemption challenges." *Great Western Shows*, 27 Cal. 4th at 867 (quoting *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109, 1119 (1997)).

Here, the proposed regulation of firearm storage in residences is not exclusively a matter of state concern, there is no indication the state intended to foreclose local regulations, and the proposed regulation greatly benefits the safety in the local community.

CONCLUSION

The proposed Safe Storage Ordinance is constitutional under the Second Amendment because it is substantially related to a government interest in firearm safety and does not impose a substantial burden on firearm owners. We further conclude that the proposed ordinance is not preempted by federal or state law because those laws regulate only certain areas of firearm regulation and do not occupy the entire field of gun control, allowing for local regulation.

⁷ See Senate Committee on Public Safety Bill Analysis, dated April 15, 2013 (available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SB108.)

⁸ San Francisco Police Code section 4512 which was also the subject of *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

⁹ Assembly Committee on Public Safety Bill Analysis, dated August 15, 2013, p. 4 (available at http://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201320140SB108.)

Additionally, the proposed Safe Storage Ordinance does not contradict or duplicate state law, and the California Legislature has not shown an intent to exclusively regulate storage of firearms in residences.

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RC-2019-4
Doc. No. 1970717_4