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**IN THE UNITED STATES DISTRICT COURT**

9

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10

**SAN FRANCISCO DIVISION**

11 ESPANOLA JACKSON, PAUL COLVIN, ) **CASE NO.: CV-09-2143-RS**  
THOMAS BOYER, )  
12 LARRY BARSETTI, DAVID GOLDEN, ) **PLAINTIFFS' OPPOSITION TO**  
NOEMI MARGARET ROBINSON, ) **DEFENDANTS' MOTION TO**  
13 NATIONAL RIFLE ASSOCIATION OF ) **CONSOLIDATE; DECLARATION**  
AMERICA, INC. SAN FRANCISCO ) **OF CLINTON B. MONFORT IN**  
14 VETERAN POLICE OFFICERS ) **SUPPORT THEREOF**  
ASSOCIATION, )

15

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Plaintiffs

) Hearing Date: December 9, 2010  
) Time: 1:30 p.m.

17

vs.

) Place: Judge Richard Seeborg  
) United States District Court  
) 450 Golden Gate Avenue,  
) Courtroom 3, 17<sup>th</sup> Floor  
) San Francisco, CA

18

CITY AND COUNTY OF SAN )  
FRANCISCO, MAYOR GAVIN )  
19 NEWSOM, IN HIS OFFICIAL CAPACITY;) )  
POLICE CHIEF GEORGE GASCÓN, in his )  
20 official capacity, and Does 1-10, )

) Trial Date: None Set

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Defendants.

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1 **I. INTRODUCTION**

2 This case – filed in May of 2009 – involves a discreet challenge to three San Francisco  
 3 ordinances that violate Plaintiffs’ constitutional rights to keep and bear arms. The suit names as  
 4 Defendants only the City and County of San Francisco and its representatives, in their official  
 5 capacities only, and does not request a jury trial. It seeks declaratory and injunctive relief only.  
 6 (*See* Compl. for Declaratory and Injunctive Relief.)

7 A subsequent case, *Pizzo v. Newsom*, was filed in September 2009. That case brings  
 8 mixed challenges to multiple federal, state, and local laws. It requests a jury trial, names multiple  
 9 local and state defendants and officers, some of whom are sued in their individual capacities, and  
 10 seeks monetary damages. *See* Complaint, *Pizzo v. Newsom*, No. 09-4493 (N.D. Cal. Sept. 23,  
 11 2009).<sup>1</sup>

12 Because of the numerous differences between the two cases, on November 20, 2009, the  
 13 Court ruled that this case and *Pizzo* are *not even related*. (*See* Order Den. Related Case Req.,  
 14 Nov. 20, 2009 (a true and correct copy of which is attached hereto as Exhibit “B”).) Nonetheless,  
 15 Defendants now urge the Court to not only relate the two cases, but to actually *consolidate* them.

16 Defendants’ Motion makes much over the fact that they are not precluded from filing a  
 17 motion to consolidate the two cases just because the two cases have not been deemed related.  
 18 (Defs.’ Mem. of P. & A. Supp. Mot. to Consolidate 5-6.) But while Defendants may technically  
 19 be within their rights to bring this motion, doing so ignores guidance from the Court on the very  
 20 issue central to a consolidation motion. Consolidation, though subject to judicial discretion,  
 21 requires at a minimum that Defendants establish the cases share similar questions of law and fact  
 22 such that consolidation is appropriate. But the Court’s own Order denying relation of these cases  
 23 suggests this threshold is not even close to being met. In its Order, the Court explicitly stated that  
 24 “*these two cases do not concern substantially the same parties, and . . . there are far more*

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27 <sup>1</sup> A true and correct copy of the Complaint in *Pizzo v. Newsom*, No. 09-4493,  
 28 filed in the United States District Court for the Northern District of California and  
 currently before the Honorable Judge Claudia Wilken, is labeled Exhibit “A” and  
 attached to Plaintiffs’ Request for Judicial Notice filed concurrently herewith.

1 *differences between the two complaints* [than similarities].” (Order Den. Related Case Req. 3  
2 (emphasis added).)

3 That was a year ago. Defendants fail to offer any evidence demonstrating that these cases  
4 have somehow become more similar since that time. This is not surprising – in fact, the cases  
5 have become *even more distinguishable* both in law and fact since then.

6 From a procedural standpoint, *Pizzo* remains stayed, while the court has lifted the stay in  
7 the present case. (See Order Granting Mot. to Lift Stay, Sept. 13, 2010.) Plaintiffs are rapidly  
8 moving forward with their case to redress deprivations of *fundamental rights* as confirmed by the  
9 Supreme Court in *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010). Plaintiffs have engaged  
10 in settlement negotiations with Defendants on some claims, met and conferred with Defendants in an  
11 attempt to negotiate a briefing schedule for cross-motions for summary judgment to resolve this  
12 case on the merits, and in light of Defendants’ attempts to bog this case down through irrelevant  
13 factual contentions and procedural maneuvers including this attempt to get the case intertwined  
14 with the legal quagmire that is *Pizzo*, intend to file a motion for preliminary injunction prior to the  
15 hearing on consolidation. (Declaration of Clinton B. Monfort (CBM Decl.) ¶¶ 4-7.)

16 From a substantive standpoint, Plaintiffs have foregone their sole state law claim in light  
17 of the Supreme Court’s ruling in *McDonald*. (See Stip. & Order Re: Dismissal of Pls.’ Fifth  
18 Claim for Relief (a true and correct copy of which is attached hereto as Exhibit “C”).) So, in  
19 addition to the numerous legal and factual differences between the two cases, *Pizzo* involves  
20 federal *and* state law causes of action, while this case involves only Second Amendment  
21 challenges.

22 Consolidation of this case will only delay the progress of *Jackson*, promote prejudice and  
23 confusion, and burden both the parties and the Court. The legal nature and procedural postures of  
24 these cases do not warrant consolidation. Plaintiffs respectfully request the Court deny  
25 Defendants’ Motion consistent with its ruling on November 20, 2009.

## 26 **II. STATEMENT OF FACTS**

27 On May 15, 2009, Plaintiffs filed their Complaint for declaratory and injunctive relief  
28 against Defendants City and County of San Francisco, Mayor Gavin Newsom, and Chief of Police

1 Heather Fong,<sup>2</sup> challenging the validity of three firearms-related ordinances enacted and enforced  
2 by Defendants. Specifically, Plaintiffs challenge: (1) San Francisco Police Code (“SFPC”) section 4512,  
3 requiring handguns kept within the home be stored in a locked container or disabled with a trigger lock;  
4 (2) SFPC section 613.10(g), prohibiting the sale of ammunition which “serves no sporting purpose”;  
5 and (3) SFPC section 1290, prohibiting the discharge of any firearm within the limits of the City and County of San Francisco. (Compl. ¶¶ 1-7.)

7 Plaintiffs originally raised the following five causes of action: (1) section 4512 violates  
8 the rights to keep and bear arms under the Second and Fourteenth Amendments of the United States  
9 Constitution (Compl. ¶¶ 43-50); (2) section 613.10(g) violates the rights to keep and bear  
10 arms under the Second and Fourteenth Amendments (Compl. ¶¶ 51-54); (3) section 1290 violates  
11 the rights to keep and bear arms under the Second and Fourteenth Amendments (Compl. ¶¶ 55-  
12 56); (4) section 613.10(g) violates the Fifth Amendment right to due process (Compl. ¶¶ 57-62);  
13 and (5) each section challenged violates the right to self-defense under state law (Compl. ¶¶ 63-  
14 70).

15 On July 9, 2009, Defendants filed a motion to dismiss for lack of subject matter  
16 jurisdiction. Plaintiffs then amended their complaint, addressing Defendants’ jurisdictional  
17 concerns and obviating the need for a hearing on Defendants’ motion. (*See* Am. Compl. for  
18 Declaratory & Injunctive Relief.) On August 27, 2009, the parties stipulated to stay this case  
19 pending a decision in *Nordyke v. King*, Case No. 07-15763, the Ninth Circuit case then expected  
20 to resolve the pertinent issue of Second Amendment incorporation through the Fourteenth  
21 Amendment. (*See* Minute Entry: Initial Case Management Conference.) Thereafter, *Nordyke* was  
22 itself stayed pending the United States Supreme Court ruling in *McDonald v. City of Chicago*.  
23 Order, *Nordyke v. King*, No. 07-15763 (9th Cir. Sept. 24, 2009).

24 *Pizzo v. Newsom* was filed on September 23, 2009. *See* Complaint, *Pizzo v. Newsom*,  
25 *supra*. In that case, Plaintiff sued Defendants Mayor Gavin Newsom, former Chief of Police  
26 Heather Fong, and Chief of Police George Gascón, in both their *individual and official capacities*,

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28 <sup>2</sup> In their Amended Complaint, filed on August 24, 2009, Plaintiffs named current Chief of Police George Gascón, sued in his official capacity, in the place of former Chief of Police Heather Fong. (Am. Compl. 2 n.1.)

1 Sheriff Mike Hennessey and California Attorney General Edmund G. Brown, in their official  
2 capacities only,<sup>3</sup> and the City and County of San Francisco. *Id.* at 6-7, ¶¶ 45, 49, 53, 56-59, 62.

3 Unlike Plaintiffs here, *Pizzo* seeks both declaratory and injunctive relief *and monetary*  
4 *damages*. *Id.* at 1, 30-31, ¶¶ 1-14. *Pizzo* challenges not only SFPC sections 613.10(g), 1290, and  
5 4512, but also *state law*—California Penal Code section 12050 et seq. (concerning the  
6 discretionary issuance of carry concealed weapons licenses by local law enforcement), California  
7 Penal Code section 12031(b) (prohibiting the carrying of a loaded firearm in a public place or on a  
8 public street in one’s vehicle, except as to current and retired police officers), and *federal law*—the  
9 Law Enforcement Officers Safety Act (LEOSA), codified at 18 U.S.C. §§ 926B, 926C. *Id.* at 7,  
10 ¶¶ 64-66.

11 The *Pizzo* complaint asserts the following *eleven* causes of action: (1) SFPC section 4512  
12 violates the Second Amendment; (2) SFPC section 1290 violates the Second Amendment; (3)  
13 California Penal Code section 12050 et seq. violates the Second Amendment; (4) Defendants’  
14 application and enforcement of California Penal Code section 12050 et seq. violates the  
15 Fourteenth Amendment right to equal protection under the law; (5) California Penal Code section  
16 12031(b) violates the Fourteenth Amendment right to equal protection under the law; (6)  
17 Defendants’ enforcement of LEOSA violates the Fourteenth Amendment right to equal protection  
18 under the law; (7) SFPC section 613.10(g) violates the Second Amendment; (8) SFPC section  
19 613.10(g) violates the Fifth Amendment right to due process; (9) SFPC sections 613.10(g), 1290,  
20 and 4512 and California Penal Code section 12050 et seq. violate the Constitution and laws of the  
21 State of California; (10) Defendants’ enforcement and application of all code sections challenged  
22 violate the right to travel under Article IV, Section 2 of the United States Constitution and the  
23 Privileges and Immunities Clause of the Fourteenth Amendment; and (11) Defendants’  
24 enforcement and application of all code sections challenged violate the Due Process Clause of the

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27 <sup>3</sup> The caption in *Pizzo*’s Complaint names Chief of Police George Gascón in his  
28 official capacity only and names Sheriff Mike Hennessey in both his individual and  
official capacities. The text of the complaint, however, names Chief of Police Gascón in  
both his individual and official capacities and names Sheriff Hennessey in his official  
capacity only. Complaint, *Pizzo v. Newsom*, *supra*, at 1, 6-7, ¶¶ 56, 62.

1 Fourteenth Amendment. Complaint, *Pizzo v. Newsom*, *supra*, at 30-31, ¶¶ 1-11. Further, Plaintiff  
2 demanded a jury trial. *Id.* at 30, ¶ 268.

3 On November 2, 2009, Plaintiffs in the present action filed a Notice of Related Cases and,  
4 shortly thereafter, Defendants filed a Motion to Relate Cases and Memorandum in Support. The  
5 Court denied the related case request, stating “[t]he court finds that these two cases do not  
6 concern substantially the same parties, and there is no property, transaction, or event at issue in  
7 the complaints.” (Order Den. Related Case Req. 3, Nov. 20, 2009 (a true and accurate copy is  
8 attached hereto as Exhibit “B”)). The Court went on to add:

9 It is clear . . . that while there are some similarities in the provisions of the  
10 Police Code that are challenged, and that both cases assert violations of the  
11 Second Amendment, *there are far more differences between the two*  
12 *complaints*. They involve different plaintiffs, and although both name  
13 three of the same defendants, *Pizzo* names a number of defendants that are  
14 not named in *Jackson*, and several defendants are sued in their individual  
15 capacity, unlike *Jackson*. *Different provisions of various laws are*  
16 *challenged, and the underlying basis for the challenges are different.*  
17 (Order Den. Related Case Req. 3 (emphasis added).)

18 On December 10, 2009, *Pizzo* was stayed pending a decision in *Nordyke*. See Order  
19 Granting Stay of Proceedings as Modified, *Pizzo v. Newsom*, No. 09-4493 (N.D. Cal. 2009).

20 The United States Supreme Court issued a decision in *McDonald v. City of Chicago* on  
21 June 28, 2010, holding that “the Due Process Clause of the Fourteenth Amendment incorporates  
22 the Second Amendment right [to possess a handgun in the home for the purpose of self-defense]  
23 recognized in *Heller*” to apply to the states. *McDonald*, 130 S. Ct. at 3050. With the Second  
24 Amendment incorporation issue resolved, Plaintiffs in *Jackson* filed a Motion for Relief from  
25 Stay, which the Court granted on September 13, 2010. (Order Granting Mot. to Lift Stay, Sept.  
26 13, 2010.) *Pizzo* remains stayed, however, as “the parties . . . have thus far preferred to leave their  
27 stay in place.” (Defs.’ Mot. to Consolidate 5.)

28 Because the Supreme Court’s decision in *McDonald* confirmed the Second Amendment is  
incorporated to apply to state and local governments, Plaintiffs decided to forego their fifth claim  
for relief, challenging the validity of SFPC sections 613.10(g), 1290, and 4512 under California  
law. As such, on November 8, 2010, the parties filed a stipulation dismissing Plaintiffs’ single  
state law claim, maintaining only the federal challenges. (Stip. & Order Re: Dismissal of Pls.’

1 Fifth Claim for Relief.)<sup>4</sup>

2 In light of the Supreme Court's decision in *McDonald*, Plaintiffs now suffer violations of  
3 their fundamental constitutional rights each day this case progresses. For this reason, and because  
4 Plaintiffs have been unable to negotiate a briefing schedule with Defendants to resolve Plaintiffs'  
5 claims via cross-motions for summary judgment, Plaintiffs intend to file a motion for preliminary  
6 injunction prior to hearing on Defendants' consolidation motion to prevent further deprivation of  
7 Plaintiffs' fundamental rights. (CBM Decl. ¶¶ 4-7.)

8 Despite the many differences already noted by the Court between this case and *Pizzo*,  
9 differences which have only increased in scope since the Court issued its order, Defendants now  
10 move to have the two cases consolidated. As set forth in detail below, consolidation of the two  
11 actions is improper and Plaintiffs oppose Defendants' motion.

### 12 **III. ARGUMENT**

13 The Court should not consolidate *Jackson* and *Pizzo* because they lack a common question  
14 of law or fact and because consolidation will cause undue delay, promote unfair prejudice and  
15 confusion, and will burden the parties and waste judicial resources.

#### 16 **A. *Jackson* and *Pizzo* Should Not Be Consolidated Because They Lack a** 17 **Common Question of Law or Fact**

18 The essential requirement of consolidation is *questions of law or fact* common to the cases  
19 to be consolidated. *Hill v. England*, No. 1:03-6903, 2006 U.S. Dist. LEXIS 37732, \*3 (E.D. Cal.  
20 May 24, 2006) (citing *Enterprise Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994)). And, as this  
21 Court has already determined, these cases lack sufficient similarities to justify consolidation.

22 In denying Defendants' Motion to Relate *Jackson* and *Pizzo*, the Court found that "there  
23 are *far more differences* between the two complaints" than similarities. (Order Den. Related Case  
24 Req. 3 (emphasis added).) The Court went on to clarify:

25 \_\_\_\_\_  
26 <sup>4</sup> Defendants suggest that Plaintiffs bring ten claims: four under the federal  
27 constitution and six under state law. (Defs.' Mot. to Consolidate 4.) Those "six state  
28 claims" were originally brought as one cause of action by which SFPC sections  
613.10(g), 1290, and 4512 were challenged under state constitutional and statutory rights  
to self-defense. The parties have since stipulated to dismiss this cause of action, leaving  
only the *four federal claims*.

1 [The cases] involve *different plaintiffs*, and although both name  
2 three of the same defendants, *Pizzo* names a number of [additional]  
3 *defendants* that are not named in *Jackson*, and several defendants  
4 are sued in their *individual capacity*, unlike *Jackson*. *Different*  
5 *provisions of various laws are challenged*, and the *underlying basis*  
6 for the challenges are *different*.

7 (Order Den. Related Case Req. (emphasis added).) Defendants suggest that the earlier Order  
8 Denying Related Case Request poses no barrier to consolidation at this point. Although the  
9 denial of an earlier related case request does not wholly preclude consolidation,  
10 the Court's earlier findings detail the vast differences between these cases and counter  
11 Defendants' suggestion that common questions of law or fact predominate. What's more, a  
12 number of advancements have been made in *Jackson* making these cases *even more*  
13 *distinguishable* than they were at the time of the Court's previous Order.

14 First, this Court has lifted the stay, thereby allowing *Jackson* to proceed. And the *Jackson*  
15 Plaintiffs are ready and willing to pursue this action on its merits. Each day that passes is another  
16 day that Plaintiffs' *fundamental rights* are violated, and Plaintiffs are anxious to vindicate these  
17 rights. To that end, Plaintiffs have prepared a Motion for Preliminary Injunction which will be  
18 filed prior to hearing on Defendants' Consolidation Motion. (CBM Decl. ¶ 7.) In *Pizzo*,  
19 however, the stay remains in effect and Defendants have represented that *Pizzo* is to remain so  
20 stayed until the *Nordyke* opinion is finally issued. (Defs.' Mot. to Consolidate 5.) Consolidating  
21 these cases at this point then will only hinder and further delay the ability of *Jackson*'s parties to  
22 address the merits of Plaintiffs' Complaint.

23 Secondly, the parties in *Jackson* filed a stipulation dismissing Plaintiffs' state law claims.  
24 As a result, only *four federal* causes of action remain, all against San Francisco and its  
25 representatives. *Pizzo*, however, continues to pursue *eleven causes of action*, a number of which  
26 challenge *different laws on different grounds*. Even though Defendants represent that *Pizzo* raises  
27 "the *exact same claims* against the exact same San Francisco Police Code sections and the exact  
28 same *defendants*" (Defs.' Mot. to Consolidate 4 (emphasis added)), it is clearly more accurate to  
suggest, as this Court already has, that "[d]ifferent provisions of various laws are challenged and  
the underlying basis for the challenges are different" (Order Den. Related Case Req. 3). While

1 Defendants acknowledge that *Pizzo* involves CCW claims not implicated by *Jackson*, they simply  
2 ignore the fact that *Pizzo* also involves a number of *state and federal* challenges to *state and*  
3 *federal laws* not challenged here. As such, adjudicating the two cases as one would become  
4 complicated and would not aid in the efficient resolution of either case. The mere fact that the  
5 two cases involve Second Amendment challenges to *some* of the same laws (i.e., SFPC sections  
6 613.10(g), 1290, and 4512) does not itself justify consolidation—in fact, it seems more likely to  
7 counsel against it.

8 Since *Jackson* and *Pizzo* lack common questions of law or fact, and are now even more  
9 distinguishable in law and fact than they were when the Court denied the earlier related case  
10 request, *Jackson* and *Pizzo* should remain separate, unconsolidated actions.

#### 11 **B. Consolidation Is Discretionary and Should Be Denied**

12 Even where two cases touch upon similar issues, the Court is not *required* to grant  
13 consolidation. (*Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, No. 92-  
14 20643, 1994 U.S. Dist. LEXIS 17569, \*13 (N.D. Cal. Apr. 19, 1994) (“[A]lthough the court finds  
15 that there are some common issues, ‘the mere existence of common issues . . . does not mandate  
16 consolidation.’ ” (citation omitted).) To the contrary, because the *paramount concern is for a fair*  
17 *and impartial trial*, the court must weigh considerations of judicial economy and convenience  
18 against the risks of delaying trial, *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 762 (5th Cir.  
19 1989), prejudice and confusion, *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993), and  
20 increasing the burden on parties and the court, *Johnson v. Celotex*, 899 F.2d 1281, 1285 (2d Cir.  
21 1990). Because the potential for delay, confusion, and prejudice is so great and because judicial  
22 economy is likely to be obstructed rather than advanced, consolidation is improper and should be  
23 denied.

#### 24 **1. Consolidation Will Unduly Delay the Progress of *Jackson***

25 Consolidation may be denied where the cases involved are at different stages of  
26 preparedness for trial. *Mills*, 886 F.2d at 762; *see also Modesto Irrigation Dist. v. Gutierrez*, No.  
27 1:06-00453, 2007 U.S. Dist. LEXIS 25954, \*13 (E.D. Cal. Mar. 21, 2007) (“Factors such as  
28 differing trial dates or stages of discovery usually weigh against consolidation.”). And

1 Defendants impliedly acknowledge that, procedurally, *Jackson* and *Pizzo* are at different stages of  
2 readiness. (Defs.’ Mot. to Consolidate 4-5.) The difference, however, is more significant than  
3 Defendants admit. As such, Defendants’ consolidation request should be denied.

4 As described above, the stay in *Jackson* has been lifted and Plaintiffs are ready and able to  
5 move this action forward in a manner most efficient to vindicate the ongoing deprivations of their  
6 *fundamental rights*. In fact, since the stay was lifted, Plaintiffs have rapidly moved forward with  
7 their case. To that end, the parties have engaged in settlement negotiations and met and conferred  
8 in an attempt to negotiate a briefing schedule for cross-motions for summary judgment. (CBM  
9 Decl. ¶¶ 4-6.) As a result of these negotiations and discussions, Plaintiffs have now prepared and  
10 intend to file a Motion for Preliminary Injunction prior to the hearing on this Motion to  
11 Consolidate. (CBM Decl. ¶ 7.)

12 The parties in *Pizzo*, however, “have thus far preferred to leave their stay in place in  
13 anticipation of rulings in pending Ninth Circuit cases that may decide fundamental questions of  
14 governing law necessary to resolve Plaintiff’s claims.” (Defs.’ Mot. to Consolidate 5.) Despite  
15 this Court’s instruction that “[i]t would be an unworkable rule to stay district court litigation every  
16 time an appellate court has under consideration some issue relevant thereto” (Order Granting Mot.  
17 to Lift Stay 1:27-2:1), the stay in *Pizzo* remains in effect and there is no indication that the parties  
18 intend to move that case forward at anytime in the near future.

19 Plaintiffs are ready to proceed with this action and anxiously await Defendants’ filing of  
20 its Answer to Plaintiffs’ Amended Complaint. Instead, Defendants have filed a motion to enlarge  
21 time to file an Answer, filed this Motion to Consolidate, and have expressly indicated their intent  
22 to file yet another Motion to Dismiss. (Defs.’ Mot. to Consolidate 9.) Contrary to Defendants’  
23 characterization of the delay in this action as largely “self-imposed” by Plaintiffs (Defs.’ Mot. to  
24 Consolidate 8), Defendants’ own barrage of preliminary motions is more accurately the cause of  
25 the delay. In fact, Plaintiffs have attempted to negotiate a briefing schedule which would allow  
26 the parties to prepare cross-motions for summary judgment to bring this case, which involves  
27 *questions of law*, to an efficient conclusion on the merits. Because Defendants have thus far been  
28 unwilling to allow this action to progress beyond a series of pre-answer motions or to agree to

1 prepare for summary judgment, Plaintiffs must prepare and file yet another pre-trial motion – for  
2 preliminary injunction – to prevent further deprivation of Plaintiffs’ fundamental rights while this  
3 case slowly proceeds. Defendants’ unwillingness to answer the merits of this case, not Plaintiffs’  
4 opposition to the present motion, is the genesis for the delay. And consolidation with a stayed  
5 case would only compound this issue.

6 Defendants suggest that Plaintiffs’ opposition to this motion lies solely in the “delay it  
7 requires to brief, hear and decide a noticed motion.” (Defs.’ Mot. to Consolidate 8 n.4.) This  
8 mischaracterizes Plaintiffs’ concerns regarding the delay and complications consolidation  
9 presents. If these cases are consolidated, the parties will face a hearing on bifurcation, a motion to  
10 either lift the stay in *Pizzo* or reinstate the stay in *Jackson*, protracted pleadings battles brought by  
11 some or all of the parties defending against the mishmash of *Pizzo* claims (brought by either San  
12 Francisco, and/or by the California Attorney General’s office defending against state law  
13 challenges, and/or by the United States Attorney’s office defending against federal law  
14 challenges, or by all three), and the near certainty that Defendants will file a Motion to Continue  
15 Plaintiffs’ Motion for Preliminary Injunction while the details of these issues are worked out.  
16 And Plaintiffs’ case is certain to progress more slowly once the details of consolidation and  
17 bifurcation are determined, as the parties will have different settlement, negotiation, and litigation  
18 tactics, as is evident from the nature and progress of the two cases thus far.

19 None of this is necessary absent consolidation. All of this halts the parties’ current  
20 progress toward resolving the much simpler *Jackson* case on the merits.<sup>5</sup>

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21  
22 <sup>5</sup> Defendants rely on *Hanson v. District of Columbia*, 257 F.R.D. 19 (D.D.C.  
23 2009), a district court case in the District of Columbia, to suggest that consolidation  
24 would not be improper even if it serves to delay the resolution of *Jackson*. (Defs.’ Mot.  
25 to Consolidate 8-9.) In that case, the court explains “it is the court’s duty to consider not  
26 only the delay that consolidating the cases might cause for plaintiffs, but also the delay  
27 that *not* consolidating the cases might cause for the defendants and for the court.”  
28 *Hanson*, 257 F.R.D. at 22. Defendants go on to suggest that “for those facing duplicative  
proceedings, consolidation saves substantial time.” (Defs.’ Mot. to Consolidate 9.) Even  
if this case were controlling authority, it was decided *before* the Supreme Court’s  
decision in *McDonald* confirmed that state and local governments were bound to respect  
their citizens’ fundamental rights to keep and bear arms. And, even if it were true that  
consolidation of these cases burdened *only* Plaintiffs and not the Court, increasing the  
time it takes Defendants to prepare separate cases is simply not comparable to delaying

1                                   **2. Consolidation Will Promote Prejudice and Confusion**

2           The risk of prejudice and confusing the jury from consolidating separate cases must be  
 3 weighed against the risk of inconsistent adjudications if they are not consolidated. *Cantrell*, 999  
 4 F.2d at 1011; *see also Adler v. Royal Cruise Line*, No. 95-1304, 1996 U.S. Dist. LEXIS 22528,  
 5 \*42 (N.D. Cal. Mar. 20, 1996) (“[T]he court should not consolidate matters in such a way as to  
 6 prejudice any party, even for the sake of judicial economy.”). Consolidation of *Jackson* and *Pizzo*  
 7 will invite undue prejudice upon the plaintiffs in these cases, forcing them alone to bear the brunt  
 8 of ensuring that the vast differences among the causes of action pursued, the underlying basis for  
 9 each claim, and the identities and capacities of each defendant are not improperly intertwined.  
 10 And because *Pizzo* has requested a jury trial, the Court must consider the great likelihood that a  
 11 jury will become confused by this complex web of different claims, theories, and defendants,  
 12 combined with the fact that Plaintiffs in the present action prefer a bench trial to resolve its claims  
 13 – which present questions of law.

14           Defendants reduce the significant differences regarding the identities of Defendants and  
 15 the capacities in which they are sued to a mere footnote. (Defs’ Mot. to Consolidate 4 n.3.) Such  
 16 cursory treatment of the fact that these cases involve a number of different defendants sued in  
 17 different capacities ignores the confusion that consolidation of these cases is likely to promote.

18           *Jackson’s* Plaintiffs sue individual Defendants Mayor Gavin Newsom and Chief of Police  
 19 George Gascón in their official capacities only. The *Pizzo* plaintiff sues individual Defendants  
 20 Mayor Gavin Newsom, former Chief of Police Heather Fong, and Chief of Police George Gascón,  
 21 in both their *individual and official capacities*, and Sheriff Mike Hennessey and California  
 22 Attorney General Edmund G. Brown. Complaint, *Pizzo v. Newsom, supra*, at 6-7, ¶¶ 45, 49, 53,  
 23 56, 62.

24           Defendants argue that “all plaintiffs’ shared claims against the City’s gun control  
 25 ordinances are identical facial challenges that do not touch upon the individual acts of any

26 \_\_\_\_\_  
 27 the progress of Plaintiffs’ case and thereby prolonging the ongoing violations of  
 28 Plaintiffs’ fundamental rights. Regardless, consolidation would cause further delays for  
 the Court – with bifurcation proceedings and by virtue of consolidating two very different  
 cases that are at different points of the procedural time line.

1 defendants, and given that none of the plaintiffs seeks damages in any event, this slight technical  
2 difference between the plaintiffs' approaches should not affect the decision to consolidate."  
3 (Defs.' Mot. to Consolidate 4 n.3.) But Defendants cannot simply pick and choose which parts of  
4 plaintiffs' cases matter to the issue of consolidation. The few claims that these cases share  
5 (namely, the challenges to SFPC sections 613.10(g), 1290, and 4512 that the *Pizzo* defendants cut  
6 and pasted from the *Jackson* Complaint) may, as Defendants suggest, involve the same named  
7 defendants in their official capacities, but the several extra claims brought by *Pizzo* (seven of  
8 eleven total claims asserted) involve a number of defendants, sued in their individual and official  
9 capacities, who are not sued by Plaintiffs in *Jackson*. In fact, the *bulk* of the *Pizzo* complaint  
10 attacks different laws, on different grounds, against different defendants, in each of their different  
11 capacities; and with different local, state, and likely federal government lawyers defending.  
12 Consolidating these two cases, then, serves to promote not judicial economy, but confusion as to  
13 the underlying basis for each claim and which defendants are impacted by each claim and in what  
14 capacity.

### 15 3. Consolidation Will Burden the Parties and Waste Judicial Resources

16 Added time will be required in trying multiple lawsuits consolidated for trial, with greater  
17 inconvenience and expense to all concerned. *See Johnson, v. Celotex*, 899 F.2d 1281, 1285 (2d  
18 Cir. 1990). This burden may be reduced where all parties *on each side* are represented by the  
19 same counsel, *id.*, but this is not the case here.

20 Defendants argue that consolidation would "cut the court's overall workload in half," yet  
21 concede "that benefit may not flow directly to this Court and its chambers since consolidation  
22 would entail assuming *additional responsibilities* that currently rest with Judge Wilken." (Defs.'  
23 Mot. to Consolidate 7 (emphasis added).) Contrary to Defendants' assertions, this Court's  
24 workload will not be cut in half, but rather will be more than doubled. *Jackson* has only four  
25 limited causes of action based on Second Amendment challenges, three defendants, two of whom  
26 are individuals sued only in their official capacities, and a lifted stay. *Pizzo*, on the other hand,  
27 has *eleven* causes of action based on federal and state law challenges, *six* defendants (three of  
28 whom are individuals sued in *both* their individual *and* official capacities, and two of whom are



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**DECLARATION OF CLINTON B. MONFORT**

I, Clinton Monfort, declare as follows:

1. I am over the age of eighteen and not a party to this action. I am an attorney licensed to practice law before all district courts in the State of California. I am an associate attorney of the law firm Michel & Associates, P.C., attorneys of record for Plaintiffs in this action.

2. Attached hereto as Exhibit “B” is true and correct copy of this Court’s November 9, 2009 Order Denying Related Case Request.

3. After the United States Supreme Court’s decision in *McDonald v. City of Chicago* confirmed that the individual, fundamental Second Amendment rights to keep and bear arms are applicable to state and local governments, 130 S. Ct. 3020, 3050 (2010), Plaintiffs decided to forego their state law claims to San Francisco Police Code (SFPC) sections 613.10(g), 1290, and 4512. As such, on or about November 8, 2010, the parties filed a stipulation dismissing Plaintiffs’ fifth claim for relief. Attached hereto as Exhibit “C” is a true and correct copy of the parties’ Stipulation and Order Re: Dismissal of Plaintiffs’ Fifth Claim for Relief.

4. Since this Court issued its Order Granting Motion to Lift Stay on September 13, 2010, the parties have negotiated acceptable amendments the City and County of San Francisco could make to SFPC section 1290 in an effort to bring it into compliance with *McDonald* and resolve Plaintiffs’ claims challenging this ordinance.

5. On or about September 13, 2010, our office contacted opposing counsel via e-mail in an attempt to negotiate a briefing schedule for cross-motions for summary judgment.

6. On or about September 13, 2010, opposing counsel responded via e-mail, indicating her intention to file another motion to dismiss and other preliminary motions. As a result, the parties were unable to reach an agreement to proceed with cross-motions for summary judgment.

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1           7.       Because this Court must hear various preliminary motions which will inevitably delay  
2 a decision on the merits, Plaintiffs' counsel have prepared and, before the hearing on Defendants'  
3 Motion to Consolidate, intend to file a motion asking the Court to preliminarily enjoin Defendants'  
4 enforcement of SFPC sections 613.10(g), 1290, and 4512, to avoid further deprivation of Plaintiff's  
5 fundamental Second Amendment rights while this case proceeds on the merits.

6           I declare under penalty of perjury under the laws of the United States of America that the  
7 foregoing is true and correct.

8           Executed on November 18, 2010, at Long Beach, California.

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\_\_\_\_\_ /S/ \_\_\_\_\_  
Clinton B. Monfort

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**EXHIBIT B**  
**CASE NO.: CV-09-2143-RS**

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ESPANOLA JACKSON, et al.,

Plaintiff(s),

No. C 09-2143 PJH

v.

**ORDER DENYING RELATED  
CASE REQUEST**

CITY AND COUNTY OF SAN  
FRANCISCO, et al.,

Defendant(s).

Defendants seek an order relating this case with *Pizzo v. City and County of San Francisco, et al.*, C09-4493 CW. This case was filed on May 15, 2009, by six individuals and two organizations (the National Rifle Association, and the San Francisco Veteran Police Officers Association), against CCSF, Mayor Newsom, and Chief of Police Heather Fong. Newsom and Fong were sued in their official capacities only. Plaintiffs seek declaratory and injunctive relief.

Plaintiffs challenge a San Francisco law (Police Code § 4512) which mandates that any handgun kept in a residence in S.F. be stored in a locked container or disabled with an approved trigger lock. Plaintiffs also challenge a law (Police Code § 613.10(g)) which prohibits the sale of ammunition intended for use in what plaintiffs call “self-defense situations,” and another law (Police Code § 1290) that prohibits the discharge of any firearm within the city limits, without any exception for self-defense.

Plaintiffs assert five causes of action – that § 4512 violates the Second Amendment to the U.S. Constitution; that § 613.10(g) violates the Second Amendment; that § 1290 violates the Second Amendment; that § 613.10(g) is overly vague and therefore violates

1 the Due Process Clause of the Fifth Amendment; that all three challenged statutes violate  
2 the right to self defense under the California Constitution and the California Penal Code.

3 The *Pizzo* case was filed on September 23, 2009, by one individual, against CCSF,  
4 Mayor Newsom, former Chief of Police Heather Fong, present Chief of Police George  
5 Gascon, S.F. Sheriff Mike Hennessey, and California Attorney General Edmund G. Brown.  
6 Newsom, Fong, and Hennessey are sued in both individual and official capacities, and  
7 Gascon and Brown are sued in their official capacities only. Plaintiffs seek damages, and  
8 declaratory and injunctive relief.

9 Plaintiff challenges Police Code § 4512, Police Code § 1290, California Penal Code  
10 § 12050, et seq. (providing police and sheriffs with absolute discretion regarding the  
11 issuance of concealed weapons permits); California Penal Code § 12031(b) (prohibiting  
12 carrying of loaded firearm on one’s person or in one’s vehicle while in public place or on  
13 public street, with exception for police officers and retired police officers); and Police Code  
14 613.10(g).

15 Plaintiff asserts ten causes of action – that § 4512 violates the Second Amendment  
16 to the U.S. Constitution; that § 1290 violates the Second Amendment; that Penal Code  
17 § 12050, et seq., violates the Second Amendment; that Penal Code § 12050, et seq.,  
18 violates the Equal Protection Clause of the Fourteenth Amendment; that Penal Code §  
19 12031(b) violates the Equal Protection Clause; that enforcement of the federal Law  
20 Enforcement Officers Safety Act (LEOSA), 18 U.S.C. §§ 926B, 926C, violates the Equal  
21 Protection Clause; that § 613.10(g) violates the Second Amendment; that § 613.10(g)  
22 violates the Fifth Amendment Due Process Clause; that Police Code §§ 4512, 1290,  
23 613.10(g), and Penal Code § 12050, et seq., are invalid because they violate the  
24 Constitution and laws of the State of California; and that Police Code §§ 4512, 1290,  
25 613.10(g), and Penal Code § 12050, et seq. violate the Due Process Clause of the  
26 Fourteenth Amendment.

27 Defendants contend that the two cases should be related simply because each  
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challenges the validity and constitutionality of the same sections of the S.F. Police Code. It is clear from the above recitation of the claims, that while there are some similarities in the provisions of the Police Code that are challenged, and that both cases assert violations of the Second Amendment, there are far more differences between the two complaints. They involve different plaintiffs, and although both name three of the same defendants, *Pizzo* names a number of defendants that are not named in *Jackson*, and several defendants are sued in their individual capacity, unlike *Jackson*. Different provisions of the various laws are challenged and the underlying basis for the challenges are different.

Civil Local Rule 3-12 defines a related case as one in which the actions concern substantially the same parties, property, transaction or event. The court finds that these two cases do not concern substantially the same parties, and there is no property, transaction or event at issue in the complaints. The court has not and does not interpret the rule as providing for a related case determination just because the same laws might be challenged by different lawsuits. Thus, all cases brought by different plaintiffs, challenging the new San Francisco gun ordinance, might be similar, but they are not, in the court's view, related within the meaning of Rule 3-12.

**IT IS SO ORDERED.**

Dated: November 20, 2009

\_\_\_\_\_  
PHYLLIS J. HAMILTON  
United States District Judge

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**EXHIBIT C**  
**CASE NO.: CV-09-2143-RS**

1 C. D. Michel - S.B.N. 144258  
Don B. Kates - S.B.N. 39193  
2 Glenn S. McRoberts - SBN 144852  
Clinton Monfort - S.B.N.255609  
3 MICHEL & ASSOCIATES, PC  
180 E. Ocean Boulevard, Suite 200  
4 Long Beach, CA 90802  
Telephone: 562-216-4444  
5 Facsimile: 562-216-4445  
Email: cmichel@michellawyers.com  
6

7 Attorneys for Plaintiffs  
8

9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN FRANCISCO DIVISION**

12 ESPANOLA JACKSON, PAUL COLVIN, )  
THOMAS BOYER, LARRY BARSETTI, ) **CASE NO. CV-09-2143-RS**  
13 DAVID GOLDEN, NOEMI MARGARET ) **STIPULATION AND ORDER RE:**  
ROBINSON, NATIONAL RIFLE ) **DISMISSAL OF PLAINTIFFS' FIFTH**  
14 ASSOCIATION OF AMERICA, INC. SAN ) **CLAIM FOR RELIEF**  
FRANCISCO VETERAN POLICE )  
15 OFFICERS ASSOCIATION, ) **VALIDITY OF SFPC §§ 4512, 1290, and**  
16 ) **613.10(g) Violation of the Right Self-Defense**  
Plaintiffs, ) **Under State Law**  
17 )  
vs. )  
18 )  
CITY AND COUNTY OF SAN )  
FRANCISCO, MAYOR GAVIN )  
19 NEWSOM, IN HIS OFFICIAL CAPACITY;) )  
POLICE CHIEF GEORGE GASCON, in his )  
20 official capacity, and Does 1-10, )  
21 )  
Defendants. )

22  
23 Pursuant to Federal Rules of Civil Procedure Rule 41(a)(1) and Northern District Local  
24 Rule 7-12, the parties to this action, through their respective attorneys of record, do hereby  
25 stipulate and agree as follows:

26 WHEREAS, Plaintiffs filed their amended complaint on August 24, 2009.

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1 WHEREAS, Plaintiffs have decided to forego pursuing their fifth claim for relief,  
2 challenging the validity of San Francisco Police Code sections 4512, 1290, and 613.10(g) as a  
3 violation of the right to self-defense under Article 1 of the California Constitution and California  
4 Penal Code section 12026, in light of the United States Supreme Court's recent decision in  
5 *McDonald v. Chicago*, 130 S. Ct. 3020 (2010).

6 IT IS HEREBY STIPULATED by and between the parties to this action through their  
7 counsel that the following claim in the above-titled action be dismissed without prejudice:

8 **FIFTH CLAIM FOR RELIEF:**  
9 **VALIDITY OF SFPC §§ 4512, 1290, and 613.10(g)**  
10 **Violation of the Right Self-Defense Under State Law**  
(Cal. Const., art. 1 § 1, Cal. Penal Code § 12026)

11 Although this claim shall be dismissed without prejudice, the parties stipulate that  
12 Plaintiffs shall and hereby do waive their rights to pursue this claim, or any other state law claims,  
13 during the course of this litigation.

14 The parties further stipulate that Plaintiffs shall and hereby do waive any claim for fees  
15 and/or costs under section 1021.5 of the California Code of Civil Procedure.

16 Date: November 8, 2010

MICHEL & ASSOCIATES, PC

17  
18 \_\_\_\_\_  
/S/

19 C. D. Michel  
20 Attorney for Plaintiffs ESPANOLA JACKSON, et al.

21 Date: November 8, 2010

22 DENNIS J. HERRERA  
City Attorney  
23 WAYNE SNODGRASS  
SHERRI SOKELAND KAISER  
Deputy City Attorneys

24  
25 \_\_\_\_\_  
/S/

26 Sherri Sokeland Kaiser  
27 Attorneys for Defendants CITY AND COUNTY OF  
SAN FRANCISCO, MAYOR GAVIN NEWSOM, and  
28 POLICE CHIEF GEORGE GASCON

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PURSUANT TO STIPULATION, IT IS SO ORDERED.

Date: \_\_\_\_\_

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The Honorable Richard Seeborg  
United States District Court Judge

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

ESPANOLA JACKSON, PAUL COLVIN, ) **CASE NO.: CV-09-2143-RS**  
THOMAS BOYER, LARRY BARSETTI, )  
DAVID GOLDEN, NOEMI MARGARET )  
ROBINSON, NATIONAL RIFLE ) **CERTIFICATE OF SERVICE**  
ASSOCIATION OF AMERICA, INC. SAN )  
FRANCISCO VETERAN POLICE )  
OFFICERS ASSOCIATION, )

Plaintiffs

vs.

CITY AND COUNTY OF SAN )  
FRANCISCO, MAYOR GAVIN )  
NEWSOM, IN HIS OFFICIAL CAPACITY; )  
POLICE CHIEF HEATHER FONG, in her )  
official capacity, and Does 1-10, )

Defendants.

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of:

**STIPULATION AND ORDER RE: DISMISSAL  
OF PLAINTIFFS' FIFTH CLAIM FOR RELIEF:**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Wayne Snodgrass, Deputy City Attorney  
Sherri Kaiser, Deputy City Attorney  
City and County of San Francisco  
Office of the City Attorney  
City Hall 1 Drive Carlton B.  
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on November 8, 2010.

\_\_\_\_\_/S/  
C. D. Michel  
Attorney for Plaintiffs'