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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ESPANOLA JACKSON, PAUL COLVIN, THOMAS BOYER, LARRY BARSETTI, DAVID GOLDEN, NOEMI MARGARET ROBINSON, NATIONAL RIFLE 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 GEORGE GASCÓN, in his official capacity, and Does 1-10,

Defendants.

Case No. C09-2143 RS

REPLY TO *JACKSON* PLAINTIFFS' OPPOSITION TO MOTION TO CONSOLIDATE

Hearing Date: December 9, 2010
Time: 1:30 p.m.
Place: Courtroom 3, 17th Floor
Judge: Hon. Richard Seeborg

INTRODUCTION

Of all the plaintiffs and defendants in *Jackson* and *Pizzo*, only the *Jackson* plaintiffs oppose consolidation. Yet their brief nowhere addresses the most pressing reason why the City has asked the Court to order it: separately adjudicating two identical sets of facial Second Amendment claims against the same three San Francisco gun control ordinances poses a serious risk of inconsistent rulings on some of the most unsettled and important constitutional questions currently facing any federal court in the country.

Instead, the *Jackson* plaintiffs spend the first eight pages of their 13-page brief enumerating all the differences they can think of between the two cases, then arguing that, because the raw number of differences exceeds the raw number of common questions, the two cases should not be consolidated. But this is the wrong legal standard. Rule 42(a) of the Federal Rules of Civil Procedure gives the Court discretion to order consolidation when actions before it "involv[e] a common question of law or fact." The *Jackson* plaintiffs subtly but significantly transform the Rule 42 test into a requirement of "common questions of law or fact," and apparently the more the better. Opp. Br. at 6:18-19; *id*. at 7:8-9 (there are "vast differences between the cases" and "common questions" do not "predominate"); *id*. at 8:8 ("*Jackson* and *Pizzo* lack common questions of law or fact, and are now even more distinguishable"). This leads them simply to catalog and count the differences between the cases, a task woefully lacking in legal relevance. Because once a common question of law or fact is identified, there is no further legal requirement that the common questions predominate. *See Habitat Educ. Ctr., Inc. v. Kimbell*, 250 F.R.D. 390, 394 (E.D. Wis. 2008). And to the extent there is a practical concern that the common issues should predominate, predominance is determined "not by counting the *number* of common issues, but by weighing their *significance*." *Lewis v. First American Title Ins. Co.*, 265 F.R.D. 536, 559 (D.Idaho 2010) (emphasis added). There is no doubt that the shared Second Amendment claims are the most significant issues presented in these two cases, and no one, not even the *Jackson* plaintiffs, argues to the contrary.

The *Jackson* plaintiffs' second overarching theme, that consolidation will inevitably create inefficiencies, delay and confusion, is likewise rooted in legal misconceptions, not to mention willful blindness to the Court's case management powers. Plaintiffs appear to suggest this Court should

measure whether consolidation promotes judicial efficiency by comparing whether it would be easier for this Court to adjudicate *Jackson* alone, or *Jackson* with a case from another judge's docket attached. The true question, of course, is whether it would be more efficient for the court as a whole to adjudicate *Jackson* and *Pizzo* together or separately. The *Jackson* plaintiffs take another erroneous legal position when they cast all procedural considerations and preliminary motions as mere "delay tactics" that their Second Amendment case is too important to suffer. They want the Court to deny consolidation and rush their case alone to judgment so that they can put an end to their clients' alleged injuries as soon as possible. This argument is both unwise and improper. Weighty cases should be decided with the greatest care and deliberation, not as a race to the finish line. The proper way to safeguard important rights for the duration of litigation is by means of a preliminary injunction, not by opposing consolidation.

In the circumstances present here, consolidation will foster the efficient, consistent, thoughtful and timely resolution of important constitutional questions of first impression, and the City respectfully requests the Court to order it.

ARGUMENT

I. THE NUMBER OF DIFFERENCES BETWEEN *JACKSON* AND *PIZZO* IS LEGALLY AND FACTUALLY IRRELEVANT TO CONSOLIDATION BECAUSE THE CASES SHARE SIGNIFICANT AND IDENTICAL QUESTIONS OF LAW.

As the City discussed in its Opening Brief, the Court should exercise its discretion to consolidate *Pizzo* with *Jackson* primarily to avoid inconsistent rulings on important, identical, and notably unsettled questions of civil rights and public safety. The *Jackson* plaintiffs do not dedicate a single word of their brief to disputing this point, but instead focus on the rather unremarkable proposition that the two different cases are . . . different. But none of the differences the *Jackson* plaintiffs identify really matters much to the consolidation analysis, either on a legal or practical level.

Legally, there can be no doubt that two cases that raise identical, facial Second Amendment challenges to the same three San Francisco gun control ordinances, and an identical, facial vagueness challenge to the same unreasonably dangerous ammunition ban, involve common questions of law, and that these common questions of law satisfy the legal threshold for consolidation under Rule 42(a). Although the *Jackson* plaintiffs baldly assert that the two cases should not be consolidated because

they "lack a common question of law or fact" (Opp. Br. at 6:13-14, 6:17), it is hard to imagine that they could possibly be serious. And apparently they aren't, because they soon concede that "the two cases involve Second Amendment challenges to some of the same laws" (Opp. Br. at 8:5-6 (emphasis omitted)), and that there are "claims that these cases share (namely, the challenges to SFPC sections 613.10(g), 1290, and 4512 that the *Pizzo* defendants [*sic*] cut and pasted from the *Jackson* Complaint)." *Id*. at 12:4-7. In fact, not only are there common questions, but they are the *only* questions at issue in *Jackson*.

Given the indisputable existence and prominence of the common questions, Rule 42(a) provides no legal purchase for resisting consolidation, so the *Jackson* plaintiffs set about instead to list as many differences as they can find between their case and the broader *Pizzo* complaint—as if consolidation were a math problem, warranted only when the number of common questions exceeds the number of differences between two cases. So, for example, the *Jackson* plaintiffs repeatedly italicize the fact that they now assert four claims while the *Pizzo* case contains eleven, but beyond sheer number they do not explain why this matters. *See, e.g.*, Opp. Br. at 7:22-23 ("[O]nly *four federal* causes of action remain [in *Jackson*]. *Pizzo*, however, continues to pursue *eleven causes of action* . . ."") (emphasis in original). They also stress that *Pizzo's* seven additional claims challenge "*different laws on different grounds*," *id*. at 7:24 (emphasis in original), but that just reiterates the numerical point that *Pizzo* contains more claims than *Jackson*. (Obviously different claims aren't different if they challenge the same laws on the same grounds.) The *Jackson* plaintiffs' proposed preponderance-of-similarities test erroneously substitutes the legal standard for relating cases under Local Rule 3-12(a)(1), which asks whether the cases involve "substantially the same" parties, property, transactions or events, for the Rule 42(a) common-question test for consolidation. S*ee Investors Research Co. v. U.S. Dist. Ct. for the Southern Dist. Of Cal.*, 877 F.2d 777, 777 (9th Cir. 1989) (holding that a district court order declining to relate two cases does not control a subsequent motion to consolidate). In fact, Rule 42(a) does not require that the parties, property, transactions or events at issue in the two complaints bear any similarity at all; a common question of law or fact is all that is required. Nor, the *Jackson* plaintiffs' intimations to the contrary notwithstanding, is there any requirement that the common questions outnumber the differences between the two cases. *See Habitat*

Educ. Ctr., Inc. v. Kimbell, 250 F.R.D. 390, 394 (E.D. Wis. 2008) (common questions of fact or law need not predominate in a motion to consolidate).

The Jackson plaintiffs' apparent effort to convince the Court to apply Local Rule relation standard in place of the Rule 42 consolidation standard serves two strategic purposes, both of which the Court should regard with great skepticism. First, if the relation standard properly controlled consolidation, then the *Jackson* plaintiffs would be justified in encouraging the Court to rely on Judge Hamilton's earlier decision declining to relate the two cases as precedent for refusing to consolidate them now, particularly if the Court also accepted the argument that the cases "are now even more distinguishable in law and fact than they were when the Court denied the earlier related case request." Opp. Br. 8:8-10. But this is wrong. The relation and consolidation inquiries are governed by meaningfully different standards that must be evaluated separately, particularly where, as here, they would yield such different results.

Second, employing a standard that focuses on evaluating cases for their "substantial similarities" makes the *Jackson* plaintiffs' exercise in tallying differences seem more relevant than it is. Distinctions between the cases are not important for their mere existence or their number, but only if they have independent significance for purposes of consolidation. *See Lewis, supra,* 265 F.R.D. at 559.

Seen in this light, and as the City already explained in its Opening Brief, the most significant difference between *Jackson* and *Pizzo* is that *Pizzo* includes a challenge to the State's CCW laws and the San Francisco Sheriff's administration of them. Many of the other differences that so trouble the *Jackson* plaintiffs—more claims, more defendants and a request for damages—simply go to the CCW claims. But as the City has also already explained, none of these CCW-challenge-based differences poses a practical obstacle to consolidation because the Court, to the extent it has any concerns about confusion or delay, can simply bifurcate the CCW claims.

The other differences the *Jackson* plaintiffs drum up have even less significance for purposes of consolidation. So, for example, the *Jackson* plaintiffs are dismayed to contemplate having their unstayed case consolidated with *Pizzo*, which currently remains stayed (in part pending the outcome of this motion) before Judge Wilken; but if the Court consolidates the cases, it could lift the stay with a

stroke of its pen. And given that the purpose of consolidation is to allow the Second Amendment claims to proceed together, presumably it would do so. Thus, this difference in the status of the cases exists, but it doesn't really bear on whether the cases should be consolidated. And so it goes also for many other asserted differences, such as *Pizzo's* state law claims against the City's ordinances, which are easily addressed alongside the Second Amendment claims in a consolidated motion; *Pizzo's* allegations of individual liability against some City defendants, which are patently frivolous and can be resolved as a matter of law in a consolidated motion; and the claim that *Jackson* has achieved a more advanced procedural posture, when in fact the *Jackson* plaintiffs await a response to their complaint, just like *Pizzo*.

At bottom, the Court would be best served to disregard the *Jackson* plaintiffs' arguments that the two cases are too different to be consolidated. They improperly rely on the wrong legal standard and paper the Court with irrelevancies.

II. THE *JACKSON* PLAINTIFFS' CONCERNS ABOUT DELAY AND CONFUSION ARE GREATLY EXAGGERATED AND, IN ANY EVENT, CAN EASILY BE AMELIORATED.

The *Jackson* plaintiffs complain mightily that consolidation will slow down the imminent resolution of their case because *Pizzo* is more complicated and will take longer to resolve. They also argue that, because the Second Amendment protects fundamental rights, their Second Amendment claims should not be subjected to "delay tactics" like procedural motions or motions to dismiss, but instead should proceed immediately to cross-motions for summary judgment. They also worry that a jury would be confused by the differences between the cases. None of these worries is legitimate, and certainly none provides a basis for denying consolidation.

First, there is no present reason to believe that it will take any longer to resolve one case than the other. They may both be fully adjudicated on motions to dismiss. Or they may both require limited discovery and cross-motions for summary judgment. There is no indication that either case will require extended discovery. Under these circumstances, there is no basis to conclude that the simple presence of additional claims and defendants in *Pizzo* will slow its progress through the standard procedural junctures that govern all civil cases. And if that were to occur, the Court could

use its case management powers, including, if necessary, its discretion to bifurcate issues, to make sure that the Second Amendment issues proceed at a reasonable pace.

Moreover, the fact that Second Amendment rights are fundamental does not sew special wings onto the *Jackson* case that exempt it from the generally applicable Rules of Civil Procedure or the Court's legitimate concern for the orderly administration of its cases. To the contrary: the challenge of mapping out the delicate and uncharted give-and-take between individual armed self-defense and overarching concerns for public safety in the aftermath of *Heller* and *McDonald* counsels in favor of a thorough and deliberative consideration of the issues, not shortcuts.

To the extent the *Jackson* plaintiffs are genuinely concerned about the immediacy of their fundamental rights, they may address those concerns by bringing their promised motion for a preliminary injunction. If the Jackson plaintiffs can satisfy the governing legal standards for such injunctive relief, including showing that the challenged ordinances in fact touch upon their fundamental rights and that they have a likelihood of success on the merits (two propositions the City very much doubts), then the Court can immediately enjoin the ordinances to safeguard the plaintiffs' fundamental rights during the course of the litigation, however long it takes. Preliminary injunctions exist to fulfill precisely this function and keep cases with particularly important or time-sensitive issues from turning into some kind of free-for-all rush to judgment.

Finally, the notion that a jury would be confused by the similarities and subtle differences of claims and defendants in the two cases is highly implausible. Moreover, if there were a realistic threat of such confusion, the Court could easily address the situation. The common questions are all facial, constitutional challenges to City ordinances, and while the CCW claims raise an as-applied challenge, it appears unlikely that there will be any material facts about plaintiff Pizzo's application or the City's application process that will be in dispute. Accordingly, while it is always possible that the some of the claims in these cases could come before a jury, that contingency is unusually remote. It is much more likely that these claims will be decided by the Court as a matter of law on a motion to dismiss, or perhaps on summary judgment with some supplemental constitutional fact-finding. And in the event that a jury trial does loom after all pretrial motions have been decided and the Court at that point is concerned about the potential for jury confusion, it could address the problem in the usual ways,

whether by means of instruction or, in a more extreme case, bifurcation. Fortunately, in evaluating these possible contingencies, at least one thing is clear. The *Jackson* plaintiffs' speculation that some future, hypothetical jury might be confused by the interplay of all or some of the similar but distinct claims in a consolidated trial that is particularly unlikely to come to pass does not provide any sort of concrete, sensible basis for denying consolidation in the here and now.

CONCLUSION

In the end, where two cases contain a common question of law, as *Jackson* and *Pizzo* indisputably do, the decision whether to consolidate is entrusted to the District Court's sound discretion, and the terms of consolidation are subject to refinement and revision just like any other case management order. The City trusts that, despite the *Jackson* plaintiffs' distracting arm-waving and exaggerated hand-wringing, the Court will recognize the legal significance of the identical Second Amendment claims, the need to avoid inconsistent adjudications, the efficiencies that will flow to the Court and the City from consolidation, and its inherent power to rectify unforeseen delays or confusion if they arise. For these reasons, the City respectfully requests that the Court consolidate *Jackson* and *Pizzo* for all purposes.

Dated: November 24, 2010

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