No. 12-17803

United States Court of Appeals for the Ninth Circuit

ESPANOLA JACKSON, *ET AL.*,

Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California
Case No. CV-09-2143-RS

BRIEF OF *AMICUS CURIAE* LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Law Center to Prevent Gun Violence states that it is a non-profit organization, has no parent companies, and has not issued shares of stock.

DATED: March 14, 2013

/s/ Brent P. Ray
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STATEMENT OF INTEREST

Amicus curiae Law Center to Prevent Gun Violence ("the Law Center") is a non-profit, national law center dedicated to reducing gun violence and the destructive impact it has on communities. The Law Center—which was founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993—focuses on providing comprehensive legal expertise to promote smart gun laws. These efforts include tracking all Second Amendment litigation nationwide and providing support to jurisdictions facing legal challenges. The Law Center has filed amicus briefs in many cases, including *District of Columbia v. Heller* and *McDonald v. City of Chicag*o.

The Law Center has a substantial interest in ensuring jurisdictions have the authority to implement common-sense laws to reduce gun violence. Accordingly, the Law Center submits this brief pursuant to Rule 29(a) to assist the Court in developing appropriate jurisprudence for firearm safe storage laws, such as San Francisco's Police Code § 4512, intended to significantly reduce deaths and injuries from unintentional shootings, gun trafficking, suicides, and gun violence. All parties have consented to the filing of this brief.

RULE 29(C)(5) STATEMENT

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

On December 14, 2012, Nancy Lanza's legally owned but unsecured and unlocked weapons were stolen by her son, who used them to brutally murder twenty schoolchildren and six teachers at Sandy Hook Elementary School in Newtown, Connecticut.[1] The children, all first-graders, were killed by what the state's chief medical investigator described as a "devastating set of injuries," the gruesome results of which were "the worst [he had] seen" in his career.[2]

San Francisco's safe storage law, Police Code § 4512, was designed to address the problems created by unsecured firearms in the home. As the city found in support of the ordinance, unsecured handguns are disproportionately tied to violent accidents, suicides, illegal gun trafficking, and school shootings. Unintentional shootings killed over 5,700 people in the United States between 2000 and 2007, and unintentional death rates for children 5–14 years old in the United States are significantly higher than those of other industrialized

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[1] James Barron, *Children Were All Shot Multiple Times With a Semiautomatic, Officials Say*, N.Y. TIMES, Dec. 16, 2012, at A1. *See also* Ray Rivera, *Reliving Horror and Faint Hope at Massacre Site*, N.Y. TIMES, Jan. 28, 2013, at A1.

[2] Barron, N.Y. TIMES, Dec. 16, 2012, at A2.

nations. *See* Police Code § 4511(1)(c), (d). Of children who die by firearm suicide, the vast majority use a family member's gun—usually a parent's. *Id.* § 4511(3)(b). Keeping unsecured guns in the home also increases the flow of illegal guns into the community—over 500,000 firearms are stolen each year, and many are subsequently sold illegally. *Id.* § 4511(2)(d). School shooters in particular are likely to use unsecured weapons: as San Francisco found, more than two-thirds of school shooters obtained their gun(s) from their own home or that of a relative. *Id.* § 4511(3)(b).

Notwithstanding these facts, the National Rifle Association—whose response to the Sandy Hook mass killing was described by residents as "rude," "ugly," "insensitive," and "completely ludicrous"[3]—demands this Court invalidate a safe storage law aimed at preventing this sort of tragedy, simply because the law might delay a handgun owner's attempt to fire the weapon at home by a few seconds. According to the NRA, this two or three second delay is an "unconstitutional … substantial burden" on self-defense. (App. Br. at 38)

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[3] *See* Rick Jervis, *Newtown on NRA Speech: "Completely Off The Mark"*, U.S.A. TODAY, Dec. 21, 2012, available at http://www.usatoday.com/story/news/nation/2012/12/21/nra-guns-newtown-reaction/1784957/ (last visited Mar. 8, 2013).

The NRA's naked assertion is belied by the historical record. In fact, San Francisco's Police Code § 4512 is the direct descendant of an enormous variety of founding-era safe storage regulations responsibly governing the use of firearms in the home. San Francisco's ordinance is no historical outlier—indeed, it is significantly *less* burdensome on self-defense than founding-era analogues. As discussed below, a founding-era gun owner in Boston, under the safe storage laws of that time period, would not have been able to use a gun in self-defense in the home *at all* before 1808, and even afterwards would not have been able to fire his or her gun at an intruder in less than approximately 20 seconds. These laws were not historical oddities: rather, even into the Reconstruction era, courts referenced such laws as *prima facie* examples of responsible health and safety ordinances.

Furthermore, San Francisco's safe storage regulation is not the only safe storage ordinance in existence today. In fact, both New York City and Massachusetts have safe storage restrictions that are similar to San Francisco's. These safe storage ordinances have been uniformly upheld against Second Amendment challenge. The NRA cannot point to

a single case overturning a similar safe storage ordinance, because there is none.

The Law Center accordingly requests that this Court uphold San Francisco's reasonable, minimally burdensome law aimed at preventing the epidemic of gun violence and gun accidents that, like the Newtown killings, tear apart communities and leave thousands of grieving families in their wake.

I. *HELLER* AND *MCDONALD* CONFIRM THE VALIDITY OF SAFE STORAGE LAWS LIKE SAN FRANCISCO'S.

In both *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Supreme Court set strict limits on the type of gun safety laws that would be invalidated under the Second Amendment. The Court stated unequivocally that its analysis did not "suggest the invalidity of laws regulating the storage of firearms to prevent accidents." *Heller*, 554 U.S. at 632.

In *Heller*, the Supreme Court reviewed a District of Columbia ordinance that "totally ban[ned] handgun possession in the home" and required "that any lawful firearm in the home be disassembled or bound by a trigger lock *at all times*." 554 U.S. at 628 (emphasis added). The Court found the ordinance unconstitutional precisely because it made it

"*impossible* for citizens to use [firearms] for the core lawful purpose of self-defense." *Id.* at 630 (emphasis added). But the Court was careful to restrict its ruling to the unduly broad prohibition at issue. Thus, the Court specifically warned that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626–27.

Moreover, the Court specifically noted Justice Breyer's dissenting opinion's reference to founding-era gunpowder storage laws, and stated that such laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns." *Id.* at 632. The Court therefore concluded: "Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents." *Id.*

McDonald reaffirmed these principles. In *McDonald*, the Court struck down city ordinances that once again "effectively bann[ed] handgun possession by almost all private citizens." 130 S.Ct. at 3026.

But again the Court warned: "We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures [as those identified as presumptively lawful in *Heller*]." *Id.* at 3047.

The specific bounds of *Heller* and *McDonald* continue to emerge through jurisprudence. One thing, however, is clear: those decisions do not invalidate safe storage regulations—like those in place around the founding—that do not significantly burden self-defense. *See United States v. DeCastro*, 682 F.3d 160, 166 (2d Cir. 2012) (noting that early laws requiring the safe storage of gunpowder "did not much burden self-defense and had a minimal deterrent effect on the exercise of Second Amendment rights"); *see also Nordyke v. King*, 644 F.3d 776, 783 (9th Cir. 2011), *vacated by* 681 F.3d 1041 (9th Cir. 2012) (en banc) (noting that, in *Heller*, the U.S. Supreme Court explained that D.C.'s handgun ban was distinguishable from founding-era gunpowder storage laws, in that the storage laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns.").

San Francisco's Police Code § 4512, which requires a handgun kept in the home to be "stored in a locked container or disabled with a trigger lock" unless "carried on the person of an individual over the age

of 18" or under the control of a peace officer, is *far less burdensome* to self-defense than the founding-era laws that *Heller* and *McDonald* concluded "do not remotely burden the right of self-defense." *Heller*, 554 U.S. at 632. Thus, contrary to the NRA's assertions, there is no authority in either *Heller* or *McDonald* for invalidating the law.

II. HISTORICAL GUN STORAGE LAWS SHOW THAT SAN FRANCISCO'S LAW IS CONSISTENT WITH THE SECOND AMENDMENT.

As recognized by *Heller*, numerous safe storage laws were in effect at the time the Second Amendment was adopted. Like San Francisco's safe storage law, these early laws were intended to prevent accidents. Although many of the laws were more onerous than San Francisco's ordinance, they were never rejected as significant infringements on the right to self-defense. Instead, courts repeatedly referenced the laws as permissible extensions of the government's police power.

A. Founding-Era Safe Storage Laws in Massachusetts

Massachusetts' founding-era gunpowder storage laws, for instance, significantly restricted the ability of gun owners to use their firearms in the home for self defense. Under those laws, a resident of Boston in the founding era who wanted to own a firearm for self defense would not have been permitted to store *any* gunpowder within his or

her house with which to load the weapon, and in no event would have been permitted to store gunpowder inside the firearm—even if the firearm was fully within his or her possession and/or control. The combination of these laws would have *completely eliminated* the ability of a founding-era Bostonian to use a gun against a home invader.

At most, after 1808 a Boston resident could have kept a small amount of gunpowder by his or her bedside—but not loaded into a firearm. Upon hearing an attacker, the gun owner would have had to first load the gunpowder and shot into the firearm, a process that by historical accounts would have taken between 15 and 20 seconds (if the gun owner was a trained marksman) or perhaps a minute (if the gun owner was not well-trained). If, as the NRA asserts, a delay of two to four seconds represents a "substantial burden" in such situations, there is no doubt that Massachusetts' prior laws would have "substantially burdened" a homeowner acting in self-defense.

Nevertheless, such laws were widely accepted beginning as early as 1706, when Massachusetts enacted a complete ban on the storage of gunpowder in homes. In passing the ban, the legislature stated that "considering the imminent hazard of keeping powder … in or near to

dwelling-houses, the government have thought it necessary to order the erecting and building of a publick magazine or powderhouse on the common or training-field in Boston." Act of July 9, 1706, THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF MASSACHUSETTS BAY, Vol. 1, 588 (Wright & Potter 1869) (hereinafter "ACTS & RESOLVES"). The act thus required "all gunpowder imported and landed at the port of Boston [to] be brought to and lodged in [the public magazine] and not elsewhere, *on pain of confiscation of all powder put or kept in any other house* or place." *Id.* (emphasis added).[4]

After finding the 1706 law not "sufficient to deter men from so keeping [gunpowder]," a subsequent law in 1715 imposed punitive fines for noncompliance. Act of Dec. 15, 1715, ACTS & RESOLVES, Vol. 2, at 23–24. That act provided that "any person within the town of Boston, that shall presume to keep, *in his house* or warehouse, any powder above what is by law allowed, shall forfeit and pay for every half barrel the sum of five pounds,[5] and so *pro rato* for every greater quantity over

[4] The only exception was for a small amount to be stored in a "shop for sale."

[5] This was no small fee. A calculator based on the retail price index estimates that £5 in 1715 is equivalent to £610 (approximately $950) in current prices; and a calculator based on average earnings estimates

and above the forfeiture or confiscation of said powder." *Id.* at 23 (emphasis added).[6]

In 1783, the Massachusetts legislature also enacted a law directly restricting the storage of loaded firearms in a home. The 1783 act prohibited Bostonians from keeping—even temporarily—any "Fire Arm, loaded with, or having Gun Powder in the same" in "any Dwelling House, Stable, Barn, Out House, Store, Ware House, Shop, or other Building." Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218. A violation of this act subjected the firearm to forfeiture, and required the person violating the act to "pay the Sum of Ten Pounds." *Id.*

As Justice Breyer noted in *Heller*, the 1783 law, by itself, "would … have prevented a homeowner from keeping in his home a gun that he could immediately pick up and use against an intruder." 554 U.S. at 685 (Breyer, J. dissenting). In order to use a gun in the home in self-defense, "the homeowner would have had to get the gunpowder and load

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that £5 in 1715 is equivalent to £8,780 (approximately $13,600) today. *See generally* http://www.measuringworth.com/ppoweruk/ (providing calculations based on RPI and average earnings).

[6] In 1755, the legislature increased the fine for storing gunpowder unlawfully to £10 "for every half-barrel of powder." Act of Jan. 5, 1733, ACTS & RESOLVES, Vol. 2, at 659. A 1780 law increased the fine to £20. Act of Oct. 4, 1780, ACTS & RESOLVES, Vol. 5, at 1418.

it into the gun, an operation that would have taken a fair amount of time to perform." *Id.* As previously noted, historical estimates suggest that it would have taken a trained marksman between 15 and 20 seconds to load and fire a musket—and an untrained marksman might have taken at least one minute. *See id.* (citations omitted). Of course, this estimate assumes, counterfactually, that a gun owner would have gunpowder on hand with which to load the weapon—which was not the case under the gunpowder storage laws of the time.

These restrictive regulations were not abandoned after the Constitution's signing or the passage of the Bill of Rights. In 1801, Massachusetts revised and replaced its existing gunpowder storage requirements, but adopted a similar regulatory scheme. For the first time, Boston retailers were permitted to keep some quantity of gunpowder in their "houses" in addition to their shops. *See* Act of June 19, 1801, ch. 20, 1801 Mass. Acts. 507, § 1. Any such quantity, however, was to be kept "in brass, copper, or tin Tunnels, & no[t] otherwise, under the penalty of forfeiting all such Gun Powder" *id.*, and the law made no provision for gunpowder stored in a home for non-retail purposes.

In 1808, the Massachusetts legislature—for the first time—permitted non-retail possession of gunpowder in a home. Act of Mar. 12, 1808, ch. 136, 1808 Mass. Acts. 373, 374 § 3 (limiting the amount permitted to five pounds).[7] But, even after 1808, while a gun owner could store a small quantity of powder in his or her house, the gun owner could not store it loaded into a weapon, and thus could not have responded to a home invasion, even if an expert marksman, in less than approximately 20 seconds. *See Heller*, 554 U.S. at 685.

B. Founding-Era Safe Storage Laws In Other Jurisdictions

Massachusetts' founding-era safe storage regulatory scheme was not unique—variations on it were quite common during that time

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[7] Although this particular act was focused on Boston, in subsequent years the legislature enacted similar regulatory schemes for other towns and cities in Massachusetts, and empowered those jurisdictions to further regulate safe storage. *See*, *e.g.*, Act of June 20, 1809, ch. 35, 1809 Mass. Acts. 44 (Cambridge); Act of Feb. 18, 1814, ch. 139, 1814 Mass. Acts. 389 (Charleston); Act of June 14, 1814, ch. 47, 1814 Mass. Acts 533 (Roxbury); Act of Mar. 2, 1826, ch. 114, 1826 Mass. Acts. 183 (Salem); Act of Feb. 20, 1829, ch. 62, 1829 Mass. Acts. 94 (empowering all towns within Massachusetts to, *inter alia*, "order and direct … that no Gunpowder shall be kept at any place within the limits of such town, unless the same be well-secured in tight casks or cannisters"); Act of Mar. 16, 1833, ch. 129, 1833 Mass. Acts. 695 (Lowell); Act of Mar. 6, 1947, ch. 51, 1847 Mass. Acts 342 (empowering local regulation of gun-cotton if "necessary for public safety").

period. In Maryland, for example, an 1803 law empowered the town of Centerville to "prevent the storage of gunpowder, or other combustible matter or article, in such quantities or places within the town as may be deemed dangerous to the safety of the same." Act of Jan. 8, 1803, ch. 53. 1802 Md. Laws 27.[8] And a Pennsylvania law from 1725 prohibited anyone in Philadelphia from "keep[ing] in any house, shop, cellar, store or place of the city nor within two miles thereof, other than the powder store aforesaid, any more or greater quantity at any one time than twelve pounds of gunpowder." Act of Aug. 14, 1725, ch. 287, 4 Pa. Stat. 31. *See also generally* Saul Cornell & Nathan DeDino, *A Well Regulated Right*, 73 FORDHAM L. REV. 487, 510–12 (2004) (citing a number of safe storage laws).

Similar to the Massachusetts statutes, these safe storage laws specified not only the amount of gunpowder that could be personally stored, but the precise means for storing it. For example, a New York statute of April 13, 1784 required gunpowder to be separated into stone jugs or tin containers. 1784 N.Y. Laws 627. A Rhode Island statute

[8] *See also* Act of Jan. 8, 1803, ch. 81, 1802 Md. Laws 43; Act of Jan. 5, 1805, ch. 26, 1804 Md. Laws 16 (creating similar authority for the commissioners of Havre-de-Grace, Bridgetown, and Sandtown).

from 1762 mandated that all gunpowder in Newport be deposited in a powder house unless it was a quantity under 25 pounds and stored "in a tin powder-flask." Act of June 28, 1762, 1762-1765 R.I. Acts & Resolves 132. And a New Hampshire law provided that any person who kept gunpowder in a "dwelling house" could not keep a quantity greater than ten pounds, and was required to keep that quantity in a tin canister. Act of Feb. 18, 1794, 1830 N.H. Laws tit. XLII, ch. 1, 275.

In total, at least seven of the thirteen original colonies had laws regulating the safe storage of gunpowder and/or firearms to prevent fires or other accidents. All of these laws would have made the quick firing of a weapon in the home quite difficult, and certainly not easier than unlocking and firing a loaded handgun. Yet, there was no movement to repeal these laws after the passage of the Bill of Rights. Nor has any historian discovered that the Founders believed that such laws would infringe on the Second Amendment, even though these laws significantly constricted the ability of gun owners to immediately fire their weapons in self-defense at intruders in the home.

C. Safe Storage Laws In The Reconstruction Era

Nor were these safe storage laws abandoned by the mid-nineteenth century, despite what some have described as the rising sentiment that the Second Amendment protected an individual (as opposed to collective) right to self-defense. *See McDonald*, 130 S. Ct. at 3038 (citations omitted). Instead, courts repeatedly referenced these laws as *prima facie* examples of the government's ability to regulate an individual's use of property to protect the common good.

In *Williams v. City Council of Augusta*, for example, the Georgia Supreme Court considered a challenge to an Augusta ordinance prohibiting non-retail storage of gunpowder. 4 Ga. 509, 511–12 (1848). The court held that the city's power to pass such an ordinance was well within the authority given to it by the state legislature. *Id.* at 512. In so holding, the court concluded:

> The ordinance regulating the keeping of gun-powder in the City, is, in our judgment, *necessary* for the *security* and welfare of the inhabitants in the City. It is a sanatory *police* regulation, for the benefit and *safety* of the persons and property within the limits thereof.

Id. The court did not say that the law adversely affected anyone's right to self-defense.[9]

Other courts echoed this sentiment. For instance, in *Foote v. Fire Department of the City of New York*, the court considered a challenge to an act providing that "it shall not be lawful for any person or persons to have or keep any quantity of gunpowder [outside specified conditions]." 5 Hill 99, 100 (N.Y. Sup. Ct. 1843). The court, in holding that the statute did not conflict with the Commerce Clause, concluded that "the statute is a mere police regulation—an act to prevent a nuisance to the city." *Id.* at 101. At no point did the court consider, or plaintiffs suggest, that the act infringed on rights of self defense. *See also Cotter v. Doty*, 5 Ohio 393, 398 (1832) (upholding the power of the Cincinnati city council to "pass a law to prevent large quantities of gunpowder from being kept in the city").

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[9] The Georgia Supreme Court reaffirmed this view of safe storage regulations in *Perdue v. Ellis*, 18 Ga. 586 (1855). In that case, the court upheld a liquor licensing ordinance based in part on the fact that it fell within the typical powers of cities to enact health and safety regulations. The court noted that if it were to declare that cities and towns "have no power … to enact health, harbor, and quarantine ordinances" such as for example "direct[ing] the safe-keeping of gunpowder" "a panic would be justly created throughout the state." *Id.* at 593.

Courts after Reconstruction continued to acknowledge the power of jurisdictions to pass laws regulating safe storage. In *State v. Read*, for example, the Rhode Island Supreme Court considered a law that prohibited the sale of merchandise within a mile of a religious gathering unless the religious society consented to the sale. 12 R.I. 137 (1879). The court upheld the ordinance, finding that it was "clearly constitutional" because "[i]t restrains the individual in the use of his property for the public good." *Id.* at 141. In so doing, the court concluded that "[n]othing is more common than the imposition of such restraints. Our Sunday laws are illustrations of it. So are statutes which prohibit the storage of gunpowder." *Id.* *See also State v. Cate*, 58 N.H. 240, 241 (1878) ("A reasonable measure of prevention, in relation to gunpowder or combustible and dangerous buildings, is authorized, as well as the law of arson." (citations omitted)); *Ex parte Smith*, 38 Cal. 702, 708 (1869) (noting that laws within the government's police power included those regulating "the manufacture and keeping of gunpowder").

Thus, there are numerous historical precedents for San Francisco's safe storage law. Like the gunpowder storage regulations,

San Francisco was concerned with public and private harm that could result from the unsecured storage of dangerous products. Like the historical regulations, San Francisco's ordinance does incidentally restrict the ability of a gun owner from immediately firing his or her weapon. But—unlike the historical analogues—San Francisco's ordinance does not come close to burdening the ability of a gun owner to respond to a home invasion. The dearth of historical precedent is squarely on the other side: the NRA does not, and cannot, cite a single law or case from the founding era even *suggesting* that these historical safe storage laws were unconstitutional.

III. CHALLENGES TO MODERN SAFE STORAGE LAWS HAVE BEEN REJECTED.

In addition to the historical tradition supporting the constitutionality of San Francisco's law, recent court decisions addressing safe storage ordinances in Massachusetts and New York City have found similar laws constitutional. Courts have held, *inter alia*, that those safe storage laws comply with the Second Amendment because they do not significantly burden the right to self defense. The same logic applies with even more force to the narrower restriction at issue here.

Under Massachusetts' safe storage law, it is:

> unlawful to store or keep any firearm, rifle or shotgun including, but not limited to, large capacity weapons, or machine gun in any place unless such weapon is secured in a locked container or equipped with a tamper-resistant mechanical lock or other safety device, properly engaged so as to render such weapon inoperable by any person other than the owner or other lawfully authorized user. For purposes of this section, such weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.

MASS. GEN. LAWS Ch. 140, § 131L. Following the *Heller* and *McDonald* decisions, the Massachusetts safe storage statute was challenged as unconstitutional. In each instance, the statute was upheld.

In *Commonwealth v. Runyan*, the Massachusetts Supreme Court rejected a Second Amendment challenge to the state's safe storage statute, finding that the statute did not prevent someone from exercising the right of self-defense in the home. 922 N.E. 2d 794 (Mass. 2010). *Runyan* dismissed the challenge on the basis that the Second Amendment did not apply to the states via the Fourteenth Amendment. *Id.* at 797–98. The court, however, also held that in the alternative the safe storage statute was distinguishable from the absolute ban at issue in *Heller*.

Runyan noted that in contrast to the law in *Heller*, a gun owner under Section 131L "is not obliged to secure or render inoperable a firearm while the individual carries it or while it remains otherwise under the individual's control." *Id.* at 799. Moreover, Section 131L "does not prohibit a licensed gun owner from carrying a loaded firearm in the home; the statute therefore does not make it impossible for those persons licensed to possess firearms to rely on them for lawful self-defense." *Id.* The court pointed out that a gun secured in the manner required by Section 131L could be fired in self-defense at least as quickly as in 1791. *Id.* at 799 n.8.

Following *McDonald*, the court again addressed the constitutionality of the safe storage statute in *Commonwealth v. McGowan*, --- N.E.2d ----, 464 Mass. 232, (2013). It concluded that because safe storage laws, under *Heller*, "fall[ ] outside the scope of the Second Amendment," Section 131L was "presumptively lawful" and thus "subject only to rational basis analysis, which it easily survives." *Id.* at 244. The court also noted, once again, that the safe storage law was "consistent with the right of self-defense in the home because it does not interfere with the ability of a licensed gun owner to carry or

keep a loaded firearm under his immediate control for self-defense." *Id.* at 243. And the court once again rejected the argument that "the brief period of delay needed to unlock a secure storage container or trigger lock" rendered the statute unconstitutional. *Id.* at 243–44. Rather, the court reasoned that "[a]ny law regulating the storage of firearms will delay by some degree the ability of a firearm owner to retrieve and fire the firearm in self defense," and that "[i]f such a brief period of delay were sufficient to render the law unconstitutional, the Supreme Court in *Heller* would not have declared that its analysis did not suggest the invalidity of firearm storage laws." *Id.*[10]

New York City's safe storage law has also been upheld against a Second Amendment challenge following *Heller* and *McDonald*. New York City's safe storage statute provides that:

> It shall be unlawful for any person who is the lawful owner or lawful custodian of a weapon, as that term is defined in section 10-311, to store or otherwise place or leave such weapon in such a manner or under circumstances that it is out of his or her immediate possession or control, without having rendered such weapon inoperable by employing a safety locking device.

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[10] *See also generally Commonwealth v. Reyes*, --- N.E. 2d ----, 464 Mass. 245 (2013) (rejecting a challenge to Section 131L based on its apparent requirement that firearms be safely stored when transported outside the home).

N.Y. ADMIN. CODE § 10-312.

In *Tessler v. City of New York*, 952 N.Y.S.2d 703 (2012), the petitioner sought a declaratory judgment that section 10-312 was unconstitutional under *McDonald*. *Id.* at 715. The court, however, noted the distinctions between section 10-312 and the laws addressed in *Heller* and *McDonald*. In particular, the court found that unlike the ordinances at issue in those cases, the New York City safe storage requirement "do[es] not dictate … that handguns in the home be 'kept inoperable at all times' so 'as to render them wholly useless,' and make 'it impossible for citizens to use them for the core lawful purpose of self-defense in the home.'" *Id.* at 715–16, *quoting Heller*. 554 U.S. at 629, 630. Rather, because the law did not require safe storage when a firearm was within an owner's possession, it did not endanger the user's right to self-defense. *See Tessler,* 952 N.Y.S. 2d at 716 (holding that "petitioner failed to show how a safety locking device had prevented his handguns from being readily … operable for his immediate use").

The same logic from *Runyan*, *McGowan*, and *Tessler* applies to San Francisco's Police Code § 4512. In fact, New York City's and Massachusetts' safe storage laws are broader than San Francisco's

ordinance. Unlike Massachusetts' Section 131L, San Francisco's ordinance applies only to handguns, not to "any firearm," and applies only to the gun owner's residence, not to "any place." And unlike New York's safe storage law, San Francisco's ordinance only applies to handguns, not all "weapons," and only applies to the gun owner's residence, not in any place where the owner might "store or otherwise place or leave such weapon." More fundamentally, however, none of these safe storage laws meaningfully burdens a handgun owner's right to self-defense. In fact, as the San Francisco legislature found in support of the ordinance, section 4512 delays a gun-owner's ability to render a gun operational for "just two to three seconds." *See* Police Code § 4511(7)(a). This delay does not remotely burden any person's right to self-defense in the home—most certainly not the right to self-defense that was conceived at the founding and affirmed by the Supreme Court in *Heller* and *McDonald*.

CONCLUSION

San Francisco's safe storage ordinance, Police Code § 4512, is a reasonable law in the tradition of numerous safe storage laws from the founding era to the present. It is intended to address the very real danger associated with unsecured firearms, which are disproportionately associated with violent accidents, suicides, illegal gun trafficking, and school shootings—of which the Newtown tragedy was only the most recent example. The ordinance does so by employing reasonable restrictions on the use of dangerous firearms in the home—restrictions at most delay a handgun owner's ability to fire the weapon by a few seconds. As the Supreme Court concluded in *Heller* and reaffirmed in *McDonald*, such laws do not remotely burden the Second Amendment right to self defense. The Court should therefore reject Appellants' arguments to the contrary and uphold the order entered below denying plaintiffs' request for a preliminary injunction.

DATED: March 14, 2013

Respectfully submitted,
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/s/ Brent P. Ray

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Counsel for *Amicus Curiae* Law Center to Prevent Gun Violence

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(c)(7), Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,280 words.

DATED: March 14, 2013

Respectfully submitted,
KIRKLAND & ELLIS LLP

/s/ Brent P. Ray
Brent P. Ray

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2013, an electronic PDF of foregoing Brief of *Amicus Curiae* Law Center to Prevent Gun Violence in Support of Defendants-Appellees and Affirmance was uploaded to the 9th Circuit Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

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