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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., and SAN FRANCISCO VETERAN POLICE OFFICERS ASSOCIATION,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, THE MAYOR OF SAN FRANCISCO, and THE CHIEF OF THE SAN FRANCISCO POLICE DEPARTMENT, in their official capacities,

Defendants.

Case No. C09-2143 RS

CITY AND COUNTY OF SAN FRANCISCO'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: Oct. 4, 2012
Time: 1:30 p.m.
Place: 450 Golden Gate Ave.
Courtroom 3 - 17th Floor
San Francisco, CA 94102

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INTRODUCTION

In response to the nation's epidemic of gun violence, San Francisco has taken modest and reasonable steps to promote gun safety, by requiring handgun owners to lock their handguns when not carrying them and by prohibiting the sale of certain exceptionally lethal kinds of ammunition within city limits. These measures leave ample room for the lawful use of guns in self-defense. Indeed, San Francisco's storage ordinance, by permitting gun owners to carry their guns in their home as they please, affords Plaintiffs the very right that Dick Heller sought in *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) — the right "to render a firearm operable and carry it about his home in that condition . . . when necessary for self-defense." *Id.* at 576. Its ammunition ordinance permits gun owners to purchase standard ammunition within San Francisco, and if they insist on loading their guns with ammunition designed for greater lethality, they are free to obtain that ammunition outside city limits or by ordering it online, and to possess that ammunition within city limits.

Because San Francisco's ordinances serve its compelling interest in public safety, because Plaintiffs' right to keep and bear arms in their homes is no more than minimally burdened by the ordinances, and because the Second Amendment right is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), Plaintiffs are unlikely to succeed on the merits of their constitutional claims against San Francisco. Nor do they satisfy the remaining factors for preliminary injunctive relief. This Court should deny their motion for preliminary injunction.

STATEMENT OF FACTS

Firearm injuries have a vast national and local public health impact. S.F. Police Code § 4511(1) (available at Appendix ("App.") A-6). From 2000 through 2007, there were an average of 30,000 firearms deaths every year. *Id.* § 4511(1)(a); U.S. Dep't of Hlth. & Human Servs., Centers for Disease Control & Prevention, Nat'l Ctr. for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System ("WISQARS"), *WISQARS Injury Mortality Reports 1999-2007*, at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html. In 2007, there were the equivalent of 85 firearm-related deaths (whether suicides, homicides, or accidents) every day. S.F. Police Code § 4511(1)(a). There were 18,000 people treated for unintentional gun injuries in 2009, and 5700

people were killed in unintentional shootings in this country between 2005 and 2007. S.F. Police Code § 4511(1)(c); *WISQARS Nonfatal Injury Reports 1999-2007*, at http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html; *WISQARS Unintentional Firearm Deaths & Rates Per 100,000*, at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

Although the causes of this epidemic of violence remain under study, scientific research has repeatedly shown that the rates of suicides, homicides, and accidental deaths all rise as guns are more readily available. Declaration of Daniel W. Webster ("Webster Decl.") ¶¶ 6 *et seq.*, ¶¶ 45 *et seq*. The presence of a gun in the *home* is particularly dangerous. Having a gun in the home significantly elevates the risk of suicides; one study found a 4.7 increase in suicide rates among households where a gun is present, even after controlling for other factors associated with suicide risks. *Id.*¶ 11. Another study found a *10-fold* increase in suicides among people 24 and younger living in a home where a gun was present. *Id.* ¶ 14. Other studies find a consistently positive relationship between gun ownership and suicide, and this effect lasts years after the purchase of the gun (thereby suggesting that the gun was not purchased for purposes of suicide). *Id.* ¶¶ 7-21. There is also a demonstrated relationship between the presence of a gun in the home and higher homicide rates, as high as a five-fold increase according to one study. *Id.* ¶¶ 22-36. Because a third of female homicide victims are killed by their intimate partner, it may be that women's risk of homicide is especially heightened by the presence of a gun in the home. *Id.* ¶ 22. And, unsurprisingly, the risk of an unintentional shooting death is as much as 3.7 times higher for residents homes with a firearm than those without. *Id.*¶ 37. There is a positive correlation between having a gun in the home and the risk of death from unintentional shootings for all age groups, but the correlation is highest for young children and teens. ¶ 38.

These studies make clear that the presence of a gun in the home increases the risk of violent death for people who live or visit there. While the mechanism for this positive relationship is under study, it appears that reducing the immediate availability of guns—the most lethal means of harm to self or others—is likely to reduce spontaneous or impulsive decisions to retrieve the gun and use it. Webster Decl. ¶¶ 9, 15, 22, 42, 53, 64-65. This conclusion finds support in studies showing that storing guns locked or unloaded reduces the risk of suicides and accidental shootings within the home, *id.* ¶¶ 40, 44, and in studies showing that laws requiring locked storage save lives, *id.* ¶¶ 54-55. But

there is very little evidence that guns in the home are often used to shoot burglars or other home invaders.[1] In a study of homicides in or near residential dwellings where the relationship between victim and shooter was known, only four percent of the victims were strangers to the shooter, while 52% of the victims were murdered by a spouse, intimate partner, first-degree family member, or roommate of the perpetrator and 37% were shot by a friend or an acquaintance. *Id.* ¶ 22; *see also* S.F. Police Code § 4511(2); EpiCenter, California Injury Data Online, *Firearm Ownership & Storage* (2004), http://www.apps.cdph.ca.gov/epicdata/firearms/gunownstore.htm.

The ready availability of guns is also associated with higher rates of burglaries because burglars view guns as attractive loot. Webster Decl. ¶¶ 58-61. Once a gun is in the hands of a burglar, it passes into the black market, which is a source of the guns used to commit crimes. Webster ¶¶ 58, 61.

To address the grave public health concerns stemming from the risks of guns in the home, San Francisco adopted the two ordinances that Plaintiffs challenge here.

A. Storage Ordinance

In 2007, San Francisco enacted Police Code 4512, requiring that any handgun kept in a residence must be carried on the person of an adult or stored either in a locked container or disabled with a trigger lock. S.F. Police Code § 4512 (available at App. A-10) ("Storage Ordinance"). The Storage Ordinance does *not* require handguns to be carried or stored unloaded. *Id.* § 4511(7)(a). It applies only to handguns and not to long guns. San Francisco adopted legislative findings in support of its Storage Ordinance in 2011, and these findings are set out in Police Code § 4511 (available at App. A-6).

As the findings and as social science studies demonstrate, storing guns locked can reduce the risk of self-inflicted and unintentional firearm injuries, Webster Decl. ¶¶ 40, 42, particularly but not exclusively among children and youth, *id.*¶ 42-43, 54-55; *see also* S.F. Police Code § 4511(5)(b).

[1] Even researchers who claim that gun owners very often use guns defensively to ward off crime have found that most of the effect of the gun comes from *brandishing* it, and only a quarter of defensive uses of guns actually involve firing them. *Heller*, 554 U.S. at 701 (Breyer, J., dissenting) (describing Kleck & Gertz, Armed Resistance to Crime, 86 J. Crim. L. & C. 150, 164 (1995)); *see also* Webster ¶ 62 (describing flaws in Kleck & Gertz study).

There is a wide consensus that using trigger locks or lockboxes to store guns promotes safety: The International Association of Chiefs of Police, the American Academy of Pediatrics, and the National Rifle Association have all stated that locked storage can prevent unauthorized access to guns. S.F. Police Code § 4511(6); Webster Decl. ¶ 41. Locking guns can also prevent the gun thefts that result in black market gun sales. S.F. Police Code § 4511(2)(d); Webster Decl. ¶ 58.

San Francisco's legislative findings also indicate that requiring locked storage of guns in the home when they are not being carried by a responsible adult does not compromise San Franciscans' ability to use guns for lawful self-defense purposes. S.F. Police Code § 4511(7). There is no study, ever, showing a relationship between locked storage and diminished ability to use guns in self-defense, or showing that locking guns makes people less safe. *Id.* ¶¶ 62-63. This is unsurprising in light of the capabilities of modern lockboxes, which can be opened in three or four seconds by pressing numbers on a keypad or scanning a fingerprint. Declaration of Cathy Garza ("Garza Decl.") ¶¶ 2-7.[2] Some individual plaintiffs in this case have declared that opening their lockboxes is difficult or time-consuming, but these declarations are conclusory and do not demonstrate that guns in lockboxes are inaccessible for self-defense. One plaintiff, for instance, states that she would have to find her key and her glasses to open the gun lockbox by her bedside. Declaration of Espanola Jackson, Dkt. 136-3, ¶ 6. But San Francisco's law permits her to use a biometric lockbox that does not require the step of finding her keys, and she would probably want to find her glasses in any event in order to aim her gun at an intruder. Another plaintiff states that he stores his guns in a safe in his garage and complains that he would have to go to the garage in order to retrieve them in the event of an emergency. Declaration of Sheldon Paul Colvin, Dkt. 136-6, ¶ 6. Nothing in San Francisco's law requires him to put his gun safe in the garage. In any event, as noted above, there is no research at all to support any claim that locking guns reduces safety or the ability to use guns in a self-defense emergency. Webster Decl. ¶¶ 62-63.

[2] Indeed, a demonstration of how easily the biometric lockbox described in the Garza Declaration can be operated is available at http://www.youtube.com/watch?v=3sR9r_4VjmE (last accessed Sept. 13, 2012). The user's demonstration of the simple fingerprint scan access process begins at minute 6 of the video.

B. Ammunition Ordinance

San Francisco comprehensively regulates the sale of firearms and ammunition by, among other things, requiring dealers to be licensed, to undergo background checks, to store firearms under lock and key, to submit to police inspections, and to carry liability insurance. S.F. Police Code §§ 613, 613.2, 613.9, 613.13, 613.14. Dealers are also prohibited from selling enhanced-lethality ammunition, which San Francisco defines as ammunition that

> "(1) Serves no sporting purpose;
>
> "(2) Is designed to expand upon impact and utilize the jacket, shot or materials embedded within the jacket or shot to project or disperse barbs or other objects that are intended to increase the damage to a human body or other target (including, but not limited to . . . Hollow Point Ammunition[])]; or
>
> "(3) Is designed to fragment upon impact . . .." S.F. Police Code § 613.10(g) (available at App. A-2) (hereinafter "Ammunition Ordinance").

The Ammunition Ordinance applies only to licensed firearms and ammunition dealers within San Francisco—of which there is currently exactly one, High Bridge Arms, located in the Bernal Hill neighborhood of the city. Notably, the Ammunition Ordinance does not preclude San Francisco residents from purchasing enhanced-lethality ammunition outside city limits or from ordering it online for mail delivery in San Francisco, and it does not prohibit San Francisco residents from possessing or using that ammunition.

In 2011, San Francisco adopted findings in support of its Ammunition Ordinance. S.F. Police Code § 613.9.5 (available at App. A-1). The findings state that enhanced-lethality ammunition is more likely to seriously wound or kill a person who is hit by it than conventional ammunition. *Id.* § 613.9.5(2). Plaintiffs do not contest that enhanced-lethality ammunition is more likely to seriously wound or kill its victim; indeed, in a prior filing, they submitted state laws from other jurisdictions indicating exactly that. *See* Plaintiffs' Request for Judicial Notice in Support of Motion for Partial Judgment on the Pleadings ("MJOP RJN"), Dkts. 116-17, Exh. S at 3 (in Ohio livestock euthanasia regulation, providing that "gunshot must utilize bullets … that expand on impact. The projectile must enter the brain causing instant loss of consciousness and humane death."); *id.*, Exh. T at 1 (Washington statute provides that firearms used for slaughtering livestock must contain "[h]ollow pointed bullets" or frangible ammunition and that firearms are to produce unconsciousness in livestock

"immediately by a combination of physical brain destruction and changes in intercranial pressure"). Plaintiffs indeed admit that they want enhanced-lethality ammunition precisely because it is more likely to gravely injure or kill its targets, although they euphemistically describe this property as "stopping power." Plaintiffs' Memorandum of Points & Authorities, Dkt. 136 ("Plaintiffs' MPAs") at 6:2-3.

In its findings in support of the Ammunition Ordinance, San Francisco noted its strong interest in reducing the likelihood that shooting victims will die from their injuries. S.F. Police Code § 613.9.5(6). This interest is particularly compelling because of San Francisco's finding that "personal firearms kept in the home are more likely to be used against family and friends than intruders. Home firearms may also be used in suicide attempts, accidental shootings and criminal assaults," *id.* § 613.9.5(5), a finding supported by scientific research, Webster Decl. ¶ 22; *see also id.* ¶ 7. San Francisco also found that its Ammunition Ordinance would not substantially burden any resident's ability to defend himself because conventional ammunition is sufficient for self-defense purposes: a gun loaded with a standard bullet can still maim or kill. S.F. Police Code § 613.9.5(4). Plaintiffs offer no evidence or argument to the contrary.

ARGUMENT

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 24 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.

Plaintiffs cannot obtain injunctive relief because they are unlikely to succeed on the merits of their claims: the Storage and Ammunition Ordinances do not substantially burden Plaintiffs' Second Amendment rights, and these ordinances bear a substantial relationship to San Francisco's important public safety interests. Nor is the Ammunition Ordinance unduly vague in employing a term of art, "sporting purpose," that has been used without challenge in gun laws for nearly 30 years.

Nor do Plaintiffs meet the remaining *Winter* factors. They make no showing of irreparable harm, and the public interest and balance of equities tip sharply in favor of San Francisco's compelling

interests in public safety and preventing gun deaths. The Court should deny their motion.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. Standard Of Review For Second Amendment Claims.

As this Court noted in its order denying Plaintiffs' motion for judgment on the pleadings,

> "Circuit court decisions after [*District of Columbia v.*] *Heller*, [554 U.S. 570 (2008)] . . . have generally applied a 'two-step' approach, first examining whether the statute places a burden on conduct falling within the scope of the Second Amendment as historically understood, and then applying either strict or intermediate scrutiny, depending on the severity of any such burden. [Citations.] The Ninth Circuit has yet to issue a binding determination on this point, but concurring opinions in the most recently issued decision in the *Nordyke* matter suggest at least some of its judges are likely to embrace the two-step approach. *See Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012)." Order Denying Plaintiffs' Motion for Judgment on the Pleadings, Aug. 17, 2012, Dkt. 134 ("Order") at 5.

In light of the dearth of Ninth Circuit authority, the City submits that the most persuasive analysis of the standard of review for Second Amendment claims is found in *United States v. DeCastro*, 682 F.3d 160 (2d Cir. 2012) (Jacobs, J.), which adopts the two-step approach this Court described in its order, and holds that "heightened scrutiny is appropriate only as to those regulations that *substantially* burden the Second Amendment." *Id.* at 164 (emphasis added). Noting that *Heller* repeatedly emphasized "the weight of the burden imposed by D.C. gun laws," in contrast to "18th-century laws regulating the storage of excess gunpowder, and the laws of colonial cities regulating time, place and manner for the discharge of firearms," *id.* at 166 (citation omitted), *DeCastro* finds that *Heller* does not "mandate that any marginal, incremental or even appreciable restraint on the right to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Id.*

This Court should adopt *DeCastro*'s approach. *DeCastro* is faithful to *Heller*'s admonition that the scope of the Second Amendment right is not unlimited, and to *Heller*'s recognition of the many and varied forms of firearms regulation that have existed throughout the Nation's history, such as concealed weapons prohibitions, gun-storage laws, and felon-possession prohibitions. 554 U.S. at 626-27 & n.26, 632. *DeCastro*'s substantial-burdens test is also warranted by the Supreme Court's

statement that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3046 (2010) (plurality) (quotation marks omitted). A test that reflexively applies rigid categories to states' and localities' novel regulations is incompatible with *McDonald*'s recognition that new circumstances or understandings may call for new controls on firearms; rigid categories would "handcuff[] lawmakers' ability to prevent armed mayhem." *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) *cert. denied*, 132 S.Ct. 756. Finally, as *DeCastro* noted, the substantial-burdens test largely accords with the approach of other circuits, which apply varying degrees of scrutiny to gun regulations based on the degree of burden on Second Amendment rights as well as whether the regulation impinges on the core or periphery of interests protected by the Second Amendment. *DeCastro*, 682 F.3d at 166; *Heller v. District of Columbia*, 670 F.3d 1244, 1253, 1260 (D.C. Cir. 2011) ("*Heller II*") (laws that have only a "de minimis" effect on the right to bear arms or that do not "meaningfully affect individual self-defense" do not impinge on the Second Amendment right and therefore do not warrant heightened scrutiny) (internal quotation marks omitted); *Masciandaro*, 638 F.3d at 470 (endorsing sliding-scale approach to determining the level of scrutiny applicable to laws that burden Second Amendment rights depending in part on "the extent to which [Second Amendment] interests are burdened by government regulation"); *United States v. Marzzarella*, 614 F.3d 85, 94–95 (3d Cir. 2010) (suggesting that a "*de minimis* " burden on the right to keep arms for self-defense might not warrant heightened scrutiny), *cert. denied*, 131 S.Ct. 958 (2011). *DeCastro*'s approach also accords with the vacated opinion of the *Nordyke* panel, which determined that "only regulations which substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second Amendment." *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011) (O'Scannlain, J.), *reh'g in banc granted*, 664 F.3d 774.

Plaintiffs contend instead that this Court should adopt a "scope-based analysis" that first asks whether "the restricted activity falls within the scope of the Second Amendment" as understood by the public during the founding period. Plaintiffs' MPAs at 7:7-13. If it does, the Court should consider whether "there is some 'historical justification for [the government's] regulations.'" *Id.* If the government cannot show a historical analog for its regulations, then the Court must strike them,

regardless of the strength of their justification or the extent to which they infringe on the core of Second Amendment rights. *Id.* The Court should reject Plaintiffs' scope-based test because it is logically incoherent and, contrary to *Heller* and *McDonald*'s teaching, intrinsically biased against regulation in an area where the Supreme Court has recognized that regulation and right have long existed side-by-side.

Plaintiffs' scope-based test is logically incoherent because of the circular role it assigns to history, which both determines the scope of the Second Amendment right and whether an incursion on that right is nonetheless legitimate. Plaintiffs do not explain the merits of a two-pronged test where both prongs ask the same question. Nor is Plaintiffs' test consistent the Supreme Court's pronouncements on the Second Amendment. As noted, *McDonald* recognized that states and localities may continue their "experimentation" with sensible gun regulations, and *Heller* recognized that the gun restrictions in existence at the time of the Framing do not exhaust the category of valid gun regulations. *Heller* deems prohibitions on felons' possession of any firearms to be "longstanding," 554 U.S. at 626, and "presumptively lawful," *id.* at 627 n.26. Yet "the first federal statute disqualifying felons from possessing firearms was not enacted until 1938 . . . . A 1938 law may be 'longstanding' from the perspective of 2008, when *Heller* was decided, but 1938 is 147 years after the states ratified the Second Amendment." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Thus, *Heller* itself indicates that "the legislative role [in regulating guns] did not end in 1791." *Id.*[3] But experimentation and the continuing development of firearms laws would be foreclosed by any test that exclusively inquires into a regulation's historic pedigree.

Plaintiffs claim that their scope-based inquiry is commanded by *Heller* itself, which rejected a test proposed by Justice Breyer as a "freestanding 'interest-balancing' approach" which would enable judges to decide "on a case-by-case basis whether the right is *really worth* insisting upon." 554 U.S. at 634. Plaintiffs err by treating Justice Breyer's approach—which would have balanced the

[3] *Skoien* considered not simply a time-place-and-manner restriction on the use or storage of guns but a blanket prohibition on possession of guns by people convicted of misdemeanor crimes of domestic violence, where this prohibition was enacted in 1996. 614 F.3d at 639. If legislatures continue to have the power to disarm entire classes of people upon a proper showing, as *Skoien* holds that they do, *id.* at 642, then surely legislatures also have the power to enact novel restrictions that fall short of disarmament upon adequate justification.

proportionality of the government's interest against the Second Amendment right in all cases, *id.* at 689 (Breyer, J., dissenting)—as synonymous with the familiar tiers of heightened and intermediate scrutiny. But *Heller* itself never rejects the tiers-of-scrutiny framework, and indeed it calls out Justice Breyer's approach as being *different* from the "traditionally expressed levels" of scrutiny, not synonymous with them. 554 U.S. at 634. No other court has found itself constrained by *Heller*'s rejection of the "interest-balancing" approach from adopting a tiers-of-scrutiny framework. *See supra* p. 8; Order at 5. And as the D.C. Circuit has noted, "[i]f the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at least something to that effect." *Heller II*, 670 F.3d at 1265. It did not.

Nor should this Court adopt Plaintiffs' alternative argument that strict scrutiny alone must apply to all "restrictions on the core right of law-abiding citizens to self-defense," without regard to the nature of the regulation or the severity of the burden. Plaintiffs' MPAs at 9:9-10. This, too, is contrary to the overwhelming weight of Second Amendment authority. Other circuits join *DeCastro* in holding that courts must consider the severity of the burden on Second Amendment rights in deciding what level of scrutiny to apply. *See, e.g.*, *Heller II,* 670 F.3d at 1253, 1260 ("we determine the appropriate standard of review by assessing how severely the prohibitions burden the Second Amendment right"); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right *and the severity of the law's burden* on the right") (emphasis added); *Masciandaro,* 638 F.3d at 470 (to determine standard of review, "we would take into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation").

Plaintiffs argue to the contrary, claiming that "*most circuits* have determined the applicable standard of review based on whether or not the challenged law regulates conduct at the 'core' of the Second Amendment." Plaintiffs' MPAs at 10:10-11 (emphasis added). But then Plaintiffs go on to cite only three cases, all of them by or within the Fourth Circuit. *Id.* at 10:11-16 (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Weaver*, Criminal No. 2:09-CR-00222, 2012 WL 727488 (S.D. W. Va. Mar. 6,

2012)). At most, these cases show that the Fourth Circuit—alone among circuits—shares Plaintiffs' view. But they actually show far less than that, because the statements in them that Plaintiffs rely on are dicta. Each of the cited cases applied intermediate scrutiny but, unnecessarily, stated or implied that strict scrutiny could apply where a regulation burdened core Second Amendment conduct. *Masciandaro*, 638 F.3d at 470 (applying intermediate scrutiny to prohibition on loaded firearms possession in national park);[4] *Chester*, 628 F.3d at 683 (4th Cir. 2010) (applying intermediate scrutiny to prohibition on firearms possession by domestic violence misdemeanant); *Weaver*, 2012 WL 727488, at *5 (applying intermediate scrutiny to application of federal prohibition on possession of firearms while in the employ of a felon). These cases are not authority for propositions they do not need to decide. *See, e.g., Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995).

Plaintiffs also claim that strict scrutiny is required for regulations on law-abiding citizens' use of guns in the home because strict scrutiny always applies to "*core* First Amendment conduct," and thus presumably it should be the same for the Second Amendment. Plaintiffs' MPAs at 9:18-19 (emphasis in original). But this only begs the question of what is at the "core" of the right. If it is the right to keep and carry any handgun, armed with any ammunition, in any manner whatsoever, provided that the conduct occurs in the home, then perhaps Plaintiffs' claims would have force. But *Heller* itself belies these claims, recognizing that "laws regulating the storage of firearms to prevent accidents" are not undermined by *Heller*'s analysis, notwithstanding the fact that those laws operate in the home on the firearms of law-abiding citizens. 554 U.S. at 632; *see also infra* p. 13 (discussing *Heller*'s analysis of storage laws). Indeed, the weight of authority shows the opposite: merely because a law operates in the home, on the guns of law-abiding citizens, does not necessarily trigger strict scrutiny. For instance, the D.C. Circuit held that stringent registration and training requirements that "*make it considerably more difficult* for a person lawfully to acquire and keep a firearm, including a handgun, *for the purpose of self-defense in the home*—the core lawful purpose protected by the Second Amendment"—are nonetheless subject only to intermediate scrutiny. *Heller II*, 670 F.3d at

[4] *Masciandaro* expressly supports the City's position, not Plaintiffs', when it states that to determine standard of review, a court must "take into account the nature of a person's Second Amendment interest, *the extent to which those interests are burdened by government regulation*, and the strength of the government's justifications for the regulation." 638 F.3d at 470 (emphasis added).

1255, 1257-58 (emphasis added). Similarly, in *United States v. Marzzarella*, the Third Circuit acknowledged that a prohibition on possession of a handgun without a serial number "implicates [the possessor's] interest in the defense of hearth and home" but nonetheless applied intermediate scrutiny to the law. 614 F.3d at 94, 97. Indeed, no circuit court has applied strict scrutiny to a gun regulation following *Heller*, much less embraced a categorical approach that assigns strict scrutiny to any law regulating conduct in the home.

Plaintiffs are also wrong to argue that strict scrutiny categorically applies to regulations burdening, to any degree, the "core" of enumerated or fundamental rights. Plaintiffs' MPAs at 9:15-10:2. As *DeCastro* explained in justifying its "substantial burden" framework, courts frequently assess the extent of a burden on fundamental rights in deciding how much scrutiny to pay that burden:

> "A similar threshold showing is needed to trigger heightened scrutiny of laws alleged to infringe other fundamental constitutional rights. The right to marry is fundamental, but 'reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship' are not subject to the 'rigorous scrutiny' that is applied to laws that 'interfere directly and substantially with the right to marry.' *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978). The right to vote is fundamental, but 'the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.' *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) . . . .
>
> "The weight of the burden matters in assessing the permissible bounds of regulation in other constitutional contexts as well, such as takings, abortion, and free speech. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–16 (1992) (only those regulations on property that go 'too far' require the payment of just compensation under the Takings Clause (internal quotation marks omitted)); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (prior to fetal viability, a state may not enact laws that impose an 'undue burden' on a woman's decision to terminate her pregnancy, *i.e.*, regulations that have 'the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion') . . .; *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (reasonable time, place or manner restrictions are subject to lesser scrutiny as long as they are content-neutral and preserve 'ample alternative channels for communication of the information'). . . ." 682 F.3d at 167 (parallel citations and some internal quotation marks omitted).

This Court should follow *DeCastro* in first evaluating the extent of the burden that the City's ordinances impose on Plaintiffs' rights and then, only if the burden is substantial, applying any form of scrutiny to those ordinances, in proportion to the burden they impose.

B. The Storage Ordinance Is Constitutional.

The Storage Ordinance requires only that San Franciscans lock their handguns, loaded or unloaded, when they are not carrying their handguns. S.F. Police Code § 4512. This Court has already cogently described the modest burden that this requirement imposes: at most, it creates a mere "potentiality" that, in some cases, a San Francisco resident might have a locked gun near at hand but be unable to reach it because of the time it took to open a lockbox or trigger lock. Order at 4:13-22. Of course, as Police Code § 4511 notes, in some cases the locked-storage requirement could *increase* ready access to a loaded gun: "Portable lockboxes can store loaded weapons such that they are always within easy reach on counters, tables or nightstands. Such safely stored weapons are more quickly and easily retrieved for use in self-defense than unlocked guns that have been hidden away in seldom-used locations." *Id.* at § 4511(7)(c).

There is no empirical study anywhere that substantiates Plaintiffs' view that the potentiality this Court identified, that locked storage of a gun could sometimes impair self-defense or endanger a gun owner, actually occurs with any regularity. Webster Decl. ¶¶ 62-63. But evidence does indicate that the time needed to open a lockbox to obtain a loaded gun is minimal—perhaps three or four seconds. Garza Decl. ¶¶ 2-7. Evidence also indicates that the availability of guns in homes increases the risks of suicides, homicides, and deaths from accidental shootings, particularly among children and young adults, that reducing the availability of guns in turn reduces these risks, and that policies that prevent unauthorized access to guns in the home also reduce these risks. Webster Decl. ¶¶ 6-56. In addition, locked storage requirements can reduce gun burglaries and thereby reduce the number of guns available to criminals through the black market. *Id.* ¶¶ 58-61. Plaintiffs make no showing whatsoever in their preliminary injunction motion that these facts are untrue. In light of the remote and unsubstantiated possibility that the Storage Ordinance could impair a San Francisco resident's ability to use a gun for self-defense, the minimal burden that the Storage Ordinance imposes on San Francisco residents, and the empirical evidence that locked storage of guns serves public safety interests, the Storage Ordinances passes Second Amendment scrutiny under any test that the Court could plausibly apply to it.

Under the *DeCastro* approach, the Court should determine that the Storage Ordinance does not impose a substantial burden on Second Amendment rights, and therefore that it need not pass any further scrutiny. 682 F.3d at 164. This conclusion is bolstered by *Heller* itself, which disavows that "[its] analysis suggest[s] the invalidity of laws *regulating the storage of firearms* to prevent accidents." 554 U.S. at 632 (emphasis added).

Even if the Court applies some form of heightened scrutiny, it should go no further than intermediate scrutiny. Empirical evidence shows that the burden that the Storage Ordinance imposes on the right of self-defense in the home is charitably described as minimal. Indeed, *Heller* recognizes that gun-storage laws "do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632. Appellate courts have declined to apply heightened scrutiny to far greater burdens than any San Francisco creates here. *See, e.g.*, *Heller II*, 670 F.3d at 1255-56, 1257 (applying intermediate scrutiny to stringent registration requirements that limited gun purchases to one per month and required firearms training and demonstrated knowledge of firearms for gun registration, notwithstanding the fact that these requirements "[made] it considerably more difficult for a person lawfully to acquire and keep a firearm"); *Chester*, 628 F.3d at 681-83 (after finding that history did *not* show domestic violence misdemeanants were outside Second Amendment's protection, nonetheless applying intermediate scrutiny to complete ban on possession by those misdemeanants); *Skoien*, 614 F.l3d at 641-42 (applying intermediate scrutiny to ban on firearm possession by domestic violence misdemeanants even where this ban was not historically longstanding). Indeed, in noting that its analysis did not impugn storage laws, *Heller* stated that historic storage ordinances "do not remotely burden the right of self-defense as much as an absolute ban on handguns." 554 U.S. at 632.

Thus, as the Third Circuit has phrased it, where a law "was neither designed to nor has the effect of prohibiting the possession of any class of firearms, it is more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights" and subject only to intermediate scrutiny. *Marzzarella*, 614 F.3d at 97; *see also Masciandaro*, 638 F.3d at 474 (applying only intermediate scrutiny where the law, prohibiting possession of loaded weapons in cars in national parks but allowing unloaded possession, "leaves largely intact the right to possess and carry weapons in case of confrontation" because firearms could be loaded in the event of a self-

defense emergency). The Storage Ordinance leaves largely intact the right to possess handguns in the home, does not prohibit any class of firearms, and is best characterized as a regulation of the manner of firearms possession in the home. It should therefore be evaluated under the intermediate scrutiny test.[5]

Under intermediate scrutiny, the Storage Ordinance must bear a substantial relationship to an important government interest. *Skoien*, 614 F.3d at 642. "[I]ntermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." *Masciandaro*, 638 F.3d at 474. Nor is San Francisco required to prove that its legislative judgments are empirically correct. "Even when applying strict scrutiny—requiring a more taxing proof threshold than the one we apply here [in a Second Amendment case challenging conviction of a marijuana user in possession of a firearm]—the government may, in appropriate circumstances, carry its burden by relying 'solely on history, consensus, and simple common sense.'" *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); additional quotation marks omitted)).

The Storage Ordinance readily passes intermediate scrutiny. Public safety is plainly a strong government interest. *See, e.g., Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994). The

[5] This conclusion finds further support in the historic gun- and gunpowder-storage laws that *Heller* discussed. In Boston in 1783, it was unlawful to take a loaded firearm into any building, including a dwelling. An Act In Addition to the Several Acts Already Made for the Prudent Storage of Gun-Powder within the Town of Boston, Mar. 1, 1783, in The Charter of the City Council of Boston etc. with Such Acts of the Legislature of Massachusetts as Relate to the Government of Said City 18 (1827) (available at App. A-14). In New York City in 1784, it was unlawful for "any … person … to have or keep any quantity of gun powder exceeding twenty-eight pounds weight, in any one place, less than one mile to the northward of the city hall … and the said quantity of twenty-eight pounds weight … shall be separated into four stone jugs or tin cannisters, which shall not contain more than seven pounds each." An Act to Prevent the Danger Arising From the Pernicious Practice of Lodging Gunpowder in Dwelling Houses, Stores, or Other Places Within Certain Parts of the City of New York, or on Board of Vessels Within the Harbour Thereof, Apr. 13, 1784, ch. 28, 1784 Laws of the State of N.Y. 627-28 (available at App. A-17). New York's statute contained no express exception for gunpowder kept in a loaded gun rather than a stone jug or tin canister. Pennsylvania in 1782 prohibited the storage of more than 25 pounds of gun powder in any shop or dwelling. An Act for Erecting the Town of Carlisle, in the County of Cumberland, into a borough; for Regulating the Buildings, Preventing Nuisances and Encroachments on the Commons, Squares, Streets, Lanes and Alleys of the Same, and for Other Purposes Therein Mentioned, 1782, ch. DCCCCLVIII, sec. XLII, 1803 Laws of the Commonwealth of Penn. 349-50 (available at App. A-21). These Framing-era laws demonstrates that the historical understanding of the right to bear arms has never included immunity from reasonable storage regulations to prevent accidents.

Storage Ordinance bears a substantial relationship to this interest because groups as diverse as the National Rifle Association and the American Academy of Pediatrics recommend locked storage as a way to reduce access to guns by unauthorized users, Webster Decl. ¶ 41; because reducing the immediate availability of guns in turn reduces gun deaths, *id.* ¶¶ 64-65; because locked-storage requirements may reduce gun thefts and thereby reduce the number of guns flowing into the black market and criminal hands, *id.* ¶¶ 58-61; and because locked-storage requirements have been empirically proven to save lives, *id.* ¶¶ 54-56.

Plaintiffs complain that the Storage Ordinance goes too far, applying to all gun owners regardless of their individual circumstances. But it is difficult to predict in advance which homes will be broken into and which unlocked guns will be stolen. And while San Francisco could have confined its ordinance to homes where children are sometimes or often present, such a regulation would have done nothing to prevent theft or to reduce suicides and homicides among adults living in homes with guns. In any event, because "intermediate scrutiny does not require that a regulation be the least intrusive means," *Masciandaro*, 638 F.3d at 474, the Storage Ordinance is constitutional regardless of Plaintiffs' quibbles with its breadth.

Plaintiffs also make the bizarre contention that San Francisco may not justify the Storage Ordinance as a means of reducing shootings: "The right to keep arms in an operable (*i.e.*, useful) condition cannot be prohibited by laws that seek justification in well-known risks associated with that very right, risks equally well-known to those who enshrined the right in our Second Amendment." Plaintiffs' MPAs at 16:2-5; *see also id.* at 13 n.8 (distinguishing historic gunpowder-storage ordinances from the Storage Ordinance because their purpose was "to protect firefighters in densely populated urban areas; *not* to 'protect' law-abiding citizens from themselves"). This is nonsensical. *Heller* holds that handguns may not be banned, regardless of the fact that they often injure people. But it does not state or imply that governments may not regulate based on the dangerous capabilities of firearms. If preventing shootings were an impermissible basis for regulation, what would be the justification for the extensive list of laws—from concealed weapons bans to prohibitions on firearms possession by felons and the mentally ill—that *Heller* identifies as presumptively lawful? 554 U.S. at 626-27 & n.26. No court anywhere has insisted on such a crabbed interpretation of the permissible

justifications for gun regulation. *See, e.g.*, *Skoien*, 614 F.3d at 642 (preventing "armed mayhem" was important government purpose); *Masciandaro*, 638 F.3d at 473 (prohibition of loaded firearms in vehicles in national parks was permissible because of their "dangerous[ness]"); *Heller II*, 670 F.3d at 1264 (upholding ban on large-capacity magazines because they "pose a danger to innocent people and particularly to police officers"); *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1109-10 (C.D. Ill. 2012): ("the State undoubtedly has the authority to regulate firearms in order to ensure public safety").

C. The Ammunition Ordinance Is Constitutional.

San Francisco's Ammunition Ordinance, prohibiting the *single* gun store located within city limits from selling enhanced-lethality ammunition, is motivated by the simple idea that reducing the lethality of bullets can save lives without appreciable harm to public safety. Plaintiffs apparently agree with San Francisco's view that enhanced-lethality ammunition is more likely to gravely wound or kill a human being hit by it than ordinary full-metal jacket bullets. *See* MJOP RJN, Exh. S at 3, Exh. T at 1. And Plaintiffs offer no empirical showing or argument that ordinary full-metal jacket bullets are insufficient to stop an intruder. Instead, they contend that enhanced-lethality ammunition is in common use. They also argue that it is better for self-defense precisely because of its capacity to harm and because it purportedly is less likely to "over-penetrat[e] and ricochet" than standard bullets. Plaintiffs' MPAs at 18:2-15.

Plaintiffs offer no reason why particular kinds of ammunition should be protected by the Second Amendment; instead, they simply import *Heller*'s reasoning that the Second Amendment protects *weapons* "in common use" to *ammunition*, without analysis. Plaintiffs' MPAs at 2:26-3:3, 18:3-6. It is far from clear that the "common use" standard applies to ammunition. After all, banning a class of weapons that are owned by a lot of people is an effective way to disarm them, something the Second Amendment forbids, but restricting one kind of ammunition while many other kinds remain available does not vitiate a gun owner's ability to load his gun and defend himself. But even if Plaintiffs are correct that the Second Amendment protects an interest in a particular *kind* of ammunition, their challenge to the Ammunition Ordinance nonetheless fails.

First, the Ammunition Ordinance falls within a longstanding tradition of regulating particularly dangerous weapons and ammunition, and is therefore presumptively lawful. *Heller* recognized that

prohibitions on "'dangerous and unusual weapons'" are an "important limitation on the right to keep and carry arms" based on the history of such prohibitions. 554 U.S. at 627 (quoting Blackstone, 4 Commentaries on the Laws of England 148-149 (1769)). *Heller* also recognized that "nothing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-67. Nineteenth- and early twentieth-century legislation shows that bans on the sale of particular arms, even popular or common ones, are part of our historic tradition of firearms regulation. Historic statutes prohibiting the sale of certain classes of weapons include An Act to Guard and Protect the Citizens of this State, against the Unwarrantable and Too Prevalent Use of Deadly Weapons, Dec. 25, 1837, ¶ 367, § 1, 1851 Statute Laws of the State of Ga. 848 (App. A-12) (making it illegal "for any merchant . . . or any other person . . . to sell, or offer to sell . . . pistols"); An Act to Prevent the Sale of Pistols, Mar. 14, 1879, ch. XCVI, § 1, 1879 Act of the State of Tenn. 135-36 (App. A-27) (banning the sale or disposal of "belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistol[s]"); An Act to Regulate the Carrying, Manufacture, and Sale of Pistols, and to Make a Violation of the Same a Misdemeanor, Feb. 20, 1901, No. 435, § 1, 1902 Code of the Laws of S.C. 478-49 (App. A-25) (banning the sale of pistols less than 20 inches in length and 3 pounds in weight).

The tradition continues to this day with respect to bullets, as numerous jurisdictions restrict the sale or possession of various kinds of ammunition they deem to be particularly dangerous. The federal government largely prohibits the sale of armor-piercing ammunition, 18 U.S.C. §§ 921(a)(17)(B), 922(a)(8), and has since 1986. *See* An Act to Amend Chapter 44 (Relating to Firearms) of Title 18 etc., Pub. L. No. 99-308, § 102, 100 Stat. 449 (1986). Numerous states restrict the possession or sale of that and other particularly lethal kinds of ammunition. *See, e.g.,* Ala. Code § 13A-11-60 (prohibiting possession or sale of brass or steel teflon-coated handgun ammunition); Cal. Penal Code § 30320 (prohibiting sale of "handgun ammunition designed primarily to penetrate metal or armor"); *id.* § 32310 (prohibiting manufacture or sale of "any large-capacity magazine"); Fla. Stat. Ann. § 790.31 (prohibiting possession and sale of various bullets including "exploding bullets" including those that are "designed . . . so as to detonate or forcibly break up through the use of an explosive or deflagrant"); Haw. Rev. Stat. § 134-8(a) (prohibiting manufacture, sale, or possession of "any type of

ammunition or any projectile component thereof designed or intended to explode or segment upon impact with its target"); 720 Ill. Comp. Stat. Ann. § 5/24-1(a)(11) (prohibiting sale, manufacture, or purchase of "any explosive bullet"); Iowa Code Ann. §§ 724.1(7), 724.3 (prohibiting possession of "[a]ny bullet or projectile containing any explosive mixture or chemical compound capable of exploding or detonating prior to or upon impact"); N.H. Rev. Stat. Ann. § 159:18 (prohibiting use of "any teflon-coated or armor-piercing bullet or cartridge, or any bullet or cartridge which contains any explosive substance in the projectile and is designed to explode upon impact, in the course of committing any misdemeanor or felony"); N.J. Stat. Ann. § 2C:39-3(f)(1), (g)(2) (prohibiting possession of "hollow nose or dum-dum bullet" except in the home); N.C. Gen. Stat. Ann. § 14-34.3 (prohibiting sale or possession of "teflon-coated bullet"); N.Y. Penal Law § 265.01(7) (prohibiting possession of "a bullet containing an explosive substance designed to detonate upon impact"); Tenn. Code Ann. § 39-17-1304(b) (prohibiting sale or use of "any ammunition cartridge, metallic or otherwise, containing a bullet with a hollow-nose cavity that is filled with an explosive material and designed to detonate upon impact"); Utah Code Ann. § 65A-3-2(1)(d) (prohibiting firing of "tracer or incendiary ammunition"). The Ammunition Ordinance fits comfortably within this tradition of restricting the sale of particularly dangerous kinds of ammunition and therefore calls for no Second Amendment scrutiny at all.

Second, even if this Court concludes that the Second Amendment affords protection to the ability to purchase a particularly dangerous kind of ammunition, it should nonetheless uphold the Ammunition Ordinance because that ordinance does not *substantially* burden Plaintiffs' Second Amendment rights. *DeCastro*, 682 F.3d at 164. The Ammunition Ordinance allows San Franciscans either to buy enhanced-lethality ammunition online or at gun stores outside of San Francisco (including at gun shows at Cow Palace, which is literally across the street from San Francisco), or to make do with standard ammunition, which Plaintiffs do not allege is inadequate for self-defense. Because "adequate alternatives remain for law-abiding citizens to obtain a firearm for self-defense" and to equip that firearm with ammunition adequate for self-defense, there is no substantial burden here. *Id.* at 168.

Third, even if this Court subjects the Ammunition Ordinance to some form of heightened scrutiny, it should go no further than the D.C. Circuit, which applied only intermediate scrutiny to a prohibition on the *possession*, not the mere sale, of magazines containing more than 10 rounds of ammunition. *Heller II*, 670 F.3d at 1261. Although the plaintiffs in that case claimed that depriving them of large-capacity magazines would impair their ability to fire repeatedly in an emergency without reloading, the D.C. Circuit determined that "the prohibition of . . . large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." *Id.* at 1262. The Ammunition Ordinance similarly withstands intermediate scrutiny. It is intended to serve the compelling governmental interest in public safety.[6] Plaintiffs argue that the Ammunition Ordinance is misguided because it restricts the kind of ammunition they believe is less likely to "overpenetrat[e] or ricochet" than conventional ammunition. But research demonstrates that discharging a gun at a home invader or in other legitimate self-defense circumstances is far rarer than the use of guns against loved ones, friends or acquaintances in unjustifiable shootings. Webster ¶ 22.[7] San Francisco's policy determination to protect against the latter and far more common harm by reducing the lethality of bullets, even at the expense of some overpenetration or ricochets in the far rarer situation of a self-defense emergency, is a permissible policy choice so long as standard ammunition can protect against an intruder. San Francisco found that it can, S.F. Police Code § 613.9.5(4), and Plaintiffs offer this Court no reason to disturb that determination.

Plaintiffs also contend that the Ammunition Ordinance is unconstitutional because it defines enhanced-lethality ammunition to include ammunition that "serves no sporting purpose." Plaintiffs

[6] Plaintiffs argue that the City may not rely on public safety as a justification for the Ammunition Ordinance because public safety was the District of Columbia's justification for its handgun ban, and the Supreme Court struck that ban. Plaintiffs' MPAs at 20:4-10. But the Ammunition Ordinance is not a ban on ammunition possession, and does not ban a class of arms, unlike D.C.'s handgun ban, so it does not merit strict scrutiny. And the fact that D.C.'s justification was insufficient in *Heller* does not mean that public safety can never justify firearms regulation. *See, e.g., Skoien*, 614 F.3d at 642; *Masciandaro*, 638 F.3d at 473; *Heller II*, 670 F.3d at 1264; *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1109-10. *Heller* never states or implies that public safety is not a legitimate government purpose in Second Amendment analysis.

[7] In addition, research showing that most defensive uses of guns involve brandishing them, not firing them, indicates that the kind of bullet they contain may have very little import. *See supra* n.1.

argue either that this ban violates the Second Amendment because self-defense purposes are distinct from sporting purposes, or because of the vagueness of the term. Both of these contentions fail.

As for Plaintiffs' contention that it violates the Second Amendment to permit only the sale of ammunition that serves a sporting purpose, this contention relies upon a misunderstanding of the term "sporting purpose." That term has regularly been employed by Congress for decades as a term of art to indicate weapons and ammunition that are considered suitable only for military use or that are typically used by criminals rather than law-abiding members of the public. *See, e.g.*, 18 U.S.C. § 921(4)(B) (defining "destructive device" as "any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) . . . which will . . . expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter"); *id.* § 922(r) ("It shall be unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun which is identical to any rifle or shotgun prohibited from importation under . . . this chapter as not being particularly suitable for or readily adaptable to sporting purposes"); *Gun S., Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989) (in discussing 18 U.S.C. § 922(l) concerning importation of firearms, stating "the sponsor of the legislation, Senator Dodd, stated: . . . 'The entire intent of the importation section is to get those kinds of weapons that are used by criminals and that have no sporting purpose.'") (citation to Congressional Record omitted); *United States v. McCarty*, 421 F. Supp. 2d 220, 225 (D. Me. 2006) *aff'd*, 475 F.3d 39 (1st Cir. 2007) ("Based on the legislative history of the Gun Control Act and subsequent circuit court precedent, this Court concludes that unregistered sawed-off shotguns serve no sporting purpose and fall within [26 U.S.C.] § 5845(f)(2)'s definition of a destructive device."); Law Enforcement Officers Protection Act of 1985, Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong. 1 (1985) (statement of Chairman Hughes) ("Armor-piercing ammunition has no sporting purpose whatsoever. It is not used by hunters or sportsmen or target shooters. This ammunition has principally a military or offensive purpose to penetrate armor. This ammunition should not be sold without reasonable controls to assure that it is not used in the commission of crime."); *id.* at 91 (statement of David Baker, of the International Union of Police Associations) ("[T]here is no legitimate sporting use for this ammunition. Congress has seen

fit to restrict the private ownership of machine guns and other military weapons, in part because of an absence of legitimate sporting purposes. These bullets should not be an exception to that logic."). Thus, the term does *not*, as Plaintiffs contend, mean that San Franciscans can only purchase ammunition suitable for hunting and never for self-defense. San Francisco is entitled to use the term "sporting purpose" in the sense that Congress has used it in the past and continues to use it today: as a designation for legitimate purposes, which now, after *Heller*, include self-defense purposes.

The fact that the term "no sporting purpose" has a particular meaning in the context of firearms legislation also disposes of Plaintiffs' claim that the term is unconstitutionally vague. The Constitution does not demand "perfect clarity and precise guidance," *United States v. Williams*, 553 U.S. 285, 304 (2008), but rather "an adequate warning" of what is prohibited with "sufficiently distinct" boundaries. *United States v. Petrillo*, 332 U.S. 1, 7 (1947). The use of the phrase "no sporting purpose" across decades in American firearms law shows that the language of the Ammunition Ordinance meets these constitutional standards.

Finally, Plaintiffs lack standing to raise a Fourteenth Amendment vagueness claim to the Ammunition Ordinance. They themselves are not regulated by that ordinance; only gun dealers in San Francisco are directly regulated by it. Thus, only High Bridge Arms, the lone San Francisco gun dealer, is injured if the ordinance is so vague that High Bridge Arms cannot determine what is prohibited by it. The rule generally is that a party may only assert his own interests in invoking the jurisdiction of the federal courts, and Plaintiffs make no effort at all to show that they meet one of the narrow exceptions to this general rule to permit them to assert the Fourteenth Amendment rights of High Bridge Arms. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (noting rule against third-party standing and its limited exceptions).

II. PLAINTIFFS FAIL TO SHOW A LIKELIHOOD OF IRREPARABLE HARM.

A preliminary injunction may never be granted without a showing that irreparable harm is likely. *Winter*, 555 U.S. at 22. To make this showing, Plaintiffs contend that any deprivation of Second Amendment rights is presumed to be irreparable.

With respect to the Storage Ordinance, Plaintiffs' contention might be viable if the mere existence of a criminal law injured them. But absent some showing of a genuine threat by the City to

prosecute Plaintiffs or anyone else for violating the Storage Ordinance, Plaintiffs can show no injury from those ordinances, much less irreparable injury. This Court has held to the contrary. *Jackson v. City & County of San Francisco*, 829 F. Supp. 2d 867 (N.D. Cal. 2011). The City respectfully submits that this Court erred and that, to show harm from a criminal statute, Plaintiffs must show that they intend to violate the law and must make an affirmative showing of a threat of prosecution, either because authorities have informed them of a threat of prosecution or because there is a robust history of enforcement of the law. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc); *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). This is true even where fundamental rights are allegedly threatened by the existence of a criminal law. *Thomas*, 220 F.3d at 1138 (finding no injury where plaintiffs alleged that prosecution for violating state anti-discrimination law would violate their First Amendment rights to freedom of speech and religion). *Heller* is not to the contrary; in that case, Dick Heller had standing because he had applied for and was denied a permit to possess a handgun, and the D.C. Circuit construed the District of Columbia's requirement of locked storage of long guns to be a permit condition. *Parker v. District of Columbia*, 478 F.3d 370, 375-76 (D.C. Cir. 2007), *aff'd sub nom*, *Heller*, 554 U.S. 570. Dick Heller's co-plaintiffs, however, could show no injury where they were never denied a permit and had never been threatened with enforcement. *Id.*[8] Here, Plaintiffs are in the same position as Dick Heller's co-plaintiffs and cannot show a threat of enforcement. *See* Dkt. 11 (Declaration of City Attorney Librarian finding no evidence of prosecutions).

The need for a concrete threat of enforcement separates real controversies from ones manufactured by interest groups, and allows local prosecutors the discretion to charge only in appropriate cases. For instance, plaintiff Espanola Jackson conclusorily states that her age makes it difficult for her to operate a gun lockbox. Jackson Decl. ¶ 6. If that is true, then San Francisco prosecutors might, for example, decline to enforce the law against Ms. Jackson in light of her infirmity. It is well established that "[w]hether to prosecute and what charge to file or bring before a

[8] In its order denying the City's motion to dismiss for lack of standing, this Court cited *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), as undermining the force of *San Diego Gun Rights*. *Jackson*, 829 F. Supp. 2d at 871. But *MedImmune* continues to require that a plaintiff show a "genuine threat of enforcement," 549 U.S. at 129, a requirement Plaintiffs do not meet here.

grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*, 442 U.S. 114, 124 (1979). Treating the existence of a criminal statute as interchangeable with a decision to prosecute reads prosecutorial discretion out of the law and puts government to a Hobson's choice between defending applications of the law that it might never enforce and losing the ability ever to enforce the law if it is struck down.

With respect to the Ammunition Ordinance, some of the plaintiffs contend that they wish to purchase enhanced-lethality ammunition at a store in San Francisco. But no plaintiff makes any showing that he or she suffers any difficulty, burden, harm, or expense from traveling outside of San Francisco to obtain this ammunition, or ordering it online. Even if the deprivation of Second Amendment rights is irreparable harm, Plaintiffs fail to make any factual showing that their Second Amendment rights have been burdened by the Ammunition Ordinance. *Cf. Hohe v. Casey*, 868 F.2d 69, 72-73 (3d Cir. 1989) ("the assertion of First Amendment rights does not automatically require a finding of irreparable injury," and "incidental inhibition" of First Amendment rights does not constitute irreparable injury) (internal quotation marks omitted). Since the mere invocation of Second Amendment rights is not enough, and Plaintiffs have not shown their Second Amendment rights are more than incidentally inhibited by the fact that they cannot buy ammunition from San Francisco's sole licensed ammunition dealer, they do not show irreparable harm.

Moreover, Plaintiffs delayed seeking injunctive relief more than three years after bringing their case, undercutting any claim that they are threatened with immediate irreparable harm. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984).

III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FACTORS FAVOR SAN FRANCISCO.

The final two factors that Plaintiffs must establish are that "the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Plaintiffs can show neither factor here.

Plaintiffs wave away the City's important interest in public safety, contending that it is outweighed by their intangible Second Amendment rights. This analysis ignores the strong public interest that always inheres in the implementation of laws that are duly enacted by elected legislative

bodies: the law itself shows what the Legislature believes to be the public interest, and there is rarely reason for a court to disturb that conclusion. *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). The public's interest in safety has special weight here, where research supports San Francisco's view that locked storage of guns saves lives, and where Plaintiffs do not dispute that the ammunition they seek to buy is more lethal than ordinary ammunition. As the Fourth Circuit stated in evaluating a restriction on loaded firearms in national parks, "[t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." *Masciandaro*, 638 F.3d at 475. Because public safety and gun regulations are indeed serious business, this Court should give strong weight to the findings San Francisco's elected legislators that the Storage Ordinance and Ammunition Ordinance serve public safety and the public interest.

CONCLUSION

For the reasons offered above, this Court should deny Plaintiffs' Motion for Preliminary Injunction.

Dated: September 13, 2012

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