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

11 ESPANOLA JACKSON, PAUL COLVIN, )  
THOMAS BOYER, LARRY BARSETTI, )  
12 DAVID GOLDEN, NOEMI MARGARET )  
ROBINSON, NATIONAL RIFLE )  
13 ASSOCIATION OF AMERICA, INC., SAN )  
FRANCISCO VETERAN POLICE )  
14 OFFICERS ASSOCIATION )

15 Plaintiffs, )

16 vs. )

17 CITY AND COUNTY OF SAN )  
18 FRANCISCO, THE MAYOR OF )  
SAN FRANCISCO, AND THE CHIEF )  
19 OF THE SAN FRANCISCO POLICE )  
DEPARTMENT, in their official capacities, )  
20 and DOES 1-10, )

21 Defendants. )  
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**CASE NO. CV-09-2143-RS**

**NOTICE OF MOTION AND MOTION FOR  
PRELIMINARY INJUNCTION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

Fed. R. Civ. P. 65(a)

Date: October 4, 2012

Time: 1:30 p.m.

Place: Courtroom 3 - 17th Floor  
450 Golden Gate Ave.  
San Francisco, CA 94102

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**NOTICE OF MOTION AND MOTION**

**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:** Notice is hereby given that on October 4, 2012, at 1:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Ave., San Francisco, California, in the courtroom of the Honorable Judge Richard Seeborg, Plaintiffs will and hereby do move for preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

Plaintiffs will seek an order enjoining Defendants City and County of San Francisco, the Mayor of San Francisco, and the Chief of the San Francisco Police Department (collectively, “the City”) from enforcing San Francisco Police Code section 4512 and 613.10(g). These code sections violate Plaintiffs’ right to keep and bear arms under the Second Amendment and, in particular, their right to defend themselves and others by exercising that right within their own homes. Section 613.10(g)(1) further violates Plaintiffs’ right to due process under the Fourteenth Amendment as it is unconstitutionally vague.

This motion shall be based on this notice of motion and motion, the memorandum of points and authorities in support, the declarations and evidence filed concurrently herewith, the papers on file, and upon any further matters the Court deems appropriate.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**STATEMENT OF THE ISSUES PRESENTED**

1. Whether the Court should enjoin the City’s enforcement of San Francisco Police Code section 4512,<sup>1</sup> the City’s locked-firearm-storage requirement, because Plaintiffs are likely to succeed on the merits as the law violates their fundamental right to keep an operable handgun for immediate self-defense in the home, the infringement of which causes Plaintiffs irreparable harm.

2. Whether the Court should enjoin the City’s enforcement of section 613.10(g), the City’s ban on the sale of expanding and/or fragmenting ammunition and all ammunition that “serves no sporting purpose,” because Plaintiffs are likely to succeed on the merits as the law violates their fundamental right to acquire ammunition in common use for self-defense in the

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<sup>1</sup> All statutory references are to the San Francisco Police Code, unless otherwise indicated.

1 home, the infringement of which causes Plaintiffs irreparable harm.

2 3. Whether the Court should enjoin the City's enforcement of section 613.10(g)(1), the  
3 City's ban on the sale of all ammunition that "serves no sporting purpose," because Plaintiffs are  
4 likely to succeed on the merits because the law is vague in all applications and Plaintiffs suffer  
5 irreparable harm from the law's enforcement.

## 6 INTRODUCTION

7 Sections 4512 and 613.10(g) infringe Plaintiffs' Second Amendment rights to keep and bear  
8 arms by requiring locked storage<sup>2</sup> of handguns in the home *at all times* except when being "carried  
9 on the person" and by banning the sale of a broad class of ammunition in common use for self-  
10 defense and all "non-sporting" ammunition. The infringements are self-evident because the broad  
11 regulations, like those found categorically invalid in *Heller*, directly conflict with the rights of law-  
12 abiding adults to keep and bear arms for "the core lawful purpose of self-defense" *within the home*,  
13 "where the need for defense of self, family, and property is most acute." *District of Columbia v.*  
14 *Heller*, 554 U.S. 570, 628-30.

15 This direct conflict renders Defendants' restrictions invalid under *Heller* as a matter of law.  
16 For while *Heller* did not settle *all* Second Amendment issues, it emphatically declared that  
17 "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of  
18 law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. This point  
19 is not a subtle one. It renders the right to arms within the sanctity of one's home virtually  
20 sacrosanct and restrictions on that right subject to the highest levels of scrutiny.

21 While the challenged ordinances differ in some ways from those invalidated in *Heller*, they  
22 nonetheless conflict in similar fashion with the Second Amendment. In *Heller*, the District's  
23 locked-storage law made it "legally impossible" to render one's handgun operable for self-defense  
24 emergencies. *Id.* at 630. Here, by requiring Plaintiffs' firearms to be stored inoperable when  
25 Plaintiffs are at the greatest risk of criminal attack, the City's locked-storage law makes it  
26 "practically impossible" to keep one's handgun operable for self-defense emergencies. In *Heller*,

---

27  
28 <sup>2</sup> "Locked storage," as it pertains to section 4512, means the requirement that handguns kept  
within the home be stored in a locked container or disabled with a trigger-lock.

1 the District also banned a broad class of firearms (handguns) in common use for in-home self-  
2 defense. *Id.* at 629. Here, the City bans the sale of a broad class of ammunition in common use for  
3 self-defense. In each case, the laws directly conflict with the right to keep and bear arms for “the  
4 core lawful purpose of self-defense” in the home.

5 There is no historical precedent supporting, nor any legitimate governmental interest that is  
6 furthered by, the City’s laws which broadly infringe upon the core, fundamental right of law-  
7 abiding citizens to armed self-defense in the home. Accordingly, the City’s laws are  
8 unconstitutional on their face and, by operation of law, cause Plaintiffs irreparable harm. Enjoining  
9 the enforcement of sections 4512 and 613.10(g) will restore Plaintiffs’ constitutional rights and, at  
10 the same time, restore those rights to all San Francisco residents in furtherance of the public  
11 interest. As such, temporary injunctive relief preventing the City from enforcing its  
12 unconstitutional laws is warranted while this case proceeds through discovery and toward  
13 resolution on the merits.

#### 14 STATEMENT OF THE CASE

15 Plaintiffs filed this suit on May 15, 2009, to challenge the validity of sections 4512, 1290,  
16 and 613.10(g), enacted by the City and County of San Francisco and enforced by its Mayor and  
17 Chief of Police (collectively “the City”). Plaintiffs sought declaratory and injunctive relief from  
18 violations of their Second Amendment right to keep and bear arms and their right to due process  
19 enshrined in the Fifth and Fourteenth Amendments. (Am. Compl. [Doc. No. 18] 19:21-21:1.)

20 On July 9, 2009, the City filed its first motion to dismiss. Plaintiffs filed their First  
21 Amended Complaint on August 24, 2009. The case was then stayed pending the determination of  
22 whether the Second Amendment applies against the states. (Min. Order, Aug. 27, 2009 [Doc. No.  
23 21].) That stay was lifted when the U.S. Supreme Court ruled in *McDonald v. City of Chicago*, 561  
24 U.S. 2025, 130 S. Ct. 3020 (2010), that it does. (Order, Sept. 13, 2010 [Doc. No. 37].)

25 The City thereafter filed yet another 12(b)(1) motion to dismiss, arguing again that  
26 Plaintiffs lacked standing to challenge the ordinances because they had not yet been charged with  
27 violating the challenged provisions, and because they allegedly faced no “genuine threat” of  
28 enforcement. (Defs.’ Mem. Supp. Mot. Dismiss [Doc. No. 61] 12:17-20.) For largely the same

1 reasons, the City argued that Plaintiffs' claims were not ripe for review. (*Id.* at 14:18-16:16.) The  
 2 Court denied the City's Motion to Dismiss, finding that Plaintiffs have sufficiently alleged  
 3 standing and their remaining claims are ripe for review. (Order [Doc. No. 89] 2:4.) The Court also  
 4 granted Plaintiffs leave to amend their challenge to Section 1290, which the City repealed in the  
 5 wake of this litigation to allow for the discharge of firearms in self-defense and in defense of  
 6 others, as well as other circumstances permitted under state and federal law. (*Id.* at 2:6.) Plaintiffs  
 7 later filed a notice of intent not to amend. (Notice of Intention to Not Am. Compl. [Doc. No. 90].)

8 The Court thereafter ordered the City to respond to Plaintiffs' First Amended Complaint by  
 9 October 17, 2011. (Order, Oct. 6, 2011 [Doc. No. 91].) The City filed its answer wherein it raised  
 10 six affirmative defenses, including (improperly) standing and ripeness. (Defs.' Answer [Doc. No.  
 11 92] 9:21-10:22.) In response, Plaintiffs filed a motion to strike the standing and ripeness  
 12 "affirmative defenses." (Pls.' Mot. to Strike [Doc. No. 96].) In denying that motion, the Court  
 13 acknowledged that its ruling on standing and ripeness turned on a relatively narrow set of facts,  
 14 which are unlikely to be in substantial controversy. (Order, Dec. 12, 2012 [Doc. No. 105] 1-2.)<sup>3</sup>

15 On May 17, 2012, Plaintiffs filed a motion for partial judgment on the pleadings. (Pls.'  
 16 Mot. J. Pldgs. [Doc. No. 109].) That motion was denied on August 17, 2012. (Order Den. Pls. Mot.  
 17 J. Pldgs. [Doc. No. 134].)

18 Plaintiffs now bring this motion for preliminary injunction, asking the Court to enjoin the  
 19 enforcement of sections 4512 and 613.10(g) while this case proceeds to resolution on the merits.

## 20 STATEMENT OF FACTS

21 **Section 4512 – Locked-Storage Requirement:** In August 2007, the City passed section  
 22 4512, requiring handguns kept within the home to be stored in a locked container or disabled with  
 23 a trigger-lock, unless that firearm "is carried on the person of an individual over the age of 18" or  
 24 "under the control of a person who is a peace officer." Under section 4512(e), violation is

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25  
 26 <sup>3</sup> In support of this motion, and should the City continue to dispute Plaintiffs' standing,  
 27 Plaintiffs have concurrently filed declarations attesting to the limited circumstances regarding  
 28 each plaintiffs' standing. (*See* Decls. of Espanola Jackson, Paul Colvin, Larry Barsetti, Thomas  
 Boyer, David Golden, and Noemi Margaret Robinson Supp. Mot. Prelim. J. filed concurrently  
 herewith.)

1 punishable by a fine not to exceed \$1,000 and/or by imprisonment not to exceed six months.

2 In short, section 4512 requires, under threat of prosecution, that Plaintiffs keep their  
3 handguns under lock and key and *not* immediately accessible under *any* circumstances for  
4 self-defense emergencies – except when being “carried on the person.” Notably, the “under the  
5 control” exception *applies only to peace officers*. Plaintiffs highlight this fact as the Court  
6 mistakenly stated in its recitation of relevant facts in its Order Denying Plaintiffs’ Motion for  
7 Judgment on the Pleadings that the “under control” exception applies to Plaintiffs. (Order Den.  
8 Pls.’ Mot. J. Pleadings [Doc No. 134] 2:1-3.) It does not. The only time non-peace officer  
9 residents may unlock their handguns or remove them from their safes is when they “carry” them  
10 “on the person.” And this is true regardless of whether children, felons, or other persons who  
11 *should* be denied access to handguns are present. It is true even when residents are home alone, in  
12 a locked house, in a locked room. It is true whether residents live in large, secure homes in safe  
13 neighborhoods or in small homes or apartments in dangerous neighborhoods.

14 In sum, it is a matter of fact that neither the degree of control one has over his or her  
15 handgun nor the potential need for such control, e.g., to keep the weapon out of the hands of  
16 unauthorized users who might be present, is relevant under the City’s locked-storage ordinance.  
17 *The weapon must be locked up at all times, under all circumstances – unless it is “carried on the*  
18 *person.”* Thus, it is a fact that under the City’s locked-storage law, a competent, law-abiding  
19 resident who lives alone in a studio apartment in a dangerous neighborhood cannot keep an  
20 unlocked, operable handgun on his or her bedside table while sleeping at night under *any*  
21 circumstances. It is also a matter of fact that, regardless of the circumstances under any scenario  
22 one might conjure up – circumstances *not* the result of government action – it will take longer to  
23 access a handgun that is locked in a safe or disabled by a trigger lock than one that is not. And the  
24 City’s forced locked-storage restriction, of course, *is* the result of government action.

25 **Section 613.10(g) – Ban on Sale of Expanding and/or Fragmenting Ammunition and**  
26 **Ammunition that “Serves No Sporting Purpose”:** Plaintiffs also challenge section 613.10(g)’s  
27 ban on the sale, lease, or transfer of ammunition that “serves no sporting purpose” or is designed  
28 to expand or fragment upon impact. Section 613.10(g) effectively prohibits city residents from

1 purchasing ammunition within San Francisco commonly used and preferred for self-defense  
 2 purposes. Such ammunition, including hollow point ammunition, provides greater “stopping  
 3 power” against attackers and reduces risks to innocent bystanders resulting from ricochet or over-  
 4 penetration of assailants and building materials.

## 5 ARGUMENT

6 A plaintiff seeking a preliminary injunction must establish: (1) that he or she is likely to  
 7 succeed on the merits; (2) that he or she is likely to suffer irreparable harm in the absence of  
 8 preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction  
 9 is in the public interest. *Am. Trucking Ass’n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052  
 10 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

11 Plaintiffs have suffered, and if this motion is not granted will continue to suffer, the  
 12 deprivation of their fundamental Second Amendment rights. They are likely to succeed on the  
 13 merits of their constitutional claim, and the harm invited upon them is irreparable. Further,  
 14 granting this motion will not only restore Plaintiffs’ rights, it will restore and protect the  
 15 constitutional rights of all San Francisco residents, thus serving the public interest. Accordingly,  
 16 and as described more fully below, Plaintiffs satisfy each of the factors required for temporary  
 17 injunctive relief pending resolution of the matter on the merits.

### 18 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE** 19 **CHALLENGED PROVISIONS VIOLATE PLAINTIFFS’ FUNDAMENTAL** 20 **SECOND AMENDMENT RIGHT TO SELF-DEFENSE**

21 The City’s requirement that all residents carry their handguns around their homes or keep  
 22 them locked up, regardless of the circumstances, renders Plaintiffs’ guns unavailable and thus  
 23 inoperable for “immediate self-defense” in emergency situations. *See Heller*, 554 U.S. at 635. A  
 24 law that renders guns useless for emergency self-defense within the sanctity of one’s own home  
 25 cannot pass constitutional muster under any test. As such, Plaintiffs are exceedingly likely to  
 26 succeed on the merits.

#### 26 **A. Standard of Review Governing Second Amendment Challenges**

27 The Supreme Court, while not settling on a framework for all Second Amendment  
 28 challenges, has left little doubt that courts are to assess gun laws based on history and tradition,

1 and not by resorting to interest-balancing tests. The *Heller* majority rejects the “tiers-of-scrutiny”  
2 framework advanced by the City and acknowledged by this Court in its Order Denying Plaintiffs’  
3 Motion for Judgment on the Pleadings. *Heller*, 554 U.S. at 628 n.27, 634-35; *see also Heller v.*  
4 *District of Columbia (Heller II)*, 670 F.3d 1244, 1271-74 (D.C. Cir. 2011) (Kavanaugh, J.,  
5 dissenting). Alternatively, strict scrutiny must apply.

6 **1. *Heller* and *McDonald* Endorse a Scope-Based Analysis, Not a Means-  
7 End Approach that Necessarily Entails a Balancing of Interests**

8 *Heller* advances an analytical approach that first focuses on “examination of a variety of  
9 legal and other sources to determine *the public understanding* of [the] legal text,” 554 U.S. at 605,  
10 with particular focus on “the founding period,” *id.* at 604, to determine whether the restricted  
11 activity falls within the scope of the Second Amendment. If it does, the court again turns to “text  
12 and history” to determine whether the particular restriction is nevertheless permissible because it  
13 is analogous to restrictions historically understood as permissible limits on the right to bear arms,  
14 i.e., whether there is some “historical justification for those regulations.” *Id.* at 635. In short,  
15 where sufficient historical justifications exist for a restriction on activity falling within the scope  
16 of the right, the restriction is valid; if not, it is invalid. *See id.* at 634-35. The presumption, of  
17 course, is that activity falling within the scope of the right to arms “shall not be infringed,” with  
18 the burden on the government to justify the challenged restriction, based on text, history, and  
19 tradition. *See id.* at 634-36.

20 When *Heller* was argued before the Supreme Court, the Solicitor General urged the Court  
21 to employ “intermediate scrutiny” in reviewing the District’s handgun ban and locked-storage law,  
22 believing if that standard were employed, the laws would be upheld. *See Oral Arg.* at 44-45,  
23 *Heller*, 554 U.S. 570 (No. 07-290) (attached as “Ex. A” to the Declaration of Anna M. Barvir  
24 (“Barvir Decl.”) filed concurrently herewith). Chief Justice Roberts rejected this attempt to  
25 “articulate an all-encompassing standard” applicable to every Second Amendment case, asking:

26 Isn’t it enough to determine the scope of the existing right that the amendment  
27 refers to, look at the various regulations that were available at the time, including  
28 you can’t take the gun to the marketplace and all that, and determine how . . . this  
restriction and the scope of this right looks in relation to those?

I’m not sure why we have to articulate some very intricate standard. I mean,  
these standards that apply in the First Amendment just kind of developed over the

1 years as sort of baggage that the First Amendment picked up. But I don't know why  
2 when we are starting afresh, we would try to articulate a whole standard that would  
apply in every case? *Id.*

3 Chief Justice Roberts was suggesting that courts simply ask whether the law restricts  
4 activity falling within the scope of the right as originally understood. If it does, the law is  
5 *presumed* invalid unless the *government* can show its regulation is so commonplace in our history  
6 and traditions that the scope of the fundamental right to keep and bear arms must be understood in  
7 light of it. But there would be no "balancing test" or weighing of burdens and benefits. *Id.*

8 When *Heller* was decided, this scope-based approach was, in large part, the approach taken  
9 by the majority, after it expressly rejected Justice Breyer's subjective, interest-balancing test. 554  
10 U.S. at 634-35. Notably absent from *Heller's* analysis was any discussion of "compelling  
11 interests," "narrowly tailored" laws, or any other standard of review jargon. Nor were there  
12 discussions of the District's "legislative findings" purporting to justify the restrictions.

13 Instead, *Heller* focused on whether the challenged laws restricted the right to keep and bear  
14 arms as that right was understood by those who drafted and enacted both the Second and  
15 Fourteenth Amendments. *Id.* at 626-34. The Court gleaned that understanding from an extensive  
16 examination of the textual and historical narrative surrounding the pre-existing right to arms, to  
17 define, at least in broad terms, the scope of the rights that the Second Amendment guarantees. *Id.*  
18 at 605-19. In doing so, the Court emphasized that "[c]onstitutional rights are enshrined with the  
19 scope they were understood to have when the people adopted them, whether or not future  
20 legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35.

21 The *Heller* Court ultimately found that handguns are arms protected by the Second  
22 Amendment, *id.* at 629, and that keeping handguns in one's home for self-defense purposes is core  
23 conduct protected by the same, *id.* at 635. Because the District's handgun ban and locked-storage  
24 requirement directly conflicted with protected conduct, and because there was no historical record  
25 of such restrictions, the laws were unconstitutional. *Id.* at 628-30.

26 The Court's later decision in *McDonald* further underscored the notion that history and  
27 tradition, rather than burdens and benefits, should guide analyses of Second Amendment  
28 challenges. Like *Heller*, *McDonald* did not use balancing tests, and it expressly rejected judicial



1 assessment of “the costs and benefits of firearms restrictions,” stating that courts should not make  
 2 “difficult empirical judgments” about the efficacy of particular gun regulations. *McDonald v. City*  
 3 *of Chicago*, 130 S. Ct. 3020, 3050 (2010). This language is compelling. Means-end tests, like  
 4 strict or intermediate scrutiny, necessarily require the assessment of the “costs and benefits” of  
 5 government regulations, as well as “difficult empirical judgments” about their effectiveness. The  
 6 Court’s clear rejection of such inquiries is incompatible with a means-end approach to Second  
 7 Amendment challenges.

8 **2. Alternatively, Should the Court Adopt a Means-End Test for Second**  
 9 **Amendment Challenges, Strict Scrutiny Must Apply**

10 Should the Court hold that restrictions on the core right of law-abiding citizens to self-  
 11 defense are subject to means-end review, strict scrutiny must be the test. The City has claimed that  
 12 intermediate scrutiny (or less) is appropriate for all but the most severe of Second Amendment  
 13 deprivations.<sup>4</sup> But this argument conflicts with protections that courts afford to core areas of other  
 14 fundamental, enumerated rights. And it rests on cases involving factors not present in *Heller* (e.g.,  
 15 prohibited person, sensitive place, unprotected arms). Here too, no such factors are in play.

16 Just as “any law regulating the content of speech is subject to strict scrutiny, . . . any law  
 17 that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding  
 18 citizen would be subject to strict scrutiny.” *United States v. Masciandaro*, 638 F.3d 458, 470 (4th  
 19 Cir. 2011). Courts routinely apply strict scrutiny when restrictions on *core* First Amendment  
 20 conduct is concerned, including regulations on the content of speech, *United States v. Playboy*  
 21 *Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000), political expenditures, *Citizens United v.*  
 22 *Fed. Election Comm’n*, \_\_ U.S. \_\_, 130 S. Ct. 876, 898 (2010), and expressive association,  
 23 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). In these contexts, courts consider the severity  
 24 of the burden that a regulation places on core protected conduct only in weighing whether the  
 25 regulation survives strict scrutiny – *not in determining the applicable standard of review*. See  
 26 *Citizens United*, 130 S. Ct. at 898-99; *Playboy Entm’t Grp., Inc.*, 529 U.S. at 812-13; *Boy Scouts*  
 27 *of America v. Dale*, 530 U.S. 640, 658-59 (2000); *Roberts*, 468 U.S. at 658-59. Here too, where

28 <sup>4</sup> Laws restricting Second Amendment conduct demand more than rational basis review. Whatever else *Heller* left for future courts to decide, it is clear on this point. 554 U.S. at 628 n.27.

1 the laws restrict the *core* Second Amendment right to self-defense in the home by law-abiding  
2 adults, strict scrutiny must apply regardless of the severity of the burden imposed.

3 The City has maintained that Plaintiffs' challenge is at most entitled to intermediate  
4 scrutiny because the degree of burden on Plaintiffs' rights is minimal. Even assuming the burden  
5 here is minimal (which plaintiffs do not concede), this approach derives no support from *Heller* or  
6 *McDonald*, and it stands in direct opposition to the protection afforded to core areas of  
7 enumerated, fundamental rights. While a minority of courts have relied on the severity of the  
8 burden in determining whether strict or intermediate scrutiny applies, this is *not* the approach  
9 generally taken. *See, e.g., United States v. Decastro*, 682 F.3d 160, 164-65 (2012), *Heller II*, 670  
10 F.3d at 1257. Instead, most circuits have determined the applicable standard of review based on  
11 whether or not the challenged law regulates conduct at the "core" of the Second Amendment. *See,*  
12 *e.g., Masciandaro*, 638 F.3d at 470; *United States v. Weaver*, No. 09-00222, 2012 WL 727488, at  
13 \*6 (S.D. W. Va. Mar. 6, 2012) (citing *Masciandaro* with approval); *United States v. Chester*, 628  
14 F.3d 673, 680, 682-83 (4th Cir. 2010) (applying intermediate rather than strict scrutiny because  
15 firearm possession by domestic violence misdemeanor is not within the core right of the law-  
16 abiding citizen to possess a firearm for self-defense).

17 Those courts that have applied intermediate scrutiny have done so in cases presenting  
18 vastly different questions than those presented here. Almost without exception, these cases do not  
19 involve the right to armed self-defense by law-abiding citizens within the home.<sup>5</sup> In fact, most  
20 involve conduct decidedly *outside* the core Second Amendment right, including possession by  
21 violent criminals, *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), *Chester*, 628 F.3d at  
22 680, 682-83; *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), *United States v. Skoien*,  
23 614 F.3d 638, 641 (7th Cir. 2010), possession in places the court determined to be "sensitive,"  
24 *Masciandaro*, 638 F. 3d at 471, and possession of arms the court determined are not in "common  
25 use" for lawful purposes, *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

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27 <sup>5</sup> The only cases relating to possession in the home dealt with challenges to simple permitting  
28 or registration laws. Those laws do not directly conflict with core conduct in the manner that the  
City's laws do. *Heller II*, 670 F.3d at 1254; *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

1           Accordingly, should the Court determine that the *Heller* scope-based analysis described  
2 above does not apply, precedent demands the application of strict scrutiny.

3           **B.       Section 4512 Violates the Second Amendment**

4           The City’s requirement that all residents carry their handguns around their homes or keep  
5 them locked up, regardless of the circumstances, renders Plaintiffs’ guns unavailable and thus  
6 inoperable for “immediate self-defense” in emergency situations. *See Heller*, 554 U.S. at 635.<sup>6</sup> A  
7 law that renders guns useless for emergency self-defense within the sanctity of one’s own home  
8 cannot pass constitutional muster – under any test.

9                   **1.       The City’s Requirement that Handgun Owners Either Carry Their**  
10                   **Handguns or Keep Them Locked Up at All Times in Their Homes Is**  
11                   **Invalid Under *Heller*’s Scope-Based Approach**

12           The City’s locked-storage law plainly restricts the right to keep and bear operable arms  
13 within the home for the “core lawful purpose” of self-defense. The restriction is obvious and  
14 significant. As such, it is incumbent upon the City to show its law is like others historically or  
15 traditionally accepted by those who drafted and enacted both the Second and Fourteenth  
16 Amendments as a proper limit on the right to arms. The City cannot meet that burden, for there is  
17 no such history or tradition regarding mandatory locked storage.

18                   **a.       The City’s Locked-Storage Law Restricts the Right to Keep and**  
19                   **Bear Arms for the “Core Lawful Purpose” of Self-Defense in the**  
20                   **Home**

21           The City’s locked-storage law renders Plaintiffs’ handguns *not* “operable for the purpose  
22 of immediate self-defense” in the home, *see Heller*, 544 U.S. at 635, making them, for all practical  
23 purposes, useless for self-defense in emergencies. The restriction on Plaintiffs’ Second  
24 Amendment rights is obvious and cannot be rationalized away by positing hypothetical scenarios  
25 that *might* allow an individual time to unlock and use a handgun when under attack.

26           It is a matter of common sense that City’s locked-storage requirement imposes a restriction  
27 on Second Amendment rights. Chief Justice Roberts and Justice Scalia illuminated this point  
28

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26           <sup>6</sup> The term “inoperable” is used to describe handguns kept in a locked container or disabled  
27 with a trigger-lock because that is what they are in a self-defense emergency. One could use them  
28 as a projectile or bludgeon, but cannot operate them as intended. (*See infra* p. 12:7-11 for colloquy  
between Chief Justice Roberts and Justice Scalia.)

1 during oral argument in *Heller* when counsel for the District suggested the locked-storage law at  
 2 issue there had an implied self-defense exception and that, because of that exception, the  
 3 ordinance did not restrict one’s right to armed self-defense. The Chief Justice and Justice Scalia  
 4 disagreed, finding the contention implausible as they briefly imagined the steps needed to render a  
 5 locked handgun operable to defend against a sudden late-night attack:

6 JUSTICE SCALIA: You turn on, you turn on the lamp next to your bed so you can – you  
 can turn the knob at 3-22-95, and so somebody –

7 MR. DELLINGER: Well –

CHIEF JUSTICE ROBERTS: Is it like that? Is it a numerical code?

8 MR. DELLINGER: Yes, you can have one with a numerical code.

9 CHIEF JUSTICE ROBERTS: So then you turn on the lamp, you pick up your  
 reading glasses –  
 (laughter)

10 Oral Arg. at 83-84, *Heller*, 554 U.S. 570 (No. 07-290) (attached as “Ex. A” to Barvir Decl. filed  
 11 concurrently herewith.)

12 While the Court found humor in counsel’s suggestion that the locked-storage law (even  
 13 assuming a self-defense exception) would impose only a minimal burden on the right to arms in a  
 14 self-defense emergency, the point is a serious one that translates well to the present case. The  
 15 restriction the City imposes on conduct at the core of the Second Amendment is both obvious and  
 16 significant, making armed self-defense impractical, if not impossible, when the need is most acute.  
 17 In comparison to the storage law struck down in *Heller*, we have simply gone from a law making  
 18 it “legally impossible” to keep a handgun ready for emergency self-defense to one that makes it  
 19 “practically” impossible to do so. That is a distinction without a difference when facing a sudden  
 20 attack.<sup>7</sup>

21 In short, the locked-storage law, even with a self-defense exception – which is essentially  
 22 what the City’s “carry” exception amounts to – renders a firearm inoperable for immediate self-

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24 <sup>7</sup> Moreover, “impossibility” of self-defense *cannot* be the standard for finding firearms  
 25 restrictions invalid. If it were, *Heller* would not have struck down the District’s handgun ban, for  
 26 long guns were readily available for armed self-defense. But the Court found that it is not  
 27 permissible to ban handgun possession simply because long gun possession is allowed, for the  
 28 availability of shotguns does not save the handgun ban from constitutional infirmity. *Heller*, 554  
 U.S. at 629. Similarly, just because the City’s law may leave open some avenue for exercising the  
 right to in-home self-defense, e.g., by wearing a handgun around the house during the day, it does  
 not follow that the restriction is valid.

1 defense in the home and restricts the right to arms.

2 **b. There Is No Historical or Traditional Support for Forcing**  
 3 **Handgun Owners to Carry Their Firearms or Keep Them**  
 4 **Locked Up at All Times in the Sanctity of Their Own Homes**

5 Consistent with *Heller*'s analysis, after finding that a regulation restricts conduct within  
 6 the Second Amendment's scope, courts should consider whether the regulation was historically or  
 7 traditionally understood to be an accepted limitation on the right. *Heller*, 554 U.S. at 626-28. The  
 8 question here becomes whether laws requiring people to keep their handguns locked up when in  
 9 their own homes – regardless of the circumstances – were part of the historical narrative  
 10 surrounding the Second Amendment when it was drafted.

11 *Heller* refers to a single framing-era ordinance, enacted in Boston in 1783, that prohibited  
 12 the taking of loaded firearms into “any Dwelling House, Stable, Barn, Out-house, Ware-house,  
 13 Store, Shop or other Building” and permitted the seizure of any loaded firearms found therein. *Id.*  
 14 at 631 (quoting Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts p. 218). But the Court found this  
 15 isolated law only marginally relevant to the debate over the government's right to regulate  
 16 firearms in the home, noting that “a single law, in effect in a single city” is *not* evidence of a  
 17 regulatory scheme steeped in tradition. *Id.* at 632.<sup>8</sup>

18 *Heller* cites no examples of laws requiring law-abiding citizens to keep firearms locked at  
 19 all times in the home when not being carried. If there had been any historical evidence suggesting  
 20 that people thought the government had such authority, the dissent certainly would have cited it,  
 21 and the majority would have had to distinguish it from the storage ordinance at issue in that case.  
 22 But *Heller* never engaged in such an analysis because there simply is no history or tradition  
 23 supporting the requirement. Even today, such restrictive laws are extremely rare.<sup>9</sup>

24 In sum, *Heller* found that keeping, bearing, and using handguns in defense of hearth and

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25 <sup>8</sup> The only other historic ordinances offered by Justice Breyer, *id.* at 684-86 (Breyer, J.,  
 26 dissenting), and dismissed by the Court, *id.* at 632-33 (majority opinion), addressed the storage of  
 27 excess gunpowder – again, to protect firefighters in densely populated urban areas; *not* to  
 “protect” law-abiding citizens from themselves.

28 <sup>9</sup> Massachusetts remains an outlier, with the City, in imposing such an unnecessary and  
 extreme restriction on the right to keep arms in the home. *See* Mass. Gen. Laws ch. 140, § 131L.

1 home is core conduct protected by the Second Amendment. *Id.* at 635. Common sense, and the  
2 United States Supreme Court, tell us that the City’s law restricts that protected conduct. Plaintiffs  
3 have thus satisfied the first prong of *Heller’s* two-part test. But the City cannot meet its burden to  
4 establish that there is a significant history or tradition supporting laws mandating locked storage of  
5 firearms. The City’s locked-storage requirement is thus categorically invalid, and Plaintiffs are  
6 likely to succeed on the merits of their Second Amendment challenge to section 4512.

7           **2. The City’s Requirement that Handguns Be Kept Locked Up When Not**  
8           **Being “Carried” Within the Home Cannot Survive Strict Scrutiny – or**  
9           **Any Heightened Scrutiny**

10           Under strict scrutiny, the City must show that its locked-storage law is “narrowly tailored  
11 to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 301-02 (2008). And to pass  
12 muster under even intermediate scrutiny, a standard that is not appropriate in this case, the City  
13 must establish that its locked-storage law is “*substantially* related to an important governmental  
14 objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (emphasis added). That is, the City must  
15 establish a tight “fit” between the locked-storage requirement and a substantial governmental  
16 interest, a fit “that employs not necessarily the least restrictive means but . . . a means *narrowly*  
17 *tailored* to achieve the desired objective.” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S.  
18 469, 480 (1989) (emphasis added). “The requirement of narrow tailoring is satisfied so long as the  
19 regulation promotes a substantial governmental interest that would be achieved less effectively  
20 absent the regulation, and the means chosen are not substantially broader than necessary to achieve  
21 that interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989). Even assuming the  
22 government has sufficient interest in the manner that law-abiding citizens store their firearms in  
23 their homes, the City’s broad and burdensome law is simply not “narrowly tailored.”

24           The City cannot defend its infringement of Plaintiffs’ constitutional rights by claiming the  
25 law is intended to protect children from accidental injury or to keep handguns out of the hands of  
26 unauthorized persons, with any attendant restriction on the right being incidental and necessary.  
27 There is simply no logical fit between such an interest and a law requiring that *all* residents,  
28 including competent, law-abiding adults, keep their handguns locked up at *all times* – regardless  
of whether a minor or a felon or anyone else is present or has access to them.

1 Many states have *safe-storage* regulations that address the concerns above, but in a far less  
2 burdensome manner, with safe storage being a factor that absolves the gun owner of criminal  
3 liability if an unauthorized person gains access to and misuses the firearm, thus providing  
4 significant incentive for safe storage.<sup>10</sup> These laws promote the same governmental interest, but do  
5 so in a way that at least attempts to respect the rights of law-abiding citizens to keep their firearms  
6 operable for immediate self-defense. The City's law is not so tailored. It instead broadly sweeps up  
7 all gun owners and requires they keep their handguns inoperable regardless of the circumstances.

8 The only remaining justification for forcing law-abiding adults to keep their handguns  
9 locked at all times is that guns are dangerous. Authorized users might pick up an unlocked  
10 handgun and accidentally shoot themselves – or do it on purpose. But the ordinance itself allows  
11 authorized users to carry operable handguns in the home, making the argument that the locked-  
12 storage requirement will reduce accidents and suicides among authorized users tenuous at best.

13 Moreover, the oft-cited suicide-reduction argument is directly at odds with the right to use  
14 arms in self-defense. That argument rests on the belief that the additional time it takes to unlock a  
15 handgun will afford the suicidal person time to reconsider the act – the more time, the better. The  
16 opposite is of course true in self-defense emergencies where any delay in accessing an operable  
17 handgun necessarily reduces the ability to use it to ward off an attack. Thus, in the interest of a  
18 questionable theory on suicide prevention, the City's locked-storage requirement, by design,  
19 infringes the fundamental right to armed self-defense in the home.

20 Any debate regarding whether it is a good idea to allow law-abiding adults to possess and  
21 use firearms is over. The Framers surely understood that guns are dangerous and that their misuse  
22 can result in accidental death or suicide, just as they understood that *most* rights involve risks,  
23 including injury and death. For instance, the *McDonald* Court noted how the constitutionally  
24 protected rights of criminal defendants allow some criminal offenders back on the streets to repeat

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25  
26  
27 <sup>10</sup> See Cal. Penal Code §§ 25100, 25105, 25200, 25205; Fla. Stat. § 790.174; Haw. Rev. Stat.  
28 §§134-10.5, 707-714.5; 720 Ill. Comp. Stat. 5/24-9(a); Iowa Code § 724.22(7); Md. Code Ann.,  
Crim. Law § 4-104; Minn. Stat. § 609.666; N.H. Rev. Stat. Ann. § 650-C:1; N.J. Stat. Ann. §  
2C:58-15; N.C. Gen. Stat. § 14-315.1; R.I. Gen. Laws § 11-47-60.1; Tex. Penal Code § 46.13.

1 their crimes. 130 U.S. at 3045. But that does not give state and local officials license to curtail  
2 those constitutional rights. The same is true of the Second Amendment. The right to keep arms in  
3 an operable (i.e., useful) condition cannot be prohibited by laws that seek justification in well-  
4 known risks associated with that very right, risks equally well-known to those who enshrined the  
5 right in our Second Amendment. As *Heller* observed, the inclusion of the right to arms in the Bill  
6 of Rights “necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636.

7 Because the City’s requirement that handguns be kept locked up when not being “carried”  
8 within the home cannot survive any level of heightened scrutiny, Plaintiffs are likely to succeed on  
9 the merits.

### 10 C. Section 613.10(g) Violates the Second Amendment

11 The threshold question here is whether the Second Amendment protects the sale and  
12 purchase of ammunition. Assuming it does, the City’s ban on the sale of expanding and/or  
13 fragmenting ammunition is categorically invalid under *Heller*’s scope-based approach because it  
14 restricts protected conduct without any historical justification. Alternatively, the ban fails any  
15 heightened means-end test. The City’s total ban on the sale of *any* ammunition that does not  
16 “serve a sporting purpose” is similarly invalid. That provision requires only brief examination  
17 because its sporting-purpose limitation cannot be reconciled with the “central component” of the  
18 Second Amendment right: self-defense.

#### 19 1. The Second Amendment Secures a Fundamental Right to Acquire 20 Firearms and Ammunition for Self-Defense and the City’s Ammunition Sales Ban Restricts that Right

21 Arms “typically possessed by law-abiding citizens for lawful purposes” or those “in  
22 common use” are protected by the Second Amendment. *Heller*, 554 U.S. at 624-25 (citation and  
23 internal quotation marks omitted). And the Second Amendment protects equally the purchase and  
24 possession of ammunition necessary to meaningfully exercise the right to keep and bear arms. *See*  
25 *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980) (“[F]undamental rights, even  
26 though not expressly guaranteed, have been recognized by the Court as indispensable to the  
27 enjoyment of rights explicitly defined.”); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right  
28 to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency



1 for use, and to purchase and provide ammunition suitable for such arms. . . .”). It follows that  
 2 ammunition in “common use” for “lawful purposes” is protected by the Second Amendment, and  
 3 any restriction on its sale is presumed invalid.

4 Further, banning commerce in arms violates the Second Amendment right at its core.  
 5 *Marzzarella*, 614 F.3d at 92 n.8. The government can no more ban the sale of protected  
 6 ammunition than it can ban the sale of protected books, contraceptives, or even violent video  
 7 games. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Brown v. Entm’t Merchs.*  
 8 *Ass’n*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2729, 2738 (2011). A right to keep and bear arms, without the  
 9 attendant right to acquire them, would be meaningless. Laws, like section 613.10(g), that prohibit  
 10 law-abiding citizens from purchasing protected arms are at odds with the Second Amendment,  
 11 regardless of whether they directly restrict the possession of those arms. *See Bateman v. Perdue*,  
 12 No. 5:10-265, 2012 WL 3068580, at \*4 (E.D. N.C. Mar. 29, 2012)

13 Section 613.10(g) plainly restricts Plaintiffs’ fundamental rights by banning the sale of  
 14 ammunition in “common use” for self-defense and by banning civilian purchases of ammunition  
 15 that does not “serve a sporting purpose,” regardless of its use for self-defense.

16 **a. The City’s Ban on the Commercial Sale of Ammunition in**  
 17 **“Common Use” for Lawful Purposes Cannot Survive Judicial**  
**Review Under Any Test**

18 The City’s ban on the sale of expanding and/or fragmenting ammunition broadly restricts  
 19 the sale of ammunition commonly used by law-abiding residents for self-defense. The City can  
 20 provide neither historical basis nor legitimate justification for the restriction, rendering the law  
 21 invalid under both *Heller’s* scope-based analysis and any means-end test consistent with *Heller*.

22 **i. The City’s Ban on the Sale of Expanding and/or**  
 23 **Fragmenting Ammunition Is Categorically Invalid**  
**Under *Heller’s* Scope-Based Analysis**

24 In *Heller*, the Court found a ban on handguns, a class of weapons in “common use” for  
 25 self-defense in the home, categorically invalid despite the availability of long guns. *Heller*, 554  
 26 U.S. at 629. The Court held that “[i]t is enough to note . . . that the American people have  
 27 considered the handgun to be the quintessential self-defense weapon” and “a complete prohibition  
 28 on [its] use is invalid.” *Id.* Finding handguns to be commonly used for a lawful purpose (i.e., self-

1 defense) and banned by the challenged ordinance, the Court did not have to go any further. *Id.*

2 Here, section 613.10(g)(2)-(3) bans the sale of any ammunition “designed to expand . . .  
3 [or] fragment upon impact.” Like the class of arms at issue in *Heller*, i.e. handguns, this class of  
4 ammunition is in “common use” for lawful purposes including self-defense, *see* “Exs. B-X”  
5 attached to Barvir Decl. filed concurrently herewith. As such, the City cannot completely ban its  
6 sale and purchase. With its reduced risk of over-penetration and ricochet, and its ability to bring  
7 down a violent aggressor with fewer shots fired, the prohibited ammunition is especially preferred  
8 over fully-jacketed ammunition in densely-populated areas.<sup>11</sup> Such ammunition is common  
9 throughout the nation and it is widely available in every state, there being no statewide ban on its  
10 sale or possession in California or elsewhere.<sup>12</sup> And it is no secret that civilians who own firearms  
11 for self-defense regularly purchase the ammunition at issue for use in self-defense emergencies.  
12 Indeed, such ammunition is regularly marketed for just that purpose. (*See* “Exs. T-X” attached to  
13 Barvir Decl. filed concurrently herewith.) It is indeed the “quintessential” self-defense  
14 ammunition. The City cannot credibly claim that ammunition both sold and possessed on a  
15 widespread basis by civilians for self-defense is not in “common use” for lawful purposes.<sup>13</sup>

16 In short, section 613.10(g) flatly prohibits the sale of ammunition in “common use” for  
17

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18 <sup>11</sup> Experts cite many advantages of expanding bullets over fully-jacked ammunition: (1) reduced  
19 ricochet, (2) reduced over-penetration of target and building materials, and (3) ability to take  
20 down subject in fewer shots. *See e.g.*, Clifford Krauss, *Experts Support Hollow Point Bullets*,  
21 N.Y. Times, Mar. 6, 1997 (attached as “Ex. C” to Barvir Decl. filed concurrently herewith) (“[the  
22 hollow point bullet] rarely ricochets or penetrates an object, thereby lessening the possibility of  
23 hitting anyone other than the target”); Stephen J. Lynton & Alfred E. Lewis, *More Powerful  
24 Ammo Studied By D.C. Police*, Wash. Post, Nov. 5, 1976 at A1, A4 (attached as “Ex. K” to Barvir  
25 Decl. filed concurrently herewith) (“you can neutralize the individual with a minimum number of  
26 shots”).

27 <sup>12</sup> New Jersey remains an outlier, regulating the carry of hollow nose bullets. N.J. Stat. Ann. §  
28 2C:39-3(f),(g). But even that statute does not ban the sale or possession of such ammunition.

<sup>13</sup> The self-defense interests of police in using this ammunition are no different than those of  
civilians. If anything, a civilian’s needs for effective self-defense ammunition are *more* acute.  
Hollow point ammunition allows the defensive shooter to bring down a target with fewer shots  
fired. Lynton & Lewis, *supra* note 11. This is crucial for civilians who are less likely than an  
officer to have backup support for taking down an agressor.

1 self-defense. While the City may be able to regulate ammunition sales to a degree, this far-  
2 reaching ban on the sale of common self-defense ammunition to law-abiding residents goes too  
3 far, directly conflicting with conduct protected by the right to engage in self-defense, “ ‘the *central*  
4 *component*’ of the Second Amendment . . . .” *McDonald*, 130 S. Ct. at 3036, 3048.

5 Under *Heller*’s analysis, the City must establish that our nation’s history and traditions  
6 support its flat ban on the sale of arms commonly used for self-defense. Plaintiffs submit that the  
7 City cannot meet its burden, rendering the City’s ban categorically invalid. And Plaintiffs are  
8 likely to succeed on the merits.

9 **ii. The City’s Ban on the Sale of Expanding and/or**  
10 **Fragmenting Ammunition Fails Under Any Level of**  
11 **Heightened Scrutiny**

12 Even if the Court applies a means-end analysis, section 613.10(g) still fails because there is  
13 no logical fit between the City’s ban and any interest the City may claim. And in no way is the  
14 City’s law “narrowly tailored” to those ends. Under the guise of an interest in “public safety,” the  
15 City bans the sale of expanding and/or fragmenting ammunition. By barring access to expanding  
16 and/or fragmenting ammunition, the law promotes the use of fully-jacketed ammunition –  
17 ammunition that is *more* dangerous to bystanders and neighbors in urban settings. And it  
18 eliminates access to ammunition designed to prevent ricochet and the over-penetration of targets  
19 or building materials, notorious characteristics of the fully-jacketed round. Krauss, *supra* note 11  
20 (quoting New York Medical Examiner, Dr. Charles Hirsch, “[Hollow points] are much less likely  
21 to pierce through a person, a wall, a car or other object than are fully-jacketed bullets. I think they  
22 are safer”). The use of fully-jacketed ammunition thus *increases* the likelihood that shots will pass  
23 through a target or objects behind the target. Expanding and/or fragmenting ammunition reduces  
24 that risk, making the public more safe, not less.

25 Further, the City can advance no legitimate reason (or even a rational explanation) why the  
26 government may ban the sale of protected arms despite being precluded from banning the  
27 possession of those same protected arms. And the City’s blanket sales prohibition is in no way  
28 sufficiently tailored to its stated public safety objectives. *See Reno*, 507 U.S. at 301-02; *Bd. of*  
*Trustees of State Univ. of N.Y.*, 492 U.S. at 480. Ultimately, the City’s ammunition ban represents

1 a policy choice as to the types of protected arms it desires its residents to use. But, as *Heller* made  
 2 clear, such policy choices are off the table when considering commonly used, constitutionally  
 3 protected, firearms and ammunition. *See* 554 U.S. at 636.

4 Moreover, governmental interests in banning handguns are virtually identical to the City's  
 5 purported interests in banning hollow-point ammunition – to decrease violent injuries caused by  
 6 handguns, whether through criminal misuse, accidents, or suicides through decreased availability  
 7 of such arms.<sup>14</sup> Despite these interests, the Supreme Court in *Heller* found the Districts' handgun  
 8 ban unconstitutional – making clear that even if the Court *had* adopted a means-end standard of  
 9 review, that the City's handgun ban would be unconstitutional under any test. *Id.* at 628-29. The  
 10 City's ammunition ban is similarly invalid.

11 **C. The City's Ban on the Sale of "Ammunition that Does Not Serve a Sporting  
 12 Purpose" Cannot Survive Judicial Review, Under Any Test**

13 The City's ammunition ban is wholly inconsistent with the mandates of the Second  
 14 Amendment and its "central component": individual self-defense. *McDonald*, 130 S. Ct. at 3036.  
 15 Moreover, as explained above, the Second Amendment protects the right to acquire firearms and  
 16 ammunition "in common use" for lawful purposes – period. The City cannot impose additional  
 17 "constitutional" conditions by requiring that commonly used ammunition *also* be used for some  
 18 City-recognized "sporting purpose" before Plaintiffs have the right to acquire it.

18 **1. The City's "Sporting Purposes"-Based Ammunition Ban Is  
 19 Categorically Invalid Under *Heller's* Scope-Based Analysis**

20 There is simply no squaring the right to acquire firearms and ammunition for self-defense  
 21 purposes with section 613.10(g)'s ban on the sale (and purchase) of ammunition that "does not  
 22 serve a sporting purpose." While the City's ordinance fails to define "sporting purpose," it is clear  
 23 that whatever recreational or competitive activities are covered by the City's "sporting purpose"  
 24 qualification, defending oneself from violent crime in the home is not among them. Self-defense is

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25 <sup>14</sup> The District of Columbia advanced these interests in support of its handgun ban in *Heller*,  
 26 554 U.S. at 634, and the City itself advanced similar interests when it instituted its own handgun  
 27 ban. Proposition H, as approved by voters, Gen. Elec. (November 8, 2005) §§ 1-3, invalidated by  
 28 *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895 (Cal. App. 2008) (attempting  
 to justify ban because "handgun violence is a serious problem" and because handguns contributed  
 to 67% of firearms-related injuries and deaths).

1 not a sport. Neither is militia duty, for that matter. Unless the City can show that all commonly  
2 used “self-defense ammunition” also serves a “sporting purpose,” the provision necessarily  
3 restricts conduct protected by the Second Amendment. Thus, the first prong of *Heller’s*  
4 scope-based analysis is satisfied. That being the case, it is the City’s responsibility to show some  
5 textual, historical, or traditional support for banning the sale of “ammunition that does not serve a  
6 sporting purpose” to law-abiding citizens. None appears in *Heller* or *McDonald*. Plaintiffs submit  
7 there is none and that the “sporting purpose” provision is categorically invalid. Plaintiffs are thus  
8 likely to succeed on the merits.

9 **2. The City’s “Sporting Purposes”-Based Ammunition Ban Fails Under**  
10 **Any Level of Heightened Scrutiny**

11 Even if the Court applies a means-ends test to City’s “sporting purposes”-based ban, the  
12 analysis ends quickly under any standard of review as there is no legitimate interest in restricting  
13 firearms use to “sporting purposes.” The City’s interest cannot be public safety. There is no logical  
14 reason to think the public would be safer if gun owners use only “sporting” ammunition.

15 The nonsensical nature of the ban is revealed when considering the ammunition it allows  
16 and that which it ostensibly prohibits. Under the City’s law, ammunition commonly used to hunt  
17 elk and bears is legal. Yet the City prohibits sales of the smallest caliber ammunition if it is not  
18 sufficiently used for “sporting purposes.” The City cannot credibly argue that its interest in public  
19 safety is served by an ordinance that permits residents to purchase ammunition so powerful it is  
20 used to kill wild animals weighing more than 1000 pounds, but not ammunition of the smallest  
21 caliber – just because it isn’t sufficiently used in “sporting” activities.

22 In short, section 613.10(g)(1) cannot survive any level of scrutiny and Plaintiffs are likely  
23 to succeed on the merits of their Second Amendment challenge to the provision. It serves no  
24 compelling interest, nor a substantial one – and it is not tailored to serve any such interests. In fact,  
25 to the extent the law is intelligible, it is irrational because it bans the sale of ammunition  
26 commonly used for *self-defense* if it does not also satisfy the City’s “*sporting purposes*” condition.

27 But, as with the City’s expanding and fragmenting ammunition sales ban, such means-end  
28 analysis is unnecessary because the City’s “sporting purpose” provision so clearly conflicts with  
the core constitutional guarantee of armed self-defense in the home – without any historical

1 support.

2 **D. Section 613.10(g) Is Void for Vagueness**

3 The due process clause guarantees individuals the right to “fair notice” of whether their  
4 conduct is prohibited by law. *Colautti v. Franklin*, 439 U.S. 379, 390-91 (1979). A law must fail  
5 for vagueness unless it first “give[s] the person of ordinary intelligence a reasonable opportunity to  
6 know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S.  
7 104, 108 (1972). Second, the law must provide “explicit standards” for the application of the law  
8 to prevent “arbitrary and discriminatory enforcement.” *Id.* Further, laws that abut upon  
9 constitutionally protected freedoms demand the greatest clarity. *Bagget v. Bullitt*, 377 U.S. 360,  
10 372 (1964) (“[T]he vice of unconstitutional vagueness is further aggravated where . . . the statute  
11 in question *operates to inhibit the exercise of individual freedoms affirmatively protected by the*  
12 *Constitution.*”). Although past Ninth Circuit jurisprudence suggests that the most exacting  
13 vagueness review for laws implicating constitutional conduct should be limited to the free speech  
14 context, *Hotel & Motel Ass’n of Oakland v. City of Oakland* 344 F.3d 959 (9th Cir. 2003), the  
15 Second Amendment has only recently been confirmed as protecting individual rights – freedoms  
16 that are indeed “fundamental to our system of ordered liberty”, and deserving of protections  
17 similar to the First Amendment, *Heller*, 554 U.S. at 595, 634-35; *McDonald*, 130 S. Ct. at 3042.  
18 To date, the courts have not yet had occasion to apply a more exacting review to a Second  
19 Amendment challenge. This case presents that opportunity.

20 Here, the City’s ban plainly abuts upon constitutionally protected conduct, i.e., the  
21 commercial purchase of ammunition, thus warranting heightened vagueness review. Regardless,  
22 the City’s approach to banning ammunition is unconstitutional under any standard, as it is vague  
23 in all of its applications. Without further clarification or guidelines, it is impossible for anyone  
24 (retailers, law enforcement, or otherwise) to know what ammunition is prohibited.

25 The question of what activities the City intended to qualify as a sporting purpose, and what  
26 frequency or recency of use in these activities is required for the ammunition to “serve” such  
27 purposes is unknown, and is not clarified by the Police Code or court decisions to Plaintiffs’  
28 knowledge. And even if retailers and law enforcement were to guess at these answers, they would

1 then have to undertake the painstaking task of researching the ammunition in question to  
2 determine whether any given ammunition (of which there are literally thousands of varieties)  
3 would actually satisfy the criteria of the “serves no sporting purpose” language.

4 Accordingly, the “sporting purposes” ban fails to provide notice of the ammunition that it  
5 bars, and Plaintiffs are likely to succeed on the merits of their facial vagueness claim.

6 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY**  
7 **INJUNCTION IS NOT ISSUED**

8 Generally, once a plaintiff has shown a likelihood of success on the merits of a  
9 constitutional claim, irreparable harm is presumed. 11A Charles Alan Wright et al., Federal  
10 Practice and Procedure § 2948.1 (2d ed. 1995) (“When an alleged deprivation of a constitutional  
11 right is involved, most courts hold that no further showing of irreparable injury is necessary.”)  
12 This is particularly true in the First Amendment context. *See, e.g., Elrod v. Burns*, 427 U.S. 347,  
13 373 (1976). The violation of the First Amendment right is frequently presumed to cause  
14 irreparable harm because of “the intangible nature of the benefits flowing from the exercise of  
15 those rights; and the fear that, if those rights are not jealously safeguarded, persons will be  
16 deterred, even if imperceptibly, from exercising those rights in the future.” *Miles Christi Religious*  
17 *Order v. Twp. of Northville*, 629 F.3d 533, 548 (6th Cir. 2010). Importing this  
18 “irreparable-if-only-for-a-minute” concept to cases involving other constitutional rights, federal  
19 courts have routinely held that a deprivation of constitutional rights is irreparable harm per se.  
20 *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (citing *Associated Gen.*  
21 *Contractors v. Coal. For Econ. Equity*, 950 F.2d, 1401, 1412 (9th Cir.1991)). And the Supreme  
22 Court has made clear the Second Amendment should be afforded the same respect granted the  
23 First. *See McDonald*, 130 S. Ct. at 3043-44.

24 Accordingly, the Court of Appeals for the Seventh Circuit has recognized that because  
25 “[t]he Second Amendment protects . . . intangible and unquantifiable interests” similar to those  
26 protected by the First Amendment, “[i]nfringements of this right cannot be compensated by money  
27 damages.” *Ezell v. Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). And so, in the Second  
28 Amendment context, “the plaintiffs’ harm is properly regarded as irreparable and having no  
adequate remedy at law.” *Id.* at 700.

1 With the respect due to the Second Amendment and because of the ongoing deprivation of  
2 Plaintiffs' fundamental rights, irreparable harm should be presumed. Because Plaintiffs have  
3 established they are likely to succeed on the merits of their constitutional challenges, they have  
4 presumptively demonstrated irreparable harm and preliminary injunction is appropriate.

5 **III. THE BALANCE OF THE EQUITIES TIPS SHARPLY IN PLAINTIFFS' FAVOR**  
6 **AND PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST**

7 The Ninth Circuit has held that when plaintiffs challenge government action that affects  
8 the general public seeking to exercise constitutional rights, as Plaintiffs do here, "the balance of  
9 equities and the public interest thus tip sharply in favor of enjoining the ordinance." *Klein v. City*  
10 *of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). And the City "cannot reasonably assert that  
11 [it] is harmed in any legally cognizable sense by being enjoined from constitutional violations."  
12 *Haynes v. Office of the Attorney General Phill Kline*, 298 F. Supp. 2d 1154, 1160 (D. Kan. 2004)  
(citing *Zepeda v. U.S. Immig. & Naturaliz. Serv.*, 753 F.2d 719, 727 (9th Cir. 1983)).

13 Here, Plaintiffs seek to vindicate the fundamental, constitutional rights of all San Francisco  
14 residents. And, as the Ninth Circuit has made clear, "*all* citizens have a stake in upholding the  
15 Constitution" and have "concerns [that] are implicated when a constitutional right has been  
16 violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (emphasis added). Not only  
17 are Plaintiffs' rights at stake in this action, but so are the rights of anyone wishing to engage in  
18 conduct that is protected by the Second Amendment but prohibited by the City's laws.

19 Even absent the constitutional dimension of this lawsuit, the balance of harms tips sharply  
20 in Plaintiffs' favor. As explained above, the City can establish no harm to its interests as neither  
21 law actually serves the public interest or increases public safety. To the contrary, government  
22 action impeding law-abiding citizens' ability to keep an operable firearm for immediate self-  
23 defense and limiting access to common self-defense ammunition makes the public *less* secure.

24 As explained above, and described in Plaintiffs' declarations, section 4512 necessarily  
25 impedes access to operable handguns, putting residents at *greater* risk when faced with a self-  
26 defense emergency, the consequences of which can be deadly. (*See* Decls. of Espanola Jackson,  
27 Paul Colvin, Larry Barsetti, Thomas Boyer, David Golden, and Noemi Margaret Robinson Supp.  
28 Mot. Prelim. J.) And section 613.10(g) limits access to commonly used and effective self-defense



1 ammunition, while promoting the purchase and use of fully jacketed ammunition known to over-  
2 penetrate targets and ricochet, placing bystanders and neighbors at *greater* risk of harm than that  
3 posed by the banned ammunition.

4 Further, the City has suggested that there is no threat of harm from prosecution and thus no  
5 controversy warranting injunctive relief from sections 4512 and 613.10(g) because the City has  
6 never prosecuted any person under those laws. (*See* Mot. Dismiss [Doc. 9] 9:13-15, July 9, 2009;  
7 Decl. Maria Protti Supp. Mot. Dismiss [Doc. 11] ¶¶ 6-8.) While there is a presumption that the  
8 City enforces its laws, if the City's position is that it does not, then the requested injunction will  
9 cause it no harm. It will merely maintain what the City claims is the status quo.

10 On the other hand, granting a preliminary injunction here will end the ongoing violation of  
11 Plaintiffs' Second Amendment rights to defend themselves in the sanctity of their homes, allowing  
12 them the freedom to exercise their rights without fear of prosecution. Plaintiffs will no longer be  
13 forced to choose between exercising those rights and obeying the City's laws.

14 As such, the balance of the equities tips sharply in Plaintiffs' favor and preliminary  
15 injunction is in the public interest.

#### 16 CONCLUSION

17 Based on the foregoing, Plaintiffs ask that their motion for a preliminary injunction be  
18 granted and an order issued enjoining the City and its agents, employees, officers, and  
19 representatives, including defendants the Mayor of San Francisco and the Chief of Police of the  
20 San Francisco Police Department, from enforcing San Francisco Police Code sections 4512 and  
21 613.10(g).

22 Dated: August 30, 2012

MICHEL & ASSOCIATES, P.C.

23  
24 /s/ C.D. Michel

25 C. D. Michel  
26 Attorneys for Plaintiffs  
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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

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

Plaintiffs

vs.

CITY AND COUNTY OF SAN )  
FRANCISCO, THE MAYOR OF SAN )  
FRANCISCO, AND THE CHIEF )  
OF THE SAN FRANCISCO POLICE )  
DEPARTMENT, in their official capacities, )  
and DOES 1-10, )

Defendants.

IT IS HEREBY CERTIFIED THAT:

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

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

**NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION;  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

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

Wayne Snodgrass, Deputy City Attorney  
Christine Van Aken, Deputy City Attorney  
Office of the City Attorney  
1 Drive Carlton B. Goodlett Place  
City Hall, Room 234  
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 30, 2012.

/s/ C.D. Michel  
C. D. Michel  
Attorneys for Plaintiffs