IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| LEONARD FYOCK, et al.,<br><br>Plaintiffs/Appellants<br><br>vs.<br><br>CITY OF SUNNYVALE, et al.,<br><br>Defendants/Appellees. | No. 14-15408<br>U.S. District Court No. CV 13-05807-RMW |
|---|---|

# MOTION OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF AFFIRMANCE

On Appeal from the United States District Court
for the Northern District of California

The Honorable Ronald M. Whyte

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This Motion is submitted jointly by the City and County of San Francisco and the City of Los Angeles. Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, movants respectfully ask this Court for leave to file the proposed *amicus* brief accompanying this motion.

## INTERESTS OF PROPOSED *AMICI CURIAE*

The City and County of San Francisco is a local government entity. Its police officers and citizens have been victimized by shooters using large-capacity magazines, perhaps most notoriously in the 101 California Street massacre in 1993, when Gian Luigi Ferri killed nine and wounded six at the law offices of Pettit & Martin. In response to recent mass shootings in Newtown, Connecticut and Tucson, Arizona, San Francisco prohibited the possession of magazines with capacity to hold more than 10 bullets.[1] San Francisco's measure is nearly identical to the Sunnyvale ban on large-capacity magazines, or LCMs, at issue in this case. If this Court determines that plaintiffs Leonard Fyock *et al*. (collectively Fyock) are likely to succeed on the merits of their claims against Sunnyvale, then it is nearly certain that San Francisco's LCM ban would fail as well. Moreover, if Fyock's contentions are correct that firearms in common use generally may not be prohibited or restricted, then many familiar gun control laws, such as California's restriction on purchasing assault weapons, are called into doubt. State and local governments will be hard-pressed to regulate dangerous but popular weapons even in light of compelling evidence that their harms greatly outweigh their self-defense benefits.

[1] This ordinance, San Francisco Police Code § 619, is available in the Addendum to appellants' opening brief at page 88.

The City of Los Angeles is a charter city with more than four million residents. As a large metropolitan city, the City of Los Angeles has suffered the severe impacts of gun violence: serious injuries and loss of life of its residents, threats to the security of its public safety personnel, enormous health care costs, other related economic losses, and an overall decline in the public's sense of security. Most recently, a gunman using a semi-automatic rifle loaded with a 30-round large-capacity magazine, opened fire at a Los Angeles International Airport terminal, killing a Transportation Security Administration agent and wounding several others. The shooter had five additional 30-round large-capacity magazines and hundreds of ammunition in his carrying bag.

Over the years, the City of Los Angeles has enacted various firearm-related and ammunition-related ordinances to address the public safety threats posed by gun violence in the city. Last year, the Los Angeles City Council found that large capacity magazines pose a daily threat to the City's residents and police officers. With the goal of improving public safety, the Council requested the Office of the City Attorney to prepare a draft ordinance prohibiting the possession of large-capacity ammunition magazines in the City. A draft ordinance almost identical to Sunnyvale's ban on large-capacity magazines will be transmitted to the City Council for its consideration within the next two weeks. Thus the City of Los Angeles has a critical interest in ensuring that it retains the flexibility to minimize the risks of large-capacity magazines, and to enhance the public safety of its residents by enacting reasonable regulations, such as its proposed forthcoming ordinance banning large-capacity magazines.

**REASONS WHY *AMICI'S* PARTICIPATION IS DESIRABLE**

Participation of a wide range of *amici* is desirable in this case because the proper interpretation of the Second Amendment has immense public safety impacts. As retired Justice O'Connor recently wrote for the Second Circuit, such cases "require a delicate balance between individual rights and the public interest." *Osterweil v. Bartlett*, 706 F.3d 139, 143 (2d Cir. 2013). "The regulation of firearms is a paramount issue of public safety, and recent events in this circuit are a sad reminder that firearms are dangerous in the wrong hands." *Id.* (citing James Barron, Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer, *N.Y. Times*, Dec. 15, 2012, at A1.). That Second Amendment cases are of great public importance is demonstrated by the fact that four *amicus curiae* briefs were filed in support of reversing the district court's order here. Allowing San Francisco and Los Angeles to participate as well is warranted in a case of this import.

Moreover, the brief that San Francisco and Los Angeles propose to submit does not duplicate the arguments of any brief already filed. While the City of Sunnyvale's brief argues that intermediate scrutiny is the appropriate standard of judicial scrutiny to apply to Sunnyvale's prohibition on large-capacity magazines, Dkt. 44-1 at 18-22, the proposed *amici curiae* brief of San Francisco and Los Angeles offers a rebuttal to Fyock's argument about what follows from the district court's finding that LCMs are in common use.

Finally, San Francisco and Los Angeles have a unique perspective in this case. Together, they represent the interests of nearly 5.5 million Californians. As large urban areas where gun crime is all too frequent, they have devised legislative responses to gun crime that will be jeopardized if this Court reverses the district court's order.

**FYOCK'S OBJECTION TO SAN FRANCISCO'S PARTICIPATION IS UNWARRANTED**

San Francisco sought Fyock's consent to the filing of an *amicus curiae* brief. Fyock's counsel stated,

> "While we would normally consent to an amicus filing, we are unable to do so in this instance given that San Francisco is already litigating the defense of this case and has entered into a join-defense [*sic*] agreement with the City of Sunnyvale, as reflected in the City's correspondence of May 5, 2014 to our office."

San Francisco respectfully submits that its participation in separate litigation challenging the constitutionality of San Francisco's LCM ban is irrelevant to whether it can properly participate as an *amicus* in this case. In *San Francisco Veteran Police Officers Association v. City & County of San Francisco*, N.D. Cal. Case No. C 13-05351 WHA, plaintiffs challenged that ban but dismissed their case after the district court denied their motion for summary judgment. *See* No. C 13-05351, Dkt. Nos. 59, 62. San Francisco's participation in that separate litigation does not make it a party to this case.

Nor does the fact that San Francisco has entered into a joint defense agreement with the City of Sunnyvale, enabling its counsel to communicate about matters of common interest without destroying the attorney-client or work product privileges, transform San Francisco into a party in the present case. It is unsurprising that two cities who are defending very similar laws should have an interest in communicating confidentially about matters of strategy. But that does not make them they same party; and that that does not give the City of Sunnyvale an identical interest with San Francisco or Los Angeles, which are much larger jurisdictions with extensive experience in firearms regulation. Moreover, as San Francisco and Los Angeles attest in their Federal Rule of Appellate

Procedure 29(c) statement, their counsel are the sole authors of the brief they propose to file, and they are the sole source of the funding for the preparation and submission of their brief. Their participation as *amici* is wholly consistent with the appellate rules.

In any event, none of the concerns Fyock's counsel raised are present with respect to the City of Los Angeles.

## CONCLUSION

For the reasons offered above, proposed *amici* the City and County of San Francisco and the City of Los Angeles respectfully request that this Court grant leave to file a brief in support of affirmance.

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Dated: June 23, 2014

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 23, 2014.

**MOTION OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF AFFIRMANCE**

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Executed June 23, 2014, at San Francisco, California.

s/*Pamela Cheeseborough*
Pamela Cheeseborough

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## INTERESTS OF *AMICI CURIAE*

The City and County of San Francisco is a local government entity. Its police officers and citizens have been victimized by shooters using large-capacity magazines, perhaps most notoriously in the 101 California Street massacre in 1993, when Gian Luigi Ferri killed nine and wounded six at the law offices of Pettit & Martin. In response to recent mass shootings in Newtown, Connecticut and Tucson, Arizona, San Francisco prohibited the possession of magazines with capacity to hold more than 10 bullets.[1] San Francisco's measure is nearly identical to the Sunnyvale ban on large-capacity magazines, or LCMs, at issue in this case. If this Court determines that plaintiffs Leonard Fyock *et al*. (collectively Fyock) are likely to succeed on the merits of their claims against Sunnyvale, then it is nearly certain that San Francisco's LCM ban would fail as well. Moreover, if Fyock's contentions are correct that firearms in common use generally may not be prohibited or restricted, then many familiar gun control laws, such as California's restriction on purchasing assault weapons, are called into doubt. State and local governments will be hard-pressed to regulate dangerous but popular weapons even in light of compelling evidence that their harms greatly outweigh their self-defense benefits.

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[1] This ordinance, San Francisco Police Code § 619, is available in the Addendum to appellants' opening brief at page 88.

round large-capacity magazine, opened fire at a Los Angeles International Airport terminal, killing a Transportation Security Administration agent and wounding several others. The shooter had five additional 30-round large-capacity magazines and hundreds of ammunition in his carrying bag.

Over the years, the City of Los Angeles has enacted various firearm-related and ammunition-related ordinances to address the public safety threats posed by gun violence in the city. Last year, the Los Angeles City Council found that large capacity magazines pose a daily threat to the City's residents and police officers. With the goal of improving public safety, the Council requested the Office of the City Attorney to prepare a draft ordinance prohibiting the possession of large-capacity ammunition magazines in the City. A draft ordinance almost identical to Sunnyvale's ban on large-capacity magazines will be transmitted to the City Council for its consideration within the next two weeks. Thus the City of Los Angeles has a critical interest in ensuring that it retains the flexibility to minimize the risks of large-capacity magazines, and to enhance the public safety of its residents by enacting reasonable regulations, such as its proposed forthcoming ordinance banning large-capacity magazines.

*Amici curiae* therefore submit this brief to explain why the test that Fyock urges for evaluating the constitutionality of firearms restrictions—that firearms that are in common use may never or almost never be prohibited, regardless of whether the prohibition meaningfully impairs armed self-defense—is a distortion of the holding of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and is irreconcilable with this Circuit's precedents.

Fyock did not give consent for *amici* to file this brief, and thus *amici* concurrently submit a motion for leave to file it.

## RULE 29(C) STATEMENT

No party's counsel authored this brief in whole or in part. No party or its counsel contributed money to fund the preparation or submission of this brief. No person other than *amici curiae* contributed money to fund the preparation or submission of this brief.

## ARGUMENT

> "THE COURT: So does it matter that small school children are massacred every week or every month with somebody who has a large magazine and maybe that is going to happen in San Francisco? Does that factor in here somewhere?
>
> "[PLAINTIFFS' COUNSEL]: That's a horrifying proposition, and we're seeing it with alarming regularity, and we continue to see that. **But honestly, the fact that a criminal may misuse these firearms and someone may die isn't something that . . . should be weighed when we're talking about this constitutional right**.
>
> "The Supreme Court and other circuit have held in accord, have suggested[,] that **body counts are not going to be what matters**."
>
> Transcript of Hearing, *San Francisco Veteran Police Officers v. City & County of San Francisco*, No. C 13-05351-WHA (Feb. 11, 2014) (emphasis added) (available in Appendix at App. 3-App. 4).

That remarkably unvarnished argument was offered by Fyock's counsel in a case involving San Francisco's ban on large-capacity magazines, a ban nearly identical to Sunnyvale's. And it is essentially the same argument that Fyock advances here: "Arms are either protected, or they are not." Opening Br. at 15. If a particular firearm is in common use, it cannot be prohibited, no matter how horrifying the consequences may be.

That extreme categorical view of the Second Amendment—where the "common use" test is the beginning and end of the Second Amendment inquiry—

has been rejected by every court to consider bans on large-capacity magazines, assault weapons, and similar bans. And rightly so. As this Circuit has recognized, the touchstone of the Second Amendment is self-defense. Gun laws that permit effective self-defense in the home, even if they limit an individual's choice of guns or ammunition, are subject only to intermediate scrutiny, not the categorical invalidation or strict scrutiny that Fyock proposes. The district court's analysis of Sunnyvale's ordinance was correct under controlling Circuit precedent, and this Court should affirm its decision.

## I. Fyock's Version Of The Common-Use Test Is Unsupported By *Heller* And Irreconcilable With This Circuit's Cases.

Fyock contends that, because LCMs are in common use, Sunnyvale's prohibition on LCMs is either categorically invalid or must be evaluated only under strict scrutiny—regardless of the triviality of the burden the LCM ban imposes on the ability of Sunnyvale residents to defend themselves with firearms.

Fyock's argument distorts *Heller*, and it is irreconcilable with this Circuit's recent cases applying *Heller* to other firearms restrictions.

### A. Fyock Misreads *Heller*

Under the common-use test as Fyock would have it, it is almost never possible for the government to prohibit a particular firearm that is popular with gun owners, no matter how terrible the consequences. According to Fyock, because *Heller* invalidated the District of Columbia's handgun ban without applying any particular tier of scrutiny, 554 U.S. at 628-29, then *Heller* teaches that "a ban on a protected class of firearms necessarily violates the Second Amendment under any test," Fyock Br. at 20. If Fyock is correct that such laws are categorically invalid,

then there is no government justification at all that could pass muster. After all, as Fyock puts it, the Second Amendment "necessarily takes some policy choices off the table." And it apparently puts those policy choices exclusively in the hands of gun purchasers, since "[l]egislative diktat to the contrary cannot override public choice." Fyock Br. at 14-15.

This absurd test is a distortion of *Heller*'s teaching. Fyock's argument errs because it conflates *Heller*'s common-use test—which determines only whether possession of a firearm receives any protection *at all* under the Second Amendment—with what kind of scrutiny applies once possession of a particular firearm is held to be protected.

As this Court is well aware, *Heller* marked the Supreme Court's first recognition of an individual right to keep and bear arms. This holding comes in Section II of the Supreme Court's seminal 2008 opinion, 554 U.S. at 576-626. In Section III of that opinion, the Supreme Court turns to limitations on the Second Amendment right. "Like most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626. One "important limitation" on the right is that it extends only to weapons "'in common use at the time,'" not to "'dangerous and unusual weapons.'" *Id.* at 627 (first quotation from *United States v. Miller*, 307 U.S. 174, 179 (1939); second quotation from William Blackstone, 4 Commentaries on the Laws of England 148-49 (1769)[2]).

Finally, Section IV of *Heller* turns to the application of its rule to the Washington, D.C. handgun ban that Dick Heller challenged. In Section IV, the Supreme Court holds that a handgun ban is unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights"—

[2] Blackstone's text actually refers to "dangerous *or* unusual weapons." *See* Appendix at App. 6 (emphasis added).

*i.e*. any test other than rational basis. 554 U.S. at 628-29 & n.27. But that is not because handguns are in common use. Indeed, the words "common use" do not even appear in Section IV. Instead, that section emphasizes just how broad and unusual D.C.'s prohibition was: it banned "an entire class of 'arms'" and was more severe than all but a "[f]ew laws in the history of our Nation." 554 U.S. at 628-29. *Heller*'s Section IV also emphasizes the practical utility of handguns for self-defense in the home, noting that they are "the quintessential self-defense weapon" because of their size and ease of storage, their ready accessibility in the event an emergency, the fact that they can be used by many people regardless of upper body strength, and so on. *Id.* at 629. It was those attributes that compelled the Court to determine that D.C.'s handgun ban was unconstitutional, not the mere fact that handguns are in common use.

Large-capacity magazines simply do not share these attributes. Even if LCMs are in common use and thus within the scope of the Second Amendment's protection, a ban on LCMs does not deny Sunnyvale residents access to an entire class of arms, only to a subset of the numerous ammunition magazines that can be used to equip any semiautomatic handgun or long gun. Nor is Sunnyvale's ban especially unusual. California and several other states ban acquisition of LCMs by most people other than law-enforcement officers who do not own them already; while some states ban possession entirely.[3] Federal law banned the purchase of

[3] See Cal. Penal Code § 32310 (prohibiting acquisition or transfer of LCMs); 2013 Colo. Stats. H.B. 13-1224 (prohibits magazines with capacity to hold more than 15 rounds; grandfathers previously possessed magazines); 2013 Conn. Acts P.A. 13-3, § 23 (Reg. Sess.) (prohibits LCM possession except those owned prior to the ban and registered with state authorities); Haw. Rev. Stat. § 134-8(c) (prohibiting possession of LCMs capable of use with pistols); 2013 Md. Sess. Laws ch. 427, § 1 (prohibiting possession of magazines with more than 10 rounds); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131M (prohibiting sale or possession of LCMs); N.J. Stat. Ann. §§ 2C:39-1(y), 39-3(j) (prohibiting possession of magazines with capacity of more than 15 rounds except magazines grandfathered

new LCMs nationwide from 1994 to 2004, with no suggestion that this ban was unconstitutional. *See* Pub. L. 103-322, Sept. 13, 1994, 108 Stat. 1796, 1998-2000 (formerly codified at 18 U.S.C. § 922(w)). Finally, unlike handguns, LCMs are not "the quintessential self-defense weapon." Indeed, Fyock makes the remarkable admission that they probably are not used all that often in self-defense: He confesses that Sunnyvale's ban "may not often impact the ability of law-abiding citizens to defend themselves." Fyock Br. at 13. In short, LCMs share none of the features of handguns that led the Supreme Court to invalidate the District of Columbia's handgun ban.

### B. Under Ninth Circuit Precedent, Intermediate Scrutiny Applies Even If Large-Capacity Magazines Are In Common Use.

Fyock argues that even if Sunnyvale's LCM ban is not categorically invalid, then it must be subject to strict judicial scrutiny. But Fyock offers little justification for this claim. He relies on a supposed default rule that any interference with fundamental constitutional rights is subject to strict scrutiny, Fyock Br. at 25-27, and he falls back, once again, on his common-use arguments, claiming that the fact that "there are a number of reasons that millions of Americans possess magazines over ten rounds" should be reason enough for the Court to find Sunnyvale's ban to be a severe burden on the rights of gun owners, Fyock Br. at 28-30. Nowhere in this section of Fyock's brief is any argument that large-capacity magazines are particularly effective or useful for armed self-defense. Indeed, the only argument Fyock makes concerning self-defense is a vague slippery-slope claim, that if governments are permitted to prohibit one or

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under 1990 law); 2013 N.Y. Sess. Laws ch. 1, §§ 38, 41-b (prohibiting LCM possession; eliminating previous exceptions for grandfathered magazines).

another subset of arms, then eventually there will be nothing left of the right to bear arms. Fyock Br. at 15, 29.

Fyock's argument that strict scrutiny must be the test is foreclosed by this Court's precedent. Assuming that large-capacity magazines are in common use and thus that their possession receives some degree of Second Amendment protection, cases in this Circuit establish that the degree of judicial scrutiny a gun-control law receives depends on the severity of the law's burden on armed self-defense. If a challenged law "effect[s] a '*destruction* of the right'" to keep and bear arms, then it is "an infringement under any light." *Peruta v. County of San Diego*, 742 F.3d 1144, 1168 (9th Cir. 2014) (quoting *Heller*, 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616-17 (1840))) (emphasis added by *Peruta*).[4] But that approach is reserved "for the most severe cases." *Peruta*, 742 F.3d at 1168.

If the challenged law does not destroy the right to keep and bear arms, then the "level of scrutiny should depend on (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011)). "[I]f a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right," the court applies intermediate scrutiny. *Jackson v. City & County of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014).

[4] *Peruta*, which concerns the constitutionality of restrictions on carrying firearms in public, is the subject of a petition for rehearing en banc brought by putative intervenor the Attorney General of California. 9th Cir. Case No. 10-56971, Dkt Nos. 122-1, 122-2. *Peruta*'s companion cases, *Richards v. Prieto*, 9th Cir. Case No. 11-16255, and *Baker v. Kealoha*, 9th Cir. Case No. 12-16258, are also the subject of pending petitions for rehearing en banc. *See* Case No. 11-16255, Dkt. No. 72 (*Richards*); Case No. 12-16258, Dkt. No. 59 (*Baker*).

Contrary to Fyock's argument that the utility of one or another firearm for self-defense is not relevant to determining the severity of the burden, *Jackson* recognizes that this question is at the core of the burden inquiry. In that case, this Court upheld San Francisco's prohibition on the retail sale of hollow-point bullets by licensed firearms dealers in the city. 746 F.3d at 970. Plaintiffs in that case argued strenuously that hollow-point bullets were in common use, and thus that restricting them imposed a substantial burden on the right of self-defense. 746 F.3d at 968; Case No. 12-17803, Dkt. No. 8 at 43-46.[5] This Court rejected the argument, finding the burden less than substantial because "[t]here [was] no evidence in the record indicating that ordinary bullets are ineffective for self-defense." 746 F.3d at 968. And in any event, "[a] ban on the sale of certain types of ammunition does not prevent the use of handguns or other weapons in self-defense. The regulation in this case limits only the manner in which a person may exercise Second Amendment rights by making it more difficult to purchase some types of ammunition." *Id.*

Thus, *Jackson* teaches that the severity of a restriction on acquiring or possessing a particular gun or piece of ammunition is evaluated by reference to effective armed self-defense. There is no intrinsic right to possess a 15-round magazine, or an 11-round magazine, regardless of how popular these magazines are. Instead, the right is to keep and bear arms—not one particular firearm or another—for purposes of lawful self-defense. Restrictions that limit the choices of permissible arms may burden Second Amendment rights, but so long as the

[5] Page numbers refer to the document's internal pagination, not the ECF pagination.

remaining choices are effective for self-defense, such a burden is not substantial according to *Jackson*.[6]

Under that test, the district court here correctly found that "the Sunnyvale law's burden on the Second Amendment right is light." ER 11. Sunnyvale restricts only a subset of magazines, which have been banned from sale in California for twenty years, ER 12, and residents have "countless other handgun and magazine options to exercise their Second Amendment rights," ER 11. And, as Sunnyvale's evidence demonstrated, residents' remaining magazine choices for armed self-defense are more than sufficient. Sunnyvale permits magazines holding up to 10 bullets; most incidents of armed self-defense in the home involve only a couple of shots if any. SER 168-70. Indeed, as noted above, Fyock admits that the large capacity of prohibited magazines are not often needed in self-defense emergencies. Fyock Br. at 13. And he confesses that determining the efficacy of one magazine or another for self-defense is an issue "the court is ill-equipped to deal with." *Id*. Such policy judgments are inherently legislative, and Sunnyvale's voters overwhelming supported the policy judgment that standard-capacity magazines holding 10 or fewer rounds would be sufficient for self-defense. Fyock offers no reason to reject that judgment.[7]

Thus, even assuming LCMs are in common use, intermediate scrutiny is the proper test for Sunnyvale's LCM ban. That conclusion is consistent with the conclusions of every federal court to have addressed LCM bans or similar bans

[6] The *Jackson* plaintiffs have stated that they intend to seek rehearing or rehearing en banc of that decision. Case No. 12-17803, Dkt. No. 68.

[7] It should go without saying that since Sunnyvale's LCM ban does not lay a heavy burden on Second Amendment rights, then it does not fall under *Peruta*'s holding, which invalidates only those laws that destroy Second Amendment rights. 742 F.3d at 1167-68, 1171. Fyock admits as much: "To be clear, Fyock does not allege that the Ordinance destroys his right to use a firearm for self-defense." Fyock Br. at 22.

since *Heller*. *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011) ("*Heller II*")[8]; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, – F. Supp. 2d –, 2013 WL 6909955, at *13 (W.D.N.Y. Dec. 31, 2013); *Kampfer v. Cuomo*, No. 6:13-cv-82 (GLS/ATB), 2014 WL 49961, at *5-*6 (N.D.N.Y. Jan. 7, 2014); *Tardy v. O'Malley*, Civil No. CCB-13-2861, Order & TRO Hr'g Tr. at 66-71 (D. Md. Oct. 1, 2013). This Court should likewise affirm the district court's order.

## II. Fyock's Common-Use Test Would Impede Sensible Regulation

If Fyock's views of the common-use test are adopted by this Court, the regulatory consequences will be dramatic.

Because Fyock treats the popularity of LCMs as the sole measure of the extent of their constitutional protection, he sweeps aside many other factors that most courts have found relevant in Second Amendment cases. For example, he says that the Court should not consider the fact that oversized magazines are often used by criminals, such as mass shooters who seek to kill as many people as possible without reloading. Fyock Br. at 46. That characteristic is off the table for regulation, since "that is the primary characteristic that compels millions of upstanding Americans to choose [LCMs] for the core, lawful purpose of self-defense." *Id.* Nor should courts even consider the fact that LCMs are disproportionately used in the murders of police officers—in Fyock's view, such evidence is simply irrelevant to whether LCMs may be restricted. *Id.* at 47-48.

In short, under this version of the common-use test, once a firearm reaches some level of commercial popularity, it can essentially no longer be regulated, regardless of the consequences. As gun manufacturers market more and more

[8] In fact, *Chovan* cited *Heller II* with approval in announcing this Circuit's test for the constitutionality of gun regulations. *Chovan*, 735 F.3d at 1138 & n.5.

powerful weapons to civilian markets—a trend that Fyock admits when he says that "[c]ivilians have historically modeled their choice of firearms on what police carry," Fyock Br. at 8 n.7[9]—governments must choose whether to ban them immediately when they are introduced, or lose the power to regulate them at all.

Fyock's test also destroys the ability of the states to experiment with different firearms regulations, instead forcing them into lockstep regardless of their different needs or the different views of their democratically elected legislators. That much is evident from this case itself. If Fyock succeeds here, then there can be no doubt that California's decades-old prohibition on the acquisition of large-capacity magazines, Cal. Penal Code § 32310, will fall too—after all, a ban on buying LCMs works exactly like a prohibition for anybody who does not already have one. The popularity of LCMs in other states will trump California's longstanding legislative judgment, and no state will have the power to continue to prohibit an item that people in other states purchase in sufficient numbers.

And other restrictions besides California's (and San Francisco's) LCM restrictions would fall if Fyock's views are adopted. Assault weapons sold in this country, for instance, are a significant share of all long gun sales, and the D.C. Circuit has found that they are in common use. *See Heller II*, 670 F.3d at 1261. Laws prohibiting the sale of assault weapons would surely fail if Fyock prevailed here. In another example, New Jersey has passed a law requiring that state to identify when "smart guns"[10] are commercially viable, and to thereafter prohibit the sale of other guns. *See* N.J. Stat. Ann. § 2C:39-1dd. Once that law prohibits

[9] *See also* District Court Dkt. No. 42-10 at 1, 15, 40 (Violence Policy Center report discussing gun industry's efforts to sell more powerful weapons and militarized weapons to revive flagging gun sales).

[10] Smart guns are guns with personal identification technology, engineered so that they can only be fired by an authorized user.

the sale of guns without smart-gun technology, it will be unconstitutional under Fyock's test, since it will constrict the sale of guns in common use. Such an innovation is impossible under Fyock's test.

Fyock claims that upholding Sunnyvale's LCM ban would treat the Second Amendment as different from other fundamental constitutional rights. Fyock Br. at 25. But it is Fyock's proposed test that is the constitutional anomaly. There is no other provision in the Bill of Rights whose protections depend entirely on the commercial popularity of an item. This Court should reject Fyock's proposed common-use test and affirm the ruling of the district court.

Dated: June 23, 2014

Respectfully submitted,

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By: /s/
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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 3,827 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 23, 2014.

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# APPENDIX

1 Pages 1 - 41

2 UNITED STATES DISTRICT COURT

3 NORTHERN DISTRICT OF CALIFORNIA

4 BEFORE THE HONORABLE WILLIAM H. ALSUP

5 SAN FRANCISCO VETERAN POLICE )
OFFICERS ASSOCIATION, )
6 )
Plaintiffs, )
7 )
vs. ) Case No. C 13-053510 WHA
8 ) SAN FRANCISCO, CA
CITY AND COUNTY OF ) Tuesday, February 11, 2014
9 SAN FRANCISCO, EDWIN LEE, )
GREG SUHR, ) 10:15 a.m.
10 )
Defendants. )
11 ________________________________)

12 **TRANSCRIPT OF PROCEEDINGS**

13 **(MOTION HEARING AND CASE MANAGEMENT CONFERENCE)**
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14
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24 Reported by: ***MARGARET "MARGO" GURULE, CSR #12976***
***PRO TEM COURT REPORTER, USDC***
25

1 **TUESDAY, FEBRUARY 11, 2014 10:16 A.M.**
2 **P R O C E E D I N G S**
3 THE CLERK: Civil 13-5351, San Francisco
4 Veterans Police Officers Association vs. City and County
5 of San Francisco.
6 This matter is on for a motion and case
7 management conference. Counsel, can you please state
8 your appearances for the record.
9 MS. BARVIR: Good morning, Your Honor. Anna
10 Barvir from Michel & Associates, PC, for Plaintiffs, San
11 Francisco Veterans Police Officers Association, and my
12 Co-counsel, Clinton Monfort.
13 MR. MONFORT: Good morning, Your Honor.
14 THE COURT: Welcome.
15 MS. VAN AKEN: Good morning, Judge Alsup.
16 Christine Van Aken, for City and County of San
17 Francisco, Chief of Police, and Mayor.
18 THE COURT: Okay. Before we get started, I
19 want to ask you a case management question, and that is
20 how soon can we bring this case to trial? And the
21 reason I ask this upfront is that the party who wins
22 this motion will want to drag it out forever, and the
23 other side will want a prompt trial.
24 I didn't just fall off the turnip truck. So
25 before you get a ruling, I want to know whether we can

1 At the very least, plaintiffs have at least
2 raised some serious questions of constitutional import
3 that are here on first impression. This woman's
4 preliminary relief, a temporary stay of the enforcement
5 of the law, to preserve the status quo and to preserve
6 what is very likely --
7 THE COURT: If you show the equities sharply
8 tip in your favor.
9 MS. BARVIR: Because we have -- because
10 plaintiffs have raised that constitutional claim, that
11 it's in the public's interest and the balance of
12 equities does tip in plaintiffs' favor, so that -- I
13 would think that -- I would say that that's where we
14 have made that showing.
15 THE COURT: So does it matter that small
16 school children are massacred every week or every month
17 with somebody who has a large magazine and maybe that is
18 going to happen in San Francisco? Does that factor in
19 here somewhere?
20 MS. BARVIR: That's a very horrifying
21 proposition, and we're seeing it with alarming
22 regularity, and we continue to see that. But honestly,
23 the fact that a criminal may misuse these firearms and
24 someone may die isn't something that is going to or
25 should be weighed when we're talking about this

1 constitutional right.
2 The Supreme Court and other circuits have held
3 in accord, have suggested that body counts are not going
4 to be what matters. We're not talking about, you know,
5 which side has more people dying because they cannot use
6 these arms or because people are using these arms. The
7 fact of the matter is, as the State -- as the City has
8 discussed, the State has already banned the sale on the
9 transfer of these. So they're not going to have any
10 delusion of these arms -- these magazines coming
11 into the City. They're already here. And so it's going
12 to preserve the status quo and protect what is likely to
13 be plaintiffs' constitutional rights.
14 THE COURT: All right.
15 MS. BARVIR: Okay?
16 THE COURT: Let's hear from the other side.
17 MS. VAN AKEN: Your Honor, I want to just
18 start with the point that the Court raised initially,
19 which is the evidence that these are used in
20 self-defense, and there is none. There are some
21 anecdotal accounts in the record.
22 THE COURT: I recently read with interest the
23 declaration of Massad Ayoob.
24 MS. VAN AKEN: Yes, Your Honor.
25 THE COURT: All right. And he laid out a few

# COMMENTARIES

ON THE

# LAWS

OF

# ENGLAND.

## BOOK THE FOURTH.

BY

WILLIAM BLACKSTONE, Esq.

SOLICITOR GENERAL TO HER MAJESTY.

OXFORD,

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M. DCC. LXIX.

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merly allowable to every perſon diſſeiſed, or turned out of poſſeſſion, unleſs his entry was taken away or barred by his own neglect, or other circumſtances; which were explained more at large in a former volume[l]. But this being found very prejudicial to the public peace, it was thought neceſſary by ſeveral ſtatutes to reſtrain all perſons from the uſe of ſuch violent methods, even of doing themſelves juſtice; and much more if they have no juſtice in their claim[m]. So that the entry now allowed by law is a peaceable one; that forbidden is ſuch as is carried on and maintained with force, with violence, and unuſual weapons. By the ſtatute 5 Ric. II. ſt. 1. c. 8. all forcible entries are puniſhed with impriſonment and ranſom at the king's will. And by the ſeveral ſtatutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol, till he makes fine and ranſom to the king. And moreover the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of: and, if the ſame be found by that jury, then beſides the fine on the offender, the juſtices ſhall make reſtitution by the ſheriff of the poſſeſſion, without inquiring into the merits of the title; for the force is the only thing to be tried, puniſhed, and remedied by them: and the ſame may be done by indictment at the general ſeſſions. But this proviſion does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they themſelves, or their anceſtors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.

9. THE offence of *riding* or *going armed*, with dangerous or unuſual weapons, is a crime againſt the public peace, by terrifying the good people of the land; and is particularly prohibited

[l] See Vol. III. pag. 174, &c.

[m] 1 Hawk. P. C. 141.

by


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APP. 7



by the ſtatute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and impriſonment during the king's pleaſure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour[n].

10. SPREADING *falſe news*, to make diſcord between the king and nobility, or concerning any great man of the realm, is puniſhed by common law[o] with fine and impriſonment; which is confirmed by ſtatutes Weſtm. 1. 3 Edw. I. c. 34. 2 Ric. II. ſt. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to diſturb the peace, are equally unlawful, and more penal; as they raiſe enthuſiaſtic jealouſies in the people, and terrify them with imaginary fears. They are therefore puniſhed by our law, upon the ſame principle that ſpreading of public news of any kind, without communicating it firſt to the magiſtrate, was prohibited by the antient Gauls[p]. Such falſe and pretended prophecies were puniſhed capitally by ſtatute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the ſtatute 5 Eliz. c. 15. the penalty for the firſt offence is a fine of 100 *l*. and one year's impriſonment; for the ſecond, forfeiture of all goods and chattels, and impriſonment during life.

12. BESIDES actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the ſame denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of ſuch challenge, are puniſhable by fine and impriſonment, according to the circumſtances of the offence[q]. If this challenge ariſes on account of any mo-

[n] Pott. Antiqu. b. 1. c. 26.

[o] 2 Inſt. 226. 3 Inſt. 198.

[p] "*Habent legibus ſanctum, ſi quis quid de republica a finitimis rumore aut fama acceperit, uti ad magiſtratum deferat, neve cum alio communicet: quod ſaepe homines temerarios atque imperitos falſis rumoribus terreri, et ad facinus impelli, et de ſummis rebus conſilium capere, cognitum eſt.*" Caeſ. *de bell. Gall. lib.* 6. *cap.* 19.

[q] 1 Hawk. P. C. 135. 138.

ney

APPENDIX B
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 23, 2014.

**BRIEF OF *AMICI CURIAE* THE CITY AND COUNTY OF SAN FRANCISCO AND THE CITY OF LOS ANGELES IN SUPPORT OF AFFIRMANCE**

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Executed June 23, 2014, at San Francisco, California.

s/*Pamela Cheeseborough*
Pamela Cheeseborough