No. 12-17803

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPANOLA JACKSON, *et al.*,
Plaintiffs-Appellants,

v.

THE CITY AND COUNTY OF SAN FRANCISCO, *et al.*,
Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of California
(CV-09-2143-RS)

BRIEF AMICUS CURIAE OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS' PETITION FOR RE-HEARING OR REHEARING EN BANC

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IDENTITY AND INTEREST OF AMICUS

As required by Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. No counsel for any of the parties authored any portion of this brief in whole or in part. No person or entity other than amicus, its members, or its counsel has contributed any money for the preparation or filing of this brief.

Amicus, Center for Constitutional Jurisprudence, is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of the appropriate standard of review for local restrictions on the Second Amendment's protection of the fundamental right of armed self-defense. The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court and many other courts, including the United States Supreme Court.

SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court ruled that an ordinance requiring handguns kept in the home to be disabled by a trigger lock or other mechanism violated the Second Amendment. San Francisco in this case keeps the general prohibition against maintaining a working handgun in the home but adds a limited exception for the times when the individual is in physical

possession of the gun. The city also outlawed the purchase and sale within the city of the most effective ammunition for self-defense. The panel reviewed both of these intrusions on individual rights under what it termed "intermediate scrutiny." Using intermediate scrutiny for a textually explicit fundamental right conflicts with the decisions of this Court and the United States Supreme Court.

First, the rights at issue in this case – the right of armed self-defense, especially in the home – are both fundamental and textually explicit in the Constitution. Second, when reviewing claimed infringements of other fundamental rights – including those that are not in the text of the Constitution – this Court employs strict scrutiny. This higher level scrutiny is also applied by the United States Supreme Court in cases involving fundamental constitutional rights. Finally, the intermediate "time, place, or manner" scrutiny applied by the panel conflicts with recent United States Supreme Court precedent.

ARGUMENT

I. The Right To Keep and Bear Arms Available for Immediate Use Protected by the Second Amendment Is Part of the Fundamental Right to Self-Defense and a Key Aspect of the People's Sovereignty.

The Supreme Court in *Heller* acknowledged that the Second Amendment's protection of the right to "keep and bear arms" was a "right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. This right is inextricably

linked to the right of self-defense. *Id*. at 585 (*citing* 2 COLLECTED WORKS OF JAMES WILSON 1142, and n. x (K. Hall & M. Hall eds.2007) (citing Pa. Const., Art. IX, § 21 (1790)). Because it is for self-defense, the Second Amendment protects the right to keep a firearm that is available *for immediate use*. *Heller*, 554 U.S. at 629.

This idea of a right to bear arms for self-defense was not a new idea of the Founders. The basic human right of armed self-defense is deeply engrained in western culture. For example, Aristotle tells the story of how the tyrant Pisistratus took over Athens in the sixth century B.C. by disarming the people through trickery. Aristotle, THE ATHENIAN CONSTITUTION ch. 15 (Sir Frederic G. Kenyon trans., 1901). Indeed, Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role. Stephen P. Halbrook, THAT EVERY MAN BE ARMED 11 (1994). As such, the right protects even more than immediate self-defense, but is an inherent aspect of the sovereignty of the people.

Those thinkers who most influenced the Framers understood that the right to keep and bear arms is essential for both self-defense and the preservation of liberty more broadly. John Locke spoke of the "fundamental, sacred, and unalterable law of self-preservation." John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690). Locke argued that the right to use force in self-defense is a necessity. *Id*. at § 207. This right to armed self-defense is also evident in the writings of Thomas Hobbes: [a] covenant not to defend my selfe from force, by force, is always voyd."

Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991).

Earlier works by Grotius and Cicero also affirm this basic human right. Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C.Campbell trans., 1901) ("When our lives are threatened with immediate danger, it is lawful to kill the aggressor"); Marcus Tullius Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. & trans., 1969) ("[Natural law lays] down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right"); *see also* David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. Pub. Law 43, 58-92 (2007-2008) (detailing writings of early philosophers regarding the right and duty of self-defense).

The understanding of a natural right to armed self-defense, one that would also serve as an important check on despotic tendencies of government, was the impetus for the Second Amendment. The failure to recognize a right to keep and bear arms in the original Constitution was a point of contention at a number of state ratifying conventions. Samuel Adams proposed an amendment to the Massachusetts resolution to ratify the Constitution that included a command that "Congress should not infringe the ... right of peaceable citizens to bear arms." Letter from Jeremy Belknap to Ebenezer Hazard, reprinted in 7 THE DOCUMENTARY HISTORY OF THE

RATIFICATION OF THE CONSTITUTION, Massachusetts No. 4, at 1583 (John P. Kaminski, *et al.* eds. 2009).

A number of advocates for the Constitution argued that Congress would have no power to interfere with the "rights of bearing arms for defence." Alexander White, Winchester Virginia Gazette, February 22, 1788, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 1, *supra* at 404. Notwithstanding these assurances, there were a number of proposals for amending the proposed Constitution to include an express recognition of the right to bear arms for defense. *E.g.*, Convention Debates, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania, *supra* at 597-98; The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, reprinted in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Pennsylvania, *supra* at 623-24; Convention Debates, reprinted in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Virginia No. 3, *supra* at 1553; North Carolina Convention Amendments, reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 6, *supra* at 316; Declaration of Rights and Form of Ratification Poughkeepsie Country Journal, reprinted in 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, Commentaries on the Constitution No. 6, *supra* at 298.

This general unease with how the new federal government would exercise power led to the adoption of the Bill of Rights, including codification in the Second Amendment of the right to keep and bear arms. This history demonstrates that the Second Amendment enshrines a fundamental right to armed self-defense. Like other fundamental interests protected by the Constitution, regulations that seek to restrict the protected right are tested by strict scrutiny.

II. The Panel's Choice of Intermediate Scrutiny for Regulations that Burden a Textually Explicit Fundamental Right Conflict With Decisions of this Court and the United States Supreme Court.

This Court has long recognized that the appropriate test for government action that burdens fundamental constitutional rights is strict scrutiny. *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 746 (9th Cir. 2012) (constitutional rights); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (fundamental liberty interests); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1298 (9th Cir. 1984) ("Regulations that impinge on fundamental rights are subject to strict scrutiny."). This heightened scrutiny does not require a finding that the regulation or government action at issue has extinguished the right – mere interference is sufficient to trigger strict scrutiny. *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 969 (9th Cir. 2010).

These rulings are in accord with the rulings of the United States Supreme Court. Regulations that interfere with fundamental constitutional rights are analyzed

under strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335-36 (1972). Regulations limiting fundamental rights are also tested by strict scrutiny. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969). Even when the government entity can show a compelling interest it must still prove that the regulation or ordinance is narrowly tailored to further that interest. *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). This analysis applies when the regulation interferes with a constitutional right or a liberty interest recognized as "fundamental." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

The panel opinion did not follow this long-settled line of authority. The panel reasoned that if a law did not extinguish the right to keep a firearm for self-defense, but rather only burdened that right, then intermediate scrutiny would apply. Slip op. at 11. According to the panel opinion, a law that regulates the "manner" in which one can exercise a Second Amendment right is "less burdensome that [a regulation] that bars firearm possession completely." *Id*. Certainly a law that merely restricts free speech rights is less burdensome than an outright prohibition. That does not render the restrictions immune to strict scrutiny analysis, however. That the city has not banned possession of working firearms in the home does not entitle the city's

regulation burdening that right to a lesser degree of scrutiny.

The right to keep and bear a firearm – one that is available for immediate use – lies at the core of the Second Amendment. *Heller*, 554 U.S. at 629-30. This is because the Second Amendment protects the pre-existing fundamental right of self-defense. *Any* restriction that makes it more difficult to use a firearm for self-defense strikes at the core of this fundamental right. There is no question that the ordinance at issue in this case is just such a regulation.

Why then did the panel choose intermediate scrutiny? The panel reasoned that "firearm regulations which leave open alternative channels for self-defense are less likely to place a severe burden on the Second Amendment right." Slip op. at 12. This appears to be the same analysis rejected by the Court in *Heller*. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original). As the Court noted, the Second Amendment was itself the product of interest balancing by the people. "[I]t surely elevates above all other interests the right of law-abiding citizens to use arms in defense of hearth and home." *Id*. at 635.

San Francisco seeks to limit that right – to make it more difficult for law-abiding citizens to use arms in defense of their home. To put it plainly, San Francisco seeks to make it more difficult to exercise a right guaranteed in the text of the

Constitution; a right recognized by the Supreme Court as fundamental. The Second Amendment is "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment" and cannot be relegated to the status of "poor relation" simply because the city disagrees with the choices made by the Founders. *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

Case law in this circuit and precedent of the Supreme Court dictate that a restriction on a textually explicit constitutional right be tested under strict scrutiny. Because the panel opinion departed from this line of authority this Court should grant the petition for rehearing *en banc*.

III. The Panel's Application of Time, Place, and Manner Analysis Conflicts with Recent Decisions of the United States Supreme Court.

The panel stated that the form of "intermediate scrutiny" that courts should apply in this case is the same type of scrutiny under the First Amendment for analyzing a time, place, or manner regulation. Slip op. at 10, 11, 17, 19, 21. Yet in its application, the test applied in the panel opinion more closely resembles rational basis review, deferring to the city on both the asserted justification *and* the "reasonable fit" between the restriction on fundamental constitutional rights and the asserted justification. This mode of analysis conflicts with recent United States Supreme Court precedent and justifies granting the petition for rehearing en banc.

On June 26, 2014, (three months after the panel opinion had been filed), the

Supreme Court decided *McCullen v. Coakley*, ___, S.Ct. ___No. 12-1168 (2014). In the course of that decision, the Court explained the analysis to be applied under the time, place, or manner test. Even though "strict scrutiny" does not apply where the Court finds the time, place, or manner analysis appropriate, the government regulation must still be "narrowly tailored to serve a significant government interest." *Id.* slip op. at 18. The Court explained that by "demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrificing speech for efficiency.'" *Id.* slip op. at 18-19. To satisfy this narrow tailoring requirement, the government must establish that the regulation does not impose "a substantial portion of the burden" on individuals in a manner that does not serve to advance the stated goals. *Id.* slip op. at 19. The court cannot simply defer to legislative judgment that the regulation is narrowly tailored. In the context of this case, the city must prove that the substantial portion of the burden does not fall on law-abiding gun owners seeking to exercise their right to armed self-defense.

Using this analysis, the Court unanimously struck down a "buffer zone" that prohibited speech on public sidewalks near abortion clinics. The Court noted that the state could serve its public safety interests with more narrowly tailored enforcement mechanisms. Of note here, the Court expressly rejected the state's argument that it had tried other approaches and found them unworkable. Instead, the Court demanded actual proof. *Id.* slip op. at 27.

By contrast, the panel decision never notes the significance of the burden imposed on the exercise of the constitutional right, requires only a "reasonable fit" between the stated interest and the regulation, and defers to the city on whether the "reasonable fit" test has been met. This analysis is a far cry from the time, place, or manner scrutiny applicable under First Amendment cases.

First, the panel decision never notes the significance of the burden. Trigger locks and safes can be opened in a matter of seconds, according to the panel opinion. Slip op. at 22. The opinion never considers, however, whether those seconds are even available to the homeowner seeking to protect herself or her family from an intruder.

The United States Center for Disease Control notes that firearm fatalities and injuries have declined significantly, including a near 30 percent quarterly decline in fatalities over the six-year period of the study. Karen Gotsch, *et al.*, Surveillance for Fatal and Nonfatal Firearm-Related Injuries – United States – 1993-1998.[1] The decline includes injuries from all causes, including accident, assault, and self-inflicted injury. *Id.* While accidental and self-inflicted gun injuries are on the decline, guns are used defensively hundreds of thousands of times, at a minimum, each year. Institute of Medicine and National Research Council, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE at 15 (National Academy of

[1] Available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5002a1.htm.

Science 2013). The CDC reports that, nationally, there were 31,000 gun-related fatalities and 64,000 gun-related injuries reported in 1998. Gotsch, Surveillance, *supra*. By contrast, law-abiding citizens use guns defensively between 500,000 and 3,000,000 times a year. PRIORITIES at 15. All of the data on defensive use of guns confirms "consistently lower injury rates among gun-using crime victims compared with victims who used other defensive strategies. *Id*. at 16. There are no conclusive studies establishing an increase in the type of injury San Francisco claims to be protecting against that would cancel out the net public safety benefits of defensive gun use. *Id*.

The city's regulation thus *might* prevent some gun-related injury but is much more likely to result in the injury or death of law-abiding citizens who were unable to unlock their gun quickly enough to use it for self-defense. The panel opinion gives no consideration to the likelihood of increased injury to crime victims. Instead, as in rational basis review, the opinion merely notes that the city had a reasonable basis for its conclusions and that it has drawn "reasonable inferences" that its regulation will serve its interest. Slip op. at 21.

A reasonable inference is insufficient. As the Supreme Court in *McCullen* makes clear, the government must show actual proof that the restrictions are necessary and are appropriately tailored. *McCullen*, slip op. at 27. Specifically, the government must prove that other, less intrusive, regulations cannot adequately serve

the government's purpose. *Id*. at 28. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures" with less of a burden on constitutional rights "would *fail* to achieve the government's interests, not simply that the chosen route is easier." *Id*. (emphasis added).

In the context of this case, that would require proof that the potential suicide victim is not himself the owner of the gun. A requirement that the potential suicide victim maintain physical possession of the gun will do nothing to prevent self-inflicted injuries. Similarly, the city must prove that a potential perpetrator of domestic violence is not himself the owner of the gun. Otherwise, a requirement that he physically carry the gun at all times may make it more likely rather than less likely that the gun would be used for domestic violence. Finally, the city will be required to show that the public safety benefits it will reap from the restriction on constitutional rights will make up for the increased deaths and injuries that will result in burdening the right to armed self-defense. Because the panel opinion misapplied the time, place, or manner test the Court should grant rehearing en banc.

CONCLUSION

The panel opinion conflicts with the precedent of this Court and the United States Supreme Court on the standard for review for infringement of a textually explicit fundamental right. This Court should grant the petition for rehearing or rehearing en banc to settle this conflict.

DATED: July 3, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 July 3, 2014.

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