No. __ - ____

In the
Supreme Court of the United States

LEONARD FYOCK, SCOTT HOCHSTETLER, WILLIAM DOUGLAS,
DAVID PEARSON, BRAD SEIFERS, AND ROD SWANSON,

Applicants,

v.

THE CITY OF SUNNYVALE, THE MAYOR OF SUNNYVALE,
ANTHONY SPITALERI, in his official capacity, THE CHIEF OF THE SUNNYVALE
DEPARTMENT OF PUBLIC SAFETY, FRANK GRGURINA,
in his official capacity, and DOES 1-10,

Respondents.

On Emergency Application for Injunction Pending Appeal in the United States Court of Appeals for the Ninth Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL

To the Honorable Justice Anthony Kennedy
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Ninth Circuit

C. D. Michel
Counsel of Record
Clinton B. Monfort
Sean A. Brady
Anna M. Barvir
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 908502
(562) 216-4444
cmichel@michellawyers.com
Counsel for Applicants

March 10, 2014

TABLE OF CONTENTS

page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES (CONT.)

Page(s)

FEDERAL CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

Page(s)

FEDERAL CASES (CONT.)

TABLE OF AUTHORITIES (CONT.)

Page(s)

FEDERAL STATUTES

STATE STATUTES

LOCAL ORDINANCES

TABLE OF AUTHORITIES (CONT.)

Page(s)

OTHER AUTHORITIES

To the Honorable Justice Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

On March 5, 2014, the District Court for the Northern District of California denied Applicants' request to enjoin the City of Sunnyvale from enforcing Municipal Code section 9.44.050 ("the Ordinance"). The Ordinance bans the possession of common ammunition feeding devices or "magazines" with the capacity to accept more than ten rounds—magazines that Applicants have established are protected by the Second Amendment. Pursuant to the Ordinance, any person in possession of the items had 90 days from the law's effective date— until March 6, 2014—to remove them from their homes and cease possessing them within the city. Sunnyvale, Cal., Muni. Code § 9.44.050 (b) (App. 4). Anyone failing to comply is subject to criminal penalties, including incarceration. *Id.* at art. VII, § 706 (App. 6). And those who submit to the law must forego the exercise of their right to possess the magazines for self-defense.

Applicants must thus choose between two courses of action: (1) permanently surrender their magazines or otherwise remove them from the City, foregoing the exercise of their fundamental, Second Amendment rights for the entire duration of this litigation or longer—with potentially deadly consequences in a self-defense emergency; or (2) retain possession of their magazines, exposing themselves to criminal penalties every second they flout the law. Without a grandfather clause, the retroactive criminal law is an extreme outlier, requiring that lawfully acquired and constitutionally protected property be relinquished to the government in totalitarian fashion.

This case should be as straightforward as they come. Applicants face the destruction of their core, lawful right to possess constitutionally protected magazines for

self-defense purposes. And so the law is necessarily invalid. But even if heightened means-end judicial review is appropriate here, the City has not and cannot show that banning law-abiding citizens from engaging in constitutionally protected conduct (here, possessing arms protected by the Second Amendment) is sufficiently related or appropriately tailored to its objective of preventing criminal misuse of the items it bans. In short, the Ordinance can survive *neither* intermediate nor strict scrutiny. Applicants failed to obtain relief below only because the district court ignored direct guidance from this Court in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), that stripping law-abiding citizens of their Second Amendment right to possess protected arms is not sufficiently related to the government's interest in keeping those arms from the lawless—under *any* test. While the court found that magazines over ten rounds are *constitutionally protected by the Second Amendment*, App. 3, at 5-9, it remarkably held that the City could absolutely prohibit the possession of those very items without offending the Constitution, App. 3, at 15.

Injunctive relief under the All Writs Act, 28 U.S.C. § 1651, is necessary to prevent immediate and irreparable harm during the appellate process and any further review by this Court to gun-owning residents of Sunnyvale, including Applicants, and all non-residents who travel through the City with their legally owned magazines in tow. On Thursday morning, the City presented each Applicant with a Hobson's Choice, requiring they either dispossess themselves of their protected magazines, risking their lives and the lives of their loved ones, or continue exercising their constitutional right to possess the items in violation of the law, subjecting themselves to criminal penalties. Further, because state law prohibits the lawful transfer of these magazines, those residents who

have or will surrender their magazines in compliance with the Ordinance have no lawful means of recovering them, and they will *forever* be divested of their Second Amendment right to possess them. Cal. Penal Code §§ 32310, 32400-50.

At minimum, Applicants request a temporary, administrative stay to allow for full consideration and briefing of this Application, without the daily threat of criminal penalties looming. *See, e.g.*, *Ind. State Police Pension Trust v. Chrysler, LLC*, No. 08A196 (U.S. June 8, 2009) (Ginsburg, J., in chambers).

JURISDICTION

Applicants filed their complaint on December 16, 2013, challenging the Ordinance on Second Amendment grounds. (U.S. Dist. Ct. Cal. N.D. Case No. 13-05807, Dkt. [hereafter, "Dkt."] 1). On December 23, Applicants filed a motion for preliminary injunction and supporting evidence. (Dkt. 10-20.) The district court had jurisdiction under 28 U.S.C. §§ 1343(a)(3) and 1331, and 42 U.S.C. §1983. The district court had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202.

The district court denied Applicants' motion for an injunction on March 5, 2014, and Applicants timely filed their notice of appeal to the Ninth Circuit later that day. (Dist. Ct. Order Den. Mot. Prelim. Inj. [App. 3]; Notice of Appeal [App. 2].) The Ninth Circuit had jurisdiction over this appeal under 28 U.S.C. § 1292(a). The Ninth Circuit denied Applicants' Emergency Motion Under Circuit Rule 25-3 for an Injunction Pending Appeal on March 6, 2013. (App. 1.)

This Court has jurisdiction over this Application under 28 U.S.C. § 1254(1) and has authority to grant the relief that the Applicants request under the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND AND PROCEDURAL HISTORY

Magazines capable of holding more than ten rounds are standard equipment for many common pistols and rifles purchased by the American public for both self-defense and sport. (Dkt. 12, ¶ 3; Dkt. 20, ¶ 5, Exh. B, Exh. C.) Conservative estimates set the number of these standard magazines possessed by law-abiding citizens throughout the country in the *tens of millions*. (App. 3, at 7; Dkt. 13, ¶ 13.) Many of the most predominant models of handguns in American society typically have capacities ranging from fifteen to seventeen rounds. (Dkt. 12, ¶ 3; Dkt. 20, ¶ 5, Exh. B, Exh. C.) And firearms equipped with magazines capable of holding more than ten rounds are highly effective for self-defense. (Dkt. 11, ¶¶ 11, 14, 25, 27.) They are thus preferred and possessed by many, including Applicants, for that very purpose. As the district court held, they are *not* "dangerous and unusual" or abnormal items possessed only by the lawless, App. 3, at 7-8; they are the *standard-issue* magazines for many of the most popular firearms on the market and they are currently in the homes of *millions* of law-abiding Americans.

In November 2013, the City of Sunnyvale voters passed Measure C, which included a proposed ordinance amending the Sunnyvale Municipal Code that would prohibit any person, corporation, or other entity in the City from possessing ammunition magazines with the capacity to accept more than ten rounds. Sunnyvale, Cal., Muni. Code § 9.44.050(a). Pursuant to the Ordinance, any person who lawfully possessed any of the prohibited magazines prior to its effective date would have 90 days to cease possessing those magazines within the City. *Id.* at § 9.44.050 (b). Although the election results were scheduled to be certified by the Sunnyvale City Council in January

2014, the council expedited the certification of the vote on November 26, 2013, causing the Ordinance to take effect on December 6, 2013, nearly two months earlier than originally scheduled.

With that, all those in possession of the banned magazines had until March 6, 2014, to surrender their magazines to the Sunnyvale Department of Public Safety for destruction, transfer them to a properly licensed vendor in accordance with state law, or otherwise remove them from the City. Anyone failing to comply with the Ordinance by that date is subject to criminal penalties, including incarceration. *Id.* at art. VII, § 706 (App. 5). And everyone who does comply with the law is forced to forego the exercise of their individual, fundamental right to possess protected arms for self-defense—with potentially deadly consequences each day they are deprived of that right.

Applicants are responsible, law-abiding residents of Sunnyvale who are not prohibited from owning or possessing firearms. (Dkt. 14, ¶¶ 2-3; Dkt.15, ¶¶ 2-3; Dkt. 16, ¶¶ 2-3; Dkt. 17, ¶¶ 2-3; Dkt. 18, ¶¶ 2-3.) They each currently own lawfully acquired magazines capable of holding more than ten rounds of ammunition, magazines they own for self-defense and specifically selected, in part, because they believe handguns equipped with magazines of such capacity best suit their self-defense needs. (Dkt. 14, ¶¶ 4-11; Dkt.15, ¶¶ 4-10; Dkt. 16, ¶¶ 4-9; Dkt. 17, ¶¶ 4-9; Dkt. 18, ¶¶ 4-11.) But as a result of the Ordinance, they are now prohibited from continuing to possess their protected magazines within the City. (Dkt. 14, ¶ 12; Dkt.15, ¶ 11; Dkt. 16, ¶ 10; Dkt. 17, ¶ 10; Dkt. 18, ¶ 12.)

To prevent the forced removal of their protected magazines and incurable injury, Applicants promptly brought suit against the City of Sunnyvale, Mayor Anthony

Spitaleri, and Chief Frank Grgurina (collectively, "the City"), on December 16, 2013. Just seven days later, they filed a motion for preliminary injunction to protect them from the violation of their fundamental rights pending resolution on the merits. (Dkt. 10.)[1] Without an injunction, they are forced to surrender their Second Amendment rights or face criminal penalties.

Notwithstanding Applicants' request for expedited ruling on its motion, the district court denied Applicants' motion for temporary relief on March 5, 2014—just one day before Applicants would be dispossessed of their arms. (App. 3.) Somehow, even though the district court found the items are protected, it held that the City could flatly prohibit them without offending the Second Amendment.

Applicants immediately filed a notice of appeal to the Ninth Circuit. (App. 2.) And on the same day, they filed an emergency motion for an injunction pending appeal. (9th Cir. Case No. 14-15408, Dkt. 3.) On the evening of March 6, 2014, the Ninth Circuit denied Applicants' emergency request without further comment. (App. 1.)

Now, pursuant to United States Supreme Court Rule 22 and the All Writs Act, 28 U.S.C. § 1651(a), Applicants submit this emergency application for injunction pending appeal to prevent further irreparable constitutional harm while the case proceeds.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the

[1] On January 3, 2014, the City filed an Administrative Motion to Enlarge Time for Hearing and Briefing on the Motion for Preliminary Injunction and for Expedited Discovery, Dkt. 25, which Applicants vigorously opposed due to the looming March 6 deadline to surrender their magazines, Dkt. 28. While Applicants maintained that timing on the disposition of their request for preliminary relief was of the essence to prevent the urgent circumstances Applicants now face, the district court partially granted the City's motion to enlarge time. Dkt. 30.

Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers); *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers); 28 U.S.C. § 1651(a)) (alterations in original).

This "extraordinary" relief, *Lux v. Rodrigues*, __U.S.__, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., in chambers), is warranted in cases involving the imminent and indisputable violation of civil rights. *Lucas v. Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining election where applicants established likely violation of Voting Rights Act); *Am. Trucking Assocs. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J., in chambers) (granting injunction); *Williams v. Rhodes*, __U.S.__, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (same). Because they raise a serious challenge to the violation of their Second Amendment right to possess constitutionally protected arms, a question answered *directly* by this Court's analysis in *Heller*, Applicants present such a case. The relief they seek should be granted.

I. APPLICANTS FACE CRITICAL AND EXIGENT CIRCUMSTANCES

Without emergency relief from this Court, Applicants have no acceptable options. If they submit to the law and dispossess themselves of their protected magazines, no future relief can repair the grievous injury to their Second Amendment rights—a harm that persists every minute the City strips its residents of their constitutionally protected arms. If, on the other hand, Applicants exercise their fundamental rights in violation of

the law, they face unjust criminal penalties, including imprisonment.

It is black letter law that a violation of constitutional rights constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary.") Constitutional rights are, by definition, of paramount importance. The right to keep and bear arms should be treated no differently. *See McDonald v. City of Chicago*, 561U.S. 3025, 130 S. Ct. 3020, 3043 (2010) (rejecting the government's suggestion "that the Second Amendment should be singled out for special—and specially unfavorable—treatment"); *see also Ezell v. Chicago*, 651 F.3d 684, 700 (7th Cir. 2011) (a deprivation of the right to arms is "irreparable and having no adequate remedy at law").

Here, Applicants are clearly entitled to the relief they seek from the City's ongoing violation of their Second Amendment rights, and the injury they face is immediate and cannot be remedied. Even if they are able to store their magazines outside the City, Applicants and other Sunnyvale residents have been or will be deprived of the use of their constitutionally protected magazines within the City for the duration of this litigation, which could last years. And they face potentially deadly consequences in the event of a self-defense emergency. The denial of Applicants' constitutional rights *under the threat of criminal prosecution* is an extreme and exigent harm demanding relief while this case winds through the courts.

Further, for many, it will be wholly impossible to store their magazines outside the city during this lawsuit because simply storing them at another's property could constitute an unlawful transfer of the items under state law. Cal. Penal Code §§ 32310, 32400-50. For those countless residents, the only option is to surrender or sell their magazines to a licensed dealer, dispossessing themselves of the items *permanently*, for state law provides no lawful means to recover them if Applicants ultimately succeed on the merits. For those residents, they will be *forever* deprived of the exercise of their individual, fundamental right to possess the protected items for self-defense or other lawful purposes.

Facing the impossible choice between foregoing their Second Amendment rights, potentially at the risk of losing their lives or the lives of their loved ones, or risking criminal prosecution and possible jail time, Applicants indeed find themselves in "the most critical and exigent circumstances." *Fishman*, 429 U.S. at 1326 (Marshall, J., in chambers). Granting preliminary relief pending appeal is necessary and appropriate.

II. APPLICANTS HAVE AN INDISPUTABLY CLEAR RIGHT TO RELIEF

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment is "fully applicable to the States" through the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3026. The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635 (2008). Like the handgun ban at issue in *Heller*, the Ordinance flatly prohibits law-abiding citizens from using commonly possessed arms within the sanctity of their homes, for the core,

lawful purpose of self-defense. And just like the *Heller* handgun ban, the City's magazine ban is unconstitutional under *any* test the Court might apply.

Applicants present a clear and straightforward Second Amendment claim directly and thus have an overwhelming likelihood of prevailing on their claim.

A. Applicants have clearly established that the prohibited magazines are typically possessed by law-abiding citizens for lawful purposes and are thus protected under the Second Amendment.

A historical analysis of the Second Amendment confirms that it protects arms "typically possessed by law-abiding citizens," or those that are "in common use" at the time. *Heller*, 554 U.S. at 625. (*See also* Dkt. 10, at 8-13; Dkt. 45, at 5-9.) In line with this precedent, the district court properly applied *Heller*'s "common use" analysis, concluding that "magazines having a capacity to accept more than ten rounds are in common use, and therefore are not dangerous and unusual." (App. 3, at 7.) The court acknowledged statistics showing that magazines with capacities over ten rounds make up approximately 47 percent of all magazines owned and that a large share of the firearms in the United States are sold standard with magazines that hold more than then rounds. (App. 3, at 7; *see also* Dkt. 10, at 8-13; Dkt. 11; Dkt. 12; Dkt. 13; Dkt. 14, ¶¶ 4-11; Dkt.15, ¶¶ 4-10; Dkt. 16, ¶¶ 4-9; Dkt. 17, ¶¶ 4-9; Dkt. 18, ¶¶ 4-11; Dkt. 20, ¶¶ 3-6, Exhs. A-C) [Applicants' argument and evidence establishing that magazines over ten rounds are typically possessed for lawful purposes, including self-defense]; Dkt. 45, at 5-9; Dkt. 46, Exh. E [same].) Indeed, many of the most popular models of handguns available have capacities ranging from fifteen and seventeen rounds. (Dkt. 12, ¶ 3; Dkt. 20, ¶ 5, Exh. B, Exh. C.)

Although the law carves out a number of exceptions for the possession of these magazines, they are all narrow and do not apply to the average law-abiding citizen. (App. 3, at 9.) Accordingly, the district court properly found the Ordinance prohibits law-abiding residents from possessing constitutionally protected arms. (App. 3, at 5-9.)

B. The Ordinance is categorically invalid because it destroys the right of the average law-abiding citizen to possess constitutionally protected magazines.

The Ordinance is necessarily invalid because it imposes an outright ban on the possession of arms protected by the Second Amendment. It is a fundamental principle of both law and logic that, where the constitution protects the possession or use of an item, a total ban on such possession or use will be an unconstitutional infringement of that right, regardless of the level of judicial scrutiny applied. To this end, courts properly forego application of means-end scrutiny when striking flat prohibitions on constitutionally protected conduct and items. (Dkt. 10, at 13-15; Dkt. 45, at 9-11.)

This was precisely the approach taken in *Heller*, and it controls here. In *Heller*, this Court held that a ban on a protected class of firearms necessarily violates the Second Amendment. 554 U.S. at 635. While the handgun ban would fail "any of the standards of scrutiny that [the courts have] applied to enumerated constitutional rights," *id.* at 628, the Court made a point of not applying any of those standards. Instead, it categorically invalidated the ban because it flatly prohibited a class of arms "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense. *Id.* at 628-29. That it did so without selecting a level of scrutiny is unsurprising. For the Second Amendment would mean little if the application of a particular test would permit the government to ban the very arms the Second Amendment protects.

Categorical invalidation of bans on protected Second Amendment conduct is also consistent with the approach recently taken in the Ninth Circuit in *Peruta v. County of San Diego*, No. 10 56971, 2014 WL 555862 (9th Cir. Feb. 13, 2014). Invalidating a regulatory scheme that denied most individuals the right to carry an operable firearm outside the home, *Peruta* confirmed that laws that destroy a right central to the Second Amendment are necessarily invalid. "A law that 'under the pretence of regulating, amounts to a destruction of the right' would not pass constitutional muster '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." *Id.* at *20 (quoting *Heller*, 554 U.S. at 628-29). As Applicants argued below, laws that are inimical to the Second Amendment's protections must be struck down regardless of the level of scrutiny applied. (Dkt. 10, at 13-15.) "For if self-defense outside the home is part of the core right to 'bear arms' and the California regulatory scheme prohibits the exercise of that right, no amount of interest-balancing under a heightened form of means-end scrutiny can justify" the challenged government action. *Peruta*, 2014 WL 555862, at *19. Likewise, the possession and use of protected arms for self-defense is part of the core right to keep and bear arms, and the City's absolute ban on that protected conduct cannot be squared with the Second Amendments' protections.

Because the Ordinance destroys the right to possess and use magazines overwhelmingly chosen by the American public for self-defense, the district court erred in finding that it is not a "destruction" of a Second Amendment right. In support of its conclusion, the district court pointed to the fact that the Ordinance "does not ban all, or even most, magazines." (App. 3, at 10.) Under that rationale, the *Heller* handgun ban would not have "destroyed" the right to possess and use arms for self-defense either. But

the handgun ban *was* a destruction of the right to possess and use those protected arms in self-defense. The Ordinance, by flatly banning the possession of magazines over ten rounds, similarly destroys the right to possess and use items "typically possessed by law-abiding citizens . . ." for the core, lawful purpose of self-defense. *Heller*, 554 U.S. at 627.

The basis for the district court's holding that the Ordinance is not invalid per se has been flatly rejected by this Court. "It is no answer to say, as [the District does] that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." *Heller*, 554 U.S. at 629. Indeed, "[it's] a bit like saying books can be banned because people can always read newspapers. That is not a persuasive or legitimate way to analyze a law that directly infringes an enumerated constitutional right." *Dist. of Columbia v. Heller* (*Heller II*) 670 F.3d 1244, 1289 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

In sum, the Ordinance is inimical to the Second Amendment's protections for the now-prohibited magazines. As was the case with the handgun ban in *Heller* and the effective ban on the right to public carry of a firearm in *Peruta*, the Ordinance's flat ban on the possession of protected magazines "destroys" the core Second Amendment right to use them for self-defense. It is appropriately stricken without expedition into the "levels of scrutiny" quagmire. *See United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010) (en banc).

C. The district court ignored precedent of the Ninth Circuit and this Court by selecting intermediate rather than strict scrutiny.

Again, the district court rightly held that magazines over ten rounds are protected by the Second Amendment. (App. 3, at 5-9.) But it failed to recognize that a flat ban on

their possession by all law-abiding citizens for self-defense commands strict scrutiny. Finding instead that the ban's "burden on the Second Amendment is light" because smaller magazines remain available, App. 3, at 11., the court misapplied binding precedent from the Ninth Circuit and this Court and improperly selected intermediate scrutiny.

In *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013), the Ninth Circuit upheld a ban on possession of arms by convicted domestic violence misdemeanants. After concluding the law affected Second Amendment conduct, the Court considered the law's proximity "to the core of the Second Amendment" and "the severity of the law's burden" to determine the appropriate level of heightened scrutiny. *Id.* at 1138. In selecting intermediate scrutiny, the Court explained that Chovan's claims were outside the core because his conviction excluded him from the "law abiding," and although the ban imposed a "quite substantial" burden, the law's many exceptions "lightened" it. *Id.*

Here, while the district court concluded the Ordinance does burden core conduct, it held the burden on that conduct insufficient to warrant strict scrutiny. (App. 3, at 10-12.) The district court wrongly viewed *Chovan* as requiring that a law *both* impact core conduct *and* impose a severe burden to trigger strict scrutiny. (App. 3, at 10-12.) But *Chovan* does not compel such a mechanical approach. *Chovan* and the other circuit court cases it relies on apply intermediate scrutiny after finding the laws at issue to be *outside* the core and to place varying degrees of burden on the right. 735 F.3d 1138; *Heller II*, 670 F.3d 1266; *United States v. Chester*, 628 F.3d 673, 682-83 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 97 (3d Cir. 2010). *Chovan* does *not* mandate that intermediate scrutiny apply to those laws, like the City's magazine ban, that strike at the

Second Amendment's core unless the burden is independently deemed severe. If we are guided by First Amendment principles—and *Chovan* holds that we are, 735 F.3d at 1138—laws regulating core conduct command strict scrutiny *no matter how severe the burden*. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

As one court explains, "[a] regulation that threatens a core Second Amendment right is subject to strict scrutiny, while a less severe regulation that does not encroach on a core Second Amendment right is subject to intermediate scrutiny." *Morris v. U.S. Army Corps of Enginrs.*, No. 13-00336, 2014 WL 117527, at *2 (D. Idaho Jan. 10, 2014); *see also United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (reasoning that just as "*any* law regulating the content of speech is subject to strict scrutiny, . . . any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny") (emphasis added).

Regardless, the Ordinance substantially burdens core conduct by taking protected arms from the homes of law-abiding citizens and flatly prohibiting their use for self-defense. There is no harm more severe. The court minimized this harm, reasoning that magazines over ten rounds, a "subset of magazines," are not "crucial for citizens to exercise their right bear arms" and that citizens may exercise their rights with smaller magazines. (App. 3, at 11.) The court's reasoning is fundamentally flawed.

First, it improperly identifies the right at issue broadly as the general right to self-defense, but the Second Amendment protects more than that. Here, the right at issue is the right to possess protected arms for self-defense. And a flat ban on the exercise of that right is a severe harm deserving at least strict scrutiny.

Second, it highlights the inherent constitutional problem with bans on classes of

protected arms, which necessarily leave alternative arms available for self-defense and would, in the district court's view, warrant only intermediate scrutiny. Taking the analysis to its natural conclusion, only total bans on all arms would require strict scrutiny because alternative avenues for self-defense will always remain. Surely this cannot be. Judge Kavanaugh's dissent in *Heller II*, wherein he quotes the majority opinion in *Heller*, provides the most adept response to such reasoning:

> [It's] a bit like saying books can be banned because people can always read newspapers. That is not a persuasive or legitimate way to analyze a law that directly infringes an enumerated constitutional right. **Indeed, *Heller* itself specifically rejected this mode of reasoning: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."**

Id. at 1289 (quoting 554 U.S. at 629) (Kavanaugh, J., dissenting) (emphasis added). Similarly, because magazines over ten rounds are constitutionally protected, it is no answer to say that it is permissible to ban their possession so long as the possession of other magazines (i.e., under ten rounds) is allowed.

The district court surely thought it was on solid ground in selecting intermediate scrutiny, as it recognized that "in most Second Amendment cases, courts tend to reject strict scrutiny and apply intermediate scrutiny." (App. 3, at 12, citing *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Masciandaro*, 638 F.3d at 474; *Marzzarella*, 614 F.3d at 96; *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010); *United States v. Lahey*, No. 10-CR-765, 2013 WL 4792852, at *15 (S.D.N.Y. Aug. 8, 2013).) But these cases—and the blanket statement the district

court gleaned from them—are simply not instructive in *this* case.

Unlike the City's magazine ban, not one of these cases deals with a flat prohibition on conduct that lies at the heart of the Second Amendment. And not one bans the law abiding from possessing items the reviewing court found to be constitutionally protected. In short, not one of the cited cases addresses the very sort of law this Court had before it in *Heller*. Instead, they involve conduct the courts found to be outside the Second Amendment's core, including: possession by violent criminals, *Williams*, 616 F.3d at 692; *Reese*, 627 F.3d 792; possession in "sensitive" places, *Masciandaro*, 638 F. 3d at 471; public carry, *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 96; possession for purposes other than self-defense, *Walker*, 709 F. Supp. 2d at 466; and possession of arms the court determined are not in "common use" for lawful purposes, *Marzzarella*, 614 F.3d at 92 n.8. The present case, on the other hand, presents a uniquely intrusive effort by the government to regulate the types of arms good people may keep in their homes for self-defense.

And so if the Court opts to apply a means-end level of scrutiny, strict scrutiny must apply. For, at all times the law flatly bans the exercise of the core right of law-abiding citizens to possess and use protected arms for the purpose of self-defense in their homes—the Second Amendment interest that is "surely elevate[d] above all other[s]." *Heller*, 554 U.S. at 635. The district court erred in applying lesser judicial scrutiny to Applicants' claims.

D. The Ordinance cannot survive any level of heightened means-end scrutiny.

The City failed to establish, and the district court erred in finding, that the City's outright ban on the possession of protected arms is substantially related, and appropriately tailored, to its interest in reducing access and misuse by criminals and unauthorized users. (Dkt. 10, at 18-23; Dkt. 45, at 13-15; *but see* App. 3, at 12-15.)

Applicants share a deep interest with the City in keeping the prohibited magazines, and all dangerous arms, out of the hands of criminals. But the City's approach to addressing this problem— taking protected magazines from the homes of all law-abiding citizens—is not a constitutionally permissible means of accomplishing its laudable goal, under *either* strict or intermediate scrutiny. (Dkt. 10, at 18-23; Dkt. 45, at 13-15.)

Rather than develop policies to prevent access and misuse by criminals, the City has opted to strip protected arms from the homes of law-abiding citizens. The City attempts to accomplish its objective of reducing injuries from the criminal misuse of protected magazines by banning the use of arms by the law abiding based *not* on the harm they themselves may cause, but based on the violence that may come from criminals who might steal those firearms from gun owners.

But to ban certain arms because criminals might misuse them is to tell law-abiding citizens that their liberties depend not on their own conduct, but on the conduct of the lawless. Surely this cannot be. Courts have routinely rejected the notion that the government may ban constitutionally protected activity on the grounds that the activity could lead to abuses.

Ultimately, the City's ban represents a policy choice as to the types of arms it desires its residents to use. But *Heller* is clear that such policy choices are off the table when considering commonly used, constitutionally protected arms. 554 U.S. at 636. There, D.C. sought to ban handguns for the *same reasons* the City wishes to ban its residents from having common, standard-capacity magazines over ten rounds—to decrease criminal misuse and prevent injuries through decreased availability. *Id*. at 682, 694 (Breyer, J., dissenting). Despite these interests, *Heller* is clear that D.C.'s handgun ban would "fail constitutional muster" under "any of the standards of scrutiny the Court has applied" to fundamental rights. *Id*. at 628-29.

If the D.C. handgun ban could not pass intermediate scrutiny (i.e., it was not "substantially related" or "narrowly tailored" to public safety), it follows that the City's ban on standard-capacity arms cannot survive such scrutiny either. For if stopping law-abiding citizens from possessing protected arms were a valid method of reducing criminal access and misuse, *Heller* would have been decided differently. Certainly, the justifications for a ban on handguns are substantially more related to the government's public safety objectives than a ban on firearms with magazines holding over ten rounds. While criminals might sometimes misuse magazines over ten rounds, misuse of handguns is overwhelming. *Id*. at 697-99 (Breyer, J., dissenting) (from 1993 to 1997, a whopping 81% of firearm-homicide victims were killed by handguns). Indeed, handguns are preferred and used by criminals in nearly all violent gun crimes. But despite the government's clear compelling interest in keeping concealable firearms out of the hands of criminals and unauthorized users, a ban on the possession of protected arms by the law abiding lacks the required fit *under <u>any</u> level of heightened scrutiny*. *Id*. at 628-29.

Critically, both the City and the district court ignored this instruction from this Court that banning the possession of protected arms by the law-abiding lacks the required fit *even under intermediate scrutiny*. Neither the district court nor the City can offer explanation as to why a ban on handguns, which are overwhelmingly preferred by criminals, is not substantially related to public safety interests under *Heller*—but why removing magazines from the law abiding would be any more related to those interests, even though such magazines are used far less often in crime than handguns. And they cannot. For just as the *Heller* handgun ban was not tailored to prevent criminal misuse of those arms, the City's outright ban on what amounts to roughly half of the magazines possessed by law-abiding Americans is not sufficiently tailored to its interest in keeping those magazines from criminals.

The handful of courts that have denied injunctions or otherwise upheld similar magazine bans have committed the same error the district court was guilty of here. They have each improperly selected intermediate scrutiny and, in applying that test, ignored clear guidance from this Court that removing constitutionally protected arms from the homes of law-abiding Americans lacks the required fit under *any* level of scrutiny. *See Heller II*, 670 F.3d at 1264; *S.F. Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, No. 13-05351, 2014 WL 644395, at *7 (N.D. Cal. Feb. 19, 2014); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, No. 13-291S, 2013 WL 6909955, at *18 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, No. 13-739, 2014 WL 346859, at *9 (D. Conn. Jan. 30, 2014); *Tardy v. O'Malley*, No. 13-2861, TRO Hr'g Tr., at 66-71 (D. Md. Oct. 1, 2013).

Applicants are exceedingly likely to succeed on the merits of their clear-cut Second Amendment claim because the Ordinance is unconstitutional under any test the

Court might apply. They have an indisputably clear right to the relief they seek, and injunctive relief pending appeal is proper.

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION

An injunction under the All Writs Act would be "in aid of" this Court's jurisdiction. *See* 28 U.S.C. § 1651(a). The All Writs Act extends this Court's authority to act where "the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *F.T.C. v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910). To that end, this Court has held that granting an All Writs Act injunction is appropriate where "an effective remedial order . . . would otherwise be virtually impossible." *Dean Foods*, 384 U.S. at 605 (finding an All Writs Act injunction to prevent two entities from merging was appropriate to preserve the controversy because otherwise the merger would result in the practical disappearance of one of those entities and disable effective relief); *see also Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1239 (11th Cir. 2005) (Wilson, J., dissenting).

The Court should exercise this authority here because no law-abiding Sunnyvale resident, including Applicants, will ever be able to receive effective relief from any future remedial order issued by the Ninth Circuit or this Court for the injuries they currently suffer due to the deprivation of their Second Amendment right to keep protected arms for self-defense. The harm resulting from the City's ongoing deprivation of Applicants' fundamental rights, as well as the harm invited upon those residents forced to permanently dispose of their lawfully acquired property, is irreparable.

Applicants' situation is strikingly like that of religious believers who received injunctive relief from this Court to prevent the forced choice between violating their beliefs and some punitive action. *See Little Sisters of the Poor Home for the Aged, Denver, Col. v. Sebelius*, __U.S.__, 134 S. Ct. 1022 (2014); *Holt v. Hobbs*, __U.S.__, 134 S. Ct. 635 (2013). In *Little Sisters*, had the Court not issued preliminary relief and the government had pressured the applicants to sign a document in violation of their sincerely held religious beliefs, subsequent reversal of the government mandate would allow the applicants to resume the free exercise of their religious beliefs. Similarly, in *Holt*, if the Court had not issued relief and the government had forced the applicant to shave his beard in violation of his beliefs, he could have grown it back later. Notwithstanding, in both instances the applicants would have irretrievably lost the protection to which their religious exercise was entitled during the course of litigation.

Here, not only have law-abiding residents of Sunnyvale, including Applicants, irretrievably lost their Second Amendment right to possess commonly owned magazines for self-defense, but some will never be able to recover their protected magazines and be forever barred from resuming the exercise of their fundamental right to own them. Because no effective relief from this violation can ever be fashioned, the Court should issue relief to preserve Applicants' rights and the rights of all law-abiding residents of Sunnyvale as this case progresses.

IV. ON BALANCE, THE HARDSHIPS FACING APPLICANTS ARE FAR GREATER THAN THOSE FACING THE CITY, AND INJUNCTION IS FAVORED

In a challenge to government action that affects the exercise of constitutional rights, "[t]he balance of equities and the public interest . . . tip *sharply* in favor of

enjoining the ordinance." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (emphasis added). Indeed, "all citizens have a stake in upholding the Constitution" and have "concerns [that] are implicated when a constitutional right has been violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). And the City "cannot reasonably assert that [it] is harmed in any legally cognizable sense by being enjoined from constitutional violations." *Haynes v. Office of the Att'y Gen. Phill Kline*, 298 F. Supp. 2d 1154, 1160 (D. Kan. Oct. 26, 2004) (citing *Zepeda v. U.S. Immigration.*, 753 F.2d 719, 727 (9th Cir. 1983)).

Again, Applicants seek to vindicate their fundamental Second Amendment rights. And they face a retroactive law that strips them of arms they lawfully owned before the law's enactment—a law that required them to surrender their property to the government by a date certain *without a grandfather clause*. As Applicants argued in the court below, the City could have chosen to regulate in far less intrusive ways. Instead, it chose the extraordinary path of enacting a retroactive ban on the possession of protected arms by law-abiding citizens. The burden of such a ban on the law abiding is far greater than one affecting only later-acquired property.

That burden on Applicants and other Sunnyvale residents far outweighs any burden to the City caused by temporarily suspending enforcement of the law. Indeed, the very fact that the City itself created a three-month grace period for the enforcement of the ban against those in possession of magazines over ten rounds cuts against any argument that the City suddenly has some urgent need to enforce the law *now*, rather than after the Ninth Circuit has considered the merits of Applicants' constitutional claims. If these magazines, in the hands of good and responsible adults, were such a

grievous threat necessitating immediate enforcement, such a grace period would itself have been too great a burden on the City. Really, it just illustrates how arbitrary the law's effective date is to the City—as opposed to its importance to Applicants who will be stripped of their constitutional rights every minute the law remains in force during this litigation and who will face the ever-present threat of police searches of their homes based on probable cause that they may be in continued possession of a pre-ban magazine.

Granting the injunction will simply preserve Applicants' rights while the case is decided on the merits. The sale of magazines over ten rounds is already unlawful in California, so the City will not be flooded with such magazines if an injunction is granted. On the other hand, granting an injunction will end the ongoing violation of Applicants' rights, allowing them the freedom to exercise them without fear of prosecution and allowing residents to continue possessing their lawfully acquired, common magazines in their homes.

CONCLUSION

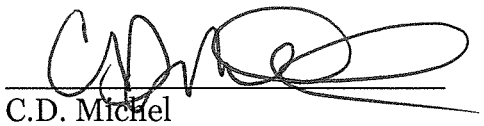
While there may be some constitutionally permissible limit to the firepower that ordinary citizens may have, any limit on magazine size simply cannot be below that which is "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624-25.

Pursuant to the All Writs Act, Applicants respectfully ask the Court to enter an injunction against the City enjoining them from enforcing or applying the Ordinance

during the pendency of this appeal. At minimum, Applicants respectfully seek an administrative stay to allow for orderly briefing and disposition of this Application.

Dated: March 10, 2014

Respectfully submitted,



C.D. Michel
Counsel for Applicants

CERTIFICATE OF SERVICE

As required by Supreme Court rule 29.5, I, C.D. Michel, a member of the Supreme Court Bar, hereby certify that one copy of the attached **EMERGENCY APPLICATION FOR INJUNCTION PENDING APPEAL** was served via electronic mail on March 10, 2014, and by first-class United States Postal Service mail on March 10, 2014, on:

Counsel for Respondents
Roderick M. Thompson
rthompson@fbm.com
Anthony P. Schoenberg
aschoenberg@fbm.com
Rochelle L. Woods
rwoods@fbm.com
FARELLA BRAUN + MARTEL LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
(415) 954-4445

APPENDIX 1

Ninth Circuit Order Denying Appellants' Emergency Motion for Injunction Pending Appeal

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LEONARD FYOCK; et al., Plaintiffs - Appellants, v. CITY OF SUNNYVALE; et al., Defendants - Appellees.	No. 14-15408 D.C. No. 5:13-cv-05807-RMW Northern District of California, San Jose ORDER

Before: W. FLETCHER, M. SMITH, and CHRISTEN, Circuit Judges.

Appellants' emergency motion for an injunction pending appeal is denied. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

Appellants' motion for a temporary injunction pending disposition of the motion for an injunction pending appeal is denied as moot.

The briefing schedule established previously in this preliminary injunction appeal shall remain in effect.

hmb/MOATT

APPENDIX 2

Plaintiffs' Notice of Appeal & Representation Statement

C. D. Michel - S.B.N. 144258
Clinton B. Monfort - S.B.N. 255609
Sean A. Brady - S.B.N. 262007
Anna M. Barvir - S.B.N. 268728
MICHEL & ASSOCIATES, P.C.
180 E. Ocean Boulevard, Suite 200
Long Beach, CA 90802
Telephone: 562-216-4444
Facsimile: 562-216-4445
Email: cmichel@michellawyers.com

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LEONARD FYOCK, SCOTT HOCHSTETLER, WILLIAM DOUGLAS, DAVID PEARSON, BRAD SEIFERS, and ROD SWANSON,

Plaintiffs,

vs.

THE CITY OF SUNNYVALE, THE MAYOR OF SUNNYVALE, ANTHONY SPITALERI, in his official capacity, THE CHIEF OF THE SUNNYVALE DEPARTMENT OF PUBLIC SAFETY, FRANK GRGURINA, in his official capacity, and DOES 1-10,

Defendants.

CASE NO: CV 13-05807 RMW

PLAINTIFFS' NOTICE OF APPEAL AND REPRESENTATION STATEMENT

PRELIMINARY INJUNCTION APPEAL

NOTICE OF APPEAL – PRELIMINARY INJUNCTION APPEAL

NOTICE IS HEREBY GIVEN that Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson, plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from an order denying Plaintiffs' Motion for Preliminary Injunction entered in this action on the 5th day of March, 2014 (Docket No. 56) attached as Exhibit A.

Plaintiffs' Representation Statement is attached to this Notice as required by Ninth Circuit Rule 3-2(b).

Date: March 5, 2014

MICHEL & ASSOCIATES, P.C.

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

REPRESENTATION STATEMENT

The undersigned represents Plaintiffs-Appellants Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson, and no other party. Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Plaintiffs-Appellants submit this Representation Statement. The following list identifies all parties to the action, and it identifies their respective counsel by name, firm, address, telephone number, and e-mail, where appropriate.

PARTIES	COUNSEL OF RECORD
Plaintiffs-Appellants Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson	C. D. Michel (S.B.N. 144258) Clinton B. Monfort (S.B.N. 255609) Sean A. Brady - S.B.N. 262007 Anna M. Barvir (S.B.N. 268728) MICHEL & ASSOCIATES, P.C. 180 East Ocean Blvd., Suite 200 Long Beach, CA 908502 Tel. No. (562) 216-4444 Fax No: (562) 216-4445 cmichel@michellawyers.com
Defendants-Appellees The City of Sunnyvale, the Mayor of Sunnyvale, Anthony Spitaleri, in His Official Capacity, the Chief of the Sunnyvale Department of Public Safety, Frank Grgurina, in His Official Capacity, and Does 1-10	Roderick M. Thompson Anthony P. Schoenberg Rochelle L. Woods Farella Braun + Martel LLP 235 Montgomery Street, 17th Floor San Francisco, CA 94104 Tel.: (415) 954-4400 Fax: (415) 954-4480 aschoenberg@fbm.com

Dated: March 5, 2014

MICHEL & ASSOCIATES, P. C.

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

APPENDIX 3

District Court Order Denying
Motion for Preliminary Injunction

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LEONARD FYOCK, SCOTT HOCHSTETLER, WILLIAM DOUGLAS, DAVID PEARSON, BRAD SEIFERS, and ROD SWANSON,

Plaintiffs,

v.

THE CITY OF SUNNYVALE, THE MAYOR OF SUNNYVALE, ANTHONY SPITALERI, in his official capacity, and THE CHIEF OF THE SUNNYVALE DEPARTMENT OF PUBLIC SAFETY, FRANK GRGURINA, in his official capacity,

Defendants.

Case No. C-13-5807-RMW

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

[Re: Docket No. 10]

The issue before the court is whether Sunnyvale's ordinance outlawing the possession of firearm magazines having a capacity to accept more than ten rounds should be preliminarily enjoined for infringing individuals' Second Amendment rights. The core of the Second Amendment right to bear arms is self-defense, especially within the home. *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008); *Peruta v. Cnty. of San Diego*, 10-56971, 2014 WL 555862, at *18 (9th Cir. Feb. 13, 2014). With this right in mind, courts have found unconstitutional a law that forbids handguns, *Heller*, 554 U.S. at 635, and a registration scheme that effectively eliminates the average law-abiding citizen's right to bear a gun, *Peruta*, 2014 WL 555862, at *22. The law challenged here

prohibits the possession of certain protected arms anywhere in Sunnyvale. However, the banned arms—magazines having a capacity to accept more than ten rounds—are hardly central to self-defense. The right to possess magazines having a capacity to accept more than ten rounds lies on the periphery of the Second Amendment right, and proscribing such magazines is, at bare minimum, substantially related to an important government interest. No court has yet entered a preliminary injunction against a law criminalizing the possession of magazines having a capacity to accept more than ten rounds, nor has any court yet found that such a law infringes the Second Amendment. Upon the present record, this court declines to be the first. Plaintiffs' Motion for Preliminary Injunction is DENIED.

I. BACKGROUND

In early 2013, concerned about gun crime, then-current Mayor of Sunnyvale Anthony Spitaleri proposed a gun control ballot initiative called Measure C. Dkt. No. 40, Spitaleri Decl. ¶¶ 4-8, Ex. 1. Measure C was put to a vote and, on November 5, 2013, the citizens of Sunnyvale passed Measure C with 66.55% of the vote. Dkt. No. 42-9, Thompson Decl., Ex. 9, at 3. Measure C was subsequently codified as Sunnyvale Municipal Code § 9.44.030-60.

Plaintiffs Leonard Fyock, William Douglas, David Pearsons, Brad Seifers, and Rod Swanson (collectively "Plaintiffs"), challenge only one provision of Measure C in this case, § 9.44.050. Section 9.44.050 reads:

> No person may possess a large-capacity magazine in the city of Sunnyvale whether assembled or disassembled. For purposes of this section, "large-capacity magazine" means any detachable ammunition feeding device with the capacity to accept more than ten (10) rounds, but shall not be construed to include any of the following:
>
> (1) A feeding device that has been permanently altered so that it cannot accommodate more than ten (10) rounds; or
>
> (2) A .22 caliber tubular ammunition feeding device; or
>
> (3) A tubular magazine that is contained in a lever-action firearm.

Sunnyvale, Cal., Mun. Code § 9.44.050(a). In short, the Sunnyvale ordinance prohibits the possession of magazines having the capacity to accept more than ten rounds. The ordinance carves out nine exceptions:

> (1) Any federal, state, county, or city agency that is charged with the enforcement of any law, for use by agency employees in the discharge of their official duties;
>
> (2) Any government officer, agent, or employee, member of the armed forces of the United States, or peace officer, to the extent that such person is otherwise authorized to possess a large-capacity magazine and does so while acting within the course and scope of his or her duties;
>
> (3) A forensic laboratory or any authorized agent or employee thereof in the course and scope of his or her duties;
>
> (4) Any entity that operates an armored vehicle business pursuant to the laws of the state, and an authorized employee of such entity, while in the course and scope of his or her employment for purposes that pertain to the entity's armored vehicle business;
>
> (5) Any person who has been issued a license or permit by the California Department of Justice pursuant to Penal Code Sections 18900, 26500-26915, 31000, 32315, 32650, 32700-32720, or 33300, when the possession of a large-capacity magazine is in accordance with that license or permit;
>
> (6) A licensed gunsmith for purposes of maintenance, repair or modification of the large-capacity magazine;
>
> (7) Any person who finds a large-capacity magazine, if the person is not prohibited from possessing firearms or ammunition pursuant to federal or state law, and the person possesses the large-capacity magazine no longer than is reasonably necessary to deliver or transport the same to a law enforcement agency;
>
> (8) Any person lawfully in possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds fewer than 10 rounds of ammunition is compatible with the firearm and the person possesses the large-capacity magazine solely for use with that firearm.
>
> (9) Any retired peace officer holding a valid, current Carry Concealed Weapons (CCW) permit issued pursuant to California Penal Code. (Ord. 3027-13 § 1).

Sunnyvale, Cal., Mun. Code § 9.44.050(c). The ordinance took effect on December 6, 2013, and it gives persons ninety days to dispossess themselves of their now-prohibited magazines. Thus, to avoid prosecution for their possession of magazines having the capacity to accept more than ten rounds, by March 6, 2014 persons must:

> (1) Remove the large-capacity magazine from the city of Sunnyvale; or
>
> (2) Surrender the large-capacity magazine to the Sunnyvale Department of Public Safety for destruction; or
>
> (3) Lawfully sell or transfer the large-capacity magazine in accordance with Penal Code Section 12020.

Sunnyvale, Cal., Mun. Code § 9.44.050(b).

On December 16, 2013, Plaintiffs filed the instant suit against the City of Sunnyvale, Anthony Spitaleri (in his official capacity as Mayor of Sunnyvale), and Frank Grgurina (in his official capacity as Chief of the Sunnyvale Department of Public Safety) (collectively "Sunnyvale) alleging that Sunnyvale Municipal Code § 9.44.050 violates their right to keep and bear arms under the Second Amendment to the United States Constitution. *See* Dkt. No. 1, Complaint. Plaintiffs now bring the present motion to enjoin Sunnyvale "from enforcing Sunnyvale Police Code section 9.44.050 pending resolution of the merits of this case or further order of this Court." Dkt. No. 21, (Proposed) Order Granting Motion for Preliminary Injunction; *see also* Dkt. No. 10, Motion for Preliminary Injunction ("Motion"). Sunnyvale filed an opposition, Dkt. No. 35 ("Opp."), Plaintiffs filed a reply, Dkt. No. 45 ("Reply"), and the motion was argued before the court on February 21, 2014.

II. ANALYSIS

Preliminary injunctions are intended to "preserve the relative positions of the parties until a trial on the merits can be held." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). It is an "extraordinary and drastic remedy," requiring the movant to clearly carry the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). A movant must show that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008).

The Ninth Circuit has also held that "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). "Serious questions" refers to questions "which cannot be resolved one way or the other at the hearing on the injunction and as to which the court perceives a need to preserve the status quo lest one side prevent resolution of the questions or execution of any judgment by altering the status quo." *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991).

A. Likelihood of Success on the Merits

The Second Amendment methodology adopted by the Ninth Circuit "(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny." *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *see also Peruta v. Cnty. of San Diego*, No. 10-56971, 2014 WL 555862, at *3 (9th Cir. Feb. 13, 2014) ("To resolve the challenge to the D.C. restrictions, the *Heller* majority described and applied a certain methodology: it addressed, first, whether having operable handguns in the home amounted to 'keep[ing] and bear[ing] Arms' within the meaning of the Second Amendment and, next, whether the challenged laws, if they indeed did burden constitutionally protected conduct, 'infringed' the right."). The court now applies that test here.

1. Burden on conduct protected by the Second Amendment

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Second Amendment is "fully applicable to the States" through the Fourteenth Amendment. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010). In asking whether the Sunnyvale ordinance burdens conduct protected by the Second Amendment, the court must naturally seek to understand the scope of the Second Amendment's protections. Indeed, "[u]nderstanding the scope of the right is not just necessary, it is key to our analysis." *Peruta*, 2014 WL 555862, at *19. On one extreme, if Sunnyvale's ordinance does not burden conduct protected by the Second Amendment, the law may be upheld without any further inquiry. On the other extreme, the Sunnyvale law may reach so far as to prohibit the exercise of the core Second Amendment right. In that case, "no amount of interest-balancing under a heightened form of means-ends scrutiny can justify" the policy. *Id.*

"*Heller* instructs that text and history are our primary guides in" determining the Second Amendment's scope. *Id.* at *18. The Second Amendment, by its text, "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Throughout our nation's history, "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628. The strength of this self-defense right is at its height in the home, "where the need

for defense of self, family, and property is most acute." *Id.* Still, the right also applies outside the home. *Peruta*, 2014 WL 555862, at *18.

Besides these broad findings, the Second Amendment's history is less useful when confronting the much narrower question of whether a prohibition on magazines having a capacity to accept more than ten rounds falls within the scope of the Second Amendment. The parties apparently agree, as neither has provided the court with any historical sources or argument. Surely the reason is that magazines apparently did not even exist when the Second Amendment was ratified.[1] Despite this, the results of the historical heavy lifting done by the *Heller* and *Peruta* courts clearly illustrate that the Sunnyvale law burdens within the scope of the Second Amendment right. The court therefore sees no use in revisiting that analysis here.

As previously stated, the Second Amendment extends to arms used for self-defense both inside and outside the home. *Heller*, 554 U.S. at 628 (inside the home); *Peruta*, 2014 WL 555862, at *18 (outside the home). Sunnyvale bans the possession of magazines having a capacity to accept more than ten rounds everywhere, so as long as such magazines bear some relation to self-defense, the ordinance burdens conduct protected by the Second Amendment.

Although the extent of the prohibited magazines' relationship to self-defense is questionable, Plaintiffs' evidence indicates that such magazines are chosen for self-defense. Helsley Decl. ¶ 3; Monfort Decl. Ex. B (listing numerous examples of guns having as standard magazines with capacities exceeding ten rounds); Monfort Decl. Ex. C (advertisements and more gun listings). Plaintiffs also submit evidence that firearms with magazines having a capacity to accept more than ten rounds are "highly effective for in-home self-defense." Motion at 4; *see, e.g.*, Ayoob Decl. ¶¶ 27-28.

Sunnyvale asserts that magazines having a capacity to accept more than ten rounds are dangerous and unusual, and are thus not protected by the Second Amendment. Indeed, there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554

[1] The fact that magazines apparently did not exist when the Second Amendment was ratified is not a reason to find that magazines having a capacity to accept more than ten rounds are not protected by the Second Amendment. As the Supreme Court has held, the argument "that only those arms in existence in the 18th century are protected by the Second Amendment" "border[s] on the frivolous." *Heller*, 554 U.S. at 582. "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.*

U.S. at 627. To measure whether a weapon is dangerous and unusual, the court looks at whether it is "in common use," or whether such weapons are "typically possessed by law-abiding citizens for lawful purposes." *United States v. Miller*, 307 U.S. 174, 179 (1939); *Heller*, 554 U.S. at 627 ("*Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.'" (quoting *Miller*, 307 U.S. at 179)); *Heller*, 554 U.S. at 625 ("We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.").

The court finds that magazines having a capacity to accept more than ten rounds are in common use, and are therefore not dangerous and unusual. Plaintiffs cite statistics showing that magazines having a capacity to accept more than ten rounds make up approximately 47 percent of all magazines owned. Curcuruto Decl. ¶ 8. Another report indicates that individuals own "millions" of the prohibited magazines, and that sales of pistols—which are more likely than revolvers to take such magazines as standard—have grown substantially at revolvers' expense. Helsey Decl. ¶ 10. Furthermore, while product offerings may not precisely mirror ownership, approximately one-third of the semiautomatic handgun models and two-thirds of the semiautomatic, centerfire rifles listed in *Gun Digest* (a gun model reference work) are typically sold with magazines having a capacity to accept more than ten rounds. Monfort Decl. Ex. B. Both parties admit that reliable data on the number of the banned magazines owned by individuals does not exist. Nevertheless, "it is safe to say that whatever the actual number of such magazines in United States consumers' hands is, it is in the tens-of-millions, even under the most conservative estimates." Curcuruto Decl. ¶ 13.

Sunnyvale refutes Plaintiffs' evidence by arguing that "[t]here is no evidence of 'common use' in California," or Sunnyvale, Opp. at 13, because a combination of federal and state law has proscribed the sale, purchase, and transfer of magazines having a capacity to accept more than ten rounds since 1994. Thompson Decl., Ex. 8, H.R. Rep. 103-439, at 32-33 (1994); Thompson Decl., Ex. 1, Cal. Stats. 1999, ch. 129, §§ 3, 3.5, codified as Cal. Penal Code § 32310. However, Sunnyvale misunderstands the common use test. The Supreme Court did not define the common use test as a local test, but rather evaluated common use as a national test in its historical discussion. *Heller*, 554 U.S. at 621-28. Moreover, it cannot be that common use is measured on anything but a

national scale—otherwise, the scope of individuals' Second Amendment rights as enshrined in the federal Constitution would vary based on location. This result would be wrong: the Second Amendment safeguards individual rights equally throughout the United States.

Sunnyvale also responds that magazines having a capacity to accept more than ten rounds are not commonly used for self-defense. Opp. at 13-15. But here again Sunnyvale misinterprets *Heller*, basing its argument on too literal a reading of the term "use." Second Amendment rights do not depend on how often the magazines are used. Indeed, the standard is whether the prohibited magazines are "typically *possessed* by law-abiding citizens for lawful purposes," not whether the magazines are often *used* for self-defense. *Heller*, 554 U.S. at 625 (emphasis added). As Plaintiffs explain, "[m]ost people will never need to discharge a firearm in self-defense at all." Reply at 8. By invoking the phrase "common use," the Supreme Court simply meant that arms must be commonly kept for lawful self-defense. The fact that few people "will require a particular firearm to effectively defend themselves," Reply at 8, should be celebrated, and not seen as a reason to except magazines having a capacity to accept more than ten rounds from Second Amendment protection. Evidence that such magazines are "typically possessed by law-abiding citizens for lawful purposes" is enough. *Heller*, 554 U.S. at 625. Sunnyvale has thus failed to prove that the banned magazines are not in common use. Therefore, unlike unregistered short-barreled shotguns, which the *Miller* court found to be unprotected by the Second Amendment, magazines having a capacity to accept more than ten rounds are not dangerous and unusual.

Sunnyvale also contends that the prohibited magazines are not "arms" within the meaning of the Second Amendment. This argument is not persuasive. First, while every court that has considered a ban on possession of magazines having a capacity to accept more than ten rounds has upheld the law, no court has found that such magazines do not qualify as "arms" under the Second Amendment. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, C-13-05351 WHA, 2014 WL 644395, at *7 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, C-13-291S, 2013 WL 6909955, at *18 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, C-13-739 AVC, 2014 WL 346859, at *9 (D. Conn. Jan. 30, 2014); *Tardy v. O'Malley*, C-13-2861, TRO

Hr'g Tr., at 66-71 (D. Md. Oct. 1, 2013). Second, if Sunnyvale is right that magazines and ammunition are not "arms," any jurisdiction could effectively ban all weapons simply by forbidding magazines and ammunition. This argument's logic would abrogate all Second Amendment protections. Rather, the court finds that the prohibited magazines are "weapons of offence, or armour of defence," as they are integral components to vast categories of guns. *Heller*, 554 U.S. at 581 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)).

In sum, Sunnyvale's ban on possession of magazines having a capacity to accept more than ten rounds implicates the Second Amendment's protections. The Sunnyvale ordinance forbids possession of such magazines in all locations—in the home and in public—and for all purposes—self-defense or otherwise. The law carves out a number of exceptions, but they are all narrow, and do not apply to the average, law-abiding citizen. Thus the court finds that the Sunnyvale ordinance prohibits average, law-abiding citizens from possessing protected arms that are not dangerous and unusual. As such, Sunnyvale's ban burdens conduct protected by the Second Amendment. In reaching this conclusion, the court does not consider the amount of the burden—this factor is examined below.[2]

2. Selecting the level of scrutiny

Some regulations are so burdensome on Second Amendment rights that they would fail any scrutiny test, as was the case in *Heller* and *Peruta*. In *Heller*, the Court reasoned that the law at issue would fail any scrutiny test because "[t]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose [of self-defense]. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. In *Peruta*, the court confronted a registration scheme that effectively banned the open and concealed carry of handguns to the average, law-abiding citizen. The Ninth Circuit interpreted *Heller* as holding that "[a] law effecting a '*destruction* of the right' rather than merely *burdening* it is, after all, an infringement under any light." *Peruta*, 2014 WL 555862, at *20 (emphasis in original). Because the registration scheme

[2] *See infra* Part II.A.2.b.

effected a destruction of the Second Amendment right to keep and bear handguns, the laws were *per se* unconstitutional. *Id.* at *22.

"It is the rare law that 'destroys' the right, requiring *Heller*-style per se invalidation." *Id.* at *21. Unlike the laws in *Heller* and *Peruta*, the Sunnyvale ordinance does not effect a "destruction of the right." The Sunnyvale law does not ban all, or even most, magazines. Rather, Sunnyvale merely burdens the Second Amendment right by banning magazines having a capacity to accept more than ten rounds. The Second Amendment likely requires that municipalities permit *some form* of magazines, but Sunnyvale's law is consistent with this requirement. *Id.* at *24 ("But the Second Amendment does require that the states permit *some form* of carry for self-defense outside the home." (emphasis in original)). As such, the Sunnyvale ordinance is not *per se* unconstitutional, and the court must select the appropriate level of scrutiny under which it will analyze the law.

The Ninth Circuit in *Chovan* observed that "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)). The court examines each factor in turn.

a. How close the law comes to the core of the Second Amendment right

As outlined earlier, the Second Amendment "right is, *and has always been,* oriented to the end of self-defense." *Peruta*, 2014 WL 555862, at *8 (emphasis in original). Upon review of the evidence, the court finds that the Sunnyvale ordinance comes relatively near the core of the Second Amendment right.

Plaintiffs present a wealth of evidence that magazines having a capacity to accept more than ten rounds are often used with relatively ordinary handguns that individuals use for self-defense both inside and outside the home. The court cited some of this evidence in the context of its determination that the banned magazines are in common use. Curcuruto Decl. ¶¶ 8, 13; Helsey Decl. ¶ 10; Monfort Decl. Ex. B. In addition, Plaintiffs' evidence suggests that many handguns kept for self-defense come standard with magazines having the prohibited capacity. Helsley Decl. ¶ 3; Monfort Decl. Ex. B (listing numerous examples of guns having as standard magazines with capacities exceeding ten rounds); Monfort Decl. Ex. C (advertisements and more gun listings). This

fact also holds for pistols and rifles. Monfort Decl. Ex. B; Monfort Decl. Ex. C. Each of the individual plaintiffs indicate that they keep the banned magazines for self-defense. Fyock Decl. ¶¶ 5-7; Douglas Decl. ¶¶ 5-7; Pearson Decl. ¶¶ 5-7; Seifers Decl. ¶¶ 5-7; Swanson Decl. ¶¶ 5-7. The evidence also shows that the American public in general prefers many of the firearms that take magazines having a capacity to accept more than ten rounds as standard. Curcuruto Decl. ¶¶ 8, 13; Helsey Decl. ¶ 10; Monfort Decl. Ex. B.

Sunnyvale counters that the connection between the forbidden magazines and their use for self-defense is not strong. However, evidence of use is of limited relevance to determining the level of scrutiny to apply. To understand whether the law approaches core Second Amendment conduct, the court must only consider the preferences of average, law-abiding citizens. *Heller*, 554 U.S. at 625. At least in this instance, the court will not judge whether the public's firearm choices are often used for self-defense, or even whether they are effective for self-defense—the firearms must merely be preferred. Therefore, the court concludes that the Sunnyvale law burdens conduct near the core of the Second Amendment right.

b. Severity of the burden

Although this conclusion points to strict scrutiny as the proper standard for this case, *Chovan* directs courts to also consider the severity of the burden on the Second Amendment right. *Chovan*, 735 F.3d at 1138. Here, the Sunnyvale law's burden on the Second Amendment right is light. Magazines having a capacity to accept more than ten rounds are hardly crucial for citizens to exercise their right to bear arms. The Sunnyvale ordinance does not place any restrictions on smaller magazines, which are the most popular magazines for self-defense. Curcuruto Decl. ¶ 8 (Plaintiffs' expert stating that 47 percent of all magazines owned are capable of holding more than ten rounds, meaning that 53 percent of all magazines are not capable of holding more than ten rounds); *see also* Yurgealitis Decl. ¶ 6. Individuals have countless other handgun and magazine options to exercise their Second Amendment rights. *See, e.g.*, Monfort Decl. Ex. B, C (listing numerous firearms that take magazines that accept ten or fewer rounds as standard). The evidence thus establishes that the banned magazines make up just one subset of magazines, which interoperate only with a subset of

all firearms. Accordingly, a prohibition on possession of magazines having a capacity to accept more than ten rounds applies only the most minor burden on the Second Amendment.

c. Selecting intermediate scrutiny

Considering both how close the Sunnyvale law comes to the core of the Second Amendment right and the law's burden on that right, the court finds that intermediate scrutiny is appropriate. The law bans possession of magazines having a capacity to accept more than ten rounds in all places, at all times, and for all purposes, thus approaching the core of the Second Amendment's protections. However, the ordinance's burden on the Second Amendment right is light because it only bans a less-preferred subset of magazines that cannot have been legally sold in California for twenty years. The conclusion that intermediate scrutiny applies is in accord with every other court that has considered a similar ban on magazines having a capacity to accept more than ten rounds. *See Heller II*, 670 F.3d at 1261-62 (D.C. Cir. 2011); *San Francisco Veteran Police*, 2014 WL 644395, at *5 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass'n*, 2013 WL 6909955, at *12-13; *Shew v. Malloy*, 2014 WL 346859, at *6-7. Further, in most Second Amendment cases, courts tend to reject strict scrutiny and apply intermediate scrutiny. *See, e.g.*, *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *U.S. v. Masciandaro*, 638 F.3d 458, 474 (4th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010); *U.S. v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *U.S. v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *U.S. v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010); *U.S. v. Lahey*, No. 10-CR-765 KMK, 2013 WL 4792852, at *15 (S.D.N.Y. Aug. 8, 2013); *see also U.S. v. Marzzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) ("the Court's willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review"); Thompson Decl., Ex. 28, Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. Rev. 1171, 1197-98 (2009) ("the *Heller* majority thus implicitly rejected strict scrutiny"). Accordingly, the court applies intermediate scrutiny.

3. Applying Intermediate Scrutiny

Intermediate scrutiny "require[s] (1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted

objective." *Chovan*, 735 F.3d at 1139 (citing *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)). Stated differently, "a regulation that burdens a plaintiff's Second Amendment rights 'passes constitutional muster if it is substantially related to the achievement of an important government interest.'" *Kwong v. Bloomberg*, 723 F.3d 160, 168 (2d Cir. 2013) (quoting *Kachalsky*, 701 F.3d at 96). Because the Sunnyvale law is substantially related to an important government objective and is reasonably tailored to the objective, the court finds that the challenged ordinance meets the intermediate scrutiny test.

Public safety and crime prevention are compelling government interests. *U.S. v. Salerno*, 481 U.S. 739, 748-50 (1987) (finding not only that public safety and crime prevention are compelling government interests, but also even that "the government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest"); *Schall v. Martin*, 467 U.S. 253, 264 (1984) ("the 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted"). The parties, however, hotly dispute what effect the Sunnyvale ordinance will have on public safety. At the outset, the court notes that its judicial role—especially in this Second Amendment context—is to apply the law and not to make policy decisions. *See, e.g.*, *Heller*, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."); *McDonald*, 130 S. Ct. at 3050 (2010) (Second Amendment analysis does not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise."). As a result, irrespective of how Sunnyvale's law impacts public safety, the means-end scrutiny test must concentrate more on the relationship between the challenged ordinance and public safety than on the exact effect the law may have. Otherwise, means-end scrutiny analyses are reduced to courts making policy judgments better left to legislatures and the people.

As stated in Measure C itself, prevention of gun violence lies at the heart of the Sunnyvale ordinance. *See* Spitaleri Decl. Exh. A at 1 ("the People of Sunnyvale find that the violence and harm caused by and resulting from both the intentional and accidental misuse of guns constitutes a clear and present danger to the populace, and find that sensible gun safety measures provide some relief from that danger and are of benefit to the entire community"). Sunnyvale submits substantial

evidence that a ban on the possession of magazines having a capacity to accept more than ten rounds may reduce the threat of gun violence. For example, Professor Koper opines in his declaration that the Sunnyvale law "has the potential to (1) reduce the number of crimes committed with [large capacity magazines]; (2) reduce the number of shots fired in gun crimes; (3) reduce the number of gunshot victims in such crimes; (4) reduce the number of wounds per gunshot victim; (5) reduce the lethality of gunshot injuries when they do occur; and (6) reduce the substantial societal costs that flow from shootings." Koper Decl. ¶ 57. Professor Koper, relying on a study assessing the 1994 federal assault weapons ban, also states that magazines having a capacity to accept more than ten rounds "are particularly dangerous because they facilitate the rapid firing of high numbers of rounds. This increased firing capacity thereby potentially increases injuries and deaths from gun violence." *Id.* ¶ 7. Studies also show that the banned magazines are used in 31% to 41% of gun murders of police. *Id.* ¶ 18.

Plaintiffs respond that Sunnyvale's ordinance will have little effect because criminal users of firearms will not comply with the law. Kleck Decl. ¶¶ 28-29. However, Sunnyvale provides data showing that, among 69 mass shootings, 115 of 153—or 75%—of the guns used were obtained legally. Allen Decl. ¶ 18. Professor Koper refutes this argument with evidence that prohibitions on magazines having a capacity to accept more than ten rounds reduce the availability of such magazines to criminals. *Id.* ¶ 47-52. In that sense, even if the Sunnyvale law has minimal compliance among potential criminal firearm users and is difficult to enforce by police, it may still reduce gun crime by restricting the banned magazines' availability.

Plaintiffs also argue that Sunnyvale's ban will have a negative impact on public safety because it imposes magazine size limits on those acting in self-defense. This evidence is relatively unpersuasive for three reasons. First, studies of the NRA Institute for Legislative Action database demonstrates that individuals acting in self-defense fire 2.1-2.2 shots on average. Allen Decl. ¶¶ 6-9. It is rare that anyone will need to fire more than ten rounds in self-defense. *Id.* Second, although Plaintiffs provide several anecdotes of instances when having a magazine with the capacity to accept more than ten rounds was necessary for self-defense, Plaintiffs do not supply any quantitative data showing that banning such magazines would negatively impact public safety. *See* Ayoob Decl.

¶¶ 5-16. The fact that Plaintiffs only present anecdotal examples rather than quantitative studies suggests that in only very rare circumstances is it necessary to possess a larger magazine in self-defense.

Finally, Plaintiffs' evidence does little to show that the Sunnyvale ordinance is not substantially related to the achievement of an important government interest. Means-end scrutiny is meant, *inter alia*, to subject laws to additional examination when there is a fear that they may trample on individual rights. *See Heller*, 554 U.S. at 634-35. Here, Plaintiffs are concerned that the Sunnyvale law infringes their Second Amendment rights, and Sunnyvale argues that its citizens voted for the law out of concern for public safety. Whether or not the law is ultimately effective is yet to be seen. But for now, Sunnyvale has submitted pages of credible evidence, from study data to expert testimony to the opinions of Sunnyvale public officials, indicating that the Sunnyvale ordinance is substantially related to the compelling government interest in public safety. While Plaintiffs present evidence that the law will not be successful, the court cannot properly resolve that question. The court is persuaded that Sunnyvale residents enacted Measure C out of a genuine concern for public safety, and that the law, with its many exceptions and narrow focus on just those magazines having a capacity to accept more than ten rounds, is reasonably tailored to the asserted objective of protecting the public from gun violence.

4. Summary: Plaintiffs are not likely to succeed on the merits

The court concludes that Plaintiffs are not likely to succeed on the merits. Although Plaintiffs demonstrate that the Sunnyvale ordinance imposes some burden on Second Amendment rights, that burden is relatively light. The Sunnyvale law passes intermediate scrutiny, as the court—without making a determination as to the law's likely efficacy—credits Sunnyvale's voluminous evidence that the ordinance is substantially tailored to the compelling government interest of public safety. This determination is based on the record as it stands at this early preliminary injunction stage of the case.[3] At this time, the court only holds that, upon this surely incomplete record, Plaintiffs have failed to prove that they are likely to succeed on the merits.[4]

[3] In addition to their reply brief, Plaintiffs raise 24 evidentiary objections in a separate fifteen-page filing. Dkt. No. 45-1. Sunnyvale responds by filing separate objections of their own to Plaintiffs' reply evidence. Dkt. No. 48. Local Rule 7-3(c) requires that Plaintiffs file their evidentiary objections "within the reply brief or memorandum." Moreover, a motion for preliminary injunction

B. Irreparable Harm

Irreparable harm is presumed if plaintiffs are likely to succeed on the merits because a deprivation of constitutional rights always constitutes irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373; *Ezell v. Chicago*, 651 F.3d 684, 699-700 (7th Cir. 2011). Here, however, the court does not find that enforcement of the Sunnyvale ordinance would likely infringe Plaintiffs' Second Amendment rights. As Plaintiffs base their entire irreparable harm argument on irreparable harm being presumed if they are likely to succeed on the merits, Plaintiffs fail to demonstrate that enforcement of the Sunnyvale law will cause them irreparable harm. The court notes that individuals who turn their prohibited magazines in to the Sunnyvale Department of Public Safety would likely suffer irreparable harm from the subsequent destruction of their property. This argument is more properly analyzed under the balance of the hardships factor, and the court will consider it there.

C. Balance of the Hardships

Plaintiffs must demonstrate that the balance of the equities tips in their favor. *Winter*, 555 U.S. at 20. Plaintiffs contend that their constitutional rights will be infringed should an injunction fail to issue. Constitutional rights, by definition, are of paramount importance, so this concern must be taken seriously. However, because Plaintiffs have failed to show a likelihood of success on the merits, it is unlikely that enforcement of Sunnyvale's ordinance will infringe their constitutional rights.

Plaintiffs also argue that they will suffer hardship because they will have to store their banned magazines outside of Sunnyvale, modify them, or turn them over to the Sunnyvale

---

must be supported by evidence that goes beyond the unverified allegations of the pleadings, but "the district court may rely on otherwise inadmissible evidence, including hearsay evidence." *Fid. Nat'l Title Ins. Co. v. Castle*, 2011 WL 5882878, at *3 (N.D. Cal. Nov. 23, 2011); *Gonzalez v. Zika*, 2012 WL 4466584, at *1 (N.D. Cal. Sep. 26, 2012); *Murphy v. Bank of N.Y. Mellon*, 2013 WL 3574628, at *3 (N.D. Cal. July 12, 2013). Thus, the parties' requests to strike various pieces of evidence are DENIED.

[4] Note that this finding accords with every other case to examine a ban on possession of magazines having a capacity to accept more than ten rounds. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, C-13-05351 WHA, 2014 WL 644395, at *7 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, C-13-291S, 2013 WL 6909955, at *18 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, C-13-739 AVC, 2014 WL 346859, at *9 (D. Conn. Jan. 30, 2014); *Tardy v. O'Malley*, C-13-2861, TRO Hr'g Tr., at 66-71 (D. Md. Oct. 1, 2013).

Department of Public Safety for destruction. The forced destruction of their property is surely a hardship to Plaintiffs, but it is also one that must be weighed against Sunnyvale's public safety concerns, as reflected in the evidence submitted by Sunnyvale to this court and the nearly two-thirds vote by Sunnyvale residents to pass the challenged ordinance.

As discussed above, Sunnyvale has a compelling interest in the protection of public safety. *Salerno*, 481 U.S. at 748-50; *Schall*, 467 U.S. at 264. The court has already found that the challenged law is, at minimum, substantially related to this interest. The purpose of the restriction on the possession of magazines having a capacity to accept more than ten rounds is to reduce their availability for criminal use. Although the likelihood that the ordinance will prevent gun violence between March 6, 2014 and whenever this case is finally resolved is hotly debated, the risk that a major gun-related tragedy would occur is enough to at least balance out the inconvenience to Plaintiffs in disposing of their now-banned magazines. Therefore, the court concludes that the balance of the hardships factor is neutral.

A corollary to this finding is that an injunction cannot issue based on the "serious questions" doctrine. As noted earlier, Ninth Circuit law allows a court to grant a preliminary injunction if the plaintiff raises "serious questions going to the merits" and the balance of the equities tip sharply in the plaintiff's favor. *Alliance for the Wild Rockies*, 632 F.3d at 1132. Here, because the court finds that the balance of the hardships is neutral, the court need not address whether Plaintiffs have raised "serious questions going to the merits."

D. Public Interest

As the parties focused their briefing and argument on the likelihood of success on the merits, they submitted little evidence and argument as to the public interest. Nonetheless, the court considers this factor and finds it to favor Sunnyvale. To some extent, the public interest analysis mirrors the balance of the hardships. Whereas on the balance of the hardships the court examined only hardship to Plaintiffs, because constitutional rights are at issue, any infringement on the Second Amendment naturally harms the public. Likewise, because gun violence threatens the public at large, the court balances the public's interest in preserving its constitutional rights against the public's interest in preventing gun violence. Again, due to Plaintiffs' failure to prove a likelihood of

success on the merits, it is unlikely that the Sunnyvale ordinance infringes the public's constitutional rights, so the court gives this consideration less weight.

Moreover, two other aspects of the Sunnyvale law cause the public interest factor to weigh against an injunction. First, the Sunnyvale ordinance was enacted by the will of the people in a vote of 66 percent in favor of Measure C. In so doing, the people of Sunnyvale determined that the ban on magazines having a capacity to accept more than ten rounds would promote public safety. There exists a public interest in deferring to this determination, and in promoting Sunnyvale's decision to engage in direct democracy. Of course, the court recognizes that constitutional rights exist in large part to protect the minority against tyranny by the majority, so this consideration does not weigh heavily. Further, if the Court found that Plaintiffs were likely to succeed in proving that the Sunnyvale ordinance infringes the Second Amendment, the Court would necessarily invoke the Second Amendment to protect the minority against the ordinance's infringement on their rights. In that case, the consideration that a 66 percent majority passed the law would not weigh against an injunction. In this circumstance, however, the fact that the great majority of Sunnyvale voters favor the ordinance supports denial of the preliminary injunction.

Finally, the public has an interest in protecting the safety of its police officers. The court credits Sunnyvale's evidence that magazines having a capacity to accept more than ten rounds present special danger to law enforcement officers. Grgurina Decl. ¶ 4; Koper Decl. ¶ 18. Sunnyvale itself has experienced the danger presented to police and the public by a criminal suspect armed with such magazines. In 2011, Shareef Allman killed three co-workers and wounded six others in a shooting incident beginning in Cupertino, California, and ending in Sunnyvale. Grgurina Decl. ¶ 4. Allman, who was in possession of several weapons, including those with magazines having a capacity to accept more than ten rounds, was killed by police in Sunnyvale after a 22 hour manhunt. *Id.* Considering a similar law, another court in this district determined that the "interest in protecting the lives and safety of [ ] police officers is also central to the public interest." *San Francisco Veteran Police*, 2014 WL 644395, at *7. This court credits similar evidence here and finds that the public interest factor counsels against issuance of a preliminary injunction.

E. Weighing the Equities

In conclusion, the court holds that Plaintiffs are not likely to succeed on the merits, that Plaintiffs failed to prove that they would suffer irreparable harm absent a preliminary injunction, that the balance of the hardships is neutral, and that the public interest favors Sunnyvale. The equities, therefore, weigh sharply against granting Plaintiffs' motion for a preliminary injunction. As the balance of the hardships is neutral, even if the court were to find that Plaintiffs raised "serious questions going to the merits"—a questionable proposition, but one that the court does not reach here—the court could not grant a preliminary injunction on this alternative basis. Accordingly, the equities clearly favor denial of Plaintiffs' motion for a preliminary injunction.

III. ORDER

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction is DENIED.[5]

Dated: March 5, 2014

Ronald M. Whyte
RONALD M. WHYTE
United States District Judge

[5] Plaintiffs' Administrative Motion for an Expedited Ruling on Plaintiffs' Motion for Preliminary Injunction is DENIED as moot. *See* Dkt. No. 31.

APPENDIX 4

Sunnyvale, Cal., Muni. Code § 9.44.050

9.44.050. Possession of large-capacity ammunition magazines prohibited.

(a) No person may possess a large-capacity magazine in the city of Sunnyvale whether assembled or disassembled. For purposes of this section, "large-capacity magazine" means any detachable ammunition feeding device with the capacity to accept more than ten (10) rounds, but shall not be construed to include any of the following:

(1) A feeding device that has been permanently altered so that it cannot accommodate more than ten (10) rounds; or

(2) A .22 caliber tubular ammunition feeding device; or

(3) A tubular magazine that is contained in a lever-action firearm.

(b) Any person who, prior to the effective date of this section, was legally in possession of a large-capacity magazine shall have ninety (90) days from such effective date to do either of the following without being subject to prosecution:

(1) Remove the large-capacity magazine from the city of Sunnyvale; or

(2) Surrender the large-capacity magazine to the Sunnyvale Department of Public Safety for destruction; or

(3) Lawfully sell or transfer the large-capacity magazine in accordance with Penal Code Section 12020.

(c) This section shall not apply to the following:

(1) Any federal, state, county, or city agency that is charged with the enforcement of any law, for use by agency employees in the discharge of their official duties;

(2) Any government officer, agent, or employee, member of the armed forces of the United States, or peace officer, to the extent that such person is otherwise authorized to possess a large-capacity magazine and does so while acting within the course and scope of his or her duties;

(3) A forensic laboratory or any authorized agent or employee thereof in the course and scope of his or her duties;

(4) Any entity that operates an armored vehicle business pursuant to the laws of the state, and an authorized employee of such entity, while in the course and scope of his or her employment for purposes that pertain to the entity's armored vehicle business;

(5) Any person who has been issued a license or permit by the California Department of Justice pursuant to Penal Code Sections 18900, 26500-26915, 31000, 32315, 32650, 32700-32720, or 33300, when the possession of a large-capacity magazine is in accordance with that license or permit;

(6) A licensed gunsmith for purposes of maintenance, repair or modification of the large-capacity magazine; (7) Any person who finds a large-capacity magazine, if the person is not prohibited from possessing firearms or ammunition pursuant to federal or state law, and the per- son possesses the large-capacity magazine no longer than is reasonably necessary to deliver or transport the same to a law enforcement agency;

(8) Any person lawfully in possession of a firearm that the person obtained prior to January 1, 2000, if no magazine that holds fewer than 10 rounds of ammunition is compatible with the firearm and the person possesses the large-capacity magazine solely for use with that firearm.

(9) Any retired peace officer holding a valid, current Carry Concealed Weapons (CCW) permit issued pursuant to California Penal Code. (Ord. 3027-13 § 1).

APPENDIX 5

Sunnyvale, Cal., Muni. Code art. VII, § 706

Section 706. Ordinances. Violation. Penalty.

Violation of an ordinance of the City is a misdemeanor unless by ordinance it is made an infraction, and the penalty therefor shall be the same as established under general law for a misdemeanor or infraction, as the case may be. Violation of an ordinance of the City may be prosecuted in the name of the People of the State of California or may be redressed by civil action or both. (Amended effective December 21, 1976: previously Section 814)