

No. 14-15408 [DC# CV 13-05807-RMW]

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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LEONARD FYOCK, *et al.*,

*Plaintiffs-Appellants,*

v.

CITY OF SUNNYVALE, *et al.*,

*Defendants-Appellees.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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**APPELLEES' SUPPLEMENTAL EXCERPTS OF RECORD**

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Roderick M. Thompson (State Bar No. 96192)  
Anthony P. Schoenberg (State Bar No. 203714)  
Rochelle L. Woods (State Bar No. 282415)  
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**Counsel for Defendants-Appellees**

Pursuant to Ninth Circuit Rule 30-1, Defendants-Appellees the City of Sunnyvale, the now former Mayor of Sunnyvale, Anthony Spitaleri, and Chief of Sunnyvale Department of Public Safety, Frank Grgurina, by and through their counsel of record, hereby submit their Supplemental Excerpts of Record.

Dated: June 17, 2014

FARELLA BRAUN + MARTEL LLP

By: /s/ Roderick M. Thompson

Attorney for Defendants-Appellees

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official capacity, THE CHIEF OF THE  
9 SUNNYVALE DEPARTMENT OF PUBLIC  
SAFETY, FRANK GRGURINA, in his official  
10 capacity

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

15 LEONARD FYOCK,  
16 SCOTT HOCHSTETLER,  
17 WILLIAM DOUGLAS,  
DAVID PEARSON, BRAD SEIFERS, and  
18 ROD SWANSON,  
Plaintiffs,

19 v.

20 THE CITY OF SUNNYVALE, THE  
MAYOR OF SUNNYVALE,  
21 ANTHONY SPITALERI in his official  
capacity, THE CHIEF OF THE  
22 SUNNYVALE DEPARTMENT OF  
PUBLIC SAFETY, FRANK GRGURINA,  
23 in his official capacity, and DOES 1-10  
24 Defendants.

Case No. 13-cv-05807 RMW

**DECLARATION OF RODERICK M.  
THOMPSON IN SUPPORT OF  
SUNNYVALE'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Date: February 21, 2014  
Time: 9:00 a.m.  
Location: San Jose Courthouse  
Courtroom 6 – 4<sup>th</sup> Floor  
280 South 1<sup>st</sup> Street  
San Jose, CA 95113

26 I, Roderick M. Thompson, declare as follows:

27 1. I am licensed to practice law in the state of California and am a partner at the law  
28 firm of Farella Braun + Martel LLP, counsel for the City of Sunnyvale; the former Mayor of

1 Sunnyvale, Anthony Spitaleri, in his official capacity; and the Chief of the Sunnyvale Department  
2 of Public Safety, Frank Grgurina, in his official capacity (“Defendants” or the “City”). I have  
3 personal knowledge of the matters stated herein and if called and sworn as a witness, I could and  
4 would competently testify to the facts set forth herein.

5 2. Attached as Exhibit 1 is a true and correct copy of California Statutes, 1999, Ch.  
6 129.

7 3. Attached as Exhibit 2 is a true and correct copy of *Mass Shootings in the United*  
8 *States involving High-Capacity Ammunition Magazines* from the Violence Policy Center.

9 4. Attached as Exhibit 3 is a true and correct copy of an article, Blair, *et al.*, “Active  
10 Shooter Events from 2000 to 2012” from the FBI Law Enforcement Bulletin, dated January 2014,  
11 available at <http://leb.fbi.gov/2014/january/active-shooter-events-from-2000-to-2012>.

12 5. Attached as Exhibit 4 is a true and correct copy of a presentation from the Mayors  
13 Against Illegal Guns, *Analysis of Recent Mass Shootings*, September 2013.

14 6. Attached as Exhibit 5 are true and correct copies of various news articles  
15 downloaded from Westlaw New Room regarding media accounts where a shooter was subdued or  
16 tackled while reloading.

17 7. Attached as Exhibit 6 is a true and correct copy of a memorandum from the  
18 Department of The Treasury, *Report and Recommendation of the Importability of Certain*  
19 *Semiautomatic Rifles*, dated July 6, 1989.

20 8. Attached as Exhibit 7 is a true and correct copy of a study by the Department of  
21 The Treasury, *Study on the Sporting Suitability of Modified Semiautomatic Assault Rifles*, April  
22 1998.

23 9. Attached as Exhibit 8 is a true and correct copy of House of Representatives  
24 Report No. 103-489 (1994).

25 10. Attached as Exhibit 9 is a true and correct copy of a website printout of Santa  
26 Clara County Election Results from November 5, 2013, available at  
27 [http://results.enr.clarityelections.com/CA/Santa\\_Clara/49877/123386/Web01/en/summary.html](http://results.enr.clarityelections.com/CA/Santa_Clara/49877/123386/Web01/en/summary.html).

28 11. Attached as Exhibit 10 is a true and correct copy of a report, *The Militarization of*

1 *the U.S. Civilian Firearms Market*, by Violence Policy Center, June 2011.

2 12. Attached as Exhibit 11 is a true and correct copy of the written testimony of  
3 Laurence H. Tribe submitted to the Senate Judiciary Committee, February 12, 2013.

4 13. Attached as Exhibit 12 are true and correct copies of excerpts of Gary Kleck, *Point*  
5 *Blank: Guns & Violence in America*, 1991 (2d ed. 2009).

6 14. Attached as Exhibit 13 is a true and correct copy of a web reprint of Claude  
7 Werner, *The Armed Citizen: A Five-Year Analysis*, printed on December 20, 2013, available at  
8 [www.gunssavelives.net/self-defense/analysis-of-five-years-of-armed-encounters-with-data-](http://www.gunssavelives.net/self-defense/analysis-of-five-years-of-armed-encounters-with-data-tables/)  
9 [tables/](http://www.gunssavelives.net/self-defense/analysis-of-five-years-of-armed-encounters-with-data-tables/).

10 15. Attached as Exhibit 14 is a true and correct copy of an excerpt of Massad Ayoob,  
11 *Gun Digest Book of Concealed Carry*, 2012 Krause Publications (2d Ed.).

12 16. Attached as Exhibit 15 is a true and correct copy of a U.S. Department of Justice,  
13 Bureau of Alcohol, Tobacco, Firearms and Explosives report, *ATF Study on the Importability of*  
14 *Certain Shotguns*, January 2011.

15 17. Attached as Exhibit 16 is a true and correct copy of a report by the U.S.  
16 Department of The Treasury, *Study on the Sporting Suitability of Modified Semiautomatic Assault*  
17 *Rifles*, April 1998.

18 18. Attached as Exhibit 17 is a true and correct copy of Brian J. Siebel, Brady Center  
19 to Prevent Gun Violence, *Assault Weapons: Mass Produced Mayhem*, October 2008.

20 19. Attached as Exhibit 18 is a true and correct copy of an excerpt of Municipal Code  
21 of Chicago, §§ 8-20-010. 8-20-075.

22 20. Attached as Exhibit 19 is a true and correct copy of the Statement of Professors of  
23 Constitutional Law: *The Second Amendment and the Constitutionality of the Proposed Gun*  
24 *Violence Prevention Legislation*, January 30, 2013.

25 21. Attached as Exhibit 20 is a true and correct copy of a news article, *Woman*  
26 *Wrestled Fresh Ammo Clip From Tucson Shooter as He Tried to Reload*, January 9, 2011, Kevin  
27 Dolak, ABCNews website page, printed on January 10, 2014, available at  
28 <http://abcnews.go.com/Politics/patricia-maisch-describes-stopping-gunman->

1 reloading/story?id=12577933.

2 22. Attached as Exhibit 21 is a true and correct copy of a news article, *Sandy Hook's*  
3 *Shooter's Pause May Have Aided Students Escape*, December 23, 2012, Edmund Mahony, The  
4 Courant website page, printed on January 10, 2014, available at [http://articles.courant.com/2012-](http://articles.courant.com/2012-12-23/news/hc-lanza-gunjam-20121222_1_rifle-school-psychologist-classroom)  
5 [12-23/news/hc-lanza-gunjam-20121222\\_1\\_rifle-school-psychologist-classroom](http://articles.courant.com/2012-12-23/news/hc-lanza-gunjam-20121222_1_rifle-school-psychologist-classroom).

6 23. Attached as Exhibit 22 is a true and correct copy of the City and County of San  
7 Francisco's Opposition to Plaintiffs' Motion for Preliminary Injunction (Dkt. 34), dated January  
8 16, 2014, in *San Francisco Veteran Police Officers, et al. v. The City and County of San*  
9 *Francisco, et al.*, Case No. CV 13-5351 WHA (N.D. Cal.).

10 24. Attached as Exhibit 23 is a true and correct copy of Brief for Professional  
11 Historians and Law Professors Saul Cornell, Paul Finkleman, Stanley Katz, and David T. Konig  
12 as *Amici Curiae* in Support of Appellees, dated September 20, 2010 in *Heller v. District of*  
13 *Colombia*, D.C. Circuit, Case No. 10-7036.

14 25. Attached as Exhibit 24 is a true and correct copy of 2002 Maryland Session Laws  
15 Ch. 26 (H.B. 11).

16 26. Attached as Exhibit 25 is a true and correct copy of N.Y.S. AB No. 11535 (2000).

17 27. Attached as Exhibit 26 is a true and correct copy of the City of Rochester, New  
18 York, City Code, Chapter 47: Dangerous Articles, as adopted by the Rochester City Council 11-  
19 25-1941.

20 28. Attached as Exhibit 27 is a true and correct copy of Francis Clines, *Death on the*  
21 *L.I.R.R.: The Rampage; Gunman in a Train Aisle Passes Out Death*, New York Times, December  
22 9, 1993.

23 29. Attached as Exhibit 28 is a true and correct copy of Dennis A. Henigan, *The Heller*  
24 *Paradox*, 56 UCLA L. Rev. 1171, 1197-98 (2009).

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed January 29, 2014, at San Francisco, California.

/s/ Roderick M. Thompson  
Roderick M. Thompson

**EXHIBIT 2**  
**To**  
**Declaration of Roderick M. Thompson in**  
**Support of Sunnyvale's Opposition to**  
**Plaintiffs' Motion for Preliminary**  
**Injunction**

**Violence Policy Center**



1730 Rhode Island Avenue, NW 202.822.8200 voice  
 Suite 1014 202.822.8205 fax  
 Washington, DC 20036 www.vpc.org web

**Mass Shootings in the United States Involving High-Capacity Ammunition Magazines**



*Columbine shooter armed with Intratec TEC-DC9 assault pistol equipped with high-capacity ammunition magazine*

Mass Shooting Incident	Casualties	Firearm(s)	High-Capacity Ammunition Magazine(s)
Santa Monica, California June 7, 2013 Shooter: John Zawahri	6 dead, (including shooter)	AR-type assault rifle built from parts	<b>40 30-round magazines</b>
Sandy Hook Elementary School Newtown, Connecticut December 14, 2012 Shooter: Adam Lanza	28 dead, (including shooter)	Bushmaster assault rifle, 10mm Glock pistol, 9mm Sig Sauer pistol	<b>30-round magazines</b>
Century Aurora 16 movie theater Aurora, Colorado July 20, 2012 Shooter: James Holmes	12 dead, 58 wounded	Smith & Wesson M&P15 assault rifle, .40 Glock pistol, Remington 12 gauge shotgun	<b>100-round magazine</b>

Mass Shooting Incident	Casualties	Firearm(s)	High-Capacity Ammunition Magazine(s)
IHOP Carson City, Nevada September 6, 2011 Shooter: Eduardo Sencion	5 dead, (including shooter), seven wounded	MAK-90 assault rifle (illegally converted to full- auto)	<b>20- and 30-round magazines</b>
Safeway parking lot Tucson, Arizona January 8, 2011 Shooter: Jared Loughner	6 dead, 13 wounded	Glock 19 pistol	<b>Two 31-round magazines Two 15-round magazines</b>
Shreveport, Louisiana August 16, 2010 Shooter: Marcus Donte Reed	3 dead	Assault weapon	<b>30-round magazine</b>
Hartford Distributors Manchester, Connecticut August 3, 2010 Shooter: Omar Thornton	9 dead (including shooter), 2 wounded	Sturm, Ruger SR9 pistol	<b>High-capacity magazine (capacity unstated)</b>
ABB, Inc. St. Louis, Missouri January 7, 2010 Shooter: Timothy Hendron	4 dead (including shooter), 5 wounded	Romarm AK-47 assault rifle, Tristar 12 gauge shotgun, Hi-Point .40 pistol	<b>Two "banana-style" high- capacity magazines (capacity not stated)</b>
Fort Hood Fort Hood, Texas November 5, 2009 Shooter: Nidal Hasan	13 dead, 34 wounded	FN Five-seven 5.7mm pistol	<b>30- and 20-round magazines</b>
LA Fitness Center Collier, Pennsylvania August 4, 2009 Shooter: George Sodini	4 dead (including shooter), nine wounded	Two 9mm pistols, .45 pistol, .32 pistol	<b>30-round magazines</b>
American Civic Association Binghamton, New York April 3, 2009 Shooter: Jiverly Wong	14 dead (including shooter), 4 wounded	9mm Beretta handgun, .45 handgun	<b>30-round magazine</b>
Alabama, multiple locations March 10, 2009 Shooter: Michael McLendon	11 dead (including shooter)	Two assault rifles	<b>High-capacity magazines taped together</b>
Walt Lou Trailer Park Stafford, Virginia May 5, 2008 Shooter: Aaron Poseidon Jackson	4 dead (including shooter)	WASR-10 assault rifle, Smith & Wesson .38 revolver	<b>30-round magazines</b>

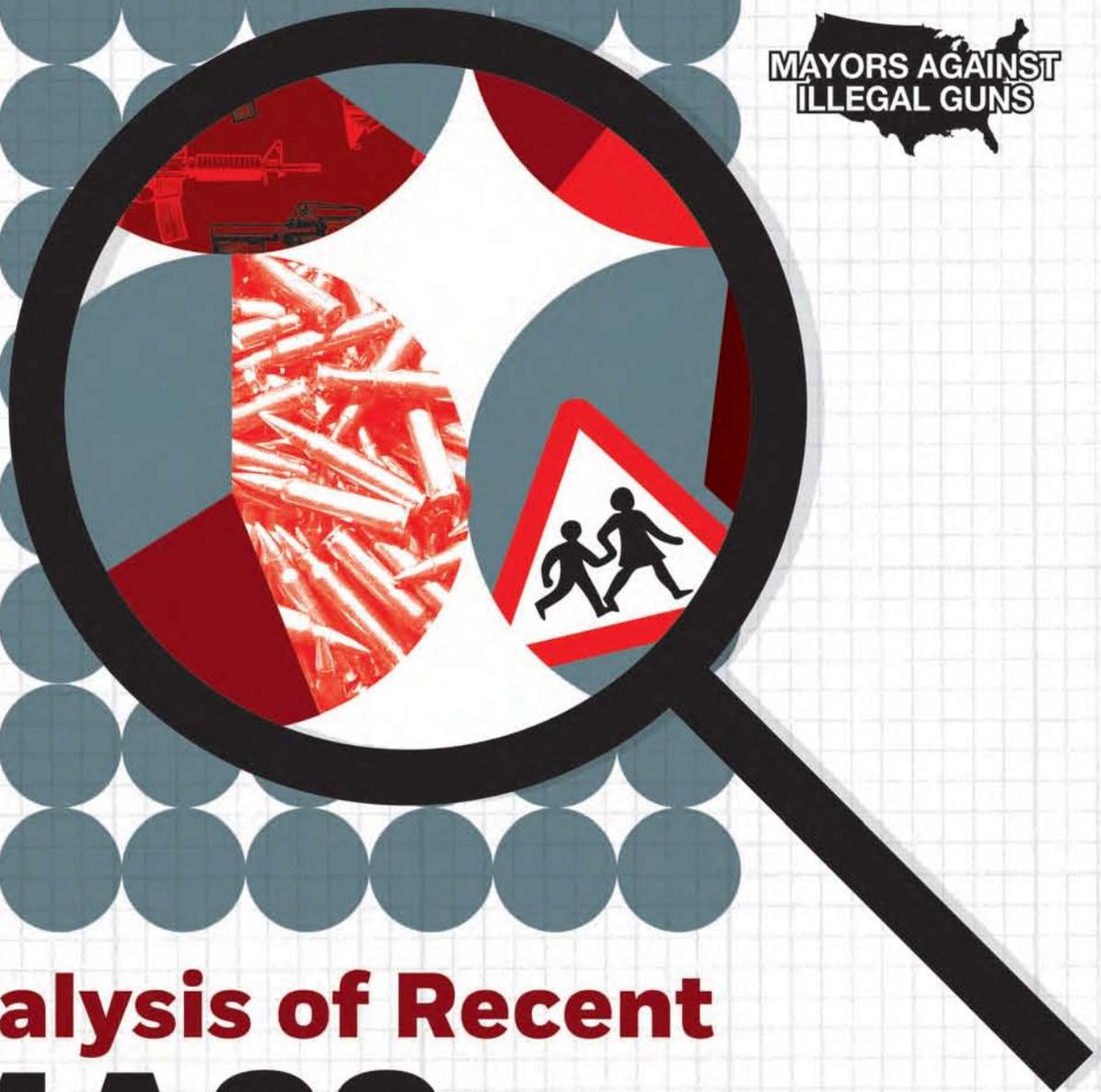
Mass Shooting Incident	Casualties	Firearm(s)	High-Capacity Ammunition Magazine(s)
Northern Illinois University DeKalb, Illinois February 14, 2008 Shooter: Steven Phillip Kazmierczak	6 dead (including shooter), 21 wounded	Glock19 9mm pistol, Hi-Point 380, Remington12 gauge Sportsman 48 shotgun	<b>33- and 15-round magazines</b>
Westroads Mall Omaha, Nebraska December 5, 2007 Shooter: Robert Hawkins	9 dead (including shooter), 5 wounded	WASR-10 assault rifle	<b>Two 30-round magazines taped together</b>
Virginia Tech Blacksburg, Virginia April 16, 2007 Shooter: Seung-Hui Cho	33 dead (including shooter), 17 wounded	Glock 19 pistol, Walther P22 pistol	<b>15-round magazines</b>
Hunting Camp Birchwood, Wisconsin November 21, 2004 Shooter: Chai Vang	6 dead, 3 wounded	SKS assault rifle	<b>20-round magazine</b>
Edgewater Technology Inc. Wakefield, Massachusetts December 26, 2000 Shooter: Michael McDermott	7 dead	AK-47 assault rifle, 12 gauge pump- action shotgun	<b>60-round, large-capacity feeding device</b>
Xerox Honolulu, Hawaii November 2, 1999 Shooter: Byran Uyesugi	7 dead	Glock 17 9mm pistol	<b>Three 15-round magazines</b>
Wedgewood Baptist Church Fort Worth, Texas September 15, 1999 Shooter: Larry Gene Ashbrook	8 dead (including shooter), 7 wounded	Sturm, Ruger P85 9mm pistol, .380 pistol	<b>Three 15-round magazines</b>
Columbine High School Littleton, Colorado April 20, 1999 Shooters: Eric Harris and Dylan Klebold	15 dead (including shooters), 23 wounded	Intratec TEC-DC9 assault pistol, Hi-Point 9mm Carbine, Savage 67H pump- action shotgun, Savage 311-D 12- gauge shotgun	<b>High-capacity magazines (capacity unstated)</b>

Mass Shooting Incident	Casualties	Firearm(s)	High-Capacity Ammunition Magazine(s)
Thurston High School Springfield, Oregon May 21, 1998 Shooter: Kip Kinkel	4 dead, 22 wounded	9mm Glock pistol, .22 Sturm Ruger rifle, .22 Sturm Ruger pistol	<b>50-round magazine</b>
Westside Middle School Jonesboro, Arkansas March 24, 1998 Shooters: Andrew Golden and Mitchell Johnson	5 dead, 10 wounded	M-1 rifle, Remington .30-06 rifle, various handguns	<b>15-round magazine</b>
Connecticut State Lottery Headquarters Newington, Connecticut March 6, 1998 Shooter: Matthew Beck	5 dead (including shooter)	Glock 9mm pistol	<b>19-round magazine</b>
Caltrans Maintenance Yard Orange, California December 18, 1997 Shooter: Arturo Reyes Torres	5 dead (including shooter), 2 wounded	AK-47 assault rifle	<b>Five 30-round magazines</b>
DC Police Headquarters Washington, DC November 22, 1994 Shooter: Bennie Lee Lawson	4 dead (including shooter), 1 wounded	Cobray M-11 assault pistol	<b>Extended magazine</b>
Fairchild Air Force Base hospital Spokane, Washington June 20, 1994 Shooter: Dean Mellberg	5 dead (including shooter), 23 wounded	MAK-90 assault rifle	<b>75-round drum magazine</b>
Long Island Railroad Long Island, New York December 7, 1993 Shooter: Colin Ferguson	6 dead, 19 wounded	Sturm, Ruger P-89 9mm pistol	<b>Four 15-round magazines</b>
Pettit & Martin Law Offices San Francisco, California July 1, 1993 Shooter: Gian Luigi Ferri	9 dead (including shooter), 6 wounded	Two Intratec TEC- DC9 assault pistols, .45 pistol	<b>40- to 50-round magazines</b>

Mass Shooting Incident	Casualties	Firearm(s)	High-Capacity Ammunition Magazine(s)
CIA Headquarters Langley, Virginia January 25, 1993 Shooter: Mir Aimal Kasi	2 dead, 3 wounded	AK-47 assault rifle	<b>30-round magazine</b>
Luby's Cafeteria Killeen, Texas October 16, 1991 Shooter: George Hennard	24 dead (including shooter), 20 wounded	Sturm, Ruger P-89 9mm pistol, Glock 9mm pistol	<b>17- and 15-round magazines</b>
General Motors Acceptance Corp. Jacksonville, Florida June 18, 1990 Shooter: James Pough	10 dead (including shooter), 4 wounded	M-1 rifle, .38 revolver	<b>30-round magazines</b>
Standard Gravure Corporation Louisville, Kentucky September 14, 1989 Shooter: Joseph Wesbecker	9 dead (including shooter), 12 wounded	AK-47 assault rifle, 2 MAC-11 assault pistols, .38 revolver, Sig Sauer 9mm pistol	<b>30-round magazines</b>
Cleveland Elementary School Stockton, California January 17, 1989 Shooter: Patrick Purdy	6 dead (including shooter), 30 wounded	AK-47 assault rifle, Taurus 9mm pistol, unidentified pistol	<b>75-round drum magazine</b>
Palm Bay shopping center Palm Bay, Florida April 23, 1987 Shooter: William Cruse	6 dead (including 2 police officers)	Sturm, Ruger Mini-14 assault rifle	<b>Five 30-round magazines</b>
McDonald's San Ysidro, California July 18, 1984 Shooter: James Huberty	22 dead (including shooter), 19 wounded	Uzi Carbine, Browning 9mm pistol, Winchester 1200 pump-action 12-gauge shotgun	<b>25-round magazine</b>

**EXHIBIT 4**  
**To**  
**Declaration of Roderick M. Thompson in**  
**Support of Sunnyvale's Opposition to**  
**Plaintiffs' Motion for Preliminary**  
**Injunction**

**September 2013**



**Analysis of Recent**

# **MASS SHOOTINGS**



## ANALYSIS OF RECENT MASS SHOOTINGS

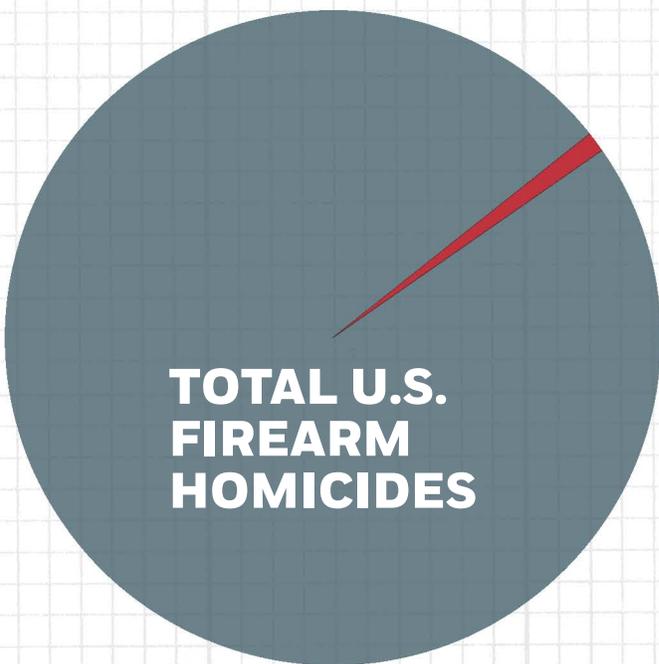
Mayors Against Illegal Guns conducted a comprehensive analysis of every mass shooting between January 2009 and September 2013 that was identifiable through FBI data and media reports. This report describes the **93 MASS SHOOTINGS — ALMOST TWO PER MONTH — THAT OCCURRED IN 35 STATES** in the nearly five-year period. Each description includes the location of the shooting, number of people killed and/or injured, and information on the shooter, gun(s), ammunition, and gun purchase, where available.

The FBI defines “mass shooting” as any incident where at least four people were murdered with a gun. Mayors Against Illegal Guns reviewed mass shootings in the FBI’s Supplementary Homicide Reports from 2009-2011, the most recent data available, and searched the media for further details about these incidents as well as for mass shootings that occurred in 2012 and 2013.

This survey includes every shooting we identified in which at least four people were murdered with a gun. And the findings reveal a different portrait of mass shootings in America than conventional wisdom might suggest:

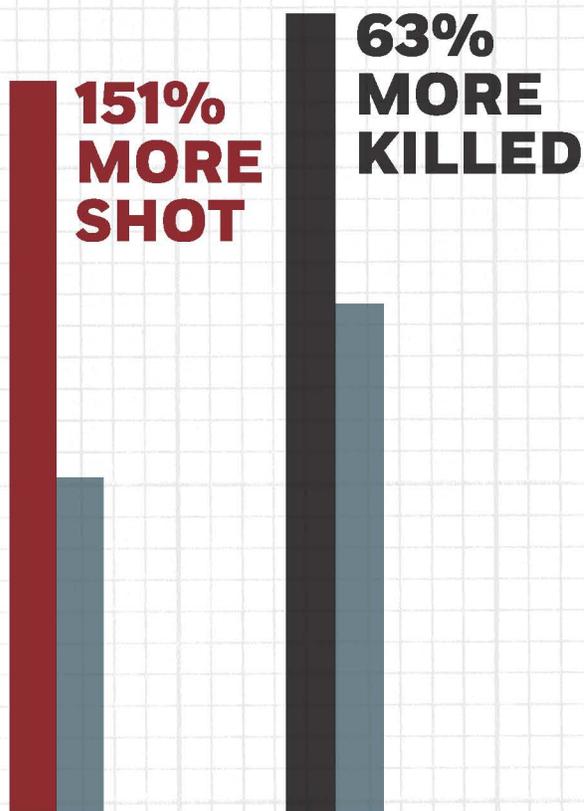


## Analysis of Recent MASS SHOOTINGS



### Mass shootings

represent a small share of total U.S. firearm homicides. Less than one percent of gun murder victims recorded by the FBI in 2010 were killed in incidents with four or more victims.



### Assault weapons or high-capacity magazines

were used in at least 14 of the incidents (15%). These incidents resulted in an average of 14.4 total people shot — 151% more people shot than in other incidents (5.7) — and 7.8 deaths — 63% more deaths than in other incidents (4.8).

# **EXHIBIT 5**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**

## NewsRoom

4/21/01 Orlando Sentinel A14  
2001 WLNR 10866670

Orlando Sentinel  
Copyright © 2001 Orlando Sentinel Communications

April 21, 2001

Section: A SECTION

### VICTIMS OF SCHOOL ATTACK REMEMBERED A SERVICE PAID TRIBUTE TO THE 12 STUDENTS AND ONE TEACHER WHO WERE KILLED IN LITTLETON, COLO.

Compiled From Wire Reports

LITTLETON, Colo. -- Holding hands and wiping away tears, about 350 people marked the second anniversary Friday of the Columbine High tragedy by listening as the names of the 13 people gunned down by two students were read aloud.

During the brief service at a park near Columbine, school officials asked the crowd to remember that the attack does not define the school or its students. Relatives, friends, survivors and students walked past 13 6-foot wooden crosses temporarily erected in a parking lot in honor of the victims.

"It's just a time to remember," Chris Bernall said, pausing at a cross bearing the name of his sister, Cassie. "I've moved on. I've had a sense of peace about it, knowing where Cassie is. She's up in heaven."

It was lunchtime on April 20, 1999, when students Eric Harris and Dylan Klebold opened fire. They killed 12 classmates and a teacher and wounded 26 others before committing suicide in the school's library.

There were scattered reports of threats at schools elsewhere in the country Friday.

Two schools in the Mattituck-Cutchogue district on New York's Long Island were closed Friday because of threatening e-mail. The content of the e-mail was not disclosed.

And in Monroe, La., a 14-year-old student at a disciplinary school drew a semiautomatic handgun and fired five shots that missed a principal and other school workers. The shooting at the Monroe City Alternative Center happened before classes as about 20 students lined up to be routinely scanned for weapons. All had been expelled from other schools.

Police said the boy drew a .38-caliber semiautomatic pistol out of a zippered binder notebook, pointed it toward a group of faculty members and pulled the trigger. But it either misfired or there was no round in the chamber.

Students and school workers ran into the auditorium and teachers held the door closed. The youth tried to open the door, then fired several times through a window in the door. He eventually re-entered the school and fired another shot, but students and school workers escaped. The youth was subdued by police as he reloaded.

As Friday's service began, low clouds settled in and light rain sprinkled the crowd. The sun broke through moments later. "When the sun came out, I knew that was Dave warming us up," said Cindy Thirouin, whose father, teacher Dave Sanders, was killed in the attack.

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---- **Index References** ----

Region: (USA (1US73); Americas (1AM92); Colorado (1CO26); North America (1NO39); New York (1NE72))

Language: EN

Other Indexing: (LITTLETON; MATTITUCK CUTCHOGUE; TEACHER) (Cassie; Chris Bernall; Cindy Thirouin; Dave Sanders; Dylan Klebold; Eric Harris)

Edition: METRO

Word Count: 480

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End of Document

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**NewsRoom**

## NewsRoom

2/23/04 S.F. Chron. A1  
2004 WLNR 7624326

San Francisco Chronicle (CA)  
Copyright 2004 The San Francisco Chronicle

February 23, 2004

Section: NEWS

### SIKH MEN SLAIN IN SAN JOSE PARK GUNMAN KILLED AFTER DEADLY RAMPAGE ON CARD PLAYERS

Demian Bulwa, Delfin Vigil, Simone Sebastian, Chronicle Staff Writers

A leisurely afternoon at a San Jose park turned violent Sunday, when a gunman opened fire on a group of mostly elderly Sikh men who were playing cards, striking six of them -- three fatally -- before the group turned on the attacker.

The assailant, a 43-year-old San Jose man whose name was not released, died at the scene after several witnesses wrestled him to the ground when his gun jammed or ran out of ammunition, San Jose police said.

Sarwan Singh Gill, 47, of San Jose witnessed the attack.

He said he was among about 15 friends who were playing cards at Overfelt Gardens in east San Jose when a man who was unfamiliar to them walked up to four of them, said something abusive in Punjabi, then started firing a semiautomatic weapon -- first at the four, then at the others.

Gill escaped the danger by hiding behind a tree. He said the shooter was reloading his weapon and began firing again when somebody tackled him from behind.

"I lost my friends, and I'm feeling very bad," Gill said in Punjabi at his home Sunday night, surrounded by family members.

Police responding to the 2:47 p.m. call about shooting at the usually tranquil park found a chaotic scene.

"This is very much unusual," said San Jose police spokesman Steve Dixon.

"These fellows play cards at this park regularly, and on typical Sunday afternoons we have never had any trouble before."

Two men died at the scene, and one died at San Jose Medical Center. They were 46, 65 and 70 years old, police said. Three others, ages 80, 78 and 62, were sent to Regional Medical Center in San Jose with non-life threatening injuries, according to Dixon.

The suspect was dead when police arrived, probably because he was beaten to death, Dixon said, though the cause of death will be determined by an autopsy by the Santa Clara County coroner.

Sunday evening, relatives, friends and associates of the shooting victims tried to make sense of the devastation and questioned why anyone would have wanted to kill them. The men -- most of whom attended Sikh Gurdwara temple in San Jose and who were between the ages of 46 and 80 years old -- were longtime friends who gathered almost daily at the park for card games.

Relatives identified the 46-year-old man who was killed as Kulwant Singh, a technician at Wintec Industries in Fremont, who came to the United States from India in 1999, leaving behind a small farm. He lived in San Jose with his wife and three daughters.

"He was a hard worker who was honest, loyal, committed, and family oriented," said Kulwant Singh's brother-in-law, Kirpal Singh Atwal.

Kulwant Singh's wife, Baljeet Kaur was walking in the park when she heard the gunshots, her brother said. It wasn't until three hours later that police told her that her husband was among the dead.

Sunday night, she was surrounded by friends and family at her San Jose apartment. Twenty friends packed onto the floor of Kaur's and Kulwant's bedroom, passing around pictures of the couple and grieving his loss.

At the Sikh Gurdwara temple on Quimby Road, where about 1,000 Sikhs worship, people gathered Sunday evening awaiting news of the victims' identities.

"Many families are calling, and they are very scared," said the vice president of the temple, Bob Dhillon, who spent several hours answering phone calls from concerned members. "This has scared the heck out of our community.

It is especially disturbing that this happened in a public place."

Temple secretary Jaswant Singh Hothi said the shooting brought back tension felt within the community following Sept. 11, 2001, when Sikhs were mistakenly targeted as followers of Osama bin Laden. Sikh men's traditional garb -- with long, thick beards and turbans -- cause them to resemble the widely publicized photographs of the Muslim terrorist.

Sikhs are not Muslims, though their traditional appearance causes confusion. Many are Punjabi natives, a tiny minority in their Indian homeland.

The 500-year-old Sikh Dharma monotheistic religion was founded in India, based in philosophies of social equality and truth.

"I'm feeling very scared," Hothi said.

"Those people just sit (at the park) every day. They don't have any problems," Hothi said. "We're just confused. Right now, we are nowhere."

The uncertainty about who the shooter was and what his motives were increased tension in the temple.

"Who has done these things? Why?" asked Billy Singh, 30, who searched the park Sunday evening for his father, Swarn Singh, who often joined in the card games.

"I haven't seen him. I've been looking for him everywhere," Billy Singh said, not knowing if his father was among the victims. He later learned his father was OK.

Swarn Singh said the group of friends had gathered at the park for years to play cards, joke around, and just talk.

PHOTO

A police officer checks over the homicide scene in Overfelt Gardens in east San Jose, where three Sikh men were shot and killed.

Kat Wade

The Chronicle

E-mail the writers at dbulwa@sfgchronicle.com, dvigil@sfgchronicle.com, and sisebastian@sfgchronicle.com.<

---- **Index References** ----

Company: WINTEC INDUSTRIES INC

Region: (India (1IN24); USA (1US73); Americas (1AM92); Indian Subcontinent (1IN32); Southern Asia (1SO52); North America (1NO39); Asia (1AS61); California (1CA98))

Language: EN

Other Indexing: (KAUR; PHOTO; SIKH; SIKH DHARMA; SIKH GURDWARA; WINTEC INDUSTRIES) (Baljeet; Billy Singh; Bob Dhillon; Dixon; Gill; Hothi; Jaswant Singh; Kat Wade; Kirpal Singh Atwal; Kulwant; Kulwant Singh; Sarwan Singh Gill; SIKH MEN SLAIN; Steve Dixon; Swarn Singh; Twenty)

Edition: FINAL

Word Count: 1004

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**NewsRoom**

## NewsRoom

7/9/07 AP Alert - CA 15:32:59

AP Alert - California

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July 9, 2007

Accused gunman in Las Vegas casino shooting due Tuesday in court

LAS VEGAS\_A man accused of opening fire with a handgun inside a Las Vegas Strip casino was scheduled to make his first appearance before a judge on Tuesday.

Steven Zegrean, 51, of Las Vegas, remained jailed without bail on suicide watch at the Clark County jail Monday after his arrest early Friday at the New York-New York casino.

Four people were wounded in the shooting and a fifth person was hurt in a crush of people fleeing the casino, after authorities say Zegrean fired 16 shots from an indoor balcony at gamblers below. None of the injuries was reported to be life-threatening, and no one remained overnight in the hospital.

Zegrean was apprehended after he paused to reload his semiautomatic pistol and was tackled by off-duty military reservists and restrained with the help of two Florida state police agents, police said. A gun was confiscated, and police said Zegrean had more ammunition in his tan trench coat when he was arrested.

He is expected to face felony charges including attempted murder, battery with a deadly weapon, and discharging a firearm in an occupied structure, police said.

Family members described Zegrean as an unemployed house painter, a Hungarian immigrant who has been divorced for several years and estranged from most of his family since his ex-wife remarried.

Police characterized Zegrean as "greatly emotionally distressed." They said he walked the Las Vegas Strip for a day and a half before the shooting, after police and paramedics responded to a report that he attempted suicide July 4.

### ---- Index References ----

News Subject: (Violent Crime (1VI27); Legal (1LE33); Social Issues (1SO05); Crime (1CR87); Criminal Law (1CR79))

Industry: (Entertainment (1EN08); Casinos (1CA80); Travel & Tourism (1TR07); Gaming Industry (1GA25))

Region: (Americas (1AM92); North America (1NO39); USA (1US73); New York (1NE72); Nevada (1NE81))

Language: EN

Other Indexing: (Steven Zegrean; Zegrean) (Hungary; HUN; Europe; United States; USA; NorthAmerica)

Keywords: (n); (Crime); (Travel); (Defense); (Labor); (Gambling); (Legal); (Law)

Word Count: 305

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End of Document

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**NewsRoom**

## NewsRoom

8/8/08 Kan. City Star (Pg. Unavail. Online)  
2008 WLNR 14809264

Kansas City Star (MO)  
Copyright © 2008 The Kansas City Star

August 8, 2008

### Three shot at Kansas City bar

A gunman opened fire in a Kansas City tavern tonight, wounding three people before being disarmed by a bystander.

Police said the gunman opened fire at The Tool Shed at U.S. 40 and Phelps Road around 8:40 p.m.

Two of the victims were taken to a hospital, Kansas City police Capt. Mike Perne said. One suffered life-threatening wounds, and the other was in critical but stable condition. A third person suffered minor injuries and was treated at the scene.

Debbie Henry, who lives at the Hyline Inn next door to The Tool Shed, said the gunman began firing inside the bar, then went outside and continued to fire. When he stopped to reload his weapon, he was tackled by another man and disarmed. Patrons of the bar had the gunman pinned to the ground when police arrived.

Henry said she heard the gunshots and came out to see what happened. She said one of the victims was shot in the back.

She added that the shooter, who appeared to be extremely intoxicated, had two more guns in his truck.

The Tool Shed is in extreme eastern Kansas City, just south of the border with Independence.

#### ---- Index References ----

Region: (North America (1NO39); Kansas (1KA13); Americas (1AM92); USA (1US73))

Language: EN

Other Indexing: (HYLINE INN; TOOL SHED) (Debbie Henry; Henry; Mike Perne) (Kansas City) (Kansas City) (Kansas City)  
(us; usa; na; us.mo; us.mo.kcity; us.mo.kancty)

Keywords: (CT/clj.crm); (CT/clj); (NT/Law+Crime); (SU/breaking.news)

Edition: 1

Word Count: 215

## NewsRoom

1/3/10 Chi. Sun-Times A3  
2010 WLNR 137103

Chicago Sun Times (IL)  
Copyright © 2010 Chicago Sun-Times, Inc.

January 3, 2010

Section: News Crime

'It replays in my mind over and over'  
Family elated to welcome home Fort Hood massacre survivor

Amy Lee

The massacre at Fort Hood in Texas in November replays in his mind over and over.

A gunman shouts in Arabic. Shots ring out. Then intense pain -- bullets tore through his left knee and other parts of his body -- and loud screams.

"It was surreal, just mass chaos," Army Pvt. 1st Class Najee Hull recalled last week. "Pain and people screaming. It replays in my mind over and over. I remember everything. . . . It's starting to mess with me."

For the first time since the shooting, Hull was able to return to his home in Homewood two weeks ago -- to spend Christmas with his family.

But he can't stop thinking about the events Nov. 5 at Darnall Army Medical Center, which is a part of Fort Hood -- where Hull, 20, was stationed.

Military authorities say a U.S. Army psychiatrist, Maj. Nidal Malik Hasan, walked into the center, shouted "Allahu Akbar" or "God is greatest," then targeted uniformed soldiers by firing more than 100 times with a semiautomatic pistol and a revolver. He allegedly killed 13 people and wounded 30.

Hasan was tackled as he paused to reload. Hasan, who remains hospitalized, is charged with 13 counts of premeditated murder and 32 counts of attempted murder.

Hull was prepping for a medical review ahead of his planned deployment to Afghanistan when the shooting began. The medical center was teeming with soldiers and civilians, including a group of nearly 600 gathered for an afternoon graduation ceremony. Hull was the first person hit in the massacre.

"He said some terrorist things, some Allah things, then just started shooting," Hull said.

"I do ask myself sometimes, 'Why me?' Of all the places to be that day, I had to be there."

While Hull said he's thrilled to be surrounded by doting friends and family members in Homewood, he struggles to accept that a member of the military turned on his comrades -- on a U.S. base -- and opened fire.

"It's like being betrayed by a family member, like someone in my family shot me," Hull said. "We die for the same cause, live by the same creed. I'm still kind of angry about it, but I try not to be angry because I'm here and a lot of people aren't. I know I'm lucky."

Hull, a 2007 graduate of Homewood-Flossmoor High School, has undergone three surgeries. One bullet destroyed his spleen, which was removed, but fragments of bullets remain lodged in his chest and knee.

"At Christmas, the whole time I kept thinking, I might have missed this. If that bullet would hit two inches higher or two inches lower, I might never have seen my family again, and I love my family," Hull said.

Hull lives with his mother, Yvonne, who works for the U.S. Postal Service, and sisters Nanette Hull, 34, and Nala Pearson, 13. He also has an older brother, Nathaniel Hull, 31.

The family was elated to finally welcome Najee home after he spent more than a month recovering at the base, Yvonne, a single mom, said.

"Christmas was truly Christmas, a celebration. We may have a sparse tree and sparse gifts, but you know we got our gift early, and we're at peace," Yvonne said. "Words cannot describe how thankful we are."

Hull, a mechanic, is part of the 36th Engineer Brigade, which will deploy this month to Afghanistan -- but without him. He'll return to Fort Hood on Friday.

"I love the Army. I love my buddies. I feel bad I won't be with them," said Hull, struggling to remain composed. "I have a lot of soul-searching to do. I really don't know what's next for me."

**---- Index References ----**

Company: US POSTAL SERVICE; UNITED STATES POSTAL SERVICE

News Subject: (Social Issues (1SO05); Violent Crime (1VI27); Crime (1CR87))

Region: (North America (1NO39); Americas (1AM92); USA (1US73))

Language: EN

Other Indexing: (1ST CLASS NAJEE HULL; 36TH ENGINEER BRIGADE; ARMY; ARMY PVT; DARNALL ARMY MEDICAL CENTER; HULL; NAJEE; NANETTE HULL; NATHANIEL HULL; US ARMY; US POSTAL SERVICE) (Hasan; Nala Pearson; Nidal Malik Hasan; Pain; Yvonne)

Edition: Final

Word Count: 682

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## NewsRoom

10/10/10 San Diego Union-Trib. A1  
2010 WLNR 20372882

San Diego Union-Tribune  
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October 10, 2010

Section: Main News

### WORKMEN BEING HAILED AS HEROES

Trio subdued man who opened fire at school Friday; suspect described as angry loner

J. HARRY JONES, U-T

Neighbors of the Oceanside man accused of shooting two schoolchildren with a .357 Magnum revolver Friday described him as an angry loner who screamed racial insults and obscenities at all hours of the night from inside his apartment.

Brendan Liam O'Rourke, 41, remained in jail a day after three construction workers chased him down and subdued him near Kelly Elementary School in Carlsbad as he tried to reload his weapon.

Two second-grade girls, ages 6 and 7, were each shot in one arm. On Saturday afternoon, Carlsbad police Lt. Kelly Cain said he believed the youngsters were in good condition.

Meanwhile, the public took to websites to hail the construction workers — Mario Contreras, Stephen Kane and Carlos Partida — as heroes. The men were given a standing ovation at the Carlsbad Police Department on Friday afternoon. They appeared the next morning on the TV program "Good Morning America."

Saturday afternoon in Chula Vista, Contreras recounted how he and his two colleagues from Randall Construction disarmed the gunman. Contreras' left hand was swollen, the result of pounding O'Rourke in the face repeatedly as the suspect tried to escape.

Contreras said he, Kane and Partida were pouring concrete as part of a school cafeteria remodel when they heard gunshots. Contreras looked over a fence and saw O'Rourke standing perhaps a dozen feet away from some children and firing a gun. Kids were screaming and crying. Contreras said it looked like O'Rourke wasn't experienced with the gun because his arm kept jerking back and forth.

He and Kane (of Jamul) ran around some buildings toward O'Rourke, who saw them coming and fled, dropping bullets along the way.

O'Rourke jumped a fence and kept running until Partida jumped in his pickup, followed O'Rourke for about 400 feet and then rammed him with the vehicle, knocking him to the ground.

All three construction workers started hitting and kicking O'Rourke, who fought back. Partida said he took the revolver out of O'Rourke's hand.

"When we got control of the guy, we started looking through his jacket pockets. He had a bunch of bullets, a couple of extra (speed-loaders) for the gun and a flashlight," said Partida, who lives in the same apartment complex as Contreras.

Police showed up minutes later and took over. O'Rourke was arrested and is expected to be charged with six counts of attempted murder — one for each bullet he fired.

Contreras said he wasn't thinking about his own safety during the chase. "I think anybody would do that for the kids," he said.

When he got home late Friday night, his wife, Clara, had heard nothing about this day. She saw his swollen hand and Contreras told her he had been in a fight.

"She was mad and thought I might have been fired," he said. "Then I told her what happened and she started to cry and said I had done a good thing."

Clara Contreras said she thought her husband might have acted as he did because they have two children of their own. "They could have been one of ours," she said.

O'Rourke gave rambling statements after being arrested, nothing that explained a motive for his shooting, Cain said.

He also had spray-painted the walls of his apartment "with nonsensical writings," Cain added. Some of the material indicated that "he was mad at State Farm and AIG," two insurance companies. One wall had the word "Christian" emblazoned on it, while another had the word "destroy."

The apartment was relatively clean otherwise, Cain said. Investigators seized a few items from the second-floor unit, including a laptop computer.

"He was a loner as best as we can make out," Cain said. "Records show he had applied for a security guard license, but we didn't find any employer."

O'Rourke has lived in the Canyon Creek Apartments on Garrison Street near the intersection of Mesa Drive since March 2009. He was served with an eviction notice last month and told he would have to leave by December, neighbors said Saturday.

They described him as an odd man who often sat alone for hours at a picnic table sandwiched between two apartment buildings late at night, doing nothing but looking around.

They called police numerous times during the past 18 months because he would make tremendous amounts of noise in his apartment — as if he were hitting things with a baseball bat, one tenant said. Whenever officers showed up, they said, O'Rourke quieted down and wouldn't let them inside.

Vickie Rowe-Mitchell, who lives directly beneath O'Rourke's unit, said the stomping and banging would be so strong at times that her ceiling fan would shake and small parts of her ceiling would fall onto her bed. She also said O'Rourke would scream the "N" word over and over and yell obscenities for long periods of time.

"I just saw him yesterday morning," said Ashley Johnson, who lives directly across the hall from O'Rourke. "I was opening my door and he was just leaving. He closed his door really fast and there was this weird chemical smell."

Authorities said a propane tank was found next to O'Rourke's newer Crown Victoria parked near the school and that he had taken a small gas can onto the school grounds.

None of the neighbors knew what O'Rourke did for a living. Rowe-Mitchell said when he first moved in, he told her he was unemployed. A few months later, he apparently found a job and settled into a routine where he would leave the apartment early in the morning and return about 4 p.m. He stopped going to work this past week, the neighbors said.

Tenant Alex Sanchez said he was somewhat friendly with O'Rourke after they had a discussion about how O'Rourke had "hit on" his wife, not knowing she was married. He also said that a few months ago, O'Rourke got into a shouting match with some people who lived in the next building over.

"I guess he was trying to hit on a girl and some dudes got mad," Sanchez recalled. "Then I remember I spoke to him once and he said, 'I'm going to kill those guys.'"

On Friday, investigators stayed at the school until about 11 p.m. to collect evidence. They found four or five .357 rounds in the playground, the field, and possibly shattered against a piece of playground equipment. The authorities returned Saturday, combing the playground again and taking evidence photographs. They wrapped up at the school about 4 p.m.

Cain said investigators discovered no other weapons, no explosives other than a gas can and propane tank located Friday, no evidence of accomplices and no affiliation between O'Rourke and Kelly Elementary.

"We have no knowledge of any type of prior relationship with the school, its employees, parents, kids or teachers," Cain said. "Rumors circulated regarding the coincidence of this crime and the 'cancer cluster' issues at the site, but those have been unfounded."

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--- Index References ---

Company: STATE FARM MUTUAL AUTOMOBILE INSURANCE CO; MAGNUM LTD; AMERICAN INTERNATIONAL GROUP INC

News Subject: (Fires (1FI90); Accidents & Injuries (1AC02); Crime (1CR87); Health & Family (1HE30); Burglary & Theft (1BU41); Violent Crime (1VI27); Social Issues (1SO05); Assault & Battery (1AS33))

Language: EN

Other Indexing: (Kelly Cain; Mario Contreras; Carlos Partida; Stephen Kane; Brendan Liam O'Rourke; Vickie Rowe-Mitchell; Ashley Johnson; Alex Sanchez; Clara Contreras)

Keywords: ARRESTS; ATTEMPT; CHILDREN; KILLINGS; SAN DIEGO; SCHOOLS (Mario Contreras)

Edition: First Edition

Word Count: 1159

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## NewsRoom

1/23/10 AP Alert - TX 12:30:47

AP Alert - Texas

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January 23, 2010

Here is the latest Texas news from The Associated Press

AUSTIN, Texas\_Bond is set at \$250,000 for a man who fired several shots outside the Texas Capitol. Court records show Fausto Cardenas was trying to reload his weapon when police confronted him and tackled him to the ground. He remained in Travis County's jail yesterday.

DALLAS (AP)\_ Albert Reyes is the first non-Anglo president in Dallas-based Buckner International's 131-year history. Reyes will manage the social service agency's nearly \$100 million annual budget. The organization provides adoption and foster care, operates group homes, residential homes, community centers and retirement homes in Texas and internationally.

FORT WORTH, Texas (AP)\_ Fort Worth-based American Airlines says the company will furlough up to 175 pilots \_ about 2 percent of its 7,800 pilots \_ in the first half of the year. American announced yesterday it sent notices to 80 pilots that they'll lose their jobs at the end of February.

AUSTIN, Texas (AP)\_ A University of Texas library and museum has acquired 50 letters written by Jacqueline Kennedy Onassis to a colleague in the book publishing business. The letters, dated from 1978 to 1992, were written when Ray Roberts worked with the former first lady at Doubleday & Co. in New York, and when he was with Little, Brown and Company in Boston.

### ---- Index References ----

Company: AMERICAN AIRLINES; AMERICAN AIRLINES INC

Region: (Texas (1TE14); North America (1NO39); Americas (1AM92); USA (1US73))

Language: EN

Other Indexing: (AMERICAN AIRLINES; BUCKNER INTL; DOUBLEDAY CO; JACQUELINE KENNEDY ONASSIS) (Albert Reyes; Brown; Fausto Cardenas; Reyes) (StateDistribution)

Keywords: (j)

Word Count: 256

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## NewsRoom

11/15/13 N.Y. Times A22  
2013 WLNR 28778618

New York Times (NY)  
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November 15, 2013

Section: A

'I Was Just Sure They Just Wanted To Kill This Group of Persians'

J. DAVID GOODMAN and VIVIAN YEE

The first sound -- a muffled pop -- caused little alarm. It had come from somewhere on the third floor of a home in East Williamsburg, Brooklyn, shared by musicians from Iran.

The men had been unwinding with a routine video game of Internet pool, each comfortably ensconced in his own room, lazily playing before bed. The next sound came from one of the men, Arash Farazmand, who wondered aloud, "What's that?"

Two more blasts, now well inside the home, had the unmistakable thunder of weaponry. And then there was the sound of someone dying.

It was soon clear that a gunman was methodically moving through the house.

"He was stepping so fast," Pooya Hosseini recalled on Thursday, describing the deadly scene that unfolded just after midnight on Monday inside 318 Maujer Street and his confrontation with the gunman -- a fellow Iranian musician -- that enabled him to survive.

Three of his friends did not: two brothers who were members of the Yellow Dogs, a rock group of political refugees, and another musician.

When Mr. Hosseini, 28, began hearing the rampage unfold, he recalled, he feared that a man who had recently been renting a room in the house -- and who had spoken of his time in the Iraq war -- had gone crazy. He had no idea the gunman was Ali Akbar Mohammadi Rafie, a former member of Mr. Hosseini's band, the Free Keys.

All Mr. Hosseini knew, as he crouched in a corner of his third-floor room sheltered only by a laden coat rack, was that the gunman was now slowly climbing upstairs. He wanted to call the police but could only recall the 1-1-0 number for the police in Tehran.

"That was the worst moment in my life," he said. "I was just sure they just wanted to kill this group of Persians."

Mr. Hosseini listened to the gunfire. Then his door crashed open.

First all he saw was the gun, and then he focused on Mr. Rafie's face, wild-eyed, not with anger but with a strange beatific purpose, an almost happy demeanor.

" 'You think my bullets are not going to go through those coats and your body and the wall?' " Mr. Hosseini recalled, using English to recount Mr. Rafie's words, which had been spoken in Persian. "I said, 'Definitely, sure, but don't kill me. Just let me talk to you.' "

For the next several minutes, they spoke, Mr. Rafie, pointing the end of a .308 caliber, Spanish-made assault rifle at Mr. Hosseini, still crouched on the floor.

"He asked me, 'What happened to us?' " Mr. Hosseini recalled.

The two had been friends in Iran, playing music together and accompanying each other on mountain bike rides in the hills north of their Tehran homes. They came to the United States together, hoping to find musical freedom in Brooklyn.

But almost from the moment the men arrived together at Kennedy Airport in December 2011, relations were fraying. Mr. Rafie made little money as a bicycle messenger and began to steal things. He would hop turnstiles, frightening Mr. Hosseini and others who were seeking asylum and trying to assiduously follow the rules.

After about five months, the men kicked Mr. Rafie out of the band and stopped living with him. Mr. Hosseini said that, apart from a text message a few months ago, the two men had not spoken.

Amir Khosravani, 26, who was part of the same musical underground in Tehran, said he had spoken with Mr. Rafie recently. Though the others would complain that Mr. Rafie owed them money, Mr. Rafie always maintained he did not. "He told me, 'O.K., I have a job, and I have everything -- they don't have anything, I have a new job and I have a girlfriend,' " Mr. Khosravani recalled.

Recently things got worse.

Mr. Rafie began making extremely paranoid statements, Mr. Khosravani said, and described working for the Freemasons. Mr. Rafie said he was being prepared for a secret mission to blow up a government building in New York.

In the last few weeks, however, Mr. Khosravani thought Mr. Rafie was getting better; he did not call as he usually had when he was feeling despondent. When Mr. Rafie posted a photo of a rifle on Facebook and seemed to threaten Anthony Azar, the bassist who had replaced him in the Free Keys, Mr. Khosravani did not alert the others, assuming it was a joke.

It was not. Mr. Rafie walked across adjacent rooftops Monday night to get to the house on Maujer Street. Through a third-floor balcony window, he shot and killed Ali Eskandarian, 35. Then he marched through the home, killing Arash Farazmand, 28, on the third floor, and his brother Soroush Farazmand, 27, on the second floor, before returning upstairs.

Gripping the gun in Mr. Hosseini's room, Mr. Rafie rattled off personal grievances and a bizarre conspiracy theory. "He said, 'You had a plan to bring me here and put me in a band, but you did it just to bring me here and fix me with a group of Freemasonry,' " Mr. Hosseini recalled the gunman saying.

As Mr. Rafie's eyes settled on a spot just above Mr. Hosseini, he announced, "I need to kill you and then I need to kill myself. This is what I have to do. This is what I have to do."

Mr. Hosseini began speaking rapidly, certain that if he stopped, he would be killed. "I said, 'Don't kill me! Don't kill me! Let me talk and then do it,' " he said. After a minute, Mr. Rafie ordered him to "come out and stand up."

Chest to chest, only the gun between them, the men spoke for three or four more minutes, Mr. Hosseini said. "I was just saying whatever came to my mind. To just make the time pass because I heard the cops," he said.

Mr. Rafie heard the sirens, too. When Mr. Rafie turned his head, Mr. Hosseini grabbed the barrel of the gun and, as they wrestled over the weapon for several moments, bullets sprayed into the ceiling and the floor. "He was turning the gun everywhere," he said. Then the clip was empty and there was blood on both men. Mr. Hosseini knew he had not been hit but decided to seize the moment.

"I just screamed so bad in his face -- 'You shot me in my stomach!' -- and he got shocked," he said. Mr. Hosseini then tackled Mr. Rafie, knocking him onto a bed, and pressed his knee on his arm, preventing him from reloading. An extra magazine fell to the floor.

The men rose and Mr. Rafie, carrying additional ammunition, headed for the roof, trying unsuccessfully to drag Mr. Hosseini with him. But Mr. Rafie heard the police outside and instead ran alone through the roof door, which Mr. Hosseini rushed up to lock.

Mr. Hosseini then descended to the first floor where he encountered the police. A few moments later a single gunshot could be heard from the roof.

Mr. Rafie was dead.

"I really wish he didn't kill himself," Mr. Hosseini said. "When somebody kills himself, he makes it easy for himself. I didn't want it to be easy. I wish he was in jail for all of his life."

PHOTOS: Pooya Hosseini, who fought off a former bandmate who had already killed three men, speaking with the police after the shootings on Monday. (PHOTOGRAPH BY ELLEN MOYNIHAN); Ali Akbar Mohammadi Rafie

**---- Index References ----**

News Subject: (Crime (1CR87); Murder & Manslaughter (1MU48); Social Issues (1SO05); Violent Crime (1VI27))

Industry: (Entertainment (1EN08); Music (1MU57))

Region: (Americas (1AM92); Asia (1AS61); Gulf States (1GU47); Iran (1IR40); Middle East (1MI23); New York (1NE72); North America (1NO39); U.S. Mid-Atlantic Region (1MI18); USA (1US73); Western Asia (1WE54))

Language: EN

Edition: Late Edition - Final

Word Count: 1241

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**NewsRoom**

# **EXHIBIT 6**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**



DEPARTMENT OF THE TREASURY  
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS  
WASHINGTON, D.C. 20226

JUL 06 1989

MEMORANDUM TO: Director  
  
FROM: Associate Director (Compliance Operations)  
  
SUBJECT: Report and Recommendation on the  
Importability of Certain Semiautomatic Rifles

The working group has completed its evaluation of the semiautomatic rifles whose importation was suspended pending a determination as to whether these weapons are, as required by 18 U.S.C. § 925(d)(3), of a type "generally recognized as particularly suitable for or readily adaptable to sporting purposes".

Attached for your review and approval is the report and recommendation on the importability of these rifles.

*Daniel R. Black*  
Daniel Black

Attachment

Approved: *Stephen E. Higgins 7/6/89*

Disapprove: \_\_\_\_\_

**REPORT AND RECOMMENDATION OF THE ATF WORKING GROUP  
ON THE IMPORTABILITY OF CERTAIN  
SEMIAUTOMATIC RIFLES**

**SUSPENSION OF ASSAULT-TYPE RIFLE IMPORTATIONS**

On March 14, 1989, ATF announced that it was suspending, effective immediately, the importation of several makes of assault-type rifles, pending a decision as to whether these weapons meet the statutory test that they are of a type generally recognized as particularly suitable for or readily adaptable to sporting purposes. The announcement stated that ATF would not approve, until further notice, the importation of AKS-type weapons, Uzi carbines, FN/FAL-type weapons, FN/FNC-type weapons and Steyr Aug semiautomatic weapons. On April 5, 1989, the suspension was expanded to include all similar assault-type rifles.

For purposes of this suspension, assault-type rifles were rifles which generally met the following criteria:

- a. military appearance
- b. large magazine capacity
- c. semiautomatic version of a machinegun

Based on these criteria, ATF suspended action on pending applications and suspended outstanding permits covering certain firearms listed in Attachment 1. These included both centerfire and .22 rimfire caliber firearms. At that time, ATF indicated that the reexamination of these weapons would take approximately 90 days.

This ATF working group was established to conduct the reevaluation of the importability of these semiautomatic rifles. This report represents the findings and recommendations of the working group.

**BACKGROUND**

Section 925(d)(3) of Title 18, United States Code, as amended, provides in pertinent part that:

The Secretary shall authorize a firearm. . .to be imported or brought into the United States . . . if the firearm . . .

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and is generally recognized as particularly suitable for or readily

adaptable to sporting purposes, excluding surplus  
military firearms. . .

This provision was originally enacted by Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, and was also contained in Title I of the Gun Control Act of 1968, which amended Title IV later that year. According to the Senate Report on Title IV, this provision was intended to “curb the flow of surplus military weapons and other firearms being brought into the United States which are not particularly suitable for target shooting or hunting.” S. Rep. No. 1097, 90th Cong. 2d Sess. 80, 1968 U.S. Code Cong. and Admin. News 2112, 2167.

Moreover, there is legislative history which indicates that Congress intended the standard to allow the importation of traditional sporting rifles, while excluding military-type rifles. The Senate Report on the Gun Control Act observed that the importation standards “. . . are designed and intended to provide for the importation of quality made, sporting firearms, including . . . rifles such as those manufactured and imported by Browning and other such manufacturers and importers of firearms.” S. Rep. No. 1501, 90th Cong. 2d Sess. 38 (1968). Significantly, the rifles being imported by Browning at that time were semiautomatic and manually operated traditional sporting rifles of high quality.<sup>1</sup>

An explanation of the effect of this section by one of the sponsors of the bill specifically stated that military firearms would not meet the “sporting purposes” test for importation. The mere fact that a military firearm may be used in a sporting event does not make it importable as a sporting firearm<sup>2</sup>.

There is a reference in the Senate Report on Title IV which notes that the importation prohibition “. . . would not interfere with the bringing in of currently produced firearms, such as rifles . . . of recognized quality which are used for hunting and for recreational purposes, or for personal protection.” S. Rep. No. 1097, 90th Cong. 2d Sess. 80, 1968 U.S. Code Cong. and Admin. News 2112, 2167. However, this language is not inconsistent with the expressed purpose of restricting importation to firearms particularly suitable for target shooting or hunting since firearms particularly suitable for those purposes can obviously be used for other purposes such as recreational shooting and personal protection.

The determination of a weapon’s suitability for sporting purposes “rest[s] directly with the Secretary of the Treasury.” 114 Cong. Rec. 27465 (1968) (Statement of Sen. Murphy). While the legislative history suggests that the term “sporting purposes” refers to the traditional sports of target shooting, trap and skeet shooting, and hunting, the statute itself provides no criteria beyond the “generally recognized” language of section 925(d)(3). S. Rep. No. 1097, 90th Cong. 2d Sess. 80, 1968 U.S. Code Cong. and Admin. News 2167. The Senate Report on the Gun Control Act stated:

The difficulty of defining weapons characteristics to meet this target [of eliminating importation of weapons used in crime] without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition.

S. Rep. No. 1501, 90th Cong. 2d Sess. 38 (1968).

Following enactment of the Gun Control Act in 1968, the Secretary established a Firearms Evaluation Panel to provide guidelines for implementation of the “sporting purposes” test of section 925(d)(3). This panel was composed of representatives from the military, law enforcement, and the firearms industry. The panel focused its attention on handguns and recommended the adoption of factoring criteria to evaluate the various types of handguns. These factoring criteria are based upon such considerations as overall length of the firearm, caliber, safety features, and frame construction. An evaluation sheet (ATF Form 4590) was developed thereafter by ATF and put into use for evaluating handguns pursuant to section 925(d)(3). Attachment 2.

The 1968 Firearms Evaluation Panel did not propose criteria for evaluating rifles and shotguns under section 925(d)(3). Other than surplus military firearms which Congress addressed separately, long guns being imported prior to 1968 were generally conventional rifles and shotguns specifically intended for sporting purposes. Thus, in 1968, there was no cause to develop criteria for evaluating the sporting purposes of rifles and shotguns. Until recently, all rifles and shotguns were approved for importation so long as they were not otherwise excluded by section 925(d)(3). Only rifles and shotguns covered by the National Firearms Act (NFA), 26 U.S.C. S 5845(a) (for example, machineguns and short-barreled rifles and short-barreled shotguns), and surplus military rifles and shotguns had been denied importation.

The Firearms Evaluation Panel did briefly comment on whether a model BM59 Beretta, 7.62mm NATO Caliber Sporter Version Rifle was suitable for sporting purposes. Minutes of the Firearms Advisory Panel, December 10, 1968. Attachment 3. It was the consensus of the Panel that this rifle did have a particular use in target shooting and hunting. Accordingly, it was recommended that importation of the Beretta BM59, together with the SIG-AMT 7.62mm NATO Caliber Sporting Rifle and the Cetme 7.62mm NATO Caliber Sporting Rifle, be authorized for importation. (The Beretta BM59 and the Cetme, the predecessor to the HK91, are two of the rifles whose importation has been suspended. The SIG-AMT is no longer being produced.) However, the Panel recommended that importation of these weapons should include the restriction that they not possess combination flash suppressors/grenade launchers.

The working group found the Panel’s consideration of these rifles to be superficial and unpersuasive. The vast majority of the work of the 1968 Panel was devoted to handguns and the establishment of the factoring criteria for the importation of handguns. Indeed, we found compelling evidence that these rifles are not generally recognized as particularly suitable for sporting purposes.

The first time that ATF looked beyond the restrictions on NFA and surplus military rifles and shotguns and undertook a meaningful analysis under the “sporting purposes” test was in 1984. At that time, ATF was faced with a new breed of imported shotgun. It was clear that the historical assumption that all shotguns were sporting was no longer viable. Specifically, ATF was asked to determine whether the Striker-12 shotgun was suitable for sporting purposes. This shotgun is a military/law enforcement weapon initially designed and manufactured in South Africa for riot control. When the importer was asked to provide evidence of sporting purposes for the weapon, ATF was provided information that the weapon was suitable for police/combat style competitions. ATF determined that this type of competition did not constitute “sporting purposes” under the statute, and that this shotgun was not suitable for traditional sporting purposes, such as hunting, and trap and skeet shooting. Accordingly, importation was denied. Attachment 4.

Thereafter, in 1986, the Gilbert Equipment Company requested that the USAS-12 shotgun be classified as a sporting firearm under section 925(d)(3). After examination and testing of the weapon, ATF found that it was a semiautomatic version of a selective fire military-type assault shotgun. In this case, ATF determined that, due to its weight, size, bulk, designed magazine capacity, configuration, and other factors, the USAS-12 was not particularly suitable for or readily adaptable to sporting purposes. Again, ATF refused to recognize police/combat competitions as a sporting purpose under section 925(d)(3). The shotgun was reviewed on the basis of its suitability for traditional shotgun sports of hunting, and trap and skeet shooting and its importation was denied. Attachment 5. This decision was upheld by the United States District Court in Gilbert Equipment Company, Inc. v. Higgins, 709 F. Supp. 1071 (S.D. Ala. 1989). The case is currently on appeal to the Eleventh Circuit.

These two cases involving shotguns represent ATF's first thorough examination of the suitability of certain combat-type weapons for sporting purposes. In these cases ATF adopted an interpretation of sporting as being limited to certain traditional sports and not simply any lawful activity in which the weapons might be employed.

### ANALYSIS

#### A. Defining the type of weapon under review.

As noted above, section 925(d)(3) expressly provides that the Secretary shall authorize the importation of a firearm that is of a type that is generally recognized as particularly suitable for sporting purposes. The legislative history also makes it clear that the Secretary shall scrutinize types of firearms in exercising his authority under section 925(d). Specifically, in its explanation of section 925(d)(3), the Senate Report on the Gun Control Act stated:

This subsection gives the Secretary authority to permit the importation of ammunition and certain types of firearms--(1) those imported for scientific or research purposes or for use in competition or training under chapter 401 of title 10 of the United States Code; (2) an unserviceable firearm other than a machinegun; (3) those firearms not coming within the purview of the National Firearms Act (26 U.S.C. 5801, et seq.) and suitable for sporting purposes (in the case of surplus military weapons this type is limited to shotguns and rifles) and those taken out of the United States. (Emphasis added.)

S. Rep. No. 1501, 90th Cong. 2d Sess. 38 (1968).

In light of the statutory mandate that types of firearms be scrutinized, the working group first attempted to determine whether the semiautomatic rifles suspended from importation fall within a type of firearm.

The working group determined that the semiautomatic rifles in question are generally semiautomatic versions of true selective fire military assault rifles.<sup>3</sup> As a class or type of firearm they are often referred to as "assault rifles," "assault-type rifles," "military style rifles," or "paramilitary rifles."<sup>4</sup> Since we are only concerned with semiautomatic rifles, it is somewhat of a misnomer to refer to these weapons as "assault rifles." True assault rifles are selective fire

weapons that will fire in a fully automatic mode.<sup>5</sup> For the purposes of this paper, it was necessary to settle on one term that best describes the weapons under consideration, and we will refer to these weapons as “semiautomatic assault rifles.” They represent a distinctive type of rifle distinguished by certain general characteristics which are common to the modern military assault rifle. The modern military assault rifle, such as the U.S. M16, German G3, Belgian FN/FAL, and Soviet AK47, is a weapon designed for killing or disabling the enemy and, as described below, has characteristics designed to accomplish this purpose.

We found that the modern military assault rifle contains a variety of physical features and characteristics designed for military applications which distinguishes it from traditional sporting rifles.<sup>6</sup> These military features and characteristics (other than selective fire) are carried over to the semiautomatic versions of the original military rifle. These features and characteristics are as follows:

### 1. Military Configuration.

- a. Ability to accept a detachable magazine. Virtually all modern military firearms are designed to accept large, detachable magazines.<sup>7</sup> This provides the soldier with a fairly large ammunition supply and the ability to rapidly reload. Thus, large capacity magazines are indicative of military firearms. While detachable magazines are not limited to military firearms, most traditional semiautomatic sporting firearms, designed to accommodate a detachable magazine, have a relatively small magazine capacity. In addition, some States have a limit on the magazine capacity allowed for hunting, usually 8 rounds or less.<sup>8</sup> That a firearm is designed and sold with a large capacity magazine, e.g., 20-30 rounds, is a factor to be considered in determining whether a firearm is a semiautomatic assault rifle.
- b. Folding/telescoping stocks. Many military firearms incorporate folding or telescoping stocks.<sup>9</sup> The main advantage of this item is portability, especially for airborne troops. These stocks allow the firearm to be fired from the folded position, yet it cannot be fired nearly as accurately as with an open stock. With respect to possible sporting uses of this feature, the folding stock makes it easier to carry the firearm when hiking or backpacking. However, its predominant advantage is for military purposes, and it is normally not found on the traditional sporting rifle.
- c. Pistol grips. The vast majority of military firearms employ a well-defined pistol grip that protrudes conspicuously beneath the action of the weapon.<sup>10</sup> In most cases, the “straight line design” of the military weapon dictates a grip of this type so that the shooter can hold and fire the weapon. Further, a pistol grip can be an aid in one-handed firing of the weapon in a combat situation. Further, such grips were designed to assist in controlling machineguns during automatic fire. On the other hand, the vast majority of sporting firearms employ a more traditional pistol grip built into the wrist of the stock of the firearm since one-handed shooting is not usually employed in hunting or competitive target competitions.
- d. Ability to accept a bayonet. A bayonet has distinct military purposes.<sup>11</sup> First, it has a psychological affect on the enemy. Second, it enables soldiers to fight in close quarters

# **EXHIBIT 7**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**



DEPARTMENT OF  
THE TREASURY  
STUDY ON  
THE SPORTING  
SUITABILITY  
OF MODIFIED  
SEMI-AUTOMATIC  
ASSAULT RIFLES

APRIL 1998

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## EXECUTIVE SUMMARY

On November 14, 1997, the President and the Secretary of the Treasury ordered a review of the importation of certain modified versions of semiautomatic assault rifles into the United States.<sup>1</sup> The decision to conduct this review stemmed in part from concerns expressed by members of Congress and others that the rifles being imported were essentially the same as semiautomatic assault rifles previously determined to be nonimportable in a 1989 decision by the Bureau of Alcohol, Tobacco and Firearms (ATF). The decision also stemmed from the fact that nearly 10 years had passed since the last comprehensive review of the importation of rifles, and many new rifles had been developed during this time.

Under 18 U.S.C. section 925(d)(3), the Secretary shall approve applications for importation only when the firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes (the “sporting purposes test”). In 1989, ATF denied applications to import a series of semiautomatic versions of automatic-fire military assault rifles. When ATF examined these semiautomatic assault rifles, it found that the rifles, while no longer machineguns, still had a military configuration that was designed for killing and disabling the enemy and that distinguished the rifles from traditional sporting rifles. This distinctively military configuration served as the basis for ATF’s finding that the rifles were not considered sporting rifles under the statute.

The military configuration identified by ATF incorporated eight physical features: ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights. In 1989, ATF took the position that any of these military configuration features, other than the ability to accept a detachable magazine, would make a semiautomatic rifle not importable.

Subsequent to the 1989 decision, certain semiautomatic assault rifles that failed the 1989 sporting purposes test were modified to remove all of the military configuration features other than the ability to accept a detachable magazine. Significantly, most of these modified rifles not only still had the ability to accept a detachable magazine but, more specifically, still had the ability to accept a detachable large capacity magazine that

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<sup>1</sup> The President and the Secretary directed that all pending and future applications for importation of these rifles not be acted upon until completion of the review. They also ordered that outstanding permits for importation of the rifles be suspended for the duration of the review period. The existence of applications to import 1 million new rifles and outstanding permits for nearly 600,000 other rifles threatened to defeat the purpose of the expedited review unless the Department of the Treasury deferred action on additional applications and temporarily suspended the outstanding permits. (See exhibit 1 for a copy of the November 14, 1997, memorandum directing this review.)

The rifles that are the subject of this review are referred to in this report as “study rifles.”

was originally designed and produced for the military assault rifles from which they were derived. These magazines are referred to in this report as “large capacity military magazines.” Study rifles with the ability to accept such magazines are referred to in this report as “large capacity military magazine rifles,” or “LCMM rifles.” It appears that only one study rifle, the VEPR caliber .308 (an AK47 variant), is not an LCMM rifle. Based on the standard developed in 1989, these modified rifles were found to meet the sporting purposes test. Accordingly, the study rifles were approved for import into the United States.

These modified rifles are the subject of the present review. Like the rifles banned in 1989, the study rifles are semiautomatic rifles based on AK47, FN-FAL, HK91 and 93, Uzi, and SIG SG550 military assault rifles. While there are at least 59 specific model designations of the study rifles, they all fall within the basic designs listed above. There are at least 39 models based on the AK47 design, 8 on the FN-FAL design, 7 on the HK91 and 93 designs, 3 on the Uzi design, and 2 on the SIG SG550 design (see exhibit 2 for a list of the models). Illustrations of some of the study rifles are included in exhibit 3 of this report.

This review takes another look at the entire matter to determine whether the modified rifles approved for importation since 1989 are generally recognized as particularly suitable for or readily adaptable to sporting purposes.<sup>2</sup> We have explored the statutory history of the sporting purposes test and prior administrative and judicial interpretations; reexamined the basic tenets of the 1989 decision; analyzed the physical features of the study rifles, as well as information from a wide variety of sources relating to the rifles’ use and suitability for sporting purposes; and assessed changes in law that might have bearing on the treatment of the rifles.

This review has led us to conclude that the basic finding of the 1989 decision remains valid and that military-style semiautomatic rifles are not importable under the sporting purposes standard. Accordingly, we believe that the Department of the Treasury correctly has been denying the importation of rifles that had any of the distinctly military configuration features identified in 1989, other than the ability to accept a detachable magazine. Our review, however, did result in a finding that the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989.

Several important changes have occurred since 1989 that have led us to reevaluate the importance of this feature in the sporting purposes test. Most significantly, by passing the 1994 bans on semiautomatic assault weapons and large capacity ammunition feeding

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<sup>2</sup> The study was carried out by a working group composed of ATF and Treasury representatives. The working group’s activities and findings were overseen by a steering committee composed of ATF and Treasury officials.

devices, Congress sent a strong signal that firearms with the ability to expel large amounts of ammunition quickly are not sporting; rather, firearms with this ability have military purposes and are a crime problem. Specifically, Congress found that these magazines served “combat-functional ends” and were attractive to criminals because they “make it possible to fire a large number of rounds without reloading, then to reload quickly when those rounds are spent.”<sup>3</sup> Moreover, we did not find any evidence that the ability to accept a detachable large capacity military magazine serves any sporting purpose. Accordingly, we found that the ability to accept such a magazine is a critical factor in the sporting purposes test, which must be given the same weight as the other military configuration features identified in 1989.

In addition, the information we collected on the use and suitability of LCMM rifles for hunting and organized competitive target shooting demonstrated that the rifles are not especially suitable for sporting purposes. Although our review of this information indicated that, with certain exceptions, the LCMM rifles sometimes are used for hunting, their actual use in hunting is limited. There are even some general restrictions and prohibitions on the use of semiautomatic rifles for hunting game. Similarly, although the LCMM rifles usually may be used, with certain exceptions, and sometimes are used for organized competitive target shooting, their suitability for this activity is limited. In fact, there are some restrictions and prohibitions on their use.

Furthermore, the information we gathered demonstrated that the LCMM rifles are attractive to certain criminals. We identified specific examples of the LCMM rifles’ being used in violent crime and gun trafficking. In addition, we found some disturbing trends involving the LCMM rifles, including a rapid and continuing increase in crime gun trace requests after 1991 and a rapid “time to crime.” Their ability to accept large capacity military magazines likely plays a role in their appeal to these criminals.

After weighing all the information collected, we found that the LCMM rifles are not generally recognized as particularly suitable for or readily adaptable to sporting purposes and are therefore not importable. However, this decision will in no way preclude the importation of true sporting firearms.

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<sup>3</sup> H. Rep. No. 103-489, at 18-19.

## BACKGROUND

### Importation of Firearms Under the Gun Control Act

The Gun Control Act of 1968 (GCA)<sup>4</sup> generally prohibits the importation of firearms into the United States.<sup>5</sup> However, the GCA creates four narrow categories of firearms that the Secretary of the Treasury shall authorize for importation. The category that is relevant to this study is found at 18 U.S.C. section 925(d)(3).

The Secretary shall authorize a firearm . . . to be imported or brought into the United States . . . if the firearm . . .

(3) is of a type that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and **is generally recognized as particularly suitable for or readily adaptable to sporting purposes**, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled. (Emphasis added)

This provision originally was enacted, in a slightly different form, by Title IV of the Omnibus Crime Control and Safe Streets Act of 1968<sup>6</sup> and also was contained in Title I of the GCA, which amended Title IV later that year.

The GCA was enacted in large part "to assist law enforcement authorities in the States and their subdivisions in combating the increasing prevalence of crime in the United States." However, the Senate Report to the act also made clear that Congress did not intend the GCA to place any undue or unnecessary restrictions or burdens on responsible, law-abiding citizens with respect to acquiring, possessing, transporting, or using firearms for lawful activities.<sup>7</sup>

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<sup>4</sup> Pub. L. No. 90-618.

<sup>5</sup> 18 U.S.C. section 922(l).

<sup>6</sup> Pub. L. No. 90-351.

<sup>7</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d Sess. 22 (1968).

Consistent with this general approach, legislative history indicates that Congress intended the importation standard provided in section 925(d)(3) to exclude military-type weapons from importation to prevent such weapons from being used in crime, while allowing the importation of high-quality sporting rifles. According to the Senate Report, section 925(d)(3) was intended to "curb the flow of surplus military weapons and other firearms being brought into the United States which are not particularly suitable for target shooting or hunting."<sup>8</sup> The report goes on to explain that "[t]he importation of certain foreign-made and military surplus nonsporting firearms has an important bearing on the problem which this title is designed to alleviate [crime]. Thus, the import provisions of this title seem entirely justified."<sup>9</sup> Indeed, during debate on the bill, Senator Dodd, the sponsor of the legislation, stated that "Title IV prohibits importation of arms which the Secretary determines are not suitable for . . . sport . . . . The entire intent of the importation section is to get those kinds of weapons that are used by criminals and have no sporting purpose."<sup>10</sup>

The Senate Report, however, also makes it clear that the importation standards "are designed and intended to provide for the importation of quality made, sporting firearms, including . . . rifles such as those manufactured and imported by Browning and other such manufacturers and importers of firearms."<sup>11</sup> (The rifles being imported by Browning at that time were semiautomatic and manually operated traditional sporting rifles of high quality.) Similarly, the report states that the importation prohibition "would not interfere with the bringing in of currently produced firearms, such as rifles . . . of recognized quality which are used for hunting and for recreational purposes."<sup>12</sup> The reference to recreational purposes is not inconsistent with the expressed purpose of restricting importation to firearms particularly suitable for target shooting or hunting, because firearms particularly suitable for these purposes also can be used for other purposes such as recreational shooting.

During debate on the bill, there was discussion about the meaning of the term "sporting purposes." Senator Dodd stated:

[h]ere again I would have to say that if a military weapon is used in a

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<sup>8</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d Sess. 22 (1968).

<sup>9</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d Sess. 24 (1968).

<sup>10</sup> 114 Cong. Rec. S 5556, 5582, 5585 (1968).

<sup>11</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d. Sess. 38 (1968).

<sup>12</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d. Sess. 22 (1968).

special sporting event, it does not become a sporting weapon. It is a military weapon used in a special sporting event . . . . As I said previously the language says no firearms will be admitted into this country unless they are genuine sporting weapons.<sup>13</sup>

Legislative history also shows that the determination of a weapon's suitability for sporting purposes is the direct responsibility of the Secretary of the Treasury. The Secretary was given this discretion largely because Congress recognized that section 925(d)(3) was a difficult provision to implement. Immediately after discussing the large role cheap imported .22 caliber revolvers were playing in crime, the Senate Report stated:

[t]he difficulty of defining weapons characteristics to meet this target without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition.<sup>14</sup>

Indeed, Congress granted this discretion to the Secretary even though some expressed concern with its breadth:

[t]he proposed import restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adaptable to, sporting purposes. If this authority means anything, it permits Federal officials to differ with the judgment of sportsmen expressed through consumer preference in the marketplace . . . .<sup>15</sup>

Section 925(d)(3) provides that the Secretary shall authorize the importation of a firearm if it is of a "type" that is generally recognized as particularly suitable for or readily adaptable to sporting purposes. The legislative history also makes it clear that the Secretary shall scrutinize types of firearms in exercising his authority under section 925(d). Specifically, the Senate Report to the GCA states that section 925(d) "gives the

Secretary authority to permit the importation of ammunition and certain types of firearms."<sup>16</sup>

<sup>13</sup> 114 Cong. Rec. 27461-462 (1968).

<sup>14</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d Sess. 38 (1968).

<sup>15</sup> S. Rep. No. 1097, 90<sup>th</sup> Cong. 2d. Sess. 2155 (1968) (views of Senators Dirksen, Hruska, Thurmond, and Burdick). In *Gun South, Inc. v. Brady*, F.2d 858, 863 (11<sup>th</sup> Cir. 1989), the court, based on legislative history, found that the GCA gives the Secretary "unusually broad discretion in applying section 925(d)(3)."

<sup>16</sup> S. Rep. No. 1501, 90<sup>th</sup> Cong. 2d. Sess. 38 (1968).

The Senate Report to the GCA also recommended that the Secretary establish a council that would provide him with guidance and assistance in determining which firearms meet the criteria for importation into the United States.<sup>17</sup> Accordingly, following the enactment of the GCA, the Secretary established the Firearms Evaluation Panel (FEP) (also known as the Firearms Advisory Panel) to provide guidelines for implementation of the "sporting purposes" test. This panel was composed of representatives from the military, the law enforcement community, and the firearms industry. At the initial meeting of the FEP, it was understood that the panel's role would be advisory only.<sup>18</sup> The panel focused its attention on handguns and recommended the adoption of factoring criteria to evaluate the various types of handguns. These factoring criteria are based upon such considerations as overall length of the firearm, caliber, safety features, and frame construction. ATF thereafter developed an evaluation sheet (ATF Form 4590) that was put into use for evaluating handguns pursuant to section 925(d)(3). (See exhibit 4.)

The FEP did not propose criteria for evaluating rifles and shotguns under section 925(d)(3). Other than surplus military firearms, which Congress addressed separately, the rifles and shotguns being imported prior to 1968 were generally conventional rifles and shotguns specifically intended for sporting purposes. Therefore, in 1968, there was no cause to develop criteria for evaluating the sporting purposes of rifles and shotguns.

#### 1984 Application of the Sporting Purposes Test

The first time that ATF undertook a meaningful analysis of rifles or shotguns under the sporting purposes test was in 1984. At that time, ATF was faced with a new breed of imported shotgun, and it became clear that the historical assumption that all shotguns were sporting was no longer viable. Specifically, ATF was asked to determine whether the Striker-12 shotgun was suitable for sporting purposes. This shotgun is a military/law enforcement weapon initially designed and manufactured in South Africa for riot control. When the importer was asked to submit evidence of the weapon's sporting purposes, it provided information that the weapon was suitable for police/combat-style competitions. ATF determined that this type of competition did not constitute a sporting purpose

under the statute, and that the shotgun was not suitable for the traditional shotgun sports of hunting, and trap and skeet shooting.

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<sup>17</sup> S. Rep. No. 1501, 90th Cong. 2d Sess. 38 (1968).

<sup>18</sup> Gilbert Equipment Co. v. Higgins, 709 F. Supp. 1071, 1083, n. 7 (S.D. Ala. 1989), aff'd without op., 894 F.2d 412 (11<sup>th</sup> Cir. 1990).

### 1986 Firearms Owners Protection Act

On May 19, 1986, Congress passed the Firearms Owners Protection Act,<sup>19</sup> which amended section 925(d)(3) to provide that the Secretary "shall" (instead of "may") authorize the importation of a firearm that is of a type that is generally recognized as particularly suitable for or readily adaptable to sporting purposes. The Senate Report to the law stated "it is anticipated that in the vast majority of cases, [the substitution of 'shall' for 'may' in the authorization section] will not result in any change in current practices."<sup>20</sup> As the courts have found, "[r]egardless of the changes made [by the 1986 law], the firearm must meet the sporting purposes test and it remains the Secretary's obligation to determine whether specific firearms satisfy this test."<sup>21</sup>

### 1986 Application of the Sporting Purposes Test

In 1986, ATF again had to determine whether a shotgun met the sporting purposes test, when the Gilbert Equipment Company requested that the USAS-12 shotgun be classified as a sporting firearm under section 925(d)(3). Again, ATF refused to recognize police/combat-style competitions as a sporting purpose. After examining and testing the weapon, ATF determined its weight, size, bulk, designed magazine capacity, configuration, and other factors prevented it from being classified as particularly suitable for or readily adaptable to the traditional shotgun sports of hunting, and trap and skeet shooting. Accordingly, its importation was denied.

When this decision was challenged in Federal court, ATF argued, in part, that large magazine capacity and rapid reloading ability are military features. The court accepted this argument, finding "the overall appearance and design of the weapon (especially the detachable box magazine . . . ) is that of a combat weapon and not a sporting weapon."<sup>22</sup> In reaching this decision, the court was not persuaded by the importer's argument that box magazines can be lengthened or shortened depending on desired shell capacity.<sup>23</sup> The court also agreed with ATF's conclusion that police/combat-style competitions were not considered sporting purposes.

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<sup>19</sup> Pub. L. No. 99-308.

<sup>20</sup> S. Rep. No. 98-583, 98<sup>th</sup> Cong. 1<sup>st</sup> Sess. 27 (1984).

<sup>21</sup> Gilbert Equipment Co., 709 F. Supp. at 1083.

<sup>22</sup> Id. at 1089.

<sup>23</sup> Id. at 1087, n. 20 and 1089.

### 1989 Report on the Importability of Semiautomatic Assault Rifles

In 1989, after five children were killed in a California schoolyard by a gunman with a semiautomatic copy of an AK47, ATF decided to reexamine whether certain semiautomatic assault-type rifles met the sporting purposes test. This decision was reached after consultation with the Director of the Office of National Drug Control Policy.

In March and April 1989, ATF announced that it was suspending the importation of certain "assault-type rifles." For the purposes of this suspension, assault-type rifles were those rifles that generally met the following criteria: (1) military appearance; (2) large magazine capacity; and (3) semiautomatic version of a machinegun. An ATF working group was established to reevaluate the importability of these assault-type rifles. On July 6, 1989, the group issued its Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles (hereinafter 1989 report).

In the 1989 report, the working group first discussed whether the assault-type rifles under review fell within a "type" of firearm for the purposes of section 925(d)(3). The working group concluded that most of the assault-type rifles under review represented "a distinctive type of rifle [which it called the "semiautomatic assault rifle"] distinguished by certain general characteristics which are common to the modern military assault rifle."<sup>24</sup> The working group explained that the modern military assault rifle is a weapon designed for killing or disabling the enemy and has characteristics designed to accomplish this purpose. Moreover, it found that these characteristics distinguish modern military assault rifles from traditional sporting rifles.

The characteristics of the modern military assault rifle that the working group identified were as follows: (1) military configuration (which included: ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights) (see exhibit 5 for a thorough discussion of each of these features); (2) ability to fire automatically (i.e., as a machinegun); and (3) chambered to accept a centerfire cartridge case having a length of 2.25 inches or less.<sup>25</sup> In regards to the ability to accept a detachable magazine, the working group explained that:

[v]irtually all modern military firearms are designed to accept large, detachable magazines. This provides the soldier with a fairly large ammunition supply and the ability to rapidly reload. Thus, large capacity magazines are indicative of military firearms. While detachable

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<sup>24</sup> 1989 report at 6.

<sup>25</sup> 1989 report at 6.

magazines are not limited to military firearms, most traditional semiautomatic sporting firearms, designed to accommodate a detachable magazine, have a relatively small magazine capacity.<sup>26</sup>

The working group emphasized that these characteristics had to be looked at as a whole to determine whether the overall configuration of each of the assault-type rifles under review placed the rifle fairly within the semiautomatic assault rifle type. The semiautomatic assault rifles shared all the above military assault rifle characteristics other than being machineguns.<sup>27</sup>

The working group also addressed the scope of the term "sporting purposes." It concluded that the term should be given a narrow interpretation that focuses on the traditional sports of hunting and organized competitive target shooting. The working group made this determination by looking to the statute, its legislative history, applicable case law, the work of the FEP, and prior interpretations by ATF. In addition, the working group found that the reference to sporting purposes was intended to stand in contrast to military and law enforcement applications. Consequently, it determined that police/combat-type competitions should not be treated as sporting activities.<sup>28</sup>

The working group then evaluated whether the semiautomatic assault rifle type of firearm is generally recognized as particularly suitable for or readily adaptable to traditional sporting applications. This examination took into account technical and marketing data, expert opinions, the recommended uses of the firearms, and information on the actual uses for which the weapons are employed in this country. The working group, however, did not consider criminal use as a factor in its analysis of the importability of this type of firearm.

After analyzing this information, the working group concluded that semiautomatic assault rifles are not a type of firearm generally recognized as particularly suitable for or readily adaptable to sporting purposes. Accordingly, the working group concluded that semiautomatic assault rifles should not be authorized for importation under section 925(d)(3). However, the working group found that some of the assault-type rifles under review (the Valmet Hunter and .22 rimfire caliber rifles), did not fall within the semiautomatic assault rifle type. In the case of the Valmet Hunter, the working group found that although it was based on the operating mechanism of the AK47 assault rifle, it had been substantially

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<sup>26</sup> 1989 report at 6 (footnote omitted).

<sup>27</sup> The semiautomatic assault rifles were semiautomatic versions of machineguns.

<sup>28</sup> 1989 report at 9-11.

changed so that it was similar to a traditional sporting rifle.<sup>29</sup> Specifically, it did not have any of the military configuration features identified by the working group, except for the ability to accept a detachable magazine.

Following the 1989 study, ATF took the position that a semiautomatic rifle with any of the eight military configuration features identified in the 1989 report, other than the ability to accept a detachable magazine, failed the sporting purposes test and, therefore, was not importable.

### Gun South, Inc. v. Brady

Concurrent with its work on the 1989 report, ATF was involved in litigation with Gun South, Inc. (GSI). In October 1988 and February 1989, ATF had granted GSI permits to import AUG-SA rifles. As mentioned previously, in March and April of 1989, ATF imposed a temporary suspension on the importation of rifles being reviewed in the 1989 study, which included the AUG-SA rifle. GSI filed suit in Federal court, seeking to prohibit the Government from interfering with the delivery of firearms imported under permits issued prior to the temporary suspension.

The court of appeals found that the Government had the authority to suspend temporarily the importation of GSI's AUG-SA rifles because the GCA "impliedly authorizes" such action.<sup>30</sup> In addition, the court rejected GSI's contention that the suspension was arbitrary and capricious because the AUG-SA rifle had not physically changed, explaining the argument "places too much emphasis on the rifle's structure for determining whether a firearm falls within the sporting purpose exception. While the Bureau must consider the rifle's physical structure, the [GCA] requires the Bureau to equally consider the rifle's use."<sup>31</sup> In addition, the court found that ATF adequately had considered sufficient evidence before imposing the temporary suspension, citing evidence ATF had considered

demonstrating that semiautomatic assault-type rifles were being used with increasing frequency in crime.<sup>32</sup>

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<sup>29</sup> This finding reflects the fact that the operating mechanism of the AK47 assault rifle is similar to the operating mechanism used in many traditional sporting rifles.

<sup>30</sup> Gun South, Inc. v. Brady, 877 F.2d 858 (11th Cir. 1989). The court of appeals issued its ruling just days before the 1989 report was issued. However, the report was complete before the ruling was issued.

<sup>31</sup> Id.

<sup>32</sup> Id.

Although GSI sued ATF on the temporary suspension of its import permits, once the 1989 report was issued, no one pursued a lawsuit challenging ATF's determination that the semiautomatic assault rifles banned from importation did not meet the sporting purposes test.<sup>33</sup>

### Violent Crime Control and Law Enforcement Act of 1994

On September 13, 1994, Congress passed the Violent Crime Control and Law Enforcement Act of 1994,<sup>34</sup> which made it unlawful, with certain exceptions, to manufacture, transfer, or possess semiautomatic assault weapons as defined by the statute.<sup>35</sup> The statute defined semiautomatic assault weapons to include 19 named models of firearms (or copies or duplicates of the firearms in any caliber);<sup>36</sup> semiauto-matic rifles that have the ability to accept detachable magazines and have at least two of five features specified in the law; semiautomatic pistols that have the ability to accept detachable magazines and have at least two of five features specified in the law; and semiautomatic shotguns that have at least two of four features specified in the law.<sup>37</sup> However, Congress

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<sup>33</sup> After the 1989 report was issued, Mitchell Arms, Inc. asserted takings claims against the Government based upon the suspension and revocation of four permits allowing for the importation of semiautomatic assault rifles and ATF's temporary moratorium on import permits for other rifles. The court found for the Government, holding the injury complained of was not redressable as a taking because Mitchell Arms did not hold a property interest within the meaning of the Just Compensation Clause of the Fifth Amendment. Mitchell Arms v. United States, 26 Cl. Ct. 1 (1992), aff'd, 7 F.3d 212 (Fed. Cir. 1993), cert. denied, 511 U.S. 1106 (1994).

<sup>34</sup> Pub. L. No. 103-22. Title XI, Subtitle A of this act may be cited as the "Public Safety and Recreational Firearms Use Protection Act."

<sup>35</sup> 18 U.S.C. section 922(v).

<sup>36</sup> Chapter 18 U.S.C. section 921(a)(30)(A) states that the term "semiautomatic assault weapon" means "any of the firearms, or copies or duplicates of the firearms in any caliber, known as -, " followed by a list of named firearms. Even though section 921(a)(3) defines "firearm" as used in chapter 18 to mean, in part, "the frame or receiver of any such weapon," the use of "firearm" in section 921(a)(30)(A) has not been interpreted to mean a frame or receiver of any of the named weapons, except when the frame or receiver actually is incorporated in one of the named weapons.

Any other interpretation would be contrary to Congress' intent in enacting the assault weapon ban. In the House Report to the assault weapon ban, Congress emphasized that the ban was to be interpreted narrowly. For example, the report explained that the present bill was more tightly focused than earlier drafts which gave ATF authority to ban any weapon which "embodies the same configuration" as the named list of guns in section 921(a)(30)(A); instead, the present bill "contains a set of specific characteristics that must be present in order to ban any additional semiautomatic assault weapons [beyond the listed weapons]." H. Rep. 103-489 at 21.

<sup>37</sup> 18 U.S.C. section 921(a)(30).

exempted from the assault weapon ban any semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition and any semiautomatic shotgun that cannot hold more than five rounds of ammunition in a fixed or detachable magazine.<sup>38</sup>

Although the 1994 law was not directly addressing the sporting purposes test in section 925(d)(3), section 925(d)(3) had a strong influence on the law's content. The technical work of ATF's 1989 report was, to a large extent, incorporated into the 1994 law. The House Report to the 1994 law explained that although the legal question of whether semiautomatic assault weapons met section 925(d)(3)'s sporting purposes test "is not directly posed by [the 1994 law], the working group's research and analysis on assault weapons is relevant on the questions of the purposes underlying the design of assault weapons, the characteristics that distinguish them from sporting guns, and the reasons underlying each of the distinguishing features."<sup>39</sup> As in the 1989 study, Congress focused on the external features of firearms, rather than on their semiautomatic operating mechanism.

The 1994 law also made it unlawful to possess and transfer large capacity ammunition feeding devices manufactured after September 13, 1994.<sup>40</sup> A large capacity ammunition feeding device was generally defined as a magazine, belt, drum, feed strip, or similar device that has the capacity of, or that can be readily restored or converted to accept, more than 10 rounds of ammunition.<sup>41</sup>

Congress passed these provisions of the 1994 law in response to the use of semiautomatic assault weapons and large capacity ammunition feeding devices in crime. Congress had been presented with much evidence demonstrating that these weapons were "the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder."<sup>42</sup> The House Report to the 1994 law recounts numerous crimes that had occurred involving semiautomatic assault weapons and large capacity magazines that were originally designed and produced for military assault rifles.<sup>43</sup>

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<sup>38</sup> 18 U.S.C. sections 922(v)(3)(C)&(D).

<sup>39</sup> H. Rep. No. 103-489, at 17, n. 19.

<sup>40</sup> 18 U.S.C. section 922(w).

<sup>41</sup> 18 U.S.C. section 921(a)(31).

<sup>42</sup> H. Rep. No. 103-489, at 13.

<sup>43</sup> H. Rep. No. 103-489, at 14-15.

In enacting the semiautomatic assault weapon and large capacity ammunition feeding device bans, Congress emphasized that it was not preventing the possession of sporting firearms. The House Report, for example, stated that the bill differed from earlier bills in that "it is designed to be more tightly focused and more carefully crafted to clearly exempt legitimate sporting guns."<sup>44</sup> In addition, Congress specifically exempted 661 long guns from the assault weapon ban which are "most commonly used in hunting and recreational sports."<sup>45</sup>

Both the 1994 law and its legislative history demonstrate that Congress recognized that ammunition capacity is a factor in determining whether a firearm is a sporting firearm. For example, large capacity ammunition feeding devices were banned, while rifles and shotguns with small ammunition capacities were exempted from the assault weapon ban. Moreover, the House Report specifically states that the ability to accept a large capacity magazine was a military configuration feature which was not "merely cosmetic," but "serve[d] specific, combat-functional ends."<sup>46</sup> The House Report also explains that, while "[m]ost of the weapons covered by the [ban] come equipped with magazines that hold 30 rounds [and can be replaced with magazines that hold 50 or even 100 rounds], . . . [i]n contrast, hunting rifles and shotguns typically have much smaller magazine capabilities--from 3-5."<sup>47</sup>

Finally, it must be emphasized that the semiautomatic assault weapon ban of section 922(v) is distinct from the sporting purposes test governing imports of section 925(d)(3). Clearly, any weapon banned under section 922(v) cannot be imported into the United States because its possession in the United States would be illegal. However, it is possible that a weapon not defined as a semiautomatic assault weapon under section 922(v) still would not be importable under section 925(d)(3). In order to be importable, the firearm must be of a type generally recognized as particularly suitable for or readily adaptable to sporting purposes regardless of its categorization under section 922(v). The

Secretary's discretion under section 925(d)(3) remains intact for all weapons not banned by the 1994 statute.

### The Present Review

Prior to the November 14, 1997, decision to conduct this review, certain members of

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<sup>44</sup> H. Rep. No. 103-489, at 21.

<sup>45</sup> H. Rep. No. 103-489, at 20. None of these 661 guns are study rifles.

<sup>46</sup> H. Rep. No. 103-489, at 18.

<sup>47</sup> H. Rep. No. 103-489, at 19 (footnote omitted).

Congress strongly urged that it was necessary to review the manner in which the Treasury Department is applying the sporting purposes test to the study rifles, in order to ensure that the present practice is consistent with section 925(d)(3) and current patterns of gun use. The fact that it had been nearly 10 years since the last comprehensive review of the importation of rifles (with many new rifles being developed during this time) also contributed to the decision to conduct this review.

### DEFINING THE TYPE OF WEAPON UNDER REVIEW

Section 925 (d) (3) provides that the Secretary shall authorize the importation of a firearm if it is of a "type" that meets the sporting purposes test. Given this statutory mandate, we had to determine whether the study rifles suspended from importation fell within one type of firearm. Our review of the study rifles demonstrated that all were derived from semiautomatic assault rifles that failed to meet the sporting purposes test in 1989 but were later found to be importable when certain military features were removed.

Within this group, we determined that virtually all of the study rifles shared another important feature: The ability to accept a detachable large capacity magazine (e.g., more than 10 rounds) that was originally designed and produced for one of the following military assault rifles: AK47, FN-FAL, HK91 or 93, SIG SG550, or Uzi. (This is the only military configuration feature cited in the 1989 study that remains with any of the study rifles).

We determined that all of the study rifles that shared both of these characteristics fell within a type of firearm which, for the purposes of this report, we call "large capacity military magazine rifles" or "LCMM rifles." It appears that only one study rifle, the VEPR caliber .308--which is based on the AK47 design--does not fall within this type because it does not have the ability to accept a large capacity military magazine.

### SCOPE OF "SPORTING PURPOSES"

As in the 1989 study, we had to determine the scope of "sporting purposes" as used in section 925(d)(3). Looking to the statute, its legislative history, the work of the Firearms Evaluation Panel (see exhibit 6), and prior ATF interpretations, we determined sporting purposes should be given a narrow reading, incorporating only the traditional sports of hunting and organized competitive target shooting (rather than a broader interpretation that could include virtually any lawful activity or competition.)

In terms of the statute itself, the structure of the importation provisions suggests a somewhat narrow interpretation. Firearms are prohibited from importation (section 922(l)), with four specific exceptions (section 925(d)). A broad interpretation permitting a firearm to be imported because someone may wish to use it in some lawful shooting activity would render the general prohibition of section 922(l) meaningless.

Similarly, as discussed in the "Background" section, the legislative history of the GCA indicates that the term sporting purposes narrowly refers to the traditional sports of hunting and organized competitive target shooting. There is nothing in the history to indicate that it was intended to recognize every conceivable type of activity or competition that might employ a firearm.

In addition, the FEP specifically addressed the informal shooting activity of "plinking" (shooting at randomly selected targets such as bottles and cans) and determined that it was not a legitimate sporting purpose under the statute. The panel found that, "while many persons participate in this type of activity and much ammunition was expended in such endeavors, it was primarily a pastime and could not be considered a sport for the purposes of importation. . . ." (See exhibit 6.)

Finally, the 1989 report determined that the term sporting purposes should be given a narrow reading incorporating the traditional rifle sports of hunting and organized competitive target shooting. In addition, the report determined that the statute's reference to sporting purposes was intended to stand in contrast with military and law enforcement applications. This is consistent with ATF's interpretation in the context of the Striker-12 shotgun and the USAS-12 shotgun. It is also supported by the court's decision in Gilbert Equipment Co. v. Higgins.

We received some comments urging us to find "practical shooting" is a sport for the purposes of section 925(d)(3).<sup>48</sup> Further, we received information showing that practical shooting is gaining in popularity in the United States and is governed by an organization that has sponsored national events since 1989. It also has an international organization.

While some may consider practical shooting a sport, by its very nature it is closer to police/combat-style competition and is not comparable to the more traditional types of sports, such as hunting and organized competitive target shooting. Therefore, we are not convinced that practical shooting does, in fact, constitute a sporting purpose under section 925(d)(3).<sup>49</sup> However, even if we were to assume for the sake of argument that practical shooting is a sport for the purposes of the statute, we still would have to decide whether a firearm that could be used in practical shooting meets the sporting purposes test. In other words, it still would need to be determined whether the firearm is of a type that is generally recognized as particularly suitable for or readily adaptable to practical shooting and other sporting purposes.<sup>50</sup> Moreover, the legislative history makes clear that the use of a military weapon in a practical shooting competition would not make that weapon

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<sup>48</sup> Practical shooting involves moving, identifying, and engaging multiple targets and delivering a number of shots rapidly. In doing this, practical shooting participants test their defensive skills as they encounter props, including walls and barricades, with full or partial targets, "no-shoots," steel reaction targets, movers, and others to challenge them.

<sup>49</sup> As noted earlier, ATF has taken the position that police/combat-style competitions do not constitute a "sporting purpose." This position was upheld in Gilbert Equipment Co., 709 F. Supp. at 1077.

<sup>50</sup> Our findings on the use and suitability of the LCMM rifles in practical shooting competitions are contained in the "Suitability for Sporting Purposes" section of this report.

sporting: “if a military weapon is used in a special sporting event, it does not become a sporting weapon. It is a military weapon used in a special sporting event.”<sup>51</sup> While none of the LCMM rifles are military weapons, they still retain the military feature of the ability to accept a large capacity military magazine.

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<sup>51</sup> 114 Cong. Rec. 27461-462 (1968) (Sen. Dodd).

## METHOD OF STUDY

As explained in the “Executive Summary” section of this report, the purpose of this study is to review whether modified semiautomatic assault rifles are properly importable under 18 U.S.C. section 925(d)(3). More specifically, we reexamined the conclusions of the 1989 report as applied today to determine whether we are correct to allow importation of the study rifles that have been modified by having certain military features removed. To determine whether such rifles are generally recognized as particularly suitable for or readily adaptable to sporting purposes, the Secretary must consider both the physical features of the rifles and the actual uses of the rifles.<sup>52</sup> Because it appears that all of the study rifles that have been imported to date have the ability to accept a large capacity military magazine,<sup>53</sup> all of the information collected on the study rifles’ physical features and actual uses applies only to the LCMM rifles.

### **Physical features:**

The discussion of the LCMM rifles’ physical features are contained in the “Suitability for Sporting Purposes” section of this report.

### **Use:**

We collected relevant information on the use of the LCMM rifles. Although the 1989 study did not consider the criminal use of firearms in its importability analysis, legislative history demonstrates and the courts have found that criminal use is a factor that can be considered in determining whether a firearm meets the requirements of section 925(d)(3).<sup>54</sup> Accordingly, we decided to consider the criminal use of the LCMM rifles in the present analysis.

The term “generally recognized” in section 925(d)(3) indicates that the Secretary should base his evaluation of whether a firearm is of a type that is particularly suitable for or readily adaptable to sporting purposes, in part, on a “community standard” of the firearm’s use.<sup>55</sup> The community standard “may change over time even though the firearm remains the same. Thus, a changing pattern of use may significantly affect whether a firearm is generally recognized as particularly suitable for or readily adaptable to a sporting purpose.”<sup>56</sup> Therefore, to assist the Secretary in determining whether the LCMM rifles presently are of a type generally recognized as particularly suitable for or readily adaptable to sporting purposes, we gathered information from the relevant “community.” The relevant community was defined as persons and groups who are

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<sup>52</sup> Gun South, Inc., 877 F.2d at 866.

<sup>53</sup> The VEPR caliber .308 discussed on page 16 has not yet been imported.

<sup>54</sup> 114 Cong. Rec. S 5556, 5582, 5585 (1968)(“[t]he entire intent of the importation section [of the sporting purposes test] is to get those kinds of weapons that are used by criminals and have no sporting purposes”) (Sen. Dodd); Gun South, Inc., 877 F.2d at 866.

<sup>55</sup> Gun South, Inc., 877 F.2d at 866.

<sup>56</sup> Id.

knowledgeable about the uses of these firearms or have relevant information about whether these firearms are particularly suitable for sporting purposes. We identified more than 2,000 persons or groups we believed would be able to provide relevant, factual information on these issues. The individuals and groups were selected to obtain a broad range of perspectives on the issues. We conducted surveys to obtain specific information from hunting guides, editors of hunting and shooting magazines, organized competitive shooting groups, State game commissions, and law enforcement agencies and organizations. Additionally, we asked industry members, trade associations, and various interest and information groups to provide relevant information.<sup>57</sup> A detailed presentation of the surveys and responses is included as an appendix to this report.

We also reviewed numerous advertisements and publications, both those submitted by the editors of hunting and shooting magazines and those collected internally, in our search for material discussing the uses of the LCMM rifles. Further, we collected importation data, tracing data, and case studies.<sup>58</sup>

Our findings on use are contained in the “Suitability for Sporting Purposes” section of this report.

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<sup>57</sup> **Hunting guides:** Guides were asked about specific types of firearms used by their clients. The guides were an easily definable group, versus the entire universe of hunters. We obtained the names of the hunting guides surveyed from the States.

**Editors of hunting and shooting magazines:** Editors were surveyed to determine whether they recommended the LCMM rifles for hunting or organized competitive target shooting and whether they had written any articles on the subject. The list of editors we surveyed was obtained from a directory of firearms-related organizations.

**Organized competitive shooting groups:** Organized groups were asked whether they sponsored competitive events with high-power semiautomatic rifles and whether the LCMM rifles were allowed in those competitions. We felt it was significant to query those who are involved with organized events rather than unofficial activities with no specific rules or guidelines. As with the editors above, the list of groups was obtained from a directory of firearms-related organizations.

**State game commissions:** State officials were surveyed to determine whether the use of the LCMM rifles was prohibited or restricted for hunting in each State.

**Law enforcement agencies and organizations:** Specific national organizations and a sampling of 26 police departments across the country were contacted about their knowledge of the LCMM rifles’ use in crime. The national organizations were surveyed with the intent that they would gather input from the wide range of law enforcement agencies that they represent or that they would have access to national studies on the subject.

**Industry members and trade associations:** These groups were included because of their knowledge on the issue.

**Interest and information groups:** These organizations were included because of their wide range of perspectives on the issue.

<sup>58</sup> To assist us with our review of the crime-related information we collected, we obtained the services of Garen J. Wintemute, MD, M.P.H. Director of the Violence Prevention Research Program, University of California, Davis, and Anthony A. Braga, Ph.D., J.F.K. School of Government, Harvard University.

### SUITABILITY FOR SPORTING PURPOSES

The next step in our review was to evaluate whether the LCMM rifles, as a type, are generally recognized as particularly suitable for or readily adaptable to hunting and organized competitive target shooting.<sup>59</sup> The standard applied in making this determination is high. It requires more than a showing that the LCMM rifles may be used or even are sometimes used for hunting and organized competitive target shooting; if this were the standard, the statute would be meaningless. Rather, the standard requires a showing that the LCMM rifles are especially suitable for use in hunting and organized competitive target shooting.

As discussed in the “Method of Study” section, we considered both the physical features of the LCMM rifles and the actual uses of the LCMM rifles in making this determination.

#### Physical Features

**The ability to accept a detachable large capacity magazine that was originally designed and produced for one of the following military assault rifles: AK47, FN-FAL, HK91 or 93, SIG SG550, or Uzi.**

Although the LCMM rifles have been stripped of many of their military features, they all still have the ability to accept a detachable large capacity magazine that was originally designed and produced for one of the following military assault rifles: AK47, FN-FAL, HK91 and 93, SIG SG550, or Uzi; in other words, they still have a feature that was designed for killing or disabling an enemy. As the 1989 report explains:

Virtually all modern military firearms are designed to accept large, detachable magazines. This provides the soldier with a fairly large ammunition supply and the ability to rapidly reload. Thus, large capacity magazines are indicative of military firearms. While detachable magazines are not limited to military firearms, most traditional

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<sup>59</sup> One commenter suggests that the Secretary has been improperly applying the “readily adaptable to sporting purposes” provision of the statute. Historically, the Secretary has considered the “particularly suitable for or readily adaptable to” provisions as one standard. The broader interpretation urged by the commenter would make the standard virtually unenforceable. If the Secretary allowed the importation of a firearm which is readily adaptable to sporting purposes, without requiring it actually to be adapted prior to importation, the Secretary would have no control over whether the adaptation actually would occur following the importation.

semiautomatic sporting firearms, designed to accommodate a detachable magazine, have a relatively small magazine capacity.<sup>60</sup>

Thus, the 1989 report found the ability to accept a detachable large capacity magazine originally designed and produced for a military assault rifle was a military, not a sporting, feature. Nevertheless, in 1989 it was decided that the ability to accept such a large capacity magazine, in the absence of other military configuration features, would not be viewed as disqualifying for the purposes of the sporting purposes test. However, several important developments, which are discussed below, have led us to reevaluate the weight that should be given to the ability to accept a detachable large capacity military magazine in the sporting purposes test.

Most significantly, we must reevaluate the significance of this military feature because of a major amendment that was made to the GCA since the 1989 report was issued. In 1994, as discussed in the “Background” section of this report, Congress passed a ban on large capacity ammunition feeding devices and semiautomatic assault weapons.<sup>61</sup> In enacting these bans, Congress made it clear that it was not preventing the possession of sporting firearms.<sup>62</sup> Although the 1994 law was not directly addressing the sporting purposes test, section 925(d)(3) had a strong influence on the law's content. As discussed previously, the technical work of ATF's 1989 report was, to a large extent, incorporated into the 1994 law.

Both the 1994 law and its legislative history demonstrate that Congress found that ammunition capacity is a factor in whether a firearm is a sporting firearm. For example, large capacity ammunition feeding devices were banned, while rifles and shotguns with small ammunition capacities were exempted from the assault weapon ban. In other words, Congress found magazine capacity to be such an important factor that a semiautomatic rifle that cannot accept a detachable magazine that holds more than five rounds of ammunition will not be banned, even if it contains all five of the assault

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<sup>60</sup> 1989 report at 6 (footnote omitted). This was not the first time that ATF considered magazine capacity to be a relevant factor in deciding whether a firearm met the sporting purposes test. See Gilbert Equipment Co., 709 F. Supp. at 1089 (“the overall appearance and design of the weapon (especially the detachable box magazine . . . ) is that of a combat weapon and not a sporting weapon.”)

<sup>61</sup> The ban on large capacity ammunition feeding devices does not include any such device manufactured on or before September 13, 1994. Accordingly, there are vast numbers of large capacity magazines originally designed and produced for military assault weapons that are legal to transfer and possess (“grandfathered” large capacity military magazines). Presently these grandfathered large capacity military magazines fit the LCMM rifles.

<sup>62</sup> See, for example, H. Rep. No. 103-489, at 21.

weapon features listed in the law. Moreover, unlike the assault weapon ban in which a detachable magazine and at least two physical features are required to ban a rifle, a large capacity magazine in and of itself is banned.

In addition, the House Report specifically states that the ability to accept a large capacity magazine is a military configuration characteristic that is not "merely cosmetic," but "serve[s] specific, combat-functional ends."<sup>63</sup> The House Report also explains that large capacity magazines

make it possible to fire a large number of rounds without re-loading, then to reload quickly when those rounds are spent. Most of the weapons covered by the proposed legislation come equipped with magazines that hold 30 rounds. Even these magazines, however, can be replaced with magazines that hold 50 or even 100 rounds. Furthermore, expended magazines can be quickly replaced, so that a single person with a single assault weapon can easily fire literally hundreds of rounds within minutes. . . . In contrast, hunting rifles and shotguns typically have much smaller magazine capabilities--from 3-5.<sup>64</sup>

Congress specifically exempted 661 long guns from the assault weapon ban that are "most commonly used in hunting and recreational sports."<sup>65</sup> The vast majority of these long guns do not use large capacity magazines. Although a small number of the exempted long guns have the ability to accept large capacity magazines, only four of these exempted long guns were designed to accept large capacity military magazines.<sup>66</sup>

The 1994 law also demonstrates Congress' concern about the role large capacity magazines and firearms with the ability to accept these large capacity magazines play in

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<sup>63</sup> H. Rep. No. 103-489, at 18.

<sup>64</sup> H. Rep. No. 103-489, at 19 (footnote omitted). The fact that 12 States place a limit on the magazine capacity allowed for hunting, usually 5 or 6 rounds, is consistent with this analysis. (See exhibit 7).

<sup>65</sup> H. Rep. 103-489, at 20.

<sup>66</sup> These four firearms are the Iver Johnson M-1 carbine, the Iver Johnson 50<sup>th</sup> Anniversary M-1 carbine, the Ruger Mini-14 autoloading rifle (without folding stock), and the Ruger Mini Thirty rifle. All of these weapons are manufactured in the United States and are not the subject of this study. In this regard, it should also be noted that Congress can distinguish between domestic firearms and foreign firearms and impose different requirements on the importation of firearms. For example, Congress may ban the importation of certain firearms although similar firearms may be produced domestically. See, for example, B-West Imports v. United States, 75 F.3d 633 (Fed. Cir. 1996).

crime. The House Report for the bill makes reference to numerous crimes involving these magazines and weapons, including the following:<sup>67</sup>

The 1989 Stockton, California, schoolyard shooting in which a gunman with a semiautomatic copy of an AK47 and 75-round magazines fired 106 rounds in less than 2 minutes. Five children were killed and twenty-nine adults and children were injured.

The 1993 shooting in a San Francisco, California, office building in which a gunman using 2 TEC DC9 assault pistols with 50-round magazines killed 8 people and wounded 6 others.

A 1993 shooting on the Long Island Railroad that killed 6 people and wounded 19 others. The gunman had a Ruger semiautomatic pistol, which he reloaded several times with 15-round magazines, firing between 30 to 50 rounds before he was overpowered.

The House Report also includes testimony from a representative of a national police officers' organization, which reflects the congressional concern with criminals' access to firearms that can quickly expel large amounts of ammunition:

In the past, we used to face criminals armed with a cheap Saturday Night Special that could fire off six rounds before [re]loading. Now it is not at all unusual for a cop to look down the barrel of a TEC-9 with a 32 round clip. The ready availability of and easy access to assault weapons by criminals has increased so dramatically that police forces across the country are being required to upgrade their service weapons merely as a matter of self-defense and preservation. The six-shot .38 caliber service revolver, standard law enforcement issue for years, is just no match against a criminal armed with a semiautomatic assault weapon.<sup>68</sup>

Accordingly, by passing the 1994 law, Congress signaled that firearms with the ability to accept detachable large capacity magazines are not particularly suitable for sporting purposes. Although in 1989 we found the ability to accept a detachable large capacity military magazine was a military configuration feature, we must give it more weight, given this clear signal from Congress.

The passage of the 1994 ban on large capacity magazines has had another effect. Under the 1994 ban, it generally is unlawful to transfer or possess a large capacity magazine

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<sup>67</sup> H. Rep. No. 103-489, at 15 (two of these examples involve handguns).

<sup>68</sup> H. Rep. 103-489, at 13-14 (footnote omitted).

manufactured after September 13, 1994. Therefore, if we require the LCMM rifles to be modified so that they do not accept a large capacity military magazine in order to be importable, a person will not be able to acquire a newly manufactured large capacity magazine to fit the modified rifle. Thus, the modified rifle neither will be able to accept a grandfathered large capacity military magazine, nor can a new large capacity magazine be manufactured to fit it. Accordingly, today, making the ability to accept a large capacity military magazine disqualifying for importation will prevent the importation of firearms which have the ability to expel large amounts of ammunition quickly without reloading.

This was not the case in 1989 or prior to the 1994 ban.

It is important to note that even though Congress reduced the supply of large capacity military magazines by passing the 1994 ban, there are still vast numbers of grandfathered large capacity military magazines available that can be legally possessed and transferred. These magazines currently fit in the LCMM rifles. Therefore, the 1994 law did not eliminate the need to take further measures to prevent firearms imported into the United States from having the ability to accept large capacity military magazines, a nonsporting factor.

Another impetus for reevaluating the existing standard is the development of modified weapons. The 1989 report caused 43 different models of semiautomatic assault rifles to be banned from being imported into the United States. The effect of that determination was that nearly all semiautomatic rifles with the ability to accept detachable large capacity military magazines were denied importation. Accordingly, at the time, there was no need for the ability to accept such a magazine to be a determining factor in the sporting purposes test. This is no longer the case. As discussed earlier, manufacturers have modified the semiautomatic assault rifles disallowed from importation in 1989 by removing all of their military configuration features, except for the ability to accept a detachable magazine. As a result, semiautomatic rifles with the ability to accept detachable large capacity military magazines (and therefore quickly expel large amounts of ammunition) legally have been entering the United States in significant numbers. Accordingly, the development of these modified weapons necessitates reevaluating our existing standards.

Thus, in order to address Congress' concern with firearms that have the ability to expel large amounts of ammunition quickly, particularly in light of the resumption of these weapons coming into the United States, the ability to accept a detachable large capacity military magazine must be given greater weight in the sporting purposes analysis of the LCMM rifles than it presently receives.<sup>69</sup>

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<sup>69</sup> A firearm that can be easily modified to accept a detachable large capacity military magazine with only minor adjustments to the firearm or the magazine is considered to be a firearm with the ability to accept these magazines. The ROMAK4 is an example of such a firearm: With minor modifications to either the

**Derived from semiautomatic assault rifles that failed to meet the sporting purposes test in 1989 but were later found importable when certain military features were removed.**

All rifles that failed to meet the sporting purposes test in 1989 were found to represent a distinctive type of rifle distinguished by certain general characteristics that are common to the modern military assault rifle. Although the LCMM rifles are based on rifle designs excluded from importation under the 1989 standard, they all were approved for import when certain military features were removed. However, the LCMM rifles all still maintain some characteristics common to the modern military assault rifle. Because the outward appearance of most of the LCMM rifles continues to resemble the military assault rifles from which they are derived, we have examined the issue of outward appearance carefully. Some might prefer the rugged, utilitarian look of these rifles to more traditional sporting guns. Others might recoil from using these rifles for sport because of their nontraditional appearance. In the end, we concluded that appearance alone does not affect the LCMM rifles' suitability for sporting purposes. Available information leads us to believe that the determining factor for their use in crime is the ability to accept a detachable large capacity military magazine.

Use

In the 1989 study, ATF found that all rifles fairly typed as semiautomatic assault rifles should be treated the same. Accordingly, the report stated "[t]he fact that there may be some evidence that a particular rifle of this type is used or recommended for sporting purposes should not control its importability. Rather, all findings as to suitability of these rifles as a whole should govern each rifle within this type."<sup>70</sup> We adopt the same approach for the present study.

**Use for hunting:**

The information we collected on the actual use of the LCMM rifles for hunting medium or larger game suggests that, with certain exceptions, the LCMM rifles sometimes are used for hunting; however, their actual use in hunting is limited.<sup>71</sup> In fact, there are some

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firearm or a large capacity magazine that was originally designed and produced for a semiautomatic assault rifle based on the AK47 design, the ROMAK4 has the ability to accept the magazine.

<sup>70</sup> 1989 report at 11.

<sup>71</sup> We targeted the surveys toward the hunting of medium and larger game (e.g., turkey and deer) because the LCMM rifles chamber centerfire cartridges and therefore likely would be most suitable for hunting this type of game. We also learned that the LCMM rifles were used to shoot certain varmints (e.g., coyotes and groundhogs), which are generally considered to be pests, not game. Many commented that the LCMM

general restrictions and prohibitions on the use of any semiautomatic rifle for hunting game. Almost half of the States place restrictions on the use of semiautomatic rifles in hunting, mostly involving magazine capacity (5-6 rounds) and what can be hunted with the rifles (see exhibit 7).

Of the 198 hunting guides who responded to our survey, only 26 stated that they had clients who used the LCMM rifles on hunting trips during the past 2 hunting seasons and only 10 indicated that they recommend the LCMM rifles for hunting. In contrast, the vast majority of the guides (152) indicated that none of their clients used the LCMM rifles on hunting trips during the past 2 hunting seasons. In addition, the hunting guides indicated that the most common semiautomatic rifles used by their clients were those made by Browning and Remington.<sup>72</sup> We found significant the comments of the hunting guides indicating that the LCMM rifles were not widely used for hunting.

Of the 13 editors of hunting and shooting magazines who responded to our survey, only 2 stated that their publications recommend specific types of centerfire semiautomatic rifles for use in hunting medium or larger game. These two respondents stated that they recommend all rifles that are safe and of appropriate caliber for hunting, including the LCMM rifles. However, they did not recommend the LCMM rifles based on the Uzi design for hunting big game; these rifles use a 9mm cartridge, which is not an appropriate caliber for this type of game, according to the editors. It is important to note that the LCMM rifles use different cartridges. The LCMM rifles based on the FN-FAL, SIG SG550, and HK91 and 93 designs are chambered for either the .308 Winchester cartridge or the .223 Remington cartridge, depending on the specific model; the LCMM rifles based on the Uzi design are chambered for the 9mm Parabellum cartridge; and the majority of the LCMM rifles based on the AK47 design are chambered for the 7.62 x 39mm cartridge (some are chambered for the .223 Remington cartridge).

Of the five interest and information groups that responded to our survey, three supported the use of the LCMM rifles for hunting. However, one of these groups stated that the

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rifles were particularly useful on farms and ranches because of their ruggedness, utilitarian design, and reliability.

<sup>72</sup> According to a 1996 study conducted for the Fish and Wildlife Service, only 2 percent of big game hunters surveyed used licensed hunting guides. Therefore, it should be noted that the information provided by the guides we surveyed may not be representative of all hunters. However, we believe that the hunting guides' information is reliable and instructive because of their high degree of experience with and knowledge of hunting.

ammunition used by the LCMM rifle models based on the Uzi design were inadequate for shooting at long distances (i.e., more than 100 yards).

Out of the 70 published articles reviewed from various shooting magazines, only 5 contained relevant information. One of these five articles stated that, in the appropriate calibers, the LCMM rifles could make “excellent” hunting rifles. Two of the articles stated that the 7.62 x 39mm cartridge (used in LCMM rifles based on the AK47 design) could be an effective hunting cartridge. One of the articles that recommended the rifles also recommended modifications needed to improve their performance in hunting. None of the articles suggested that LCMM rifles based on the Uzi design were good hunting rifles. Thus, although the LCMM rifles could be used in hunting, the articles provided limited recommendations for their use as hunting weapons.

In their usage guides, ammunition manufacturers recommend the .308 and the 7.62 x 39mm cartridges (used in LCMM rifles based on the FN-FAL and HK 91 designs, and the AK47 design respectively) for medium game hunting. However, the usage guides do not identify the 9mm cartridge (used in the Uzi design rifles) as being suitable for hunting.

A majority of the importers who provided information said that the LCMM rifles they import are used for hunting deer and similar animals. However, they provided little evidence that the rifles were especially suitable for hunting these animals. Two of the importers who responded also provided input from citizens in the form of letters supporting this position. The letters show a wide variety of uses for the LCMM rifles, including deer hunting, plinking, target shooting, home defense, and competitive shooting.

Our review of all of this information indicates that while these rifles are used for hunting medium and larger game, as well as for shooting varmints, the evidence was not persuasive that there was widespread use for hunting. We did not find any evidence that the ability to accept a large capacity military magazine serves any hunting purpose. Traditional hunting rifles have much smaller magazine capabilities. Furthermore, the mere fact that the LCMM rifles are used for hunting does not mean that they are particularly suitable for hunting or meet the test for importation.

#### **Use for organized competitive target shooting:**

Of the 31 competitive shooting groups we surveyed that stated they have events using high-power semiautomatic rifles, 18 groups stated that they permit the use of the LCMM rifles for all competitions. However, 13 respondents stated that they restrict or prohibit the LCMM rifles for some competitions, and one group stated that it prohibits the LCMM

rifles for all competitions. These restrictions and prohibitions generally were enacted for the following reasons:

1. High-power rifle competitions generally require accuracy at ranges beyond the capabilities of the 9mm cartridge, which is used by the LCMM rifles based on the Uzi design.
2. The models based on the AK47 design are limited to competitions of 200 yards or less because the 7.62 x 39mm cartridge, which is used by these models, generally has an effective range only between 300 and 500 yards.
3. Certain matches require U.S. military service rifles, and none of the LCMM rifles fall into this category.

The LCMM rifles are permitted in all United States Practical Shooting Association (USPSA) rifle competitions. The USPSA Practical Shooting Handbook, Glossary of Terms, states that “[y]ou can use any safe firearm meeting the minimum caliber (9mm/.38) and power factor (125PF) requirements.” The USPSA has stated that “rifles with designs based on the AR15, AK47, FN-FAL, HK91, HK93, and others are allowed and must be used to be competitive.” Moreover, we received some information indicating that the LCMM rifles actually are used in practical shooting competitions.<sup>73</sup> However, we did not receive any information demonstrating that an LCMM rifle’s ability to accept large capacity military magazines was necessary for its use in practical shooting competitions.

A couple of the interest groups recommended the LCMM rifles for organized competitive target shooting.

None of the 70 published articles read mentioned the use of the LCMM rifles in organized competitive target shooting.

All of the major ammunition manufacturers produce .308 Winchester ammunition (which is used in the LCMM rifle models based on the HK 91 and FN-FAL designs) and .223 Remington ammunition (which is used in the HK 93, the SIG SG550, and some of the study rifle models based on the AK47 design) specifically for competitive shooting for rifles. The major manufacturers and advertisers of 9mm ammunition (which is used in the LCMM rifles based on the Uzi design) identify it as being suitable for pistol target shooting and self-defense.

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<sup>73</sup> Merely because a rifle is used in a sporting competition, the rifle does not become a sporting rifle. 114 Cong. Rec. 27461-462 (1968).

A majority of the importers who provided information stated that the LCMM rifles they import are permitted in and suitable for organized competitive target shooting. Two of the importers who responded also provided input from citizens in the form of letters and petitions supporting this position. However, the importers provided little evidence that the rifles were especially suitable for organized competitive target shooting.

The information collected on the actual use of the LCMM rifles for organized competitive target shooting suggests that, with certain exceptions, the LCMM rifles usually may be used and sometimes are used for organized competitive target shooting; however, their suitability for this activity is limited. In fact, there are some restrictions and prohibitions on their use. The use of the rifles in competitive target shooting appears more widespread than for hunting and their use for practical shooting was the most significant. Although we are not convinced that practical shooting does in fact constitute a sporting purpose under section 925(d), we note that there was no information demonstrating that rifles with the ability to accept detachable large capacity military magazines were necessary for use in practical shooting. Once again, the presence of this military feature on LCMM rifles suggests that they are not generally recognized as particularly suitable for or readily adaptable to sporting purposes.

#### **Use in crime:**

To fully understand how the LCMM rifles are used, we also examined information available to us on their use in crime. Some disturbing trends can be identified, and it is clear the LCMM rifles are attractive to criminals.

The use of LCMM rifles in violent crime and firearms trafficking is reflected in the cases cited below. It should be noted that the vast majority of LCMM rifles imported during the period 1991-1997 were AK47 variants, which explains their prevalence in the cited cases.

#### **North Philadelphia, Pennsylvania**

From April 1995 to November 1996, a convicted felon used a straw purchaser to acquire at least 55 rifles, including a number of MAK90s. The rifles were then trafficked by the prohibited subject to individuals in areas known for their high crime rates. In one case, the rifles were sold from the parking lot of a local elementary school.

#### **Oakland, California**

On July 8, 1995, a 32-year-old Oakland police officer assisted a fellow officer with a vehicle stop in a residential area. As the first officer searched the rear compartment of the stopped vehicle, a subject from a nearby residence used a Norinco model NMH 90 to shoot the 32-year old officer in the back. The officer later died from the wound.

#### El Paso, Texas

On April 15, 1996, after receiving information from the National Tracing Center, ATF initiated an undercover investigation of a suspected firearms trafficker who had purchased 326 MAK90 semiautomatic rifles during a 6-month period. The individual was found to be responsible for illegally diverting more than 1,000 firearms over the past several years. One of the MAK90 rifles that the subject had purchased was recovered from the scene of a 1996 shootout in Guadalajara, Mexico, between suspected drug traffickers and Mexican authorities. Another MAK90 was recovered in 1997 from the residence of a former Mexican drug kingpin following his arrest for drug-related activities.

#### Charlotte, North Carolina

On May 24, 1996, four armed subjects—one with a MAK90 rifle—carried out a home invasion robbery during which they killed the resident with a 9mm pistol. All four suspects were arrested.

#### Dallas, Texas

In September 1997, an investigation was initiated on individuals distributing crack cocaine from a federally subsidized housing community. During repeated undercover purchases of the narcotics, law enforcement officials noticed that the suspects had firearms in their possession. A search warrant resulted in the seizure of crack cocaine, a shotgun, and a North China Industries model 320 rifle.

#### Chesterfield, Virginia

In November 1997, a MAK90 rifle was used to kill two individuals and wound three others at a party in Chesterfield, Virginia.

#### Orange, California

In December 1997, a man armed with an AKS 762 rifle and two other guns drove to where he was previously employed and opened fire on former coworkers, killing four and injuring three, including a police officer.

#### Baltimore, Maryland

In December 1997, a search warrant was served on a homicide suspect who was armed at the time with three pistols and a MAK90 rifle.

We also studied import and trace information to learn whether the LCMM rifles are used in crime.

Between 1991 and 1997, there were 425,114 LCMM rifles imported into the United States. This represents 7.6 percent of the approximately 5 million rifles imported during this period. The breakdown of the specific variants of LCMM rifles imported follows:

AK-47 variants:	377,934
FN-FAL variants:	37,534
HK variants:	6,495
Uzi variants:	3,141
SIG SG550 variants:	10

During this same time period, ATF traced 632,802 firearms.<sup>74</sup> This included 81,842 rifles of which approximately 3,176 were LCMM rifles.<sup>75</sup> While this number is relatively low compared to the number of total traces, it must be viewed in light of the small number of LCMM rifles imported during this time period and the total number of rifles, both imported domestic, that were available in the United States. A more significant trend is reflected in figure 1.

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<sup>74</sup> ATF traces crime guns recovered and submitted by law enforcement officials. A crime gun is defined, for purposes of firearms tracing, as any firearm that is illegally possessed, used in a crime, or suspected by law enforcement of being used in a crime. Trace information is used to establish links between criminals and firearms, to investigate illegal firearm trafficking, and to identify patterns of crime gun traces by jurisdiction. A substantial number of firearms used in crime are not recovered by law enforcement agencies and therefore not traced. In addition, not all recovered crime guns are traced. Therefore, trace requests substantially underestimate the number of firearms involved in crimes, and trace numbers contain unknown statistical biases. These problems are being reduced as more law enforcement agencies institute policies of comprehensive crime gun tracing.

<sup>75</sup> The vast majority of LCMM rifles traced during this time period were AK47 variants. Specifically, AK47 variants comprised 95.6 percent of the LCMM rifles traced. This must be viewed within the context that 88 percent of the LCMM rifles imported during this period were AK47 variants.

## Firearms Traces 1991-1997

Year	Total Firearms Traced	Total Rifles Traced	Total Assault <sup>76</sup> Rifles Traced	Total LCMM Rifles Traced
1991	42,442	6,196	656	7
1992	45,134	6,659	663	39
1993	54,945	7,690	852	182
1994	83,137	9,201	735	596
1995	76,847	9,988	717	528
1996	136,062	17,475	1,075	800
1997	194,235	24,633	1,518	1,024
Cumulative Total	632,802	81,842	6,216	3,176

Figure 1

The figures in this table show that between 1991 and 1994, trace requests involving LCMM rifles increased rapidly, from 7 to 596. During the same period, trace requests for assault rifles increased at a slower rate, from 656 to 735. The years 1991 to 1994 are significant because they cover a period between when the ban on the importation of semiautomatic assault rifles was imposed and before the September 13, 1994, ban on semiautomatic assault weapons was enacted. Thus, during the years leading up to the 1994 ban, traces of LCMM rifles were increasing much more rapidly than the traces of the rifles that had been the focus of the 1989 ban, as well as the rifles that were the focus of the 1994 congressional action.

We also compared patterns of importation with trace requests to assess the association of LCMM rifles with criminal involvement. The comparison shows that importation of LCMM rifles in the early 1990s was followed immediately by a rapid rise in the number of trace requests involving LCMM rifles. This is shown in figures 2 and 3.

<sup>76</sup> For purposes of this table, assault rifles include (1) semiautomatic assault rifles banned from importation in 1989 but still available domestically because they had been imported into the United States prior to the ban, (2) domestically produced rifles that would not have qualified for importation after 1989, and (3) semiautomatic assault rifles that were banned in 1994.

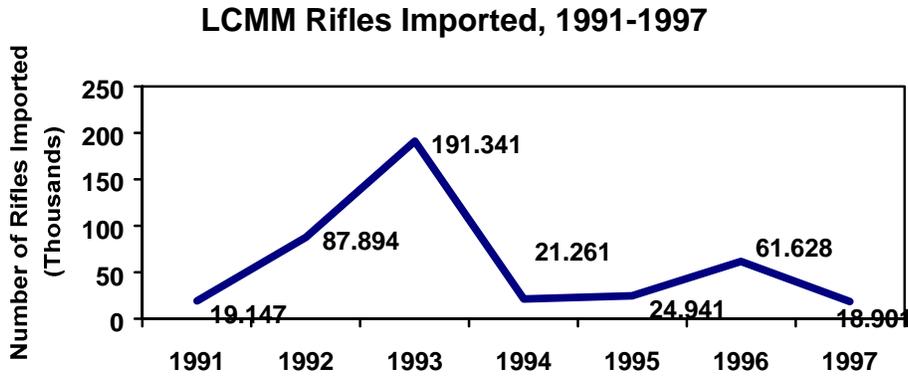


Figure 2

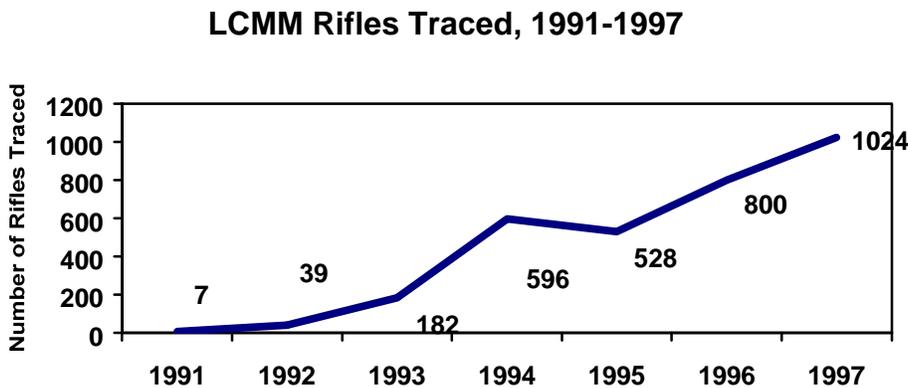


Figure 3

Two aspects of the relationship between importation and trace request patterns are significant. First, the rapid rise in traces following importation indicates that, at least in some cases, very little time elapsed between a particular LCMM rifle’s importation and its recovery by law enforcement. This time lapse is known as “time to crime.” A short time to crime can be an indicator of illegal trafficking. Therefore, trace patterns suggest what the case examples show: LCMM rifles have been associated with illegal trafficking. Second, while LCMM rifles have not been imported in large numbers since 1994,<sup>77</sup> the number of trace requests for LCMM rifles continues to rise. This reflects a sustained and

<sup>77</sup> One reason is that there has been an embargo on the importation of firearms from China since May 1994.

continuing pattern of criminal association for LCMM rifles despite the fact that there were fewer new LCMM rifles available.<sup>78</sup> Moreover, it is reasonable to conclude that if the importation of LCMM rifles resumes, the new rifles would contribute to the continuing rise in trace requests for them.<sup>79</sup>

All of the LCMM rifles have the ability to accept a detachable large capacity military magazine. Thus, they all have the ability to expend large amounts of ammunition quickly. In passing the 1994 ban on semiautomatic assault rifles and large capacity ammunition feeding devices, Congress found that weapons with this ability are attractive to criminals.<sup>80</sup> Thus, we can infer that the LCMM rifles may be attractive to criminals because in some ways they remain akin to military assault rifles, particularly in their ability to accept a detachable large capacity military magazine.

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<sup>78</sup> The increase in trace requests also reflects the fact that law enforcement officials were making trace requests for all types of firearms much more frequently beginning in 1996. There were 76,847 trace requests in 1995, 136,062 trace requests in 1996, and 194,235 trace requests in 1997. Traces for assault rifles were increasing by approximately the same percentage as traces for LCMM rifles during these years.

<sup>79</sup> In addition to looking at case studies and tracing and import information, we attempted to get information on the use of the LCMM rifles in crime by surveying national law enforcement agencies and organizations, as well as metropolitan police departments. Twenty-three national law enforcement agencies and organizations were surveyed and five responded. Three of the respondents stated they had no information. The other two provided information that was either outdated or not specific enough to identify the LCMM rifles.

The 26 metropolitan police departments surveyed provided the following information:

17 departments had no information to provide.

5 departments stated that the LCMM rifles were viewed as crime guns.

1 department stated that the LCMM rifles were non sporting.

2 departments stated that the LCMM rifles were used to hunt coyotes in their areas.

1 department stated that the LCMM rifles were used for silhouette target shooting.

<sup>80</sup> H. Rep. No. 103-489, at 13, 18, 19.

### DETERMINATION

In 1989, ATF determined that the type of rifle defined as a semiautomatic assault rifle was not generally recognized as particularly suitable for or readily adaptable to sporting purposes. Accordingly, ATF found that semiautomatic assault rifles were not importable into the United States. This finding was based, in large part, on ATF's determination that semiautomatic assault rifles contain certain general characteristics that are common to the modern military assault rifle. These characteristics were designed for killing and disabling the enemy and distinguish the rifles from traditional sporting rifles. One of these characteristics is a military configuration, which incorporates eight physical features: Ability to accept a detachable magazine, folding/telescoping stocks, separate pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights. In 1989, ATF decided that any of these military configuration features, other than the ability to accept a detachable magazine, would make a semiautomatic assault rifle not importable.

Certain semiautomatic assault rifles that failed the 1989 sporting purposes test were modified to remove all of the military configuration features, except for the ability to accept a detachable magazine. Significantly, most of these modified rifles not only still have the ability to accept a detachable magazine but, more specifically, still have the ability to accept a large capacity military magazine. It appears that only one of the current study rifles, the VEPR caliber .308 (an AK47 variant), does not have the ability to accept a large capacity military magazine and, therefore, is not an LCMM rifle. Based on the standard developed in 1989, these modified rifles were found not to fall within the semiautomatic assault rifle type and were found to meet the sporting purposes test. Accordingly, these rifles were approved for import into the United States.

Members of Congress and others have expressed concerns that these modified semiautomatic assault rifles are essentially the same as the semiautomatic assault rifles determined to be not importable in 1989. In response to such concerns, the present study reviewed the current application of the sporting purposes test to the study rifles to determine whether the statute is being applied correctly and to ensure that the current use of the study rifles is consistent with the statute's criteria for importability.

Our review took another look at the entire matter. We reexamined the basic tenets of the 1989 study, conducted a new analysis of the physical features of the rifles, surveyed a wide variety of sources to acquire updated information relating to use and suitability, and assessed changes in law that might have bearing on the treatment of the study rifles.

This review has led us to conclude that the basic finding of the 1989 decision remains valid and that military-style semiautomatic rifles are not importable under the sporting purposes standard. Accordingly, we believe that the Department of the Treasury correctly has been denying the importation of rifles that had any of the distinctly military

configuration features identified in 1989, other than the ability to accept a detachable magazine. Our review, however, did result in a finding that the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989.

Several important changes have occurred since 1989 that have led us to reevaluate the importance of this feature in the sporting purposes test. Most significantly, by passing the 1994 bans on semiautomatic assault weapons and large capacity ammunition feeding devices, Congress sent a strong signal that firearms with the ability to expel large amounts of ammunition quickly are not sporting; rather, firearms with this ability have military purposes and are a crime problem. The House Report to the 1994 law emphasizes that the ability to accept a large capacity magazine “serve[s] specific, combat-functional ends.”<sup>81</sup> Moreover, this ability plays a role in increasing a firearm’s “capability for lethality,” creating “more wounds, more serious, in more victims.”<sup>82</sup> Furthermore, the House Report noted semiautomatic assault weapons with this ability are the “weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder.”<sup>83</sup>

Moreover, we did not find any evidence that the ability to accept a detachable large capacity military magazine serves any sporting purpose. The House Report to the 1994 law notes that, while most of the weapons covered by the assault weapon ban come equipped with detachable large capacity magazines, hunting rifles and shotguns typically have much smaller magazine capabilities, from 3 to 5 rounds.<sup>84</sup> Similarly, we found that a number of States limit magazine capacity for hunting to 5 to 6 rounds. We simply found no information showing that the ability to accept a detachable large capacity military magazine has any purpose in hunting or organized competitive target shooting.

Accordingly, we find that the ability to accept a detachable large capacity military magazine is a critical factor in the sporting purposes test that must be given the same weight as the other military configuration features identified in 1989.

The information we collected on the use and suitability of the LCMM rifles for hunting and organized competitive target shooting demonstrated that the rifles are not especially suitable for sporting purposes. Although our study found that the LCMM rifles, as a type, may sometimes be used for hunting, we found no evidence that they are commonly used for hunting. In fact, some of the rifles are unsuitable for certain types of hunting.

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<sup>81</sup> H. Rep. No. 103-489, at 18.

<sup>82</sup> H. Rep. No. 103-489, at 19.

<sup>83</sup> H. Rep. No. 103-489, at 13.

<sup>84</sup> H. Rep. No. 103-489, at 19 (footnote omitted).

The information we collected also demonstrated that although the LCMM rifles, as a type, may be used for organized competitive target shooting, their suitability for these competitions is limited. There are even some restrictions or prohibitions on their use for certain types of competitions. In addition, we believe that all rifles which are fairly typed as LCMM rifles should be treated the same. Therefore, the fact that there may be some evidence that a particular rifle of this type is used or recommended for sporting purposes should not control its importability. Rather, all findings as to suitability of LCMM rifles as a whole should govern each rifle within this type. The findings as a whole simply did not satisfy the standard set forth in section 925(d)(3).

Finally, the information we gathered demonstrates that the LCMM rifles are attractive to certain criminals. We find that the LCMM rifles' ability to accept a detachable large capacity military magazine likely plays a role in their appeal to these criminals. In enacting the 1994 bans on semiautomatic assault weapons and large capacity ammunition feeding devices, Congress recognized the appeal large magazine capacity has to the criminal element.

Weighing all this information, the LCMM rifles, as a type, are not generally recognized as particularly suitable for or readily adaptable to sporting purposes. As ATF found in conducting its 1989 study, although some of the issues we confronted were difficult to resolve, in the end we believe the ultimate conclusion is clear and compelling. The ability of all of the LCMM rifles to accept a detachable large capacity military magazine gives them the capability to expel large amounts of ammunition quickly; this serves a function in combat and crime, but serves no sporting purpose. Given the high standard set forth in section 925(d)(3) and the Secretary's discretion in applying the sporting purposes test, this conclusion was clear.

This decision will in no way preclude the importation of true sporting firearms. It will prevent only the importation of firearms that cannot fairly be characterized as sporting rifles.

Individual importers with existing permits for, and applications to import involving, the LCMM rifles will be notified of this determination in writing. Each of these importers will be given an opportunity to respond and present additional information and arguments. Final action will be taken on permits and applications only after an affected importer has an opportunity to make its case.

# **EXHIBIT 9**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**

# NOVEMBER 5, 2013 CONSOLIDATED ELECTION

Last updated: 11/18/2013 3:30:46 PM PST



Santa Clara County

## Registrar of Voters



SUMMARY

PRECINCTS REPORTING

VOTER TURNOUT

FILTERS

Reports

Registered Voters: 228,435    Ballots Cast: 63,157    Voter Turnout: 27.65%

### OFFICIAL FINAL RESULTS



Customize My Search (13 of 13)

#### STANISLAUS COUNTY BOARD OF EDUCATION, TA 5 (VOTE FOR 1)

1 of 1 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
ADRIANA GARCIA	2	15.38%	<div style="width: 15.38%;"></div>
BOB VIZZOLINI	11	84.62%	<div style="width: 84.62%;"></div>
<b>Total</b>	<b>13</b>		

#### ORCHARD SCHOOL DISTRICT (VOTE FOR 3)

7 of 7 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
STEPHANIE HILL	276	21.15%	<div style="width: 21.15%;"></div>
ALAN FONG	307	23.52%	<div style="width: 23.52%;"></div>
BAMBI FLEMING	150	11.49%	<div style="width: 11.49%;"></div>
HELEN LEUNG-YUEN	271	20.77%	<div style="width: 20.77%;"></div>
KARL JACOBSON	301	23.07%	<div style="width: 23.07%;"></div>
<b>Total</b>	<b>1,305</b>		

#### CITY COUNCIL, CITY OF SUNNYVALE, SEAT 1 (VOTE FOR 1)

54 of 54 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
ANDY FRAZER	8,306	47.43%	<div style="width: 47.43%;"></div>
GUSTAV LARSSON	9,205	52.57%	<div style="width: 52.57%;"></div>
<b>Total</b>	<b>17,511</b>		

#### CITY COUNCIL, CITY OF SUNNYVALE, SEAT 2 (VOTE FOR 1)

54 of 54 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
STEVE HOFFMAN	6,406	36.34%	<div style="width: 36.34%;"></div>
GLENN HENDRICKS	10,181	57.75%	<div style="width: 57.75%;"></div>
GUSTAVO MAGANA	1,041	5.91%	<div style="width: 5.91%;"></div>
<b>Total</b>	<b>17,628</b>		

CITY COUNCIL, CITY OF SUNNYVALE, SEAT 3 (VOTE FOR 1)

54 of 54 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
JAMES R. "JIM" GRIFFITH	11,410	64.77%	<div style="width: 64.77%;"></div>
TAPPAN (TAP) G. MERRICK	6,207	35.23%	<div style="width: 35.23%;"></div>
<b>Total</b>	<b>17,617</b>		

SOUTH SANTA CLARA VALLEY MEMORIAL DISTRICT (VOTE FOR 2)

34 of 34 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
PHILIP GARCIA	1,205	26.07%	<div style="width: 26.07%;"></div>
ROBERT ARMENDARIZ	1,018	22.03%	<div style="width: 22.03%;"></div>
JESSE SANCHEZ	958	20.73%	<div style="width: 20.73%;"></div>
GABE PEREZ	1,441	31.18%	<div style="width: 31.18%;"></div>
<b>Total</b>	<b>4,622</b>		

MEASURE A - CITY OF SUNNYVALE - ELECTION DATE (VOTE FOR 1)

54 of 54 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
YES	13,259	72.06%	<div style="width: 72.06%;"></div>
NO	5,142	27.94%	<div style="width: 27.94%;"></div>
<b>Total</b>	<b>18,401</b>		

MEASURE B - CITY OF SUNNYVALE - TOT (VOTE FOR 1)

54 of 54 Precincts Reporting

Detail

Map



Choice	Votes	Percent	
YES	12,657	68.58%	<div style="width: 68.58%; background-color: red;"></div>
NO	5,799	31.42%	<div style="width: 31.42%; background-color: red;"></div>
<b>Total</b>	<b>18,456</b>		

**MEASURE C - CITY OF SUNNYVALE - GUN SAFETY (VOTE FOR 1)**

54 of 54 Precincts Reporting

[Detail](#) [Map](#)



Choice	Votes	Percent	
YES	12,404	66.55%	<div style="width: 66.55%; background-color: red;"></div>
NO	6,235	33.45%	<div style="width: 33.45%; background-color: red;"></div>
<b>Total</b>	<b>18,639</b>		

**MEASURE D - CITY OF PALO ALTO - REZONING (VOTE FOR 1)**

32 of 32 Precincts Reporting

[Detail](#) [Map](#)



Choice	Votes	Percent	
FOR THE ORDINANCE	6,538	43.55%	<div style="width: 43.55%; background-color: red;"></div>
AGAINST THE ORDINANCE	8,476	56.45%	<div style="width: 56.45%; background-color: red;"></div>
<b>Total</b>	<b>15,014</b>		

**MEASURE E - CAMPBELL UNION HIGH SD - PARCEL TAX (VOTE FOR 1)**

111 of 111 Precincts Reporting

[Detail](#) [Map](#)



Choice	Votes	Percent	
YES	19,341	76.76%	<div style="width: 76.76%; background-color: red;"></div>
NO	5,857	23.24%	<div style="width: 23.24%; background-color: red;"></div>
<b>Total</b>	<b>25,198</b>		

**MEASURE G - SUNNYVALE SD - BONDS (VOTE FOR 1)**

30 of 30 Precincts Reporting

[Detail](#) [Map](#)



Choice	Votes	Percent	
BONDS YES	6,995	68.44%	<div style="width: 68.44%; background-color: red;"></div>

BONDS NO	3,225	31.56%	
<b>Total</b>	<b>10,220</b>		

**MEASURE H - LOMA PRIETA JT. UNION SD - PARCEL TAX (VOTE FOR 1)**

4 of 4 Precincts Reporting

[Detail](#) [Map](#)



Choice	Votes	Percent	
YES	241	77.49%	
NO	70	22.51%	
<b>Total</b>	<b>311</b>		

[SUMMARY](#) [PRECINCTS REPORTING](#) [VOTER TURNOUT](#) [FILTERS](#)

# **EXHIBIT 11**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**

**Proposals to Reduce Gun Violence:  
Protecting Our Communities While Respecting the Second Amendment.**

Senate Judiciary Committee  
Subcommittee on the Constitution, Civil Rights and Human Rights

February 12, 2013

Prepared Testimony by Laurence H. Tribe\*

Mr. Chairman and members of the Committee:

I am honored and grateful for the invitation to testify before you today. I know I am not alone in wanting us to do all we can, consistent with the Constitution, to reduce the awful specter of rampant gun violence and the far too frequent massacres of our children, our friends, and our fellow citizens.

Like all decent Americans, I felt a pang of unspeakable horror on December 14, when I learned that twenty first-grade children had been brutally slaughtered in their first-grade classroom in Newtown, Connecticut. Those children, and the brave grown-ups who died at Adam Lanza's hands as they tried to save the young lives entrusted to their care, deserve every effort to translate our shared grief into shared national action. That action must not be deterred by the defeatist argument that, because we will never solve this problem in its entirety, we might as well give up. Nor should it be deterred by distorted interpretations of the United States Constitution. As others have often reminded us about that great and enduring document, it is many things to many people, but one thing it is *not* is a suicide pact.

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\* Carl M. Loeb University Professor and Professor of Constitutional Law, Harvard Law School. The institutional affiliation is noted for identification purposes only.

While we debate the pending proposals to reduce gun violence through measures focused on gun safety as part of a holistic national response, it's crucial that we not permit any part of our Constitution to become a collateral casualty of our conversation. Proposals to disarm the American people, to leave firearms solely in the hands of the military and the police, have been decisively taken off the table – if they were ever truly *on* the table – by the Supreme Court's Second Amendment decisions in 2008 and 2010. "Slippery slope" arguments predicated on the unsettled state of the law prior to 2008 have been rendered irrelevant. The only proposals under serious consideration in this body are reasonable measures that would fully respect the basic rights of responsible citizens to use ordinary firearms for self-defense and other lawful purposes. They cannot lead to unacceptably extreme measures as long as the Supreme Court sits.

Having examined those proposals, having looked at the steps announced by the President under his power faithfully to execute the laws of the United States, and having studied the decisions of the Supreme Court and lower courts around the country, I am convinced that nothing under discussion in the Senate Judiciary Committee represents a threat to the Constitution or even comes close to violating the Second Amendment or the Constitution's structural limits either on congressional power or on executive authority.

Undoubtedly we should have a national debate about how best to reconcile the Second Amendment rights of every individual with the full range of proposals to reduce gun violence in America. As someone who has studied and taught constitutional law for four decades and argued dozens of cases in the Supreme Court and dozens more in the lower courts, I am obviously interested in engaging those questions. In today's testimony, however, I will focus not on

competing theories of how the Second Amendment ought to have been interpreted but on the law as it stands. I am here not as an academic theorist but as a constitutional lawyer. As a lawyer, I've won some and I've lost some, and I know a losing argument when I see it. And the argument that any of the proposals to reduce gun violence currently being considered here might be struck down as unconstitutional is decidedly a losing argument.

There is plenty of room for policy debate over the best steps to take to reduce gun violence, but we mustn't confuse those policy differences or the ideological and cultural divisions that underlie them with genuine constitutional doubts about whether any of those steps crosses the constitutional line. Everyone in this room knows that anything Congress or the President does in this field will confront opposition. And in a nation as litigious as ours, some of that opposition will no doubt find its way into the courts. But there is no basis to suppose that the courts will or should rebuff any of the steps being debated here today. They should not, and they will not.

What I hope to do this morning, setting all hyperbole aside and approaching the law on the books with a fair-minded eye, is explain why reforms such as those this committee is considering clearly pass constitutional muster.

## I. Introduction:

### Taking the Second Amendment Seriously, But Applying it Cautiously

I begin by reaffirming my agreement with the Supreme Court that the Second Amendment guarantees Americans the right as individuals to possess guns for reasonable self-defense. Some of my friends and colleagues devoted to the cause of responsible firearms regulation evidently wish to relitigate this point. They continue to insist that the best reading of the Second Amendment would secure gun rights only in connection with service in the state militia and not for individual possession and use. For nearly a decade and a half, I have disagreed with them and have defended the individual rights view ultimately taken by the Supreme Court in 2008. In October of 1999, for example, I joined a fellow constitutional law scholar in publishing an op-ed in *The New York Times* arguing that “bearing arms [is] a ‘privilege’ of each citizen.”<sup>1</sup> I continue to defend this position today.

That matters only insofar as it bears on my credibility as a witness in today’s hearing. If I were among those who had *opposed* the individual rights interpretation adopted by the Supreme Court in *Heller*, some might wonder whether my conclusions about the regulations *Heller* permits Congress to adopt reflect wishful thinking rather than a realistic and sympathetic appraisal of what the Court that decided *Heller* would in fact permit. But there is no wishful thinking here. I am being a hard-headed realist in reading the *Heller* decision and extrapolating conclusions from the majority opinion.

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<sup>1</sup> Laurence H. Tribe & Akhil Reed Amar, *Well Regulated Militias and More*, N.Y. TIMES, Oct. 28, 1999, at A25; 1 Laurence H. Tribe, *American Constitutional Law* 900–902 (3d ed. 2000).

Although many in the community advocating gun rights had long assumed that the individual rights interpretation governed the scope of the Second Amendment, it was not until the Supreme Court's 2008 ruling in *District of Columbia v. Heller*<sup>2</sup> that a majority of the Court's Justices agreed. In so doing, the Court recognized that the core individual liberty protected by the amendment affords Americans the right to purchase and store operable firearms for self-defense in the home. Two years later, in *McDonald v. City of Chicago*,<sup>3</sup> the Court extended the *Heller* ruling to cover restrictions imposed by state and local governments, making it unmistakably clear that the right at issue was not and is not simply a right of the state-organized militia against being overrun by federal authority.

Despite this fundamental affirmation, the *Heller* decision is exceedingly narrow in many important respects. As Judge Brett Kavanaugh of the D.C. Circuit Court of Appeals recently put it, "It bears emphasis that *Heller*, while enormously significant jurisprudentially, was not revolutionary in terms of its immediate real-world effects on American gun regulation." "Indeed," he continued, "*Heller* largely preserved the status quo of gun regulation in the United States."<sup>4</sup> To understand what he meant, it helps to look first to the Washington, DC ordinance implicated in the *Heller* case. The District had in place one of the most restrictive firearms regulations in the nation; it essentially outlawed the possession of handguns in the home, where the need for self-defense is, as Justice Scalia wrote, "most acute."<sup>5</sup> For the majority on the Court, a policy like the one the District had adopted, a policy on the outer edge of gun control's reach in the United States, was irreconcilable with the Second Amendment.

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<sup>2</sup> 554 U.S. 570 (2008).

<sup>3</sup> 130 S.Ct. 3020 (2010).

<sup>4</sup> *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>5</sup> *Heller*, 544 U.S. at 628.

The *Heller* decision took great pains to emphasize its relative modesty. It repeated the mantra that the Second Amendment right “is not unlimited”<sup>6</sup> and devoted an entire section to listing types of regulation – for example, limits on gun ownership “by felons and the mentally ill” and, most relevant to today’s hearing, regulation of “dangerous and unusual weapons” – the constitutionality of which the Court had no intention of casting into doubt.<sup>7</sup> The decision paused to note that, by specifically giving a constitutional green light to some regulatory efforts, the Court did not mean to signal that others were constitutionally dubious.<sup>8</sup> Justice Scalia closed his opinion for the Court with an expression of solicitude for the regulatory goals that Washington, DC sought to advance and, more importantly, an invitation to pursue those goals with the “variety of tools” still available to the District and to other states and localities across the country even in *Heller*’s wake.<sup>9</sup>

Since that decision and its extension to state and local laws in 2010, the vast majority of federal and state courts to adjudicate Second Amendment claims have responsibly hewed to the cautious approach espoused by the Supreme Court in *Heller* and *McDonald*. For example, in a ruling highly relevant to the topic of this hearing, the D.C. Circuit recently upheld the constitutionality of Washington D.C.’s assault weapons ban, which included a restriction on

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<sup>6</sup> *Id.* at 595, 626.

<sup>7</sup> *Id.* at 626 – 28.

<sup>8</sup> *Id.* at 627 n. 26. There is no doubt, for instance, that regulatory provisions targeting firearms and ammunitions *manufacturers* in addition to those who transfer, possess, carry, or use the resulting weapons are at least as easy to defend from Second Amendment challenge as are measures that do not take effect until the point of sale.

<sup>9</sup> *Id.* at 636.

high-capacity magazines, as well as gun registration requirements.<sup>10</sup> The majority in the case, following the broad consensus that has emerged among federal and state judges,<sup>11</sup> evaluated the regulations against a standard of heightened judicial scrutiny while preserving both the option to adopt a more skeptical mode of review for restrictions on core self-defense firearm possession and the option to exempt other laws from Second Amendment review entirely when they do not enter the amendment's zone of protected conduct.<sup>12</sup> In another notable decision staking out a similar approach, a panel of the Seventh Circuit Court of Appeals struck down Chicago's firing-range ban given the close nexus between regular firing practice and training and safe, responsible self-defense in the home.<sup>13</sup> And state appellate courts from North Carolina to Wisconsin to California have joined with their federal brethren in upholding state restrictions on firearms ownership under this middle-of-the-road approach that molds the degree of judicial scrutiny to the extent of a law's burden on the core self-defense right secured by the Second Amendment.<sup>14</sup>

The central message of *Heller* and its lower-court progeny is thus to take the application of the Second Amendment seriously but also cautiously. When necessary to vindicate the core right to self-defense respected by *Heller*, neither courts nor lawmakers should be shy about invoking the Second Amendment. But because few public responsibilities are as important to

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<sup>10</sup> *Heller v. Dist. of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

<sup>11</sup> *See, e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 – 94 (2d Cir. 2012); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) cert. denied, 132 S. Ct. 1538 (U.S. 2012); *United States v. Masciandaro*, 638 F.3d 458, 469-70 (4th Cir. 2011) cert. denied, 132 S. Ct. 756 (U.S. 2011); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010);

<sup>12</sup> *Heller*, 670 F.3d at 1256 – 58.

<sup>13</sup> The court applied what it called “not quite strict scrutiny” because the law's burden struck so close to the core Second Amendment right to self-defense in the home. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

<sup>14</sup> *See, e.g.*, *Johnston v. State*, 735 S.E.2d 859 (N.C. Ct. App. 2012); *State v. Brown*, 815 N.W.2d 407 (Ct. App. Wisc. 2012); *People v. Ellison*, 196 Cal. App. 4th 1342, 1347 (2011).

good governance as legislating to secure public safety, lawmakers and jurists should not casually give the amendment an expansive scope nor unduly scrutinize reasonable firearm regulations. In the wake of the Newtown massacre and the push to propose sensible new rules about firearms, the Obama administration and many leaders in Congress have conducted themselves precisely along these lines.

## II. The Second Amendment Propriety of Recent Policy Proposals

### Limits on Large-Capacity Magazines

A core feature of the Assault Weapons Ban of 2013, introduced by Senator Dianne Feinstein, as well as the primary component of a freestanding bill championed by Senator Frank Lautenberg, is a ban on magazines capable of firing more than ten rounds of ammunition without reloading.<sup>15</sup> Before moving into the weeds of the constitutional analysis, it would be useful to contrast such a high-capacity magazine restriction to the law *Heller* struck down. *Heller* axed a local ordinance that adopted about as blunt an approach to restraining gun violence as possible: By its very design, the DC law espoused disagreement with the whole idea of law-abiding gun ownership for self-defense in the home. A limit on large-capacity magazines, by contrast, is a regulation of an entirely different caliber. It does not challenge the fundamental recognition that gun possession for self-defense is a right of every citizen; it merely seeks to reset the parameters of responsible ownership to advance the cause of public safety. It operates with a scalpel rather than an ax. Even Robert Levy, the man who largely funded the challenge to DC's sweeping

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<sup>15</sup> The Assault Weapons Ban of 2013 also prohibits firearms with fixed magazines capable of holding more than ten rounds of ammunition.

handgun ban in *Heller* and served as an attorney on the case, concedes that bans on both high-capacity magazines and assault weapons almost certainly do not infringe the Second Amendment rights he successfully fought to vindicate in court.<sup>16</sup>

By any reasonable reckoning, this crucial measure might not even trigger heightened Second Amendment review at the threshold stage that the *Heller* ruling requires courts to undertake. But even if the high-capacity magazine prohibition does require further analysis, it safely falls within a zone of regulations that do not unconstitutionally abridge Second Amendment rights.

Most constitutional challenges require lawyers and scholars to carry out two stages of analysis. First, we must assess whether a given government policy even *implicates* a given right in the first place. For example, in 1915, the Supreme Court entertained a First Amendment challenge to a filmmaker's punishment under an Ohio censorship law but, in a clear misjudgment the Court would later correct, decided that movies were not even a form of "speech" entitled to First Amendment protection.<sup>17</sup> More recently, in a ruling that may perhaps give pause to members of this committee (despite the distinct protections of the Constitution's Speech and Debate Clause), the Court concluded that votes by legislators are not a form of "speech" over which any public official can claim a personal First Amendment right.<sup>18</sup> Assuming that a law *does* implicate the right in question, the government must then proceed to justify the challenged

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<sup>16</sup> Interview with Robert A. Levy by the Washington Post (Jan. 10, 2013), *transcript available at* [http://articles.washingtonpost.com/2013-01-10/lifestyle/36272630\\_1\\_assault-weapons-high-capacity-magazines-military-style-guns](http://articles.washingtonpost.com/2013-01-10/lifestyle/36272630_1_assault-weapons-high-capacity-magazines-military-style-guns).

<sup>17</sup> *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243 (1915).

<sup>18</sup> *Nevada Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011).

law so that the court hearing the challenge may evaluate, roughly speaking, whether the justification is strong enough to permit the law to stand or, alternatively, whether the measure goes too far and thus violates the Constitution.

I begin with this return to fundamentals because it never ceases to surprise me how often those engaged in legal debate talk past one another by conflating these distinct steps. In the Second Amendment context particularly, there is no excuse for making that mistake. For *Heller* itself makes it absolutely plain that not every gun regulation even triggers Second Amendment review. In other words, sometimes governments may enact regulations addressing the manufacture, transfer, possession or use of firearms that categorically fall outside the Second Amendment's scope, freeing governments of any burden even to make detailed defenses of the provisions in question. For example, the *Heller* opinion specifically named "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" as illustrative examples of regulations that should not even receive further constitutional review.<sup>19</sup> The importance of this point should not be underemphasized. If too many entirely reasonable firearm regulations, like assault weapon bans and background checks, or rules about trafficking and straw purchases, are subjected to heightened Second Amendment review, it will become difficult if not impossible to separate those regulations categorically from the restrictions that *Heller* specifically approved without subjecting them to any "scrutiny" at all.

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<sup>19</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 - 27 (2008).

Beyond the examples appearing in the decision, *Heller* also identifies the three primary factors to consider in judging whether other types of regulation trip the Second Amendment’s alarm. First, the Court carefully frames the scope of the Second Amendment to cover *only* firearms “in common use at the time.”<sup>20</sup>

Second, *Heller* recognized that “dangerous or unusual” weapons may be and have historically been heavily regulated or banned.<sup>21</sup> It is not inconceivable – indeed, it seems quite likely – that the Court’s pause to distinguish unusually dangerous weapons from widely possessed handguns had precisely the 1994 Assault Weapons Ban, which included a prohibition on high-capacity magazines, in mind. At the very least, the *Heller* majority recognized that the government could keep machine guns —“M-16 rifles and the like”—out of the hands of civilians.<sup>22</sup> The Supreme Court thus emphatically rejected the extravagant, or as Justice Scalia characterized it, “startling” notion, still promoted by some, that the Second Amendment could fulfill its original purposes only if citizens were guaranteed a right to arm themselves to the teeth, matching in their private armories essentially the full array of weapons possessed by the United States Military.<sup>23</sup>

Third and finally, the Court emphasized the importance of a nexus to core self-defense needs.<sup>24</sup> The majority in *Heller* had no trouble recognizing that handguns represented the

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<sup>20</sup> *Id.* at 627.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 624.

<sup>24</sup> *Id.* at 599 (“Justice Breyer’s assertion that individual self-defense is merely a ‘subsidiary interest’ of the right to keep and bear arms . . . is profoundly mistaken. He bases that assertion

“quintessential self-defense weapon,” particularly in the home.<sup>25</sup> Moreover, handguns were not categorically more dangerous than other types of firearms. So Washington D.C.’s handgun ban clearly fell within the scope of the Second Amendment.

The clarity of *Heller*’s guidance on how to apply these threshold factors begins to dissipate, however, when they no longer align so strikingly in one direction. To begin with, the Court left “dangerousness” undefined, and what the Court meant by that term is not entirely self-evident. In an obvious sense, *all* firearms are dangerous; that is what makes them effective instruments of self-defense. The *Heller* ruling, therefore, asks us to balance any *exceptional* dangerousness of particular firearm design features against the potential self-defense value of those features. For example, even if home possession of machine guns for self-defense might, on rare occasion, deter criminal trespassers more than home possession of handguns, that benefit is simply not sufficient to overcome the substantial hazards to innocent bystanders and intentional targets, in particular the police. *Heller* obviously does not contemplate asking the government to provide an intricately reasoned justification for banning machine guns; instead, it recognizes – and it surely authorizes Congress, and indeed all of us, to recognize – excessive dangerousness in the inherent design of the weapon<sup>26</sup> so as to cut off Second Amendment review at the threshold.

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solely upon the prologue—but that can only show that self-defense had little to do with the right’s *codification*; it was the *central component* of the right itself.” (emphasis in original).

<sup>25</sup> *Heller*, 544 U.S. at 629.

<sup>26</sup> Throughout this debate, opponents of restrictions on large-capacity magazines have repeatedly demanded empirical evidence showing a link between magazine capacity and gun violence. Studies in that mold certainly exist, and I discuss them later. *See, e.g.*, text accompanying notes 48 – 50. But at this threshold stage of the Second Amendment inquiry, the *Heller* decision’s meaning of dangerousness cannot be equivalent to an empirically demonstrated effect on public safety. Rather, the standard is one that asks us to examine design features to assess whether the

All things considered, I conclude that reasonably restricting magazine size and availability does not implicate the core Second Amendment right as *Heller* conceived of it. The reason is not the first factor, that of “common use,” because, of course, large-capacity ammunition magazines and the firearms outfitted for them are, by any reasonable measure, in quite common use in the United States. I note here just a few examples. The standard Glock pistol, the firearm that one reporter called “America’s handgun” in a recent book on the subject, comes equipped with a seventeen-round magazine.<sup>27</sup> And America’s most popular rifle, the AR-15 model,<sup>28</sup> typically comes with a thirty-round magazine and can accommodate magazines with even larger capacities.<sup>29</sup>

But to contend that the sizeable market presence of a particular firearm feature is sufficient in itself to trigger full Second Amendment scrutiny is to misrepresent the lesson of *Heller*. The relative dangerousness and self-defense-serving capacity of a firearm or design

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weapon poses an aggravated threat to safety as a common-sense matter. First, if the former were the meaning of dangerousness, the threshold inquiry, which may lead courts to conclude that the Second Amendment does not even apply, would become indistinguishable from the more advanced stage of review, in which courts scrutinize a government’s public safety rationale. Second, making empirical evidence of salutary public-safety impacts a prerequisite to gun regulation would defeat efforts to respond to new technologies and lethal features that pose a substantial threat to public safety. The Second Amendment does not require that Americans afford the gun industry a “wait and see” grace period on the (in)famous theory that even a vicious dog deserves one free bite.

<sup>27</sup> Erin McCarthy, *Why the Glock Became America’s Handgun*, POPULAR MECHANICS (Jan. 12, 2012, 6:30 AM), <http://www.popularmechanics.com/technology/military/weapons/why-the-glock-became-americas-handgun>

<sup>28</sup> Erica Goode, *Rifle Used in Killings, America’s Most Popular, Highlights Regulation Debate*, N.Y. TIMES (Dec. 16, 2012), <http://www.nytimes.com/2012/12/17/us/lanza-used-a-popular-ar-15-style-rifle-in-newtown.html?pagewanted=all>.

<sup>29</sup> Steven Almasy, *Newton Shooter’s Guns: What We Know*, CNN (Dec. 19, 2012, 10:11 AM), <http://www.cnn.com/2012/12/18/us/connecticut-lanza-guns/index.html>.

feature are also crucial considerations. This approach makes complete sense. The common use and possession of a given firearm feature is, at best, just one helpful indicator of whether restricting that feature will stymie or frustrate the exercise of the core Second Amendment protection of lawful self-defense to a constitutionally cognizable degree. For instance, in the case of high-capacity magazines, significant market presence does not necessarily translate into heavy reliance by American gun owners on those magazines for self-defense. Analysis of the modern development of the U.S. gun market demonstrates that the firearms industry, driven by an obvious profit motive, ushered in a revolution in the state of the market during the 1980s. Manufacturers began to roll out increasing numbers of pistols with ever-larger-capacity magazines rather than revolvers, which take just six rounds of ammunition and had traditionally been the most popular firearm for personal self-defense.<sup>30</sup> The frequent purchase of such large-capacity magazines, then, may not be attributable purely or even primarily to actual gun-owner preferences, much less to gun-owner needs. Rather, guns equipped with or ready for large-capacity magazines may simply be the weapons most readily made available on the market. And even if this market presence begins to influence more Americans to purchase firearms with high-capacity magazines because they fear attacks from criminals possessing guns outfitted with the same high-capacity magazines, nothing in *Heller* suggests that it is improper for the government to halt the escalation of this arms race in its tracks. The one-way ratchet of ever more powerful firearms is not a constitutional inevitability. For unlike the doctrine of mutually assured destruction that some say maintained an uneasy peace during the nuclear arms buildup of the

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<sup>30</sup> See DC Reedy & CS Koper, *Impact of handgun types on gun assault outcomes: a comparison of gun assaults involving semiautomatic pistols and revolvers*, 9 INJURY PREVENTION 151, 151 (2002), available at <http://injuryprevention.bmj.com/content/9/2/151.full#aff-1>.

VIOLENCE POLICY CENTER, BACKGROUND ON GLOCK 19 PISTOL AND AMMUNITION MAGAZINES USED IN ATTACK ON REPRESENTATIVE GABRIELLE GIFFORDS AND OTHERS 1 (2011), available at [www.vpc.org/fact\\_sht/AZbackgrounder.pdf](http://www.vpc.org/fact_sht/AZbackgrounder.pdf).

Cold War, the propagation of increasingly dangerous guns on American streets has already taken an all-too-violent toll. In other words, tempering the trend toward more dangerous weapons actually *vindicates* the core Second Amendment right of self-defense and personal safety that *Heller* recognizes. In this context, as in many others, less is more.

But even looking beyond the market saturation of large-capacity magazines, this feature runs headlong into the other threshold obstacles that *Heller* requires Second Amendment claims to clear. As experts in effective firearms regulation have preached for years and particularly fervently in recent weeks, higher-capacity magazines pose greater dangers to public safety. By permitting shooters using semi-automatic weapons to continue firing more bullets without interruption, these magazines increase the potential lethality of armed killers.<sup>31</sup> Though well-trained gun users can change magazines quickly, this interruption may, as we saw last year in the Arizona shooting of Rep. Gabby Giffords, afford time for heroic men or women to intervene and disarm the shooter.<sup>32</sup> Moreover, this interruption gives our police a chance to return fire.<sup>33</sup> And it may even provide time for reflection and rethinking before murder becomes massacre.

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<sup>31</sup> BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, ASSAULT-STYLE WEAPONS: HIGH-CAPACITY MAGAZINES, <http://www.bradycampaign.org/legislation/msassaultweapons/highcapacity> (last visited Feb. 2, 2013).

<sup>32</sup> Ken Dolak & Justin Wealer, *Woman Wrestled Fresh Ammo Clip From Tucson Shooter as He Tried to Reload*, ABC NEWS (Jan. 9, 2011), <http://abcnews.go.com/Politics/patricia-maisch-describes-stopping-gunman-reloading/story?id=12577933>.

<sup>33</sup> I believe I can speak for many Americans when I thank Baltimore County Police Chief Jim Johnson for the illuminating insights he has publicly offered on the threats of high-capacity weapons not just to public safety in general but also law enforcement officer safety more specifically. See, e.g., John Quinones, *Baltimore Police Chief Wants to Ban High-Capacity Firepower*, ABC NEWS (Dec. 20, 2012), <http://abcnews.go.com/US/baltimore-police-chief-ban-high-capacity-firepower/story?id=18030163>

Against the evident dangerousness of high-capacity magazines as a design feature, we must evaluate the strength and plausibility of asserted self-defense interests. Critics of recent proposals to reestablish a limit on high-capacity magazines have argued that firing more than ten rounds without changing a magazine is necessary for effective self-defense. While I have no doubt that subscription to this perspective among some law-abiding gun owners is sincere, I doubt that it is well-founded. It's rhetorically effective to ask, "How many bullets do *you* want in your magazine when an intruder breaks into your home?" But the answer tells us little that is of relevance to the Second Amendment as *Heller* conceives that provision. I might want a magazine with twice as many bullets as any possible home intruder; I might want a machine gun too. But in the end that can't be the measure of what the Second Amendment says I have a *right* to own and deploy.

Despite the emotional resonance of this kind of appeal, incidents like burglaries and home invasions – even when they lead to the exchange of fire – are unlikely to *require* firing many shots. The NRA publishes a regular column featuring newspaper clippings of gun owners protecting themselves against intruder attacks, and an analysis of these reports over a five-year period demonstrated that in 50% of all cases, two or fewer shots were fired, and the average number of shots fired across the entire data sample was also about two.<sup>34</sup> Of course, this data comes from the episodes the NRA chooses to report, so selection bias is possible, meaning the

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<sup>34</sup> Claude Verner performed the analysis of reporting over the period 1997 to 2001. The findings further show that when many shots were fired, a (presumably frightened) gun owner finished an entire magazine rather than firing the number of shots that necessarily had to be fired in light of the scenario. The analysis can be found reprinted with the author's permission at *Analysis of Five Years of Armed Encounters (With Data Tables)*, GunsSaveLives.net (March 12, 2012), <http://gunssavelives.net/self-defense/analysis-of-five-years-of-armed-encounters-with-data-tables/>.

average number of shots fired per incident could be even lower.<sup>35</sup> Even police officers traditionally found revolvers with six-bullet magazines sufficient for their own safety until more dangerous guns flooded the market.<sup>36</sup> And we should not lose track of the bigger picture: studies show that self-defense in the home with firearms is rare.<sup>37</sup> Additionally, firearms accidents are all too common: between 1965 and 2000, unintentional shootings accounted for the deaths of over 60,000 Americans.<sup>38</sup> Firing more bullets quickly may compound their damage.

Another version of the critics' response is that in scary situations, like home invasions, gun owners may go through bullets too quickly in a fit of nervousness or panic.<sup>39</sup> That may be true, but it also aggravates the downside hazard in cases of error,<sup>40</sup> so it is not at all clear that increased access to large-capacity magazines for shooters subject to fragile nerves represents a

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<sup>35</sup> It seems likely, for example, that merely brandishing a weapon may often lead intruders to flee. A non-exhaustive review of the NRA column reveals several examples of exactly this scenario, giving me the impression that the NRA's reporting is not demonstrably biased toward extreme scenarios or even those in which some shots are fired. See, e.g., Armed Citizen, NRA (March 2012), <http://www.nrapublications.org/index.php/12492/armed-citizen-23/> (“[The resident] met the intruder at her bedroom door, pointed the gun at him and demanded he leave. The trespasser fled without hesitation.”).

<sup>36</sup> See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1489 (2009).

<sup>37</sup> A study of Atlanta police records, for example, found that victims of burglaries used guns in self-defense just 3% of the time. For a description of the study and a rich discussion of self-defense uses for firearms, see DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 67 (2004). The study is A.L. Kellermann et al., *Weapon involvement in home invasion crises*, 273 J. OF THE AM. MED. ASSOC. 1759 (1995).

<sup>38</sup> HEMENWAY, *supra* note 38, at 27 – 35.

<sup>39</sup> See, e.g., *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011); Emily Miller, *The High Capacity Magazine Myth*, WASHINGTON TIMES (Jan. 27, 2013), <http://www.washingtontimes.com/news/2013/jan/27/the-high-capacity-magazine-myth/>; Jacob Sullum, *The Threat Posed by Gun Magazine Limits*, REASON (Jan. 16, 2013), <http://reason.com/archives/2013/01/16/the-threat-posed-by-gun-magazine-limits>.

<sup>40</sup> *Heller*, 670 F.3d at 1263 - 64 (“[T]he tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.” (internal quotations omitted)).

net gain for home security or public safety. Finally, some critics of magazine-capacity limits have pointed out that, realistically, many gun owners have not received proper training and for that reason, may fire bullets indiscriminately; a larger magazine – so the thinking presumably goes – will increase the chances that at least one of their wayward shots will hit its mark.<sup>41</sup> As the Supreme Court recognized in *Heller*, however, the Second Amendment protects only the right of “*responsible* citizens to use arms in defense of hearth and home.”<sup>42</sup> In other words, a dangerous firearms feature otherwise outside the Second Amendment’s scope cannot become subject to heightened constitutional scrutiny because of the shortcomings of *irresponsible* gun owners.

To be sure, *some* gun owners may struggle to change magazines quickly not for lack of adequate training but rather by reason of disability or old age.<sup>43</sup> Perhaps a ban on high-capacity magazines without any exception for the disabled or elderly might, for this reason, trigger heightened scrutiny of such a ban as applied specifically to those individuals. But the possibility that a prohibition could raise constitutional questions in some subset of its applications does not mean that the prohibition is constitutionally vulnerable on its face.<sup>44</sup> And it remains the case that

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<sup>41</sup> See, e.g., Stephen Hunder, *Why 33 rounds makes sense in a defensive weapon*, WASHINGTON POST (Feb. 6, 2011),

<http://www.washingtonpost.com/wp-dyn/content/article/2011/02/04/AR2011020407083.html>

<sup>42</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added).

<sup>43</sup> Yih Chau-Chang, *High-Capacity Magazines And Their Critical Role In Lawful Self-Defense*, THE EXAMINER (March 10, 2011), <http://www.examiner.com/article/high-capacity-magazines-and-their-critical-role-lawful-self-defense>

<sup>44</sup> The Supreme Court has exhibited an extreme reluctance to strike down laws on their face – meaning in all applications – when only some applications would fall afoul of a constitutional provision (with the exception of the First Amendment, as facially overbroad laws may chill protected free speech). See RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 162, 168 (6th ed. 2009).

large-capacity magazines are highly unlikely to be necessary to self-defense in the vast majority of home invasions or burglaries, even those that resort to the exchange of fire. The facial validity of a high-capacity magazine ban is therefore clear.

Despite the considerable market presence of high-capacity magazines, the danger they pose to public safety and the weakness of the self-defense justification for their possession means that two of the three threshold *Heller* factors point strongly against extending Second Amendment protection to high-capacity magazines. The D.C. Circuit Court of Appeals, in a case challenging Washington D.C.'s restriction on magazines with more than ten rounds, recently struggled with this first stage of analysis and determined that the court did not have before it sufficient evidence to decide whether the Second Amendment even *reached* large-capacity magazines.<sup>45</sup> However, the court went on to conclude that, even if it was proper to extend coverage of the amendment to large-capacity magazines, the government's interest in banning them was strong enough to do so without violating Second Amendment rights.<sup>46</sup>

Having now reviewed the best evidence and argumentation advanced by defenders of high-capacity magazine possession, I doubt that the Supreme Court would find it necessary to reach that second stage of review in dealing with a ban on high-capacity magazines and am quite confident that, in any event, the Court would agree with the ultimate conclusion that, even if the amendment applies, a ban on high-capacity magazines withstands Second Amendment scrutiny.

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<sup>45</sup> *Heller*, 670 F.3d at 1261.

<sup>46</sup> *Id.* at 1263 – 64.

In explaining that conclusion, I emphasize that commonly advanced rejections of a legitimate government interest in banning high-capacity magazines are deeply misleading. Many opponents of reasonable firearms regulation insist that we tried banning large-capacity magazines in 1994: the results are in, they say, and we failed. One favorite trope is to cite to a 1997 Department of Justice study, which, according to the recent testimony of Wayne LaPierre, “proved that [the] ban had no impact on lowering crime.”<sup>47</sup> But no one is even *arguing* that a ban on high-capacity magazines (or on assault weapons, for that matter) will necessarily decrease crime rates; highly lethal firearms will still be widely available on the market, and some criminals will use them, just as they do now.

What defenders of a ban on high-capacity magazines *do* argue is that such a ban will help prevent these criminals from killing or maiming as many people when they commit violent crimes. And that argument is solidly grounded. One study, for example, found that between 1984 and 1993, criminals using guns with high-capacity magazines or assault weapons as defined by the 1994 Assault Weapons Ban killed or injured an average of 29 victims, compared to the average 13 victims shot by criminals unequipped with large-capacity magazines.<sup>48</sup> Another study suggests that, since the lapse of the ban in 2004, high-capacity magazines have once again

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<sup>47</sup> See, e.g., *What Should America Do About Gun Violence?: Hearing Before the S. Judiciary Comm.*, 113<sup>th</sup> Cong. (2013) (prepared testimony of Wayne LaPierre, Executive Vice President and Chief Executive Officer of the National Rifle Association).

<sup>48</sup> This study considered all “mass shooting” incidents: those in which six or more were killed or twelve or more were wounded. For an explanation of this study, see Christopher S. Koper, *America’s Experience with the Federal Assault Weapons Ban*, in *REDUCING GUN VIOLENCE IN AMERICA* 167 (Daniel W. Webster & Jon S. Vernick, eds., 2013). The study is Christopher S. Koper & Jeffrey A. Roth, *The Impact of the 1994 Federal Assault Weapon Ban on Gun Violence Outcomes: An Assessment of Multiple Outcome Measures and Some Lessons for Policy Evaluation*, 17 *J. OF QUANTITATIVE CRIMINOLOGY* 33 (2001).

become common in episodes of violent crime after the beginnings of a decline, which probably took place because the black market for these magazines had begun to dry up.<sup>49</sup>

Even more misleading is the suggestion that in 1997 we could (or even today that we can) draw meaningful conclusions from the absence of unmistakable evidence of a decrease in violence following the 1994 ban. That legislation grandfathered or exempted many thousands of weapons already owned, and those could still be sold or transferred.<sup>50</sup> In other words, the 1994 ban was crafted with long-term effects in mind; to measure its effects notwithstanding its untimely end is to misunderstand fundamentally how the legislation was designed to work. It is therefore all the more telling that supporters of reasonable regulation can cite studies based upon identifiable trends emerging during the latter years of the ban, as well as evidence from both before and after the ban, showing that the legal availability of large-capacity magazines is indeed correlated with increased deaths and injuries caused by gun violence. Considered alongside the dangerousness inherent in a large-capacity magazine as a design feature, this evidence provides the government with a sufficient basis to satisfy the Second Amendment under any plausible understanding of the Supreme Court's jurisprudence surrounding that amendment.

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<sup>49</sup> See David S. Fallis and James V. Grimaldi, *Va. data show drop in criminal firepower during assault gun ban*, WASH. POST (Jan. 23, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012203452.html> (finding that in Richmond, Virginia, the percentage of guns with high-capacity magazines seized from criminals by police fell to a low of 10% by 2004, when the federal assault weapons ban expired, but has since rebounded to 22%).

<sup>50</sup> Koper, REDUCING GUN VIOLENCE IN AMERICA, *supra* note 49, at 165 – 66.

# **EXHIBIT 13**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**



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# Analysis of Five Years of Armed Encounters (With Data Tables)

March 12 2012

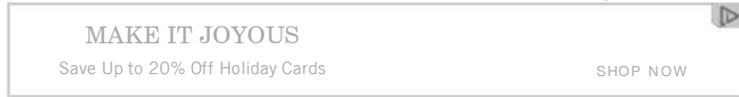
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**Incident at a Glance** (Click Links For Similar Stories)

Gun(s) Used:	Unknown	Location:	Unknown
# of Suspects:	Unknown	Shots Fired:	Unknown
Suspect Killed:	Unknown	State:	
Source:		Archived Source:	None



**Foreword by GunsSaveLives.net**

This article was originally written several years ago by Claude Werner. It is republished here, in its entirety (including data tables) with permission.

While the source material is somewhat dated there is still a lot of information we can learn from this. One thing to also note is that the stories used for this study were all situations in which a citizen *successfully* defended themselves. This means that the study focuses on and shows what works, not what doesn't work.

**Author**

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**The Armed Citizen – A Five Year Analysis**

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**Overview**

For the period 1997 – 2001, reports from “The Armed Citizen” column of the NRA Journals were collected. There were 482 incidents available for inclusion in the analysis. All involved the use of firearms by private citizens in self defense or defense of others. No law enforcement related incidents were included. The database is self-selecting in that no non-positive outcomes were reported in the column.

**Analysis**

As might be expected, the majority of incidents (52%) took place in the home. Next most common locale (32%) was in a business. Incidents took place in public places in 9% of reports and 7% occurred in or around vehicles.

The most common initial crimes were armed robbery (32%), home invasion (30%), and burglary (18%).

Overall, shots were fired by the defender in 72% of incidents. The average and median number of shots fired was 2. When more than 2 shots were fired, it generally appeared that the defender’s initial response was to fire until empty. It appears that revolver shooters are more likely to empty their guns than autoloader shooters. At least one assailant was killed in 34% of all incidents. At least one assailant was wounded in an additional 29% of all incidents. Of the incidents where shots are fired by a defender, at least one assailant is killed in 53% of those incidents.

Handguns were used in 78% of incidents while long guns were used in 13%; in the balance the type of firearm was not reported. The most common size of handgun was the .35 caliber family (.38, .357, 9mm) at 61%, with most .38s apparently being of the 5 shot variety. Mouseguns (.380s and below) were at 23%, and .40 caliber and up at 15%.

The range of most incidents appears to be short but in excess of touching distance. It appears that most defenders will make the shoot decision shortly before the criminal comes within arm’s length. Defenders frequently communicate with their

attackers before shooting.

The firearm was carried on the body of the defender in only 20% of incidents. In 80% of cases, the firearm was obtained from a place of storage, frequently in another room.

Reloading was required in only 3 incidents. One of those involved killing an escaped lion with a .32 caliber revolver, which was eventually successful after 13 shots.

Multiple conspirators were involved in 36% of the incidents. However, there were no apparent cases of getaway drivers or lookouts acting as reinforcements for the criminal actor(s) once shooting starts. At the sound of gunfire, immediate flight was the most common response for drivers and lookouts.

When multiple conspirators were involved, the first tier was a two man action team. If another member was available, he was usually the driver of the getaway car and remained in the car. If a fourth conspirator was involved, he was stationed immediately outside the target location as a lookout for the police or other possible intervening parties. The outside conspirators do not generally appear to be armed. It does appear that the trend over the period has increased from one weapon in the action team to two weapons.

The largest group of violent criminal actors was 7, a group that committed serial home invasions in Rochester NY. An alert and prepared homeowner, who saw them invade an adjacent home, accessed his shotgun, and dispatched them (2 killed and 1 seriously wounded) when they broke in his door.

Incidents rarely occurred in reaction time (i.e., ¼ second increments). Most commonly, criminals acted in a shark-like fashion, slowly circling and alerting their intended victims. The defender(s) then had time to access even weapons that were stored in other rooms and bring them to bear.

The most common responses of criminals upon being shot were to flee immediately or expire. With few exceptions, criminals ceased their advances immediately upon being shot. Even small caliber handguns displayed a significant degree of instant lethality (30 per cent immediate one shot kills) when employed at close range. Many criminal actors vocally expressed their fear of being shot when the defender displayed a weapon. Upon the criminals' flight, the "victims" frequently chased and captured or shot the criminals and held them for the authorities.

## Conclusions

- 1) Even small caliber weapons are adequate to solve the vast majority of incidents requiring armed self-defense.
- 2) Mindset of the potential victim was far more important than the type of weapon used. All the victims were willing to fight their opponents in order to survive. Although not common, in some cases bridge weapons, such as pens, were used to gain time to access the firearm.
- 3) Frequently, the defenders were aware that something was amiss before the action started and then placed themselves in position to access their weapons. Awareness of the surroundings appears to be a key element of successful defense.
- 4) The defenders had some measure of familiarity with their firearms. Although perhaps not trained in the formal sense, they appear to be able to access a firearm and immediately put it into action. At least one defender learned from a previous experience and made the firearm more accessible for subsequent use.
- 5) Training or practice with a firearm should include a substantial amount of accessing the firearm from off body locations, such as drawers, underneath counters, etc.
- 6) This analysis does not present a view of the totality of armed self-defense in that non-positive outcomes were not available for inclusion in the database. The analysis may, however, be useful in helping to describe a methodology for successful armed self-defense. This methodology might be described as:
  1. be aware,
  2. be willing to fight,
  3. have a weapon accessible,
  4. be familiar enough with the weapon to employ it without fumbling,
  5. when ready, communicate, both verbally and non-verbally, to the attacker that resistance will be given, and
  6. if the attacker does not withdraw, counterattack without hesitation.

## Location of Incident

Location	%
Home	52%
Business	32%
Public	9%
In/around Vehicle	7%

**Shots Fired**

Type of Location	No	Yes
Business	33%	72%
Home	25%	75%
Public	29%	71%
In/around Vehicle	35%	65%
Total	28%	72%

**Number of Shots Fired**

Average	2.2
Median	2
Mode	1
Max	20

**Gun Type**

Handgun	78%
Long Gun	13%
Unknown	8%

**Body Carry**

Type of Location	No	Yes
Business	69%	31%
Home	94%	6%
Public	49%	51%
In/around Vehicle	65%	35%
Total	80%	20%

**Multiple Assailants**

Type of Location	No	Yes
Business	76%	24%
Home	72%	28%
Public	62%	38%
Retail Business	52%	48%

In/around Vehicle 49% 51%  
Total 80% 20%

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# **EXHIBIT 15**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**

U.S. Department of Justice

Bureau of Alcohol, Tobacco, Firearms and Explosives

# ATF

## Study on the Importability of Certain Shotguns



Firearms and Explosives Industry Division

January 2011

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## Study on the Importability of Certain Shotguns

### Executive Summary

The purpose of this study is to establish criteria that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will use to determine the importability of certain shotguns under the provisions of the Gun Control Act of 1968 (GCA).

The Gun Control Act of 1968 (GCA) generally prohibits the importation of firearms into the United States.<sup>1</sup> However, pursuant to 18 U.S.C. § 925(d), the GCA creates four narrow categories of firearms that the Attorney General must authorize for importation. Under one such category, subsection 925(d)(3), the Attorney General shall approve applications for importation when the firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes (the “sporting purposes test”).

After passage of the GCA in 1968, a panel was convened to provide input on the sporting suitability standards which resulted in factoring criteria for handgun importations. Then in 1989, and again in 1998, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) conducted studies to determine the sporting suitability and importability of certain firearms under section 925(d)(3). However, these studies focused mainly on a type of firearm described as “semiautomatic assault weapons.” The 1989 study determined that assault rifles contained a variety of physical features that distinguished them from traditional sporting rifles. The study concluded that there were three characteristics that defined semiautomatic assault rifles.<sup>2</sup>

The 1998 study concurred with the conclusions of the 1989 study, but included a finding that “the ability to accept a detachable large capacity magazine originally designed and produced for a military assault weapon should be added to the list of disqualifying military configuration features identified in 1989.”<sup>3</sup> Further, both studies concluded that the scope of “sporting purposes” did not include all lawful activity, but was limited to traditional sports such as hunting, skeet shooting, and trap shooting. This effectively narrowed the universe of firearms considered by each study because a larger number of firearms are “particularly suitable for or readily adaptable to a sporting purpose” if plinking<sup>4</sup> and police or military-style practical shooting competitions are also included as a “sporting purpose.”<sup>5</sup>

Although these studies provided effective guidelines for determining the sporting purposes of rifles, ATF recognized that no similar studies had been completed to determine the sporting

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<sup>1</sup> Chapter 44, Title 18, United States Code (U.S.C.), at 18 U.S.C. § 922(l).

<sup>2</sup> These characteristics were: (a) a military configuration (ability to accept a detachable magazine, folding/telescoping stocks, pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights); (b) a semiautomatic version of a machinegun; and (c) chambered to accept a centerfire cartridge case having a length of 2.25 inches or less. *1989 Report and Recommendation on the Importability of Certain Semiautomatic Rifles (1989 Study)* at 6-9.

<sup>3</sup> *1998 Department of the Treasury Study on the Sporting Suitability of Modified Semiautomatic Rifles (1998 Study)* at 2.

<sup>4</sup> “Plinking” is shooting at random targets such as bottles and cans. 1989 Report at 10.

<sup>5</sup> *1989 Report* at 8-9; *1998 Study* at 18-19.

suitability of shotguns. A shotgun study working group (working group) was assigned to perform a shotgun study under the § 925(d)(3) sporting purposes test. The working group considered the 1989 and 1998 studies, but neither adopted nor entirely accepted findings from those studies as conclusive as to shotguns.

### Sporting Purpose

Determination of whether a firearm is generally accepted for use in sporting purposes is the responsibility of the Attorney General (formerly the Secretary of the Treasury). As in the previous studies, the working group considered the historical context of “sporting purpose” and that Congress originally intended a narrow interpretation of sporting purpose under § 925(d)(3).

While the 1989 and 1998 studies considered all rifles in making their recommendations, these studies first identified firearm features and subsequently identified those activities believed to constitute a legitimate “sporting purpose.” However, in reviewing the previous studies, the working group believes that it is appropriate to first consider the current meaning of “sporting purpose” as this may impact the “sporting” classification of any shotgun or shotgun features. For example, military shotguns, or shotguns with common military features that are unsuitable for traditional shooting sports, may be considered “particularly suitable for or readily adaptable to sporting purposes” if military shooting competitions are considered a generally recognized sporting purpose. Therefore, in determining the contemporary meaning of sporting purposes, the working group examined not only the traditional sports of hunting and organized competitive target shooting, but also made an effort to consider other shooting activities.

In particular, the working group examined participation in and popularity of practical shooting events as governed by formal rules, such as those of the United States Practical Shooting Association (USPSA) and International Practical Shooting Confederation (IPSC), to determine whether it was appropriate to consider these events a “sporting purpose” under § 925(d)(3). While the number of members reported for USPSA is similar to the membership for other shotgun shooting organizations,<sup>6</sup> the working group ultimately determined that it was not appropriate to use this shotgun study to determine whether practical shooting is “sporting” under § 925(d)(3). A change in ATF’s position on practical shooting has potential implications for rifle and handgun classifications as well. Therefore, the working group believes that a more thorough and complete assessment is necessary before ATF can consider practical shooting as a generally recognized sporting purpose.

The working group agreed with the previous studies in that the activity known as “plinking” is “primarily a pastime” and could not be considered a recognized sport for the purposes of

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<sup>6</sup> Organization websites report these membership numbers: for the United States Practical Shooting Association, approx. 19,000; Amateur Trapshooting Association, over 35,000 active members; National Skeet Shooting Association, nearly 20,000 members; National Sporting Clays Association, over 22,000 members; Single Action Shooting Society, over 75,000 members.

importation.<sup>7</sup> Because almost any firearm can be used in that activity, such a broad reading of “sporting purpose” would be contrary to the congressional intent in enacting section 925(d)(3). For these reasons, the working group recommends that plinking not be considered a sporting purpose. However, consistent with past court decisions and Congressional intent, the working group recognized hunting and other more generally recognized or formalized competitive events similar to the traditional shooting sports of trap, skeet, and clays.

### Firearm Features

In reviewing the shotguns used for those activities classified as sporting purposes, the working group examined State hunting laws, rules, and guidelines for shooting competitions and shooting organizations; industry advertisements and literature; scholarly and historical publications; and statistics on participation in the respective shooting sports. Following this review, the working group determined that certain shotgun features are not particularly suitable or readily adaptable for sporting purposes. These features include:

- (1) Folding, telescoping, or collapsible stocks;
- (2) bayonet lugs;
- (3) flash suppressors;
- (4) magazines over 5 rounds, or a drum magazine;
- (5) grenade-launcher mounts;
- (6) integrated rail systems (other than on top of the receiver or barrel);
- (7) light enhancing devices;
- (8) excessive weight (greater than 10 pounds for 12 gauge or smaller);
- (9) excessive bulk (greater than 3 inches in width and/or greater than 4 inches in depth);
- (10) forward pistol grips or other protruding parts designed or used for gripping the shotgun with the shooter’s extended hand.

Although the features listed above do not represent an exhaustive list of possible shotgun features, designs or characteristics, the working group determined that shotguns with any one of these features are most appropriate for military or law enforcement use. Therefore, shotguns containing any of these features are not particularly suitable for nor readily adaptable to generally recognized sporting purposes such as hunting, trap, sporting clay, and skeet shooting. Each of these features and an analysis of each of the determinations are included within the main body of the report.

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<sup>7</sup> 1989 Study at 10; 1998 Study at 17.

## Study on the Importability of Certain Shotguns

The purpose of this study is to establish criteria that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) will use to determine the importability of certain shotguns under the provisions of the Gun Control Act of 1968 (GCA).

### Background on Shotguns

A shotgun is defined by the GCA as “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.”<sup>8</sup>

Shotguns are traditional hunting firearms and, in the past, have been referred to as bird guns or “fowling” pieces. They were designed to propel multiple pellets of shot in a particular pattern that is capable of killing the game that is being hunted. This design and type of ammunition limits the maximum effective long distance range of shotguns, but increases their effectiveness for small moving targets such as birds in flight at a close range. Additionally, shotguns have been used to fire slugs. A shotgun slug is a single metal projectile that is fired from the barrel. Slugs have been utilized extensively in areas where State laws have restricted the use of rifles for hunting. Additionally, many States have specific shotgun seasons for deer hunting and, with the reintroduction of wild turkey in many States, shotguns and slugs have found additional sporting application.

Shotguns are measured by *gauge* in the United States. The gauge number refers to the “number of equal-size balls cast from one pound of lead that would pass through the bore of a specific diameter.”<sup>9</sup> The largest commonly available gauge is 10 gauge (.0775 in. bore diameter). Therefore, a 10 gauge shotgun will have an inside diameter equal to that of a sphere made from one-tenth of a pound of lead. By far, the most common gauges are 12 (0.729 in. diameter) and 20 (0.614 in. diameter). The smallest shotgun that is readily available is known as a “.410,” which is the diameter of its bore measured in inches. Technically, a .410 is a 67 gauge shotgun.

### Background on Sporting Suitability

The GCA generally prohibits the importation of firearms into the United States.<sup>10</sup> However, the statute exempts four narrow categories of firearms that the Attorney General shall authorize for importation. Originally enacted by Title IV of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>11</sup> and amended by Title I of the GCA<sup>12</sup> enacted that same year, this section provides, in pertinent part:

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<sup>8</sup> 18 U.S.C. § 921(a)(5).

<sup>9</sup> The Shotgun Encyclopedia at 106.

<sup>10</sup> 18 U.S.C. § 922(l).

<sup>11</sup> Pub. Law 90-351 (June 19, 1968).

<sup>12</sup> Pub. Law 90-618 (October 22, 1968).

the Attorney General shall authorize a firearm . . . to be imported or brought into the United States . . . if the firearm . . . (3) is of a **type** that does not fall within the definition of a firearm as defined in section 5845(a) of the Internal Revenue Code of 1954 and **is generally recognized as particularly suitable for or readily adaptable to sporting purposes**, excluding surplus military firearms, except in any case where the Secretary has not authorized the importation of the firearm pursuant to this paragraph, it shall be unlawful to import any frame, receiver, or barrel of such firearm which would be prohibited if assembled.<sup>13</sup> (Emphasis added)

This section addresses Congress' concern that the United States had become a "dumping ground of the castoff surplus military weapons of other nations,"<sup>14</sup> in that it exempted only firearms with a generally recognized sporting purpose. In recognizing the difficulty in implementing this section, Congress gave the Secretary of the Treasury (now the Attorney General) the discretion to determine a weapon's suitability for sporting purposes. This authority was ultimately delegated to what is now ATF. Immediately after discussing the large role cheap imported .22 caliber revolvers were playing in crime, the Senate Report stated:

[t]he difficulty of defining weapons characteristics to meet this target without discriminating against sporting quality firearms, was a major reason why the Secretary of the Treasury has been given fairly broad discretion in defining and administering the import prohibition.<sup>15</sup>

Indeed, Congress granted this discretion to the Secretary even though some expressed concern with its breadth:

[t]he proposed import restrictions of Title IV would give the Secretary of the Treasury unusually broad discretion to decide whether a particular type of firearm is generally recognized as particularly suitable for, or readily adaptable to, sporting purposes. If this authority means anything, it permits Federal officials to differ with the judgment of sportsmen expressed through consumer preference in the marketplace. . . .<sup>16</sup>

Since that time, ATF has been responsible for determining whether firearms are generally recognized as particularly suitable for or readily adaptable to sporting purposes under the statute.

<sup>13</sup> 18 U.S.C. § 925(d)(3). In pertinent part, 26 U.S.C. § 5845(a) includes "a shotgun having a barrel or barrels of less than 18 inches in length."

<sup>14</sup> 90 P.L. 351 (1968).

<sup>15</sup> S. Rep. No. 1501, 90th Cong. 2d Sess. 38 (1968).

<sup>16</sup> S. Rep. No. 1097, 90th Cong. 2d. Sess. 2155 (1968) (views of Senators Dirksen, Hruska, Thurmond, and Burdick). In Gun South, Inc. v. Brady, 877 F.2d 858, 863 (11th Cir. 1989), the court, based on legislative history, found that the GCA gives the Secretary "unusually broad discretion in applying section 925(d)(3)."

On December 10, 1968, the Alcohol and Tobacco Tax Division of the Internal Revenue Service (predecessor to ATF) convened a “Firearm Advisory Panel” to assist with defining “sporting purposes” as utilized in the GCA. This panel was composed of representatives from the military, law enforcement, and the firearms industry. The panel generally agreed that firearms designed and intended for hunting and organized competitive target shooting would fall into the sporting purpose criteria. It was also the consensus that the activity of “plinking” was primarily a pastime and therefore would not qualify. Additionally, the panel looked at criteria for handguns and briefly discussed rifles. However, no discussion took place on shotguns given that, at the time, all shotguns were considered inherently sporting because they were utilized for hunting or organized competitive target competitions.

Then, in 1984, ATF organized the first large scale study aimed at analyzing the sporting suitability of certain firearms. Specifically, ATF addressed the sporting purposes of the Striker-12 and Streetsweeper shotguns. These particular shotguns were developed in South Africa as law enforcement, security and anti-terrorist weapons. These firearms are nearly identical 12-gauge shotguns, each with 12-round capacity and spring-driven revolving magazines. All 12 rounds can be fired from the shotguns within 3 seconds.

In the 1984 study, ATF ruled that the Striker-12 and the Streetsweeper were not eligible for importation under 925(d)(3) because they were not “particularly suitable for sporting purposes.” In doing this, ATF reversed an earlier opinion and specifically rejected the proposition that police or combat competitive shooting events were a generally accepted “sporting purpose.” This 1984 study adopted a narrow interpretation of organized competitive target shooting competitions to include the traditional target events such as trap and skeet. ATF ultimately concluded that the size, weight and bulk of the shotguns made them difficult to maneuver in traditional shooting sports and, therefore, these shotguns were not particularly suitable for or readily adaptable to these sporting purposes. At the same time, however, ATF allowed importation of a SPAS-12 variant shotgun because its size, weight, bulk and *modified* configuration were such that it was particularly suitable for traditional shooting sports.<sup>17</sup> The Striker-12 and Streetsweeper were later classified as “destructive devices” pursuant to the National Firearms Act.<sup>18</sup>

In 1989, and again in 1998, ATF conducted studies to determine whether certain rifles could be imported under section 925(d)(3). The respective studies focused primarily on the application of the sporting purposes test to a type of firearm described as a “semiautomatic assault weapon.” In both 1989 and 1998, ATF was concerned that certain semiautomatic assault weapons had been approved for importation even though they did not satisfy the sporting purposes test.

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<sup>17</sup> Private letter Ruling of August 9, 1989 from Bruce L. Weininger, Chief, Firearms and Explosives Division.

<sup>18</sup> See ATF Rulings 94-1 and 94-2.

### 1989 Study

In 1989, ATF announced that it was suspending the importation of several semiautomatic assault rifles pending a decision on whether they satisfied the sporting criteria under section 925(d)(3). The 1989 study determined that assault rifles were a “type” of rifle that contained a variety of physical features that distinguished them from traditional sporting rifles. The study concluded that there were three characteristics that defined semiautomatic assault rifles:

- (1) a military configuration (ability to accept a detachable magazine, folding/telescoping stocks, pistol grips, ability to accept a bayonet, flash suppressors, bipods, grenade launchers, and night sights);
- (2) semiautomatic version of a machinegun;
- (3) chambered to accept a centerfire cartridge case having a length of 2.25 inches or less.<sup>19</sup>

The 1989 study then examined the scope of “sporting purposes” as used in the statute.<sup>20</sup> The study noted that “[t]he broadest interpretation could take in virtually any lawful activity or competition which any person or groups of persons might undertake. Under this interpretation, any rifle could meet the “sporting purposes” test.<sup>21</sup> The 1989 study concluded that a broad interpretation would render the statute useless. The study therefore concluded that neither plinking nor “police/combat-type” competitions would be considered sporting activities under the statute.<sup>22</sup>

The 1989 study concluded that semiautomatic assault rifles were “designed and intended to be particularly suitable for combat rather than sporting applications.”<sup>23</sup> With this, the study determined that they were not suitable for sporting purposes and should not be authorized for importation under section 925(d)(3).

### 1998 Study

The 1998 study was conducted after “members of Congress and others expressed concern that rifles being imported were essentially the same as semiautomatic assault rifles previously determined to be nonimportable” under the 1989 study.<sup>24</sup> Specifically, many firearms found to be nonimportable under the 1989 study were later modified to meet the standards outlined in the study. These firearms were then legally imported into the country under section 925(d)(3). ATF commissioned the 1998 study on the sporting suitability of semiautomatic rifles to address concerns regarding these modified firearms.

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<sup>19</sup> 1989 Report and Recommendation on the ATF Working Group on the Importability of Certain Semiautomatic Rifles (1989 Study).

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* At 9.

<sup>23</sup> *Id.* At 12.

<sup>24</sup> 1998 Study at 1.

The 1998 study identified the firearms in question and determined that the rifles shared an important feature—the ability to accept a large capacity magazine that was originally designed for military firearms. The report then referred to such rifles as Large Capacity Military Magazine rifles or “LCMM rifles.”<sup>25</sup>

The study noted that after 1989, ATF refused to allow importation of firearms that had any of the identified non-sporting features, but made an exception for firearms that possessed only a detachable magazine. Relying on the 1994 Assault Weapons Ban, the 1998 study noted that Congress “sent a strong signal that firearms with the ability to expel large amounts of ammunition quickly are not sporting.”<sup>26</sup> The study concluded by adopting the standards set forth in the 1989 study and by reiterating the previous determination that large capacity magazines are a military feature that bar firearms from importation under section 925(d)(3).<sup>27</sup>

### Present Study

While ATF conducted the above mentioned studies on the sporting suitability of rifles, to date, no study has been conducted to address the sporting purposes and importability of shotguns. This study was commissioned for that purpose and to ensure that ATF complies with its statutory mandate under section 925(d)(3).

### Methodology

To conduct this study, the working group reviewed current shooting sports and the sporting suitability of common shotguns and shotgun features. At the outset, the working group recognized the importance of acknowledging the inherent differences between rifles, handguns and shotguns. These firearms have distinct characteristics that result in specific applications of each weapon. Therefore, in conducting the study, the working group generally considered shotguns without regard to technical similarities or differences that exist in rifles or handguns.

The 1989 and 1998 studies examined particular features and made sporting suitability determinations based on the generally accepted sporting purposes of *rifles*. These studies served as useful references because, in recent years, manufacturers have produced shotguns with features traditionally found only on rifles. These features are typically used by military or law enforcement personnel and provide little or no advantage to sportsmen.

Following a review of the 1989 and 1998 studies, the working group believed that it was necessary to first identify those activities that are considered legitimate “sporting purposes” in the modern era. While the previous studies determined that only “the traditional sports of hunting and organized competitive target shooting” would be considered “sporting,”<sup>28</sup> the working group recognized that sporting purposes may evolve over time. The working group felt

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<sup>25</sup> 1998 Study at 16.

<sup>26</sup> 1998 Study at 3.

<sup>27</sup> The 1994 Assault Weapons Ban expired Sept. 13, 2004, as part of the law's sunset provision.

<sup>28</sup> 1998 Study at 16

that the statutory language supported this because the term “generally recognized” modifies, not only firearms used for shooting activities, but also the shooting activities themselves. This is to say that an activity is considered “sporting” under section 925(d)(3) if it is generally recognized as such.<sup>29</sup> Therefore, activities that were “generally recognized” as legitimate “sporting purposes” in previous studies are not necessarily the same as those activities that are “generally recognized” as sporting purposes in the modern era. As stated above, Congress recognized the difficulty in legislating a fixed meaning and therefore gave the Attorney General the responsibility to make such determinations. As a result, the working group did not simply accept the proposition that sporting events were limited to hunting and traditional trap and skeet target shooting. In determining whether an activity is now generally accepted as a sporting purpose, the working group considered a broad range of shooting activities.

Once the working group determined those activities that are generally recognized as a “sporting purpose” under section 925(d)(3), it examined numerous shotguns with diverse features in an effort to determine whether any particular firearm was particularly suitable for or readily adaptable to those sports. In coming to a determination, the working group recognized that a shotgun cannot be classified as sporting merely because it may be used for a sporting purpose. During debate on the original bill, there was discussion about the meaning of the term "sporting purposes." Senator Dodd stated:

Here again I would have to say that if a military weapon is used in a special sporting event, it does not become a sporting weapon. It is a military weapon used in a special sporting event . . . . As I said previously the language says no firearms will be admitted into this country unless they are genuine sporting weapons.<sup>30</sup>

In making a determination on any particular feature, the working group considered State hunting laws, currently available products, scholarly and historical publications, industry marketing, and rules and regulations of organization such as the National Skeet Shooting Association, Amateur Trapshooting Association, National Sporting Clays Association, Single Action Shooting Society, International Practical Shooting Confederation (IPSC), and the United States Practical Shooting Association (USPSA). Analysis of these sources as well as a variety of shotguns led the working group to conclude that certain shotguns were of a type that did not meet the requirements of section 925(d)(3), and therefore, could not lawfully be imported.

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<sup>29</sup> ATF previously argued this very point in *Gilbert Equipment Company, Inc. v. Higgins*, 709 F.Supp. 1071, 1075 (S.D. Ala. 1989). The court agreed, noting, “according to Mr. Drake, the bureau takes the position . . . that an event has attained general recognition as being a sport before those uses and/or events can be ‘sporting purposes’ or ‘sports’ under section 925(d)(3). *See also* Declaration of William T. Drake, Deputy Director, Bureau of Alcohol, Tobacco and Firearms.

<sup>30</sup> 114 Cong. Rec. 27461-462 (1968).

## Analysis

### A. Scope of Sporting Purposes

In conducting the sporting purposes test on behalf of the Attorney General, ATF examines the physical and technical characteristics of a shotgun and determines whether those characteristics meet this statutory requirement. A shotgun's suitability for a particular sport depends upon the nature and requirements inherent to that sport. Therefore, determining a "sporting purpose" was the first step in this analysis under section 925(d)(3) and is a critical step of the process.

A broad interpretation of "sporting purposes" may include any lawful activity in which a shooter might participate and could include any organized or individual shooting event or pastime. A narrow interpretation of "sporting purposes" would clearly result in a more selective standard governing the importation of shotguns.

Consistent with previous ATF decisions and case law, the working group recognized that a sport or event must "have attained general recognition as being a 'sport,' before those uses and/or events can be 'sporting purposes' or 'sports' under Section 925(d)(3)."<sup>31</sup> The statutory language limits ATF's authority to recognize a particular shooting activity as a "sporting purpose," and therefore requires a narrow interpretation of this term. As stated however, the working group recognized that sporting purposes may change over time, and that certain shooting activities may become "generally recognized" as such.

At the present time, the working group continues to believe that the activity known as "plinking" is not a generally recognized sporting purpose. There is nothing in the legislative history of the GCA to indicate that section 925(d)(3) was meant to recognize every conceivable type of activity or competition that might employ a firearm. Recognition of plinking as a sporting purpose would effectively nullify section 925(d)(3) because it may be argued that *any* shotgun is particularly suitable for or readily adaptable to this activity.

The working group also considered "practical shooting" competitions. Practical shooting events generally measure a shooter's accuracy and speed in identifying and hitting targets while negotiating obstacle-laden shooting courses. In these competitions, the targets are generally stationary and the shooter is mobile, as opposed to clay target shooting where the targets are moving at high speeds mimicking birds in flight. Practical shooting consist of rifle, shotgun and handgun competitions, as well as "3-Gun" competitions utilizing all three types of firearm on one course. The events are often organized by local or national shooting organizations and attempt to categorize shooters by skill level in order to ensure competitiveness within the respective divisions. The working group examined participation in and popularity of practical shooting events as governed under formal rules such as those of the United States Practical Shooting Association (USPSA) and International Practical Shooting Confederation (IPSC) to see

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<sup>31</sup> Gilbert at 1085.

if it is appropriate to consider these events a legitimate “sporting purpose” under section 925(d)(3).

The USPSA currently reports approximately 19,000 members that participate in shooting events throughout the United States.<sup>32</sup> While USPSA’s reported membership is within the range of members for some other shotgun shooting organizations,<sup>33</sup> organizations involved in shotgun hunting of particular game such as ducks, pheasants and quail indicate significantly more members than any of the target shooting organizations.<sup>34</sup> Because a determination on the sporting purpose of practical shooting events should be made only after an in-depth study of those events, the working group determined that it was not appropriate to use this shotgun study to make a definitive conclusion as to whether practical shooting events are “sporting” for purposes of section 925(d)(3). Any such study must include rifles, shotguns and handguns because practical shooting events use all of these firearms, and a change in position by ATF on practical shooting or “police/combat-type” competitions may have an impact on the sporting suitability of rifles and handguns. Further, while it is clear that shotguns are used at certain practical shooting events, it is unclear whether shotgun use is so prevalent that it is “generally recognized” as a sporting purpose. If shotgun use is not sufficiently popular at such events, practical shooting would have no effect on any sporting suitability determination of shotguns. Therefore, it would be impractical to make a determination based upon one component or aspect of the practical shooting competitions.

As a result, the working group based the following sporting suitability criteria on the traditional sports of hunting, trap and skeet target shooting.

#### B. Suitability for Sporting Purposes

The final step in our review involved an evaluation of shotguns to determine a “type” of firearm that is “generally recognized as particularly suitable or readily adaptable to sporting purposes.” Whereas the 1989 and 1998 studies were conducted in response to Congressional interest pertaining to a certain “type” of firearm, the current study did not benefit from a mandate to focus upon and review a particular type of firearm. Therefore, the current working group determined that it was necessary to consider a broad sampling of shotguns and shotgun features that may constitute a “type.”

Whereas rifles vary greatly in size, function, caliber and design, historically, there is less variation in shotgun design. However, in the past several years, ATF has witnessed increasingly diverse shotgun design. Much of this is due to the fact that some manufacturers are now applying rifle designs and features to shotguns. This has resulted in a type of shotgun that has

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<sup>32</sup> See [www.uspsa.org](http://www.uspsa.org).

<sup>33</sup> Organization websites report these membership numbers: for the United States Practical Shooting Association, approx. 19,000; Amateur Trapshooting Association, over 35,000 active members; National Skeet Shooting Association, nearly 20,000 members; National Sporting Clays Association, over 22,000 members; Single Action Shooting Society, over 75,000 members.

<sup>34</sup> Organization websites report these membership numbers: Ducks Unlimited, U.S adult 604,902 (Jan. 1, 2010); Pheasants/Quail Forever, over 130,000 North American members (2010) <http://www.pheasantfest.org/page/1/PressReleaseViewer.jsp?pressReleaseId=12406>.

features or characteristics that are based on tactical and military firearms. Following a review of numerous shotguns, literature, and industry advertisements, the working group determined that the following shotgun features and design characteristics are particularly suitable for the military or law enforcement, and therefore, offer little or no advantage to the sportsman. Therefore, we recognized that any shotgun with one or more of these features represent a “type” of firearm that is not “generally recognized as particularly suitable or readily adaptable to sporting purposes” and may not be imported under section 925(d)(3).

(1) Folding, telescoping or collapsible stock.

Shotgun stocks vary in style, but sporting stocks have largely resembled the traditional design.<sup>35</sup> Many military firearms incorporate folding or telescoping stocks. The main advantage of this feature is portability, especially for airborne troops. These stocks allow the firearm to be fired from the folded or retracted position, yet it is difficult to fire as accurately as can be done with an open or fully extended stock. While a folding stock or telescoping stock makes it easier to carry the firearm, its predominant advantage is for military and tactical purposes. A folding or telescoping stock is therefore not found on the traditional sporting shotgun. Note that certain shotguns may utilize adjustable butt plates, adjustable combs, or other designs intended only to allow a shooter to make small custom modifications to a shotgun. These are not intended to make a shotgun more portable, but are instead meant to improve the overall “fit” of the shotgun to a particular shooter. These types of adjustable stocks are sporting and are, therefore, acceptable for importation.

(2) Bayonet Lug.

A bayonet lug is generally a metal mount that allows the installation of a bayonet onto the end of a firearm. While commonly found on rifles, bayonets have a distinct military purpose. Publications have indicated that this may be a feature on military shotguns as well.<sup>36</sup> It enables soldiers to fight in close quarters with a knife attached to their firearm. The working group discovered no generally recognized sporting application for a bayonet on a shotgun.

(3) Flash Suppressor.

Flash suppressors are generally used on military firearms to disperse the muzzle flash in order to help conceal the shooter’s position, especially at night. Compensators are used on military and commercial firearms to assist in controlling recoil and the “muzzle climb” of the shotgun. Traditional sporting shotguns do not have flash suppressors or compensators. However, while compensators have a limited benefit for shooting sports because they allow the shooter to quickly reacquire the target for a second shot, there is no particular benefit in suppressing muzzle flash in

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<sup>35</sup> Exhibit 1.

<sup>36</sup> *A Collector’s Guide to United States Combat Shotguns* at 156.

sporting shotguns. Therefore, the working group finds that flash suppressors are not a sporting characteristic, while compensators are a sporting feature. However, compensators that, in the opinion of ATF, actually function as flash suppressors are neither particularly suitable nor readily adaptable to sporting purposes.

(4) Magazine over 5 rounds, or a Drum Magazine.

A magazine is an ammunition storage and feeding device that delivers a round into the chamber of the firearm during automatic or semiautomatic firing.<sup>37</sup> A magazine is either integral (tube magazine) to the firearm or is removable (box magazine). A drum magazine is a large circular magazine that is generally detachable and is designed to hold a large amount of ammunition.

The 1989 Study recognized that virtually all modern military firearms are designed to accept large, detachable magazines. The 1989 Study noted that this feature provides soldiers with a large ammunition supply and the ability to reload rapidly. The 1998 Study concurred with this and found that, for rifles, the ability to accept a detachable large capacity magazine was not a sporting feature. The majority of shotguns on the market today contain an integral “tube” magazine. However, certain shotguns utilize removable box magazine like those commonly used for rifles.<sup>38</sup>

In regard to sporting purposes, the working group found no appreciable difference between integral tube magazines and removable box magazines. Each type allowed for rapid loading, reloading, and firing of ammunition. For example, “speed loaders” are available for shotguns with tube-type magazines. These speed loaders are designed to be preloaded with shotgun shells and can reload a shotgun with a tube-type magazine in less time than it takes to change a detachable magazine.

However, the working group determined that magazines capable of holding large amounts of ammunition, regardless of type, are particularly designed and most suitable for military and law enforcement applications. The majority of state hunting laws restrict shotguns to no more than 5 rounds.<sup>39</sup> This is justifiable because those engaged in sports shooting events are not engaging in potentially hostile or confrontational situations, and therefore do not require the large amount of immediately available ammunition, as do military service members and police officers.

Finally, drum magazines are substantially wider and have considerably more bulk than standard clip-type magazines. They are cumbersome and, when attached to the shotgun, make it more difficult for a hunter to engage multiple small moving targets. Further, drum magazines are generally designed to contain more than 5 rounds. Some contain as many as 20 or more

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<sup>37</sup> Steindler's New Firearms Dictionary at 164.

<sup>38</sup> See Collector's Guide to United States Combat Shotguns at 156-7, noting that early combat shotguns were criticized because of their limited magazine capacity and time consuming loading methods.

<sup>39</sup> Exhibit 2.

rounds.<sup>40</sup> While such magazines may have a military or law enforcement application, the working group determined that they are not useful for any generally recognized sporting purpose. These types of magazines are unlawful to use for hunting in most states, and their possession and manufacture are even prohibited or restricted in some states.<sup>41</sup>

(5) Grenade Launcher Mount.

Grenade launchers are incorporated into military firearms to facilitate the launching of explosive grenades. Such launchers are generally of two types. The first type is a flash suppressor designed to function as a grenade launcher. The second type attaches to the barrel of the firearm either by screws or clamps. Grenade launchers have a particular military application and are not currently used for sporting purposes.

(6) Integrated Rail Systems.<sup>42</sup>

This refers to a mounting rail system for small arms upon which firearm accessories and features may be attached. This includes scopes, sights, and other features, but may also include accessories or features with no sporting purpose, including flashlights, foregrips, and bipods. Rails on the sides and underside of shotguns—including any accessory mount—facilitate installation of certain features lacking any sporting purpose. However, receiver rails that are installed on the top of the receiver and barrel are readily adaptable to sporting purposes because this facilitates installation of optical or other sights.

(7) Light Enhancing Devices.

Shotguns are generally configured with either bead sights, iron sights or optical sights, depending on whether a particular sporting purpose requires the shotgun to be pointed or aimed.<sup>43</sup> Bead sights allow a shooter to “point” at and engage moving targets at a short distance with numerous small projectiles, including birds, trap, skeet and sporting clays. Iron and optical sights are used when a shooter, firing a slug, must “aim” a shotgun at a target, including deer, bear and turkeys.<sup>44</sup> Conversely, many military firearms are equipped with sighting devices that utilize available light to facilitate night vision capabilities. Devices or optics that allow illumination of a target in low-light conditions are generally for military and law enforcement purposes and are not typically found on sporting shotguns because it is generally illegal to hunt at night.

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<sup>40</sup> Exhibit 3.

<sup>41</sup> See, e.g., Cal Pen Code § 12020; N.J. Stat. § 2C:39-9.

<sup>42</sup> Exhibit 4.

<sup>43</sup> NRA Firearms Sourcebook at 178.

<sup>44</sup> Id.

(8) Excessive Weight.<sup>45</sup>

Sporting shotguns, 12 gauge and smaller, are lightweight (generally less than 10 pounds fully assembled),<sup>46</sup> and are balanced and maneuverable. This aids sportsmen by allowing them to carry the firearm over long distances and rapidly engage a target. Unlike sporting shotguns, military firearms are larger, heavier, and generally more rugged. This design allows the shotguns to withstand more abuse in combat situations.

(9) Excessive Bulk.<sup>47</sup>

Sporting shotguns are generally no more than 3 inches in width or more than 4 inches in depth. This size allows sporting shotguns to be sufficiently maneuverable in allowing hunters to rapidly engage targets. Certain combat shotguns may be larger for increased durability or to withstand the stress of automatic fire. The bulk refers to the fully assembled shotgun, but does not include magazines or accessories such as scopes or sights that are used on the shotgun. For both width and depth, shotguns are measured at the widest points of the action or housing on a line that is perpendicular to the center line of the bore. Depth refers to the distance from the top plane of the shotgun to the bottom plane of the shotgun. Width refers to the length of the top or bottom plane of the firearm and measures the distance between the sides of the shotgun. Neither measurement includes the shoulder stock on traditional sporting shotgun designs.

(10) Forward Pistol Grip or Other Protruding Part Designed or Used for Gripping the Shotgun with the Shooter's Extended Hand.<sup>48</sup>

While sporting shotguns differ in the style of shoulder stock, they are remarkably similar in fore-end design.<sup>49</sup> Generally, sporting shotguns have a foregrip with which the shooter's forward hand steadies and aims the shotgun. Recently, however, some shooters have started attaching forward pistol grips to shotguns. These forward pistol grips are often used on tactical firearms and are attached to those firearms using the integrated rail system. The ergonomic design allows for continued accuracy during sustained shooting over long periods of time. This feature offers little advantage to the sportsman. Note, however, that the working group believes that pistol grips for the trigger hand are prevalent on shotguns and are therefore generally recognized as particularly suitable for sporting purposes.<sup>50</sup>

While the features listed above are the most common non-sporting shotgun features, the working group recognizes that other features, designs, or characteristics may exist. Prior to importation, ATF will classify these shotguns based upon the requirements of section 925(d)(3). The working

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<sup>45</sup> See generally Gilbert.

<sup>46</sup> Shotgun Encyclopedia 2001 at 264.

<sup>47</sup> Exhibit 5.

<sup>48</sup> Exhibit 6.

<sup>49</sup> See Exhibit 1. See generally NRA Firearms Sourcebook at 121-2.

<sup>50</sup> See Exhibit 1.

group expects the continued application of unique features and designs to shotguns that may include features or designs based upon traditional police or military tactical rifles. However, even if a shotgun does not have one of the features listed above, it may be considered “sporting” only if it meets the statutory requirements under section 925(d)(3). Further, the simple fact that a military firearm or feature *may* be used for a generally recognized sporting purposes is not sufficient to support a determination that it is sporting under 925(d)(3). Therefore, as required by section 925(d)(3), in future sporting classifications for shotguns, ATF will classify the shotgun as sporting only if there is evidence that its features or design characteristics are generally recognized as particularly suitable for or readily adaptable to generally recognized sporting purposes.

The fact that a firearm or feature was initially designed for military or tactical applications, including offensive or defensive combat, may indicate that it is not a sporting firearm. This may be overcome by evidence that the particular shotgun or feature has been so regularly used by sportsmen that it is generally recognized as particularly suitable for or readily adaptable to sporting purposes. Such evidence may include marketing, industry literature and consumer articles, scholarly and historical publications, military publications, the existence of State and local statutes and regulations limiting use of the shotgun or features for sporting purposes, and the overall use and the popularity of such features or designs for sporting purposes according to hunting guides, shooting magazines, State game commissioners, organized competitive hunting and shooting groups, law enforcement agencies or organizations, industry members and trade associations, and interest and information groups. Conversely, a determination that the shotgun or feature was originally designed as an improvement or innovation to an existing sporting shotgun design or feature will serve as evidence that the shotgun is sporting under section 925(d)(3). However, any new design or feature must still satisfy the sporting suitability test under section 925(d)(3) as outlined above.

The Attorney General and ATF are not limited to these factors and therefore may consider any other factor determined to be relevant in making this determination. The working group recognizes the difficulty in applying this standard but acknowledges that Congress specifically intended that the Attorney General perform this function. Therefore, the working group recommends that sporting determinations for shotguns not specifically addressed by this study be reviewed by a panel pursuant to ATF orders, policies and procedures, as appropriate.

### Conclusion

The purpose of section 925(d)(3) is to provide a limited exception to the general prohibition on the importation of firearms without placing “any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms....”<sup>51</sup> Our determinations will in no way preclude the importation of true sporting shotguns. While it will certainly prevent the importation of certain shotguns, we believe that

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<sup>51</sup> 90 P.L. 351 (1968).

those shotguns containing the enumerated features cannot be fairly characterized as “sporting” shotguns under the statute. Therefore, it is the recommendation of the working group that shotguns with any of the characteristics or features listed above not be authorized for importation.

Shotgun Stock Style Comparison

Exhibit 1

“Straight” or “English” style stock (Ruger Red Label):



“Pistol grip” style stock (Browning Citori):



“Pistol grip” style stock (Mossberg 935 Magnum Turkey):



“Thumbhole” style stock (Remington SP-10):



Stock with Separate Pistol Grip



Hunting Statutes by State

Exhibit 2

State	Gauge	Mag Restriction / plugged with one piece filler requiring disassembly of gun for removal	Attachments	Semi-Auto	Other
Alabama	10 gauge or smaller;	(Species specific) 3 shells			1
Alaska	10 gauge or smaller				
Arizona	10 gauge or smaller	5 shells			
Arkansas	≤ 10 gauge; some zones ≥ .410; ≥ 20 gauge for bear	(Species specific) 3 shells			
California	≤ 10 gauge; Up to 12 gauge in some areas	(Species specific) 3 shells			
Colorado	≥ 20 gauge; Game Mammals ≤ 10 gauge	3 shells			
Connecticut	≤ 10-gauge	(Species specific) 3 shells	telescopic sights		
Delaware	20, 16, 12, 10 gauge	3 shells	Muzzleloaders may be equipped with scopes		2
Florida	Muzzleloading firing ≥ 2 balls ≥ 20-gauge; Migratory birds ≤ 10-gauge; opossums - single-shot .41 -gauge shotguns	(Species specific) 3 shells			
Georgia	≥ 20-gauge; Waterfowl ≤ 10-gauge	5 shells	Scopes are legal		
Hawaii	≤ 10 gauge	(Species specific) 3 shells			
Idaho			some scopes allowed		3
Illinois	20 - 10 gauge; no .410 or 28 gauge allowed	3 shells			
Indiana		(Species specific) 3 shells	Laser sights are legal		

Hunting Statutes by State

Exhibit 2

<b>Iowa</b>	10-, 12-, 16-, and 20-gauge			
<b>Kansas</b>	≥ 20 gauge; ≤ 10 gauge,	(Species specific) 3 shells		
<b>Kentucky</b>	up to and including 10-gauge, includes .410-	(Species specific) 3 shells	Telescopic sights (scopes)	
<b>Louisiana</b>	≤ 10 gauge	3 shells	Nuisance Animals; infrared, laser sighting devices, or night vision devices	
<b>Maine</b>	10 - 20 gauge	(Species specific) 3 shells	may have any type of sights, including scopes	Auto-loading illegal if hold more than 6 cartridges
<b>Maryland</b>	Muzzle loading ≥ 10 gauge ; Shotgun ≤ 10-gauge	(Species specific) 3 shells	may use a telescopic sight on muzzle loading firearm	
<b>Massachusetts</b>	≤ 10 gauge	(Species specific) 3 shells		
<b>Michigan</b>	any gauge	(Species specific) 3 shells		Illegal: semi-automatic holding > 6 shells in barrel and magazine combined
<b>Minnesota</b>	≤ 10 gauge	(Species specific) 3 shells		
<b>Mississippi</b>	any gauge	(Species specific) 3 shells	Scopes allowed on primitive weapons	
<b>Missouri</b>	≤ 10 gauge	(Species specific) 3 shells		
<b>Montana</b>	≤ 10 gauge	(Species specific) 3 shells		
<b>Nebraska</b>	≥ 20 gauge	(Species specific) 3 shells		Illegal: semi-automatic holding > 6 shells in barrel and magazine combined
<b>Nevada</b>	≤ 10 gauge; ≥ 20 gauge	(Species specific) 3 shells		
<b>New Hampshire</b>	10 - 20 gauge	(Species specific) 3 shells		
<b>New Jersey</b>	≤ 10 gauge; ≥ 20 gauge; or .410 caliber	(Species specific) 3 shells	Require adjustable open iron, peep sight or scope affixed if hunting with slugs. Telescopic sights Permitted	
<b>New Mexico</b>	≥ 28 gauge, ≤ 10 gauge	(Species specific) 3 shells		
<b>New York</b>	Big game ≥ 20 gauge		scopes allowed	No semi-automatic firearm with a capacity to hold more than 6 rounds

Hunting Statutes by State

Exhibit 2

<b>North Carolina</b>	≤ 10 gauge	(Species specific) 3 shells	
<b>North Dakota</b>	≥ 410 gauge; no ≤ 10 gauge	3 shells (repealed for migratory birds)	
<b>Ohio</b>	≤ 10 gauge	(Species specific) 3 shells	
<b>Oklahoma</b>	≤ 10 gauge	(Species specific) 3 shells	
<b>Oregon</b>	≤ 10 gauge; ≥ 20 gauge	(Species specific) 3 shells	Scopes (permanent and detachable), and sights allowed for visually impaired
<b>Pennsylvania</b>	≤ 10 gauge; ≥ 12 gauge	(Species specific) 3 shells	
<b>Rhode Island</b>	10, 12, 16, or 20-gauge	5 shells	
<b>South Carolina</b>		(Species specific) 3 shells	
<b>South Dakota</b>	(Species specific) ≤ 10 gauge	5 shells	No auto-loading firearm holding > 6 cartridges
<b>Tennessee</b>	Turkey: ≥ 28 gauge	(Species specific) 3 shells	May be equipped with sighting devices
<b>Texas</b>	≤ 10 gauge	(Species specific) 3 shells	scoping or laser sighting devices used by disabled hunters
<b>Utah</b>	≤ 10 gauge; ≥ 20 gauge	(Species specific) 3 shells	
<b>Vermont</b>	≥ 12 gauge	(Species specific) 3 shells	
<b>Virginia</b>	≤ 10 gauge	(Species specific) 3 shells	
<b>Washington</b>	≤ 10 gauge	(Species specific) 3 shells	
<b>West Virginia</b>			
<b>Wisconsin</b>	10, 12, 16, 20 and 28 gauge; no .410 shotgun for deer/bear	(Species specific) 3 shells	
<b>Wyoming</b>			

4

- 1 Shotgun/rifle combinations (drilling) permitted
- 2 large game training course - Students in optional proficiency qualification bring their own pre-zeroed, ≥ .243 , scoped shotgun
- 3 no firearm that, in combination with a scope, sling and/or any attachments, weighs more than 16 pounds
- 4 no relevant restrictive laws concerning shotguns

General Firearm Statutes by State

Exhibit 2

State	Source	Semi-Auto Restrictions	Attachments	Prohibited* (in addition to possession of short-barrel or sawed-off shotguns by non-authorized persons, e.g., law enforcement officers for official duty purposes)
Alabama	Alabama Code, title 13:			
Alaska	Alaska Statutes 11.61.200.(h)			
Arizona	Arizona Rev. Statutes 13-3101.8.	single shot	silencer prohibited	
Arkansas	Arkansas Code Title 5, Chapter 73.			
California	California Penal Code, Part 4.12276. and San Diego Municipal Code 53.31.	San Diego includes under "assault weapon," any shotgun with a magazine capacity of more than 6 rounds		"Assault weapons": Franchi SPAS 12 and LAW 12; Striker 12; Streetsweeper type S/S Inc. ; semiautomatic shotguns having both a folding or telescoping stock and a pistol grip protruding conspicuously beneath the action of the weapon, thumbhole stock, or vertical handgrip; semiautomatic shotguns capable of accepting a detachable magazine; or shotguns with a revolving cylinder.
Colorado	2 CCR 406-203			
Connecticut	Connecticut Gen. Statutes 53-202a.			"Assault weapons": Steyr AUG; Street Sweeper and Striker 12 revolving cylinder shotguns
D.C	7-2501.01.			

General Firearm Statutes by State

Exhibit 2

<b>Delaware</b>	7.I.§ 711.		7.I.§ 711. Hunting with automatic-loading gun prohibited; penalty (a) No person shall hunt for game birds or game animals in this State, except as authorized by state-sanctioned federal depredation/conservation orders for selected waterfowl species, with or by means of any automatic-loading or hand-operated repeating shotgun capable of holding more than 3 shells, the magazine of which has not been cut off or plugged with a filler incapable of removal through the loading end thereof, so as to reduce the capacity of said gun to not more than 3 shells at 1 time, in the magazine and chamber combined. (b) Whoever violates this section shall be guilty of a class C environmental misdemeanor. (c) Having in one's possession, while in the act of hunting game birds or game animals, a gun that will hold more than 3 shells at one time in the magazine and chamber combined, except as authorized in subsection (a) of this section, shall be prima facie evidence of violation of this section.
<b>Florida</b>	Florida statutes, Title XLVI.790.001.		
<b>Georgia</b>			
<b>Hawaii</b>	Hawaii Rev. Statutes, Title 10., 134-8.	silencer prohibited	
<b>Idaho</b>	Idaho Code, 18-3318.		
<b>Illinois</b>	Code of Ordinances, City of Aurora 29-43.	Aurora includes under "assault weapon," any shotgun with a magazine capacity of more than 5 rounds	"Assault weapons": Street Sweeper and Striker 12 revolving cylinder shotguns or semiautomatic shotguns with either a fixed magazine with a capacity over 5 rounds or an ability to accept a detachable magazine and has at least a folding / telescoping stock or a pistol grip that protrudes beneath the action of firearm and which is separate and apart from stock

General Firearm Statutes by State

Exhibit 2

<b>Indiana</b>	Indiana Code 35-47-1-10. and Municipal Code of the City of South Bend 13-95.	South Bend under "assault weapon" firearms which have threads, lugs, or other characteristics designed for direct attachment of a silencer, bayonet, flash suppressor, or folding stock; as well as any detachable magazine, drum, belt, feed strip, or similar device which can be readily made to accept more than 15. rounds	South Bend includes under "assault weapon," any shotgun with a magazine capacity of more than 9 rounds
<b>Iowa</b>	Iowa Code, Title XVI. 724.1.		Includes as an offensive weapon, "a firearm which shoots or is designed to shoot more than one shot, without manual reloading, by a single function of the trigger"
<b>Kansas</b>			
<b>Kentucky</b>	Kentucky Revised Statutes- 150.360		
<b>Louisiana</b>	Louisiana RS 56:116.1		
<b>Maine</b>	Maine Revised Statutes 12.13.4.915.4.§11214. F.		
<b>Maryland</b>	Maryland Code 5-101.		"Assault weapons": F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun; Steyr-AUG-SA semi-auto; Holmes model 88 shotgun; Mossberg model 500 Bullpup assault shotgun; Street sweeper assault type shotgun; Striker 12 assault shotgun in all formats; Daewoo USAS 12 semi-auto shotgun

General Firearm Statutes by State

Exhibit 2

<b>Massachusetts</b>	Massachusetts Gen L. 140.121.	under "assault weapon": any shotgun with (fixed or detachable) magazine capacity of more than 5 rounds	"Assault weapons": revolving cylinder shotguns, e.g., Street Sweeper and Striker 12; also "Large capacity weapon" includes any semiautomatic shotgun fixed with large capacity feeding device (or capable of accepting such), that uses a rotating cylinder capable of accepting more than 5 shells
<b>Michigan</b>	Il.2.1. (2)		
<b>Minnesota</b>	Minnesota Statutes 624.711		"Assault weapons": Street Sweeper and Striker-12 revolving cylinder shotgun types as well as USAS-12 semiautomatic shotgun type
<b>Mississippi</b>	Mississippi Code 97-37-1.	silencer prohibited	
<b>Missouri</b>	Code of State Regulations 10-7.410(1)(G)		
<b>Montana</b>			
<b>Nebraska</b>	Nebraska Administrative Code Title 163 Chapter 4 001.		
<b>Nevada</b>	Nevada Revised Statutes 503.150 1.		
<b>New Hampshire</b>			
<b>New Jersey</b>	New Jersey Statutes 23:4-13. and 23:4-44. and New Jersey Rev. Statutes 2C39-1.w.	magazine capacity of no more than 5 rounds	"Assault weapons": any shotgun with a revolving cylinder, e.g. "Street Sweeper" or "Striker 12" Franchi SPAS 12 and LAW 12 shotguns or USAS 12 semi-automatic type shotgun; also any semi-automatic shotgun with either a magazine capacity exceeding 6 rounds, a pistol grip, or a folding stock
<b>New Mexico</b>	New Mexico Administrative Code 19.31.6.7H., 19.31.11.10N. , 19.31.13.10M. and 19.31.17.10N.		

General Firearm Statutes by State

Exhibit 2

<b>New York</b>	New York Consolidated Laws 265.00. 22. and Code of the City of Buffalo 1801B.	magazine capacity of no more than 5 rounds	sighting device making a target visible at night may classify a shotgun as an assault weapon	"Assault weapons": Any semiautomatic shotgun with at least two of the following: folding or telescoping stock; pistol grip that protrudes conspicuously beneath the action of the weapon; fixed magazine capacity in excess of five rounds; an ability to accept a detachable magazine; or any revolving cylinder shotguns, e.g., Street Sweeper and Striker 12; Buffalo 1801B. Assault Weapon: (2) A center-fire rifle or shotgun which employs the force of expanding gases from a discharging cartridge to chamber a fresh round after each single pull of the trigger, and which has: (a) A flash suppressor attached to the weapon reducing muzzle flash; (c) A sighting device making a target visible at night; (d) A barrel jacket surrounding all or a portion of the barrel, to dissipate heat therefrom; or (e) A multi-burst trigger activator. (3) Any stockless pistol grip shotgun.
<b>North Carolina</b>	North Carolina Gen. Statutes 14-288.8		silencer prohibited	
<b>North Dakota</b>	North Dakota Century Code 20.1-01-09. Section 20.1-04-10, SHOTGUN SHELL-HOLDING CAPACITY RESTRICTION, repealed/eliminated			
<b>Ohio</b>	Ohio Rev. Code 2923.11. and Columbus City Codes 2323.11.	magazine capacity of no more than 5 rounds		semiautomatic shotgun that was originally designed with or has a fixed magazine or detachable magazine with a capacity of more than five rounds. Columbus includes under "Assault weapon" any semi-automatic shotgun with two or more of the following: pistol grip that protrudes conspicuously beneath the receiver of the weapon; folding, telescoping or thumbhole stock; fixed magazine capacity in excess of 5 standard 2-3/4, or longer, rounds; or ability to accept a detachable magazine; also any shotgun with revolving cylinder
<b>Oklahoma</b>				
<b>Oregon</b>	Oregon Rev. Statutes 166.272.		silencer prohibited	
<b>Pennsylvania</b>	Title 34 Sec. 2308. (a)(4) and (b)(1)			
<b>Rhode Island</b>	Rule 7, Part III, 3.3 and 3.4			
<b>South Carolina</b>	SECTION 50-11-310. (E) and ARTICLE 3. SUBARTICLE 1. 123 40			

General Firearm Statutes by State

Exhibit 2

<b>South Dakota</b>	South Dakota Codified Laws 22,1,2, (8)		silencer prohibited
<b>Tennessee</b>			
<b>Texas</b>			
<b>Utah</b>	Utah Administrative Code R657-5-9. (1), R657-6-6. (1) and R657-9-7.		
<b>Vermont</b>			
<b>Virginia</b>	Virginia Code 18.2-308.	magazine capacity no more than 7 rounds (not applicable for hunting or sport shooting)	"Assault weapons": Striker 12's commonly called a "streetsweeper," or any semi-automatic folding stock shotgun of like kind with a spring tension drum magazine capable of holding twelve shotgun shells prohibited
<b>Washington</b>	Washington Administrative Code 232-12-047		
<b>West Virginia</b>	West Virginia statute 8-12-5a.		
<b>Wisconsin</b>	Wisconsin Administrative Code – NR 10.11 and NR 10.12		
<b>Wyoming</b>	Wyoming Statutes, Article 3. Rifles and Shotguns [Repealed] and 23-3-112.		silencer prohibited

Drum Magazine

Exhibit 3



Integrated Rail System

Exhibit 4

Sporting



Sporting



Non-Sporting

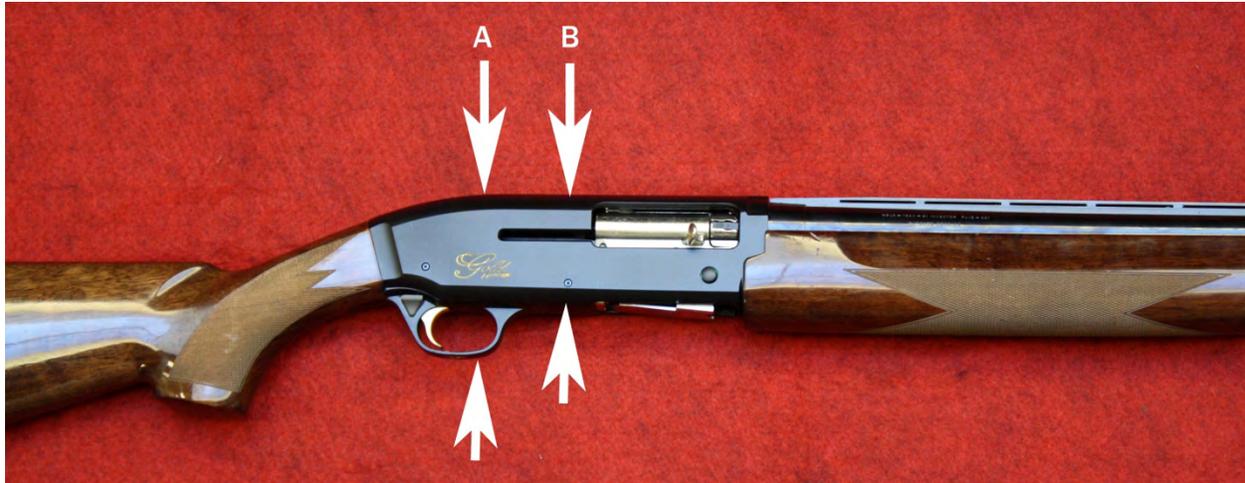


Non-Sporting

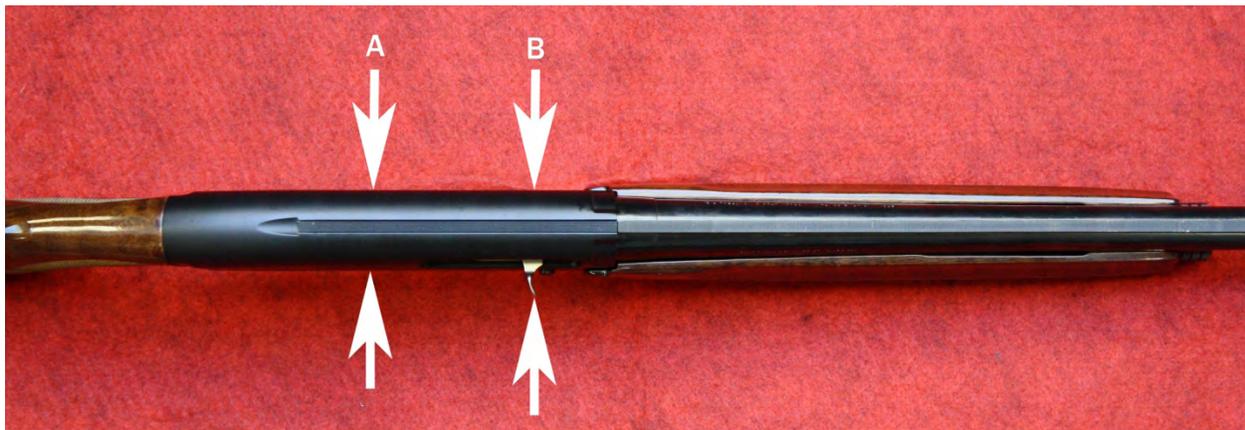


Bulk Measurements

Depth refers to the distance from the top plane of the shotgun to the bottom plane of the shotgun. Depth measurement “A” below is INCORRECT; it includes the trigger guard which is not part of the frame or receiver. Depth measurement “B” below is CORRECT; it measures only the depth of the frame or receiver:



Width refers to the length of the top or bottom pane of the firearm and measures the distance between the sides of the shotgun. Width measurement “A” below is CORRECT; it measures only the width of the frame or receiver. Width measurement “B” below is INCORRECT; it includes the charging handle which is not part of the frame or receiver:



Forward Pistol Grip

Exhibit 6



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# **EXHIBIT 20**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**



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# Woman Wrestled Fresh Ammo Clip From Tucson Shooter as He Tried to Reload

TUCSON, Ariz. Jan. 9, 2011

By KEVIN DOLAK and JUSTIN WEAVER via WORLD NEWS

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Team of Heroes Takes Down Arizona Gunman

NEXT VIDEO  
Female Hero Stopped Shooter From Reloading

AUTO START: ON | OFF

Patricia Maisch looks like a grandmother, but she is being hailed as a hero today for helping to stop alleged Tucson shooter Jared Loughner by wrestling away a fresh magazine of bullets as he tried to reload.

Maisch, 61, effectively disarmed the shooter as several men pounced on him and threw him to ground. As they struggled to hold him down, Maisch joined the scrum on the ground, clinging to the gunman's ankles.

Maisch and her fellow heroes -- identified as Bill Badger, Roger Sulzgeber and Joseph Zamudio -- stopped the carnage after 20 people were shot, including Rep. Gabrielle Giffords. Six people died.

"[I] knew right away it was a gun... I heard a continuation of shots," Maisch told a news conference today.

Maisch, who has a crown of snow-white hair, was standing towards the back of the line to greet and snap a photo with Giffords at the "Congress in Your Corner" event at a Safeway grocery store.

Speaking to the press today, Maisch recalled how she stopped Loughner as he tried to reload his Glock 9 mm weapon.

"I could see him coming. [He] shot the lady next to me," Maisch said.

As he was shooting, she said, she was expecting to be hit and she wondered what it would feel like.

There was "lots of blood and confusion," she said.

http://abcnews.go.com/Politics/patricia-maisch-describes-stopping-gunman-reloading/story?id=12577933

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She considered trying to run away, she said, but thought that would make her more of a target, so she laid down on the ground. But then something unexpected happened.

"Then he was next to me on the ground," she said. "The gentleman knocked him down.

"I kneeled over him. He was pulling a magazine [to reload] and I grabbed the magazine and secured that. I think the men got the gun, and I was able to get the magazine," she said.

Maisch said Badger and Sulzgeber both sat on the gunman while she held his ankles down. Police said that Zimudie helped by hanging on to Loughner's legs.

Sulzgeber was reportedly standing with his wife, third in line to meet with Giffords, while Zimudie was in the nearby Walgreens and came running out once he heard the shooting.

"I thought I would be shot. I am thankful for those two brave men," Maisch said. "I am not a hero. The other guys are. I just assisted getting the clip."

Badger, a 74-year-old retired army colonel living in Tucson, told Pottsville, Pa.'s Republican-Herald how he helped capture Loughner, and that he was grazed in the back of the head by a bullet.

### The Heroes of the Tucson Shooting

"I heard the shots but I thought they were fireworks at first," Badger told the newspaper. "I wasn't sure they were shots until I actually saw the shooter, and I was sure he was really shooting bullets when I felt the sting on the back of my head."

According to Badger, who the Republican-Herald confirmed was treated for an injury at a hospital, he was the first person standing next to a row of chairs leading to Giffords when the first shots rang out.

Badger told the paper, "I turned and saw him running down the line of people on the chairs. He ran between me and the store. Someone hit him with a chair and he flinched a little. That's when I grabbed his left arm. Someone grabbed his right arm and we got him to the ground.

"The other guy put his knee into the back of his neck and I grabbed him around the throat. We held him until police got there. While we had him on the ground I saw blood running and it wasn't until then I realized it was coming from the back of my head," Badger said.

Speaking outside her home this evening, Maisch said that when she noticed that one of the men was bleeding from the head, she ran into the Safeway to get paper towels.

"I put a compress on the man's head while he was securing the shooter," she said.

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### RECOMMENDED FOR YOU



Michelle Obama's mixed race heritage proved by DNA. (Ancestry.com)



The One Smell Women Can't Resist (Nick Mom)



Former Miss Venezuela, Soap-Opera Star Gunned Down by Armed Robbers



Chris Christie: Senior Aide 'Lied to Me'

### FROM AROUND THE WEB

Aunt Gets Horrifying Christmas 'Present' From Nephew She Was Trying to Help (Articles in the News)

Girl Arrested After Taking Stupidest Selfie Ever (Articles in the News)

Innocent Man Gets Dead Wife and 25 Years in Jail; Lying Prosecutor Gets 10 Days in Prison (Downtrend)

Woman Suing Hospital, Doctor After Prank Photo Snapped — While She Was Unconscious — Winds Up On Facebook (Radar Online)

### MORE FROM ABC NEWS

Rep. Giffords Responds to Commands But Not Out of the Woods Yet

9/11 Baby Among Those Killed

Palin's Now in 'Crosshairs' of Giffords Debate

Rep. Giffords in Medically Induced Coma to Rest Brain

Female Hero Stopped Shooter From Reloading

FBI: No Doubt Gabrielle Giffords was Target

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### PHOTO GALLERIES



View: Peek Inside a \$12K-per-Night Motor Home-Turned-Hotel

Travel

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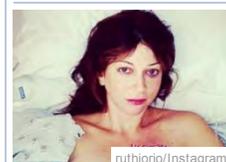
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# **EXHIBIT 21**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**



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## Sandy Hook Shooter's Pause May Have Aided Students' Escape

Detectives reviewing Lanza's psychiatric records

December 23, 2012 | By EDMUND H. MAHONY, DAVE ALTIMARI and JON LENDER, daltimar@courant.com, The Hartford Courant

As many as a half-dozen first graders may have survived Adam Lanza's deadly shooting spree at Sandy Hook Elementary School because he stopped firing briefly, perhaps either to reload his rifle because it jammed, according to law enforcement officials familiar with the events.

A source said that the Bushmaster rifle that Lanza used in the shootings is at the state police forensic laboratory undergoing several tests, including tests to determine whether it was jammed.



A Bushmaster semi-automatic rifle, similar to the type used by Adam Lanza... (MICHELLE MCLOUGHLIN, REUTERS)

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The children escaped from the first-grade classroom of teacher Victoria Soto, one of the six educators Lanza killed in Newtown after shooting his way through a glass door with the .223-caliber semiautomatic rifle on the morning of Dec. 14.

On Friday, detectives obtained and began examining records related to psychiatric care Lanza had received in an attempt to determine a motive. Several friends of his mother have said that he suffered from Asperger's syndrome but authorities have not confirmed that or indicated it had anything to do with the shootings.

Lanza killed 27 people — 20 children, four teachers, the school principal, a school psychologist and his mother, Nancy — before shooting himself in the head as police began arriving at the school.

The arriving officers encountered a shocking scene in Soto's classroom. Lanza had shot her, as well as special education teacher Anne Marie Murphy and six of Soto's 6- and 7-year old students. Seven of Soto's students were found huddled and unharmed in a classroom closet, apparently hidden by Soto when she heard shooting. The other students fled the classroom.

Based on initial statements from surviving children and the fact that unfired bullets from Lanza's rifle were found on the ground, detectives suspect that some students were able to run to safety when Lanza stopped firing, probably for a short period of time, the officials said.

It is possible that Lanza, who reloaded the rifle frequently, mishandled or dropped a magazine and unfired bullets fell to the floor, they said.

But it also is possible, they said, that the mechanism that fed bullets into the rifle jammed, causing Lanza to remove the magazine and clear the weapon. Unfired bullets could have fallen to the classroom floor during that process as well, law enforcement officials said.

The six children who escaped Lanza's rampage ran to a home a short distance from the school. Upon reaching the home, one of the boys told the owner that "we obeyed the rules, we stayed on the sidewalk," one of the officials said.

The authorities have learned generally from the children who ran away that something may have happened to Lanza's rifle that caused him to stop firing. The substance of the statements, which are not entirely consistent, is that a piece of the weapon, probably a magazine holding live bullets, was dropped or fell to the classroom floor.

Investigators have decided not to formally interview the children, based on advice from Yale child psychologists. Given the chaotic nature of the scene, it is also possible that some children escaped while Lanza was shooting others in the room.

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State police are expected to wrap up work at the school and release the school as a crime scene in the next few days. They still are trying to determine how many shots Lanza fired.

Lanza killed himself in Soto's classroom with one of the two pistols he carried into the building. He killed himself as police entered the building.

Police found a loaded 20-round shotgun in the trunk of the car similar to what is known as a "street sweeper." Police believe that Lanza didn't bring it into the school because he couldn't carry all of the weapons and ammunition. Lanza, who was about 6 feet tall, weighed barely 110 pounds, law enforcement sources said.

The few people who knew Lanza have portrayed him in the days since the mass shootings as an awkward, emotionally isolated, withdrawn young man. He attended public schools in Newtown, but at times was home-schooled by his mother, who was said by authorities and others to be the only person with whom he was socially engaged.

Lanza lived with his mother. He had two bedrooms and used one of them to keep computer equipment on which he is said to have enjoyed playing video games involving violent war games.

Before the shootings at the elementary school, Lanza shot his mother four times with a .22-caliber rifle as she lay in bed. He left the rifle at the house. All the guns were properly registered to Nancy Lanza.

Adam Lanza also broke apart his computer equipment in a way that has prevented authorities from retrieving data that could reveal with whom he may have corresponded or played video games.

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# **EXHIBIT 22**

## **Declaration of Roderick M. Thompson in Support of Sunnyvale's Opposition to Plaintiffs' Motion for Preliminary Injunction**

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SAN FRANCISCO POLICE CHIEF GREG SUHR  
9

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12

13 SAN FRANCISCO VETERAN POLICE  
OFFICERS ASSOCIATION, LARRY  
BARSETTI, RAINERIO GRANADOS,  
14 ARTHUR RITCHIE, and RANDALL LOW,

15 Plaintiffs,

16 vs.

17 THE CITY AND COUNTY OF SAN  
FRANCISCO, THE MAYOR OF SAN  
18 FRANCISCO, EDWIN LEE in his official  
capacity, THE CHIEF OF THE SAN  
19 FRANCISCO POLICE DEPARTMENT,  
GREG SUHR, in his official capacity, and  
20 DOES 1-10,

21 Defendants.  
22  
23  
24  
25  
26  
27  
28

Case No. CV 13-5351 WHA

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

Hearing Date: Feb. 13, 2013  
Time: 8:00 a.m.  
Place: Courtroom 8, 19th Floor

Date Action Filed: Nov. 19, 2013  
Trial Date: None Set

1 and long guns were equipped with LCMs, LCMs were used in somewhere between 31% to 41% of  
 2 gun murders of police. Koper Dec. ¶ 18 & Ex. D at 160, 162. Indeed, across all kinds of gun attacks,  
 3 those committed with semiautomatic weapons, including LCMs, tend to result in more shots fired,  
 4 more people wounded, and more wounds per victim than attacks with other weapons. Koper Dec.  
 5 ¶¶ 21-26. These results have been confirmed in multiple studies. *Id.* There is also evidence  
 6 suggesting that the particularly large ammunition capacities of assault weapons, along with their  
 7 military-style features, have special attraction for criminals, who purchase them at higher rates than  
 8 those without criminal histories or arrest records. Koper Dec. ¶ 11 & Ex. C at 17.

9 Facing an offender equipped with a large-capacity magazine is a particularly dangerous event  
 10 for a police officer. Lazar Dec. ¶ 8. When a shooter pauses, even briefly, to reload a weapon, police  
 11 officers have the chance to take tactical action, such as by advancing or taking cover. A shooter who  
 12 does not have to reload does not give police that opportunity. *Id.*; Van Aken Dec. Ex. 18 (media  
 13 accounts where shooters were subdued by police or bystanders during reloading). The danger that  
 14 LCMs pose to police officers in San Francisco is not hypothetical. San Francisco police officers have  
 15 been shot at and murdered by shooters with LCMs. Lazar Dec. ¶¶ 8-9 & Ex. A.

16 In addition to the immense human toll of gun murders committed using LCMs, every act of  
 17 gun violence results in high social costs. The lifetime medical costs per gunshot injury are nearly  
 18 \$30,000, and studies estimate the full societal costs from gun violence to be \$1 million per shooting.  
 19 Koper Dec. ¶¶ 53-54. If these estimates are correct, then even a 1% reduction in shootings nationally  
 20 could result in hundreds of millions of dollars in savings. *Id.* ¶ 54.

### 21 **III. Plaintiffs' Evidence Does Not Rebut This Showing of Increased Lethality**

22 To combat any claim that LCMs are more dangerous than standard-capacity magazines,  
 23 Plaintiffs offer the declaration of criminologist Gary Kleck. Because this is the only evidence that  
 24 Plaintiffs offer that relies on social science evidence, it bears special attention.

25 Dr. Kleck's work on guns and gun violence has been widely discredited in other contexts. He  
 26 has famously estimated that 2.5 million Americans use a gun defensively against a criminal attacker  
 27 each year. *See* Cook et al., "The Gun Debate's New Mythical Number: How Many Defensive Uses  
 28 Per Year?", *J. of Pol'y Analysis & Mgmt*, Vol. 16, No. 3, 1997, at 463 (Van Aken Dec., Ex. 19). This

1 estimate, based on self-reported survey responses, is unreliable. For instance, the survey numbers that  
2 Dr. Kleck relied on show 132,000 perpetrators killed or wounded by defenders every year—  
3 approximately the same number of people whom hospitals report were killed by gunshots or received  
4 treatment for gunshot wounds each year. *Id.* at 465. It cannot be that every gunshot is a self-defense  
5 gunshot. Also according to these survey numbers, more guns are wielded to defend against rapes each  
6 year than there are actual rapes or attempted rapes each year. *Id.* at 466. It turns out that asking  
7 people about their subjective experiences of using guns is just not a very reliable social science  
8 method. For that reason, Dr. Kleck’s claim about defensive gun use has been called an “outrageous  
9 number” with “no reasonable basis.” *Id.* at 463 (internal quotation marks omitted). “All attempts at  
10 external validation [have] reveal[ed] it to be a huge overestimate.” Hemenway, *Private Guns, Public*  
11 *Health*, 2004, at 67 (excerpt at Van Aken Dec., Ex. 20).

12 Dr. Kleck’s analysis is no more reliable in this case. His declaration attempts to show, for  
13 instance, that LCMs are not often used in mass shootings, and he states that, of the 57 mass shootings  
14 between 1994 and July 2014 that he studied, “no LCM was used in . . . 35 incidents (or about 61%).”  
15 Kleck Dec. ¶ 14. This is a deeply misleading assertion: A review of the appendix to Dr. Kleck’s  
16 declaration reveals that his dataset of mass shootings included only *three* incidents where a magazine  
17 of standard capacity was used, 30 incidents where magazine capacity was *unknown*, and 22 incidents  
18 where a large-capacity magazine was known to be used. *Id.* at pp. 14-36. In other words, when Dr.  
19 Kleck tells the Court that LCMs were not used in 35 incidents, what he means is that either LCMs  
20 were not used or magazine capacity was not reported. If one only counts instances where magazine  
21 capacity is known, the figure is 22 out of 25 incidents, or 88%.

22 Dr. Kleck also argues that magazine capacity does not make a difference because shooters in  
23 mass killings do not achieve rates of fire that are any faster than they could achieve by reloading a new  
24 magazine. Kleck Dec. ¶¶ 18-19 & p. 13. This, too, is specious. Dr. Kleck bases his rate-of-fire  
25 estimates on media accounts of the number of shots and the length of shooting. But he includes in his  
26 dataset several instances where the shooter was known not to have fired continuously but to have  
27 walked from place to place during the event to seek out more victims, such as the 2012 Sandy Hook  
28 Elementary School shooting and the 2007 Virginia Tech massacre. *See Sandy Hook Report, supra*, at

1 1-2; *Mass Shootings at Virginia Tech: Report of the Review Panel*, Aug. 2007, at 27-28 (Van Aken  
2 Dec., Ex. 21). Thus, even assuming that media accounts of the duration of events like these are  
3 reliable, Dr. Kleck’s rate-of-fire estimate is simply not an approximation of how fast a mass shooter  
4 with a large-capacity magazine can fire. And if it were, it would be contradicted by the account  
5 Plaintiffs offer from Massad Ayoob, who reports, “A highly skilled police officer or competitive  
6 shooter may be able to accomplish a reload in two seconds. Most people take considerably longer;  
7 especially someone who is under the mental duress typically experienced during an attack.” Ayoob  
8 Dec. ¶ 27. “By contrast, simply pulling the trigger again on a pistol that still has more ammunition in  
9 it can be accomplished in a fraction of a second.” *Id.* ¶ 28.

10 Most importantly, Dr. Kleck’s central contention—that use of LCMs almost never makes a  
11 difference in the lethality of mass shootings—is wrong. He asserts that magazine capacity makes a  
12 difference to injuries or deaths only where the shooter possesses only one gun and only one LCM,  
13 since shooters who have more than one gun or magazine could simply switch guns or magazines to  
14 keep firing. Kleck Dec. ¶ 14. He reports that there have been no such cases since 1994. *Id.* There are  
15 many problems with this analysis. First, Dr. Kleck is wrong that shooters infrequently have only one  
16 gun; Dr. Lucy Allen’s analysis showed a single gun in 41% of mass shooting incidents. Allen Dec.  
17 ¶ 17. Dr. Kleck apparently used an incomplete dataset, as he did not include a number of the single-  
18 gun incidents that Dr. Allen found using the very well-publicized *Mother Jones* dataset. *Compare*  
19 Allen Dec. table 1 (listing, for example, single-gun shootings in 2013 in Hialeah, Florida; and  
20 Herkimer, New York) *with* Kleck Dec. at p. 35 (reporting no mass shootings in 2013). Second, Dr.  
21 Kleck offers no reason why it is just as fast to switch guns or magazines as it is to keep shooting with  
22 the same magazine, and the Ayoob Declaration contradicts that view. Ayoob Dec. ¶¶ 27-28. Third,  
23 Dr. Kleck misses the forest for the trees: His narrow criteria for when an LCM matters *exclude the*  
24 *single incident where he admits that a shooter was tackled while reloading*—that is, where actual  
25 events proved that magazine capacity mattered—because that shooter had three guns and three LCMs.  
26 Kleck Dec. ¶ 15; *id.* at p. 17. Plainly, real life demonstrates that Dr. Kleck’s criteria for materiality of  
27 LCM use are too narrow.

1 And indeed, real life demonstrates this in many more instances. The shooter who wounded  
 2 Gabrielle Giffords and killed six others, including a federal judge, was tackled by bystanders while he  
 3 was reloading, according to first-hand accounts of the incident. Dolak & Weaver, *Woman Wrestled*  
 4 *Fresh Ammo Clip from Tucson Shooter as He Tried to Reload*, ABC News, Jan. 9, 2011 (Van Aken  
 5 Decl., Ex. 22).<sup>7</sup> In addition to the 1998 Oregon mass shooting where Dr. Kleck acknowledges the  
 6 shooter was subdued while reloading, Kleck Dec. ¶ 15, the 1993 Long Island Railroad commuter train  
 7 shooter was tackled as he attempted to load a fresh 15-round LCM in his pistol. See H.R. Rep. No.  
 8 103-322, *supra*, at 33.<sup>8</sup> And law enforcement sources have stated that a half-dozen children may have  
 9 been able to escape from Sandy Hook Elementary School while the shooter was switching magazines.  
 10 Mahoney *et al.*, “Sandy Hook Shooter’s Pause May Have Aided Students’ Escape,” *Hartford Courant*,  
 11 Dec. 23, 2012 (Van Aken Dec., Ex. ) at 1;<sup>9</sup> see also Declaration of John J. Donohue III (“Donohue  
 12 Decl.”) ¶ 11 & n.4 (families estimate 11 children saved during Newtown shooter’s reloading).

13 Mass shootings are not the only instances where a killer’s pause to reload has saved lives. In  
 14 less well-known incidents where multiple bullets are fired but fatalities are fewer, there are many  
 15 occasions where shooters have been subdued while reloading. See Van Aken Dec., Ex. 18 (media  
 16 reports concerning 42 such incidents). In a case challenging New York State’s LCM ban last year, Dr.  
 17 Kleck filed a declaration claiming, inconsistently with his declaration in this case, that he knew of only  
 18 one mass shooting event where bystanders had intervened, the 1993 L.I.R.R. shooting described  
 19 above, and that “[b]ystander intervention was feasible in that case *only because of its unique location*,”  
 20 *i.e.* on a train where bystanders were forced to remain close to the shooter. Declaration of Gary Kleck,  
 21 Dkt. 23-9, *NYSRPA v. Cuomo*, Civil No. 1-13-cv-00291, at 4 (Van Aken Dec., Ex. 38) (emphasis  
 22 added). The 42 accounts San Francisco has located where bystanders or police intervened during a  
 23

24 <sup>7</sup> Notably, this event, too, is excluded from Dr. Kleck’s account of cases where LCM use was  
 25 material because the shooter had four magazines.

26 <sup>8</sup> This shooter had multiple magazines as well. See Clines, “Death on the L.I.R.R.,” *New York*  
 27 *Times*, Dec. 9, 1993 (Van Aken Dec., Ex. 23).<sup>9</sup> These officials attributed the children’s escape either to  
 28 the shooter’s pause to reload or to a jammed rifle. But the rifle was later tested and functioned  
 properly. *Sandy Hook Report, supra*, 22.

<sup>9</sup> These officials attributed the children’s escape either to the shooter’s pause to reload or to a  
 jammed rifle. But the rifle was later tested and functioned properly. *Sandy Hook Report, supra*, 22.

1 shooter’s reloading, in a wide variety of locations, demonstrates that Dr. Kleck’s understanding is  
2 deeply mistaken.

3 Finally, Dr. Kleck offers no evidence to contradict Dr. Koper’s and Dr. Allen’s empirical  
4 evidence that mass shootings with LCMs, or indeed any kinds of crimes committed with LCMs, result  
5 in more fatalities and more injuries than with standard-capacity magazines.

#### 6 **IV. Large-Capacity Magazines Are Not Useful for Self-Defense in the Home**

7 There is no credible evidence whatsoever that prohibiting San Franciscans from using large-  
8 capacity magazines will impact their ability to defend themselves. The direct case that Plaintiffs make  
9 that civilians need military or police firepower in the home is based solely on a handful of anecdotes  
10 from across the country, most of them decades old, some of them involving police action or offensive  
11 action by the shooter, and nearly all occurring outside the home. *See* Ayoob Decl. ¶¶ 5-9 & n.3; Van  
12 Aken Dec., Exs. 25 (Gonzalez account: 1997); 26 (Neel account: 1994; Neel decided to come to the  
13 aid of a police officer); 27 (Honeycutt account: 2004; Honeycutt fired 15 rounds at close range into  
14 someone who “approach[ed] with a gun).

15 But Plaintiffs present no evidence whatsoever that such occurrences are widespread, and the  
16 great weight of the evidence is to the contrary. Even Dr. Kleck has admitted elsewhere that most  
17 criminal uses of guns, and most defensive uses of guns, result in few if any shots fired. Kleck, *Point*  
18 *Blank: Guns & Violence in America* (1991) (2d paperback ed. 2009), at 111 (Van Aken Dec., Ex. 28)  
19 (“Only a tiny fraction of criminal gun assaults involves anyone actually being wounded, even  
20 nonfatally, and one would expect the same to be true of defensive gun uses”).<sup>10</sup> Gun-rights supporters  
21 maintain databases of “self-defense stories” to illustrate the need for firearms in the home, but these  
22 stories only illustrate that rarely are more than a few shots fired. Allen Dec. ¶ 7. Dr. Allen’s analysis  
23 of this database for the last three years showed an average of 2.1 bullets fired by defenders, and there  
24 were *no* incidents where the defender reporting firing more than 10 bullets. *Id.* ¶ 9. And an analysis  
25 of earlier “self-defense stories” printed on a pro-gun website reported that “the average and median

26 \_\_\_\_\_  
27 <sup>10</sup> Dr. Kleck is reported elsewhere by Harvard public health specialist David Hemenway as  
28 stating, “There is little or no need for a gun for self-protection [for most Americans] because there’s so  
little risk of crime. People don’t believe it, but it’s true. You just can’t convince most Americans  
they’re not at serious risk.” Hemenway, *Private Guns, supra*, at 64.

# **EXHIBIT 27**

**To**

**Declaration of Roderick M. Thompson in  
Support of Sunnyvale's Opposition to  
Plaintiffs' Motion for Preliminary  
Injunction**

## DEATH ON THE L.I.R.R.: The Rampage; Gunman in a Train Aisle Passes Out Death

By FRANCIS X. CLINES  
Published: December 09, 1993

When the gunman emptied his first clip into passengers at the rear of the car and stopped to reload, Kevin Zaleskie, crouching in panic a few seats farther along, realized he had one small chance to flee before aim was taken at him as the stalker worked the aisle, shooting to the right, then to the left, as methodical as if he were taking tickets.

"I got up to run, but the aisle was jammed with someone," Mr. Zaleskie, a financial analyst for I.B.M., said today, recalling what he thought would be the violent ending of his life amid the most banal routine of commuting home. "I didn't think I was going to get out. I was very panicky. I ducked back down in the seat. The guy was moving in my direction, shooting again." A Ticket and a Gun

The rampage by the gunman aboard the 5:33 evening commuter train from Pennsylvania Station had moved Mr. Zaleskie and 80 other passengers in the third car from the easiest of lulling habits to an instantaneous scramble of terror and fear.

A man intent on murder who carefully paid for his ticket back in New York City was firing methodically with a 9-millimeter pistol, a hallmark of modern America's pathology of violence and fear. In three minutes of gunfire, he reduced the defenseless commuters in the third car to casualties on a one-sided battlefield.

As the gunman was finally brought to ground, tackled by one brave passenger and pinned by two others as he sought to reload his pistol for a third 15-shot rampage, David Farrell joined a reinforcement group that came from hiding to grab his legs and arms. "We held on and the gunman said, 'Oh God, what did I do? What did I do? I deserve whatever I get.' "

One of the men who subdued him could be heard commanding again and again from within the bloody scrimmage: "Stay where you are. Shut up. Shut up. Shut up."

Passengers farther away in the train would not discover the carnage until well after the gunman was subdued and the first of his 25 victims limped or were carried onto the Long Island Rail Road platform. One passenger, William A. Warshowsky, had scrambled for his life from the gunman's approach, leaped with a crowd into the darkness from the stopped train and ran all the way home, finally checking his body for wounds and celebrating his survival intact.

Another passenger, Margaret Richards, was amazed even beyond the bloodied windows and three victims she saw slumped tightly together with head wounds, when she saw the gunman handcuffed later in a patrol car. "He was very calm. No emotions showing. Everything fine, you know, 'dum-de-dum,' " she related, songlike. "And then someone came over from all the blood of the train and lost it and began shouting, 'How can he be sitting there so calm after everything he did?' "

In the moment after the gunman had been subdued, Mr. Zaleskie had turned in his mind from the next likely victim to someone of immeasurable good fortune. In a minute, he was taking off his necktie and began making a tourniquet for a woman bleeding nearby, delivered from the terrifying stalker.

"The guy kept coming down the aisle with the gun," Mr. Zaleskie related of the height of the carnage. "And I just put my briefcase in front of my face and hunched down with two other people in the seat," he said, describing something close to fearful resignation. "He walked past, still shooting. And I didn't feel any bullets," the passenger continued in a very tight, very grateful monotone of recollection and survival.

At this point, more than a score of passengers were already cast about the car, wounded and bleeding, and the gunman tended his pistol, the second 15-shot clip exhausted.

"So he's reloading again and he was certainly going to keep shooting," Mr. Zaleskie recalled. "But someone yells, 'Grab him!' "

That was when one passenger tackled the gunman in the center of the car before he could get off another round and two more men piled onto him. The killer was pinned in a seat in the blood- and gore-smeared third car of the train, which had come to a stop at the Merillon Avenue station, panic spreading in all directions.

"A horror," said Mr. Zaleskie of the scene inside the car, suddenly quiet after the outrageous siege. "An absolute horror, and lying around in the aisles and in the seats, you see these people you never quite got to know across years of commuting," he said, his tone tinged with wonder. "Faces you recognize each day, but don't really know. And this horror has happened to them."

At the front of the car, Mr. Warshowsky had got up to wait by the door as the train approached the station when he heard the pop of the 9-millimeter gunfire and mistook it for something harmless, caps or fireworks. "A woman yelled, 'He's got a gun! He's shooting people!' " the passenger recalled, saying he was instantly moving in an adrenal blur, jumping down into a seat to hide as the bullets sprayed about the car.

"I heard 15 shots," said the 26-year-old purchasing department worker at The New York Times. "The gunman was pressing the trigger every half second or so. Going side to side shooting people. Not rapid fire, but pressing the trigger steadily -- pop, pop, pop. When he stopped to reload I made a run for the next car. We were trampling each other. I thought the guy was right at my back," said the New York City native, in his

second year of suburban life.

In the next car, the second in the 12-car train, some passengers, unaware of the killing going on next door, seemed annoyed at the unruly influx. "Be calm," one shouted at Mr. Warshowsky, who joined a crowd that manually forced open a door as the train pulled into the station. He burst forth to freedom.

The gunman had moved backward down the aisle, suddenly, briefly, facing each victim as or after he fired. The gunman was identified by the police today as Colin Ferguson, a 35-year-old native of the island of Jamaica who authorities said was a rage-filled individual from a furnished room in Brooklyn.

Police officials reported that the suspect was carrying scraps of angry notes cast in racist tones but directed across a spectrum of institutions and ethnic groups, including whites, Asians and black officials police said he characterized in his angry jottings as corrupt and racist. None of his victims was black, and police officials, who described his siege as methodical and inclusive, were unable to say whether there were other black passengers aboard the train.

"This was the work of a deranged, maniacal person who for a variety of reasons decided to explode," said Chief Joseph Flynn of the Long Island Rail Road police.

When Mr. Warshowsky began fleeing, he saw a conductor peer into the bloody third car from the second, spot the gunman and make an about-face. The railroad defended the crew's performance, saying the engineer, informed of the shooting, thought it best not to open the doors immediately because two of the cars were not at the platform. A conductor finally managed to climb from a train window and open some doors from outside so the panicky throng could flee.

As the gunman had moved in vicious pathology down the aisle, one passenger heard a man suddenly shout, "I have seven kids. Please don't kill me." His fate was unknown.

Police detectives said it appeared that the gunman had been planning his foray for more than a week. In the aftermath, it was his relentlessness that was most often recalled with lingering fear.

In the fourth car, Lorraine Oltadel's first notion of something going wrong aboard the 5:33 was the sudden shout, "He is coming with a gun!"

She did not immediately comprehend the warning but looked into the third car and saw the full threat, gun in hand, leveling passengers. "There he was. He was coming."

Then came a pause free of gunfire. A man shouted, "I think he has run out of bullets." But then, Ms. Oltadel recalled, someone screamed anew in the train: "He's coming again."

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8 SUNNYVALE, ANTHONY SPITALERI in his  
official capacity, THE CHIEF OF THE  
9 SUNNYVALE DEPARTMENT OF PUBLIC  
SAFETY, FRANK GRGURINA, in his official  
10 capacity

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION  
14

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

18 Plaintiffs,

19 v.

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

24 Defendants.  
25

Case No. 13-cv-05807 RMW

**DECLARATION OF LUCY P. ALLEN IN  
SUPPORT OF SUNNYVALE’S OPPOSITION  
TO PLAINTIFFS’ MOTION FOR  
PRELIMINARY INJUNCTION**

Date: February 21, 2014  
Time: 9:00 a.m.  
Location: San Jose Courthouse  
Courtroom 6 – 4<sup>th</sup> Floor  
280 South 1<sup>st</sup> Street  
San Jose, CA 95113

26 I, Lucy P. Allen, declare as follows:

27 1. I am a Senior Vice President of NERA Economic Consulting (“NERA”), a  
28 member of NERA’s Securities and Finance Practice and Chair of NERA’s Mass Torts and

1 Product Liability Practice. NERA provides practical economic advice related to highly complex  
2 business and legal issues arising from competition, regulation, public policy, strategy, finance,  
3 and litigation. NERA was established in 1961 and now employs approximately 500 people in  
4 more than 20 offices worldwide.

5 2. In my 19 years at NERA, I have been engaged as an economic consultant or expert  
6 witness in numerous projects involving economic and statistical analysis. I have been qualified as  
7 an expert and testified in court on various economic and statistical issues relating to the flow of  
8 guns into the criminal market. I have testified at trials in Federal District Court, before the New  
9 York City Council Public Safety Committee, the American Arbitration Association and the  
10 Judicial Arbitration Mediation Service, as well as in depositions.

11 3. I have a B.A. from Stanford University, an M.B.A. from Yale University, and  
12 M.A. and M. Phil. degrees in Economics, also from Yale University. Prior to joining NERA, I  
13 was an Economist for both President George H. W. Bush’s and President Bill Clinton’s Council  
14 of Economic Advisers.

15 4. This declaration addresses the results of analyses that I and others under my  
16 direction at NERA conducted with respect to the following issues: (a) the number of rounds of  
17 ammunition fired by individuals using a gun in self-defense; and (b) magazines used in mass  
18 shootings.

19 **A. Number of rounds fired by individuals in self-defense**

20 5. Plaintiffs claim the banned “large-capacity magazines” are commonly used in  
21 Sunnyvale in the home for self-defense. The Complaint alleges that the “magazines prohibited by  
22 the Ordinance are in widespread, common use throughout the United States” and that these  
23 magazines, which are “capable of holding more than ten rounds [...] are currently possessed by  
24 law-abiding citizens for the core lawful purpose of self-defense, including in-home self-defense.”<sup>1</sup>  
25

26 <sup>1</sup> Complaint, ¶2 and ¶42. The complaint also alleges that “the use of standard-capacity firearms  
27 and magazines with capacities of more than ten rounds increase the likelihood that a law-abiding  
28 citizen will survive a criminal attack.” ¶49.

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6. Data from the NRA Institute for Legislative Action (“NRA-ILA”), however, indicates that it is rare for a person, when using a firearm in self-defense, to fire more than ten rounds.

7. The NRA-ILA maintains a database of “armed citizen” stories describing private citizens who have successfully defended themselves, or others, using a firearm. A study of all incidents in this database over a 5-year period from 1997 through 2001 found that it is rare for individuals to defend themselves using more than ten rounds. Specifically, this study found that, on average, 2.2 shots were fired by defenders and that in 28% of incidents of armed citizens defending themselves the individuals fired no shots at all.<sup>2</sup>

8. We performed a similar analysis of NRA-ILA stories for the 3-year period January 2011 through December 2013. For each incident, the number of offenders, defenders, and shots fired were tabulated, along with the location, nature and outcome of the crime. The information was gathered for each incident from both the NRA-ILA synopsis and, where available, one additional news story.<sup>3</sup>

9. According to this analysis, defenders fired on average 2.1 bullets. Out of 279 incidents, there were no incidents in which the defender was reported to have fired more than 10 bullets. In 16% of incidents, the defender did not fire any shots, and simply threatened the offender with a gun. For incidents occurring in the home (53% of total), defenders fired an average of 2.1 bullets, and fired no bullets in 12% of incidents in the home. The table below summarizes some of these findings.

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<sup>2</sup> Claude Werner, “The Armed Citizen – A Five Year Analysis.”

<sup>3</sup> The following incidents were excluded from the analysis: (1) repeat stories (one incident listed multiple times on NRA website), (2) wild animal attacks, and (3) one incident where the supposed victim later pleaded guilty to covering up a murder. When the exact number of shots fired was not specified, we used the average for the most relevant incidents with known number of shots. For example, if the stories indicated that “shots were fired” this would indicate that at least two shots were fired and thus we used the average number of shots fired in all incidents in which two or more shots were fired and the number of shots was specified.

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<b>Rounds Fired in Self-Defense Based on NRA-ILA Armed Citizen Stories January 2011 - December 2013</b>		
	<u>Rounds Fired by Individual in Self-Defense</u>	
	<u>Overall</u>	<u>Incidents In Home</u>
Average Shots Fired	2.1	2.1
Number of Incidents with No Shots Fired	44	17
Percent of Incidents with No Shots Fired	15.8%	11.5%
Number of Incidents with >10 Shots Fired	0	0
Percent of Incidents with >10 Shots Fired	0.0%	0.0%
<b>Notes and Sources:</b>		
Events from NRA-ILA Armed Citizen database covering 279 incidents from January 1, 2011 through December 31, 2013. Excludes repeat stories, wild animal attacks, and one incident where the supposed victim later pleaded guilty to covering up a murder.		

**B. Mass shootings**

**1. Use of large-capacity magazines in mass shootings**

10. We found two comprehensive sources detailing historical mass shootings: 1) “US Mass Shootings, 1982-2012: Data From Mother Jones’ Investigation” published by Mother Jones and 2) “Mass Shooting Incidents in America (1984-2012)” published by the Citizens Crime Commission of New York City. See attached Table 1 for a summary of the combined data.

11. The definition of mass shooting and the period covered differed somewhat for each of the sources. Mother Jones covers 67 mass shootings from 1982 to 2013. Mother Jones includes mass shootings in which a shooter killed four or more people in one incident in a public place and excludes crimes involving armed robbery or gang violence.<sup>4</sup> Citizens Crime Commission covers 30 mass shootings from 1984 to 2012. Citizens Crime Commission includes mass shootings in which a shooter killed four or more people and the gun used by the shooter had

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<sup>4</sup> “What Exactly is a Mass Shooting,” Mother Jones, August 24, 2012. <http://www.motherjones.com/mojo/2012/08/what-is-a-mass-shooting>. Two incidents included in the Mother Jones data (Columbine High School and Westside Middle School) involved two shooters. “A Guide to Mass Shootings in America,” Mother Jones, February 27, 2013.

1 a magazine with capacity greater than ten.<sup>5</sup> We updated the data on shots fired for mass  
2 shootings in 2013 where available.

3 12. Based on the combined data we found that large-capacity magazines (those with a  
4 capacity to hold more than 10 rounds of ammunition) are often used in mass shootings. Such  
5 large-capacity magazines were used in the majority of the mass shootings with known magazine  
6 capacity since 1982 (34 out of 40 mass shootings).<sup>6</sup> In the past two years, large-capacity  
7 magazines were used in five of the seven mass shootings with known magazine capacity.<sup>7</sup>

8 13. The data indicates that it is common for offenders to fire more than ten rounds  
9 when using a gun with a large-capacity magazine in mass shootings. In particular, in mass  
10 shootings that involved use of large-capacity magazine guns, the average number of shots fired  
11 was 75.<sup>8</sup>

12 **2. Casualties in mass shootings with large-capacity magazine guns compared**  
13 **with other mass shootings**

14 14. Based on our analysis of the combined mass shootings data in the past 30 years,  
15 casualties were higher in the mass shootings that involved large-capacity magazine guns than in  
16 other mass shootings. In particular, we found an average number of fatalities or injuries of 22 per  
17 mass shooting with a large-capacity magazine versus 9 for those without.<sup>9</sup>

18 <sup>5</sup> “Mass Shooting Incidents in America (1984-2012),” Citizens Crime Commission of New York  
19 City. <http://www.nycrimecommission.org/mass-shooting-incidents-america.php>

20 <sup>6</sup> For many of the mass shootings, the data does not indicate whether a large-capacity magazine is  
21 used. Based only on Mother Jones data, large capacity magazines were used in 32 out of 38 mass  
22 shootings with known magazine capacity.

23 <sup>7</sup> There were five additional mass shootings in which the magazine capacity was unknown.

24 <sup>8</sup> There were 27 mass shootings, in which the magazine capacity and the number of shots fired  
25 were known.

26 <sup>9</sup> A 2013 study by Mayors Against Illegal Guns similarly found that when mass shootings  
27 involved assault weapons or high capacity magazine, the number of deaths was higher. The study  
28 was based on data from the FBI and media reports covering the period January 2009 through  
January 2013. The study found that mass shootings where assault weapons or high-capacity  
magazines were used resulted in an average of 14.4 people shot and 7.8 deaths versus other mass  
shootings that resulted in 5.7 people shot and 4.8 deaths. *Analysis of Recent Mass Shootings*,  
Mayors Against Illegal Guns, September, 2013.

1           **3. Mass shootings with only one gun and large capacity magazines**

2           15. In his declaration filed in this matter, plaintiffs’ expert Dr. Gary Kleck implies that  
3 killers in mass shootings are unlikely to have only one gun with a large-capacity magazine, and  
4 that thus, the ban would not prevent mass shootings because shooters could use multiple guns.<sup>10</sup>

5           16. Dr. Kleck states that there has not been “a single mass shooting in which the  
6 offender used a LCM [large capacity magazine], and was known to have possessed just one gun  
7 and just one magazine in his immediate possession.”<sup>11</sup> Dr. Kleck’s statement is misleading  
8 because his list of mass shootings includes a number of incidents with missing data. There are 11  
9 mass shootings in Dr. Kleck’s data, or 20% of the incidents, for which there is not enough data to  
10 make such a conclusion. In other words, according to Dr. Kleck’s data in 20% of these incidents  
11 it is possible that a large capacity magazine, one gun, and one magazine was used.

12           17. Moreover, based on our analysis of the combined mass shootings data in the past  
13 30 years, there have been 34 incidents (85% of the 40 mass shootings with known magazine  
14 capacity) in which the shooter used a large capacity magazine. There have been 28 incidents  
15 (41% of the 69 mass shootings) in which the shooter had only one gun. There were 14 incidents  
16 (35% of the 40 mass shootings with known magazine capacity) where the shooter had only one  
17 gun and used a large capacity magazine. An average of 14 people were killed or injured in each  
18 of these 14 mass shootings.<sup>12</sup>

19           **4. Percent of mass shooters’ guns legally obtained**

20           18. The combined data on mass shootings indicates that the majority of guns used in  
21 mass shootings were obtained legally. Shooters in almost 78% of mass shootings in the past 30

22  
23 <sup>10</sup> Declaration of Gary Kleck, December 23, 2013, ¶14.

24 <sup>11</sup> Declaration of Gary Kleck, December 23, 2013, ¶14.

25 <sup>12</sup> An analysis of only the mass shootings identified by Mother Jones yielded similar results: 1)  
26 Large capacity magazines were used in 32 out of the 38 mass shootings with known magazine  
27 capacity; 2) The shooter had only one gun in 26 out of the 67 mass shootings; 3) The shooter had  
28 only one gun and used a large capacity magazine in 12 of the 38 shootings with known magazine  
capacity. An average of 15 people were killed or injured during these 12 mass shootings.

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years obtained their guns legally (at least 54 of the 69 mass shootings) and 75% of the guns used in these 69 mass shootings were obtained legally (at least 115 of the 153 guns).<sup>13</sup>

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 29<sup>th</sup> day of January, 2014, in New York, NY.



Lucy P. Allen

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<sup>13</sup> Based on data from "US Mass Shootings, 1982-2012: Data from Mother Jones' Investigation" published by Mother Jones. <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data>

**Table 1: Combined Mass Shootings Data  
1982 - 2013**

Case	Location	Date	Source	Large-Capacity Magazine <sup>1</sup>		Fatalities <sup>2</sup>		Injuries <sup>2</sup>		Shots Fired	Obtained Legally?	Offenders' Number of Guns
				MJ/NE	CC	MJ	CC	MJ	CC	CC	MJ	MJ
1 Washington Navy Yard	Washington D.C.	9/16/2013	MJ	-	-	13	-	8	-	-	Yes	2
2 Hialeah	Hialeah, Florida	7/26/2013	MJ	-	-	7	-	0	-	10 <sup>3</sup>	Yes	1
3 Santa Monica	Santa Monica, California	6/7/2013	MJ	Yes	-	6	-	3	-	70 <sup>4</sup>	Yes	2
4 Federal Way	Federal Way, Washington	4/21/2013	MJ	-	-	5	-	0	-	-	Yes	2
5 Upstate New York	Herkimer, New York	3/13/2013	MJ	No	-	5	-	2	-	-	Yes	1
6 Newtown school	Newtown, Connecticut	12/14/2012	MJ/CC	Yes	Yes	28	28	2	-	154	Stolen	4
7 Accent Signage Systems	Minneapolis, Minnesota	9/27/2012	MJ	Yes	-	7	-	1	-	-	Yes	1
8 Sikh temple	Oak Creek, Wisconsin	8/5/2012	MJ/CC	Yes	Yes	7	7	3	3	-	Yes	1
9 Aurora theater	Aurora, Colorado	7/20/2012	MJ/CC	Yes	Yes	12	12	58	58	70	Yes	4
10 Seattle cafe	Seattle, Washington	5/30/2012	MJ	-	-	6	-	1	-	-	Yes	2
11 Oikos University	Oakland, California	4/2/2012	MJ	No	-	7	-	3	-	-	Yes	1
12 Su Jung Health Sauna	Norcross, Georgia	2/22/2012	MJ	-	-	5	-	0	-	-	Yes	1
13 Seal Beach	Seal Beach, California	10/14/2011	MJ	-	-	8	-	1	-	-	Yes	3
14 IHOP	Carson City, Nevada	9/6/2011	MJ/CC	Yes	Yes	5	5	7	7	-	Yes	3
15 Grand Rapids Shooting	Grand Rapids, Michigan	7/7/2011	CC	-	Yes	-	8	-	2	10	No	1
16 Tucson	Tucson, Arizona	1/8/2011	MJ/CC	Yes	Yes	6	6	13	13	33	Yes	1
17 Hartford Beer Distributor	Manchester, Connecticut	8/3/2010	MJ/CC	Yes	Yes	9	9	2	2	11	Yes	2
18 Coffee shop police killings	Parkland, Washington	11/29/2009	MJ	-	-	4	-	1	-	-	Stolen	2
19 Fort Hood	Fort Hood, Texas	11/5/2009	MJ/CC	Yes	Yes	13	13	30	30	214	Yes	1
20 Binghamton	Binghamton, New York	4/3/2009	MJ/CC	Yes	Yes	14	14	4	4	99	Yes	2
21 Carthage nursing home	Carthage, North Carolina	3/29/2009	MJ	No	-	8	-	3	-	-	Yes	2
22 Atlantis Plastics	Henderson, Kentucky	6/25/2008	MJ	-	-	6	-	1	-	-	Yes	1
23 Northern Illinois University	DeKalb, Illinois	2/14/2008	MJ/CC	Yes	Yes	6	6	21	21	54	Yes	4
24 Kirkwood City Council	Kirkwood, Missouri	2/7/2008	MJ	-	-	6	-	2	-	-	Stolen	2
25 Westroads Mall	Omaha, Nebraska	12/5/2007	MJ/CC	Yes	Yes	9	9	4	5	14	Stolen	1
26 Crandon	Crandon, Wisconsin	10/7/2007	MJ	-	-	6	-	1	-	-	Yes	1
27 Virginia Tech	Blacksburg, Virginia	4/16/2007	MJ/CC	Yes	Yes	33	33	23	17	176	Yes	2
28 Trolley Square	Salt Lake City, Utah	2/12/2007	MJ	No	-	6	-	4	-	-	No	2
29 Amish school	Lancaster County, Pennsylvania	10/2/2006	MJ	-	-	6	-	5	-	-	Yes	3
30 Capitol Hill	Seattle, Washington	3/25/2006	MJ	-	-	7	-	2	-	-	Yes	4
31 Goleta postal	Goleta, California	1/30/2006	MJ	Yes	-	8	-	0	-	-	Yes	1
32 Red Lake	Red Lake, Minnesota	3/21/2005	MJ	-	-	10	-	5	-	-	Stolen	3
33 Living Church of God	Brookfield, Wisconsin	3/12/2005	MJ	-	-	7	-	4	-	-	Yes	1
34 Damageplan show	Columbus, Ohio	12/8/2004	MJ	-	-	5	-	7	-	-	Yes	1
35 Hunting Camp	Meteor, Wisconsin	11/21/2004	CC	-	Yes	-	6	-	3	20	-	1
36 Lockheed Martin	Meridian, Mississippi	7/8/2003	MJ	-	-	7	-	8	-	-	Yes	5

**Table 1: Combined Mass Shootings Data  
1982 - 2013**

Case	Location	Date	Source	Large-Capacity Magazine <sup>1</sup>		Fatalities <sup>2</sup>		Injuries <sup>2</sup>		Shots Fired	Obtained Legally?	Offenders' Number of Guns
				MJ/NE	CC	MJ	CC	MJ	CC	CC	MJ	MJ
37 Navistar	Melrose Park, Illinois	2/5/2001	MJ	-	-	5	-	4	-	-	Yes	4
38 Wakefield	Wakefield, Massachusetts	12/26/2000	MJ/CC	Yes	Yes	7	7	0	0	37	Yes	3
39 Hotel	Tampa, Florida	12/30/1999	MJ	-	-	5	-	3	-	-	Yes	2
40 Xerox	Honolulu, Hawaii	11/2/1999	MJ/CC	Yes	Yes	7	7	0	0	28	Yes	1
41 Wedgwood Baptist Church	Fort Worth, Texas	9/15/1999	MJ/CC	Yes	Yes	8	8	7	7	30	Yes	2
42 Atlanta day trading spree	Atlanta, Georgia	7/29/1999	MJ	-	-	9	-	13	-	-	Yes	4
43 Columbine High School	Littleton, Colorado	4/20/1999	MJ/CC	Yes	Yes	15	15	24	23	188	No	4
44 Thurston High School	Springfield, Oregon	5/21/1998	MJ/CC	Yes	Yes	4	4	25	25	50	No	3
45 Westside Middle School	Jonesboro, Arkansas	3/24/1998	MJ/CC	Yes	Yes	5	5	10	10	26	Stolen	9
46 Connecticut Lottery	Newington, Connecticut	3/6/1998	MJ/CC	Yes	Yes	5	5	1	0	5	Yes	1
47 Caltrans maintenance yard	Orange, California	12/18/1997	MJ/CC	Yes	Yes	5	5	2	2	144	Yes	1
48 R.E. Phelon Company	Aiken, South Carolina	9/15/1997	MJ	-	-	4	-	3	-	-	No	1
49 Fort Lauderdale revenge	Fort Lauderdale, Florida	2/9/1996	MJ	-	-	6	-	1	-	-	Yes	2
50 Walter Rossler Company	Corpus Christi, Texas	4/3/1995	MJ	-	-	6	-	0	-	-	Yes	2
51 Air Force base	Fairchild Air Force Base, Washington	6/20/1994	MJ/CC	Yes	Yes	5	6	23	23	-	Yes	1
52 Chuck E. Cheese	Aurora, Colorado	12/14/1993	MJ	-	-	4	-	1	-	-	-	1
53 Long Island Rail Road	Garden City, New York	12/7/1993	MJ/CC	Yes	Yes	6	6	19	19	30	Yes	1
54 Luigi's	Fayetteville, North Carolina	8/6/1993	MJ	-	-	4	-	8	-	-	Yes	3
55 101 California Street	San Francisco, California	7/1/1993	MJ/CC	Yes	Yes	9	9	6	6	75	No	3
56 Watkins Glen	Watkins Glen, New York	10/15/1992	MJ	-	-	5	-	0	-	-	Yes	1
57 Lindhurst High School	Olivehurst, California	5/1/1992	MJ	-	-	4	-	10	-	-	Yes	2
58 Royal Oak postal	Royal Oak, Michigan	11/14/1991	MJ	-	-	5	-	5	-	-	Yes	1
59 University of Iowa	Iowa City, Iowa	11/1/1991	MJ	No	-	6	-	1	-	-	Yes	1
60 Luby's	Killeen, Texas	10/16/1991	MJ/CC	Yes	Yes	24	24	20	20	100	Yes	2
61 GMAC	Jacksonville, Florida	6/18/1990	MJ/CC	Yes	Yes	10	10	4	4	14	Yes	2
62 Standard Gravure	Louisville, Kentucky	9/14/1989	MJ/CC	Yes	Yes	9	9	12	12	21	Yes	5
63 Stockton schoolyard	Stockton, California	1/17/1989	MJ/CC	Yes	Yes	6	6	29	30	106	Yes	2
64 ESL	Sunnyvale, California	2/16/1988	MJ	-	-	7	-	4	-	-	Yes	7
65 Shopping centers	Palm Bay, Florida	4/23/1987	MJ	Yes	-	6	-	14	-	-	Yes	3
66 United States Postal Service	Edmond, Oklahoma	8/20/1986	MJ	-	-	15	-	6	-	-	Yes	3
67 San Ysidro McDonald's	San Ysidro, California	7/18/1984	MJ/CC	Yes	Yes	22	22	19	19	257	Yes	3
68 Dallas nightclub	Dallas, Texas	6/29/1984	MJ/CC	Yes	Yes	6	6	1	1	-	No	1
69 Welding shop	Miami, Florida	8/20/1982	MJ	No	-	8	-	3	-	-	Yes	1
<b>Average:</b>						<b>8.2</b>	<b>10.3</b>	<b>7.6</b>	<b>12.6</b>	<b>73.1</b>		
<b>Large-Capacity Magazine Average:</b>						<b>10.1</b>	<b>10.3</b>	<b>12.1</b>	<b>12.6</b>	<b>75.4</b>		
<b>Non Large-Capacity Magazine Average:</b>						<b>6.7</b>	<b>-</b>	<b>2.7</b>	<b>-</b>	<b>-</b>		

**Table 1: Combined Mass Shootings Data  
1982 - 2013**

Case	Location	Date	Source	Large-Capacity Magazine <sup>1</sup>		Fatalities <sup>2</sup>		Injuries <sup>2</sup>		Shots Fired	Obtained Legally?	Offenders' Number of Guns
				MJ/NE	CC	MJ	CC	MJ	CC	CC	MJ	MJ

**Notes and Sources:**

MJ represents Mother Jones data. CC represents Citizens Crime Commission of New York City data. NE represents NERA data. "-" means unspecified.

Mother Jones mass shootings data: "US Mass Shootings, 1982, 2012: Data from Mother Jones' Investigation," Mother Jones, December 28, 2012.

Mother Jones high capacity magazine data: "More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines," Mother Jones, February 27, 2013.

Citizens Crime Commission data from: "Citizens Crime Commission of New York City, Mass Shooting Incidents in America (1984-2012).

<sup>1</sup> Large-capacity magazines are those with a capacity to hold more than 10 rounds of ammunition.

<sup>2</sup> Offender included in counts of fatalities and injuries.

<sup>3</sup> Shots fired: "Shooter Set \$10,000 on Fire in Hialeah Shooting Rampage," NBC News, July 28, 2013.

<sup>4</sup> Shots fired: "Santa Monica shooter was 'ready for battle'; At least 70 rounds fired at students," The Malibu Times, June 8, 2013.

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SUNNYVALE, ANTHONY SPITALERI in his  
official capacity, THE CHIEF OF THE  
9 SUNNYVALE DEPARTMENT OF PUBLIC  
SAFETY, FRANK GRGURINA, in his official  
10 capacity

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13 SAN JOSE DIVISION

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

18 Plaintiffs,

19 v.

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

24 Defendants.

Case No. 13-cv-05807 RMW

**DECLARATION OF JAMES E.  
YURGEALITIS IN SUPPORT OF  
SUNNYVALE'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

Date: February 21, 2014  
Time: 9:00 a.m.  
Location: San Jose Courthouse  
Courtroom 6 – 4<sup>th</sup> Floor  
280 South 1<sup>st</sup> Street  
San Jose, CA 95113

1 I, James E. Yurgealitis, declare as follows:

2 1. I am currently Self Employed as a Legal and Forensic Consultant providing  
3 Criminal Case Reviews, Forensic Case Reviews and Technical Firearms Consulting, Testing and  
4 Training Services to Corporations, Legal Counsel and the Public Sector. During my previous 26  
5 year career as a Federal Law Enforcement Officer I have been recognized, and testified as, an  
6 expert witness in numerous local, state and federal courts. I have toured numerous firearms and  
7 ammunition manufacturer’s facilities both in the United States and overseas. I maintain a personal  
8 library of firearms and ammunition related books and periodicals and maintain contact with other  
9 recognized experts in the field. My final assignment in government service was as Senior Special  
10 Agent / Program Manager for Forensic Services for the Bureau of Alcohol, Tobacco, Firearms  
11 and Explosives (ATF), U.S. Department of Justice, a position I held for nine (9) years. During  
12 that time I was responsible for all Bureau firearms and forensic firearms related training and  
13 research at the ATF National Laboratory Center in Ammendale, Maryland.

14 2. My credentials, training, background and experience are stated in my curriculum  
15 vitae, a true and correct copy of which is attached as Exhibit A. My credentials, training,  
16 background and experience as an expert witness are detailed on my Statement of Qualifications, a  
17 true and correct copy of which is attached as Exhibit B.

18 3. I have been provided with, and have reviewed, a copy of the documents submitted  
19 by the Plaintiff(s) relative to Case No. 13-cv-05807 RMW in United States District Court for the  
20 Northern District of California, San Jose Division. I have also been provided with, and have  
21 reviewed, a copy of The City of Sunnyvale, California, Municipal Ordinance 9.44.050, (the  
22 “Ordinance”) wherein the possession and use of “ammunition feeding devices” or “magazines”  
23 with a capacity of more than ten (10) Ammunition Cartridges or “rounds” is prohibited.

24 4. The specific capacity limitation in the Ordinance addresses “Detachable  
25 Magazines”. Detachable Magazines are ammunition feeding devices not permanently integrated  
26 or fixed to the firearm receiver or frame. Common types of firearms which utilize detachable  
27 magazines include Semi Automatic Pistols, Semi Automatic Rifles, Bolt Action Rifles, Semi  
28 Automatic Shotguns, Bolt Action Shotguns and Machineguns.

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5. Detachable Magazines are, can be, and have been manufactured with varying capacities. The operation (or cycle of fire) of any firearm designed and manufactured to accept a detachable magazine will function regardless of the capacity of the magazine itself. For example modern firearms such as the Beretta Model 92 Semi Automatic Pistol and the AR- 15 Type Semi Automatic Rifles will function as designed whether the operator utilizes a magazine limited to ten (10) rounds or one of greater capacity. Generally speaking, any firearm capable of accepting a detachable "Large Capacity Magazine" as defined under the Ordinance will readily accept a magazine with a maximum capacity of ten (10) rounds. This includes the vast majority of Handguns and Shoulder Fired firearms so designed and manufactured.

6. Following the enactment of California Penal Code Section 32310 regulating the Manufacture, Import or Sale of Large Capacity Magazines, numerous Firearm Manufacturers have produced firearms compliant with the legislation. For example Smith and Wesson currently markets specific models of AR-15 type rifles and Semi Automatic pistols compliant with California Law(s). Beretta, Glock, Colt, Sturm Ruger, Sigarms and numerous other manufacturers have produced and marketed specific models of firearms in California after minor changes to their design or component parts. In general firearm magazines with a maximum capacity of ten (10) rounds have been mass produced since the mid 1990's and are readily available to the public.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of January, 2014, in Sparks, Maryland.

  
James E. Yurgealitis

# EXHIBIT A

To

DECLARATION OF JAMES E.  
YURGEALITIS IN SUPPORT OF  
SUNNYVALE'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION

## James E. Yurgealitis

P.O. Box 331  
New Freedom, Pennsylvania 17349  
24 Hour Mobile: (443) 452-7248  
Email: jyurgealitis@gmail.com

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### SUMMARY:

Currently self employed as a Legal and Forensic Consultant providing Criminal Case Reviews, Forensic Analysis Reviews and Technical Firearms Consulting, Testing and Training Services to Corporations, Legal Counsel and the Public Sector

### EDUCATION:

B.A., Political Science and Psychology, St. John Fisher College, Rochester, New York – May 1985

### PROFESSIONAL EXPERIENCE:

December 2003 to December 2012: Senior Special Agent / Program Manager for Forensic Services ATF National Laboratory Center (NLC), Beltsville, Maryland. U. S Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)

Directed the administration and management of ATF's Forensic Training Programs to include the National Firearms Examiner Academy (NFEA) a 12 month training program for State and Local Forensic Firearm Examiner Trainees. Also managed two additional forensic training programs. Administered a \$1M + budget in accordance with strict ATF and National Institute of Justice (NIJ) guidelines and reporting requirements. Responsible for oversight of all Forensic Firearms related research at the NLC. Supervised a full and part time cadre of fifty two (52) instructors and administrative personnel. Maintained liaison with commercial firearms and ammunition manufacturers and subject matter experts and ensure that lesson plans and curriculum reflected the latest technical developments in firearms manufacture, forensics and their application to federal and state law. Applied for, received and managed in excess of \$2M in external grants to facilitate uninterrupted delivery of training during internal budget shortfalls. Detailed to the Department of Homeland Security Command Center in 2005 with overall responsibility to coordinate and direct Federal, State and Local Law Enforcement assets during and following Hurricanes "Irene" and "Katrina" and again in 2010 for "Andrew" and "Danielle".

June 1997 - December 2003: Special Agent / Violent Crime Coordinator, ATF Baltimore Field Division, Baltimore, Maryland

Responsible for management of ATF's "Project Disarm", a joint law enforcement initiative between ATF, The United States Attorney's office for the District of Maryland (USAO), the Baltimore City Police Department, the Baltimore City States Attorney's Office and the Maryland State Police. Duties included reviewing over 400 state and local firearms related arrests annually for subsequent referral to the USAO and Federal Prosecution. Managed a caseload of 75 – 100 criminal cases annually. Responsible for selection, referral, follow - up investigation and subsequent indictment and prosecution of armed career criminals. Testified in front of Federal Grand Juries in excess of 75 times annually. Was recognized, and testified, as an expert witness in the Identification, Operability and origin of Firearms and Ammunition in three Federal Judicial Districts. Toured over 25 firearms and ammunition manufacturing facilities in Europe and the United States.

June 1990 – June 1997:

Special Agent, ATF Baltimore Field Division, Baltimore, Maryland

Served in various capacities as a street-level Special Agent. Acted as Group Supervisor and Assistant Special Agent in Charge on numerous occasions. Served on the Washington – Baltimore High Intensity Drug Trafficking Area (HIDTA) task force from 1995 – 1999. Investigated armed narcotics trafficking organizations, seized assets, authored and executed Federal and state search and arrest warrants, conducted surveillance, interviews / interrogations, testified in Federal and state courts as a fact witness, purchased firearms, explosives and narcotics while in an undercover capacity, investigated fatal bombings and arsons, firearms trafficking, alcohol and tobacco trafficking, homicide, fraud and gun store burglaries. Also while detailed for 8 months as the Public Information Officer authored press releases, provided interviews to local and national print and television media outlets and made presentations to local and national public and special interest groups and associations.

April 1989 – June 1990 and July 1986 – March 1987: Special Agent, United States Department of State, Diplomatic Security Service (DSS), Washington Field Office, Rosslyn, VA

Conducted investigations of violations of Federal Law under the department's purview to include Passport and Visa Fraud, Illegal trafficking of restricted firearms and war materials to prohibited countries, human trafficking, seized assets, authored and executed State, local and Federal Arrest and Search Warrants, testified in Federal Court as a fact witness, detailed on an as needed basis to the Dignitary Protection Division as Agent in Charge of multiple protective details for visiting and resident foreign dignitaries, temporarily assigned to support Physical and Personal Protective Security in various U.S. Embassies overseas on an as needed basis, detailed to the Secretary of State Protective Division on an as needed basis to supervise "jump team" agents assigned to augment the permanent protective detail overseas and domestically.

March 1987-February 1989: Special Agent, DSS, Secretary of State Protective Division, Washington, DC

Served in various capacities as Acting Agent in Charge, Acting Shift Leader, Lead Advance Agent and Shift Agent. Responsibilities included close personal protection of the Secretary of State both domestically and overseas, extensive foreign travel to facilitate and prepare security arrangements for overseas visits to include Presidential Summit meetings, liaison with foreign host government officials to plan and solicit assistance with security arrangements, supervision of "jump team" agents temporarily assigned to augment the detail, liaison with U.S Government Intelligence Agencies, other Federal, State and Local Law Enforcement Agencies to identify and protect against potential threats to the Secretary of State.

CLEARANCES:

Top Secret since March 1986 valid through February 2015. Numerous prior SCI Clearances.

TEACHING EXPERIENCE:

Instructed at the Federal Law Enforcement Training Center (FLETC), both recruit and in service training for ATF and other Federal Law Enforcement Agencies

Instructed at the International Law Enforcement Academy (ILEA) in Budapest, Hungary

Instructed for numerous State, local and / or regional law enforcement agencies both in the United States, Canada and Central America.

# **EXHIBIT B**

**To**

**DECLARATION OF JAMES E.  
YURGEALITIS IN SUPPORT OF  
SUNNYVALE'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION**

**Qualifications of James E. Yurgealitis  
Independent Legal and Forensic Consultant**

I, James E. Yurgealitis, being duly sworn, depose and state:

- 1.) That I was previously employed as a Senior Special Agent / Program Manager with the Bureau of Alcohol, Tobacco Firearms & Explosives, (ATF) United States Department of Justice, and had been so employed since 1990. Prior to 1990 I was employed as a Special Agent with the Bureau of Diplomatic Security, (DSS) United States Department of State and had been so employed since 1986.
- 2.) I have a Bachelor of Arts Degree in Political Science and Psychology from St. John Fisher College, Rochester, New York.
- 3.) I am a graduate of the Federal Law Enforcement Training Center, Glynco, Georgia, the Criminal Investigator Training Program, Bureau of Diplomatic Security New Agent Training, and the Bureau of ATF New Agent Training Program.
- 4.) I have completed the Firearms Interstate Nexus Training Program conducted by the Firearms Technology Branch, ATF Headquarters, Washington, D.C.
- 5.) I have completed both Advanced Interstate and European Nexus Training conducted by ATF in conjunction with several domestic and European firearm manufacturers.
- 6.) I have testified in excess of 200 times before Federal Grand Juries regarding the classification, operability, and commerce of firearms and / or ammunition.
- 7.) I have previously qualified as an expert witness regarding the origin, operability / classification and interstate movement of firearms and ammunition in U.S. District Court for the District of Maryland, U.S. District Court for the District of Delaware and the Circuit Court For Baltimore City, Maryland.
- 8.) I have conducted regular training for local, state and federal law enforcement agencies both domestically and overseas regarding firearms classification, operability and firearms statutes.
- 9.) I maintain a personal library of books, printed material and documents that relate to the field of firearms, ammunition, and firearms classification, attend local and national trade shows and professional association meetings, and regularly review periodicals relating to firearms and ammunition.
- 10.) I attend trade shows, maintain contact with, and regularly consult with other persons, to include published authors and recognized experts in the origin, identification and classification of firearms and ammunition.
- 11.) I have, during my tenure with ATF, personally examined in excess of five thousand

Qualifications Of James E. Yurgealitis contd.

firearms to determine their origin and classification and operability, and to facilitate the tracing of those firearms.

I have toured production facilities for numerous firearms and ammunition manufacturers. The tours were conducted by corporate historians, corporate officers, or production engineering personnel.

Domestic Firearm Manufacturers:

Bushmaster Firearms, Ilion, NY, USA  
Colt, New Haven CT, USA (4x)  
H&R 1871 Inc., Chicopee, MA, USA (2x)  
Marlin, North Haven CT, USA (4x)  
O.F. Mossberg & Sons, North Haven, CT, USA (4x)  
Remington Firearms, Ilion, NY, USA  
Savage Arms Inc., Westfield, MA, USA (4x)  
Sig-Sauer / SIGARMS Inc., Exeter, NH, USA (3x)  
Smith and Wesson, Springfield, MA, USA (4x)  
Sturm Ruger, Newport, NH, USA (4x)  
Yankee Hill Machining, Florence, MA, USA

Foreign Firearm Manufacturers:

Carl Walther GmbH, Ulm, Germany  
Ceska Zbrojovka (CZ), Uhersky Brod, Czech Republic  
Fegarmy (FEG), Budapest, Hungary  
F.N Herstal S.A., Herstal, Belgium  
Glock GmbH, Deutsch-Wagram, Austria  
Heckler & Koch GmbH, Oberndorf au Neckar, Germany  
J.P. Sauer & Sohn GmbH, Eckernforde, Germany

Domestic Ammunition Manufacturers:

Fiocchi Ammunition, Ozark, MO, USA  
PMC, Boulder City, NV, USA  
Remington, Lonoke, AR, USA (4x)  
Sierra, Sedalia, MO, USA  
Starline Brass, Sedalia, MO, USA

European Proof Houses

Beschussamt Ulm, (Ulm Proofhouse) Ulm, Germany  
Beschusstelle Eckernforde, (Eckernforde Proofhouse) Eckernforde, Germany  
Czech Republic Proofhouse, Uhersky Brod, Czech Republic  
Liege Proofhouse, Liege, Belgium

Qualifications Of James E. Yurgealitis contd.

I have been allowed regular access to the following reference collections:

Bureau of Alcohol, Tobacco Firearms and Explosives Reference Collection, Martinsburg, West Virginia, USA consisting of 5,000+ firearms

Liege Proofhouse, Liege, Belgium consisting of 1,000+ ammunition cartridges

Springfield Armory National Historic Site Firearms Collection, Springfield, MA, USA consisting of 10,000+ Firearms

Smithsonian Institution (Museum of American History) Firearms Reference Collection Washington, DC, USA, consisting of 4000+ firearms

Wertechische Studiensammlung des BWB, (Federal Defense Procurement Bureau Museum) Koblenz, Germany consisting of 10,000+ Firearms

I have toured the following museums:

Heeresgeschichtliches Museum, (Museum of Military History), Vienna, Austria

Hungarian Military Museum, Budapest, Hungary

Springfield Armory National Historic Site, Springfield, MA, USA

United States Air Force Museum, Dayton, OH, USA

United States Army Ordnance Museum, Aberdeen Proving Ground, Aberdeen, MD, USA

United States Military Academy Museum, West Point, NY, USA

United States Naval Academy Museum, Annapolis, MD, USA

Wertechische Studiensammlung des BWB, (Federal Defense Procurement Bureau Museum) Koblenz, Germany

Membership in Professional Organizations:

Member, International Ammunition Association (IAA)

Technical Advisor (pending approval), Association of Firearm and Toolmark Examiners (AFTE)

Member, Federal Law Enforcement Officers Association (FLEOA)

1 Roderick M. Thompson (State Bar No. 96192)  
2 Anthony P. Schoenberg (State Bar No. 203714)  
3 Rochelle L. Woods (State Bar No. 282415)  
4 Farella Braun + Martel LLP  
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6 Attorneys for Defendants THE CITY OF  
7 SUNNYVALE, THE MAYOR OF SUNNYVALE,  
8 ANTHONY SPITALERI, in his official capacity,  
9 and THE CHIEF OF THE SUNNYVALE  
10 DEPARTMENT OF PUBLIC SAFETY, FRANK  
11 GRGURINA, in his official capacity

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

14 LEONARD FYOCK,  
15 SCOTT HOCHSTETLER,  
16 WILLIAM DOUGLAS, DAVID  
17 PEARSON, BRAD SEIFERS, and  
18 ROD SWANSON,

17 Plaintiffs,

18 v.

19 THE CITY OF SUNNYVALE, THE  
20 MAYOR OF SUNNYVALE,  
21 ANTHONY SPITALERI, in his official  
22 capacity, THE CHIEF OF THE  
23 SUNNYVALE DEPARTMENT OF  
24 PUBLIC SAFETY, FRANK GRGURINA,  
25 in his official capacity, and DOES 1-10,

23 Defendants.

Case No. 13-cv-05807 RMW

**SUNNYVALE’S OPPOSITION TO  
PLAINTIFFS’ MOTION FOR  
PRELIMINARY INJUNCTION**

Date: February 21, 2014  
Time: 9:00 a.m.  
Location: San Jose Courthouse  
Courtroom 6 – 4<sup>th</sup> Floor  
280 South 1<sup>st</sup> Street  
San Jose, CA 95113

1 F.3d at 682). The closer the law comes to the core of the Second Amendment right—“the right of  
 2 law-abiding, responsible citizens to use arms in defense of hearth and home,” *Heller*, 554 U.S. at  
 3 635—and the greater the severity of the law’s burden, the greater scrutiny it should draw.  
 4 *Chovan*, 735 F.3d at 1138. A law that permits armed self-defense in the home and merely  
 5 regulates some types of arms, leaving a person “free to possess any otherwise lawful firearm,”  
 6 only operates like a “regulation of the manner” in which persons may lawfully exercise their  
 7 Second Amendment rights, and is therefore subject only to intermediate scrutiny. *Marzzarella*,  
 8 614 F.3d at 97 (cited with approval in *Chovan*, 735 F.3d at 1138); see also *Nat’l Rifle Ass’n v.*  
 9 *Bureau of Alcohol, Tobacco & Firearms*, 700 F.3d 185, 205-7 (5th Cir. 2012) (applying  
 10 intermediate scrutiny to ban on some handgun sales to young adults); *U.S. v. Skoien*, 614 F.3d  
 11 638, 641-2 (7th Cir. 2010) (*en banc*).

12 **B. Measure C Does Not Burden Conduct Protected By The Second Amendment.**

13 The Second Amendment right is not “a right to keep and carry any weapon whatsoever in  
 14 any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. Instead, “[s]tate  
 15 regulation under the Second Amendment has always been more robust than of other enumerated  
 16 rights.” *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012). “[W]hen the  
 17 fledgling republic adopted the Second Amendment, an expectation of sensible gun safety  
 18 regulation was woven into the tapestry of the guarantee.” *Nat’l Rifle Ass’n*, 700 F.3d at 200. The  
 19 Supreme Court has emphasized that “incorporation [of the Second Amendment into the Due  
 20 Process Clause of the Fourteenth Amendment] does not imperil every law regulating firearms,”  
 21 and agreed that “reasonable firearms regulation will continue under the Second Amendment.”  
 22 *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3046-7 (2010) (internal citations omitted).

23 As set forth above, the threshold inquiry at the outset of the two-step analysis set forth by  
 24 *Chovan* is whether Measure C burdens conduct protected by the Second Amendment. 735 F.3d at  
 25 1136. A recent New York federal court decision, addressing a state assault weapons ban that  
 26 includes an LCM ban similar to Measure C, found that the “burden” placed upon Second  
 27 Amendment rights by such a ban must be measured by its burden on the right to bear arms  
 28 generally—*i.e.*, “any burden upon the possession of an ‘assault weapon’ is relevant only insofar

1 as it generally impacts one’s ability to possess arms.” *Kampfer v. Cuomo*, No. 6:13-cv-82  
 2 (GLS/ATB), 2014 WL 49961, at \*6 n. 10 (N.D.N.Y. Jan. 7, 2014); *see also* Thompson Decl., Ex.  
 3 19, Statement of Professors of Constitutional Law: The Second Amendment and the  
 4 Constitutionality of the Proposed Gun Violence Prevention Legislation (Jan. 30, 2013) (submitted  
 5 to Congress re: 2013 proposal to prohibit LCMs & assault weapons). The *Kampfer* court went on  
 6 to hold that the ban did not substantially burden an individual’s Second Amendment rights in  
 7 light of the number of alternative firearms available to an individual to use for self-defense, and  
 8 thus warranted no heightened scrutiny at all. *Id.* at \*\*5-6.

9 Similarly, California courts have held that the state ban on assault rifles does not implicate  
 10 the Second Amendment. *See People v. Zondorak*, 220 Cal. App. 4th 829, 836 (2013) (“the ban  
 11 on AK series rifles does not impinge on rights protected by the Second Amendment because  
 12 assault weapons are at least as dangerous and unusual as the short-barreled shotgun . . . an  
 13 evaluation of the validity of the law under either strict scrutiny or intermediate scrutiny is  
 14 unnecessary”) (internal quotations omitted); *People v. James*, 174 Cal. App. 4th 662, 676 (2009)  
 15 (holding that ban on semi-automatic assault weapons does not implicate Second Amendment, and  
 16 noting that an “assault weapon has such a high rate of fire and capacity for firepower that its  
 17 function as a legitimate sports or recreational firearm is substantially outweighed by the danger  
 18 that it can be used to kill and injure human beings.”) (internal citations omitted).

19 Measure C’s LCM ban imposes no burden on Plaintiffs’ right to keep and bear arms.

### 20 1. Large-Capacity Magazines Are Not “Arms.”

21 First, only the right to keep and bear “arms” is protected by the Second Amendment, and  
 22 LCMs by definition do not qualify as “arms.” In answering what types of “arms” are protected  
 23 by the Second Amendment in *Heller*, the Supreme Court observed that the “18th-century  
 24 meaning” of “arms” “is no different from the meaning today”: “weapons of offence, or armour of  
 25 defence.” 554 U.S. at 581 (*quoting* 1 Dictionary of the English Language 106 (4th ed.) (reprinted  
 26 1978)). Another late 18th-century legal dictionary relied upon by the Court defined arms as “any  
 27 thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike  
 28 another.” *Id.* (*quoting* 1 A New and Complete Law Dictionary). The *Heller* majority opinion

1 does not mention magazines or devices to hold ammunition at all. Contemporary sources make  
 2 clear that accoutrements and ammunition often used with firearms are something different from  
 3 the “arms” themselves: “The Virginia military law, for example, ordered that ‘every one of the  
 4 said officers . . . shall constantly keep the aforesaid arms, accoutrements, and ammunition, ready  
 5 to be produced whenever called for . . . .’” 554 U.S. at 650 (Stevens, J., dissenting) (*quoting* Act  
 6 for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2) (emphasis omitted).

7 Large-capacity magazines are not “arms” at all. Magazines are containers. They are not  
 8 “weapons of offence,” or things worn for defense or taken “to cast at or strike another.” Rather,  
 9 they are merely devices used for feeding ammunition into firearms. LCMs are not necessary  
 10 components of firearms, but, by definition, are detachable, allowing them to be easily switched  
 11 out with other detachable magazines of lower capacity but that can still feed ammunition into a  
 12 firearm. Although the Plaintiffs state a preference for the use of LCMs, they do not and cannot  
 13 allege that firearms are rendered inoperable with lower-capacity magazines.<sup>7</sup> Accordingly,  
 14 because LCMs are neither “arms” nor are they required to operate arms, they fall outside the  
 15 scope of the Second Amendment’s protection.

## 16 2. LCMs Are Dangerous And Unusual.

17 Even if LCMs could be construed to be “arms,” the Second Amendment would still not  
 18 protect a right to possess them. The Supreme Court held in *Heller* that “dangerous and unusual  
 19 weapons” are excluded from the scope of the Second Amendment. 544 U.S. at 627, *aff’g U.S. v.*  
 20 *Miller*, 307 U.S. 174, 178 (1939) (holding that short-barreled shotguns are not protected by the  
 21 Second Amendment, because they are dangerous and unusual).<sup>8</sup> And courts have upheld

22  
 23 <sup>7</sup> Most firearms that are capable of accepting LCMs are also capable of accepting magazines with  
 24 a maximum capacity of ten rounds. Declaration of James E. Yurgealitis (“Yurgealitis Decl.”) ¶ 5.

25 <sup>8</sup> The Supreme Court also identified a non-exhaustive list of “presumptively lawful regulatory  
 26 measures” (*Heller*, 544 U.S. at 626-7 & n.26), including “longstanding prohibitions” on firearm  
 27 possession by felons and the mentally ill, as well as laws forbidding firearm possession in  
 28 sensitive places such as schools and government buildings, and imposing conditions on the  
 commercial sale of firearms. *Id.* at 626-27. In addition, the Court declared that its analysis  
 should not be read to suggest “the invalidity of laws regulating the storage of firearms to prevent  
 accidents.” *Id.* at 632.

1 prohibitions restricting the possession of “dangerous and unusual” weapons after *Heller*. See,  
 2 e.g., *Heller II*, 670 F.3d at 1263-64 (acknowledging *Heller*’s exception for “dangerous and  
 3 unusual” weapons, and upholding the D.C. assault weapons and LCM bans against a Second  
 4 Amendment challenge); *U.S. v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (defendant’s  
 5 possession of machine gun not protected by Second Amendment as those firearms fall “within the  
 6 category of dangerous and unusual weapons”); *James*, 174 Cal. App. 4th at 676 (upholding  
 7 California’s assault weapon prohibition because assault weapons fall within category of  
 8 “dangerous and unusual” weapons); *U.S. v. Decastro*, 682 F.3d 160, 165 n. 4 (2d Cir. 2012)  
 9 (“[T]he Second Amendment right does not encompass all weapons, but only those ‘typically  
 10 possessed by law-abiding citizens for lawful purposes’ and thus does not include the right to  
 11 possess ‘dangerous and unusual weapons.’”) (*quoting Heller*, 544 U.S. at 625, 627).

12 **a. LCMs Are Not In Common Use For Self-Defense.**

13 Plaintiffs’ primary argument in support of its request for an injunction appears to be that  
 14 Measure C is invalid because LCMs are in “common use” and therefore may not be prohibited.  
 15 Pl. Br. at 4, 6-15. This relies on a misreading of *Heller*. *Heller*’s “common use” test is merely a  
 16 test for whether a firearm (not an ammunition container) is subject to *any* Second Amendment  
 17 scrutiny. 554 U.S. at 627. *Heller* does not, as Plaintiffs contend, say that all “common use”  
 18 firearms are immune from regulation or that any regulation on such firearms is subject to strict  
 19 scrutiny. *Heller* explains that “the right secured by the Second Amendment is not unlimited,”  
 20 noting that “nothing in our opinion should be taken to cast doubt on” a host of “presumptively  
 21 lawful regulatory measures,” *id.* at 626-27 & n.26, and that the Second Amendment does not  
 22 protect all arms. The Court declared, for example, that the Second Amendment extends no  
 23 protection at all to arms that are not “in common use at the time.” *Id.* at 627 (*quoting Miller*,  
 24 307 U.S. at 179). Such arms can be entirely prohibited without further judicial inquiry. *Heller*,  
 25 554 U.S. at 625. When *Heller* applies these principles to the District of Columbia’s handgun ban,  
 26 it does not say the converse, *i.e.*, that arms in common use cannot be prohibited. Instead, in  
 27 striking down the handgun ban “[u]nder any of the standards of scrutiny that [the Court has]  
 28 applied to enumerated constitutional rights,” *Heller* emphasizes both the breadth of D.C.’s ban—

1 “a prohibition of an entire class of ‘arms’”—and how singularly well-suited handguns are for  
2 self-defense purposes. 554 U.S. at 628-29.

3 Indeed, if the standard advocated by Plaintiffs were the rule, as long as the ownership  
4 numbers of a particular firearm (or a firearm accessory, as here) were sufficiently high, the  
5 government either could never prohibit the sale of that firearm, no matter what dire harm it is  
6 proven to cause, or the government could only prohibit its sale if that prohibition withstands strict  
7 scrutiny. That is not the law and would be a perverse test indeed. Such a test would incentivize  
8 the government to prohibit any new firearms technology as soon as it is developed, lest it become  
9 popular and thus no longer subject to regulation. And it would incentivize firearms  
10 manufacturers to boost the sales of new products at any cost—including the militarized novelty  
11 products that the industry has focused on selling to committed gun owners as the number of gun-  
12 owning households in America has dropped, *see* Thompson Decl., Ex. 10, Violence Policy  
13 Center, *The Militarization of the U.S. Civilian Firearms Market*, June 2011, at 1, 15, 40; *id.*, Ex.  
14 11, Testimony of Laurence H. Tribe before Senate Judiciary Committee, Feb. 12, 2013, at 14.  
15 Such a test would place the constitutionality of firearms prohibitions in the hands of gun  
16 manufacturers and firearms enthusiasts who could determine the scope of constitutional  
17 protections simply by making more firearms and stockpiling new items.

18 Moreover, Plaintiffs’ contentions that LCMs are popular and widespread are unsupported  
19 by empirical evidence. Plaintiffs’ “evidence” appears to rely solely on two sources: First, they  
20 point to handguns and long guns that are sold standard with LCMs, Monfort Decl. (Dkt. 20) Exs.  
21 B-D; and second, they offer the declaration of James Curcuruto, a gun industry trade association  
22 representative. This evidence does not establish their point.

23 Mr. Curcuruto estimates that there are 75 million LCMs in private hands in America.  
24 Curcuruto Decl. (Dkt. 13) ¶ 8. But Mr. Curcuruto’s estimate draws from an incomplete dataset.  
25 While federal data provides an aggregate number of long guns and handguns sold, it does not  
26 disaggregate the numbers of each make or model sold, nor does Mr. Curcuruto explain how  
27 “[f]irearms industry professionals” then attributed numbers of each magazine to the firearms sold.  
28

1 *Id.* at ¶¶ 11-12.<sup>9</sup> This self-serving estimate deserves little weight. Nor is it probative that  
 2 Plaintiffs attach advertisements for guns that are sold standard with LCMs in firearms catalogs to  
 3 their attorney declaration. Monfort Decl., Exs. B-D. None of that establishes the actual number  
 4 of those guns that are sold, let alone those guns that are sold with LCMs in California, where such  
 5 sales have been illegal for nearly 15 years. *See* Cal. Penal Code § 32310.

6 Second, it is highly likely that LCM ownership is not widespread, but instead very  
 7 concentrated. Gun ownership in America has been dropping as a percentage of households for  
 8 decades. Declaration of John J. Donohue III (“Donohue Decl.”) ¶¶ 3-5. Yet gun sales have risen  
 9 at the same time. *Id.* ¶ 7. One trend driving these sales is the sale of more weapons, and more  
 10 powerful weapons, to a smaller and smaller group of gun enthusiasts. *See generally* Thompson  
 11 Decl., Ex. 10; Donohue Decl. ¶¶ 6-8. And studies directly show that gun ownership itself is very  
 12 concentrated: 20% of gun owners possess 65% of the nation’s guns. Donohue Decl. ¶ 6. Thus, it  
 13 is likely that LCMs are similarly collected by a small number of enthusiasts; there is no evidence  
 14 to indicate that they are widely popular—especially in a small city like Sunnyvale. *Id.* ¶¶ 9-10.

15 Even if such magazines are arguably in “common use” nationally, plaintiffs have not even  
 16 attempted to show that this is the case in California. Even before the passage of Measure C,  
 17 federal law in conjunction with California law has banned the sale, purchase, and transfer of such  
 18 LCMs in this State since 1994. *See supra* at II(B). As a result, with few statutory exceptions, no  
 19 individuals have legally transferred or sold LCMs in California for nearly twenty years. Since the  
 20 state ban on the sale and manufacture of LCMs was enacted in 1999, gun manufacturers have  
 21 been producing and promoting specific models of firearms with lower-capacity magazines that  
 22 comply with California law. Yurgealitis Decl. ¶ 6. Presumably only a small number of  
 23 individuals legally acquired their LCMs before 2000 (when the state ban went into effect), have  
 24 possessed those LCMs during the last 14 years, and continue to possess them in California, let  
 25 alone Sunnyvale. There is no evidence of “common use” in California.

26 In any event, regardless of whether LCMs are in widespread use in California or

27 \_\_\_\_\_  
 28 <sup>9</sup> Mr. Curcuruto also excludes the iconic revolver from his “survey” – revolvers do not use  
 magazines and typically hold fewer bullets than LCMs. Curcuruto Decl., Ex. A.

1 nationally, that still would not establish that LCMs are widely used for *self-defense* in the home,  
 2 the purpose of the Second Amendment right. *See Heller*, 554 U.S. at 599; *see also* Thompson  
 3 Decl., Ex. 11, 2013 Tribe Testimony, at 14 (noting that, “in the case of high-capacity magazines,  
 4 significant market presence does not necessarily translate into heavy reliance by American gun  
 5 owners on those magazines for self-defense”). Plaintiffs offer no evidence directly establishing  
 6 that LCMs are used for self-defense, and Plaintiffs’ indirect evidence about the utility of LCMs  
 7 for self-defense is dubious. An analysis of the NRA’s own reports “over a five-year period” of  
 8 firearm use in self-defense, both within the home and elsewhere, “demonstrated that in 50% of all  
 9 cases, two or fewer shots were fired, and the average number of shots fired across the entire data  
 10 sample was also about two.” Thompson Decl., Ex. 11 at 16-17.<sup>10</sup> And although Plaintiffs posit  
 11 fantastical scenarios involving multiple home invaders who can be stopped only by a  
 12 homeowner’s immediate access to firearms containing more than ten rounds of ammunition (*see*  
 13 Pl. Br. at 10-11; Ayoob Decl.), the evidence does not provide any reasonable grounds for these  
 14 sorts of speculative fears. Similarly, the “overwhelming” “evidence” that Plaintiffs point to  
 15 regarding the suitability of firearms with LCMs for home defense merely consists of a few

16 \_\_\_\_\_  
 17 <sup>10</sup> Even Dr. Kleck has admitted elsewhere that most criminal uses of guns, and most defensive  
 18 uses of guns, result in few if any shots fired. Thompson Decl., Ex. 12, Kleck, *Point Blank: Guns*  
 19 *& Violence in America* (1991) (2d ed. 2009), at 111 (“Only a tiny fraction of criminal gun  
 20 assaults involves anyone actually being wounded, even nonfatally, and one would expect the  
 21 same to be true of defensive gun uses”). Gun-rights supporters maintain databases of “self-  
 22 defense stories” to illustrate the need for firearms in the home, but these stories only illustrate that  
 23 rarely are more than a few shots fired. Allen Decl. ¶ 7. Dr. Allen’s analysis of this database for  
 24 the last three years showed an average of 2.1 bullets fired by defenders, and there were no  
 25 incidents where the defender reporting firing more than 10 bullets. *Id.* ¶ 9. And an analysis of  
 26 earlier “self-defense stories” printed on a pro-gun website reported that “the average and median  
 27 number of shots fired was 2,” and that “[r]eloading was required in only 3 incidents,” one of  
 28 which involved an escaped lion. Thompson Decl., Ex. 13, Werner, *The Armed Citizen: A Five-  
 Year Analysis*, at 3-4. Even where a defender faced multiple offenders, only a few shots were  
 needed. In fact, “[t]he most common responses of criminals upon being shot were to flee  
 immediately or expire. With few exceptions, criminals ceased their advances immediately upon  
 being shot. Even small caliber handguns displayed a significant degree of instant lethality (30 per  
 cent immediate one shot kills) when employed at close range.” *Id.* at 4. Plaintiffs’ witness  
 Massad Ayoob has said much the same thing. Although the declaration he filed in this case  
 insists that LCMs are needed for self-defense, in his 2012 book, the *Gun Digest Book of  
 Concealed Carry*, Ayoob writes, “The bottom line is, it’s not about ‘what gun you have,’ so much  
 as it’s about ‘did you have a gun?’” Thompson Decl., Ex. 14, at 64.

1 anecdotal, unverified stories—some of which are decades-old, and most of which involve law  
 2 enforcement officers or business owners, not private citizens defending their homes. Pl. Br. at 4,  
 3 10.<sup>11</sup> For example, Plaintiffs’ sole citations in support of its sweeping statement that firearms  
 4 with LCMs “are highly effective for in-home self-defense” are to several third-hand accounts that  
 5 do not relate to in-home self-defense at all. Pl. Br. at 4, *citing* Ayoob Decl. ¶¶ 11, 14, 25, 27.

6 Measure C neither creates new standards for prohibited LCMs in California, nor creates  
 7 new restrictions on citizens’ ability to obtain them. Rather, Measure C merely closes one modest  
 8 loophole in California law by bringing to an end the special dispensation of LCMs owned prior to  
 9 the effective date of the 10-round statewide standard in January, 2000.

10 **b. LCMs Are Dangerous And Unsuitable For Responsible Self-  
 11 Defense In The Home.**

12 Regardless of their claimed popularity, LCMs are an inappropriate choice for responsible  
 13 self-defense in the home. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 66, 71 & n.7 (1st  
 14 Cir. 2012) (noting that “large capacity weapons” – in that case, those able to carry “more than ten  
 15 rounds” – are not “of the type characteristically used to protect the home”); Thompson Decl., Ex.  
 16 15, 2011 ATF Study, at 10-11 (determining that “magazines capable of holding large amounts of  
 17 ammunition, regardless of type, are particularly designed and most suitable for *military and law*  
 18 *enforcement applications*”) (emphasis added); *id.* at Ex. 16, 1998 ATF report, at 3, 37 (“firearms  
 19 with the ability to expel large amounts of ammunition quickly. . . . have *military purposes* and are  
 20 a crime problem”) (emphasis added).

21 For example, a former Baltimore Police Colonel testified before Congress that “[t]he  
 22 typical self-defense scenario in a home does not require more ammunition than is available in a  
 23 standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of potential harm to

24 <sup>11</sup> The City objects to the “self-defense” stories presented in Mr. Ayoob’s declaration (¶¶ 5-16)  
 25 because Mr. Ayoob lacks personal knowledge regarding any of the stories. Fed .R. Evid. 602.  
 26 The City further objects to the remainder of Mr. Ayoob’s declaration (¶¶ 17-34) as speculative  
 27 and lacking foundation. For example, Mr. Ayoob does not even attempt to cite to any evidence to  
 28 support of his conclusory statements (*e.g.*, “[Mass shooters] simply could have drawn a second  
 (or third) gun that they had on their persons and shot whoever attempted to grab the empty one”  
 (¶ 22); “The loss of time for a magazine change is generally of little consequence for the attacker”  
 (¶ 28)).

1 others in the household, passersby, and bystanders, too much firepower is a hazard.” Thompson  
2 Decl., Ex. 17, Brian J. Siebel, Brady Center to Prevent Gun Violence, *Assault Weapons: Mass*  
3 *Produced Mayhem*, at 16 (2008). Furthermore, LCMs exacerbate concerns about stray bullets,  
4 because “the tendency for defenders [is] to keep firing until all bullets have been expended.” *Id.*  
5 As discussed above, California state law has long recognized these dangers of LCMs, declaring  
6 them to be a “nuisance.” Cal. Penal Code §32390.

7 Plaintiffs themselves confirm the additional danger that LCMs create, and their  
8 inappropriateness for responsible self-defense in the home, by acknowledging that many of the  
9 shots fired do not actually hit their intended targets. Pl. Br. at 11-12 (e.g., “[T]he stress of a  
10 criminal attack greatly reduces the likelihood that shots fired will actually hit” their intended  
11 target); *see also* Helsley Decl. (Dkt. 12) ¶ 11 (“Gunfights frequently involve a lot of ‘missing.’  
12 This can be the result of improper aim . . .”). Responsible self-defense does not mean the  
13 capacity to spray dozens of additional bullets in the home when the first ten have not been fired  
14 accurately. *See, e.g., Heller II*, 670 F.3d at 1263-64 (“[H]igh-capacity magazines are dangerous  
15 in self-defense situations because ‘the tendency is for defenders to keep firing until all bullets  
16 have been expended, which poses grave risks to others in the household, passersby, and  
17 bystanders.’”).

18 Plaintiffs simplistically assert that LCMs should be protected essentially because more  
19 bullets equal more effective self-defense in the home. *See, e.g.,* Pl. Br. at 10 (“A firearm’s  
20 ammunition capacity is thus directly related to its suitability for self-defense”). Under that  
21 reasoning, fully automatic machine guns—which could be for obvious reasons quite effective at  
22 repelling and disabling attackers—should also be protected. *Cf. New York State Rifle and Pistol*  
23 *Ass’n, Inc. v. Cuomo*, No. 13-cv-291S, 2013 WL 6909955, at \*\*14 (W.D.N.Y. Dec. 31, 2013)  
24 (“There . . . can be no serious dispute that the very features that increase a weapon’s utility for  
25 self-defense also increase its dangerousness to the public at large.”). It is precisely because  
26 LCMs are so effective at inflicting great damage in a short time that they should be banned.

27  
28



1 Mahoney *et al.*, “Sandy Hook Shooter’s Pause May Have Aided Students’ Escape,” *Hartford*  
 2 *Courant*, Decl. 23, 2012, at 1, 9; *see also* Donohue Decl. ¶ 11 & n. 4 (families estimate 11  
 3 children saved during shooter’s reloading). Imagine how many more children could have escaped  
 4 from Sandy Hook alive if the shooter had been limited to ten round magazines and forced to  
 5 spend more time reloading.

6 In an attempt to distract from the fact that LCMs are more dangerous than standard-  
 7 capacity magazines, Plaintiffs offer the declaration of criminologist Dr. Gary Kleck. As  
 8 discussed in detail in the brief filed by San Francisco in a suit challenging a similar ordinance,  
 9 where Dr. Kleck filed a substantively identical declaration, Dr. Kleck’s claims regarding the  
 10 frequency of use of LCMs in mass shootings, as well as the impact of LCMs on the rate-of-fire  
 11 and lethality in mass shootings, are flawed and misleading. *See* Thompson Decl., Ex. 22, San  
 12 Francisco’s Opposition to Plaintiffs’ Motion for Preliminary Injunction, Case No. 5:13-cv-05351-  
 13 WHA, Dkt. 34, at 5-9 (Jan. 16, 2014). For example, Kleck states that, of the 57 mass shootings  
 14 between 1994 and July 2014 that he studied, “no LCM was used in . . . 35 incidents (or about  
 15 61%).” Kleck Decl. ¶ 14. The appendix to Dr. Kleck’s declaration reveals that his dataset of  
 16 mass shootings included only *three* incidents where a standard-capacity magazine was used, 30  
 17 incidents where magazine capacity was *unknown*, and 22 incident where an LCM was known to  
 18 be used, *id.* at 18-46. When Dr. Kleck tells the Court that LCMs were not used in 35 incidents, he  
 19 actually means that *either* LCMs were not used *or* (in many more cases) magazine capacity was  
 20 not reported (in 30 incidents). It is not surprising that Dr. Kleck’s work on guns and gun violence  
 21 has been widely discredited. *See* Thompson Decl., Ex. 22, at 5-9.

22 For all these reasons, Measure C’s LCM ban regulates conduct that is not within the scope  
 23 of the Second Amendment right. Thus, Plaintiffs’ challenge of the ban fails as a matter of law.

24 **C. Even If Large-Capacity Magazines Do Implicate The Second Amendment,**  
 25 **Sunnyvale’s Statute Banning These Weapons Would Remain Constitutional.**

26 Plaintiffs’ failure to establish a Second Amendment right to possess LCMs should end this  
 27 Court’s inquiry. But even if this Court were to expansively read the limited holdings of *Heller*  
 28 and *McDonald* and conclude that Measure C implicates the Second Amendment right to possess a

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Dated: January 29, 2014

Farella Braun + Martel LLP

By: /s/ Roderick M. Thompson  
Roderick M. Thompson

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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  
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9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN JOSE DIVISION**

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12 HOCHSTETLER, WILLIAM DOUGLAS, )  
13 DAVID PEARSON, BRAD SEIFERS, and )  
ROD SWANSON, )

14 )  
15 Plaintiffs, )  
16 vs. )

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

21 Defendants. )  
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**CASE NO: CV 13-05807 RMW**  
**PLAINTIFFS' ADMINISTRATIVE**  
**MOTION FOR AN EXPEDITED RULING**  
**ON PLAINTIFFS' MOTION FOR**  
**PRELIMINARY INJUNCTION;**  
**DECLARATION OF CLINTON B.**  
**MONFORT IN SUPPORT**

1 The current schedule on Plaintiffs’ motion for preliminary injunction leaves just thirteen  
2 days between the hearing date and the effective date of the Ordinance. (Monfort Decl. ¶ 4.)

3 Even if the Court rules to enjoin the Ordinance, time is of the essence. (Monfort Decl. ¶  
4 4.) If the Court issues a ruling enjoining the Ordinance after its effective date, Sunnyvale residents  
5 will have already been required to remove the banned magazines from their homes. (Monfort  
6 Decl. ¶ 4.) And if the Court issues a ruling anytime between the hearing date and the effective  
7 date of the Ordinance, it is likely that some residents will have already dispossessed themselves of  
8 the prohibited magazines, depending on when a ruling is issued. (Monfort Decl. ¶ 4.) In both  
9 situations, law-abiding residents will be permanently dispossessed of their constitutionally  
10 protected magazines with no way to replace them because state law prohibits the purchase and  
11 sale of these magazines. Cal. Penal Code §§ 32310, 32400-50. (Monfort Decl. ¶ 4.)

12 If the Court for any reason does not enjoin the Ordinance, time is likewise of the essence.  
13 Because the Ordinance was certified almost two months ahead of the original schedule, law-  
14 abiding Sunnyvale residents have even less time to comply with the Ordinance. (Monfort Decl. ¶  
15 5.) Residents will need time to determine how they will comply with the Ordinance, and to take  
16 such steps to ensure they are not at risk of criminal prosecution. (Monfort Decl. ¶ 5.) In addition,  
17 these residents, including Plaintiffs, will need time to purchase new compliant magazines to  
18 replace the magazines they were required to turn into police, surrender to a licensed gun dealer, or  
19 remove from the city. (Monfort Decl. ¶ 5.)

20 Finally, an expedited ruling would preserve already scarce time to file an emergency  
21 motion seeking a temporary stay of enforcement pending appeal pursuant to Circuit Rule 27-3  
22 and/or an emergency application for injunction pending appellate review under the All Writs Act,  
23 28 U.S.C. section 1651(a). (Monfort Decl. ¶ 5.)

24 An expedited ruling will thus ensure that Plaintiffs and law-abiding residents will not  
25 suffer any inadvertent harm.

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United States District Court  
For the Northern District of California

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

Defendant(s).

Case No. C-13-5807-RMW

**ORDER GRANTING WITH  
MODIFICATIONS DEFENDANTS'  
ADMINISTRATIVE MOTION TO  
ENLARGE TIME FOR HEARING  
AND BRIEFING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND DENYING  
DEFENDANTS' MOTION FOR  
EXPEDITED DISCOVERY**

**[Re: Docket No. 25]**

On January 3, 2014, Defendants 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 (collectively "Sunnyvale") filed an administrative motion to enlarge time for hearing and briefing plaintiffs' motion for preliminary injunction and for expedited discovery. *See* Dkt. No. 25. Plaintiffs Leonard Fyock, Scott Hochstetler, William Douglas, David Pearson, Brad Seifers, and Rod Swanson (collectively "plaintiffs") filed an



**CERTIFICATE OF SERVICE**

I hereby certify that I filed an electronic PDF of **APPELLEES’ SUPPLEMENTAL EXCERPTS OF RECORD** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 17, 2014. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 17, 2014

By: /s/ Roderick M. Thompson  
Roderick M. Thompson  
Attorneys for Defendants-Appellees