

Appeal No. 14-15408

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

LEONARD FYOCK, et. al.,

Plaintiffs-Appellants,

vs.

CITY OF SUNNYVALE, et al.,

Defendants-Appellees.

On Appeal From the United States District Court
for the Northern District of California
Hon. Ronald M. Whyte
Case No. CV 13-05807-RMW

**DEFENDANTS-APPELLEES' OPPOSITION TO PLAINTIFFS-
APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE
27-3 FOR AN INJUNCTION PENDING APPEAL**

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Contrary to Appellants' unsupported assertions, there is no "emergency": Appellants have been aware of Sunnyvale Municipal Code, § 9.44.050 (the "Ordinance"), the ordinance limiting the size of ammunition magazines to no more than 10 rounds, since it was approved by 2/3rds of voters on November 5, 2013. (Appellants' Emergency Motion Under Circuit Rule 27-3 For An Injunction Pending Appeal ("Motion"), Ex. B at EB000012.) It had already been unlawful to manufacture, sell, or transfer (but not to merely possess) such large-capacity magazines ("LCMs") in Sunnyvale and elsewhere in California since 2000. *See* Penal Code § 32310. Sunnyvale's limited ban on continued possession of LCMs went into effect on December 6, 2013. (Motion, Ex. D (Order Denying Motion for Preliminary Injunction) at ED000003.) Appellants and other Sunnyvale residents have had more than four months to make arrangements for storing or otherwise disposing of any LCMs that they may have been holding since 2000. The Ordinance provided for a 90-day grace period, which expired today, to allow residents to switch to California compliant magazines and to take any existing LCMs out of Sunnyvale or lawfully dispose of them. (*Id.*)

Nothing, however, changed today. While the City expects all citizens to comply with the Ordinance and will enforce the Ordinance as it enforces all of the City's laws, the Ordinance will not, as Appellants state, "strip Plaintiffs-Appellants of their magazines on March 6, 2014" (Motion at 1). Rather, the Ordinance will continue to be enforced when violations are observed—the same as

any other public safety ordinance, and just as it has been since it became effective. As noted above, Appellants have had months to make arrangements for compliance under the 90-day grace period in the Ordinance.

In their “Emergency” motion, Appellants do not even attempt to articulate how they will be “irreparably harmed” by the District Court’s denial of their request for a preliminary injunction. They argue that they will be “permanently dispossess[ed]” of their LCMs. (Appellants’ Circuit Rule 27-3 Certificate (“Certificate”) at 2.) But, as Appellants have previously conceded, the Ordinance permits them to store their LCMs outside the City (Motion, Ex. D (Order) at ED000003, ED000016), and they can do so for the duration of the appeal. Appellants also acknowledge that they may simply “purchase new compliant magazines” which are readily available to replace their LCMs. (Motion, Ex. B (Defendants’ Opposition Brief) at EB000007.)

No irreparable harm exists here. Appellants’ motion concedes as much by rehashing for 16 of its 18 pages the same arguments previously made in the extensive briefing on their motion for preliminary injunction and in their oral argument to the District Court. (Motion, Exs. A and C; Case No. 5:13-cv-05807-RMW, Dkt. 47, Plaintiffs’ Statement of Recent Decision (regarding *Peruta*), Dkt. 51.) Instead of articulating any specific harm they will allegedly suffer if this motion is denied, they simply assert that they are likely to succeed on the merits and harm therefore can be “presumed.” (Motion at 16-17.) This is the same

argument that was already considered and rejected by the District Court, which concluded that:

Plaintiffs are not likely to succeed on the merits, that Plaintiffs failed to prove that they would suffer irreparable harm absent a preliminary injunction, that the balance of the hardships is neutral, and that the public interest favors Sunnyvale. The equities, therefore, weigh sharply against granting Plaintiffs' motion for a preliminary injunction.

(*Id.*, Ex. D (Order) at ED000019.) In making these findings, the District Court noted that “the Sunnyvale ordinance is substantially related to the compelling government interest in public safety” (*id.* at ED000015), and that “the risk that a major gun-related tragedy” would occur between March 6, 2014 and the date this case is resolved “balance[s] out” any inconvenience to Appellants in disposing of their magazines (*id.* at ED000017).

The District Court's decision is consistent with every other decision on this issue: every court, including a federal appeals court, that has considered the constitutionality of a ban on LCMs has applied intermediate scrutiny and held that such a ban does not violate the Second Amendment. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1264 (D.C. Cir. 2011); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, C-13-05351 WHA, 2014 WL 644395, at *7 (N.D. Cal. Feb. 19, 2014); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, C-13-291S, 2013 WL 6909955, at *18 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, C-13-739 AVC, 2014 WL 346859, at *9 (D.

Conn. Jan. 30, 2014); *Tardy v. O'Malley*, C-13-2861, TRO Hr'g Tr., at 66-71 (D. Md. Oct. 1, 2013).

In sum, there is no threat of irreparable harm. As the District Court recognized, the “inconvenience to Plaintiffs in disposing of their now-banned magazines” is outweighed by Sunnyvale’s interest in public safety and the safety of its police officers. (Motion, Ex. D (Order) at ED000016-19.) By making this “emergency” motion, Appellants are asking this Court to prejudge—without having the benefit of complete briefing and oral argument from both parties—the very issues that will be before the merits panel in this appeal. Appellants’ motion should be denied.

Dated: March 6, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2014, an electronic PDF of DEFENDANTS-APPELLEES' OPPOSITION TO EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR AN INJUNCTION PENDING APPEAL was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Dated: March 6, 2014

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