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October 22, 2013

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**Re: File No. 130585 – Police Code – Large Capacity Magazines;  
Sales of Firearms and Ammunition; Reporting Lost or Stolen  
Firearms; Shooting Ranges – OPPOSITION**

Dear Honorable Mayor and Board of Supervisors:

We write on behalf of our clients, the National Rifle Association (NRA) and the California Rifle and Pistol Association (CRPA), as well as the hundreds of thousands of their members in California, including those residing in San Francisco ("the City").

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For the reasons discussed below, our clients oppose adoption of File No. 130585 – Police Code – Large Capacity Magazines; Sales of Firearms and Ammunition; Reporting Lost or Stolen Firearms; Shooting Ranges to be considered by the Board of Supervisors on October 22, 2013 (“the Proposed Ordinance”).

## **I. “LARGE CAPACITY MAGAZINE” POSSESSION BAN**

California state law prohibits the sale, manufacture, or importation of “large capacity magazines” (i.e., ammunition feeding devices capable of holding more than 10 rounds). Cal. Penal Code § 32310. California does not prohibit the simple possession of “large capacity magazines” owned prior to January 1, 2000. *See* Cal. Penal Code §§ 32310, 32400 *et seq.*

The Proposed Ordinance seeks to: (1) Ban the possession of “large capacity magazines” in San Francisco, *including* many magazines lawfully acquired prior to January 1, 2000; (2) require persons already possessing a “large capacity magazine” to remove it from the city, surrender it to the Police Department, or sell or transfer it lawfully, within 90 days; and (3) provide certain exemptions.

As detailed below, the proposed magazine ban violates the Second Amendment and is impliedly preempted by state law.

### **A. The City’s Proposal to Ban the Possession of “Large Capacity Magazines” Violates the Second Amendment**

The Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008), is clear that arms “typically possessed by law-abiding citizens for lawful purposes” or those “in common use” are protected by the Second Amendment. That protection surely extends to commonly used ammunition feeding devices (e.g., magazines) which are often necessary for the meaningful exercise of the right. Under any standard of review, a flat ban on items protected by the Second Amendment is unconstitutional. *See id.* at 628-29 (finding D.C. ban on handguns, arms typically possessed by law-abiding citizens for lawful purposes, unconstitutional regardless of the standard of review applied).

The lawful use of ammunition feeding devices with a capacity of ten or more rounds for self-defense and other lawful purposes is exceedingly common. Due to the popularity of these magazines, and because of their effectiveness for personal defense, these items are widely used (and often preferred) for in-home self-defense. Certainly in the rushed and frantic circumstances that often accompany home invasions or personal attacks, the added capacity of a “large capacity magazine” may be the difference between life and death. The Proposed Ordinance will strip its

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citizens of access to magazines that enable them to adequately protect themselves when attacked by one or more armed assailants in their home.

The possession of “large capacity magazines” is thus protected by the Second Amendment, and the City’s proposed flat ban on that conduct is invalid. As the City’s “large capacity magazine” ban plainly violates the Second Amendment, its adoption will make the City a prime target for litigation, which can be costly.

**B. The City’s Proposal to Ban the Possession of “Large Capacity Magazines” Is Preempted by State Law**

Under the preemption doctrine, a local regulation will be struck down if it duplicates state law, conflicts with state law, or enters into a field wholly occupied by the state to the exclusion of local regulation, either expressly or by implication. *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 903-04 (2008). Banning the possession of “large capacity magazines,” as defined by the Proposed Ordinance, runs afoul of the preemption doctrine insofar as it contradicts state law and enters into an area of law that is fully occupied by state law.

**1. The “Large-Capacity Magazine” Ban Contradicts State Law**

A local law “*contradicts* state law when it is inimical to or cannot be reconciled with state law.” *O’Connell v. City of Stockton*, 41 Cal.4th 1061, 1068 (2007). The Proposed Ordinance is preempted as contradictory to state law to the extent it is intended to apply to any “large-capacity magazine” acquired prior to January 1, 2000. Those magazines are not illegal to possess under state law and, in fact, owners of such magazines enjoy various uses *expressly* granted by various Penal Code sections. To the extent the Proposed Ordinance applies to “large capacity magazines” acquired before 2000, it deprives those in lawful possession of such magazines from conduct they are expressly entitled to engage in under state law.

Flatly prohibiting what the state expressly allows, the proposal conflicts with state law and is preempted. *See Fiscal*, 158 Cal. App. 4th at 915.

**2. The “Large Capacity Magazine” Ban Improperly Enters an Area of Law That Is Fully Occupied by State Law**

Similarly, attempts to apply the Proposed Ordinance to “large-capacity magazines” acquired prior to 2000 is impliedly preempted by state law. A local ordinance that encroaches on an area of law impliedly occupied by the Legislature will be stricken as unconstitutional. State law impliedly preempts local regulation when:

(1) [T]he subject matter has been so fully and completely covered by general law as to

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clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; *or* (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

*Id.* at 904 (emphasis added).

First, “large-capacity magazines” are fully and completely regulated under the Penal Code, thereby foreclosing any local interference with the state statutory scheme (except that which was expressly authorized). Indeed, 16 different state statutes *specifically* regulate the possession, sale, manufacture, and importation of “large capacity magazines.”<sup>1</sup> While state law explicitly bans these practices generally, Cal. Penal Code § 32310, these 16 laws enumerate multiple circumstances in which it remains lawful to transfer “large capacity magazines.” And because a “large capacity magazine” is also a “generally prohibited weapon” under section 16590, an additional eight statutes apply.<sup>2</sup> In sum, 24 state statutes govern “large capacity magazines,” making up a broad and comprehensive regulatory regime indicating the Legislature’s intention to exclude additional regulation by local governments.

A prime example of the Legislature’s intent to prevent the local prohibition of “large capacity magazines” is found at Penal Code section 32420, which explicitly states that the magazine importation ban “does not apply to the importation of a large-capacity magazine by a person who lawfully possessed the large-capacity magazine in the state prior to January 1, 2000, lawfully took it out of the state, and is returning to the state with” the same magazine. Surely, the State did not intend to *explicitly permit* the importation of “large capacity magazines” by persons who possessed them prior to the sales ban, only to have the simultaneous and subsequent possession of the same magazines be made unlawful by local regulation. Further, local governments near California’s borders could effectively prohibit these magazines from exiting or entering the state, regardless of state law. Such a result offends the constitutional decree that local laws are subordinate.

The City’s proposal is also impliedly preempted because the regulation of “large capacity magazine” possession is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. If local governments,

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<sup>1</sup> See Cal. Penal Code §§ 16740, 18010, 32310, 32315, 32390, 32400, 32405, 32410, 32415, 32420, 32425, 32430, 32435, 32440, 32445, 32450.

<sup>2</sup> See Cal. Penal Code §§ 16590, 17715, 17720, 17725, 17730, 17735, 17745, 17800.

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rather than the state, are permitted to enact further criminal restrictions on the possession of “large capacity magazines,” firearm holders will be confronted by a patchwork quilt of firearm and magazine laws each time they enter another jurisdiction, sowing frustration, uncertainty, and fear of prosecution among California residents as they travel throughout the state.

For the foregoing reasons, state law impliedly preempts the local regulation of “large capacity magazines,” and the City’s proposal is consequently invalid.

## **II. FAILURE TO TIMELY REPORT THE LOSS OR THEFT OF FIREARMS AND THE PRESUMPTION OF POSSESSION**

Currently, local law requires firearm owners to report the theft or loss of a firearm to law enforcement within 48 hours of becoming aware of the theft or loss. The Proposed Ordinance will amend Police Code section 616 to establish that the failure of a firearm owner to report a firearm theft or loss in accordance with local law creates a rebuttable presumption that he or she still possesses the firearm.

This proposal simply does not comport with our sense of justice and fairness. In fact, it turns the justice system on its head. When a gun is stolen, the firearm owner is the victim of a crime. But often, a gun owner may not discover and report a missing firearm before it is used in crime or before the City thinks they “*should* have become aware” it was missing. Under this law, the gun owner will be victimized again – this time, when the City treats them as a criminal with the burden of proving that they did not commit the crime their gun was used in by establishing that they no longer possessed it. The Proposed Ordinance thus places the burden of proof on the victim of gun theft to prove his or her innocence, rather than on the government where it belongs. This is *not* how our justice system works.

## **III. AMMUNITION SALES REGISTRATION REQUIREMENT**

Our client is pleased to see that the City has abandoned, for now, its attempt to amend current local law to require registration of all ammunition sales within the City. Each of the concerns that we expressed in our March 4, 2013, letter opposing the current registration of sales of 500 or more rounds would be greatly magnified by a requirement that required the reporting of every ammunition transaction, no matter how small.

## **IV. BAN ON MINORS AT SHOOTING RANGES WITHOUT PARENT OR GUARDIAN PRESENT**

It has been reported that the only shooting range within the City’s jurisdiction does not oppose the proposal to ban minors from entering a shooting ranges without a parent or guardian

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present.<sup>3</sup> Our client does not generally oppose such a requirement, except that it prevents youth civic and educational groups, such as the Boy Scouts of America or Girl Scouts of the United States of America, from honing proficiency in firearms safety and marksmanship through parent-approved group or troop outings.

To achieve the City's likely goals of preventing juvenile criminals from accessing shooting ranges, the City need only pass a law that no minor may enter a shooting range without the express, written permission of a parent or guardian. Our clients urge the City to amend the Proposed Ordinance accordingly.

## V. CONCLUSION

For the foregoing reasons, we strongly urge you to reject this proposal. Note that adoption of the unconstitutional provisions of the Proposed Ordinance will result in immediate litigation against the City to enjoin enforcement and have them declared invalid.

Should you require further guidance, our office is available to discuss in further detail the nuances of the constitutional issues raised by this proposal and analyzed in this correspondence.

Sincerely;

**Michel & Associates, P.C.**



Anna M. Barvir

AMB/ca

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<sup>3</sup> Neal Riley, *More Gun Control Laws Proposed for San Francisco*, SFGate (June 4, 2013), available at <http://blog.sfgate.com/cityinsider/2013/06/04/more-gun-control-laws-proposed-for-san-francisco/> (last accessed Oct. 21, 2013).