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Vice Mayor Marty Winter  
Council Member Nancy Kemnitzer  
Council Member Claire McAuliffe  
Council Member Bob McCaskill  
BELVEDERE CITY COUNCIL  
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**Re: Opposition to Proposed Ordinance Adding Chapter 9.70 to the Belvedere  
Municipal Code Requiring the Locked-Storage of Handguns in the Home**

Honorable Mayor and City Council:

We write on behalf of our clients, the National Rifle Association and the California Rifle & Pistol Association, as well as the hundreds of thousands of their members in California, many residing within your jurisdiction, opposing any further consideration of the proposed ordinance adding Chapter 9.70, "Regulation of Firearms," to the Belvedere Municipal Code mandating the locked-storage of handguns in one's home.

As written, Belvedere's proposed ordinance prohibits anyone from keeping a handgun within their home "unless the Handgun is stored in a Locked Container or disabled with a Trigger Lock that has been approved by the California Department of Justice." The only two exceptions listed are when the "Handgun is carried on the person of an individual," or when "under the control of a person who is a peace officer." Violators face a potential misdemeanor conviction that can result in imprisonment of up to six months in the County jail and a fine of up to \$1,000.

But as explained below, a recent federal court decision has called into question the constitutionality of similar ordinances that fail to provide exceptions for firearms within reach or control of the owner. Further, the proposed ordinance is preempted by state law, largely unenforceable, and will only be detrimental to the public health, safety, and welfare of Belvedere residents.

**I. A RECENT FEDERAL COURT DECISION HAS CALLED INTO QUESTION THE CONSTITUTIONALITY OF ORDINANCES IDENTICAL TO THE CITY'S PROPOSAL**

The Second Amendment protects a fundamental, individual right to keep and bear arms. As the United States Supreme Court held in *District of Columbia v. Heller*, central to that right is the “inherent right of self-defense[,]” a right that “is most acute” in the home.<sup>1</sup> Laws that burden the exercise of that right are constitutionally suspect. Laws that prohibit it are categorically invalid.

Recently, a federal district court was faced with a challenge to a locked-storage ordinance nearly identical to the City's proposal.<sup>2</sup> Despite ultimately upholding the ordinance, the court was careful to point out that such ordinances may still be found unconstitutional. As noted by the district court, “[a] person may be somewhat burdened by rendering his or her distant weapons inoperable—imagine, for example, fleeing pursuers and attempting to open a safe or disable a trigger lock—but an individual carrying his or her weapon would not be so burdened.”<sup>3</sup> Given the Second Amendment's guarantee of “immediate self-defense, which should reasonably account for weapons within his or her reach or control, not just his or her person,” the district court found such scenarios to be “troubling.”<sup>4</sup>

As a result, the district court questioned the constitutionality of locked-storage ordinances that lack any exception for firearms within a person's “reach or control,” concluding that an “as-applied challenge . . . could lead to a more limited holding.”<sup>5</sup> What's more, it would be “unlikely that the governmental interest in preventing accidental shootings or thefts would be significantly harmed by adopting a reach or control rule, rather than an ‘on the person’ rule as it currently stands.”<sup>6</sup>

Here, because the proposed ordinance only exempts one from the storage requirements when “carried on the person of an individual over the age of 18,” and not also when in the reach or control of an individual, the ordinance directly conflicts with *Heller*'s core holding and is therefore unconstitutional. For this same reason, other local jurisdictions with similar ordinances have

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<sup>1</sup> 554 U.S. 570, 628 (2008).

<sup>2</sup> *Murphy v. Guerrero*, No. 14-cv-00026, 2016 WL 5508998 (D. N. Mar. I. Sept. 28, 2016).

<sup>3</sup> *Murphy*, 2016 WL 5508998, at \*12 (citing *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2800 (2015) (Thomas, J. dissenting from denial of cert.) (“petitioners contended that the law effectively denies them their right to self-defense at times when their potential need for that defense is most acute” because, for example, “it is impossible to ‘carry’ a firearm on one's person while sleeping” at night, which is when most burglaries occur)).

<sup>4</sup> *Id.* at n.18 (conferring with *Arizona v. Grant*, 556 U.S. 332, 335 (2009) (reaffirming the Fourth Amendment rule that “police may search incident to arrest only the space within an arrestee's immediate control, meaning the area from within which he might gain possession of a weapon or destructible evidence”)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

recognized the constitutional problem and included an exception for firearms within the reach or control of the owner.<sup>7</sup>

## **II. NOTWITHSTANDING THE CONSTITUTIONAL CONCERNS RAISED BY THE PROPOSED ORDINANCE, IT IS PREEMPTED BY STATE LAW**

Under the preemption doctrine, a local regulation is void if it duplicates, contradicts, or enters a field wholly occupied by the state to the exclusion of local regulation, either expressly or by implication.<sup>8</sup> Belvedere's mandate that residents keep their handguns inoperable unless he or she is a police officer runs afoul of the preemption doctrine insofar as it contradicts state law and also enters into an area of law that is fully occupied by California's law.

### **A. The Proposed Ordinance Contradicts State Law**

A local ordinance "contradicts state law when it is inimical to or cannot be reconciled with state law."<sup>9</sup> With regards to firearm storage laws, California maintains a comprehensive set of statutes creating liability for the improper storage of a firearm whenever a minor or prohibited person accesses a firearm and carries it to a public place or uses it to cause death or bodily injury.<sup>10</sup> California, however, provides an equally comprehensive set of exceptions to such liability.<sup>11</sup> For instance, individuals are exempt from liability whenever the firearm is:

- (1) Kept in a locked container;
- (2) Kept in a location reasonably believed to be secure;
- (3) Carried on one's person;
- (4) Kept in close enough proximity to the person to be retrieved and used as if it were carried on one's person; or,
- (5) Locked by a locking device.<sup>12</sup>

In contrast, the express terms of Belvedere's ordinance strip residents of their right to engage in behavior deemed lawful by the state. For a resident of Belvedere must store any handgun in a locked container or disabled with a trigger lock, unless the resident is a police officer. As such, Belvedere's ordinance flatly denies individuals options explicitly authorized by state law—i.e., to keep firearms in a secure location (locked or not) or to keep the firearm within close enough proximity to be retrieved and used as if carried on one's person—thereby contradicting state law.

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<sup>7</sup> For example, the City of Los Angeles includes an exception for its locked-storage ordinance for handguns "[w]ithin close enough proximity and control that [the person] can readily retrieve and use the handgun as if carried on the person." L.A., Cal., Muni. Code § 55.21(b)(3).

<sup>8</sup> *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895, 903-04 (2008).

<sup>9</sup> See *O'Connell v. City of Stockton*, 41 Cal. 4th 1061, 1068 (2007).

<sup>10</sup> PENAL CODE §§ 25100-25135; 25200-25225.

<sup>11</sup> PENAL CODE §§ 25105(a-g); 25135(a)(1-6); 25205.

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

**B. The Proposed Ordinance Improperly Enters an Area of Law that Is Fully Occupied by State Law**

A local ordinance that encroaches on an area of law impliedly occupied by the Legislature will be stricken as unconstitutional.<sup>13</sup> A state's law impliedly preempts a local regulation when:

- (1) The subject matter has been so fully and completely covered by general law as to 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.<sup>14</sup>

California's comprehensive regulatory scheme fully and completely covers laws regarding the storage of firearms, thereby impliedly preempting Belvedere's ordinance. Recall, California law includes a complex set of laws and exemptions regarding firearm storage and firearm carrying.<sup>15</sup> In addition, California mandates that any firearm sold by a licensed dealer must include a firearm safety device.<sup>16</sup> Such safety devices must meet rigorous safety standards so that they "significantly reduce the risk of firearm-related injuries to children 17 years of age and younger."<sup>17</sup>

Simply put, California's firearm storage scheme is so comprehensive, any local interference with that scheme (except that which was expressly authorized) is likely impliedly preempted.

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<sup>13</sup> *Fiscal*, 158 Cal. App. 4th at 903-04.

<sup>14</sup> *Fiscal*, 158 Cal. App. 4th at 904.

<sup>15</sup> See *supra* Part II.A.

<sup>16</sup> PENAL CODE § 23635(a). Additionally, whenever an individual purchases a long gun in California, they must sign an affidavit stating ownership of a California approved gun safe or lock box. *BOF 978 (Rev. 01/2013): Affidavit Stating Ownership of a Gun Safe or Lock Box*, California Department of Justice, Bureau of Firearms, [https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/bof\\_978.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/bof_978.pdf) (Jan. 2013).

<sup>17</sup> PENAL CODE § 23650(a).

### **III. THE PROPOSED ORDINANCE IS LARGELY UNENFORCEABLE AND DETRIMENTAL TO THE PUBLIC HEALTH, SAFETY, AND WELFARE OF RESIDENTS**

From a practical standpoint, Belvedere cannot enforce the ordinance without running afoul of the Fourth Amendment, which provides for “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.”<sup>18</sup> This Amendment prevents Belvedere from inspecting how individuals are storing their firearms in their home or vehicle without first having established probable cause that they are in violation of the ordinance. Tellingly, although other California jurisdictions have similar ordinances in effect, we are unaware of a single instance where such a regulation has been enforced.

More importantly, Belvedere’s ordinance fails to consider the many residents who wish—or need—to have immediate access to their firearms for the lawful purpose of self-defense in an emergency. In contrast, California’s comprehensive set of laws regarding the storage of firearms is written so that individuals can choose, based on their particular needs and circumstances, how best to store their firearms, while simultaneously achieving the state’s goal of preventing unauthorized persons from accessing firearms.

Belvedere’s ordinance presents a myriad of problems for gun owners, and ultimately will only create an environment in which otherwise law-abiding individuals will be driven to not cooperate with police in fear of prosecution.

### **IV. CONCLUSION**

Our clients understand the need to combat the criminal misuse of firearms, and they have a variety of effective programs for doing so available to the City upon request. These programs include, but are not limited to, firearm safety training,<sup>19</sup> the Eddie Eagle GunSafe® Program,<sup>20</sup> the National School Shield Program,<sup>21</sup> and youth programs,<sup>22</sup> all of which have proven to reduce accidental gun deaths and promote public safety more than any gun-control law ever will. We ask the City to consider these alternatives to the proposed ordinance, which as drafted, infringes on every law-abiding citizen’s rights under the Second Amendment, is otherwise preempted by state law, and will only be detrimental to the public health, safety, and welfare of Belvedere residents.

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<sup>18</sup> U.S. Const. amend. IV.

<sup>19</sup> <https://explore.nra.org/interests/safety-and-education/>. With roughly 1 million people attending NRA training courses annually, the NRA is recognized nationally as the Gold Standard for firearm safety training.

<sup>20</sup> <https://eddieeagle.nra.org/>. The Eddie Eagle GunSafe® program is a gun accident prevention program that seeks to help parents, law enforcement, community groups and educators navigate a topic paramount to our children’s safety, teaching children when they see a gun to “Stop! Don’t touch! Leave the area, and tell an adult.”

<sup>21</sup> <https://www.nationalschoolshield.org/>. The National School Shield program is committed to addressing the many facets of school security, including best practices in security infrastructure, technology, personnel, training, and policy.

<sup>22</sup> <http://youth.nra.org/>.

To that end, it behooves you to drop any further consideration of the ordinance. While anti-Second Amendment groups such as the Law Center to Prevent Gun Violence may promise to provide a legal defense of the proposed ordinance for the City pro bono, the City can still be liable for costs and attorneys' fees, which can be significant.<sup>23</sup>

Should you require further guidance, our office is available to discuss the issues raised in this correspondence or to assist you in drafting a suitable amendment to your code.

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



Matthew D. Cubeiro

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<sup>23</sup> For example, San Francisco was forced to pay roughly \$600,000 in addition to the \$380,000 it paid to plaintiffs to reimburse the NRA for its attorney's fees following the decision in *Fiscal v. City & Cty. of San Francisco*, 158 Cal. App. 4th 895 (2008). And more recently, the City of Chicago was forced to pay \$125,000 to a plaintiff who challenged the constitutionality of an ordinance banning people with certain non-violent misdemeanor convictions from possessing firearms in their homes for self-defense. *Gowder v. Chicago*, 923 F.Supp.2d 1110 (N.D. Ill. 2012). That was following Chicago's payment of approximately \$1.4 million to the NRA and \$400,000 to the Second Amendment Foundation following the Supreme Court decision in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).