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October 16, 2017

Mayor Sam Liccardo
Vice Mayor Magdalena Carrasco
Councilmember Charles "Chappie" Jones
Councilmember Sergio Jimenez
Councilmember Raul Peralez
Councilmember Lan Diep
Councilmember Devora "Dev" Davis
Councilmember Tam Nguyen
Councilmember Sylvia Arenas
Councilmember Donald Rocha
Councilmember Johnny Khamis

SAN JOSÉ CITY COUNCIL
200 E. Santa Clara St.
San José, CA 95113
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VIA EMAIL & FAX: (408) 292-6207

**Re: Proposed Ordinance Amending Chapter 10.32 of Title 10 of the San Jose
Municipal Code—OPPOSITION**

Honorable Members of the City Council,

We write to you on behalf of our clients, the National Rifle Association of America, and the California Rifle & Pistol Association, Inc., as well as the hundreds of thousands of their members in California, including those members residing in the City of San José.

Our clients oppose the adoption of the recently proposed ordinance mandating firearms be stored in a locked container or disabled with a trigger lock in a person's place of residence (the "Proposed Ordinance"). As drafted, the Proposed Ordinance will preclude the safest and most secure methods of storing a firearm as a means of satisfying its requirements, suffers from serious vagueness issues, and is otherwise preempted by state law.

For the following reasons, we ask the City Council to reject the Proposed Ordinance, and instead consider the alternative programs offered by our clients that will better achieve the City's goals of combatting criminal misuse of firearms and preventing accidental injuries.

I. THE PROPOSED ORDINANCE PRECLUDES THE USE OF THE SAFEST AND MOST SECURE MEANS OF STORING FIREARMS AVAILABLE ON THE MARKET

As a threshold matter, the Proposed Ordinance requires any person who keeps a firearm in their residence to “store the Firearm in a Locked Container or disable the Firearm with a Trigger Lock upon leaving the Residence.” In order for a device to be considered a “Locked Container,” the Proposed Ordinance requires that the device satisfy the definition of California Penal Code Section 16850 and also be listed on the California Department of Justice, Bureau of Firearms (“DOJ”) “roster of approved firearm safety devices.”

California law defines the term “locked container” as “a secure container that is fully enclosed and locked by a padlock, keylock, combination lock, or similar locking device.”¹ But California law also defines the term “firearm safety device” as “a device *other than a gun safe* that locks and is designed to prevent children and unauthorized users from firing a firearm.”² Such devices “may be installed on a firearm, be incorporated into the design of the firearm, or prevent access to the firearm.”³

Because the Proposed Ordinance requires a “Locked Container” to meet both the definition of a “locked container” *and* be listed on DOJ’s “roster of approved firearm safety devices,” it will preclude the use of many gun safes as a means for securing a firearm in one’s residence—gun safes which are undoubtedly the safest and most secure means of storing a firearm available on the market. We highly doubt the drafters of the Proposed Ordinance intended such an absurd result. Rather, we believe the confusion stems from DOJ’s own misinterpretation of the law.

In addition to the definitions for “locked container” and “firearm safety device,” California law also defines the term “gun safe” as “a locking container that fully contains and secures one or more firearms, and that meets the standards for gun safes adopted pursuant to [Penal Code] Section 23650.”⁴ Under Penal Code section 23650, DOJ was required to “develop regulations to implement a minimum safety standard for firearm safety devices *and* gun safes to significantly reduce the risk of firearm-related injuries to children 17 years of age and younger.”⁵ Today, standards for “firearm safety devices” can be found in 11 C.C.R. section 4094, and standards for “gun safes” can be found in 11 C.C.R. section 4100.

For years, California has required all firearm transactions to be accompanied by a “firearm safety device that is listed on [DOJ’s] roster of approved firearm safety devices.”⁶ However, if the purchaser or transferee already owns a gun safe that satisfies both California and DOJ’s standards, and

¹ Cal. Pen. Code § 16850. For reasons unrelated to the proposed ordinance, this definition does not apply to a utility or glove compartment of a motor vehicle.

² Cal. Pen. Code § 16540 (emphasis added).

³ *Id.*

⁴ Cal. Pen. Code § 16610.

⁵ Cal. Pen. Code § 23650(a) (emphasis added).

⁶ Cal. Pen. Code § 23635(a).

provides proof of ownership or otherwise as authorized by the Attorney General, this requirement is waived.⁷ What's more, while a "firearm safety device" is required to be tested by DOJ in order to appear on the "roster of approved firearm safety devices," *[g]un safes shall not be required to be tested, and therefore may meet the standards without appearing on the Department of Justice roster.*⁸

Despite the fact that a gun safe is not requirement to be tested, DOJ has nonetheless tested and listed several gun safes on the "roster of approved firearm safety devices." But the vast majority of gun safes still do not appear on the roster for the reasons discussed above. Thus, by requiring a device to meet the definition of a locked container under California law *and* be listed on DOJ's roster of approved firearm safety devices, the Proposed Ordinance will preclude the use of many gun safes as a means of satisfying its requirement to safely secure a firearm upon leaving one's residence.

II. THE PROPOSED ORDINANCE IS UNCONSTITUTIONALLY VAGUE

The due process provisions of the Fourteenth Amendment and Article 1, section 7 of the California Constitution require "a reasonable degree of certainty in legislation, especially in the criminal law."⁹ And where statutes impact constitutionally protected conduct, the United States Supreme Court has raised the bar on the required certainty, demanding the greatest clarity "where the certainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights."¹⁰

"The underlying concern [of the void for vagueness doctrine] is the core due process requirement of adequate notice."¹¹ To provide such notice, the terms of a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct" is to be regulated.¹² Any statute that requires persons of "common intelligence" to "guess at its meaning" or "differ as to its application" necessarily violates due process.¹³

In other words, a law is unconstitutionally vague if: (1) the law fails to provide notice to persons of ordinary intelligence as to what items must be secured in a locked container as required; or (2) that the law's definitions are so vague that, without more, it fails to provide sufficient standards to prevent arbitrary and discriminatory enforcement.

Here, the definition of the term "firearm," as used in the Proposed Ordinance, refers only to California Penal Code section 16520. As generally defined by this section, a "firearm" is "a device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of

⁷ Cal. Pen. Code § 23635(b).

⁸ Cal. Pen. Code § 23635(b)(1); See also Cal. Pen. Code § 23655.

⁹ *People v. Heitzman*, 9 Cal.4th 189, 199 (1994) (quoting *In re Newbern*, 53 Cal.2d 786, 792 (1960)) (emphasis added).

¹⁰ *Coluati v. Franklin*, 439 U.S. 379, 391 (1979); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); See also *People v. Barksdale*, 8 Cal.3d 320, 327 (1972) (stating that "stricter standards of permissible statutory vagueness may be applied to a statute having a *potentially inhibiting effect on fundamental rights*" (emphasis added)).

¹¹ *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997).

¹² *Katzev v. Los Angeles County*, 52 Cal.2d 360 (1959).

¹³ *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

an explosion or other form of combustion.”¹⁴ But in addition to this definition, there are a number of ways the term is defined. For one, the term also includes “the frame or receiver of the weapon,” but only as applied to:

- Firearm transaction records;
- The definition of “infrequent” loans involving firearms;
- Operation of law transfers;
- The definition of “responsible adult” regarding California firearm laws;
- The definition of “used firearm”;
- The license requirements for the sale, lease, or transfer of firearms, and the exceptions to these requirements relating to law enforcement;
- The exceptions for law enforcement to the requirements for gun shows;
- Recordkeeping, background checks, and fees relating to the sale, lease, or transfer of firearms;
- The “manufacture” of firearms;
- The restrictions on minors possessing firearms;
- The restrictions on firearm possession by prohibited persons;
- The exceptions relating to law enforcement for firearm eligibility checks;
- The Firearm Safety Certificate program;
- The Department of Justice’s “Ballistic Identification System”; or,
- The use of the term in the Welfare and Institutions Code.¹⁵

Penal Code section 16520 also states that the term “firearm” can include a “rocket, rocket propelled projectile launcher, or similar device containing an explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes,” but only as applied to:

- The definition of “lawful possession of [a] firearm”;
- California’s “loaded” firearm restrictions regarding criminal storage, carrying a concealed firearm, and carrying a loaded firearm in public; or,
- California’s restriction against carrying a concealed firearm.¹⁶

Penal Code section 16520 also states that the term “firearm” does “not include an unloaded antique firearm,” but only as applied to:

- The definition of “infrequent” firearm transactions;
- The definition of “firearm transaction records”;

¹⁴ Cal. Penal Code § 16520(a).

¹⁵ Cal. Penal Code § 16520(b)(1-19).

¹⁶ Cal. Penal Code § 16520(c).

- Operation of law transfers;
- The definition of “used firearm”;
- California’s restriction against the open carry of unloaded handguns;
- California’s restriction against carrying an unloaded firearm that is not a handgun in an incorporated city or city and county;
- The license requirements for the sale, lease, or transfer of firearms;
- California’s restriction against the sale or transfer of a handgun to any person under the age of 21, or any other firearm to a person under the age of 18;
- California’s restriction against the sale or transfer of a handgun that does not bear either a manufacturer’s serial number or other identification mark assigned to it by the California Department of Justice;
- California’s restrictions on the delivery of a firearm by a licensed firearms dealer;
- California’s restriction that all firearm transfers in California be processed by a California licensed firearms dealer;
- California’s license requirement for the manufacture of firearms; or,
- California’s requirements for the storage of firearms in a residence where another resident is prohibited from possessing firearms;¹⁷

Further, as used when referring to firearms that are unclaimed, abandoned, or subject to destruction, Penal Code section 16520 states the term “firearm” does not include a destructive device.¹⁸ And as used when referring to “undetectable” firearms, the term “firearm” has the same meaning under Federal law, which is defined as “(A) any weapon (including a starter gun) which will or is designed to or may be readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device,” with the exception that the term “does not include an antique firearm.”¹⁹

Finally, as used when referring to the manufacture of firearms, the term “firearm” includes “the unfinished frame or receiver of a weapon that can be readily converted to the functional condition of a finished frame or receiver.”²⁰

By defining the term “firearm” as “a firearm as defined in California Penal Code, Section 16520, as may be amended from time to time,” absent any further clarification, the Proposed Ordinance is unconstitutionally vague. Penal Code section 16520 provides multiple definitions for the term “firearm” as it applies to specific provisions of the California Penal Code relating to firearms. While some items may be considered firearms for the purposes of one definition provided under Penal Code section 16520, those same items may not be considered firearms under other provisions of Penal Code section 16520.

¹⁷ Cal. Penal Code § 16520(d).

¹⁸ Cal. Penal Code § 16520(e).

¹⁹ Cal. Penal Code § 16520(f).

²⁰ Cal. Penal Code § 16520(g).

Because the proposed definition for the term “firearm” fails to provide adequate notice to persons of ordinary intelligence as to what specific firearms must be secured in a locked container, and otherwise fails to provide sufficient standards to prevent arbitrary and discriminatory enforcement, the Proposed Ordinance is unconstitutionally vague and unenforceable.

III. THE PROPOSED ORDINANCE IS PREEMPTED BY STATE LAW

Under the preemption doctrine, a local law 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.²¹ A local law “*duplicates* state law when it is “coextensive” with state law.”²² A local law “*contradicts* state law when it is inimical to or cannot be reconciled with state law.”²³

Here, the Proposed Ordinance dictates the manner in which residents keep their firearms within their own homes, and requires anyone who resides in San José to keep their firearms in a locked container or disabled with a trigger lock upon leaving their residence.

a. The Proposed Ordinance Contradicts State Law

California maintains a comprehensive set of statutes, creating criminal and/or civil liability for the improper storage of a firearm whenever a minor or prohibited person accesses a firearm and uses that firearm to cause death or bodily injury or carries it to a public place.²⁴ Liability for such is subject to an equally comprehensive set of exceptions.²⁵

Specifically, state law exempts one from liability whenever: (1) the firearm is kept in a locked container; (2) the firearm is kept in a location a reasonable person would believe to be secure; (3) the firearm is carried on one’s person or the firearm is kept in close enough proximity to the person to be retrieved and used as if it were carried on one’s person; or (4) the firearm is locked by a locking device.²⁶

By its express terms, the Proposed Ordinance strips from ordinary San José residents the right to engage in behavior specifically deemed lawful by the state. For it flatly denies individuals two options explicitly authorized by state law—i.e., to keep their firearms in a secure location (locked or not) or to keep the firearm under their immediate control—thereby contradicting state law.

b. The Proposed Ordinance Enters an Area Fully Occupied by State Law

In addition to the above, a local law is impliedly preempted by state law when it encroaches on an area of law occupied by state law. This occurs when either:

²¹ Cal. Const., art. XI, § 7; *O’Connell v. City of Stockton*, 41 Cal.4th 1061, 1067 (2007); *Fiscal v. City & Cty. of San Francisco*, 158 Cal.App.4th 895, 903-04 (2008).

²² *O’Connell*, 41 Cal.4th at 1068.

²³ *Id.*

²⁴ Cal. Penal Code §§ 25100-25135, 25200-25225.

²⁵ Cal. Penal Code §§ 25105(a-g), 25135(a)(1-6), 25205.

²⁶ Cal. Penal Code §§ 25105(a-g), 25135(a)(1-6), 25205.

- (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.²⁷

As discussed above, the storage of firearms is fully and completely regulated by state law. In addition to California's negligent storage provision, any firearm sold by a California licensed firearms dealer must include a firearm safety device.²⁸ Dealers must also obtain an affidavit from customers who purchase long guns stating ownership of a gun safe or lock box.²⁹ To be an approved firearm safety device, DOJ conducts rigorous safety tests to ensure they "significantly reduce the risk of firearm-related injuries to children 17 years of age and younger."³⁰ There are also several storage requirements that apply to anyone living with another individual who is prohibited by state or federal law from owning firearms.³¹

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

IV. CONCLUSION

Our clients understand the need to combat the criminal misuse of firearms and to prevent accidental injuries. To that end, they have a number of programs available to the City upon request.³² These include firearm safety training,³³ the Eddie Eagle GunSafe® Program,³⁴ the National School

²⁷ *Fiscal*, 158 Cal.App.4th at 904.

²⁸ Cal. Penal Code § 23635(a).

²⁹ See *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 (Jan. 2013).

³⁰ Cal. Penal Code § 23650(a).

³¹ Cal. Penal Code § 25135.

³² <https://explore.nra.org/interests/safety-and-education/>.

³³ <https://explore.nra.org/interests/firearms-training/>. With roughly 1 million people attending NRA training courses annually, the NRA is recognized nationally as the Gold Standard for firearm safety training.

³⁴ <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."

Shield Program,³⁵ and youth-specific programs designed to teach firearm safety and responsibility.³⁶ Each of these programs have proven to reduce accidental gun deaths and promote public safety—more so than any gun-control law can hope to achieve. Instead of adopting the Proposed Ordinance, we ask the City of San José to consider such alternatives.

For these reasons, we strongly encourage the City Council to reject the Proposed Ordinance. If you have any questions or concerns regarding the content of this correspondence, please feel free to contact us at your convenience.

Sincerely,
Michel & Associates, P.C.



Matthew D. Cubeiro

³⁵ <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.

³⁶ <http://youth.nra.org/>.

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE
AMENDING CHAPTER 10.32 OF TITLE 10 OF THE
SAN JOSE MUNICIPAL CODE TO ADD A NEW PART
5 TO REQUIRE SAFE STORAGE OF FIREARMS IN A
RESIDENCE, AS DEFINED**

WHEREAS, firearm injuries have a significant adverse public health and safety impact nationally, in the State of California, and locally; and

WHEREAS, the Santa Clara County Public Health Department issued a report on firearm injuries in October 2015. In 2013, 12% of injury deaths were due to firearms injuries. During the period 2004-2013, there were an average of 44 deaths per year due to self-inflicted/suicide from firearms injuries, and an average of 28 deaths per year due to assault/homicide from firearms injuries. Self-inflicted/suicide accounted for the highest percentage of deaths (59%) from firearms injuries, with assault/homicide accounting for 37% of deaths from firearm injuries.

WHEREAS, unlocked guns in the home are susceptible to theft during burglaries. According to a November 2012 report of data from the Bureau of Justice Statistics—a program of the United States Department of Justice—an average of approximately 172,000 firearms were stolen each year during burglaries over the six-year period from 2005 through 2010. At least 80% or an annual average of at least 135,000 of these stolen firearms were never recovered by police; and

WHEREAS, according to a report by the Bureau of Alcohol, Tobacco and Firearms, private individuals in California reported over 10,000 lost or stolen firearms in 2012. The actual number of stolen guns is likely higher because California law does not currently require gun owners to report the theft of a firearm, although gun owners in

California are required to report the loss or theft of a firearm beginning July 1, 2017;
and

WHEREAS, according to the San Jose Police Department, during the period from May 1, 2014 through April 30, 2017, 286 firearms were reported stolen out of 9270 residential burglaries reported in the City of San Jose.

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF
SAN JOSE:**

A new Part is added to Chapter 10.32 of Title 10 of the San José Municipal Code, to be numbered, entitled, and to read as follows:

**Part 5
SAFE STORAGE OF FIREARMS IN A RESIDENCE**

10.32.160 Definitions

As used in this Part, the following terms have the following meaning:

- A. "Firearm" means a firearm as defined in California Penal Code, Section 16520, as may be amended from time to time.

- B. "Locked Container" means a locked container as defined in California Penal Code Section 16850, as amended from time to time, and is listed on the California Department of Justice Bureau of Firearms roster of approved firearm safety devices.

- C. "Residence" means any structure intended or used for human habitation, including but not limited to houses, condominiums, rooms within a Residence, in-law units, motels, hotels, single room occupancy units, time shares, and recreational and other vehicles where human habitation occurs.

- D. "Trigger Lock" means a trigger lock that is listed on the California Department of Justice's roster of approved firearms safety devices, and that is identified as appropriate for that firearm by reference to either the manufacturer and model of the firearm or to the physical characteristics of the firearm that match those listed on the roster for use with the device under California Penal Code Section 23635, as may be amended from time to time.

10.32.170 Firearms in Residence -- Prohibition

A person who owns or possesses a Firearm and keeps it in his or her Residence shall store the Firearm in a Locked Container or disable the Firearm with a Trigger Lock upon leaving the Residence.

RD:CBM:KML
7/28/2017

PASSED FOR PUBLICATION of title this _____ day of _____, 2017, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk