

1 DENNIS J. HERRERA, State Bar #139669
 City Attorney
 2 WAYNE SNODGRASS, State Bar #148137
 SHERRI SOKELAND KAISER, State Bar #197986
 3 Deputy City Attorneys
 1 Dr. Carlton B. Goodlett Place
 4 City Hall, Room 234
 San Francisco, California 94102-4682
 5 Telephone: (415) 554-4691
 Facsimile: (415) 554-4747
 6 E-Mail: sherri.kaiser@sfgov.org

7 Attorneys for Defendants
 CITY AND COUNTY OF SAN FRANCISCO,
 8 MAYOR GAVIN NEWSOM and POLICE CHIEF
 GEORGE GASCÓN
 9

10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13

14 ESPANOLA JACKSON, PAUL COLVIN,
 THOMAS BOYER, LARRY BARSETTI,
 15 DAVID GOLDEN, NOEMI MARGARET
 ROBINSON, NATIONAL RIFLE
 16 ASSOCIATION OF AMERICA, INC. SAN
 FRANCISCO VETERAN POLICE
 17 OFFICERS ASSOCIATION,

18 Plaintiffs,

19 vs.

20 CITY AND COUNTY OF SAN
 FRANCISCO, MAYOR GAVIN NEWSOM,
 21 in his official capacity; POLICE CHIEF
 GEORGE GASCÓN, in his official capacity,
 22 and Does 1-10,

23 Defendants.
 24
 25
 26
 27
 28

Case No. C09-2143 RS

**MOTION TO ENLARGE TIME TO RESPOND
 TO FIRST AMENDED COMPLAINT AND
 EXCEED OTHERWISE APPLICABLE PAGE
 LIMITS (CIV. L.R. 6-3 and 7-11)**

1 Defendant City and County of San Francisco ("City") seeks additional time and additional
2 pages to allow it to provide a succinct but comprehensive response to Plaintiffs' First Amended
3 Complaint, while first addressing the procedurally important issue of consolidation. As detailed
4 below, six individual and two organizational Plaintiffs have raised a total of ten federal and state
5 claims against three San Francisco Police Code sections that respectively regulate in-home gun
6 storage, ammunition sales, and firearm discharges within the City. In response, the City intends to
7 raise a total of 23 substantive and jurisdictional grounds to dismiss these claims under Federal Rule of
8 Civil Procedure 12(b)(1) and 12(b)(6), and it will also move under Rule 12(e) for a more definite
9 statement of one plaintiff's vague allegations that may or may not support standing. In addition,
10 however, the City must first file a motion seeking consolidation of identical claims now pending
11 before the Honorable Claudia Wilken in order to avoid an unnecessary duplication of efforts by the
12 Court and counsel, and to avoid the risk of inconsistent adjudications. In these circumstances, the
13 City's request for more time to respond and more pages to accommodate the breadth of issues is
14 reasonable, and Plaintiffs' silent refusal to agree to these requests is not. Briefing novel, complicated
15 constitutional issues well and resolving them efficiently serves everyone's interests.

16 **BACKGROUND**

17 On May 15, 2009, the National Rifle Association ("NRA"), the San Francisco Veteran Police
18 Officers Association, and six individual plaintiffs filed the original complaint in this action against the
19 City, the Mayor, and the Chief of Police. Docket No. 1. The complaint attacks three sections of the
20 San Francisco Police Code. The first is a "safe storage" law that allows gun owners to carry loaded
21 weapons freely in their homes, but requires them to store their firearms in a locked container or use a
22 trigger lock whenever those weapons are not under the owner's direct, personal control. S.F. Police
23 Code § 4512. The second, Police Code Section 613.10(g), is a licensing provision that prohibits
24 ammunition retailers from selling types of bullets that have no sporting purpose or are designed to be
25 increase the damage to the human body, such as hollow point bullets that flatten and tear a wider
26 swath through the body, exploding bullets that project barbs or other shrapnel into surrounding tissues,
27 or fragmenting bullets. The third challenged ordinance, Police Code Section 1290, bans firearm
28 discharges within City limits.

1 Plaintiffs challenge the safe storage law as inconsistent with the Second Amendment right to
2 keep and use handguns in the home in self-defense, asserting that because a safe storage requirement
3 may delay, however briefly, their access to a loaded weapon during a home invasion. Am. Compl.
4 ¶¶ 47-55. Plaintiffs assert that the City's refusal to license the sale of unusually injurious ammunition
5 likewise burdens their Second Amendment right to in-home self defense by making a few types of
6 ammunition that are suitable for self-defense purposes more difficult to procure. *Id.* ¶¶ 56-62. They
7 further complain that the distinction between permissible and impermissible ammunition sales is
8 unconstitutionally vague. *Id.* ¶¶ 68-73. Plaintiffs attack the discharge ban under the Second
9 Amendment because it does not expressly exempt shooting in self-defense in the home. *Id.* ¶¶ 63-67.
10 Finally, Plaintiffs also challenge each of the three ordinances as violating an asserted California
11 constitutional right to use firearms for self-defense for similar reasons, and they allege that each
12 ordinance is preempted under various constellations of state statutory and decisional law. *Id.* ¶¶ 74-81.
13 In sum, Plaintiffs make 10 claims; four under the federal constitution and six state law claims.

14 On July 9, 2009, the City moved to dismiss the complaint for lack of subject-matter
15 jurisdiction. Docket No. 9. The City argued that all Plaintiffs lacked standing and that their claims
16 were unripe because Plaintiffs failed to allege that any of them (or their members) had ever been
17 arrested or charged with a violation of any of the challenged ordinances, or faced any imminent threat
18 of enforcement. On August 24, 2009, rather than oppose the City's motion, Plaintiffs filed an
19 Amended Complaint in which they newly alleged, without elaboration, that Plaintiff Golden was
20 "harassed by city agencies regarding the manner of storage of firearms in his home." Am. Cmpl. at 5.

21 Three days later, on August 27, 2009, Judge Hamilton held the initial case management
22 conference. Docket No. 22. That same day, Plaintiffs filed a regularly noticed motion to stay the case
23 on the basis that the Ninth Circuit (and, as it turned out, the Supreme Court) was poised to address the
24 question whether the Second Amendment was incorporated against state and local governments.
25 Docket No. 19. At the case management conference, Judge Hamilton noted that she was prepared to
26 stay the case immediately if both parties agreed. Declaration of Sherri Kaiser, ¶ 12. The City
27 indicated its agreement, withdrew its pending motion, and requested that the full statutory period to
28

1 respond to the Amended Complaint would begin only when the Court lifted the stay. *Id.* The Court
 2 stayed the case with that proviso. Docket No. 22.

3 On September 23, 2009, with the *Jackson* case already stayed, Plaintiff Therese Pizzo filed a
 4 separate action, attacking the same three San Francisco Police Code sections on all of the same
 5 grounds as Plaintiffs in this case had, and also challenging the City's denial of her application to carry
 6 a concealed weapon. *Pizzo v. Newsom*, N.D. Cal. Case No. 09-4493 CW, Docket No. 1. On
 7 December 10, 2009, Judge Wilken stayed *Pizzo* based on a stipulation of the parties. Docket No. 12.

8 On March 18, 2010, *Jackson* was reassigned to this Court for all further proceedings. Docket
 9 No. 27. On September 13, 2010, the Court lifted the stay and advised that any party could seek
 10 consolidation with *Pizzo* by stipulation or by noticed motion. Docket No. 37. Shortly thereafter, the
 11 City sought the Plaintiffs' agreement to consolidation, which plaintiffs had until that point supported.
 12 Kaiser Dec. ¶ 3 & Ex. A. Plaintiffs declined to stipulate, without explanation for their change of heart.
 13 *Id.*, Ex. B. Plaintiffs have also indicated, by means of their silence in the face of the City's extensive
 14 meet and confer attempts, that they will neither agree to extend the time to respond nor jointly seek
 15 relief from the governing page limitations.¹ *Id.*, Exs. C-G.

16 ARGUMENT

17 The Court should increase the page limit for the City's response to the Amended Complaint
 18 from 25 to 50 pages and set a filing deadline of 30 days after the Court rules on consolidation.

19 1. The City will present 23 grounds for dismissal under Fed. R. Civ. P. 12 and 20 move for a more definite statement.

21 The sheer volume of defenses under Rule 12 will make it difficult for the City to observe the
 22 standard 25-page limit for an opening brief. In addition to seeking dismissal of all ten claims on the
 23 merits for failure to state a claim (10 grounds), the City will argue that the Plaintiffs lack standing to
 24 challenge each ordinance absent an allegation of constitutionally sufficient harm (3 grounds); that they
 25 do not fall within the zone of interest of the ordinance governing ammunition sales (1 ground); that
 26 none of their claims is ripe (3 grounds); that the Court should refuse to exercise supplemental

27 ¹ According, contrary to its usual practice, the City does not propose extensions of time or
 28 relief from page limit requirements for all parties. Having frustrated the City's attempts to work
 cooperatively, it is now incumbent upon the Plaintiffs to seek any desired relief in a separate motion.

1 jurisdiction over novel and complex questions of state law (3 claims); and that the Court should
2 abstain from deciding the state law claims under the *Pullman* doctrine (3 claims). In addition, the City
3 will move for a more definite statement of City agencies' alleged harassment of Plaintiff Golden.

4 Given this unusually high number of discrete issues, a 25-page briefing limit would leave the
5 City little more than a page per issue, a number that would in fact be greatly reduced by the need to
6 provide an introduction, background, conclusion and the like. While the City agrees that briefs must
7 be kept concise, a page limit that is too severe can prevent the parties from making a fair presentation
8 of the issues. Since that would clearly be the case here (Kaiser Dec. ¶ 13), the City respectfully asks
9 that the Court extend the page limit for the City's opening brief from 25 to 50 pages.

10 **2. The Amended Complaint presents difficult and unsettled questions of**
11 **constitutional law.**

12 The gravamen of the Amended Complaint is its assertion that each of the three Police Code
13 sections violates the newly announced individual right protected by the Second Amendment to keep
14 and fire handguns in the home in self-defense. But while that right has now been enunciated, there is
15 no decision that is binding on this Court that describes how to test challenged laws for a violation of it.
16 Thus, in its motion to dismiss, the City will have to present an argument for which standard of scrutiny
17 should apply under the Second Amendment, then apply that standard (and possible competing
18 standards) to three very different ordinances. The novelty and complexity of those three grounds
19 alone could legitimately take 50 pages to brief, but here the City asks only for 50 total pages, or little
20 more than two pages each to address 23 grounds to dismiss and a motion for a more definite statement.
21 Although 50 pages is an unusual request, we submit that in these circumstances it is justified.

22 **3. It would needlessly waste the Court's and the City's resources to proceed**
23 **on the merits before deciding whether to consolidate *Jackson* and *Pizzo*.**

24 The only differences between the City's response to the challenges to its ordinances in the
25 Amended Complaint in *Jackson* and the complaint on file in *Pizzo* will be its refutation of *Pizzo's*
26 substantive due process claims and the absence of a motion for a more definite statement. Given such
27 overwhelming unanimity between the issues in both cases, it would be wasteful for two judges of the
28 same court to wade through them twice, provide two hearings, and issue two separate written opinions.
Likewise, it would be imprudent to risk inconsistent decisions that might impose conflicting legal

1 duties on the City regarding important questions of civil rights and public safety. For these reasons, it
2 makes both practical and legal sense to decide the consolidation issue before proceeding further on the
3 merits. The timeline for responding to the Amended Complaint should be adjusted to accommodate a
4 motion to consolidate, and the City's response should not be due until 30 days after the Court issues its
5 order granting or denying consolidation.

6 **4. The order staying the case provided a 20-day floor, but not a ceiling, on the**
7 **City's time to respond.**

8 Finally, the August 27, 2009 minute order staying the case should not be interpreted to bar the
9 City's request for additional time to respond. The City requested a 20-day time to respond in the
10 minute order to ensure that it would have at least the full statutory response period from the date the
11 Court lifted the stay, even though the Plaintiffs had filed their Amended Complaint three days before
12 the stay order issued. Seeking clarification that the stay would reset the clock rather than merely toll it
13 had no bearing on whether the City might later seek to extend the time to respond, particularly since
14 the City could not have foretold the need to seek consolidation of a nearly identical case that was yet
15 to be filed. Nor could the City have confidently predicted the state of Second Amendment law when
16 the stay would be lifted. In fact, counsel could not even guarantee that she would be available to write
17 a response within 20 days of an unknown date when the stay would lift. Thus, the request and
18 resulting order providing 20 days to respond was merely a safety net for the City. It was not a promise
19 that the City could reasonably respond in 20 days, no matter the unknown, future circumstances.

20 **CONCLUSION**

21 For all of the foregoing reasons, the Court should grant the City permission to file a response to
22 the Amended Complaint that does not exceed 50 pages in length and that shall be filed no later than 30
23 days after the Court's order granting or denying consolidation.

24 Dated: September 22, 2010

25 s/Sherri Sokeland Kaiser
26 SHERRI SOKELAND KAISER
27 Deputy City Attorney

28 Attorney for Defendants CITY AND COUNTY OF SAN
FRANCISCO, et al.