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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

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

) **CASE NO.: CV-09-2143-PJH**
)
) **JOINT CASE MANAGEMENT**
) **STATEMENT AND PROPOSED**
) **ORDER**

17 Plaintiffs

18 vs.

19 CITY AND COUNTY OF SAN
20 FRANCISCO, MAYOR GAVIN
NEWSOM, IN HIS OFFICIAL
21 CAPACITY; POLICE CHIEF
HEATHER FONG, in her official
22 capacity, and Does 1-10,

23 Defendants.
24

25 The parties to the above-entitled action jointly submit this Case Management
26 Statement and Proposed Order and request the Court to adopt it as its Case
27 Management Order in this case.
28

1 Preliminary Matter

2 As a preliminary matter, we note that this case involves a Second Amendment
3 challenge to three San Francisco ordinances regulating firearms and ammunition.
4 Plaintiffs' complaint for declaratory and injunctive relief regarding those
5 ordinances is founded in large part upon the decision in *Nordyke v. King* (9th Cir.
6 2009) 563 F.3d 439, wherein the court concluded that the Due Process Clause of
7 the Fourteenth Amendment applies the protections of the Second Amendment to
8 state and local government action. The Ninth Circuit Court of Appeals recently
9 decided to rehear *Nordyke*, en banc, the week of September 21, 2009, so that
10 decision is not yet final. In light of this, the parties believe a stay of this action is
11 warranted pending the outcome of the rehearing en banc. Plaintiffs will be filing a
12 motion to stay on those grounds shortly. Defendants agree that a stay is warranted.

13 **1. Jurisdiction and Service**

14 The Court has original jurisdiction of this civil action pursuant to 28 U.S.C. §
15 1331 because the action arises under the Constitution and laws of the United
16 States, thus raising federal questions. The Court also has jurisdiction under 28
17 U.S.C. § 1343(a)(3) and 42 U.S.C. § 1983 in that this action seeks to redress the
18 deprivation, under color of the laws, statutes, ordinances, regulations, customs and
19 usages of the City and County of San Francisco, a political subdivision of the State
20 of California and political subdivisions thereof, of rights, privileges or immunities
21 secured by the United States Constitution and by Acts of Congress. The Court has
22 supplemental jurisdiction over Plaintiffs' state law claims asserted herein under 28
23 U.S.C. § 1367 because such claims arise out of the same case or controversy as the
24 federal claims.

25 Defendants have challenged jurisdiction by way of the motion referenced
26 below in No. 4. All parties have been served.

27 **2. Facts**

28 Plaintiffs challenge the validity of three San Francisco ordinances: (1) San

1 Francisco Police Code (“SFPC”) § 4512, which provides in pertinent part: “No
2 person shall keep a handgun within a residence unless the handgun is stored in a
3 locked container or disabled with a trigger lock that has been approved by the
4 California Department of Justice;” (2) SFPC § 613.10(g), which prohibits the sale
5 of all ammunition that “serves no sporting purpose” or is designed to expand or
6 fragment upon impact; and (3) SFPC § 1290, which prohibits without exception
7 (e.g., for self-defense) the discharge of any firearms within the limits of the City
8 and County of San Francisco.

9 **3. Legal Issues**

10 A. Whether the federal constitutional right to keep and bear arms under the
11 Second Amendment, recently enunciated in *District of Columbia v. Heller* (2008)
12 128 S. Ct. 2783, 2818, 171 L. Ed. 637, 680, is incorporated and applies to the
13 States and their subdivisions.

14 B. If so, whether these municipal ordinances unduly burden Plaintiffs’
15 Second Amendment rights.

16 C. Whether SFPC § 613.10(g) also violates Plaintiffs’ right to Due Process
17 under the Fifth Amendment to the United States Constitution insofar as its ban on
18 all ammunition that “serves no sporting purpose” is both vague and over-broad.

19 D. Whether the three challenged ordinances also violate related California
20 laws: including (1) Article 1, section 1 of the California Constitution (right to self
21 defense); (2) California Penal Code § 12026(b) (right to possess handgun in home
22 or business); (3) and innumerable statutes, and the public policy they express,
23 authorizing the use of firearms in self-defense, especially in light of *Fiscal v. City
24 and County of San Francisco* (2008) 158 Cal.App.4th 895.

25 E. Whether the Court has jurisdiction over the case and if so whether for
26 prudential reasons the Court should decline to exercise that jurisdiction (as
27 outlined in Defendants’ motion to dismiss).

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1 **4. Motions**

2 Motion to Dismiss: On July 9, 2009, Defendants filed a motion to dismiss
3 Plaintiffs' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ.
4 P. 12(b)(1), set to be heard on September 23, 2009. Only the moving papers have
5 been filed. Defendants assert that Plaintiffs are not in danger of harm from
6 enforcement of the ordinances, and that there is no evidence of enforcement,
7 generally, i.e., that there is no case or controversy. Plaintiffs disagree.

8 Motion to Stay: Plaintiffs will file, before the Case Management Conference,
9 an amended Complaint to address certain concerns in Defendants' motion to
10 dismiss. In light of this, Plaintiffs believe the motion to dismiss should thereafter
11 be taken off calendar. Plaintiffs will then file a motion to stay these proceedings
12 because of the appellate court's recent decision to rehear, en banc, the decision in
13 *Nordyke v. King* (9th Cir. 2009) 563 F.3d 439, wherein the court concluded that the
14 *Due Process Clause of the Fourteenth Amendment* applies the protections of the
15 *Second Amendment* to state and local governments. Plaintiffs' case is based
16 primarily upon the Second Amendment applying to San Francisco municipal, thus
17 the decision in *Nordyke* is critical. If the en banc panel reverses the initial
18 decision, much of Plaintiffs' case may be moot – hence the stay.

19 Motions for Summary Judgment: If *Nordyke* is upheld and the case otherwise
20 moves forward, the parties anticipate filing cross-motions for summary judgment
21 on the validity of the three ordinances.

22 **5. Amendment of Pleadings**

23 As noted above, Plaintiffs intend to amend their complaint to cure the alleged
24 subject matter jurisdiction defects raised in Defendants' motion to dismiss.

25 **6. Evidence Preservation**

26 The parties will preserve all relevant documents and electronic evidence.

27 **7. Disclosures**

28 Initial disclosure have not yet been made.

1 **8. Discovery**

2 As the case is a declaratory relief action regarding the validity of certain
3 ordinances, it primarily concerns issues of law. But there are also areas that will
4 require discovery, including the standing of the plaintiffs, the enforcement of the
5 statutes, and the burdens or benefits of the challenged ordinances. As of now,
6 neither party anticipates the need for limitations or modifications of the Court's
7 discovery rules. The parties will revisit the issue following the anticipated stay of
8 the case, and the results of the en banc hearing in *Nordyke*.

9 **9. Class Actions**

10 Not applicable.

11 **10. Related Cases**

12 Other than the above-referenced *Nordyke* case (which is "related" to the
13 extent that it provides the legal basis for the bulk of the suit), there are no related
14 cases pending before this court or any other court.

15 **11. Relief**

16 Plaintiffs request the following relief:

17 1) For a declaration that San Francisco Police Code §§ 4512, 613.10(g), and
18 1290 infringe upon the right to keep and bear arms protected by the Second
19 Amendment or the right to Due Process under the Fifth Amendment, as
20 incorporated into the Fourteenth Amendment;

21 2) For a preliminary and permanent prohibitory injunction forbidding City and
22 County of San Francisco and its agents, employees, officers, and representatives,
23 including Defendants Mayor Newsom and Police Chief George Gascon, from
24 enforcing, or attempting to enforce San Francisco Police Code §§ 4512, 613.10(g),
25 and 1290;

26 3) In the alternative, pursuant to California law, for: (1) a declaration that San
27 Francisco Police Code §§ 4512, 1290, and/or 613.10(g) infringe upon Article 1,
28 section 1 of the California Constitution, in conjunction with California Penal Code

1 § 12026 and related state laws; and (2) a preliminary and permanent prohibitory
2 injunction forbidding the City and County of San Francisco and its agents,
3 employees, officers, and representatives, including Defendants Mayor Newsom and
4 Police Chief George Gascon, from enforcing, or attempting to enforce San
5 Francisco Police Code §§ 4512, 1290 and/or 613.10(g);

6 4) For attorneys fees pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988,
7 California Code of Civil Procedure § 1021.5 (private attorney general statute)
8 and/or other applicable state and federal law.

9 **12. Settlement and ADR**

10 There may be some prospects for settlement in terms of narrowing the case, if
11 the parties can agree on certain amendments to the ordinances that would address
12 the Plaintiffs' concerns, e.g., by inserting a self-defense, defense of others, and
13 defense of property exception to Section 1290's ban on discharging a firearms
14 within city limits.

15 The parties have filed the Stipulation and Proposed Order Selecting ADR
16 Process in compliance with ADR L.R. 3-5. The parties have agreed to participate
17 in mediation pursuant to ADR L.R. 6 and to hold the ADR session thirty (30) days
18 after the filing of parties' anticipated cross-motions for summary judgment.

19 **13. Consent to Magistrate Judge for All Purposes**

20 The parties do not consent to have a magistrate judge conduct all further
21 proceedings, including trial and entry of judgment.

22 **14. Other References**

23 The parties do not believe that this case is suitable for reference to binding
24 arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

25 **15. Narrowing of Issues**

26 The case may be significantly narrowed depending on the outcome of the en
27 banc review of *Nordyke v. King*. On July 29, 2009, the Ninth Circuit Court of
28 Appeals ordered that *Nordyke* be reheard en banc the week of September 21, 2009.

1 Three of Plaintiffs' claims rely on the *Nordyke* holding that the Second
2 Amendment is incorporated and applicable to the states. Should the Ninth Circuit
3 overturn *Nordyke*, these claims can be dismissed, thereby narrowing the case
4 without having this Court expend any judicial resources. The mediation agreed to
5 by the parties might also narrow the case, to the extent the parties can agree on
6 amendments to one or more of the ordinances.

7 **16. Expedited Schedule**

8 The parties do not believe that this case can be handled on an expedited basis.

9 **17. Scheduling**

10 The parties respectfully suggest that, under the circumstances, discovery and
11 pre-trial deadlines be set at a second Case Management Conference within 30 days
12 after the Ninth Circuit Court of Appeals' en banc decision in *Nordyke v. King*
13 becomes final. The parties would submit a Supplemental Joint Case Management
14 Statement and Proposed Order the week preceding that conference with their
15 proposed schedule.

16 **18. Trial**

17 The case will be tried to the Court, and is expected to take three days or less.

18 **19. Disclosure of Non-Party Interested Entities or Persons**

19 Plaintiffs have filed the Certification of Interested Entities or Persons as
20 required by Local Rule 3-16. Pursuant to the Local Rule, Defendants are exempt
21 from filing the certification.

22 As of this date, other than the named parties, Plaintiffs are not aware of any
23 other interested parties.

24 **20. Other Matters**

25 Because Plaintiffs' case is founded upon the Second Amendment ruling in
26 *Nordyke v. King*, Plaintiffs respectfully suggest, and Defendants do not oppose,
27 staying this case until 30 days after the en banc panel's decision in that matter is
28 final. At that time, Plaintiffs further suggest that the parties submit a supplemental

1 Joint Case Management Conference Statement and attend a subsequent CMC to set
2 dates for future case activities. (If the en banc panel reverses *Nordyke's* ruling on
3 incorporation of the Second Amendment, the nature of the case will be altered
4 dramatically, e.g., the three main claims would be moot.) Plaintiffs will be filing
5 forthwith a motion to stay the case, setting out the rationale for doing so in more
6 detail.

7 Date: August 20, 2009

MICHEL & ASSOCIATES, P.C.

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/S/
C. D. Michel
Attorney for Plaintiffs

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12 Date: August 20, 2009

San Francisco City Attorneys Office

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/S/
Sherri Kaiser, Deputy City Attorney
Attorney for Defendants

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CASE MANAGEMENT ORDER

The Case Management Statement and Proposed Order is hereby adopted by the Court as the Case Management Order for the case and the parties are ordered to comply with this Order. In addition the Court orders:

Dated: _____

UNITED STATES DISTRICT JUDGE

