

No. 12-17803

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESPANOLA JACKSON et al.,

Plaintiffs-Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(CV-09-2143-RS)

**APPELLANTS' EXCERPTS OF RECORD
VOLUME II of IV**

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Pursuant to Ninth Circuit Rule 30-1, Plaintiffs-Appellants Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti, David Golden, Noemi Margaret Robinson, National Rifle Association of America, Inc., and San Francisco Veteran Police Officers Association, by and through their counsel of record, hereby confirm to the contents and form of Appellants' Excerpts of Record on appeal.

Date: February 7, 2013

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel

C. D. Michel

Attorney for Plaintiffs/Appellants

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2013, an electronic PDF of **APPELLANTS' EXCERPTS OF RECORD VOLUME II of IV** was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: February 7, 2013

MICHEL & ASSOCIATES, P.C.

/s/ C. D. Michel

C. D. Michel

Attorney for Plaintiffs-Appellants

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

11 ESPANOLA JACKSON, PAUL COLVIN,) **CASE NO. C09-2143-RS**
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **PLAINTIFFS' NOTICE OF APPEAL AND**
ROBINSON, NATIONAL RIFLE) **REPRESENTATION STATEMENT**
13 ASSOCIATION OF AMERICA, INC., SAN)
FRANCISCO VETERAN POLICE) **PRELIMINARY INJUNCTION APPEAL**
14 OFFICERS ASSOCIATION,)
15 Plaintiffs)
16 vs.)
17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF)
18 SAN FRANCISCO, AND THE CHIEF)
OF THE SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)
20 Defendants.)
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NOTICE OF APPEAL – PRELIMINARY INJUNCTION APPEAL

NOTICE IS HEREBY GIVEN that Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti, David Golden, Noemi Margaret Robinson, National Rifle Association of America, Inc., and San Francisco Veteran Police Officers Association, plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from an order denying Plaintiffs’ Motion for Preliminary Injunction entered in this action on the 26th day of November, 2012 (Docket No. 150).

Plaintiffs’ Representation Statement is attached to this Notice as required by Ninth Circuit Rule 3-2(b).

Date: December 21, 2012

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel

C.D. Michel
Attorney for Plaintiffs
180 E. Ocean Blvd., Suite 200
Long Beach, CA 90802

REPRESENTATION STATEMENT

The undersigned represents Plaintiffs-Appellants Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti, David Golden, Noemi Margaret Robinson, National Rifle Association of America, Inc., San Francisco Veteran Police Officers Association, and no other party. Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Circuit Rule 3-2(b), Plaintiffs-Appellants submit this Representation Statement. The following list identifies all parties to the action, and it identifies their respective counsel by name, firm, address, telephone number, and e-mail, where appropriate.

PARTIES	COUNSEL OF RECORD
Plaintiffs-Appellants Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti, David Golden, Noemi Margaret Robinson, National Rifle Association of America, Inc., San Francisco Veteran Police Officers Association	C. D. Michel (S.B.N. 144258) Glenn S. McRoberts (S.B.N. 144852) Clinton B. Monfort (S.B.N. 255609) Anna M. Barvir (S.B.N. 268728) MICHEL & ASSOCIATES, P.C. 180 East Ocean Blvd., Suite 200 Long Beach, CA 908502 Tel. No. (562) 216-4444 Fax No: (562) 216-4445 cmichel@michellawyers.com
Defendants-Appellees City and County of San Francisco, the Mayor of San Francisco, the Chief of the San Francisco Police Department, in their official capacities, and Does 1-10	Wayne Snodgrass, Deputy City Attorney Christine Van Aken, Deputy City Attorney Office of the City Attorney 1 Drive Carlton B. Goodlett Place City Hall, Room 234 San Francisco, CA 94102 Tel: (415) 554-4633 Fax: (415) 554-4699 christine.van.aken@sfgov.org

Date: December 21, 2012

MICHEL & ASSOCIATES, P.C.

s/ C. D. Michel

 C.D. Michel
 Attorney for Plaintiffs

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ESPANOLA JACKSON, PAUL COLVIN,) **CASE NO.: CV-09-2143-RS**
THOMAS BOYER, LARRY BARSETTI,)
DAVID GOLDEN, NOEMI MARGARET)
ROBINSON, NATIONAL RIFLE) **CERTIFICATE OF SERVICE**
ASSOCIATION OF AMERICA, INC., SAN)
FRANCISCO VETERAN POLICE)
OFFICERS ASSOCIATION,)

Plaintiffs)

vs.)

CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF)
SAN FRANCISCO, AND THE CHIEF)
OF THE SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)

Defendants.)

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of

PLAINTIFFS' NOTICE OF APPEAL AND REPRESENTATION STATEMENT

PRELIMINARY INJUNCTION APPEAL

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Wayne Snodgrass, Deputy City Attorney
Christine Van Aken, Deputy City Attorney
Office of the City Attorney
1 Drive Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 21, 2012.

/s/ C. D. Michel
C. D. Michel
Attorney for Plaintiffs

1 UNITED STATES DISTRICT COURT

2 NORTHERN DISTRICT OF CALIFORNIA

3 BEFORE THE HONORABLE RICHARD SEEBORG, JUDGE

4 -----)
5 Espanola Jackson, et al.,)
6 Plaintiffs,)
7 v.) No. C 09-2143 (RS)
8 City and County of)
9 San Francisco, et al.,)
10 Defendants.) San Francisco, California
11 -----) Tuesday, October 9, 2012
(20 pages)

12 TRANSCRIPT OF PROCEEDINGS

13 APPEARANCES:

14 For Plaintiffs: Michel & Associates, P.C.
15 180 East Ocean Boulevard
16 Suite 200
17 Los Angeles, California 90802
C.D. MICHEL
BY: GLENN S. McROBERTS

18 For Defendants: Office of the City Attorney
19 City and County of San Francisco
20 City Hall - Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
BY: CHRISTINE VAN AKEN

1 Tuesday, October 9, 2012

2 (1:55 p.m.)

3 **(In open court)**

4 DEPUTY CLERK: Calling Case 09-2143, Jackson, et al.,
5 vs. City and County of San Francisco.

6 DEPUTY CLERK: Counsel, please state your
7 appearances.

8 MR. MICHEL: Chuck Michel appearing for plaintiffs.

9 THE COURT: Good afternoon.

10 MS. VAN AKEN: Christine Van Aken for the City and
11 County of San Francisco.

12 THE COURT: Well, we've all been together before.
13 This now is on calendar for a motion for preliminary
14 injunction. I have spent some time going through what you
15 submitted and refreshing my memory on arguments that we've
16 had in this case. Interesting case in terms of how we
17 analyze and understand the *Heller* decision and where that
18 brings us.

19 What I'm inclined to do is just let you -- I don't
20 have a tentative to give you. But rather to just look to
21 each of you if there's anything additional that you do want
22 to go over with me.

23 So, I'll start with the plaintiffs.

24 MR. MICHEL: I don't have anything to add other than
25 what's in the briefs, your Honor. I -- candidly, I don't

1 think I've ever stood in front of a court and said this
2 before, but I sort of expect to lose, based on the Court's
3 ruling in our motion for judgment on the pleadings. So this
4 case -- and I'm sure you understand the context, it's always
5 been -- the first legal issue we were trying to resolve is
6 incorporation back in 2009 and the standard of review. We
7 got tied up behind the *Nordyke* case. There was a
8 three-judge panel ruling in the *Nordyke* case. Then it went
9 en banc, and it didn't give us what we had hoped it would
10 give us.

11 THE COURT: It got sent off for mediation, didn't it?
12 Isn't that what happened in the case? Is that ever -- well,
13 never mind.

14 MR. MICHEL: Just for academic interest, they didn't
15 settle, but then the Court said, Well, there's the judicial
16 admission that you could have gun shows under certain
17 conditions, so the case is moot, essentially.

18 THE COURT: I see. I see.

19 MR. MICHEL: So we never got the standard of review
20 ruling, which obviously is kind of critical to going forward
21 on any of these things. So my suggestion, and our approach
22 now basically is to try and get something that's an
23 appealable order.

24 THE COURT: Yeah. No, I recognize the procedural
25 conundrum you've been addressing. And when I saw your

1 motion, just as I made a comment on what you expect to
2 happen, I wasn't surprised to see your motion.

3 So, we have gone down this path and talked about
4 these very interesting issues. And they are really
5 interesting. So I don't take any umbrage from your
6 prediction, but I'm also not ruling today. So -- I do know,
7 though, that the parties -- I think both parties want to
8 move this along. And I recognize certainly from the
9 plaintiff's perspective you want to do that. And I have --
10 I share the notion that some clarity from courts above would
11 be useful, and so I hear your request.

12 In terms of the substance of the argument, of the two
13 ordinances we have -- and as I say, you have fully briefed
14 it, but I just wanted to make sure to give you an
15 opportunity, if there's anything further that you want to
16 say.

17 MR. MICHEL: No, not really, your Honor. I think
18 really -- this case is on for case management conference as
19 well.

20 THE COURT: Yes, I was going to talk about that in a
21 minute.

22 MR. MICHEL: I have a lot of thoughts on how we might
23 approach that.

24 THE COURT: Let's talk about the preliminary
25 injunction motion first.

1 MS. VAN AKEN: Thank you, your Honor.

2 THE COURT: Miss Van Aken?

3 MS. VAN AKEN: Thank you. The only thing I would add
4 to the papers, and I won't repeat anything that's in there,
5 is that even under plaintiff's view of the second amendment,
6 that it is a categorical approach that we take, that we look
7 only to history, text and tradition, I think the City
8 prevails in this case. So I, too, expect plaintiffs to lose
9 this motion after the Court has had the opportunity to
10 review it thoroughly and consider its ruling.

11 And this is because -- the Second Amendment objection
12 is not an unlimited right. And we know that not only are
13 there -- is there a history of different kinds of gun
14 regulations, but there's also a history of disarming entire
15 classes of people based on some sort of notion of bad
16 conduct: Domestic violence, narcotics use, juveniles -- not
17 because of bad conduct, but because we think they're not
18 responsible. So there's a notion of virtuous possessors of
19 guns that I think is embodied in the Second Amendment, and
20 that history tests and tradition recognizes.

21 THE COURT: We have the not unusual scenario of a
22 Supreme Court opinion of which both sides can take sentences
23 and present use. You highlight, as I would in your shoes,
24 this comment in *Heller* that it's not an unlimited right.
25 And you're pointing to limits. The plaintiffs point to

1 language in *Heller* that says there's nothing more core to
2 the second amendment right than protecting your residence.
3 And so -- and they make -- and *Heller* has some very strong
4 statements in that regard. So I wish, and I -- I wish that
5 one could read the *Heller* decision and it would tell us what
6 we need to know. And I think perhaps both of you think it
7 does tell us what we need to know, and it's -- your
8 respective sides should win. I think you read the *Heller*
9 decision and there are some unanswered questions.

10 So -- and we go from there.

11 MS. VAN AKEN: I agree, there's many unanswered
12 questions in *Heller*, and the Supreme Court acknowledges
13 that, that it's just beginning. But I would submit that the
14 history of the Second Amendment is not only that the
15 possessors of guns -- that there's a requirement of virtuous
16 possessors, but there's also a requirement of virtuous
17 possession. That people must be responsible. It is a
18 well-regulated militia that is protected by the Second
19 Amendment, not merely a free-for-all, and the historic
20 scholarship --

21 THE COURT: Well, I think one thing *Heller* said was
22 it's an individual right, it's not -- that battle has been
23 fought.

24 MS. VAN AKEN: I believe that it's an individual
25 right, but the Supreme Court points out that the framers'

1 understanding of the militia was that it was every
2 able-bodied person who could contribute to the state's
3 defense. In other words, everyone is a part of this right;
4 everyone participates in this right. But at the same time,
5 the framers didn't hesitate and states haven't hesitated to
6 disarm entire classes of people where they are not
7 responsible members of that militia.

8 I would submit that storage regulations -- not only
9 are they acknowledged in *Heller* as not disturbed by *Heller*'s
10 ruling, but also that they are of a piece with virtuous
11 possession. And the fact that Boston prohibited any
12 gunpowder at all in any dwelling, that New York required any
13 gunpowder to be stored in these containers that they
14 specified the size of, indicates that the manner of
15 possession has long been regulated. And so the framers may
16 not have contemplated the Barska storage safe that you can
17 open merely by pressing your thumb print -- I don't know if
18 the YouTube video that we cited in our briefs was of any
19 use, but, having never seen one of these operated, it was
20 certainly instructive to me that the manner of storing
21 firearms may change as technology changes --

22 THE COURT: Do you think there's any significance
23 that this ordinance arises in a fashion that someone -- that
24 it impacts their home? Is that of consequence at all, do
25 you think?

1 MS. VAN AKEN: I do think it's of consequence in that
2 *Heller* -- it's not even clear that the Second Amendment
3 applies outside the home. And that *Heller* does indicate
4 that the right to self-defense, the need for self-defense is
5 most acute in the home. I don't disregard that. I think
6 that's important. But I think, as the Court points out,
7 what Dick Heller sued for was the right to render his
8 firearms operative.

9 THE COURT: To do what the city ordinance allows you
10 to do.

11 MS. VAN AKEN: Precisely. And the court in *Heller*
12 went out of its way to decide that the D.C. ordinance had no
13 exception for self-defense situations.

14 Now, if it were the case that the Second Amendment
15 prohibited Dick Heller from -- or prohibited D.C. from
16 saying, Okay, you can store your firearms, but you can put
17 them together in case of an emergency, there would have been
18 no reason at all for the Court to decide that there was no
19 self-defense exception in that ordinance. In other words,
20 if D.C. couldn't say, Okay, store it broken down, but you
21 can put it together if you need to in a self-defense
22 emergency, there would be no reason why the *Heller* court had
23 to reach the question of whether there was a self-defense
24 exception in the D.C. ordinance.

25 THE COURT: Let me ask you both, and then we'll talk

1 about the case management issues: Just so I'm clear on your
2 respective arguments, as we've discussed, in *Nordyke*, we
3 were teased by the notion we would get some guidance on what
4 level of scrutiny we were to apply, and then it was pulled
5 away.

6 But from the plaintiff's perspective on -- I almost
7 hear -- or I do hear the argument that that's really the
8 wrong construct? That the identifying level of scrutiny, if
9 one must -- you would prefer strict scrutiny, but that we're
10 not even necessarily -- the Supreme Court is suggesting that
11 we shouldn't necessarily buy into the level of scrutiny
12 construct. Is that right or wrong?

13 MR. MICHEL: That's absolutely right. Let me first
14 say, I'm not going to respond to every one of those points,
15 but obviously I disagree with the vast majority of them.
16 Two important things to keep in mind: One is *Heller* and
17 *McDonald* recognized two different constitutional rights.
18 Civil rights. *McDonald* recognized the right to keep and
19 bear arms, per se, the actual instrumentality. *Heller*
20 recognized -- did not recognize the right to keep and bear
21 arms expressly. It recognized the right to self-defense.
22 So those are two different rights that have never been
23 addressed before by the courts.

24 And so the question is: Is there infringement on
25 really either one of them? And really, this case is whether

1 or not this ordinance infringes on the right to self-defense
2 and the right to keep and bear arms, because you can't have
3 a firearm readily available for self-defense in case of
4 confrontation in your own home. So a guy who has no
5 children, and has, you know, in a secure home sitting alone
6 by himself, has to either have it in a holster, including
7 when he goes to bed, if he wants to have it more readily
8 available, or put it in a locked box. That's the degree --
9 *Heller* dealt with the legally impossible. This deals with
10 practically impossible.

11 And so it's the degree of infringement that is the
12 right to self-defense infringed by this. And we think that
13 now it's the Supreme Court's inclination that you're going
14 forward with two rights which have never been recognized
15 before, really. Is to look at the tests that have been
16 applied historically in other contexts, First Amendment
17 being the most obvious, and say, Why are we going to -- look
18 at all the Rube Goldberg machinations that we had to come up
19 with as we developed this body of jurisprudence on the First
20 Amendment. Why go there? And so there's this fundamental
21 difference of opinion about what the approach should be, and
22 engrained in the Supreme Court to say, You go by the
23 intention of the founders. What was the understanding at
24 the time the law was passed, based on history and tradition?
25 And then see if there are acceptable regulations which are

1 kind of -- it's sort of a societal test, you know,
2 original-ism. And there's a few justices on the Supreme
3 Court that are pushing that -- and so that's really kind of
4 what this comes down to.

5 So, it's a great case to be involved in. It's
6 cutting edge stuff. But I certainly understand why the
7 court would -- why many courts have taken sort of a -- not
8 cautious, but a more measured approach. I think it's
9 something that needs to go up. So...

10 THE COURT: Okay. Thank you.

11 With respect to -- your position, I understand, Miss
12 Van Aken, is a classic level of scrutiny needs to be
13 identified against which the ordinance is to be assessed.
14 Is that correct?

15 MS. VAN AKEN: Yes, your Honor. Although --

16 THE COURT: And you think it should be rational
17 basis?

18 MS. VAN AKEN: Your Honor, I think that under the
19 DeCastro -- I think the DeCastro test is the one the Court
20 should adopt, which is not to say that --

21 THE COURT: And that's out of the Third Circuit.

22 MS. VAN AKEN: Second Circuit. Which says that if
23 there's a substantial -- in view of the multifaceted
24 restrictions on gun possession and ownership, that only
25 those that impose a substantial burden on the right to keep

1 and bear arms are subject to a degree of heightened
2 scrutiny. And then after that, we evaluate the extent of
3 the burden, how close --

4 THE COURT: Heightened scrutiny. What label do you
5 put on the heightened scrutiny?

6 MS. VAN AKEN: I think every court -- every court --
7 has applied something short of strict scrutiny.

8 THE COURT: Something more than rational basis.

9 MS. VAN AKEN: Something more than rational basis.
10 Intermediate scrutiny is the one most courts have adopted.
11 District of Columbia, Fourth Circuit, Third Circuit. I
12 understand plaintiffs distinguish that because they are were
13 not necessarily in the home, but that is -- the overwhelming
14 weight of authority points to intermediate scrutiny for
15 everything except something that disarms someone who is a
16 virtuous possessor.

17 THE COURT: Okay. Well, it's very interesting and
18 I'll work on it and get you an order.

19 Let's talk now about briefly about the case
20 management issues with respect to this matter. We are --
21 the reality here, that when I do issue the opinion on the
22 motion for preliminary injunction, I assume there will be a
23 request for review at that point, so I hear the plaintiff
24 saying that because of that inevitability, that some further
25 management may be premature. Am I hearing that correctly?

1 MR. MICHEL: Essentially, yes. We got a little
2 wrapped up in the CMC statement about stay or don't stay.
3 Really, I think the City's suggestion that there be a motion
4 to stay filed that gets heard, you know, notice of motion, I
5 think that's a good one. And I think that both sort -- our
6 office contemplated that, but really was a little -- but as
7 I thought more about this, it occurred to me, Well, why not
8 just file a motion for stay Wednesday? And get a hearing on
9 November 16th.

10 And if something happens, which I don't expect to
11 happen, we can always withdraw that motion and I'll run over
12 and buy a bunch of lottery tickets. But in the meantime,
13 why not get that on calendar?

14 And also, we have a --

15 THE COURT: You wouldn't want to bring a motion to
16 stay an order that hasn't yet been issued.

17 MR. MICHEL: It would be to stay the case pending
18 appeal. To stay discovery as well? I mean, right now we
19 have a bunch of --

20 THE COURT: I think the more appropriate way to
21 proceed -- I'm not the lawyer here -- but when a decision is
22 rendered, if you are concerned about delay or whatever, you
23 bring a motion to have something heard on shortened time,
24 and then you hear it. But to anticipate -- it just -- I
25 think that would be a procedurally difficult motion to

1 consider before a decision has been rendered, whatever that
2 decision may be.

3 But the concept of not setting a lot of dates that
4 otherwise are going to fall by the wayside because another
5 court is going to be spending time on this is something to
6 discuss.

7 Now, as I hear the City argue, they're saying, if I
8 understand it correctly, even if the decision is subject to
9 review by the appellate court, that that shouldn't mean --
10 because then there's a question of how much of the
11 jurisdiction in this court is being divested vested by
12 virtue of the review of the appeal, and I hear the City
13 saying you shouldn't assume you can't continue to work on
14 the case even if there's appellate review on a preliminary
15 injunction determination.

16 MS. VAN AKEN: That's correct, your Honor. I think
17 what I suggest is that -- the discovery in this case is not
18 extensive. But that's what we're ready for. That's the
19 next stage in this case. I think that the parties should
20 proceed with that and get it done. And then, in the event
21 that this court is now looking at scheduling summary
22 judgment and one of us has taken an appeal to the Ninth
23 Circuit and it hasn't yet been decided, it might be
24 appropriate at that point for the Court to avoid considering
25 summary judgment, and to stay summary judgment.

1 But what does not make sense to me is to stay this
2 step of discovery that we will need to take in all
3 likelihood, no matter what -- should not happen. The
4 only -- I mean, if the Ninth Circuit says categorically
5 plaintiffs are correct and there is no set of circumstances
6 under which.... then possibly. But then -- it's not as if
7 the discovery is so extensive that we would have been put to
8 much burden from proceeding with that anyway.

9 And in the meantime, your Honor, this is a cloud in
10 the legitimacy of the City's ordinance. We want to get it
11 resolved. This case has been going on a long time. I
12 understand that sometimes appellate courts, you know, don't
13 decide things as quickly or in the order that the parties
14 would like. But I think the case just needs to proceed.

15 MR. MICHEL: One of the reasons to have a formal
16 motion to stay heard is to kind of lay out where we think
17 the discovery would have to go under a noncategorical test.
18 I mean, I've been giving some thought to that. But it's
19 certainly -- and I think it's a gross mischaracterization to
20 say that there's not much to it. The City just wants to
21 explore standing. And if there are -- if we do some kind of
22 burden analysis, what kind of experts are there that I have
23 to depose? What kind of subpoenas do I have to issue? What
24 credit does the City's findings get? How deferential are we
25 to them? How much can I attack them? How would I attack

1 them? Am I going to issue subpoenas to each of the authors?
2 Am I going to try to get the raw data?

3 The burden, so to speak, of the actual labor of
4 discovery, if the standard of review, depending on what it
5 is, is going to be tremendous. And I expect there'll be
6 lots of fights about it.

7 THE COURT: Well, and the other thing is that just as
8 you say, the discovery wouldn't be all that extensive, that
9 cuts both ways, maybe, because if and when there's review
10 and the case comes back, you're not starting on a very
11 extended development of the case. It could be then done
12 rather quickly.

13 The question is, you know: Will there be guidance in
14 some form if we -- that may effectively streamline this case
15 when it gets done. And I'm also cognizant of the fact,
16 although not entirely up to speed on it -- are you counsel
17 in Judge Wilken's case?

18 MS. VAN AKEN: I am.

19 THE COURT: So I know that that's going along. And I
20 don't know if that weighs into this at all either, but
21 you're talking about a cloud on the City's ordinances.
22 Well, it's an issue in her case, and I don't -- you know.

23 MS. VAN AKEN: I could advise the Court.

24 THE COURT: Well, I'm curious, yeah.

25 MS. VAN AKEN: Summary judgment has been heard, and

1 that was about a month ago. We're still waiting on the
2 order. Obviously it will be up to Judge Wilken. She was
3 very interested in standing at the hearing, so it is quite
4 possible that we will not get a merits ruling at all in that
5 case.

6 MR. MICHEL: I would also point out that whole
7 cloud -- there were times where the City wanted to stay it
8 for the McDonald hearing, for the Nordyke hearing. The City
9 hasn't been in a hurry until now when the burden of proof is
10 poised to be very burdensome on us.

11 THE COURT: I tell you what, what I'm going to do.
12 It's not so much an issue about specific dates here, it's
13 whether or not dates should be set. I've heard you. What I
14 think I will do is focus first on the preliminary injunction
15 issue, and then I will give you further guidance when I
16 issue that decision on how we may proceed. And it could be
17 that I contemplate some sort of accelerated motion to stay,
18 or something along those lines. I don't think filing a
19 motion to stay prior to my preliminary injunction order is a
20 good idea.

21 MR. MICHEL: Your Honor, can I suggest -- we have a
22 hearing right now on November 8th in this court.

23 THE COURT: Remind me what that's about.

24 MR. MICHEL: It's about dismissing a plaintiff.

25 THE COURT: I thought that was unopposed.

1 MR. MICHEL: There's two.

2 THE COURT: And you oppose one of them?

3 MS. VAN AKEN: Yes, your Honor.

4 THE COURT: All right.

5 MR. MICHEL: So the one concern I have is, we do have
6 dates that are actually going by, and it makes lawyers
7 nervous when there are dates that a judge has said that
8 they're not adhering to. So I hope we can vacate those
9 dates, and perhaps we could continue the CMC to the 8th, at
10 which point maybe there will be some more information that
11 we can use to --

12 THE COURT: Maybe.

13 MS. VAN AKEN: I think what I would suggest as an
14 alternative, your Honor, would be: The City's happy to
15 forgo taking discovery now while the Court is considering
16 the preliminary injunction motion. The Court has indicated
17 that it would, you know, provide some guidance about case
18 management in that order or set something shortly
19 thereafter, so perhaps we should set "pause" on everything,
20 including dismissal of the plaintiffs. If we're not to do
21 any discovery, whether they're in the case or not really
22 doesn't have much material impact.

23 That would be my suggestion. And then we can revisit
24 this in light of the preliminary injunction.

25 THE COURT: That's fine. Therefore, if the City's

1 taking a position that the, if you will, "pause" is
2 appropriate, do I need to hear this November 8th motion with
3 respect to the plaintiffs?

4 MR. MICHEL: Not if we're stopping anything. We just
5 want to keep it on calendar so we have something on
6 calendar. Or otherwise we're going to --

7 THE COURT: I'm paying attention to this case. This
8 won't -- you don't have to worry that it will somehow --

9 MR. MICHEL: The Court will bring us back? That's
10 fine.

11 THE COURT: I will give the order. I'll give you
12 also clearer guidance on the question on the 8th. I'll go
13 back, take a look, and I may either do that on the papers --
14 I'll give you further guidance on it, but I don't think I'm
15 going to set any dates today.

16 MR. MICHEL: But your Honor, doesn't the Court need
17 to vacate -- we have a pretrial motion cutoff coming up for
18 November 11th.

19 THE COURT: All right. I will go ahead and -- were
20 these dates set by me or by whoever had this before me? It
21 initially was Judge Hamilton's case. Did she set these
22 dates?

23 MS. VAN AKEN: I think they were your dates, your
24 Honor. This was before I had the case. It was Docket
25 Number 101, if I remember correctly.

1 THE COURT: Okay.

2 MS. VAN AKEN: But I'm not sure.

3 THE COURT: Well. So the particular dates that are
4 looming that you want vacated are -- run them by me again.

5 MR. MICHEL: Well, a pretrial motion deadline of
6 November 8th; a pretrial statement due January 31st;
7 pretrial conference, February 14th; and trial,
8 February 25th.

9 THE COURT: Okay. I'm going to vacate all those
10 dates.

11 MR. MICHEL: That would be my suggestion.

12 THE COURT: And then we will see where we are. Okay.

13 MS. VAN AKEN: Okay.

14 MR. MICHEL: Thank you, your Honor.

15 MS. VAN AKEN: Thank you, your Honor.

16 (Adjourned)

17 oOo

18

19 CERTIFICATE OF REPORTER

20

21 I, Connie Kuhl, Official Reporter for the United
22 States Court, Northern District of California, hereby certify
23 that the foregoing proceedings were reported by me, a
24 certified shorthand reporter, and were thereafter transcribed
25 under my direction into written form.

23

24

Connie Kuhl

25

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Tuesday, October 23, 2012

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

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13 ASSOCIATION OF AMERICA, INC., SAN)
FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION)

15 Plaintiffs,)

16 vs.)

17)
18 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF)
19 OF THE SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
20 and DOES 1-10,)

21 Defendants.)
22)
23)
24)
25)
26)
27)
28)

CASE NO. CV-09-2143-RS

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Fed. R. Civ. P. 65(a)

Date: October 4, 2012

Time: 1:30 p.m.

Place: Courtroom 3 - 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

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1 **I. INTRODUCTION**

2 Plaintiffs do not oppose truly modest or reasonable gun storage regulations and, in fact,
 3 cited such regulations in their moving papers, by way of contrast. Similarly, Plaintiffs do not
 4 oppose restrictions on uncommon and unusually dangerous arms. What they oppose is a blanket
 5 ban on a broad class of ammunition in common use for self-defense purposes. The question here is
 6 not whether gun regulation is permissible; it is whether there is any history or tradition that would
 7 justify the City’s extreme restrictions. There is none. If the court instead applies a means-ends test,
 8 the question becomes whether the City has shown that its laws are narrowly tailored to serve some
 9 sufficient interest. And that is the question this Court should ask when considering each
 10 justification and each “study” offered by the City. If it does, the Court will find no answers, only
 11 conjecture. And that is not enough to justify infringing Plaintiffs’ constitutional rights.

12 When the real questions are presented, the City provides no answers, no proof. And it is its
 13 burden to do so. Instead, the City offers unpersuasive hypotheticals and firearm injury statistics
 14 that do not support its position. We’re told the answer to the “home-alone-at-night” scenario is to
 15 sleep with your gun. Or, the time it takes to put on your glasses to open a safe is not important
 16 because high-tech safes are available and you might need glasses to see an attacker anyway. Or,
 17 that you can buy self-defense ammunition in some other county. These arguments trivialize the
 18 Second Amendment. If the right is to be taken seriously, the City’s overbearing laws must fail.

19 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS**

20 **A. Second Amendment Standard of Review**

21 **1. The Scope-Based Approach Is Consistent With *Heller* and *McDonald***

22 *Heller* advances a scope-based approach that determines first whether the law restricts
 23 activity within the scope of the right as originally understood, and second whether the regulation is
 24 nonetheless permissible because it has sufficient “historical justification.” See *Heller v. District of*
 25 *Columbia*, 554 U.S. 570, 634-35 (2008); Oral Arg. at 44, *Heller*, 554 U.S. 570 (No. 07-290).

26 The City attempts to discredit Plaintiffs’ history-based approach, characterizing it as
 27 “circular” and suggesting that both prongs of the analysis “ask the same question.” Defs.’ Opp’n
 28 Mot. Prelim. Inj. (“Defs.’ Opp’n”) 9:6-9. The City misunderstands the application of Plaintiffs’

1 test, which relies on history and tradition to guide the analysis of two very different inquiries: first,
 2 whether the *conduct* being regulated is protected by the Second Amendment and, second, whether
 3 the *regulation* of that conduct is nonetheless permissible. That a sort of regulation was prevalent at
 4 or near the framing of the Constitution does not necessarily mean that the conduct it targets is
 5 altogether outside the scope of the right. Instead, it suggests that it may be the type of regulation
 6 that is tolerated by the Second Amendment, even if the regulated conduct is protected.

7 The Court need not fear that the *Heller* scope-based approach will effectively foreclose
 8 “experimentation and the continuing development of firearms laws,” freezing gun regulation as it
 9 existed during the founding era. Defs.’ Opp’n 9:10-19. “[J]ust because gun regulations are
 10 assessed by reference to history and tradition does not mean that governments lack flexibility or
 11 power to enact gun regulations.” *Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir.
 12 2011) (“*Heller II*”) (Kavanaugh, J., dissenting). To the contrary, a history-based analysis *preserves*
 13 the government’s power to regulate – perhaps more so than a means-end test like strict scrutiny,
 14 under which very few regulations are likely to be upheld. As *Heller* recognized, “history and
 15 tradition show that a variety of gun regulations have co-existed with the Second Amendment right
 16 and are consistent with” it. *Id.* Under Plaintiffs’ approach, reasonable gun regulation may
 17 continue, as long as it remains consistent with our nation’s history and traditions.

18 *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009), provides an interesting case in point.
 19 There, a federal juvenile-in-possession law was upheld solely by resort to history and tradition
 20 even though the challenged law was only passed in 1994. Evaluating a long history of state laws
 21 regulating juvenile access to handguns and “evidence that the founding generation would have
 22 regarded such laws as consistent with the right,” the court determined that the regulation, “with its
 23 narrow scope and its exceptions,” was constitutional regardless of its recent vintage. *Id.* at 14-16.¹

24
 25
 26 ¹ That *Heller* deemed the felon-in-possession prohibition “longstanding” and “presumptively
 27 lawful,” even though it was enacted 147 years after ratification, does not discredit Plaintiffs’
 28 analysis. Nor does it support the City’s claim that laws not analogous to founding-era laws may be
 valid. Indeed, “[s]cholarship suggests historical support for a common-law tradition that permits
 restrictions directed at citizens who are not law-abiding and responsible” that far pre-dates federal
 law codifying those restrictions. *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011).

1 The important difference then between applying the *Heller* scope-based approach and one
 2 of the various levels of scrutiny is not necessarily the number of laws that will survive judicial
 3 review. “Instead, it is that the *Heller* test will be more determinate and ‘much less subjective’
 4 because ‘it depends upon a body of evidence susceptible of reasoned analysis rather than a variety
 5 of vague ethico-political First Principles whose combined conclusion can be found to point in any
 6 direction the judges favor.’ ” *Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting) (quoting
 7 *McDonald*, 130 S. Ct. at 3058 (Scalia, J., concurring)).

8 The City’s reliance on studies to justify its restriction on core protected conduct “creates
 9 exactly the type of problem identified by Justice Scalia [quoted above], since when reviewing the
 10 constitutionality of an ordinance under a balancing test, as opposed to under a text, history, and
 11 tradition approach, for every study, there can be a credible or convincing rebuttal study.” *See*
 12 *Gowder v. City of Chicago*, No. 11-1304, slip op. at 15 (N.D. Ill. June 19, 2012). Further, if the
 13 City’s points about the harm caused by criminal or accidental misuse of guns were somehow
 14 relevant to the consideration of the validity of laws regulating core Second Amendment conduct,
 15 the Supreme Court surely would have addressed those arguments somewhere in its exhaustive
 16 analyses when raised by D.C. in *Heller* and by Chicago in *McDonald*. Instead, the Court mentions
 17 such concerns only in passing and casts them aside as irrelevant. *Heller*, 554 U.S. at 636;
 18 *McDonald*, 130 S. Ct. at 3050. The absence from both cases of any meaningful consideration of
 19 the “guns-are-dangerous” arguments raised by D.C. and Chicago – and now raised here – reflects
 20 their relevance as to restrictions on core Second Amendment conduct, i.e., little or none.

21 Accordingly, an examination of history and traditions should guide the Court’s analysis.

22 **2. Alternatively, Strict Scrutiny Must Apply Because The Challenged**
 23 **Laws Restrict Competent, Law-Abiding Adults in the Home**

24 The Supreme Court has described the right of the people to keep and bear arms for self-
 25 defense as fundamental. *McDonald*, 130 S. Ct. at 3036-42. As with other fundamental rights, the
 26 explicit nature of the right precludes application of rational-basis review. Whatever else *Heller* left
 27 for future courts to decide, it is clear on at least this point:

28 Obviously, [rational basis review] could not be used to evaluate the extent to which
 a legislature may regulate a specific, enumerated right, be it the freedom of speech,

1 the guarantee against double jeopardy, the right to counsel, *or the right to keep and*
 2 *bear arms.*
 3 *Heller*, 554 U.S. at 628 n.27 (citations omitted) (emphasis added). As such, a law that makes it
 4 more difficult or inconvenient to use or possess arms for self-defense burdens the Second
 5 Amendment right, and it *requires* some form of heightened scrutiny. *See, e.g., Ezell v. City of*
 6 *Chicago*, 651 F.3d 684, 701 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir.
 7 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v.*
 8 *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). Meaningful judicial review cannot be avoided simply
 9 by calling the restriction a minor inconvenience – or not quite “substantial” enough.

10 The City ignores *Heller’s* direction on this point and urges this Court to adopt the
 11 “substantial burden” analysis followed by the Second Circuit in *United States v. DeCastro*, 682
 12 F.3d 160 (2d Cir. 2012). But insofar as *DeCastro* held that “heightened scrutiny is appropriate
 13 *only* as to those regulations that *substantially* burden the Second Amendment,” *id.* at 164
 14 (emphasis added), it is simply incorrect. *DeCastro* introduces a threshold requirement that appears
 15 nowhere in either the *Heller* or *McDonald* opinions. *Heller* plainly states that a rational basis alone
 16 cannot sufficiently justify laws regulating conduct protected by the Second Amendment. 554 U.S.
 17 at 628 n.27. And the Court made this pronouncement without reference to the severity of the
 18 burden imposed. It is simply untenable to conclude that *Heller* authorizes an approach that invokes
 19 heightened review only for the most substantial of restrictions.

20 The City claims support for the *DeCastro* “substantial burden” approach in other circuits,
 21 citing *Heller II*, 670 F.3d at 1253, 1260, *Marzzarella*, 614 F.3d at 94-95, and *United States v.*
 22 *Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011), none of which impose a “substantial burden”
 23 threshold just to trigger heightened scrutiny, and each of which instead consider the type of burden
 24 imposed only in determining which level of *heightened* scrutiny – strict or intermediate – applies.

25 Contrary to the City’s characterization of the *DeCastro* test as “largely [in] accord[]” with
 26 the approach taken by other circuits, it is a stark departure from the holdings of those courts.² The

27 ² Similarly, *DeCastro* is *not* the approach described by this Court in its order denying
 28 Plaintiffs’ motion for judgment on the pleadings, which suggests that either “strict or intermediate
 scrutiny” will apply, depending on the severity of the burden. Order Den. Mot. J. Pldgs. 5:10-11.

1 majority of other circuits to have decided the issue apply some level of heightened scrutiny to all
2 regulations burdening activity within the scope of the Second Amendment. *See, e.g.,*
3 *GeorgiaCarry.org. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012); *Ezell*, 651 F.3d at 706; *Heller II*,
4 670 F.3d 1244; *Reese*, 627 F.3d 792; *Chester*, 628 F.3d at 680; *Marzzarella*, 614 F.3d at 94-95.
5 Under this approach, the only threshold question is whether the challenged law burdens activity
6 that falls within the scope of the right, a question that is answered by resort to text, history, and
7 tradition. *Ezell*, 651 F.3d at 701-03. If the regulation targets conduct protected by the Second
8 Amendment as historically understood, then heightened scrutiny is mandated. *Id.* at 703. This
9 analysis is critically different from the City’s “substantial burden” test, which, as a threshold
10 question, focuses on the magnitude of the burden imposed rather than the nature of the conduct
11 regulated. So, even if the Court rejects the *Heller* scope-based approach, it should decline the
12 City’s invitation to adopt *DeCastro*’s misguided analysis.

13 Core areas of fundamental, enumerated rights demand strict scrutiny. Just as “any law
14 regulating the content of speech is subject to strict scrutiny, . . . any law that would burden” (not
15 just substantially) “the ‘fundamental,’ core right of self-defense in the home by a law-abiding
16 citizen would be subject to strict scrutiny.” *Masciandaro*, 638 F.3d at 470. The City unfairly
17 characterizes Plaintiffs’ claim, suggesting they seek the “right to keep and carry any handgun,
18 armed with any ammunition, in any manner whatsoever, provided that the conduct occurs in the
19 home.” Defs.’ Opp’n 11:14-16. Plaintiffs have never advocated an approach that requires strict
20 scrutiny anytime a law touches upon conduct in the home, regardless of the type of arms involved
21 or the identity of the person claiming the right. Indeed, Plaintiffs’ moving papers recognize
22 various cases upholding laws that in some way affect the right to self-defense in the home, Pls.’
23 Mot. Prelim. Inj. (“Pls.’ Mot.”) 10:17-25. But not one of those cases touches upon the right
24 Plaintiffs seek to exercise – the very core right recognized by *Heller* of *law-abiding citizens* to
25 keep *protected* arms *operable* for immediate self-defense within their homes. Instead, they involve
26 conduct decidedly outside that core right. *Id.* *Heller II* stands alone in circuit cases applying
27 merely intermediate scrutiny to a law burdening the core right (and *Heller II* involved only a
28 registration requirement, not a ban on keeping one’s firearm operable in the home and purchasing

1 common, self-defense ammunition). It is hardly the “weight of authority” the City claims it is.

2 Plaintiffs maintain that most circuits that have passed on the issue, have determined the
3 applicable standard of review based on whether or not the law challenged regulates “core
4 conduct.” See *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *Masciandaro*, 638 F.3d at 470;
5 *Chester*, 628 F.3d at 680, 682-83; *Reese*, 627 F.3d 792; *United States v. Skoien*, 614 F.3d 638 (7th
6 Cir. 2010).³ To the extent these courts might have hinted that they would consider the severity of
7 the burden on Second Amendment conduct, they did not yet have occasion to do so. Instead, each
8 case involved conduct outside the core of the right, prompting the deciding courts to settle on
9 intermediate scrutiny. The implication is that laws that do restrict the core right to armed self-
10 defense in the home by law-abiding citizens with protected arms require strict scrutiny.

11 **B. The City’s Locked Storage Law Is Unconstitutional Under Any Analysis**

12 **1. The Locked-Storage Law Burdens Protected Conduct**

13 The City’s locked-storage law plainly restricts the core right of law-abiding citizens to
14 keep operable arms within the home for the “core lawful purpose” of self-defense. The City fails
15 to address any *material* fact that establishes otherwise. And no amount of legislative “fact” finding
16 or expert opinion regarding the accessibility of certain gun safes can rationalize away the
17 restriction that the City imposes on conduct at the very core of the Second Amendment.

18 It is in the dead of night, when robberies of occupied dwellings are most prevalent, that the
19 City’s locked-storage requirement presents the most obvious restriction. Pls.’ Mot. 11:23-12:11
20 (citing Oral Arg. at 83-84, *Heller*, 554 U.S. 570 (No. 07-290)). The law requires Plaintiffs, under
21 threat of criminal penalty, to choose between locking up their handguns through the night when
22 they are at highest risk for attack, or sleep with their loaded guns strapped to their bodies. See
23 Defs.’ Opp’n Pls’ Mot. J. Pldgs. 10:2-7. The “choice” is as false as it is absurd.

24 It is irrelevant that the City has determined that “the time needed to open a lockbox to
25 obtain a loaded gun is minimal – perhaps three or four seconds.” Defs.’ Opp’n 13:14-16 (citing
26 Garza Decl. ¶¶ 2-7.) How quickly one’s firearm might be *rendered* operable (with the right
27

28 ³ Plaintiffs inadvertently provided a non-exhaustive list in their moving papers.

1 technology) simply has no bearing on whether the City’s requirement infringes the core right of
 2 law-abiding citizens to keep their arms operable for immediate self-defense in their homes.
 3 Physical impossibility to exercise the right is not the test for determining whether a firearm
 4 restriction is valid. Pls.’ Mot. 12 n.7 (citing *Heller*, 554 U.S. at 629).

5 The City paints its regulation as posing only a modest imposition on Plaintiffs’ Second
 6 Amendment rights, claiming that there is only a remote possibility that the law could impair
 7 Plaintiffs’ ability to use their firearms in self-defense. Defs.’ Opp’n 13:22-25. Citing its expert, the
 8 City claims there is no study proving that locked storage mandates impair self-defense. Defs.’
 9 Opp’n 13:12-14 (citing Webster Decl. ¶¶ 62-63). Aside from the fact that the cited statements do
 10 stand for that assertion, it is simply untrue. *See, e.g.*, John R. Lott & John E. Whitley, *Safe-Storage*
 11 *Gun Laws: Accidental Deaths, Suicides, and Crime*, 44 J.L. & Econ. 659 (2001). Indeed, Lott and
 12 Whitley’s study found that “storage requirements [do] appear to impair people’s ability to use
 13 guns defensively,” while there is “no support that [they] reduce either juvenile accidental gun
 14 deaths or suicides.” *Id.* at 659. Further, the famed Tueller Drill emphasizes that an attacker who is
 15 21 feet away can close the entire distance between himself and the victim in a *second-and-a-half*.
 16 If the victim is ready for a potential attack, it may be possible to deploy a readily available
 17 handgun in time to defend against a sudden attack. If an untrained victim is under attack, the
 18 fastest reaction time is about 2.5 seconds. It is impossible to react even that fast if the gun is
 19 locked or disabled – which, even under the City’s rosy estimate, more than *doubles* reaction time.⁴

20 Regardless, the City’s locked-storage mandate is by no means a modest burden. It serves as
 21 a flat prohibition on conduct at the very core of the Second Amendment, i.e., the *keeping* of an
 22 operable firearm for self-defense in the home by law-abiding citizens “in case of confrontation.”
 23 *See Heller*, 554 U.S. at 592. It is the *most* extreme example of a burden on that right that remains

24
 25 ⁴ Ayoob Decl. ¶¶ 10-23; *see also* Bob Irwin, Rethinking the 21-Foot Rule: *You Can’t React to*
 26 *a Knife Attack as Fast as You Think You Can*, POLICE, Oct. 1, 2007, available at
 27 <http://www.policemag.com/channel/patrol/articles/2007/10/rethinking-the-21-foot-rule.aspx>;
 28 Dennis Tueller, *How Close Is Too Close*, SWAT, Mar. 1983, available at http://www.theppsc.org/Staff_Views/Tueller/How.Close.htm. (The Tueller Drill is performed by police with readily
 available guns who already know the aggressor is encroaching with a knife. Hence, the cognitive
 deadly force decision making has been virtually eliminated from the reaction time.)

1 in force, insofar as it mandates locked storage of one’s handguns at all times when the firearm is
2 not carried, regardless of the circumstances. Even Massachusetts’ law, the only law that comes
3 close to the City’s, provides an exception when the firearm is either “carried by *or under the*
4 *control of* the owner or other lawfully authorized user.” Mass. Gen. Laws ch. 140, § 131L.

5 **2. The Locked-Storage Law Fails *Heller*’s Scope-Based Approach**
6 **Because the City Has Proven No Historical Justification**

7 The City has not met its burden to establish that laws requiring people to keep their
8 handguns locked up when in their own homes regardless of the circumstances were part of the
9 historical narrative surrounding the Second Amendment when it was drafted.

10 In reviewing potentially relevant history and tradition, both Plaintiffs and the City have
11 referenced the same three Framing-era regulations. Pls.’ Mot. 13:10-16, n.8; Defs.’ Opp’n 15 n.5.
12 Not one of those laws, however, establishes a history and tradition of laws that, like the City’s,
13 mandate locked storage of firearms in the home regardless of the circumstances. Two of the
14 ordinances regulated only the storage of large quantities of gunpowder, and were motivated by an
15 expressed desire to prevent widespread fires. *Heller*, 554 U.S. at 631. Unlike the City’s
16 generalized interest in preventing accidents, those ordinances do not claim some amorphous
17 regulatory interest in public safety, nor do they reference any harm posed by unsecured firearms.

18 In any event, the City cannot justify its extreme locked-storage requirement on so few
19 marginally relevant framing-era ordinances. *See Heller*, 554 U.S. at 632. This is especially clear
20 considering that the gun storage provisions of nearly every other jurisdiction come no where close
21 to the restriction the City imposes in requiring locked storage at all times. Pls.’ Mot. 15:1-6, n.10.

22 **3. The Locked-Storage Law Cannot Survive Any Heightened Scrutiny**

23 To pass muster under even intermediate scrutiny, the City must establish a tight “fit”
24 between the locked-storage requirement and a substantial governmental interest, a fit “that
25 employs not necessarily the least restrictive means but . . . a means *narrowly tailored* to achieve
26 the desired objective.” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)
27 (emphasis added). A law is “narrowly tailored” if it “promotes a substantial government interest
28 that would be achieved *less effectively absent the regulation*, and the means chosen are *not*
substantially broader than necessary to achieve that interest.” *Ward v. Rock Against Racism*, 491

1 U.S. 781, 799-800 (1989) (internal quotations omitted) (emphasis added).

2 Here, examples abound of narrowly tailored laws that promote the same governmental
 3 interest, but do so in a way that at least attempts to respect the rights of law-abiding citizens. Pls.’
 4 Mot. 15 n.10. The City’s law is *not* so tailored. It instead broadly sweeps up all gun owners and
 5 requires that they keep their handguns inoperable regardless of the circumstances. Nothing in the
 6 City’s opposition or “fact” finding legislation establishes that those more narrowly tailored laws
 7 are less effective means for achieving the City’s interest. Indeed, by absolving gun owners of
 8 criminal and/or civil liability in the case one’s firearms are misused by an unauthorized person,
 9 such laws provide *substantial* incentive to keep guns locked when they are not under the owners’
 10 control. Ironically, the City’s expert admits that California’s less restrictive storage law reduces
 11 unintentional youth firearm deaths, but he does not opine that the City’s law is more effective.⁵

12 The City complains that while it “could have confined its ordinance to homes where
 13 children are sometimes or often present, such a regulation would have done nothing to prevent
 14 theft or to reduce suicides and homicides among adults living in homes with guns.” Defs.’ Opp’n
 15 16:10-13. But the locked-storage requirement *also* does nothing to prevent these ills. Trigger locks
 16 and lock boxes that allow the gun owner to carry the locked firearm around the home (as
 17 contemplated by the City’s opposition) provide little deterrent to criminals who can simply carry
 18 away a locked firearm to later pry off the trigger lock or break open the box. And the ordinance
 19 itself allows authorized users to carry handguns in the home, making the argument that the law
 20 reduces accidents, suicides, and homicides among authorized users tenuous at best.

21 The Court should ask how forcing a competent, law-abiding adult – especially one who is
 22 alone in his or her home – to lock up a handgun entirely within his or her control serve public
 23 safety? How does it protect children, prevent theft, or keep arms out of unauthorized users hands?
 24

25 ⁵ Even if the City’s expert suggested that the locked-storage requirement more effectively
 26 prevented firearm deaths, such findings would be unpersuasive because they fail to account for the
 27 *increase* of other crimes – crimes that must also be contemplated by the City’s asserted interest in
 28 public safety – that have been linked to the passage of locked-storage requirements. Lott &
 Whitley, *supra*, at 678 (“[T]he 15 states that had the safe-storage law in effect in 1996
 experienced 3,738 more rapes, 26,724 more robberies, and 69,741 more burglaries.”)

1 It doesn't. It only restricts the authorized user's access to preferred arms for self-defense. And it
 2 does so at times and in the place where the need to exercise the right is most acute. At the very
 3 least, the City should expand its law enforcement exception, allowing *every* competent,
 4 law-abiding adult to keep arms unlocked in the home when under their control. Such a law would
 5 serve the City's purported interests, but the means would be more narrowly tailored. The City has
 6 failed to establish that such a law would be less effective than its broad-sweeping mandate.

7 Because the City's locked-storage requirement cannot survive even intermediate scrutiny,
 8 and because the City makes no attempt to justify its regulation under strict scrutiny, Plaintiffs are
 9 likely to succeed on the merits of their challenge to section 4512. Pls.' Mot. 14:7-16:9.

10 **C. The City's Ban on the Commercial Sale of Expanding/Fragmenting**
 11 **Ammunition Is Unconstitutional Under Any Standard**

12 **1. The Ammunition Ban Restricts Protected Conduct**

13 The City concedes that *Heller* applies a "common use" test in determining which "arms"
 14 are protected by the Second Amendment. Defs.' Opp'n 17:19-20. Its only argument is that
 15 Plaintiffs have not shown that ammunition is also protected under this test. But, as Plaintiffs'
 16 moving papers make clear, protected "arms" under the Second Amendment include both firearms
 17 and ammunition. Pls.' Mot. 16:19-17:3. As it is beyond dispute that the prohibited ammunition is
 18 in "common use" – and because the City itself does not dispute this – the ammunition ban restricts
 19 conduct within the scope of the Second Amendment. Pls.' Mot. 18:8-15; Exs. B-E, I-X.

20 The City's contention that other types of ammunition are available for self-defense is
 21 simply irrelevant to a determination of whether the City can ban the sale of protected ammunition.
 22 *Heller* is clear that just because some other arm may "suffice" for self-defense – that does not save
 23 a ban on arms in "common use." "It is no answer to say, as petitioners do, that it is permissible to
 24 ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is
 25 allowed." *Heller*, 554 U.S. at 629. The court of appeal in *Heller* made a nearly identical ruling:

26 The District contends that since it only bans one type of firearm, "residents still
 27 have access to hundreds more," and thus its prohibition does not implicate the
 28 Second Amendment because it does not threaten total disarmament. *We think that*
argument frivolous. It could be similarly contended that all firearms may be banned
 so long as sabers were permitted.

Parker v. District of Columbia, 478 F.3d 370, 400 (D.C. Cir. 2007) (emphasis added). Similarly, it

1 is not permissible to ban the sale of protected ammunition so long as other ammunition is allowed.

2 Further, any argument that Plaintiffs might purchase ammunition outside the City or online
 3 is equally irrelevant. In *Ezell*, the Seventh Circuit considered a challenge to Chicago’s ordinance
 4 prohibiting firing ranges within the city. 651 F.3d at 690, 711. The district court had refused to
 5 apply heightened scrutiny partly on the ground that the law imposed only a “minimal
 6 inconvenience,” requiring travel to ranges just outside the city. *Id.* at 694. The Seventh Circuit
 7 rejected as a “profoundly mistaken assumption” the notion that the city ban on ranges caused little
 8 or no Second Amendment harm because citizens could get their range training outside the city. *Id.*
 9 at 697. The Court reasoned, “the question is not whether or how easily Chicago residents can
 10 comply with the range-training requirement by traveling outside the city,” but “whether the
 11 Second Amendment prevents the City Council from banning firing ranges everywhere in the city;
 12 that ranges are present in neighboring jurisdictions has no bearing on this question.” *Id.* at 696-97.

13 Here too, the question is not whether Plaintiffs may travel elsewhere to purchase the
 14 restricted ammunition or order it online, but whether the City can lawfully ban the sale of
 15 protected ammunition everywhere in the City. That the restricted ammunition may be available “in
 16 neighboring jurisdictions has no bearing on this question.” *See id.* at 697. The City ignores *Ezell*’s
 17 express guidance on this point.

18 In short, the City cannot, consistent with *Heller*, flatly ban the sale of protected arms.

19 **2. The Ammunition Ban Fails *Heller*’s Scope-Based Approach**
 20 **Because the City Has Proven No Historical Justification**

21 Generally, laws that prohibit access to fundamental rights are unconstitutional. *See Brown*
 22 *v. Entm’t Merchs. Ass’n*, __ U.S. __, 131 S. Ct. 2729, 2736 (2011) (access to violent video games
 23 protected by the First Amendment). In *Heller*, the Supreme Court made clear that bans on
 24 protected arms cannot stand – without resorting to means end scrutiny. 554 U.S. at 636. Nothing
 25 in our nation’s history suggests tolerance for laws banning the sale of commonly used arms.

26 Regardless, the City seeks to justify its ammunition ban with three state statutes, claiming
 27 that bans on the sale of common arms have existed throughout history. Defs.’ Opp’n 18:7-16. But
 28 three laws enacted well after the adoption of the Second Amendment do not suggest that the right
 must be understood in light of them. *See Heller*, 554 U.S. at 632. Further, it strains all sense of

1 reason to suggest that these statutes could survive a constitutional challenge in light of *Heller*.
 2 Each proscribed the sale of *handguns* – the very type of firearm *Heller* held to be in “common
 3 use” for lawful purposes and protected by the Second Amendment. 554 U.S. at 628. It is untenable
 4 to conclude that, after *Heller*, bans on the sale of protected arms are constitutional.

5 Finding insufficient justification for its ammunition ban in historic statutes banning
 6 handgun possession, the City devotes nearly an entire page to a string cite purporting to establish a
 7 continuing tradition of restricting the sale or possession of various types of ammunition. Defs.’
 8 Opp’n 18:17-19:17. But *not one* of the laws the City cites bars the sale or possession of
 9 ammunition in “common use” for “lawful purposes.” The cited laws regulate instead “dangerous
 10 and unusual” ammunition, including armor-piercing ammunition, explosive ammunition, and
 11 incendiary or tracer ammunition – arms unlikely to be found in “common use” for lawful
 12 purposes. The City cites to no law that, like the ordinance at issue, bans the sale of a broad class of
 13 ammunition in “common use” by law-abiding citizens for self-defense in the home.

14 3. The Ammunition Ban Cannot Survive Any Heightened Scrutiny

15 The City advances no legitimate reason why the government may ban the sale of protected
 16 arms despite being precluded from banning the possession of those same arms. And the City’s
 17 blanket sales prohibition is in no way sufficiently tailored to its stated public safety objectives. *See*
 18 *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Bd. of Trustees of State Univ. of N.Y.*, 492 U.S. at
 19 480. Ultimately, the City’s ammunition ban represents an impermissible policy choice as to the
 20 types of protected arms it desires its residents to use. *See* 554 U.S. at 636.

21 Moreover, governmental interests in banning handguns are virtually identical to the City’s
 22 purported interests in banning hollow-point ammunition – to decrease violent injuries caused by
 23 handguns, whether through criminal misuse, accidents, or suicides through decreased availability
 24 of such arms. Despite these interests, the Supreme Court found the Districts’ handgun ban
 25 unconstitutional in *Heller* – making clear that, even if the Court had adopted a means-end standard
 26 of review, the City’s handgun ban would be unconstitutional under any level of scrutiny. 554 U.S.
 27 at 628-29. The City’s ammunition ban is similarly invalid.

1 **D. The City’s Ban on the Sale of Ammunition that “Serves No Sporting Purpose”**
 2 **Violates the Second Amendment**

3 The City’s “sporting purposes”-based ammunition ban is unconstitutional because it
 4 directly contravenes the central component of the Second Amendment – individual self-defense.
 5 *McDonald*, 130 S. Ct. at 3036. The City’s opposition ignores the Supreme Court’s instruction that
 6 individuals have a fundamental right to arms for the core purpose of *self-defense*, regardless of
 7 whether such arms are used for “sporting purposes.” And the City fails to explain why its ordinance
 8 is constitutional under *Heller*, citing no commonplace historical tradition of banning self-defense
 9 firearms and ammunition, instead allowing citizens to access only “sporting” arms.

10 Instead, the City spends much of its argument attempting to give its ordinance meaning by
 11 looking to federal statutes prohibiting the importation of non-sporting arms. But these statutes,
 12 enacted in the latter part of the twentieth century and without historical antecedents, merely limit
 13 the *importation* of arms to those that serve a “sporting purpose” and do not provide the required
 14 historical basis for *a blanket ban on the sale* of all non-sporting ammunition to the law-abiding.

15 The City also attempts to characterize its law as a ban on arms that serve no “legitimate
 16 purpose.” Defs.’ Opp’n 21:5-7, 22:3-6. But that is not what its ordinance prohibits. Rather, the
 17 City’s ordinance plainly bans the sale of ammunition that “does not serve a *sporting* purpose,”
 18 regardless of its suitability for self-defense. If the City wishes to craft an ordinance to prohibit
 19 ammunition it maintains is used in crime and serves no legitimate purpose, that is what it should
 20 do. But the government simply cannot, in the wake of *Heller* and *McDonald*, ban the sale of
 21 ammunition on the premise that it does not serve a “sporting purpose.”

22 Even if this Court employs a means-end test, the City offers no explanation as to how a law
 23 that bans self-defense ammunition but allows “sporting” ammunition would further its interests in
 24 public safety. It is illogical to suggest that criminals who might purchase ammunition in San
 25 Francisco (or steal it from residents) would use self-defense ammunition in the commission of
 26 crimes, but would not commit those crimes using “sporting” ammunition. And the City offers no
 27 explanation as to how the public is safer as a result of a law that bans the smallest caliber of
 28 ammunition that does not “serve a sporting purpose,” but allows for the sale of much larger rounds
 so long as they have been used in a sporting event. Further, the restriction is by no means narrowly

1 tailored to further those interests. This is a point even the City does not dispute.

2 **III. PLAINTIFFS SUFFER REAL AND IRREPARABLE HARM**

3 The violation of a fundamental right is sufficient irreparable harm to warrant preliminary
4 injunctive relief. Pls.’ Mot. 23:6-24:4. The City makes no argument that this well-established rule
5 does not apply in the Second Amendment context.

6 Instead, the City claims that Plaintiffs suffer no irreparable harm because they have not
7 suffered an injury traceable to the City’s conduct. That argument is without merit, and this Court
8 has rightly dismissed it. *Jackson v. City & County of San Francisco*, 829 F. Supp. 2d 867 (N.D.
9 Cal. 2011).⁶ The City’s enactment of, threat to enforce, and recent attempt to strengthen the
10 ordinances inform Plaintiffs’ well-founded fear the City will enforce its laws against them should
11 they attempt to exercise their constitutional rights in contravention of the challenged ordinances. As
12 such, Plaintiffs presently endure the direct and ongoing irreparable harm of the denial of their
13 fundamental right to keep and bear arms. *See* Pls.’ Opp’n Mot. Dismiss, 9-20, ECF 65.

14 The ammunition ban imposes more than the “incidental inhibition” of Plaintiffs’ rights. The
15 notion that “the harm to a constitutional right is measured by the extent to which it can be exercised
16 in another jurisdiction [is] a profoundly mistaken assumption.” *Ezell*, 651 F.3d at 697 (finding
17 irreparable harm even though the right could be exercised outside of the city – potentially even
18 *more* easily). Likewise, the harm to Plaintiffs here is real, and it is far from “incidental.”

19 Finally, though Plaintiffs did not choose to immediately seek temporary relief at the outset
20 of the case, the “urgent need for speedy action” to protect Plaintiffs’ rights has not passed. The
21 irreparable harm Plaintiffs endure is the very violation of their fundamental rights, any loss of
22 which – however briefly – is irreparable harm per se. *See Monterey Mech. Co. v. Wilson*, 125 F.3d
23 702, 715 (9th Cir. 1997). When the ongoing violation of one’s fundamental, enumerated rights is
24 the purported harm, the urgency with which the court should restore those rights never lapses.

25 The City claims that *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14

26 _____
27 ⁶ The Court also correctly held that Plaintiffs have standing to challenge the vagueness of the
28 “sporting purpose” ban because Plaintiffs claim it “unduly burdens their *own* alleged right to
acquire and possess” the banned ammunition. *Jackson*, 829 F. Supp. 2d at 872 n.3.

1 (9th Cir. 1984), supports its argument that Plaintiffs’ claim of irreparable harm is undercut because
 2 they waited to bring this motion. Defs.’ Opp’n 24:18-20. It does not. The *Lydo* plaintiff lacked
 3 irreparable harm because its lost business could be compensated with money damages and because
 4 the court found no actual violation of First Amendment rights. *Id.* *Lydo* discusses the delay issue
 5 only in balancing the equities, clarifying that it is but a “factor to be considered in weighing the
 6 propriety of relief” and that such delay was not the “principal basis” for its decision. *Id.* at 1213,
 7 1216. As Plaintiffs continue to suffer irreparable harm, they cannot be denied relief on this basis.

8 **IV. THE BALANCE OF THE EQUITIES TIPS SHARPLY IN PLAINTIFFS’ FAVOR
 AND PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST**

9 Plaintiffs challenge government action that affects the general public seeking to exercise
 10 constitutional rights. “The balance of equities *and* the public interest thus tip sharply in favor of
 11 enjoining the ordinance.” *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009)
 12 (emphasis added). And because the City does not – and cannot – cite to any harm that would befall
 13 it if preliminary injunction is issued, the balance of the equities tips ever more in Plaintiffs’ favor.

14 Further, the weight of the public’s interest in safety does not fall on the side of denying
 15 temporary relief, but on the side granting it. Impeding law-abiding citizens’ right to keep a firearm
 16 operable for immediate self-defense and limiting access to common, self-defense ammunition
 17 makes the public *less* safe. While an ordinance itself generally establishes that the Legislature has
 18 already weighed the public interest, this case presents the situation contemplated in *Golden Gate*
 19 *Restaurant Ass’n v. City and County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008),
 20 whereby the court may deem public interest not served by a duly enacted ordinance if it is
 21 unconstitutional. If Plaintiffs are to succeed on the merits, the laws must be unconstitutional, and
 22 the Court should give little weight to the City’s finding that they nonetheless serve public interest.

23 **V. CONCLUSION**

24 Accordingly, Plaintiffs request the Court grant their motion for a preliminary injunction.

25 Date: September 20, 2012

MICHEL & ASSOCIATES, PC

27 s/ C.D. Michel

C. D. Michel

28 Attorney for Plaintiffs

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
6 DAVID GOLDEN, NOEMI MARGARET)
7 ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
8 ASSOCIATION OF AMERICA, INC., SAN)
9 FRANCISCO VETERAN POLICE)
10 OFFICERS ASSOCIATION,)
11 Plaintiffs)
12 vs.)
13 CITY AND COUNTY OF SAN)
14 FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF)
OF THE SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)
Defendants.)

15 IT IS HEREBY CERTIFIED THAT:

16 I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My
business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

17 I am not a party to the above-entitled action. I have caused service of

18 **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO**
19 **MOTION FOR PRELIMINARY INJUNCTION**

20 on the following party by electronically filing the foregoing with the Clerk of the District Court
using its ECF System, which electronically notifies them.

21 Wayne Snodgrass, Deputy City Attorney
22 Christine Van Aken, Deputy City Attorney
23 Office of the City Attorney
24 1 Drive Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

25 I declare under penalty of perjury that the foregoing is true and correct. Executed on
September 20, 2012.

26 /s/ C.D. Michel
27 C. D. Michel
28 Attorneys for Plaintiffs

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

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143 RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF MASSAD AYOOB IN**
ROBINSON, NATIONAL RIFLE) **SUPPORT OF PLAINTIFFS' REPLY TO**
13 ASSOCIATION OF AMERICA, INC. ,SAN) **DEFENDANTS' OPPOSITION TO MOTION**
FRANCISCO VETERAN POLICE) **FOR PRELIMINARY INJUNCTION**
14 OFFICERS ASSOCIATION,)

15 Plaintiffs)

16 vs.)

17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
18 FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)

20 Defendants.)
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DECLARATION OF MASSAD AYOOB

1. I, Massad Ayoob, make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. My areas of expertise include the following: 1) dynamics of violent encounters; 2) training standards for safe weapons handling (law enforcement/civilian); 3) training standards of firearms and use of force (police/civilian); 4) homicide/use of force investigation; 5) personal and professional security; 6) weapon retention/disarming; and 7) law enforcement internal investigation/discipline.

3. My expertise as outlined above is based on decades of experience, including but not limited to my career in law enforcement, the extensive training I have received as a law enforcement officer and as a civilian, my studies concerning law enforcement and self-defense tactics, and the vast amount of instruction I have provided to both law enforcement and civilians.

4. My career in law enforcement included the following:

A) **Hooksett, New Hampshire Police Department:** 1972-73, auxiliary policeman, 1973-1980, fully sworn Police Officer. Duties under four chiefs included patrol, firearms training, community relations and crime prevention assignments. I was the department firearms instructor for most of this period. Served in part time capacity with full police authority.

B) **Deerfield, New Hampshire Police Department:** 1982-1990. Fully sworn officer, rank of Sergeant ('82-'84) in charge of all police training, and Lieutenant ('84-'90), in charge of police training and crime prevention activities. Served in part time capacity with full police authority.

C) **Grantham, New Hampshire Police Department:** 1990-present. Fully sworn Captain and Police Prosecutor, in charge of training, research, and other administrative functions. Serve in part time capacity with full police authority.

5. My personal training includes the following:

A) **Smith & Wesson Academy:** Advanced Combat Shooting (1st in class), Instructor course; Instructor Update (twice); Officer Survival Course (1st in class);

- 1 Weapon Retention instructor course; and advanced revolver shooting course.
- 2 B) **Glock Firearms:** Glock Instructor Course; and Glock Armorer Course.
- 3 C) **Firearms Instructor Courses:** National Rifle Association.
- 4 D) **Ordnance Expo:** Firearms and Ballistic Evidence; Officer Involved Shooting
- 5 Investigation; Advanced Officer Involved Shooting Investigation; Officer Survival;
- 6 and Management of Barricaded Suspects.
- 7 E) **International Police Academy:** Defensive Tactics (Unarmed Combat and
- 8 Restraint) Instructor Course, rated Master Instructor by sensei James Morell.
- 9 F) **NYPD:** “Hostage Negotiation for Supervisors”, “Post Shooting Tactics”,
- 10 “House Clearing Techniques”, “Off Duty Confrontation Tactics”, “Summary of
- 11 Violent Encounter Patterns”, and “Police Shotgun Program.”
- 12 G) Advanced Homicide Investigator school, by Vern Geberth, NYPD Ret., author
- 13 of “Practical Homicide Investigation.”
- 14 H) International Homicide Investigators’ Seminar (2 occasions).
- 15 I) **PPCT:** Pressure Point Control Tactics, taught by Bruce Siddle.
- 16 J) **Federal Law Enforcement Training Center:** BOSS program including officer
- 17 survival, intelligence briefings on outlaw bike gangs, booby traps, counter-ambush
- 18 tactics, arrest techniques.
- 19 K) **Knife/Counter-Knife courses:** Master Paul Vunak, Hank Renhardt, Sensei
- 20 Jim Maloney, Michael de Bethencourt.
- 21 L) Studying personally with world handgun champions Ray Chapman, Rob
- 22 Leatham, Jerry Miculek, and Frank Garcia in advanced shooting programs.
- 23 6. I have studied special units and their training on site as follows:
- 24 A) NYPD Firearms & Tactics Unit, Emergency Services Unit, Armed Robbery
- 25 Stakeout Unit.
- 26 B) LAPD SWAT, Firearms Training Unit.
- 27 C) FBI Firearms Training Unit.
- 28 D) Metro-Dade Police Firearms/SWAT Training Unit

- 1 E) Illinois State Police Ordnance Section.
- 2 F) NH State Police SWAT, EVOC, Firearms Training.
- 3 G) Kentucky State Police, Firearms Training and SRT Training.
- 4 H) Arizona Highway Patrol Firearms Training.
- 5 D) London, England Metropolitan Police firearms training and special services unit
- 6 (D.11, PT-17, SO-19).
- 7 J) I have reviewed or audited numerous other law enforcement firearms training
- 8 programs.
- 9 7. My instruction/teaching experience includes the following:
- 10 A) Director, Massad Ayoob Group, 2009-present.
- 11 B) Director, Lethal Force Institute, 1981-2009.
- 12 C) Chair of firearms committee, American Society of Law Enforcement Trainers
- 13 (ASLET), 1987-2007. Also served on Ethics Committee, and led an annual Panel
- 14 of Experts on firearms/deadly force issues at ASLET's international seminars.
- 15 D) Special Instructor, Chapman Academy, 1981-88.
- 16 E) International Instructor, PR-24 baton; has lectured several times at annual
- 17 international seminar. Trains other instructors and trainers of instructors.
- 18 F) Advisory Board member, International Law Enforcement Educators' and
- 19 Trainers' Association, has lectured there on investigation and management of
- 20 police use of force cases since the organization's inception.
- 21 G) National Instructor, Weapon Retention & Disarming, National Law
- 22 Enforcement Training Center. Trains other instructors and trainers of instructors.
- 23 1990-2009.
- 24 H) Assistant professor teaching weapons and chemical agents, Advanced Police
- 25 Training Program of New Hampshire, 1974-77.
- 26 D) Co-instructor (with former world pistol champion Ray Chapman) of Advanced
- 27 Officer Survival Seminars through Police Marksman Assn., in the 1980s.
- 28

1 J) International Instructor, Persuader Mini-Baton, certified by Joe Truncale.
2 K) Instructor, Kubotan self-defense, certified by Soke Takayuki Kubota.
3 L) National Instructor, Telescoping baton, certified by CASCO.
4 M) Instructor, straight baton, certified by COPSTK.
5 N) I have taught relevant topics for National, International, and Regional seminars
6 of International Association of Law Enforcement Firearms Instructors; regional
7 seminars for CLE credit on defending deadly force cases (NACDL, MA. CDL
8 Assn); International Homicide Investigators' Seminar (investigation of
9 officer-involved shootings and characteristics of self-defense shootings); McGill
10 University School of Medicine (medico-legal aspects of gunshot and knife
11 wounds); officer survival tactics (Ordnance Expo, Los Angeles; National Tactical
12 Invitational; New England SWAT Seminar; DEA National Academy; Metro-Dade
13 Police Academy; DEA/Miami).

14 L) I have appeared in several self-defense and law enforcement training videos.

15 8. I have been quoted as an authoritative reference in numerous publications including,
16 but not limited to, the following: 1) FBI Journal; 2) "Law Enforcement Handgun Digest"
17 (Grennell); 3) "Gun Digest Book of Combat Handgunnery", 1st edition (Lewis & Mitchell), 2nd
18 and 3rd editions (Karwan); 4) "Shooting Schools: An Analysis" (Winter); 5) "Street Survival:
19 Tactics for Armed Encounters," (Adams, McTernan, Remsberg); 6) "Tactical Edge: Tactics for
20 High Risk Patrol" (Remsberg); 7) "Handgun Retention System" (Lindell); 8) "The Street Smart
21 Gun Book" (Farnam); 9) "Police Handgun Manual" (Clede); 10) "Police Shotgun Manual"
22 (Clede); 11) "High Tech SWAT Weapons" (Bane); 12) "PR-24 Baton Manual" (Starrett); and
23 13) "Police Officers Guide" (Clede).

24 9. I have received various awards and recognitions for my expertise, including the
25 Honorary Distinguished Expert award from the Federal Law Enforcement Training Center.

26 10. Based on my experience in self-defense scenarios, fractions of seconds can mean the
27 difference between the victim successfully repelling an attacker and the victim being subdued.

28 11. Police officer training often includes an exercise known as the Tueller Drill, which

1 demonstrates to officers an attacker who is 21 feet away can close the entire distance between
2 himself and the victim in approximately one second-and-a-half. The Tueller Drill is designed to
3 make officers aware that even having a loaded firearm readily accessible may not protect them
4 from an attacker who is within 21 feet, more or less, even if the officer is aware of the attacker
5 being a threat.

6 12. Based on my training and experience, the amount of time it takes for a person with
7 proper firearms training to draw a readily accessible firearm, and hit well placed shots on a
8 person-sized target at seven yards is approximately about one and one-half seconds. For a not so
9 well trained individual, it could take two and a half to four seconds to do so.

10 13. In performing the Tueller Drill, the officers are aware of the threat existing and have a
11 readily available firearm, with which they are generally trained to use. This means that the drill
12 does not take into account the necessary reaction time if someone who is not aware of the threat to
13 recognize the threat, locate one's firearm, confirm the threat warrants use of deadly force,
14 engaging the target, and decide to pull the trigger, and accurately fire the weapon.

15 14. Even with prior knowledge of the threat and a readily accessible weapon, some
16 officers are unable to effectively draw and fire shots before the attacker reaches them during the
17 Tueller Drill.

18 15. The Tueller Drill demonstrates that threats existing within 21 feet of a victim, give the
19 victim about one and a half second to react effectively. If the victim's firearm is in a locked
20 container or with a trigger lock affixed to it, it will take the victim extra time to effectively engage
21 the attacker. According to the City, it takes approximately an additional 3-4 seconds to retrieve a
22 firearm from a locked container or remove a trigger lock.

23 16. Imposing an additional delay of 3-4 second severely restricts the ability of a potential
24 victim to engage in self-defense when facing a violent attack.

25 17. San Francisco's estimate of three to four seconds to retrieve a loaded gun from a lock
26 box appears to be highly optimistic. I have tested such gun boxes. I have seen some that did not
27 work. I was present at a National Mid-Winter Championship event of the International Defensive
28 Pistol Association in which one stage involved retrieving the gun from a lock box and shooting,

1 with an electronic timer running. The stage had to be eliminated from the championship because
2 the lock box malfunctioned so many times, preventing the shooter from getting the gun out of it at
3 all.

4 18. Many lock boxes work electronically, and are dependent on batteries. If the batteries
5 have died, the box will not open, and the shooter will have to retrieve and apply a key to open the
6 box.

7 19. Some lock boxes require a key to open in any case. This requires the user to find the
8 key, insert it exactly into the (usually small) keyhole, and turn the key. This is a fine motor skill,
9 the type of skill which degrades severely in human beings under stress due to vasoconstriction
10 (loss of blood flow to the extremities) and also due to tremors induced by internally-generated
11 adrenaline (epinephrine). This is a well-known physiological reaction that has been in the
12 medical literature and training literature for a century or longer, defined as "fight or flight"
13 response by Dr. Walter Cannon at Harvard Medical School before World War I.

14 20. Other lock box designs may require complex dial combinations (impractical or
15 impossible to operate while hiding in the dark from an intruder, and extremely fumble-prone for
16 the reasons described above).

17 21. Still other "high tech" lock box designs work off biometrics, i.e., fingerprint
18 recognition. It is well known in the security field that biometrics applied in this respect are not yet
19 a perfect science. There are people whose fingerprints will be recognized by the machines, and
20 people whose fingerprints will not. In any case, no biometric device can recognize fingerprints
21 that are obscured with clothing, dirt, or blood before accessing the lock box.

22 22. In self-defense situations, fractions of a second often mean the difference between life
23 and death. Even assuming that a firearm can be safely and effectively removed from a locked
24 container under the duress of a violent attack in 3-4 seconds, based on my training and
25 experience, taking additional time to remove a firearm from a locked box or remove a trigger lock
26 greatly reduces an potential victim's ability to defend against a violent attacker in a self-defense
27 emergency.

28 ////

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CITY AND COUNTY OF SAN FRANCISCO,
THE MAYOR OF SAN FRANCISCO and
THE CHIEF OF THE SAN FRANCISCO POLICE DEPARTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, THE MAYOR OF SAN
FRANCISCO, and THE CHIEF OF THE SAN
FRANCISCO POLICE DEPARTMENT, in
their official capacities,

Defendants.

Case No. C09-2143 RS

**DECLARATION OF DANIEL W. WEBSTER
IN SUPPORT OF CITY AND COUNTY OF
SAN FRANCISCO'S OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: Oct. 4, 2012
Time: 1:30 p.m.
Place: 450 Golden Gate Ave.
Courtroom 3 - 17th Floor
San Francisco, CA 94102

1 I, Daniel W. Webster, declare as follows:

2 1. For the past ten years, I have served as Co-Director of the Johns Hopkins Center for
3 Gun Policy. I have also been Deputy Director for Research for the Johns Hopkins Center for the
4 Prevention of Youth Violence since 2005.

5 2. I began my career in public safety research in 1985 as a Research Associate at the
6 University of Michigan and have focused most of my research on gun-related injuries and violence
7 during the past 23 years. I have a Masters of Public Health degree from the University of Michigan
8 and a doctorate in Health Policy and Management from the Johns Hopkins School of Public Health.
9 This graduate training included many advanced courses in epidemiology, research methods, and
10 statistical analysis.

11 3. Immediately prior to joining the faculty at Johns Hopkins, I directed a program on
12 violence research at the Washington (DC) Hospital Center. I joined the faculty of the Johns Hopkins
13 School of Public Health in 1992, and I am a tenured Professor of Health Policy and Management with
14 a joint appointment in the School of Education's Division of Public Safety Leadership. As noted
15 above, I am the Co-Director of the Johns Hopkins Center for Gun Policy and the Deputy Director for
16 Research for the Johns Hopkins Center for the Prevention of Youth Violence since 2005. I teach
17 graduate courses on violence prevention and research and evaluation methods at Johns Hopkins, direct
18 a PhD program in Health and Public Policy, and serve on the steering committee of a pre- and post-
19 doctoral training program in violence prevention research funded by the National Institutes of Health.

20 4. I have directed numerous studies related to gun violence and its prevention. I have
21 published 66 articles in scientific, peer-reviewed journals, the vast majority of these addressed some
22 aspect of violence and/or firearm injuries and their prevention. My CV, detailing these publications, is
23 attached as Exhibit 1 to this report.

24 5. I have been retained by the City and County of San Francisco to render expert opinions
25 in this case. I make this declaration on the basis of my training and expertise, the research discussed
26 herein, and the work that I have done in this case to date. This declaration does not constitute my final
27 written expert report. For my work in this case, I am being compensated at a rate of \$250 per hour.

I. THE AVAILABILITY OF FIREARMS IN THE HOME INCREASES THE RISKS OF SUICIDE, HOMICIDE, AND DEATHS FROM UNINTENTIONAL SHOOTINGS.

6. It is my opinion that the availability of firearms in homes increases the risks of suicide, homicide, and deaths from unintentional shootings. In the following paragraphs, I describe the research that supports my opinion.

A. Gun Availability and Suicides.

7. Debates about gun policy tend to focus solely on violent crime, but policies and personal decisions about keeping firearms in the home should take into consideration that sixty percent of firearm-related deaths which occur in the U.S. are suicides.¹ A study which used data from the National Mortality Follow-back Survey – a detailed survey of a systematic random sample of all deaths in the U.S. in 1993 of persons age 15 years or older – focused on homicides and suicides. Data from this study revealed that among the violent deaths which occurred within the home, suicides were more than twice as common as homicides.² In San Francisco in 2009, suicides were more than twice as common as homicides (97 vs. 40) and there were nearly as many firearm suicides as firearm homicides (19 vs. 22).³ Because the research cited below indicates that the accessibility of firearms significantly increases the risk of suicide, especially for adolescents and young adults, San Francisco has an interest in reducing the availability of firearms within homes to children, adolescents, and unauthorized individuals.

8. Furthermore, policies concerning how firearms are kept within the home should consider that suicides within the home are more than twice as common as homicides in the home, firearms are by far the most common method used in both causes of death, and the presence of firearms in the home is associated with increased risk of both of these causes of death.

¹ 18,735 of 31,347 firearm deaths in the U.S. in 2009. National Center for Injury Prevention and Control. WISQARS Injury Mortality Reports, 1999-2009. Centers for Disease Control and Prevention, Atlanta, GA. Accessed August 31, 2012.

² Weibe DJ. Homicide and suicide risks associated with firearms in the home. *Annals of Emergency Medicine* 2003;41:771-782.

³ Data generated from Centers for Disease Control and Prevention, National Center for Health Statistics. Underlying Cause of Death 1999-2009 on CDC WONDER Online Database, released 2012. Accessed August 31, 2012.

1 9. I reviewed several types of studies to arrive at my conclusions about the relationship
2 between firearm availability within the home and the risk of suicide, homicide, and unintentional
3 firearm deaths. The studies use different designs, study samples or populations, and analytic methods,
4 but the findings are consistent in showing a positive association between keeping firearms in the home
5 and the risk of suicide. The findings are also consistent with a widely accepted principle among
6 experts in the study and prevention of youth violence – that making the most lethal means of self-harm
7 less accessible will generally reduce risks for suicide and result in fewer suicides. This principle and
8 recommendation is referred to in many consensus documents such as recent reports on suicide
9 prevention by the U.S. Surgeon General and the National Action Alliance for Suicide Prevention⁴ and
10 the World Health Organization.⁵

11 **Household Studies**

12 10. There have been many case-control studies of households which measure the
13 association between the presence of firearms in the home and suicide, homicide, or unintentional
14 shooting death. Case-control studies involve comparisons between cases – those with the condition or
15 outcome of interest – and controls – those who do not have the condition or outcome of interest. Case-
16 control studies determine whether cases had greater exposure to a factor of interest, in this case being
17 in a home with a firearm, than did controls.

18 11. Nearly all of the case-control studies have shown a positive relationship between gun
19 ownership and suicides, with firearm ownership being associated with large increases in the risk of
20 suicide to household members. In a study of 803 suicides, 565 of which occurred within residences in
21 two metropolitan counties, Dr. Arthur Kellermann and colleagues⁶ reported that firearm ownership
22 was associated with a 4.7-fold increase in suicide after controlling differences between cases and
23 controls on a number of factors that are associated with suicide risks including age, sex, race, failure to

24 _____
25 ⁴ U.S. Department of Health and Human Services (HHS) Office of the Surgeon General and
26 National Action Alliance for Suicide Prevention. *2012 National Strategy for Suicide Prevention:
27 Goals and Objectives for Action*. Washington, DC: HHS, September 2012.

28 ⁵ World Health Organization. *Public Health Action for the Prevention of Suicide: A
Framework*. Geneva, 2012.

⁶ Kellermann AL, Rivara FP, Somes G, et al. Suicide in the home in relation to gun ownership.
New England Journal of Medicine 1992;327:467-472.

graduate from high school, living alone, alcohol consumption, prior alcohol-related hospitalization, current use of prescription medication for depression or mental illness, and use of illicit drugs. Elevated suicide risks were observed only for suicides committed with a firearm. Individuals who committed suicide by other means were no more or less likely to have had a firearm in their home. The association between being in a home with a firearm and suicide was stronger for males (aOR = 6.4), who would be much more likely to have acquired the firearm(s) kept in the home, than for females (aOR = 3.3). Thus the data indicate that the risk of suicide was three times higher for women living in homes with a firearm even though females are far less likely than are males to purchase and own firearms. This substantial increase in suicide risk for females makes it difficult to attribute the firearms-suicide association solely to suicidal intent prompting firearm ownership. The guns-suicide association was also much stronger in situations where there was no prior history of mental illness (aOR = 32.8) than when there was mental illness (aOR = 3.0).

12. Cummings and colleagues conducted a case-control study to examine the association between legal purchases of handguns and suicide and homicide using data from a large population of individuals enrolled in a health maintenance organization in metropolitan Seattle, Washington over a 13-year period.⁷ One advantage to this study over the one by Kellermann and colleagues is that it does not rely upon data from proxy respondents for the cases but uses pre-existing administrative data to measure risk factors including handgun purchases. The cases were 353 suicide victims and 117 homicide victims who were members of the HMO. Each case was matched with five control subjects from the same HMO membership of the same age, sex, and ZIP code of residence. After controlling for the individual's age, sex, the number of family members in the home, and neighborhood affluence and education levels, the risk of suicide was 1.9 times higher for members of households where a family member had legally purchased a handgun from a licensed gun dealer. Elevated risks for suicide within homes with handgun purchases were exclusive to suicides committed with a firearm (RR = 3.1); however, there was no association between handgun purchase and suicide by other means. The

⁷ Cummings P, Koepsell TD, Grossman DC, Savarino J, Thompson RS. The association between the purchase of a handgun and homicide or suicide. *American Journal of Public Health* 1997;87:974-8.

1 association between handgun purchases and suicide risks were slightly higher for the person who
2 purchased the handgun (RR = 2.0, CI = 1.4 to 2.8) than for other family members (RR = 1.5, CI = 0.9
3 to 2.5). The elevated risk of suicide associated with handgun purchase history was greatest when a
4 handgun had been purchased less than a year before death, nevertheless, handgun purchases 5 or more
5 years prior were still associated with increased risk of suicide within the home (RR = 1.7, CI = 1.3 to
6 2.3). Furthermore, the median interval between the most recent handgun purchase by a household
7 member and a suicide was 10.7 years, indicating that in most instances the suicide victim did not
8 purchase a gun in order to complete a plan to commit suicide but rather used a firearm that had been
9 purchased years ago, sometimes by individuals other than the one who committed suicide.

10 13. In a nationally-representative study, based on data from the National Mortality Follow-
11 Back Survey and the National Health Interview Study, firearm ownership was associated with more
12 than a 3-fold increase in the risk of suicide for household members (adjusted odds ratio – aOR = 3.44,
13 CI = 3.06 to 3.86).⁸ The increased risk of suicide connected to guns in the home was exclusive to
14 suicides committed with a firearm. Risks for suicide by means other than firearms were slightly lower
15 among those living in a home with a gun, but much stronger association between guns and firearm
16 suicide led to a net increase in suicide by any means.

17 14. In the two case-control studies which examined the relationship between household
18 firearm access and suicide risk within age groups, the risk of suicide resulting from access to a firearm
19 in the home was elevated the most among adolescents and young adults. The positive association
20 between firearm ownership and suicides in the home in Kellermann et al.’s study indicated a 10-fold
21 increase in risk of suicide for those ages 24 and younger (aOR = 10.4, CI 1.6 to 68.8). In the national
22 study by Wiebe, age-group-specific suicide risk increases connected to household firearm ownership
23 were greatest for young adults ages 18-24 (aOR = 4.50, CI = 3.26 to 6.21).

24
25
26
27
28 ⁸ Weibe DJ. Homicide and suicide risks associated with firearms in the home. *Annals of
Emergency Medicine* 2003;41:771-782.

1 15. Ready access to the most lethal method for suicide is likely to greatly influence suicide
2 risks for adolescents for whom suicides are often very impulsive acts,⁹ and ready availability of the
3 most lethal means of self-harm determines whether an individual survives suicidal acts.^{10 11}
4 Adolescents and young adults are most likely to live in households with older adults, and it seems
5 unlikely that the firearms brought into the homes in cases where someone under age 25 committed
6 suicide would have been prompted by the victim's intention to commit suicide. Research has shown
7 that firearms used by adolescent suicide victims were typically owned by parents or other family
8 members.¹²

9 16. Suicide by firearm is the third leading cause of death for persons ages 15 to 24.¹³ Local
10 studies have found that about two-thirds of adolescents who commit suicide with a firearm obtained
11 the gun from within their own homes or the home of a relative or friend¹⁴ and where the gun was
12 typically left unlocked.¹⁵

13 17. A series of studies of adolescent suicides in Western Pennsylvania have shown that
14 adolescents who died from suicides there were much more likely to have lived in homes with firearms
15 than adolescents in the following comparison groups – adolescents who had been hospitalized for
16 nonfatal suicide attempts and had psychiatric disorders,¹⁶ adolescents with psychiatric disorders who
17

18 ⁹ Azrael D, Hemenway D, Miller M, Barber CW, Schackner R. Youth suicide: insights from 5
19 years of Arizona Child Fatality Review Team data. *Suicide and Life Threatening Behavior*
2004;34:36-43.

20 ¹⁰ Miller M, Azrael D, Hemenway D. The epidemiology of case fatality rates for suicide in the
21 Northeast. *Annals of Emergency Medicine*. 2004;43:723-30.

22 ¹¹ Vyrostek SB, Annet JL, Ryan GW. Surveillance for fatal and nonfatal injuries—United
23 States, 2001. *MMWR Surveillance Summaries*. 2004;53:1–57.

24 ¹² Johnson RM, Barbor C, Azrael D, Clark DE, Hemenway D. Who are the owners of firearms
25 used in adolescent suicides? *Suicide & Life Threatening Behavior*. 2010;40:609–611.

26 ¹³ National Center for Injury Prevention and Control. WISQARS Injury Mortality Reports,
27 1999-2007. Centers for Disease Control and Prevention, Atlanta, GA. Accessed August 31, 2012.

28 ¹⁴ Grossman DC, Reay DT, Baker SA. Self-inflicted and unintentional firearm injuries among
children and adolescents: the source of the firearm. *Arch Pediatr Adolesc Med*. 1999;153:875-878.

¹⁵ Shah S, Hoffman RE, Wake L, Marine WM. Adolescent suicide and household access to
firearms in Colorado: results of a case-control study. *Journal of Adolescent Health* 2000;26:157-163.

¹⁶ Brent DA, Perper JA, Goldstein CE, et al. Risk factors for adolescent suicide: a comparison
of adolescent suicide victims with suicidal inpatients. *Archives of Gen Psychiatry* 1988;45:581-8.

1 had never attempted suicide,¹⁷ adolescents with a lifetime history of affective disorders who were
2 living at home with their families,¹⁸ adolescents in a demographically-matched group of community
3 controls without psychiatric conditions,¹⁹ and a general survey of adolescents drawn from the same
4 area as the suicides.²⁰

5 18. As a study design, case-control studies have limitations, perhaps most importantly the
6 difficulty in discerning the direction of cause (e.g., firearm ownership) and effect (e.g., suicide)
7 because suicidal intentions can cause someone to bring a gun into their home as well as having a gun
8 in the home contributes to a suicide. Yet the evidence indicates that suicide risks are elevated by
9 having firearms in the home for those who typically do not purchase or bring firearms into the home –
10 women and adolescents. Some have speculated that the consistently positive association between
11 firearm ownership and heightened risk of suicide might be due to unmeasured confounders – factors
12 which are correlated with firearm ownership that are causally related to suicide risks. However, there
13 does not appear to be higher rates of mental illness or suicidal ideation in homes with firearms
14 compared with homes with no firearms.^{21 22 23}

17 ¹⁷ Brent DA, Perper JA, Allman CJ, Moritz G, Wartella ME, Zelenak JP. The presence and
18 accessibility of firearms in the homes of adolescent suicides, a case-control study. *Journal of the
19 American Medical Association* 1991;266:2989–2995.

20 ¹⁸ Brent D, Perper JA, Moritz G, Baugher M, Schweers J, Roth,C. Suicide in affectively ill
adolescents: A case-control study. *Journal of Affective Disorders* 1994;31:193–202.

21 ¹⁹ Brent DA, Perper JA, Moritz G, Baugher M, Allman C. Suicide in adolescents with no
apparent psychopathology. *Journal of the American Academy of Child and Adolescent Psychiatry*
1993;32:494–500.

22 ²⁰ Brent DA, Perper JA, Moritz G, Baugher M, Schweers J, Roth C. Firearms and adolescent
23 suicide: a community based case control study. *American Journal of Diseases of Children*
1993;147:1066-1071.

24 ²¹ Miller M. Recent psychopathology, suicidal thoughts and suicide attempts in households
25 with and without firearms: findings from the National Comorbidity Study Replication. *Injury
Prevention* 2009;15:183-7.

26 ²² Hemenway D, Miller M. Association of rates of household handgun ownership, lifetime
27 major depression, and serious suicidal thoughts with rates of suicide across US census regions. *Injury
Prevention* 2002;8:313-8.

28 ²³ Betz ME, Barber C, Miller M. Suicidal behavior and firearm access: results from the second
injury control and risk survey. *Suicide & Life Threatening Behavior*. 2011;41:384-91.

Cohort Studies

19. Cohort studies measure exposures (e.g., having firearms in your home) within a population and how those exposures are associated with subsequent outcomes (e.g., suicides). Wintemute and colleagues conducted a population-based cohort study to compare mortality among 238,292 persons who purchased a handgun in California in 1991 with that in the general adult population of the state. Mortality was examined for a period from the time of handgun purchase through the end of 1996. Sex-specific standardized mortality ratios (SMR – the ratio of the number of deaths among handgun purchasers to the number expected on the basis of age- and sex-specific rates among adults in California) were calculated for several age groups. During the first year after the purchase of a handgun, suicide was the leading cause of death among handgun purchasers. Handgun purchasers experienced suicide rates more than four times that of all Californians. The increased risk was attributable entirely to the excess risk of suicide with a firearm (SMR = 7.1). While the immediate risk for suicide among handgun purchasers is likely to reflect suicidal wishes prompting handgun purchases, handgun purchasers remained at increased risk for suicide by firearm throughout the six year study period, especially among women (SMR = 15.5 compared with 3.2 for men)²⁴.

Aggregate-Level Studies: Cross-Sectional Studies

20. The case-control and cohort studies referenced above measure the exposure and outcome at the level of individuals or households. In contrast, aggregate-level studies measure relationships between variables which are measured in the aggregate such as by city, county, state, or national. Several aggregate-level (mostly US state-level) studies have shown that populations with higher rates of firearm ownership tend to have significantly higher risks for firearm suicide and suicide by any means.^{25 26 27 28 29} Perhaps the most rigorous of these studies was led by Harvard physician and

²⁴ Wintemute GJ, Parham CA, Beaumont JJ, Wright M, Drake C. Mortality among recent purchasers of handguns. *New England Journal of Medicine* 1999;341:1583-1589.

²⁵ Birckmayer J, Hemenway D. Suicide and firearm prevalence: Are youth disproportionately affected? *Suicide & Life Threatening Behavior* 2001;31:303–10.

²⁶ Markush RE, Bartolucci AA. 1984. Firearms and suicide in the United States. *Am. J. Public Health* 74:123–27.

²⁷ Miller M, Azrael D, Hemenway D. Firearm availability and suicide, homicide, and unintentional firearm deaths among women. *Journal of Urban. Health* 2002;79:26–38.

1 epidemiologist Matthew Miller who is considered by many to be the nation's leading expert on the
 2 relationship between the availability of lethal means of suicide and suicide risks. Miller and his
 3 colleagues analyzed data on suicide rates across the 50 U.S. states and controlled for differences in
 4 rates of poverty, urbanization, unemployment, mental illness, and drug and alcohol dependence and
 5 abuse.³⁰ As would be expected if access to firearms in the home increased the risk for suicide, the
 6 prevalence of household firearm ownership was positively associated with suicide rates (the higher the
 7 prevalence of firearm ownership the higher the rate of suicide), and the positive association was
 8 limited to suicides committed with firearms.

9 **Aggregate-Level Studies: Longitudinal Studies**

10 21. Most aggregate-level studies which examine the association between firearm ownership
 11 and suicide have been cross-sectional, comparing suicide rates with gun ownership for a selected time
 12 period. Studies based on longitudinal data, which compare *changes* in firearm ownership in relation to
 13 *changes* in suicide rates are less vulnerable to potential threats to validity. Miller and colleagues
 14 conducted such a study by examining annual changes in suicides in relation to annual changes in a
 15 validated, surrogate measure of firearm ownership³¹ over the period of 1980 through 2002. After
 16 statistically controlling for changes in age, unemployment, per capita alcohol consumption, and
 17 poverty, for every 10 percent reduction in firearm ownership, there was a 4.2 percent reduction in the
 18 rate of suicides with firearms and a 2.5 percent reduction in suicides by any means. There was no
 19 relationship between changes in firearm ownership and changes in non-firearm suicides.³²

22 ²⁸ Miller M, Azrael D, Hemenway D. Firearm availability and unintentional firearm deaths,
 23 suicide, and homicide among 5–14 year olds. *Journal of Trauma*. 2002;52:267–274.

24 ²⁹ Miller M, Azrael D, Hemenway D. Household firearm ownership and suicide rates in the
 25 United States. *Epidemiology* 2002;13:517–524.

26 ³⁰ Miller M, Lipmann SJ, Azrael D, Hemenway D. Household firearm ownership and rates of
 27 suicide across the 50 United States. *Journal of Trauma* 2007;62:1029-34.

28 ³¹ Azrael D, Cook PJ, Miller M. State and local prevalence of firearm ownership:
 measurement, structure and trends. *Journal of Quantitative Criminology* 2004;20:43-62.

³² Miller M, Azrael D, Hepburn LM, Hemenway D, Lipmann SJ. The association between
 changes in household firearm ownership and rates of suicide in the United States, 1981-2002. *Injury
 Prevention* 2006;12:178-182.

1 **B. Gun Availability and Homicides.**

2 22. One third of all homicides in the U.S. occur in or around residential dwellings (Wiebe,
3 2003). In an in-depth study of homicides which occurred in or around residential dwellings in
4 geographically diverse metropolitan counties, of the cases in which the victim-perpetrator relationship
5 was known, 52 percent of the victims were murdered by a spouse, intimate partner, first-degree family
6 member, or roommate of the perpetrator, 37 percent were a friend or an acquaintance, and only 4
7 percent were strangers.³³ Thus, ready access to a firearm within the home when arguments or
8 altercations occur could determine whether such conflicts result in a homicide as well as a
9 community's homicide rate. This may be especially true for women's risk of homicide. One third of
10 all female homicide victims in the U.S. are killed by an intimate partner.³⁴ Twelve percent of all
11 violent crimes and 22.6 percent of all violent crimes committed against females are committed by the
12 victims' intimate partners (e.g., spouses, boyfriends),³⁵ who often live in the same household with the
13 victim.

14 **Household Studies**

15 23. Kellermann and colleagues used a case-control study design to examine the relationship
16 between firearm ownership and the risk of homicide in the home.³⁶ The cases were homicide incidents
17 which occurred within residences in three metropolitan counties and included 347 victims. Controls
18 were matched with cases by sex, race, age group, and neighborhood of residence. As noted above,
19 when the relationship between the victim and offender was known, most of the victims were related to,
20 intimate partners with, or roommates of the perpetrator, and only four percent were strangers. After
21 statistically controlling for differences due to home rental versus ownership, living alone, household

22
23 ³³ Kellermann AL, Rivara F, Rushforth NB, et al. Gun ownership as a risk factor for homicide
in the home. *New England Journal of Medicine* 1993;329:1084-1091.

24 ³⁴ Fox JA, Zawitz MW. *Homicide Trends in the United States*. Bureau of Justice Statistics,
Office of Justice Programs, U.S. Department of Justice.
25 <http://bjs.ojp.usdoj.gov/content/homicide/relationship.cfm>. Accessed Aug. 8, 2011.

26 ³⁵ Bureau of Justice Statistics. *Criminal Victimization in the United States, 2008 – Statistical
Tables*. Table 43a. NCJ 231173 Office of Justice Programs, U.S. Department of Justice, Washington,
27 DC, May 2011.

28 ³⁶ Kellermann AL, Rivara F, Rushforth NB, et al. Gun ownership as a risk factor for homicide
in the home. *New England Journal of Medicine* 1993;329:1084-1091.

1 members' involvements in fights within the home, history of arrest, and illicit drug use, firearm
2 ownership was associated with risk of homicide that was 2.7 times higher than in homes without
3 firearms (aOR = 2.7, 95% CI = 1.6 to 4.4) . The firearm-homicide relationship was strongest for
4 homicides committed by the victim's intimate partner or family member and indicated that the risk of
5 domestic homicide increased nearly eightfold for in homes with firearms (aOR = 7.8, 95% CI = 2.6 to
6 23.2).

7 24. A subsequent study drawing upon the same data in the Kellermann study focused on a
8 subset of the cases in which the person killed was a woman. In this study, there was a nearly fivefold
9 increased risk of a woman being the victim of a homicide associated with living in a home with
10 firearms.³⁷ In the majority of these cases, the victim was killed by an intimate partner or other family
11 member. I was a co-investigator of a subsequent case-control study of risk factors for intimate partner
12 homicide of women who had been in physically abusive intimate relationships. The study gathered
13 data in eleven cities and controlled for a wide range of risk factors including nature of prior intimate
14 partner violence, substance abuse, relationship characteristics, as well as abuser and victim
15 characteristics. This study found that the abuser's ownership of a firearm was associated with a
16 fivefold increase in risk of intimate partner homicide (aOR = 5.38). The study also examined
17 associations between factors present in the most serious incidents of intimate partner violence and
18 found that the abuser's use of a firearm increased the risk of lethal outcomes 41 times above that of
19 incidents in which a firearm was not involved.³⁸

20 25. In addition to examining the association between handgun purchases and suicide risks
21 to household members, the study of the HMO population cited above (Cummings et al. 1997) also
22 reported that the risk of homicide was more than twice as high (RR = 2.2) within households where
23 there had been one or more handguns purchased. The elevated risk for homicide was similar among
24 the handgun purchaser and his or her family members. A concern about case-control studies is that the
25

26 ³⁷ Baily JE, Kellermann AL, Somes G, Banton JG, Rivara F, Ruthforth NB. Risk factors for
violent death of women in the home. *Archives of Internal Medicine* 1997;15:777-782.

27 ³⁸ Campbell JC, Webster DW, Koziol-McLain J, et al. Risk factors for femicide within
28 physically abusive intimate relationships: Results from a multi-site case control study. *American
Journal of Public Health* 2003; 93:1089-1097.

1 risk of being a homicide victim could prompt gun acquisition and confound the estimated causal effect
2 of gun ownership on homicide risks. However, in Cummings study of the HMO population, the
3 median interval between first family handgun purchase and any homicide death was 11.3 years and the
4 risk of homicide was unrelated to how recently a handgun was purchased. Thus it seems unlikely that
5 the association measured is due to immediate homicide risks prompting gun ownership.

6 26. Wiebe's (2003) nationally representative study of the risk of violent death associated
7 with the presence of guns in the home demonstrated a positive association between living in a home
8 with at least one firearm and homicide victimization. Overall, the odds of a gun in the home was 41
9 percent higher among victims of homicide compared with demographically-matched controls. The
10 positive association between firearm ownership and homicide risk was greater for females (aOR =
11 2.72) than for males (aOR = 1.23). Twenty-nine percent of the homicides of male victims and 55
12 percent of homicides of females occurred in the home or private area around the home. Thus, while
13 adult males more commonly bring firearms into the home (male:female ratio of gun ownership is
14 between 3 and 4 to 1),³⁹ they are more commonly victimized outside the home. In contrast, females
15 suffer increased risk within their own homes when males bring firearms into the home.

16 27. While prior case-control studies examined the association between gun ownership and
17 homicide victimization, criminologists Kleck and Hogan conducted a national case-control study in
18 which the outcome of interest was homicide perpetration. Data from their cases came from the U.S.
19 Census Bureau's Survey of State Prison Inmates of 1991 who had committed a homicide as an adult
20 between 1980 and 1991. Controls were taken from the General Social Survey of the U.S. population.
21 They found gun ownership was positively associated with homicide perpetration. After statistically
22 controlling for age, sex, race, Hispanic ethnicity, marital status, personal income, education, military
23 veteran status, and having a child less than 18 years of age, the odds that a gun owner would commit a
24 homicide was 1.36 times higher than the odds of a nongun owner committing a homicide after
25 controlling for confounders.⁴⁰ Although the strength of the association between gun ownership and

26 ³⁹ Violence Policy Center. *The Shrinking Minority: The Continuing Decline of Gun Ownership*
27 *in America*. Washington, DC, 2011. <http://www.vpc.org/studies/ownership.pdf>

28 ⁴⁰ Kleck G, Hogan M. National case-control Study of homicide offending and gun ownership.
Social Problems 1999;46:275-293

1 homicide perpetration risk was lower than was observed in the case-control studies of homicide
2 victimization, the direction of the association was consistent with the other studies.

3 **Cohort Studies**

4 28. Wintemute’s study of the mortality risks of a cohort of legal handgun purchasers in
5 California relative to the general population of Californians with the same age and sex distribution
6 examined risks for homicide as well as for suicide. The risk being a victim of homicide with a firearm
7 was twice as high among women handgun purchasers relative to Californian women of the same age,
8 but was lower among men who legally purchased firearms (SMR = 0.8). I suspect that the elevated
9 risk for women was due to the fact that women are more likely to be killed by an intimate partner or
10 family member who might have access to a firearm kept in the woman’s home whereas men are more
11 commonly murdered on the street by an acquaintance or stranger.

12 **Aggregate-Level Studies: Cross-Sectional Studies**

13 29. Miller and colleagues conducted a study to assess the cross-sectional association
14 between the prevalence of firearms in the home and homicide rates at the state level. The researchers
15 statistically controlled for differences across states in rates of aggravated assault, robbery,
16 unemployment, urbanization, per capita alcohol consumption, and economic resource deprivation.
17 States with higher rates of household firearm ownership had significantly higher homicide
18 victimization rates for men, women and children. Differences in the prevalence of household firearm
19 ownership were associated with proportionately similar differences in rates of homicide committed
20 with firearms. Consistent with the hypothesis that the positive association between gun ownership and
21 homicide was due to gun availability and not to differences in the propensity for violence between gun
22 owners and people who do not own guns, non-gun homicide victimization was not associated with
23 firearm ownership.⁴¹ In my opinion, this study might understate the cross-sectional relationship
24 between firearm ownership and homicide rates because the statistical models control for crimes that
25 could themselves be caused by higher levels of gun ownership (aggravated assaults and robberies).

26
27 ⁴¹ Miller M, Hemenway D, Azrael D. State-level homicide victimization rates in the US in
28 relation to survey measures of household firearm ownership, 2001-2003. *Social Sciences & Medicine*
2007;64:656-64.

1 These findings were consistent with those of similar prior studies that relied on a surrogate measure of
 2 gun ownership rather than direct survey data^{42 43} and a subsequent study using similar data.^{44 45}

3 30. Miller and colleagues also published studies on the association between gun availability
 4 and homicide of children ages 5 – 14 years⁴⁶ and homicides of women ages 20 and over.⁴⁷ In each
 5 case, they report statistically significant positive associations between gun availability and firearm
 6 homicide rates at the state-level, but no gun availability effects on non-firearm homicides. It is worth
 7 noting that the groups Miller and colleagues studied – children and women – do not typically bring a
 8 firearm into the home. Therefore positive associations between gun availability and homicide risks are
 9 unlikely to be due to individuals being motivated by their own risk of homicide to acquire a gun.

10 **Aggregate-Level Studies: Longitudinal Studies**

11 31. Longitudinal study designs are generally preferable to cross-sectional studies because
 12 they can ascertain temporal relationships between variables. This is important for studying the

13 _____
 14 ⁴² Miller M, Azrael D, Hemenway D. Rates of household firearm ownership and homicide
 across US regions and states, 1988-1997. *American Journal of Public Health*. 2002;92:1988-93.

15 ⁴³ Price, JH, Thompson AJ, Dake JA. Factors associated with state variations in homicide,
 suicide, and unintentional firearm deaths. *Journal of Community Health*, 2004;29: 271–283.

16 ⁴⁴ Gius M. The effect of gun ownership rates on homicide rates: a state-level analysis. *Applied*
 17 *Economics Letters* 2009;16:1687-1690.

18 ⁴⁵ Kleck and Patterson analyzed cross-sectional data for 170 U.S. cities with populations of
 19 100,000 or more and report that gun ownership has no impact on homicide (Kleck G, Patterson EB.
 20 The impact of gun control and gun ownership levels on violence rates. *Journal of Quantitative*
 21 *Criminology* 1993;9:249-288). To address the concern that cross-sectional associations between gun
 22 ownership and homicide could be due to higher homicide rates prompting increased gun ownership for
 23 protection, the researchers used a two-stage least squares regression approach to the analyses which
 24 involves using an instrumental variable in the first stage to estimate gun ownership levels absent any
 25 effects from homicide rates. But this analytic approach is contingent upon the instrumental variable
 being used to measure gun ownership meeting several conditions that are typically difficult to meet. A
 detailed criticism of Kleck and Patterson’s study correctly points out that Kleck and Patterson failed to
 provide common statistical tests to confirm that the instrumental variable he used met these conditions.
 Alba RD, Messner SF. Point Blank and the Evidence: A Rejoinder to Gary Kleck. *Journal of*
Quantitative Criminology 1995;11:425-428. Thus, the validity of Kleck and Patterson’s findings are
 unclear.

26 ⁴⁶ Miller M, Azrael D, Hemenway D. Firearm availability and unintentional firearm deaths,
 27 suicide, and homicide among 5 – 14 year olds. *Journal of Trauma, Injury, Infection, and Critical*
Care 2002;52:267-275.

28 ⁴⁷ Miller M, Azrael D, Hemenway D. Firearm availability and suicide, homicide, and
 unintentional firearm deaths among women. *Journal of Urban Health* 2002;79:26-38.

1 relationship between gun ownership because gun ownership may affect homicide risks and homicide
 2 risks can affect firearm acquisition. McDowall examined changes in two proxy measures for gun
 3 ownership – the proportion of suicides committed with a firearm and the proportion of robberies
 4 committed with a firearm – to study the temporal relationship between firearm availability and
 5 homicide rates in Detroit. Using methods to negate reverse causality and statistically controlling for
 6 changes in racial composition of the city, the proportion in the high-risk 15-24 year age group, the
 7 homicide clearance rate lagged by 1 year, and the robbery rate, gun ownership was positively
 8 associated with Detroit’s homicide rate. Licenses issued to purchase handguns were also positively
 9 associated with homicide rates.⁴⁸

10 32. In a similar study, Sorenson and Berk examined temporal relationships between
 11 handgun sales (lagged one year to avoid concerns of reverse causation) and age-, sex-, and race-
 12 specific homicide rates after controlling for racial composition, cohort size, beer sales, unemployment,
 13 and migration for the period 1972 – 1993. Lagged handgun sales were positively associated with
 14 homicide rates for males of every age group and race/ethnicity; however, they found no relationship
 15 between handgun sales and homicide victimization of females.⁴⁹

16 33. Magaddino and Medoff examined data for the years 1947 – 1977 and found that, while
 17 new guns manufactured and imported did not predict homicide rates, the *cumulative* number of
 18 handguns available was positively associated with homicide rates.^{50 51} A weakness of studies of this

19
 20 ⁴⁸ McDowall D. Firearm availability and homicide rates in Detroit, 1951 – 1986. *Social Forces* 1991;69:1085-1101.

21 ⁴⁹ Sorenson SB, Berk R. Handgun sales, beer sales, and youth homicide. *Journal of Public Health Policy* 2001;22:182-197.

22 ⁵⁰ Magaddino JF, Medoff M. An empirical analysis of federal and state firearm control laws. Pages 225-258 in DB Kates(ed), *Firearms and Violence*. Cambridge, MA: Ballinger, 1984.

23 ⁵¹ Kleck conducted two time-series studies to examine the relationship between guns and
 24 homicide rates for the United States as a whole. The first study examined data for 1947 – 1973 and
 25 used a commonly used statistical approach (two-stage least-squares regression) to disentangle
 26 potentially reciprocal relationships between variables such as homicides and gun sales while
 27 controlling for other variables related to both. His findings indicated that increases in the number of
 28 guns manufactured or imported into the U.S. predicted higher U.S. homicide rates. In his second study
 of this type, Kleck extended the data from this first study through 1978, added additional explanatory
 variables including robbery rates to his statistical models, and used a four-equation simultaneous
 model. His analyses indicated that increases in the number of guns manufactured or imported did not
 predict changes in homicides; however, there was a positive association between guns manufactured
 or imported and homicide rates if robbery rates were not included as an explanatory variable.

1 type is that the studies aggregate data over the entire United States, ignoring considerable variation at
2 state and local levels in gun sales and homicides.

3 34. In his book *More Guns, Less Crime*, John Lott, Jr. used state-level data on gun
4 ownership from exit polling data following the 1988 and 1996 presidential elections and reported a
5 negative relationship between gun ownership and homicide rates (suggesting that measured increases
6 in gun ownership led to decreases in homicide rates) over these two time periods.⁵² However, the
7 polling data Lott used only included actual voters who represent a non-random minority of the actual
8 adult population. His findings on changes in gun ownership are inconsistent with rigorous surveys
9 designed to accurately reflect conditions across all households that show gun ownership declining
10 from 1988 to 1996 (e.g., the University of Chicago's General Social Survey)⁵³.

11 35. In a study examining longitudinal data at the state and county levels, economist Mark
12 Duggan examined the dynamic relationship between gun ownership and crime over the period 1980-
13 1998 using state- and county-level data on a validated proxy for gun ownership. To avoid the
14 potential for reverse causality (higher homicide rates prompting higher rates of gun ownership),
15 Duggan examines the relationship between gun ownership lagged by one year ($t - 1$) with homicide
16 rates. Data from this study demonstrate that changes in gun ownership were positively related to
17 changes in homicide rates. As with other studies, the gun ownership-homicide relationship is due
18 entirely to gun ownership's effects on homicides committed with firearms. Gun ownership does not
19 predict rates of homicides committed without firearms. This pattern of findings was the same for
20 analyses done at the state level and at the county level. Duggan estimates that a third of the dramatic
21

22 Kleck's findings have little relevance to the question of the relationship between the
23 availability of firearms and homicide rates because changes in the number of guns manufactured or
24 imported in a given year should have little effect on the prevalence of firearms within homes. It could
25 take years for many of those guns to be sold and when they are sold, divergent trends in gun sales,
26 which are going up, and the prevalence of gun ownership, which is going down, suggest that they are
27 most commonly sold to people who already own guns (Violence Policy Center. *The Shrinking
28 Minority: The Continuing Decline of Gun Ownership in America.*
<http://www.vpc.org/studies/ownership.pdf>).

26 ⁵² Lott, John Jr. *More Guns, Less Crime: Understanding Crime and Gun Control Laws*.
27 Second edition. Chicago: University of Chicago Press, 2000.

28 ⁵³ Smith, TW. Public Attitudes towards the Regulation of Firearms. National Opinion
Research Center, University of Chicago, May 2007.

1 reductions in firearm homicide rates relative to changes in nonfirearm homicide rates which occurred
2 from 1993 to 1998 could be attributed to declines in the fraction of homes with firearms.⁵⁴

3 36. Noted economists and experts on gun policy, Philip Cook and Jens Ludwig, analyzed
4 20 years of state- and county-level data and also find a significant positive association between gun
5 availability and homicides with the relationship being exclusive to homicides committed with a
6 firearm. They estimate elasticities (the percentage change in homicides for every one percent change
7 in gun ownership) of +.1 to +.3 between gun ownership and homicides.⁵⁵

8 **C. Gun Availability and Deaths from Unintentional Shootings.**
9 **Household Studies**

10 37. To my knowledge, there has been only one study which has examined the relationship
11 between firearms in the home and the risk of unintentional firearm deaths. In this study, Wiebe used
12 data from a nationally representative survey – the 1993 National Mortality Followback Survey and
13 1994 National Health Interview Study (NHIS) – and a case-control study design to assess the
14 association between the presence of firearms in the home and risks of death from an unintentional
15 shooting. Cases consisted of 84 persons killed as a result of an unintentional shooting. Each case was
16 matched with up to 20 controls from the NHIS matched by sex, age group, race, and region of
17 residence and the analyses statistically controlled for any differences between the cases and controls
18 with respect to marital status, education level, and annual family income. The risk of an unintentional
19 shooting death was 3.7 times higher within homes with any firearm. Elevated risks were greatest, more
20 than a fivefold increase in risk for unintentional shooting death (RR = 5.3), in homes that kept only
21 handguns.⁵⁶ Keeping only handguns and not long guns, should be more likely to be the case for gun
22 owners in urban settings such as San Francisco.

23
24
25 ⁵⁴ Duggan M. More guns, more crime. *The Journal of Political Economy* 2001;109:1086-1114.

26 ⁵⁵ Cook PJ, Ludwig J. "The social costs of gun ownership." *Journal of Public Economics*.
27 2006; 90: 379-391.

28 ⁵⁶ Wiebe DJ. Firearms in US homes as a risk factor for unintentional gunshot fatality. . *Accident
Analysis and Prevention*. 2003;35:711-716.

Aggregate-Level Studies

38. I found only one aggregate-level study designed to assess the relationship between firearm availability and the risk of death from an unintentional shooting. Miller and colleagues (2001) studied the association between a state’s rate of deaths due to unintentional shootings and the prevalence of firearms. They found a very strong positive relationship between measures of firearm availability and the rate of deaths from unintentional shootings. This positive relationship was strongest for young children and teens.⁵⁷

II. LOCKED STORAGE OF FIREARMS REDUCES THE RISK OF SUICIDE, HOMICIDE, AND DEATHS FROM UNINTENTIONAL SHOOTINGS.

39. It is my opinion that keeping firearms locked up or locked with a trigger guard reduces the risks associated with keeping firearms in the home. In the following paragraphs, I describe the research that supports my opinion.

40. Data from Kellermann et al.’s study of risk factors for suicide within the home suggest that safe gun storage practices reduce the risk of suicide within the home. The adjusted odds ratios contrasting risks compared with similar households with no firearms clearly show a progression of increasing risk with increasing ease of access – all guns locked up (aOR = 2.4), all guns stored unloaded (aOR = 3.3), any gun left unlocked (aOR = 5.6), and any gun kept loaded (aOR = 9.2) the condition under which guns would be most readily available for misuse. Thus the storage condition which increased suicide risks the least above that of having no firearm in the home was storing all guns locked up as is directed by the San Francisco ordinance in question.

41. Safe storage of firearms is likely to be particularly important for protecting teens from killing themselves or others. Groups as diverse as the National Rifle Association and the American Academy of Pediatrics recommend that gun owners store their guns so that they are inaccessible to unauthorized persons including children and teens.^{58 59.}

⁵⁷ Miller M, Azrael D, et al. Firearm availability and unintentional firearm deaths. *Accident Analysis and Prevention* 2001;33:477-484.

⁵⁸ National Rifle Association. NRA Gun Safety Rules. <http://www.nrahq.org/education/guide.asp>. Accessed August 3, 2011.

⁵⁹ American Academy of Pediatrics. Safety and Prevention: Gun Safety: Keeping Children Safe. <http://www.healthychildren.org/English/safety-prevention/all-around/Pages/Gun-Safety-Keeping-Children-Safe.aspx>. Accessed August 3, 2011.

1 42. Grossman and colleagues conducted a case-control study to assess the relationship
2 between firearm storage practices and adolescents' risk of suicide and unintentional shootings. They
3 collected data for cases from households where a youth less than 18 years of age was killed as a result
4 of a suicide or unintentional shooting and examined these deaths in 37 counties in the states of
5 Washington, Oregon, and Missouri in addition to nonfatal self-inflicted or unintentional shooting
6 victims treated at trauma centers in Seattle, Spokane, and Tacoma, Washington and Kansas City,
7 Missouri. Cases included 82 self-inflicted shootings (95% of which were fatal) and 24 unintentional
8 shootings (50% of which were fatal). Controls were identified through random surveys of the counties
9 where the cases were drawn and consisted of households where at least one firearm was kept in or near
10 (e.g., garage) the home. Data from this study indicate that the risk of self-inflicted and unintentional
11 firearm injuries was about 70 percent lower in gun-owning homes where firearms were stored locked
12 up and unloaded compared with homes where guns were not stored locked up and unloaded. The
13 relationship between gun storage practices and firearm deaths to adolescents was similar for suicide
14 and unintentional shootings.⁶⁰

15 43. Using data from statewide surveys of health and safety practices conducted by the
16 Centers for Disease Control and Prevention, which included questions about firearm ownership and
17 storage practices, Miller and colleagues conducted a state-level study to assess the relationship
18 between firearm storage and rates of death from unintentional shootings. Controlling for the
19 prevalence of guns in the home as well as urbanization and poverty levels, states in which it was less
20 common to store firearms unlocked and unloaded had significantly lower rates of unintentional firearm
21 deaths. The researchers contrasted data between the six states with the highest percentage of
22 individuals living in households with loaded firearms with the ten states where this practice was most
23 common. Although the six states with the highest prevalence of exposure to loaded firearms within the
24 home had less than half as many people and fewer people exposed to firearms than was the case with
25 the 10 states with the lowest percentage in homes with a loaded firearm, there were more than twice as
26

27 ⁶⁰ Grossman DC, Mueller BA, Riedy C, Dowd MD, Villaveces A, Prodzinski J, Nakagawara J,
28 Howard J, Thiersch N, Harruff R. Gun storage practices and risk of youth suicide and unintentional
firearm injuries. *Journal of the American Medical Association*. 2005 Feb 9;293(6):707-14.

1 many unintentional shooting deaths to youth under age 18 years than in the ten states where living in a
2 home with a loaded firearm was least common.⁶¹

3 44. Other than Kellermann et al.'s study connecting increasing ease of access to guns with
4 increasingly elevated risk of suicide among adults and showing that keeping all guns locked up
5 attenuated the increased risk more than other storage options, no other study specifically examined the
6 relationship between firearm storage and reduced risks of suicide, homicide, and unintentional
7 shootings among adults. Nonetheless, it is reasonable to believe that a protective effect from locked
8 storage would be found in any instance of firearm violence that is impulsive or spontaneous.
9 California's CAP law covers youth under age 18, but San Francisco's safe storage requirements which
10 extend to all adults should have some protective effects, especially for youth ages 18-24 where prior
11 studies have shown substantial increased suicide risks associated with access to firearms. Many young
12 adults live in homes with parents or with other adults who may own guns. Requirements to store
13 firearms locked up should be protective to young adults in these situations.

14 **III. POLICIES THAT REDUCE THE AVAILABILITY OF FIREARMS REDUCE
15 FIREARM-RELATED MORTALITY.**

16 45. It is my opinion that policies that reduce the availability of firearms reduce firearm-
17 related mortality. In the following paragraphs, I describe the research that supports my opinion.

18 46. In the United States, most gun control laws are not overly restrictive with respect to the
19 eligibility to legally purchase and possess firearms and have numerous loopholes which can diminish
20 the ability of the laws to keep guns from prohibited individuals. As such, most U.S. gun control laws
21 have minimal impact on the gun ownership. The most restrictive and rigorous gun control laws are
22 permit-to-purchase licensing laws which allow law enforcement agencies (usually local agencies)
23 issuing permits to purchase firearms to use their discretion in issuing these permits. These states also
24 have some of the most stringent nondiscretionary requirements for issuing permits to purchase
25 firearms. These three states have among the lowest rates of household gun ownership.

26
27
28 ⁶¹ Miller M, Azrael D, Hemenway D, Vrinitotis M. Firearm storage practices and rates of
unintentional firearm deaths in the United States. *Accident Analysis & Prevention* 2005;661-667.

47. The data in the table below contrast these three states' firearm ownership and age-adjusted suicide rates among non-Hispanic Whites with that of the nation as a whole. Thus, the data presented control for three demographic factors associated with suicide rates – age, race, and ethnicity. The data indicate that the prevalence of firearms within homes is less than half as high as the national average and suicide rates for non-Hispanic White were 39% to 51% lower than the national average. The two right-hand columns present data on homicide rates for non-Hispanic whites and Blacks in large central metro counties where violent crime tends to be highest and therefore the availability of firearms most critical. For non-Hispanic Whites, homicide rates in these three states with low gun prevalence were 33% to 42% lower than for the nation overall. For Blacks, homicide rates were 8% to 45% lower than the national average. Though these data do not prove that policies which reduced the prevalence of firearms in homes led to fewer suicides and homicides, it is consistent with that thesis.

Table 1. Prevalence of household firearm ownership (2001), statewide age-adjusted suicide rates, and age-adjusted homicide rates for large central metro counties (2002 - 2004) for selected demographic groups in the three states with the most restrictive laws pertaining to permits to purchase a handgun by allowing local law enforcement discretion in issuing permits in comparison to U.S. totals.

	household gun prevalence, 2001 %	age-adjusted suicide rates – non-Hispanic Whites, 2002-2004 ⁱ	age-adjusted homicide rates – non-Hispanic Whites, 2002-2004 ⁱ	age-adjusted homicide rates – Blacks, 2002-2004 ⁱ
New York	18.0	7.6	2.2	15.1
New Jersey	12.3	6.3	2.5	25.5
Massachusetts	12.6	7.3	1.9	18.7
United States	31.7	12.8	3.3	27.6

ⁱ per 100,000 population per year

48. A recent study more formally examines the relationship between different types of gun policies and state's suicide rates from 1995 through 2004. The study statistically controls for differences in educational attainment, income, alcohol consumption, proportion of the population over age 65, and the proportion of the population that is non-Hispanic and white. Some models control for the popularity of sports shooting by using hunting licenses per capita as a covariate in the regression models. The study found that permit-to-purchase licensing and bans on minors purchasing firearms –

1 54. Recognizing the risks of unsupervised access of firearms to children and teens, 18
2 states and the District of Columbia have passed laws requiring gun owners to store their firearms in a
3 manner that prevents access to underage youth, typically requiring guns to be stored locked away or
4 with a trigger guard to prevent the gun from firing if handled when locked. In research which I
5 conducted, I found that these so-called child access prevention (CAP) laws are associated with
6 significant reductions in suicides of teens ages 14 – 17 years in the states where they have been
7 adopted.⁶⁹ Cummings and colleagues also examined the effects of CAP laws on suicides and found a
8 negative relationship between presence of a CAP law and suicide risks among youth under age 15.⁷⁰

9 55. There is also evidence that CAP laws intended to required firearm storage which would
10 make firearms either inaccessible or unable to be fired can reduce unintentional shooting deaths of
11 children and teens. Cummings and colleagues conducted the first evaluation of CAP laws and reported
12 that the laws were associated with significant reductions in deaths due to unintentional shootings of
13 youth under age 15. Subsequent research that I conducted with Marc Starnes, as well as a study
14 conducted by Hepburn and colleagues, showed that the effects of CAP laws on unintentional firearm
15 deaths to youth were uneven across states. Reductions were only statistically significant in Florida and
16 California where the laws likely garnered significant publicity.^{71 72} Florida’s law received
17 considerable publicity because it was the first state to pass a CAP law, doing so after a series of highly
18 publicized deaths of children killed in unintentional shootings resulting from underage access to
19 firearms in the home. Florida and California are among the few states where CAP law violators can be
20 charged with a felony crime. The ability for prosecutors to charge CAP law violators with a felony
21 may increase the likelihood of prosecution and increased publicity and awareness of CAP laws.

22
23
24 ⁶⁹ Webster DW, Vernick JS, Zeoli AM, Manganello JA. Effects of youth-focused firearm laws on youth suicides. *Journal of the American Medical Association* 2004; 292:594-601.

25 ⁷⁰ Cummings P, Grossman DC, Rivara FP, Koepsell TD. State gun safe storage laws and child mortality due to firearms. *JAMA* 1997;278:1084-1086.

26 ⁷¹ Webster DW, Starnes M. Reexamining the association between child access prevention gun laws and unintentional firearm deaths among children, *Pediatrics*, 2000;106:1466-1469.

27 ⁷² Hepburn L, Azrael D, Miller M, Hemenway D. The effect of child access prevention laws on unintentional child firearm fatalities, 1979-2000. *Journal of Trauma* 2006;61:423-428.

1 56. Research on the effects of CAP laws in the U.S. have appropriately focused on the
2 effects of the laws on underage youth. San Francisco's safe gun storage ordinance extends
3 California's CAP law to all households, regardless of the presence of children or teens, by requiring all
4 handguns to be stored in a locked container or with a trigger lock. In my opinion, it is reasonable to
5 believe that, in light of the relationship between firearm availability and firearm violence discussed
6 throughout this report, the study connecting ease of access to firearms with increased suicide rates, and
7 the problem of gun thefts discussed *infra* in Section IV, requiring locked storage of guns among all
8 households is likely to reduce firearm injuries and deaths. Moreover, San Francisco is particularly
9 justified in enacting this ordinance because U.S. Census data indicate that nearly a third of all
10 households in San Francisco in 2010 included non-family households with adults living with non-
11 family members.⁷³ In such cases, legal possessors of handguns could be sharing a home with a
12 prohibited person who might be able to easily access and use a handgun that was not locked up.

13 57. Some have referenced the work of a review panel of the National Research Council to
14 conclude that there is no scientific evidence that gun control works.⁷⁴ However, this body reviewed a
15 limited set of studies published before 2004, did not consider all policies such as permit-to-purchase
16 licensing systems, and did not examine evaluations of policies implemented outside of the United
17 States. Thus, most of the studies cited above were not included in the committee's review of the
18 research on the effects of gun control policies.

19 **IV. GREATER FIREARM AVAILABILITY WITHIN HOMES INCREASES THE RISK**
20 **OF HOME BURGLARIES AND OF GUNS ENTERING THE ILLEGAL MARKET**
21 **VIA THEFT.**

22 58. It is my opinion that greater firearm availability within homes increases the risk of
23 home burglaries and of guns entering the illegal market via theft. The research supporting my opinion
24 is described in the following paragraphs.

25 ⁷³ U.S. Census Bureau. American Fact Finder. Household Population and Household Type by
26 Tenure: 2010. 2010 Census Summary File, San Francisco, California. Data indicate that 62,416 of
345,811 households involved nonfamily member adults living in the same household.

27 ⁷⁴ National Research Council. *Firearms and Violence: A Critical Review*. Committee to
28 Improve Research Information and Data on Firearms. Charles F. Welford, John V. Pepper, and Carol
V. Petrie, editors. Committee on Law and Justice, Division of Behavioral and Social Sciences and
Education, Washington, DC: The National Academies Press, 2005.

1 59. Some claim that if more people owned guns there would be a greater deterrent to
2 criminals breaking into homes. However, a careful empirical examination of the data proves that the
3 opposite is true. Economists Phillip Cook and Jens Ludwig analyzed longitudinal burglary data from
4 the Uniform Crime Reports at the state and county levels and cross-sectional data from special
5 restricted-access version of the National Crime Victimization Survey (NCVS) that identified the
6 county in which the survey respondents reside. In the longitudinal analyses they found that a one-year
7 lag of a gun availability proxy (ratio of firearm suicides to all suicides) was positively associated with
8 higher burglary rates with the elasticity of burglaries to gun ownership ranging from around +0.4 to
9 +0.5. Thus, a 10 percent increase in gun ownership would yield a 3 to 7 percent increase in burglary
10 rates. Estimates of the effects of gun ownership on burglaries were very similar in direction and
11 magnitude when the researchers used an instrumental variable for gun ownership rather than the gun
12 suicide proxy.⁷⁵

13 60. A limitation to these analyses is that commercial burglaries are lumped together with
14 residential burglaries in the UCR data. Cook and Ludwig's cross-sectional analyses of NCVS data
15 reveal a strikingly similar positive association between a county's prevalence of gun ownership and
16 the probability that a household reported a home burglary after controlling for characteristics of the
17 household and county. The study also found that, contrary to the view that gun ownership reduces the
18 likelihood that a home is burglarized while someone is at home, there was no statistically significant
19 relationship between county-level gun ownership and the probability that someone was at home during
20 a burglary attempt. The authors argue that the presence of firearms in homes represents attractive loot
21 for criminals, thus providing increased incentives for home burglaries which appear to outweigh the
22 deterrent effects resulting from fears of being shot by a home occupant.

23 61. Data from a nationally-representative survey conducted in the 1990s suggest that as
24 many as 500,000 firearms are stolen each year from U.S. citizens.⁷⁶ A nationally-representative survey
25

26 ⁷⁵ Cook PJ, Ludwig J. "The Effects of Gun Prevalence on Burglary: Deterrence vs.
27 Inducement." Pages 74-120 in *Evaluating Gun Policy*. Jens Ludwig and Philip J. Cook, (eds).
Washington, DC: Brookings, 2003.

28 ⁷⁶ Cook PJ, Ludwig J. *Guns in America: Results of a Comprehensive Survey of Gun Ownership
and Use*. Washington, DC: Police Foundation, 1996.

1 of inmates at state prisons from 1997 revealed that 10 percent of firearm offenders had obtained the
2 weapon they had used in crime through theft and another eight percent obtained their gun through a
3 fence or black market source and presumably many of these guns had be stolen from homes.⁷⁷ A more
4 recent study which I conducted used a more recent (2004) survey of prison inmates and revealed very
5 similar findings on the role of theft and street sources in directly supplying criminal offenders with
6 guns.⁷⁸ Thus the findings from Cook and Ludwig's study of the relationship between gun ownership
7 and burglaries suggest that San Francisco's current requirements for gun owners to store firearms in
8 the home in a locked container or with a trigger lock would reduce the number of guns available to
9 criminals obtained directly or indirectly through home thefts. Moreover, to the extent that would-be
10 burglars anticipate that firearms will be locked and difficult for them to access, Cook and Ludwig's
11 study suggests that the reduction in this attractive loot may, in turn, reduce the number of burglaries.

12 **V. THERE IS NO RESEARCH THAT SUPPORTS THE NOTION THAT STORING**
13 **UNLOCKED GUNS IN HOMES MAKES OCCUPANTS SAFER.**

14 62. The notion that citizens use guns in self-defense far more commonly than they are
15 victimized by someone with a gun was supported by data from a national survey directed by
16 criminologist Gary Kleck. Kleck and Gertz conducted a national phone survey of 4,977 adults. Fifty-
17 six (1.1%) respondents reported having used defensively used a gun within the past 12 months in
18 situations in which they report being the would-be victim of a crime. The data were used to make a
19 projection that 2.5 million times per year a U.S. citizen used a firearm defensively in situations when
20 someone was committing or attempting to commit a crime.⁷⁹ The projections from this survey are
21 discordant with data from other sources of data relevant to crime and violence, Aside from the fact that
22 the number of defensive gun uses from Kleck and Gertz is 22 times higher than what was estimated
23 from the National Crime Victimization Survey (NCVS), Kleck and Gertz's data fail tests of external

24 _____
25 ⁷⁷ Harlow CW. *Firearm Use by Offenders: Survey of Inmates in State and Federal Correctional*
26 *Facilities*. Special Report from the U.S. Bureau of Justice Statistics, U.S. Department of Justice,
27 Washington, DC, November 2001.

28 ⁷⁸ Vittes KA, Vernick JS, Webster DW. Legal status and source of offenders' firearms in states
with the least stringent criteria for gun ownership. *Injury Prevention* 2012; Epub.

⁷⁹ Kleck G, Gertz M. Armed resistance to crime: the prevalence and nature of self-defense with
a gun. *Journal of Criminal Law and Criminology* 1995;86:150-187.

1 validity. For example, Kleck and Gertz data indicate that there are over 200,000 assailants who are
2 wounded by civilians defending themselves against crime each year, yet a national surveillance system
3 for hospital emergency department visits indicate that fewer than 100,000 people are treated for
4 gunshot wounds annually in the United States. Subsequent surveys conducted by Hemenway and
5 colleagues were designed to measure all civilian uses of guns, hostile or aggressive as well as
6 defensive. Their data indicate that, despite a likely bias toward reporting defensive uses of guns that
7 would be viewed favorably and against admitting acts that were criminal behavior, survey respondents
8 more frequently admitted to engaging in aggressive or hostile uses of guns than they did defensive
9 uses of guns. Furthermore, many of the so-called defensive uses are of questionable legality due to
10 inadequate justification for using deadly force.⁸⁰ This finding is far more consistent with the research
11 showing that greater gun availability tends to be associated with higher rates of homicide.

12 63. No prior study of civilian defensive gun use has examined questions most directly
13 relevant to San Francisco’s law mandating that firearms in the home be stored in locked containers or
14 with trigger locks.

15 **VI. CONCLUSION**

16 64. San Francisco’s safe gun storage ordinance, by limiting the accessibility of firearms to
17 unauthorized users, is likely to benefit public safety by reducing violent deaths within the home and
18 reducing the number of guns obtained by criminals through theft.

19 65. Prior research demonstrates that reducing the availability of firearms in the home,
20 especially reduced availability for unauthorized users such as children and adolescents, decreases the
21 risk for suicide, homicide, and deaths from unintentional shootings. Risks of violent death within the
22 home of gun owners are reduced by safe storage practices such as locking up guns. Such storage
23 practices would reduce availability of operable firearms available to an unauthorized household
24 member when he or she becomes distraught, suicidal, angry, or otherwise lose control of his or her
25 emotions and thus lead to fewer tragic deaths. Furthermore, the law should reduce the number of guns
26 which are stolen and then enter the illegal market.

27 _____
28 ⁸⁰ Hemenway D, Azrael D, Miller M. Gun use in the United States: Results from two national surveys. *Injury Prevention* 2000;6:263-267.

1 I declare under penalty of perjury under the laws of the State of California that the foregoing is
2 true and correct. Executed this 13th day of September, 2012, in Baltimore, Maryland.

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 DANIEL W. WEBSTER

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THE CHIEF OF THE SAN FRANCISCO POLICE DEPARTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, THE MAYOR OF SAN
FRANCISCO, and THE CHIEF OF THE SAN
FRANCISCO POLICE DEPARTMENT, in
their official capacities,

Defendants.

Case No. C09-2143 RS

**DECLARATION OF CATHY GARZA IN
SUPPORT OF CITY AND COUNTY OF SAN
FRANCISCO'S OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: Oct. 4, 2012
Time: 1:30 p.m.
Place: 450 Golden Gate Ave.
Courtroom 3 - 17th Floor
San Francisco, CA 94102

1 I, Cathy Garza, declare as follows:

2 1. I am an Investigator with the San Francisco City Attorney’s Office. The matters stated
 3 in this declaration are based on my personal observations and knowledge except where stated
 4 otherwise. I could and would testify competently to the matters stated in this declaration.

5 2. On September 7, 2012, I tested a new **Stack-On Personal Safe with Biometric Lock**
 6 **(Serial #Y111HD0370584)**. This is a lockbox for the storage of handguns. I opened the lockbox with
 7 the set of keys provided with the unit. I installed batteries in the unit. This unit can be opened by
 8 keys, by a four-digit code entered into a keypad, or by biometric fingerprint scanning. After
 9 familiarizing myself with the unit, I attempted to open the unit five times using the keypad by entering
 10 a four-digit code that I selected. Another investigator timed my attempts. The time it took me to open
 11 the unit on each attempt was as follows:

1	2.90 seconds
2	2.90 seconds
3	2.89 seconds
4	2.49 seconds
5	3.05 seconds

15 3. Next, I tested the same unit using the biometric fingerprint scanner. I attempted to open
 16 the unit five times in this manner. Another investigator timed my attempts. The time it took me to
 17 open the unit on each attempt was as follows:

1	3.50 seconds
2	3.57 seconds
3	3.59 seconds
4	3.35 seconds
5	3.05 seconds

21 4. On September 11, 2012, I tested a new **Stack-On Strong Box Safe with Electronic**
 22 **Lock (Serial #L222GM1720472)**. This is a lockbox for the storage of handguns. I opened the
 23 lockbox with the set of keys provided with the unit. I installed batteries in the unit. This unit can be
 24 opened by keys and by codes of three to nine digits (according to the user’s preference) entered into a
 25 keypad. After familiarizing myself with the unit, I created a three-digit code and attempted to open the
 26 unit five times by entering the code into the keypad. Another investigator timed my attempts. The
 27 time it took me to open the unit on each attempt using a three-digit code was as follows:

1	2.70 seconds
---	--------------

2	2.60 seconds
3	2.80 seconds
4	2.60 seconds
5	2.60 seconds

5. Next, I created a four-digit code and attempted to open the unit five times by entering the code into the keypad. Another investigator timed my attempts. The time it took me to open the unit on each attempt using a four-digit code was as follows:

1	2.60 seconds
2	2.60 seconds
3	3.60 seconds
4	2.80 seconds
5	2.60 seconds


6. Next, I created a five-digit code and attempted to open the unit five times by entering the code into the keypad. Another investigator timed my attempts. The time it took me to open the unit on each attempt using a five-digit code was as follows:

1	3.80 seconds
2	4.10 seconds
3	4.00 seconds
4	3.80 seconds
5	4.20 seconds

7. Next, I created a six-digit code and attempted to open the unit five times by entering the code into the keypad. Another investigator timed my attempts. The time it took me to open the unit on each attempt using a six-digit code was as follows:

1	4.50 seconds
2	4.20 seconds
3	4.30 seconds
4	4.30 seconds
5	3.50 seconds

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 12th day of September, 2012, in San Francisco, California.



 CATHY GARZA

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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
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14 ESPANOLA JACKSON, PAUL COLVIN,
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15 DAVID GOLDEN, NOEMI MARGARET
ROBINSON, NATIONAL RIFLE
16 ASSOCIATION OF AMERICA, INC., and
SAN FRANCISCO VETERAN POLICE
17 OFFICERS ASSOCIATION,

18 Plaintiffs,

19 vs.

20 CITY AND COUNTY OF SAN
FRANCISCO, THE MAYOR OF SAN
21 FRANCISCO, and THE CHIEF OF THE SAN
FRANCISCO POLICE DEPARTMENT, in
22 their official capacities,

23 Defendants.
24
25
26
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Case No. C09-2143 RS

**CITY AND COUNTY OF SAN FRANCISCO'S
OPPOSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

Hearing Date: Oct. 4, 2012
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Place: 450 Golden Gate Ave.
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1 *WISQARS Nonfatal Injury Reports 1999-2007*,
2 <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>; *WISQARS Unintentional Firearm Deaths*
& *Rates Per 100,000*, at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html2

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1 people were killed in unintentional shootings in this country between 2005 and 2007. S.F. Police
 2 Code § 4511(1)(c); *WISQARS Nonfatal Injury Reports 1999-2007*, at
 3 <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>; *WISQARS Unintentional Firearm Deaths &*
 4 *Rates Per 100,000*, at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

5 Although the causes of this epidemic of violence remain under study, scientific research has
 6 repeatedly shown that the rates of suicides, homicides, and accidental deaths all rise as guns are more
 7 readily available. Declaration of Daniel W. Webster (“Webster Decl.”) ¶¶ 6 *et seq.*, ¶¶ 45 *et seq.* The
 8 presence of a gun in the *home* is particularly dangerous. Having a gun in the home significantly
 9 elevates the risk of suicides; one study found a 4.7 increase in suicide rates among households where a
 10 gun is present, even after controlling for other factors associated with suicide risks. *Id.* ¶ 11. Another
 11 study found a *10-fold* increase in suicides among people 24 and younger living in a home where a gun
 12 was present. *Id.* ¶ 14. Other studies find a consistently positive relationship between gun ownership
 13 and suicide, and this effect lasts years after the purchase of the gun (thereby suggesting that the gun
 14 was not purchased for purposes of suicide). *Id.* ¶¶ 7-21. There is also a demonstrated relationship
 15 between the presence of a gun in the home and higher homicide rates, as high as a five-fold increase
 16 according to one study. *Id.* ¶¶ 22-36. Because a third of female homicide victims are killed by their
 17 intimate partner, it may be that women’s risk of homicide is especially heightened by the presence of a
 18 gun in the home. *Id.* ¶ 22. And, unsurprisingly, the risk of an unintentional shooting death is as much
 19 as 3.7 times higher for residents homes with a firearm than those without. *Id.* ¶ 37. There is a positive
 20 correlation between having a gun in the home and the risk of death from unintentional shootings for all
 21 age groups, but the correlation is highest for young children and teens. ¶ 38.

22 These studies make clear that the presence of a gun in the home increases the risk of violent
 23 death for people who live or visit there. While the mechanism for this positive relationship is under
 24 study, it appears that reducing the immediate availability of guns—the most lethal means of harm to
 25 self or others—is likely to reduce spontaneous or impulsive decisions to retrieve the gun and use it.
 26 Webster Decl. ¶¶ 9, 15, 22, 42, 53, 64-65. This conclusion finds support in studies showing that
 27 storing guns locked or unloaded reduces the risk of suicides and accidental shootings within the home,
 28 *id.* ¶¶ 40, 44, and in studies showing that laws requiring locked storage save lives, *id.* ¶¶ 54-55. But

1 there is very little evidence that guns in the home are often used to shoot burglars or other home
 2 invaders.¹ In a study of homicides in or near residential dwellings where the relationship between
 3 victim and shooter was known, only four percent of the victims were strangers to the shooter, while
 4 52% of the victims were murdered by a spouse, intimate partner, first-degree family member, or
 5 roommate of the perpetrator and 37% were shot by a friend or an acquaintance. *Id.* ¶ 22; *see also* S.F.
 6 Police Code § 4511(2); EpiCenter, California Injury Data Online, *Firearm Ownership & Storage*
 7 (2004), <http://www.apps.cdph.ca.gov/epicdata/firearms/gunownstore.htm>.

8 The ready availability of guns is also associated with higher rates of burglaries because
 9 burglars view guns as attractive loot. Webster Decl. ¶¶ 58-61. Once a gun is in the hands of a burglar,
 10 it passes into the black market, which is a source of the guns used to commit crimes. Webster ¶¶ 58,
 11 61.

12 To address the grave public health concerns stemming from the risks of guns in the home, San
 13 Francisco adopted the two ordinances that Plaintiffs challenge here.

14 **A. Storage Ordinance**

15 In 2007, San Francisco enacted Police Code 4512, requiring that any handgun kept in a
 16 residence must be carried on the person of an adult or stored either in a locked container or disabled
 17 with a trigger lock. S.F. Police Code § 4512 (available at App. A-10) (“Storage Ordinance”). The
 18 Storage Ordinance does *not* require handguns to be carried or stored unloaded. *Id.* § 4511(7)(a). It
 19 applies only to handguns and not to long guns. San Francisco adopted legislative findings in support
 20 of its Storage Ordinance in 2011, and these findings are set out in Police Code § 4511 (available at
 21 App. A-6).

22 As the findings and as social science studies demonstrate, storing guns locked can reduce the
 23 risk of self-inflicted and unintentional firearm injuries, Webster Decl. ¶¶ 40, 42, particularly but not
 24 exclusively among children and youth, *id.* ¶ 42-43, 54-55; *see also* S.F. Police Code § 4511(5)(b).

25
 26 ¹ Even researchers who claim that gun owners very often use guns defensively to ward off
 27 crime have found that most of the effect of the gun comes from *brandishing* it, and only a quarter of
 28 defensive uses of guns actually involve firing them. *Heller*, 554 U.S. at 701 (Breyer, J., dissenting)
 (describing Kleck & Gertz, *Armed Resistance to Crime*, 86 J. Crim. L. & C. 150, 164 (1995)); *see also*
 Webster ¶ 62 (describing flaws in Kleck & Gertz study).

1 There is a wide consensus that using trigger locks or lockboxes to store guns promotes safety: The
 2 International Association of Chiefs of Police, the American Academy of Pediatrics, and the National
 3 Rifle Association have all stated that locked storage can prevent unauthorized access to guns. S.F.
 4 Police Code § 4511(6); Webster Decl. ¶ 41. Locking guns can also prevent the gun thefts that result in
 5 black market gun sales. S.F. Police Code § 4511(2)(d); Webster Decl. ¶ 58.

6 San Francisco's legislative findings also indicate that requiring locked storage of guns in the
 7 home when they are not being carried by a responsible adult does not compromise San Franciscans'
 8 ability to use guns for lawful self-defense purposes. S.F. Police Code § 4511(7). There is no study,
 9 ever, showing a relationship between locked storage and diminished ability to use guns in self-defense,
 10 or showing that locking guns makes people less safe. *Id.* ¶¶ 62-63. This is unsurprising in light of the
 11 capabilities of modern lockboxes, which can be opened in three or four seconds by pressing numbers
 12 on a keypad or scanning a fingerprint. Declaration of Cathy Garza ("Garza Decl.") ¶¶ 2-7.² Some
 13 individual plaintiffs in this case have declared that opening their lockboxes is difficult or time-
 14 consuming, but these declarations are conclusory and do not demonstrate that guns in lockboxes are
 15 inaccessible for self-defense. One plaintiff, for instance, states that she would have to find her key and
 16 her glasses to open the gun lockbox by her bedside. Declaration of Espanola Jackson, Dkt. 136-3, ¶ 6.
 17 But San Francisco's law permits her to use a biometric lockbox that does not require the step of
 18 finding her keys, and she would probably want to find her glasses in any event in order to aim her gun
 19 at an intruder. Another plaintiff states that he stores his guns in a safe in his garage and complains that
 20 he would have to go to the garage in order to retrieve them in the event of an emergency. Declaration
 21 of Sheldon Paul Colvin, Dkt. 136-6, ¶ 6. Nothing in San Francisco's law requires him to put his gun
 22 safe in the garage. In any event, as noted above, there is no research at all to support any claim that
 23 locking guns reduces safety or the ability to use guns in a self-defense emergency. Webster Decl.
 24 ¶¶ 62-63.

25
 26
 27 ² Indeed, a demonstration of how easily the biometric lockbox described in the Garza
 28 Declaration can be operated is available at http://www.youtube.com/watch?v=3sR9r_4VjmE (last
 accessed Sept. 13, 2012). The user's demonstration of the simple fingerprint scan access process
 begins at minute 6 of the video.

B. Ammunition Ordinance

San Francisco comprehensively regulates the sale of firearms and ammunition by, among other things, requiring dealers to be licensed, to undergo background checks, to store firearms under lock and key, to submit to police inspections, and to carry liability insurance. S.F. Police Code §§ 613, 613.2, 613.9, 613.13, 613.14. Dealers are also prohibited from selling enhanced-lethality ammunition, which San Francisco defines as ammunition that

“(1) Serves no sporting purpose;

“(2) Is designed to expand upon impact and utilize the jacket, shot or materials embedded within the jacket or shot to project or disperse barbs or other objects that are intended to increase the damage to a human body or other target (including, but not limited to . . . Hollow Point Ammunition[]); or

“(3) Is designed to fragment upon impact . . .” S.F. Police Code § 613.10(g) (available at App. A-2) (hereinafter “Ammunition Ordinance”).

The Ammunition Ordinance applies only to licensed firearms and ammunition dealers within San Francisco—of which there is currently exactly one, High Bridge Arms, located in the Bernal Hill neighborhood of the city. Notably, the Ammunition Ordinance does not preclude San Francisco residents from purchasing enhanced-lethality ammunition outside city limits or from ordering it online for mail delivery in San Francisco, and it does not prohibit San Francisco residents from possessing or using that ammunition.

In 2011, San Francisco adopted findings in support of its Ammunition Ordinance. S.F. Police Code § 613.9.5 (available at App. A-1). The findings state that enhanced-lethality ammunition is more likely to seriously wound or kill a person who is hit by it than conventional ammunition. *Id.*

§ 613.9.5(2). Plaintiffs do not contest that enhanced-lethality ammunition is more likely to seriously wound or kill its victim; indeed, in a prior filing, they submitted state laws from other jurisdictions indicating exactly that. *See* Plaintiffs’ Request for Judicial Notice in Support of Motion for Partial Judgment on the Pleadings (“MJOP RJN”), Dkts. 116-17, Exh. S at 3 (in Ohio livestock euthanasia regulation, providing that “gunshot must utilize bullets . . . that expand on impact. The projectile must enter the brain causing instant loss of consciousness and humane death.”); *id.*, Exh. T at 1 (Washington statute provides that firearms used for slaughtering livestock must contain “[h]ollow pointed bullets” or frangible ammunition and that firearms are to produce unconsciousness in livestock

1 “immediately by a combination of physical brain destruction and changes in intercranial pressure”).
 2 Plaintiffs indeed admit that they want enhanced-lethality ammunition precisely because it is more
 3 likely to gravely injure or kill its targets, although they euphemistically describe this property as
 4 “stopping power.” Plaintiffs’ Memorandum of Points & Authorities, Dkt. 136 (“Plaintiffs’ MPAs”) at
 5 6:2-3.

6 In its findings in support of the Ammunition Ordinance, San Francisco noted its strong interest
 7 in reducing the likelihood that shooting victims will die from their injuries. S.F. Police Code
 8 § 613.9.5(6). This interest is particularly compelling because of San Francisco’s finding that “personal
 9 firearms kept in the home are more likely to be used against family and friends than intruders. Home
 10 firearms may also be used in suicide attempts, accidental shootings and criminal assaults,” *id.*
 11 § 613.9.5(5), a finding supported by scientific research, Webster Decl. ¶ 22; *see also id.* ¶ 7. San
 12 Francisco also found that its Ammunition Ordinance would not substantially burden any resident’s
 13 ability to defend himself because conventional ammunition is sufficient for self-defense purposes: a
 14 gun loaded with a standard bullet can still maim or kill. S.F. Police Code § 613.9.5(4). Plaintiffs offer
 15 no evidence or argument to the contrary.

16 ARGUMENT

17 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v.*
 18 *Natural Res. Defense Council*, 555 U.S. 7, 24 (2008). “A plaintiff seeking a preliminary injunction
 19 must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in
 20 the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
 21 in the public interest.” *Id.* at 20.

22 Plaintiffs cannot obtain injunctive relief because they are unlikely to succeed on the merits of
 23 their claims: the Storage and Ammunition Ordinances do not substantially burden Plaintiffs’ Second
 24 Amendment rights, and these ordinances bear a substantial relationship to San Francisco’s important
 25 public safety interests. Nor is the Ammunition Ordinance unduly vague in employing a term of art,
 26 “sporting purpose,” that has been used without challenge in gun laws for nearly 30 years.

27 Nor do Plaintiffs meet the remaining *Winter* factors. They make no showing of irreparable
 28 harm, and the public interest and balance of equities tip sharply in favor of San Francisco’s compelling

1 interests in public safety and preventing gun deaths. The Court should deny their motion.

2 **I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR**
3 **CLAIMS.**

4 **A. Standard Of Review For Second Amendment Claims.**

5 As this Court noted in its order denying Plaintiffs' motion for judgment on the pleadings,

6 "Circuit court decisions after [*District of Columbia v.*] *Heller*, [554 U.S. 570
7 (2008)] . . . have generally applied a 'two-step' approach, first examining
8 whether the statute places a burden on conduct falling within the scope of the
9 Second Amendment as historically understood, and then applying either strict or
10 intermediate scrutiny, depending on the severity of any such burden.
11 [Citations.] The Ninth Circuit has yet to issue a binding determination on this
12 point, but concurring opinions in the most recently issued decision in the
13 *Nordyke* matter suggest at least some of its judges are likely to embrace the two-
14 step approach. *See Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012)." Order
15 Denying Plaintiffs' Motion for Judgment on the Pleadings, Aug. 17, 2012, Dkt.
16 134 ("Order") at 5.

17 In light of the dearth of Ninth Circuit authority, the City submits that the most persuasive
18 analysis of the standard of review for Second Amendment claims is found in *United States v.*
19 *DeCastro*, 682 F.3d 160 (2d Cir. 2012) (Jacobs, J.), which adopts the two-step approach this Court
20 described in its order, and holds that "heightened scrutiny is appropriate only as to those regulations
21 that *substantially* burden the Second Amendment." *Id.* at 164 (emphasis added). Noting that *Heller*
22 repeatedly emphasized "the weight of the burden imposed by D.C. gun laws," in contrast to "18th-
23 century laws regulating the storage of excess gunpowder, and the laws of colonial cities regulating
24 time, place and manner] for the discharge of firearms," *id.* at 166 (citation omitted), *DeCastro* finds
25 that *Heller* does not "mandate that any marginal, incremental or even appreciable restraint on the right
26 to keep and bear arms be subject to heightened scrutiny. Rather, heightened scrutiny is triggered only
27 by those restrictions that . . . operate as a substantial burden on the ability of law-abiding citizens to
28 possess and use a firearm for self-defense (or for other lawful purposes)." *Id.*

This Court should adopt *DeCastro*'s approach. *DeCastro* is faithful to *Heller*'s admonition
that the scope of the Second Amendment right is not unlimited, and to *Heller*'s recognition of the
many and varied forms of firearms regulation that have existed throughout the Nation's history, such
as concealed weapons prohibitions, gun-storage laws, and felon-possession prohibitions. 554 U.S. at
626-27 & n.26, 632. *DeCastro*'s substantial-burdens test is also warranted by the Supreme Court's

1 statement that “[s]tate and local experimentation with reasonable firearms regulations will continue
2 under the Second Amendment.” *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3046 (2010)
3 (plurality) (quotation marks omitted). A test that reflexively applies rigid categories to states’ and
4 localities’ novel regulations is incompatible with *McDonald*’s recognition that new circumstances or
5 understandings may call for new controls on firearms; rigid categories would “handcuff[] lawmakers’
6 ability to prevent armed mayhem.” *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011)
7 *cert. denied*, 132 S.Ct. 756. Finally, as *DeCastro* noted, the substantial-burdens test largely accords
8 with the approach of other circuits, which apply varying degrees of scrutiny to gun regulations based
9 on the degree of burden on Second Amendment rights as well as whether the regulation impinges on
10 the core or periphery of interests protected by the Second Amendment. *DeCastro*, 682 F.3d at 166;
11 *Heller v. District of Columbia*, 670 F.3d 1244, 1253, 1260 (D.C. Cir. 2011) (“*Heller II*”) (laws that
12 have only a “de minimis” effect on the right to bear arms or that do not “meaningfully affect
13 individual self-defense” do not impinge on the Second Amendment right and therefore do not warrant
14 heightened scrutiny) (internal quotation marks omitted); *Masciandaro*, 638 F.3d at 470 (endorsing
15 sliding-scale approach to determining the level of scrutiny applicable to laws that burden Second
16 Amendment rights depending in part on “the extent to which [Second Amendment] interests are
17 burdened by government regulation”); *United States v. Marzarella*, 614 F.3d 85, 94–95 (3d Cir.
18 2010) (suggesting that a “de minimis “ burden on the right to keep arms for self-defense might not
19 warrant heightened scrutiny), *cert. denied*, 131 S.Ct. 958 (2011). *DeCastro*’s approach also accords
20 with the vacated opinion of the *Nordyke* panel, which determined that “only regulations which
21 substantially burden the right to keep and to bear arms trigger heightened scrutiny under the Second
22 Amendment.” *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011) (O’Scannlain, J.), *reh’g in banc*
23 *granted*, 664 F.3d 774.

24 Plaintiffs contend instead that this Court should adopt a “scope-based analysis” that first asks
25 whether “the restricted activity falls within the scope of the Second Amendment” as understood by the
26 public during the founding period. Plaintiffs’ MPAs at 7:7-13. If it does, the Court should consider
27 whether “there is some ‘historical justification for [the government’s] regulations.’” *Id.* If the
28 government cannot show a historical analog for its regulations, then the Court must strike them,

1 regardless of the strength of their justification or the extent to which they infringe on the core of
2 Second Amendment rights. *Id.* The Court should reject Plaintiffs’ scope-based test because it is
3 logically incoherent and, contrary to *Heller* and *McDonald*’s teaching, intrinsically biased against
4 regulation in an area where the Supreme Court has recognized that regulation and right have long
5 existed side-by-side.

6 Plaintiffs’ scope-based test is logically incoherent because of the circular role it assigns to
7 history, which both determines the scope of the Second Amendment right and whether an incursion on
8 that right is nonetheless legitimate. Plaintiffs do not explain the merits of a two-pronged test where
9 both prongs ask the same question. Nor is Plaintiffs’ test consistent the Supreme Court’s
10 pronouncements on the Second Amendment. As noted, *McDonald* recognized that states and localities
11 may continue their “experimentation” with sensible gun regulations, and *Heller* recognized that the
12 gun restrictions in existence at the time of the Framing do not exhaust the category of valid gun
13 regulations. *Heller* deems prohibitions on felons’ possession of any firearms to be “longstanding,”
14 554 U.S. at 626, and “presumptively lawful,” *id.* at 627 n.26. Yet “the first federal statute
15 disqualifying felons from possessing firearms was not enacted until 1938 A 1938 law may be
16 ‘longstanding’ from the perspective of 2008, when *Heller* was decided, but 1938 is 147 years after the
17 states ratified the Second Amendment.” *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en
18 banc). Thus, *Heller* itself indicates that “the legislative role [in regulating guns] did not end in 1791.”
19 *Id.*³ But experimentation and the continuing development of firearms laws would be foreclosed by
20 any test that exclusively inquires into a regulation’s historic pedigree.

21 Plaintiffs claim that their scope-based inquiry is commanded by *Heller* itself, which rejected a
22 test proposed by Justice Breyer as a “freestanding ‘interest-balancing’ approach” which would enable
23 judges to decide “on a case-by-case basis whether the right is *really worth* insisting upon.” 554 U.S. at
24 634. Plaintiffs err by treating Justice Breyer’s approach—which would have balanced the

25 ³ *Skoien* considered not simply a time-place-and-manner restriction on the use or storage of
26 guns but a blanket prohibition on possession of guns by people convicted of misdemeanor crimes of
27 domestic violence, where this prohibition was enacted in 1996. 614 F.3d at 639. If legislatures
28 continue to have the power to disarm entire classes of people upon a proper showing, as *Skoien* holds
that they do, *id.* at 642, then surely legislatures also have the power to enact novel restrictions that fall
short of disarmament upon adequate justification.

1 proportionality of the government’s interest against the Second Amendment right in all cases, *id.* at
2 689 (Breyer, J., dissenting)—as synonymous with the familiar tiers of heightened and intermediate
3 scrutiny. But *Heller* itself never rejects the tiers-of-scrutiny framework, and indeed it calls out Justice
4 Breyer’s approach as being *different* from the “traditionally expressed levels” of scrutiny, not
5 synonymous with them. 554 U.S. at 634. No other court has found itself constrained by *Heller*’s
6 rejection of the “interest-balancing” approach from adopting a tiers-of-scrutiny framework. *See supra*
7 p. 8; Order at 5. And as the D.C. Circuit has noted, “[i]f the Supreme Court truly intended to rule out
8 any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at
9 least something to that effect.” *Heller II*, 670 F.3d at 1265. It did not.

10 Nor should this Court adopt Plaintiffs’ alternative argument that strict scrutiny alone must
11 apply to all “restrictions on the core right of law-abiding citizens to self-defense,” without regard to
12 the nature of the regulation or the severity of the burden. Plaintiffs’ MPAs at 9:9-10. This, too, is
13 contrary to the overwhelming weight of Second Amendment authority. Other circuits join *DeCastro*
14 in holding that courts must consider the severity of the burden on Second Amendment rights in
15 deciding what level of scrutiny to apply. *See, e.g., Heller II*, 670 F.3d at 1253, 1260 (“we determine
16 the appropriate standard of review by assessing how severely the prohibitions burden the Second
17 Amendment right”); *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (“the rigor of this
18 judicial review will depend on how close the law comes to the core of the Second Amendment right
19 and the severity of the law’s burden on the right”) (emphasis added); *Masciandaro*, 638 F.3d at 470 (to
20 determine standard of review, “we would take into account the nature of a person’s Second
21 Amendment interest, the extent to which those interests are burdened by government regulation, and
22 the strength of the government’s justifications for the regulation”).

23 Plaintiffs argue to the contrary, claiming that “*most circuits* have determined the applicable
24 standard of review based on whether or not the challenged law regulates conduct at the ‘core’ of the
25 Second Amendment.” Plaintiffs’ MPAs at 10:10-11 (emphasis added). But then Plaintiffs go on to
26 cite only three cases, all of them by or within the Fourth Circuit. *Id.* at 10:11-16 (citing *United States*
27 *v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010);
28 *United States v. Weaver*, Criminal No. 2:09-CR-00222, 2012 WL 727488 (S.D. W. Va. Mar. 6,

1 2012)). At most, these cases show that the Fourth Circuit—alone among circuits—shares Plaintiffs’
2 view. But they actually show far less than that, because the statements in them that Plaintiffs rely on
3 are dicta. Each of the cited cases applied intermediate scrutiny but, unnecessarily, stated or implied
4 that strict scrutiny could apply where a regulation burdened core Second Amendment conduct.
5 *Masciandaro*, 638 F.3d at 470 (applying intermediate scrutiny to prohibition on loaded firearms
6 possession in national park);⁴ *Chester*, 628 F.3d at 683 (4th Cir. 2010) (applying intermediate scrutiny
7 to prohibition on firearms possession by domestic violence misdemeanor); *Weaver*, 2012 WL
8 727488, at *5 (applying intermediate scrutiny to application of federal prohibition on possession of
9 firearms while in the employ of a felon). These cases are not authority for propositions they do not
10 need to decide. *See, e.g., Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1472 (9th Cir. 1995).

11 Plaintiffs also claim that strict scrutiny is required for regulations on law-abiding citizens’ use
12 of guns in the home because strict scrutiny always applies to “core First Amendment conduct,” and
13 thus presumably it should be the same for the Second Amendment. Plaintiffs’ MPAs at 9:18-19
14 (emphasis in original). But this only begs the question of what is at the “core” of the right. If it is the
15 right to keep and carry any handgun, armed with any ammunition, in any manner whatsoever,
16 provided that the conduct occurs in the home, then perhaps Plaintiffs’ claims would have force. But
17 *Heller* itself belies these claims, recognizing that “laws regulating the storage of firearms to prevent
18 accidents” are not undermined by *Heller*’s analysis, notwithstanding the fact that those laws operate in
19 the home on the firearms of law-abiding citizens. 554 U.S. at 632; *see also infra* p. 13 (discussing
20 *Heller*’s analysis of storage laws). Indeed, the weight of authority shows the opposite: merely because
21 a law operates in the home, on the guns of law-abiding citizens, does not necessarily trigger strict
22 scrutiny. For instance, the D.C. Circuit held that stringent registration and training requirements that
23 “make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a
24 handgun, for the purpose of self-defense in the home—the core lawful purpose protected by the
25 Second Amendment”—are nonetheless subject only to intermediate scrutiny. *Heller II*, 670 F.3d at

26
27 ⁴ *Masciandaro* expressly supports the City’s position, not Plaintiffs’, when it states that to
28 determine standard of review, a court must “take into account the nature of a person’s Second
Amendment interest, the extent to which those interests are burdened by government regulation, and
the strength of the government’s justifications for the regulation.” 638 F.3d at 470 (emphasis added).

1 1255, 1257-58 (emphasis added). Similarly, in *United States v. Marzzarella*, the Third Circuit
2 acknowledged that a prohibition on possession of a handgun without a serial number “implicates [the
3 possessor’s] interest in the defense of hearth and home” but nonetheless applied intermediate scrutiny
4 to the law. 614 F.3d at 94, 97. Indeed, no circuit court has applied strict scrutiny to a gun regulation
5 following *Heller*, much less embraced a categorical approach that assigns strict scrutiny to any law
6 regulating conduct in the home.

7 Plaintiffs are also wrong to argue that strict scrutiny categorically applies to regulations
8 burdening, to any degree, the “core” of enumerated or fundamental rights. Plaintiffs’ MPAs at 9:15-
9 10:2. As *DeCastro* explained in justifying its “substantial burden” framework, courts frequently
10 assess the extent of a burden on fundamental rights in deciding how much scrutiny to pay that burden:

11 “A similar threshold showing is needed to trigger heightened scrutiny of laws
12 alleged to infringe other fundamental constitutional rights. The right to marry is
13 fundamental, but ‘reasonable regulations that do not significantly interfere with
14 decisions to enter into the marital relationship’ are not subject to the ‘rigorous
15 scrutiny’ that is applied to laws that ‘interfere directly and substantially with the
16 right to marry.’ *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978). The right to
17 vote is fundamental, but ‘the rigorousness of our inquiry into the propriety of a
18 state election law depends upon the extent to which a challenged regulation
19 burdens First and Fourteenth Amendment rights.’ *Burdick v. Takushi*, 504 U.S.
20 428, 434 (1992)

21 “The weight of the burden matters in assessing the permissible bounds of
22 regulation in other constitutional contexts as well, such as takings, abortion, and
23 free speech. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–16 (1992)
24 (only those regulations on property that go ‘too far’ require the payment of just
25 compensation under the Takings Clause (internal quotation marks omitted));
26 *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (prior to fetal viability, a state
27 may not enact laws that impose an ‘undue burden’ on a woman’s decision to
28 terminate her pregnancy, *i.e.*, regulations that have ‘the purpose or effect of
placing a substantial obstacle in the path of a woman seeking an abortion’) . . . ;
Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (reasonable time, place
or manner restrictions are subject to lesser scrutiny as long as they are content-
neutral and preserve ‘ample alternative channels for communication of the
information’). . . .” 682 F.3d at 167 (parallel citations and some internal
quotation marks omitted).

This Court should follow *DeCastro* in first evaluating the extent of the burden that the City’s
ordinances impose on Plaintiffs’ rights and then, only if the burden is substantial, applying any form of
scrutiny to those ordinances, in proportion to the burden they impose.

1 **B. The Storage Ordinance Is Constitutional.**

2 The Storage Ordinance requires only that San Franciscans lock their handguns, loaded or
3 unloaded, when they are not carrying their handguns. S.F. Police Code § 4512. This Court has
4 already cogently described the modest burden that this requirement imposes: at most, it creates a mere
5 “potentiality” that, in some cases, a San Francisco resident might have a locked gun near at hand but
6 be unable to reach it because of the time it took to open a lockbox or trigger lock. Order at 4:13-22.
7 Of course, as Police Code § 4511 notes, in some cases the locked-storage requirement could *increase*
8 ready access to a loaded gun: “Portable lockboxes can store loaded weapons such that they are always
9 within easy reach on counters, tables or nightstands. Such safely stored weapons are more quickly and
10 easily retrieved for use in self-defense than unlocked guns that have been hidden away in seldom-used
11 locations.” *Id.* at § 4511(7)(c).

12 There is no empirical study anywhere that substantiates Plaintiffs’ view that the potentiality
13 this Court identified, that locked storage of a gun could sometimes impair self-defense or endanger a
14 gun owner, actually occurs with any regularity. Webster Decl. ¶¶ 62-63. But evidence does indicate
15 that the time needed to open a lockbox to obtain a loaded gun is minimal—perhaps three or four
16 seconds. Garza Decl. ¶¶ 2-7. Evidence also indicates that the availability of guns in homes increases
17 the risks of suicides, homicides, and deaths from accidental shootings, particularly among children and
18 young adults, that reducing the availability of guns in turn reduces these risks, and that policies that
19 prevent unauthorized access to guns in the home also reduce these risks. Webster Decl. ¶¶ 6-56. In
20 addition, locked storage requirements can reduce gun burglaries and thereby reduce the number of
21 guns available to criminals through the black market. *Id.* ¶¶ 58-61. Plaintiffs make no showing
22 whatsoever in their preliminary injunction motion that these facts are untrue. In light of the remote
23 and unsubstantiated possibility that the Storage Ordinance could impair a San Francisco resident’s
24 ability to use a gun for self-defense, the minimal burden that the Storage Ordinance imposes on San
25 Francisco residents, and the empirical evidence that locked storage of guns serves public safety
26 interests, the Storage Ordinances passes Second Amendment scrutiny under any test that the Court
27 could plausibly apply to it.
28

1 Under the *DeCastro* approach, the Court should determine that the Storage Ordinance does not
2 impose a substantial burden on Second Amendment rights, and therefore that it need not pass any
3 further scrutiny. 682 F.3d at 164. This conclusion is bolstered by *Heller* itself, which disavows that
4 “[its] analysis suggest[s] the invalidity of laws *regulating the storage of firearms* to prevent
5 accidents.” 554 U.S. at 632 (emphasis added).

6 Even if the Court applies some form of heightened scrutiny, it should go no further than
7 intermediate scrutiny. Empirical evidence shows that the burden that the Storage Ordinance imposes
8 on the right of self-defense in the home is charitably described as minimal. Indeed, *Heller* recognizes
9 that gun-storage laws “do not remotely burden the right of self-defense as much as an absolute ban on
10 handguns.” 554 U.S. at 632. Appellate courts have declined to apply heightened scrutiny to far
11 greater burdens than any San Francisco creates here. *See, e.g., Heller II*, 670 F.3d at 1255-56, 1257
12 (applying intermediate scrutiny to stringent registration requirements that limited gun purchases to one
13 per month and required firearms training and demonstrated knowledge of firearms for gun registration,
14 notwithstanding the fact that these requirements “[made] it considerably more difficult for a person
15 lawfully to acquire and keep a firearm”); *Chester*, 628 F.3d at 681-83 (after finding that history did *not*
16 show domestic violence misdemeanants were outside Second Amendment’s protection, nonetheless
17 applying intermediate scrutiny to complete ban on possession by those misdemeanants); *Skoien*, 614
18 F.3d at 641-42 (applying intermediate scrutiny to ban on firearm possession by domestic violence
19 misdemeanants even where this ban was not historically longstanding). Indeed, in noting that its
20 analysis did not impugn storage laws, *Heller* stated that historic storage ordinances “do not remotely
21 burden the right of self-defense as much as an absolute ban on handguns.” 554 U.S. at 632.

22 Thus, as the Third Circuit has phrased it, where a law “was neither designed to nor has the
23 effect of prohibiting the possession of any class of firearms, it is more accurately characterized as a
24 regulation of the manner in which persons may lawfully exercise their Second Amendment rights” and
25 subject only to intermediate scrutiny. *Marzzarella*, 614 F.3d at 97; *see also Masciandaro*, 638 F.3d at
26 474 (applying only intermediate scrutiny where the law, prohibiting possession of loaded weapons in
27 cars in national parks but allowing unloaded possession, “leaves largely intact the right to possess and
28 carry weapons in case of confrontation” because firearms could be loaded in the event of a self-

1 defense emergency). The Storage Ordinance leaves largely intact the right to possess handguns in the
 2 home, does not prohibit any class of firearms, and is best characterized as a regulation of the manner
 3 of firearms possession in the home. It should therefore be evaluated under the intermediate scrutiny
 4 test.⁵

5 Under intermediate scrutiny, the Storage Ordinance must bear a substantial relationship to an
 6 important government interest. *Skoien*, 614 F.3d at 642. “[I]ntermediate scrutiny does not require that
 7 a regulation be the least intrusive means of achieving the relevant government objective, or that there
 8 be no burden whatsoever on the individual right in question.” *Masciandaro*, 638 F.3d at 474. Nor is
 9 San Francisco required to prove that its legislative judgments are empirically correct. “Even when
 10 applying strict scrutiny—requiring a more taxing proof threshold than the one we apply here [in a
 11 Second Amendment case challenging conviction of a marijuana user in possession of a firearm]—the
 12 government may, in appropriate circumstances, carry its burden by relying ‘solely on history,
 13 consensus, and simple common sense.’” *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012)
 14 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995); additional quotation marks omitted).

15 The Storage Ordinance readily passes intermediate scrutiny. Public safety is plainly a strong
 16 government interest. *See, e.g., Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 768 (1994). The
 17

18 ⁵ This conclusion finds further support in the historic gun- and gunpowder-storage laws that
 19 *Heller* discussed. In Boston in 1783, it was unlawful to take a loaded firearm into any building,
 20 including a dwelling. An Act In Addition to the Several Acts Already Made for the Prudent Storage of
 21 Gun-Powder within the Town of Boston, Mar. 1, 1783, in The Charter of the City Council of Boston
 22 etc. with Such Acts of the Legislature of Massachusetts as Relate to the Government of Said City 18
 23 (1827) (available at App. A-14). In New York City in 1784, it was unlawful for “any ... person ... to
 24 have or keep any quantity of gun powder exceeding twenty-eight pounds weight, in any one place, less
 25 than one mile to the northward of the city hall ... and the said quantity of twenty-eight pounds weight
 26 ... shall be separated into four stone jugs or tin cannisters, which shall not contain more than seven
 27 pounds each.” An Act to Prevent the Danger Arising From the Pernicious Practice of Lodging
 28 Gunpowder in Dwelling Houses, Stores, or Other Places Within Certain Parts of the City of New
 York, or on Board of Vessels Within the Harbour Thereof, Apr. 13, 1784, ch. 28, 1784 Laws of the
 State of N.Y. 627-28 (available at App. A-17). New York’s statute contained no express exception for
 gunpowder kept in a loaded gun rather than a stone jug or tin canister. Pennsylvania in 1782
 prohibited the storage of more than 25 pounds of gun powder in any shop or dwelling. An Act for
 Erecting the Town of Carlisle, in the County of Cumberland, into a borough; for Regulating the
 Buildings, Preventing Nuisances and Encroachments on the Commons, Squares, Streets, Lanes and
 Alleys of the Same, and for Other Purposes Therein Mentioned, 1782, ch. DCCCCLVIII, sec. XLII,
 1803 Laws of the Commonwealth of Penn. 349-50 (available at App. A-21). These Framing-era laws
 demonstrates that the historical understanding of the right to bear arms has never included immunity
 from reasonable storage regulations to prevent accidents.

1 Storage Ordinance bears a substantial relationship to this interest because groups as diverse as the
2 National Rifle Association and the American Academy of Pediatrics recommend locked storage as a
3 way to reduce access to guns by unauthorized users, Webster Decl. ¶ 41; because reducing the
4 immediate availability of guns in turn reduces gun deaths, *id.* ¶¶ 64-65; because locked-storage
5 requirements may reduce gun thefts and thereby reduce the number of guns flowing into the black
6 market and criminal hands, *id.* ¶¶ 58-61; and because locked-storage requirements have been
7 empirically proven to save lives, *id.* ¶¶ 54-56.

8 Plaintiffs complain that the Storage Ordinance goes too far, applying to all gun owners
9 regardless of their individual circumstances. But it is difficult to predict in advance which homes will
10 be broken into and which unlocked guns will be stolen. And while San Francisco could have confined
11 its ordinance to homes where children are sometimes or often present, such a regulation would have
12 done nothing to prevent theft or to reduce suicides and homicides among adults living in homes with
13 guns. In any event, because “intermediate scrutiny does not require that a regulation be the least
14 intrusive means,” *Masciandaro*, 638 F.3d at 474, the Storage Ordinance is constitutional regardless of
15 Plaintiffs’ quibbles with its breadth.

16 Plaintiffs also make the bizarre contention that San Francisco may not justify the Storage
17 Ordinance as a means of reducing shootings: “The right to keep arms in an operable (*i.e.*, useful)
18 condition cannot be prohibited by laws that seek justification in well-known risks associated with that
19 very right, risks equally well-known to those who enshrined the right in our Second Amendment.”
20 Plaintiffs’ MPAs at 16:2-5; *see also id.* at 13 n.8 (distinguishing historic gunpowder-storage
21 ordinances from the Storage Ordinance because their purpose was “to protect firefighters in densely
22 populated urban areas; *not* to ‘protect’ law-abiding citizens from themselves”). This is nonsensical.
23 *Heller* holds that handguns may not be banned, regardless of the fact that they often injure people. But
24 it does not state or imply that governments may not regulate based on the dangerous capabilities of
25 firearms. If preventing shootings were an impermissible basis for regulation, what would be the
26 justification for the extensive list of laws—from concealed weapons bans to prohibitions on firearms
27 possession by felons and the mentally ill—that *Heller* identifies as presumptively lawful? 554 U.S. at
28 626-27 & n.26. No court anywhere has insisted on such a crabbed interpretation of the permissible

1 justifications for gun regulation. *See, e.g., Skoien*, 614 F.3d at 642 (preventing “armed mayhem” was
2 important government purpose); *Masciandaro*, 638 F.3d at 473 (prohibition of loaded firearms in
3 vehicles in national parks was permissible because of their “dangerous[ness]”); *Heller II*, 670 F.3d at
4 1264 (upholding ban on large-capacity magazines because they “pose a danger to innocent people and
5 particularly to police officers”); *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1109-10 (C.D. Ill. 2012):
6 (“the State undoubtedly has the authority to regulate firearms in order to ensure public safety”).

7 **C. The Ammunition Ordinance Is Constitutional.**

8 San Francisco’s Ammunition Ordinance, prohibiting the *single* gun store located within city
9 limits from selling enhanced-lethality ammunition, is motivated by the simple idea that reducing the
10 lethality of bullets can save lives without appreciable harm to public safety. Plaintiffs apparently
11 agree with San Francisco’s view that enhanced-lethality ammunition is more likely to gravely wound
12 or kill a human being hit by it than ordinary full-metal jacket bullets. *See* MJOP RJN, Exh. S at 3,
13 Exh. T at 1. And Plaintiffs offer no empirical showing or argument that ordinary full-metal jacket
14 bullets are insufficient to stop an intruder. Instead, they contend that enhanced-lethality ammunition is
15 in common use. They also argue that it is better for self-defense precisely because of its capacity to
16 harm and because it purportedly is less likely to “over-penetrat[e] and ricochet” than standard bullets.
17 Plaintiffs’ MPAs at 18:2-15.

18 Plaintiffs offer no reason why particular kinds of ammunition should be protected by the
19 Second Amendment; instead, they simply import *Heller*’s reasoning that the Second Amendment
20 protects *weapons* “in common use” to *ammunition*, without analysis. Plaintiffs’ MPAs at 2:26-3:3,
21 18:3-6. It is far from clear that the “common use” standard applies to ammunition. After all, banning
22 a class of weapons that are owned by a lot of people is an effective way to disarm them, something the
23 Second Amendment forbids, but restricting one kind of ammunition while many other kinds remain
24 available does not vitiate a gun owner’s ability to load his gun and defend himself. But even if
25 Plaintiffs are correct that the Second Amendment protects an interest in a particular *kind* of
26 ammunition, their challenge to the Ammunition Ordinance nonetheless fails.

27 First, the Ammunition Ordinance falls within a longstanding tradition of regulating particularly
28 dangerous weapons and ammunition, and is therefore presumptively lawful. *Heller* recognized that

1 prohibitions on “dangerous and unusual weapons” are an “important limitation on the right to keep
2 and carry arms” based on the history of such prohibitions. 554 U.S. at 627 (quoting Blackstone, 4
3 Commentaries on the Laws of England 148-149 (1769)). *Heller* also recognized that “nothing in our
4 opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the
5 commercial sale of arms.” 554 U.S. at 626-67. Nineteenth- and early twentieth-century legislation
6 shows that bans on the sale of particular arms, even popular or common ones, are part of our historic
7 tradition of firearms regulation. Historic statutes prohibiting the sale of certain classes of weapons
8 include An Act to Guard and Protect the Citizens of this State, against the Unwarrantable and Too
9 Prevalent Use of Deadly Weapons, Dec. 25, 1837, ¶ 367, § 1, 1851 Statute Laws of the State of Ga.
10 848 (App. A-12) (making it illegal “for any merchant . . . or any other person . . . to sell, or offer to sell
11 . . . pistols”); An Act to Prevent the Sale of Pistols, Mar. 14, 1879, ch. XCVI, § 1, 1879 Act of the
12 State of Tenn. 135-36 (App. A-27) (banning the sale or disposal of “belt or pocket pistols, or
13 revolvers, or any other kind of pistols, except army or navy pistol[s]”); An Act to Regulate the
14 Carrying, Manufacture, and Sale of Pistols, and to Make a Violation of the Same a Misdemeanor, Feb.
15 20, 1901, No. 435, § 1, 1902 Code of the Laws of S.C. 478-49 (App. A-25) (banning the sale of pistols
16 less than 20 inches in length and 3 pounds in weight).

17 The tradition continues to this day with respect to bullets, as numerous jurisdictions restrict the
18 sale or possession of various kinds of ammunition they deem to be particularly dangerous. The federal
19 government largely prohibits the sale of armor-piercing ammunition, 18 U.S.C. §§ 921(a)(17)(B),
20 922(a)(8), and has since 1986. *See* An Act to Amend Chapter 44 (Relating to Firearms) of Title 18
21 etc., Pub. L. No. 99-308, § 102, 100 Stat. 449 (1986). Numerous states restrict the possession or sale
22 of that and other particularly lethal kinds of ammunition. *See, e.g.*, Ala. Code § 13A-11-60
23 (prohibiting possession or sale of brass or steel teflon-coated handgun ammunition); Cal. Penal Code §
24 30320 (prohibiting sale of “handgun ammunition designed primarily to penetrate metal or armor”); *id.*
25 § 32310 (prohibiting manufacture or sale of “any large-capacity magazine”); Fla. Stat. Ann. § 790.31
26 (prohibiting possession and sale of various bullets including “exploding bullets” including those that
27 are “designed . . . so as to detonate or forcibly break up through the use of an explosive or
28 deflagrant”); Haw. Rev. Stat. § 134-8(a) (prohibiting manufacture, sale, or possession of “any type of

1 ammunition or any projectile component thereof designed or intended to explode or segment upon
2 impact with its target”); 720 Ill. Comp. Stat. Ann. § 5/24-1(a)(11) (prohibiting sale, manufacture, or
3 purchase of “any explosive bullet”); Iowa Code Ann. §§ 724.1(7), 724.3 (prohibiting possession of
4 “[a]ny bullet or projectile containing any explosive mixture or chemical compound capable of
5 exploding or detonating prior to or upon impact”); N.H. Rev. Stat. Ann. § 159:18 (prohibiting use of
6 “any teflon-coated or armor-piercing bullet or cartridge, or any bullet or cartridge which contains any
7 explosive substance in the projectile and is designed to explode upon impact, in the course of
8 committing any misdemeanor or felony”); N.J. Stat. Ann. § 2C:39-3(f)(1), (g)(2) (prohibiting
9 possession of “hollow nose or dum-dum bullet” except in the home); N.C. Gen. Stat. Ann. § 14-34.3
10 (prohibiting sale or possession of “teflon-coated bullet”); N.Y. Penal Law § 265.01(7) (prohibiting
11 possession of “a bullet containing an explosive substance designed to detonate upon impact”); Tenn.
12 Code Ann. § 39-17-1304(b) (prohibiting sale or use of “any ammunition cartridge, metallic or
13 otherwise, containing a bullet with a hollow-nose cavity that is filled with an explosive material and
14 designed to detonate upon impact”); Utah Code Ann. § 65A-3-2(1)(d) (prohibiting firing of “tracer or
15 incendiary ammunition”). The Ammunition Ordinance fits comfortably within this tradition of
16 restricting the sale of particularly dangerous kinds of ammunition and therefore calls for no Second
17 Amendment scrutiny at all.

18 Second, even if this Court concludes that the Second Amendment affords protection to the
19 ability to purchase a particularly dangerous kind of ammunition, it should nonetheless uphold the
20 Ammunition Ordinance because that ordinance does not *substantially* burden Plaintiffs’ Second
21 Amendment rights. *DeCastro*, 682 F.3d at 164. The Ammunition Ordinance allows San Franciscans
22 either to buy enhanced-lethality ammunition online or at gun stores outside of San Francisco
23 (including at gun shows at Cow Palace, which is literally across the street from San Francisco), or to
24 make do with standard ammunition, which Plaintiffs do not allege is inadequate for self-defense.
25 Because “adequate alternatives remain for law-abiding citizens to obtain a firearm for self-defense”
26 and to equip that firearm with ammunition adequate for self-defense, there is no substantial burden
27 here. *Id.* at 168.

1 Third, even if this Court subjects the Ammunition Ordinance to some form of heightened
2 scrutiny, it should go no further than the D.C. Circuit, which applied only intermediate scrutiny to a
3 prohibition on the *possession*, not the mere sale, of magazines containing more than 10 rounds of
4 ammunition. *Heller II*, 670 F.3d at 1261. Although the plaintiffs in that case claimed that depriving
5 them of large-capacity magazines would impair their ability to fire repeatedly in an emergency without
6 reloading, the D.C. Circuit determined that “the prohibition of . . . large-capacity magazines does not
7 effectively disarm individuals or substantially affect their ability to defend themselves.” *Id.* at 1262.
8 The Ammunition Ordinance similarly withstands intermediate scrutiny. It is intended to serve the
9 compelling governmental interest in public safety.⁶ Plaintiffs argue that the Ammunition Ordinance is
10 misguided because it restricts the kind of ammunition they believe is less likely to “overpenetrat[e] or
11 ricochet” than conventional ammunition. But research demonstrates that discharging a gun at a home
12 invader or in other legitimate self-defense circumstances is far rarer than the use of guns against loved
13 ones, friends or acquaintances in unjustifiable shootings. Webster ¶ 22.⁷ San Francisco’s policy
14 determination to protect against the latter and far more common harm by reducing the lethality of
15 bullets, even at the expense of some overpenetration or ricochets in the far rarer situation of a self-
16 defense emergency, is a permissible policy choice so long as standard ammunition can protect against
17 an intruder. San Francisco found that it can, S.F. Police Code § 613.9.5(4), and Plaintiffs offer this
18 Court no reason to disturb that determination.

19 Plaintiffs also contend that the Ammunition Ordinance is unconstitutional because it defines
20 enhanced-lethality ammunition to include ammunition that “serves no sporting purpose.” Plaintiffs
21

22
23 ⁶ Plaintiffs argue that the City may not rely on public safety as a justification for the
24 Ammunition Ordinance because public safety was the District of Columbia’s justification for its
25 handgun ban, and the Supreme Court struck that ban. Plaintiffs’ MPAs at 20:4-10. But the
26 Ammunition Ordinance is not a ban on ammunition possession, and does not ban a class of arms,
27 unlike D.C.’s handgun ban, so it does not merit strict scrutiny. And the fact that D.C.’s justification
was insufficient in *Heller* does not mean that public safety can never justify firearms regulation. *See*,
e.g., *Skoien*, 614 F.3d at 642; *Masciandaro*, 638 F.3d at 473; *Heller II*, 670 F.3d at 1264; *Moore v.*
Madigan, 842 F. Supp. 2d 1092, 1109-10. *Heller* never states or implies that public safety is not a
legitimate government purpose in Second Amendment analysis.

28 ⁷ In addition, research showing that most defensive uses of guns involve brandishing them, not
firing them, indicates that the kind of bullet they contain may have very little import. *See supra* n.1.

1 argue either that this ban violates the Second Amendment because self-defense purposes are distinct
2 from sporting purposes, or because of the vagueness of the term. Both of these contentions fail.

3 As for Plaintiffs' contention that it violates the Second Amendment to permit only the sale of
4 ammunition that serves a sporting purpose, this contention relies upon a misunderstanding of the term
5 "sporting purpose." That term has regularly been employed by Congress for decades as a term of art
6 to indicate weapons and ammunition that are considered suitable only for military use or that are
7 typically used by criminals rather than law-abiding members of the public. *See, e.g.*, 18 U.S.C.
8 § 921(4)(B) (defining "destructive device" as "any type of weapon (other than a shotgun or a shotgun
9 shell which the Attorney General finds is generally recognized as particularly suitable for sporting
10 purposes) . . . which will . . . expel a projectile by the action of an explosive or other propellant, and
11 which has any barrel with a bore of more than one-half inch in diameter"); *id.* § 922(r) ("It shall be
12 unlawful for any person to assemble from imported parts any semiautomatic rifle or any shotgun
13 which is identical to any rifle or shotgun prohibited from importation under . . . this chapter as not
14 being particularly suitable for or readily adaptable to sporting purposes"); *Gun S., Inc. v. Brady*, 877
15 F.2d 858, 862 (11th Cir. 1989) (in discussing 18 U.S.C. § 922(l) concerning importation of firearms,
16 stating "the sponsor of the legislation, Senator Dodd, stated: . . . 'The entire intent of the importation
17 section is to get those kinds of weapons that are used by criminals and that have no sporting
18 purpose.'" (citation to Congressional Record omitted); *United States v. McCarty*, 421 F. Supp. 2d
19 220, 225 (D. Me. 2006) *aff'd*, 475 F.3d 39 (1st Cir. 2007) ("Based on the legislative history of the Gun
20 Control Act and subsequent circuit court precedent, this Court concludes that unregistered sawed-off
21 shotguns serve no sporting purpose and fall within [26 U.S.C.] § 5845(f)(2)'s definition of a
22 destructive device."); Law Enforcement Officers Protection Act of 1985, Hearing Before the
23 Subcomm. on Crime of the H. Comm. on the Judiciary, 99th Cong. 1 (1985) (statement of Chairman
24 Hughes) ("Armor-piercing ammunition has no sporting purpose whatsoever. It is not used by hunters
25 or sportsmen or target shooters. This ammunition has principally a military or offensive purpose to
26 penetrate armor. This ammunition should not be sold without reasonable controls to assure that it is
27 not used in the commission of crime."); *id.* at 91 (statement of David Baker, of the International Union
28 of Police Associations) ("[T]here is no legitimate sporting use for this ammunition. Congress has seen

1 fit to restrict the private ownership of machine guns and other military weapons, in part because of an
2 absence of legitimate sporting purposes. These bullets should not be an exception to that logic.”).
3 Thus, the term does *not*, as Plaintiffs contend, mean that San Franciscans can only purchase
4 ammunition suitable for hunting and never for self-defense. San Francisco is entitled to use the term
5 “sporting purpose” in the sense that Congress has used it in the past and continues to use it today: as a
6 designation for legitimate purposes, which now, after *Heller*, include self-defense purposes.

7 The fact that the term “no sporting purpose” has a particular meaning in the context of firearms
8 legislation also disposes of Plaintiffs’ claim that the term is unconstitutionally vague. The
9 Constitution does not demand “perfect clarity and precise guidance,” *United States v. Williams*, 553
10 U.S. 285, 304 (2008), but rather “an adequate warning” of what is prohibited with “sufficiently
11 distinct” boundaries. *United States v. Petrillo*, 332 U.S. 1, 7 (1947). The use of the phrase “no
12 sporting purpose” across decades in American firearms law shows that the language of the
13 Ammunition Ordinance meets these constitutional standards.

14 Finally, Plaintiffs lack standing to raise a Fourteenth Amendment vagueness claim to the
15 Ammunition Ordinance. They themselves are not regulated by that ordinance; only gun dealers in San
16 Francisco are directly regulated by it. Thus, only High Bridge Arms, the lone San Francisco gun
17 dealer, is injured if the ordinance is so vague that High Bridge Arms cannot determine what is
18 prohibited by it. The rule generally is that a party may only assert his own interests in invoking the
19 jurisdiction of the federal courts, and Plaintiffs make no effort at all to show that they meet one of the
20 narrow exceptions to this general rule to permit them to assert the Fourteenth Amendment rights of
21 High Bridge Arms. *See, e.g., Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004) (noting rule against
22 third-party standing and its limited exceptions).

23 **II. PLAINTIFFS FAIL TO SHOW A LIKELIHOOD OF IRREPARABLE HARM.**

24 A preliminary injunction may never be granted without a showing that irreparable harm is
25 likely. *Winter*, 555 U.S. at 22. To make this showing, Plaintiffs contend that any deprivation of
26 Second Amendment rights is presumed to be irreparable.

27 With respect to the Storage Ordinance, Plaintiffs’ contention might be viable if the mere
28 existence of a criminal law injured them. But absent some showing of a genuine threat by the City to

1 prosecute Plaintiffs or anyone else for violating the Storage Ordinance, Plaintiffs can show no injury
2 from those ordinances, much less irreparable injury. This Court has held to the contrary. *Jackson v.*
3 *City & County of San Francisco*, 829 F. Supp. 2d 867 (N.D. Cal. 2011). The City respectfully submits
4 that this Court erred and that, to show harm from a criminal statute, Plaintiffs must show that they
5 intend to violate the law and must make an affirmative showing of a threat of prosecution, either
6 because authorities have informed them of a threat of prosecution or because there is a robust history
7 of enforcement of the law. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th
8 Cir. 2000) (en banc); *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). This
9 is true even where fundamental rights are allegedly threatened by the existence of a criminal law.
10 *Thomas*, 220 F.3d at 1138 (finding no injury where plaintiffs alleged that prosecution for violating
11 state anti-discrimination law would violate their First Amendment rights to freedom of speech and
12 religion). *Heller* is not to the contrary; in that case, Dick Heller had standing because he had applied
13 for and was denied a permit to possess a handgun, and the D.C. Circuit construed the District of
14 Columbia's requirement of locked storage of long guns to be a permit condition. *Parker v. District of*
15 *Columbia*, 478 F.3d 370, 375-76 (D.C. Cir. 2007), *aff'd sub nom, Heller*, 554 U.S. 570. Dick Heller's
16 co-plaintiffs, however, could show no injury where they were never denied a permit and had never
17 been threatened with enforcement. *Id.*⁸ Here, Plaintiffs are in the same position as Dick Heller's co-
18 plaintiffs and cannot show a threat of enforcement. *See* Dkt. 11 (Declaration of City Attorney
19 Librarian finding no evidence of prosecutions).

20 The need for a concrete threat of enforcement separates real controversies from ones
21 manufactured by interest groups, and allows local prosecutors the discretion to charge only in
22 appropriate cases. For instance, plaintiff Espanola Jackson conclusorily states that her age makes it
23 difficult for her to operate a gun lockbox. Jackson Decl. ¶ 6. If that is true, then San Francisco
24 prosecutors might, for example, decline to enforce the law against Ms. Jackson in light of her
25 infirmity. It is well established that “[w]hether to prosecute and what charge to file or bring before a

26 _____
27 ⁸ In its order denying the City's motion to dismiss for lack of standing, this Court cited
28 *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), as undermining the force of *San Diego Gun*
Rights. *Jackson*, 829 F. Supp. 2d at 871. But *MedImmune* continues to require that a plaintiff show a
“genuine threat of enforcement,” 549 U.S. at 129, a requirement Plaintiffs do not meet here.

1 grand jury are decisions that generally rest in the prosecutor’s discretion.” *United States v.*
 2 *Batchelder*, 442 U.S. 114, 124 (1979). Treating the existence of a criminal statute as interchangeable
 3 with a decision to prosecute reads prosecutorial discretion out of the law and puts government to a
 4 Hobson’s choice between defending applications of the law that it might never enforce and losing the
 5 ability ever to enforce the law if it is struck down.

6 With respect to the Ammunition Ordinance, some of the plaintiffs contend that they wish to
 7 purchase enhanced-lethality ammunition at a store in San Francisco. But no plaintiff makes any
 8 showing that he or she suffers any difficulty, burden, harm, or expense from traveling outside of San
 9 Francisco to obtain this ammunition, or ordering it online. Even if the deprivation of Second
 10 Amendment rights is irreparable harm, Plaintiffs fail to make any factual showing that their Second
 11 Amendment rights have been burdened by the Ammunition Ordinance. *Cf. Hohe v. Casey*, 868 F.2d
 12 69, 72-73 (3d Cir. 1989) (“the assertion of First Amendment rights does not automatically require a
 13 finding of irreparable injury,” and “incidental inhibition” of First Amendment rights does not
 14 constitute irreparable injury) (internal quotation marks omitted). Since the mere invocation of Second
 15 Amendment rights is not enough, and Plaintiffs have not shown their Second Amendment rights are
 16 more than incidentally inhibited by the fact that they cannot buy ammunition from San Francisco’s
 17 sole licensed ammunition dealer, they do not show irreparable harm.

18 Moreover, Plaintiffs delayed seeking injunctive relief more than three years after bringing their
 19 case, undercutting any claim that they are threatened with immediate irreparable harm. *Lydo*
 20 *Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984).

21 **III. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FACTORS FAVOR SAN** 22 **FRANCISCO.**

23 The final two factors that Plaintiffs must establish are that “the balance of equities tips in
 24 [their] favor, and that an injunction is in the public interest.” *Winter*, 555 U.S. at 20. Plaintiffs can
 25 show neither factor here.

26 Plaintiffs wave away the City’s important interest in public safety, contending that it is
 27 outweighed by their intangible Second Amendment rights. This analysis ignores the strong public
 28 interest that always inheres in the implementation of laws that are duly enacted by elected legislative

bodies: the law itself shows what the Legislature believes to be the public interest, and there is rarely reason for a court to disturb that conclusion. *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008). The public’s interest in safety has special weight here, where research supports San Francisco’s view that locked storage of guns saves lives, and where Plaintiffs do not dispute that the ammunition they seek to buy is more lethal than ordinary ammunition. As the Fourth Circuit stated in evaluating a restriction on loaded firearms in national parks, “[t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.” *Masciandaro*, 638 F.3d at 475. Because public safety and gun regulations are indeed serious business, this Court should give strong weight to the findings San Francisco’s elected legislators that the Storage Ordinance and Ammunition Ordinance serve public safety and the public interest.

CONCLUSION

For the reasons offered above, this Court should deny Plaintiffs’ Motion for Preliminary Injunction.

Dated: September 13, 2012

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7

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

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

15 Plaintiffs,)

16 vs.)

17)
18 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF)
19 SAN FRANCISCO, AND THE CHIEF)
OF THE SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
20 and DOES 1-10,)

21 Defendants.)
22)
23)
24)
25)
26)
27)
28)

CASE NO. CV-09-2143-RS

**NOTICE OF MOTION AND MOTION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Fed. R. Civ. P. 65(a)

Date: October 4, 2012

Time: 1:30 p.m.

Place: Courtroom 3 - 17th Floor
450 Golden Gate Ave.
San Francisco, CA 94102

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: Notice is hereby given that on October 4, 2012, at 1:30 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Ave., San Francisco, California, in the courtroom of the Honorable Judge Richard Seeborg, Plaintiffs will and hereby do move for preliminary injunction pursuant to Rule 65(a) of the Federal Rules of Civil Procedure.

Plaintiffs will seek an order enjoining Defendants City and County of San Francisco, the Mayor of San Francisco, and the Chief of the San Francisco Police Department (collectively, “the City”) from enforcing San Francisco Police Code section 4512 and 613.10(g). These code sections violate Plaintiffs’ right to keep and bear arms under the Second Amendment and, in particular, their right to defend themselves and others by exercising that right within their own homes. Section 613.10(g)(1) further violates Plaintiffs’ right to due process under the Fourteenth Amendment as it is unconstitutionally vague.

This motion shall be based on this notice of motion and motion, the memorandum of points and authorities in support, the declarations and evidence filed concurrently herewith, the papers on file, and upon any further matters the Court deems appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Court should enjoin the City’s enforcement of San Francisco Police Code section 4512,¹ the City’s locked-firearm-storage requirement, because Plaintiffs are likely to succeed on the merits as the law violates their fundamental right to keep an operable handgun for immediate self-defense in the home, the infringement of which causes Plaintiffs irreparable harm.

2. Whether the Court should enjoin the City’s enforcement of section 613.10(g), the City’s ban on the sale of expanding and/or fragmenting ammunition and all ammunition that “serves no sporting purpose,” because Plaintiffs are likely to succeed on the merits as the law violates their fundamental right to acquire ammunition in common use for self-defense in the

¹ All statutory references are to the San Francisco Police Code, unless otherwise indicated.

1 home, the infringement of which causes Plaintiffs irreparable harm.

2 3. Whether the Court should enjoin the City’s enforcement of section 613.10(g)(1), the
3 City’s ban on the sale of all ammunition that “serves no sporting purpose,” because Plaintiffs are
4 likely to succeed on the merits because the law is vague in all applications and Plaintiffs suffer
5 irreparable harm from the law’s enforcement.

6 **INTRODUCTION**

7 Sections 4512 and 613.10(g) infringe Plaintiffs’ Second Amendment rights to keep and bear
8 arms by requiring locked storage² of handguns in the home *at all times* except when being “carried
9 on the person” and by banning the sale of a broad class of ammunition in common use for self-
10 defense and all “non-sporting” ammunition. The infringements are self-evident because the broad
11 regulations, like those found categorically invalid in *Heller*, directly conflict with the rights of law-
12 abiding adults to keep and bear arms for “the core lawful purpose of self-defense” *within the home*,
13 “where the need for defense of self, family, and property is most acute.” *District of Columbia v.*
14 *Heller*, 554 U.S. 570, 628-30.

15 This direct conflict renders Defendants’ restrictions invalid under *Heller* as a matter of law.
16 For while *Heller* did not settle *all* Second Amendment issues, it emphatically declared that
17 “whatever else it leaves to future evaluation, it surely elevates above all other interests the right of
18 law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 635. This point
19 is not a subtle one. It renders the right to arms within the sanctity of one’s home virtually
20 sacrosanct and restrictions on that right subject to the highest levels of scrutiny.

21 While the challenged ordinances differ in some ways from those invalidated in *Heller*, they
22 nonetheless conflict in similar fashion with the Second Amendment. In *Heller*, the District’s
23 locked-storage law made it “legally impossible” to render one’s handgun operable for self-defense
24 emergencies. *Id.* at 630. Here, by requiring Plaintiffs’ firearms to be stored inoperable when
25 Plaintiffs are at the greatest risk of criminal attack, the City’s locked-storage law makes it
26 “practically impossible” to keep one’s handgun operable for self-defense emergencies. In *Heller*,

27 _____
28 ² “Locked storage,” as it pertains to section 4512, means the requirement that handguns kept
within the home be stored in a locked container or disabled with a trigger-lock.

1 the District also banned a broad class of firearms (handguns) in common use for in-home self-
 2 defense. *Id.* at 629. Here, the City bans the sale of a broad class of ammunition in common use for
 3 self-defense. In each case, the laws directly conflict with the right to keep and bear arms for “the
 4 core lawful purpose of self-defense” in the home.

5 There is no historical precedent supporting, nor any legitimate governmental interest that is
 6 furthered by, the City’s laws which broadly infringe upon the core, fundamental right of law-
 7 abiding citizens to armed self-defense in the home. Accordingly, the City’s laws are
 8 unconstitutional on their face and, by operation of law, cause Plaintiffs irreparable harm. Enjoining
 9 the enforcement of sections 4512 and 613.10(g) will restore Plaintiffs’ constitutional rights and, at
 10 the same time, restore those rights to all San Francisco residents in furtherance of the public
 11 interest. As such, temporary injunctive relief preventing the City from enforcing its
 12 unconstitutional laws is warranted while this case proceeds through discovery and toward
 13 resolution on the merits.

14 STATEMENT OF THE CASE

15 Plaintiffs filed this suit on May 15, 2009, to challenge the validity of sections 4512, 1290,
 16 and 613.10(g), enacted by the City and County of San Francisco and enforced by its Mayor and
 17 Chief of Police (collectively “the City”). Plaintiffs sought declaratory and injunctive relief from
 18 violations of their Second Amendment right to keep and bear arms and their right to due process
 19 enshrined in the Fifth and Fourteenth Amendments. (Am. Compl. [Doc. No. 18] 19:21-21:1.)

20 On July 9, 2009, the City filed its first motion to dismiss. Plaintiffs filed their First
 21 Amended Complaint on August 24, 2009. The case was then stayed pending the determination of
 22 whether the Second Amendment applies against the states. (Min. Order, Aug. 27, 2009 [Doc. No.
 23 21].) That stay was lifted when the U.S. Supreme Court ruled in *McDonald v. City of Chicago*, 561
 24 U.S. 2025, 130 S. Ct. 3020 (2010), that it does. (Order, Sept. 13, 2010 [Doc. No. 37].)

25 The City thereafter filed yet another 12(b)(1) motion to dismiss, arguing again that
 26 Plaintiffs lacked standing to challenge the ordinances because they had not yet been charged with
 27 violating the challenged provisions, and because they allegedly faced no “genuine threat” of
 28 enforcement. (Defs.’ Mem. Supp. Mot. Dismiss [Doc. No. 61] 12:17-20.) For largely the same

1 reasons, the City argued that Plaintiffs' claims were not ripe for review. (*Id.* at 14:18-16:16.) The
 2 Court denied the City's Motion to Dismiss, finding that Plaintiffs have sufficiently alleged
 3 standing and their remaining claims are ripe for review. (Order [Doc. No. 89] 2:4.) The Court also
 4 granted Plaintiffs leave to amend their challenge to Section 1290, which the City repealed in the
 5 wake of this litigation to allow for the discharge of firearms in self-defense and in defense of
 6 others, as well as other circumstances permitted under state and federal law. (*Id.* at 2:6.) Plaintiffs
 7 later filed a notice of intent not to amend. (Notice of Intention to Not Am. Compl. [Doc. No. 90].)

8 The Court thereafter ordered the City to respond to Plaintiffs' First Amended Complaint by
 9 October 17, 2011. (Order, Oct. 6, 2011 [Doc. No. 91].) The City filed its answer wherein it raised
 10 six affirmative defenses, including (improperly) standing and ripeness. (Defs.' Answer [Doc. No.
 11 92] 9:21-10:22.) In response, Plaintiffs filed a motion to strike the standing and ripeness
 12 "affirmative defenses." (Pls.' Mot. to Strike [Doc. No. 96].) In denying that motion, the Court
 13 acknowledged that its ruling on standing and ripeness turned on a relatively narrow set of facts,
 14 which are unlikely to be in substantial controversy. (Order, Dec. 12, 2012 [Doc. No. 105] 1-2.)³

15 On May 17, 2012, Plaintiffs filed a motion for partial judgment on the pleadings. (Pls.'
 16 Mot. J. Pldgs. [Doc. No. 109].) That motion was denied on August 17, 2012. (Order Den. Pls. Mot.
 17 J. Pldgs. [Doc. No. 134].)

18 Plaintiffs now bring this motion for preliminary injunction, asking the Court to enjoin the
 19 enforcement of sections 4512 and 613.10(g) while this case proceeds to resolution on the merits.

20 STATEMENT OF FACTS

21 **Section 4512 – Locked-Storage Requirement:** In August 2007, the City passed section
 22 4512, requiring handguns kept within the home to be stored in a locked container or disabled with
 23 a trigger-lock, unless that firearm "is carried on the person of an individual over the age of 18" or
 24 "under the control of a person who is a peace officer." Under section 4512(e), violation is

25
 26 ³ In support of this motion, and should the City continue to dispute Plaintiffs' standing,
 27 Plaintiffs have concurrently filed declarations attesting to the limited circumstances regarding
 28 each plaintiffs' standing. (*See* Decls. of Espanola Jackson, Paul Colvin, Larry Barsetti, Thomas
 Boyer, David Golden, and Noemi Margaret Robinson Supp. Mot. Prelim. J. filed concurrently
 herewith.)

1 punishable by a fine not to exceed \$1,000 and/or by imprisonment not to exceed six months.

2 In short, section 4512 requires, under threat of prosecution, that Plaintiffs keep their
 3 handguns under lock and key and *not* immediately accessible under *any* circumstances for
 4 self-defense emergencies – except when being “carried on the person.” Notably, the “under the
 5 control” exception *applies only to peace officers*. Plaintiffs highlight this fact as the Court
 6 mistakenly stated in its recitation of relevant facts in its Order Denying Plaintiffs’ Motion for
 7 Judgment on the Pleadings that the “under control” exception applies to Plaintiffs. (Order Den.
 8 Pls.’ Mot. J. Pleadings [Doc No. 134] 2:1-3.) It does not. The only time non-peace officer
 9 residents may unlock their handguns or remove them from their safes is when they “carry” them
 10 “on the person.” And this is true regardless of whether children, felons, or other persons who
 11 *should* be denied access to handguns are present. It is true even when residents are home alone, in
 12 a locked house, in a locked room. It is true whether residents live in large, secure homes in safe
 13 neighborhoods or in small homes or apartments in dangerous neighborhoods.

14 In sum, it is a matter of fact that neither the degree of control one has over his or her
 15 handgun nor the potential need for such control, e.g., to keep the weapon out of the hands of
 16 unauthorized users who might be present, is relevant under the City’s locked-storage ordinance.
 17 *The weapon must be locked up at all times, under all circumstances – unless it is “carried on the*
 18 *person.”* Thus, it is a fact that under the City’s locked-storage law, a competent, law-abiding
 19 resident who lives alone in a studio apartment in a dangerous neighborhood cannot keep an
 20 unlocked, operable handgun on his or her bedside table while sleeping at night under *any*
 21 circumstances. It is also a matter of fact that, regardless of the circumstances under any scenario
 22 one might conjure up – circumstances *not* the result of government action – it will take longer to
 23 access a handgun that is locked in a safe or disabled by a trigger lock than one that is not. And the
 24 City’s forced locked-storage restriction, of course, *is* the result of government action.

25 **Section 613.10(g) – Ban on Sale of Expanding and/or Fragmenting Ammunition and**
 26 **Ammunition that “Serves No Sporting Purpose”:** Plaintiffs also challenge section 613.10(g)’s
 27 ban on the sale, lease, or transfer of ammunition that “serves no sporting purpose” or is designed
 28 to expand or fragment upon impact. Section 613.10(g) effectively prohibits city residents from

1 purchasing ammunition within San Francisco commonly used and preferred for self-defense
2 purposes. Such ammunition, including hollow point ammunition, provides greater “stopping
3 power” against attackers and reduces risks to innocent bystanders resulting from ricochet or over-
4 penetration of assailants and building materials.

5 **ARGUMENT**

6 A plaintiff seeking a preliminary injunction must establish: (1) that he or she is likely to
7 succeed on the merits; (2) that he or she is likely to suffer irreparable harm in the absence of
8 preliminary relief; (3) that the balance of equities tips in his or her favor; and (4) that an injunction
9 is in the public interest. *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052
10 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

11 Plaintiffs have suffered, and if this motion is not granted will continue to suffer, the
12 deprivation of their fundamental Second Amendment rights. They are likely to succeed on the
13 merits of their constitutional claim, and the harm invited upon them is irreparable. Further,
14 granting this motion will not only restore Plaintiffs’ rights, it will restore and protect the
15 constitutional rights of all San Francisco residents, thus serving the public interest. Accordingly,
16 and as described more fully below, Plaintiffs satisfy each of the factors required for temporary
17 injunctive relief pending resolution of the matter on the merits.

18 **I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE THE**
19 **CHALLENGED PROVISIONS VIOLATE PLAINTIFFS’ FUNDAMENTAL**
20 **SECOND AMENDMENT RIGHT TO SELF-DEFENSE**

21 The City’s requirement that all residents carry their handguns around their homes or keep
22 them locked up, regardless of the circumstances, renders Plaintiffs’ guns unavailable and thus
23 inoperable for “immediate self-defense” in emergency situations. *See Heller*, 554 U.S. at 635. A
24 law that renders guns useless for emergency self-defense within the sanctity of one’s own home
25 cannot pass constitutional muster under any test. As such, Plaintiffs are exceedingly likely to
26 succeed on the merits.

26 **A. Standard of Review Governing Second Amendment Challenges**

27 The Supreme Court, while not settling on a framework for all Second Amendment
28 challenges, has left little doubt that courts are to assess gun laws based on history and tradition,

1 and not by resorting to interest-balancing tests. The *Heller* majority rejects the “tiers-of-scrutiny”
2 framework advanced by the City and acknowledged by this Court in its Order Denying Plaintiffs’
3 Motion for Judgment on the Pleadings. *Heller*, 554 U.S. at 628 n.27, 634-35; *see also Heller v.*
4 *District of Columbia (Heller II)*, 670 F.3d 1244, 1271-74 (D.C. Cir. 2011) (Kavanaugh, J.,
5 dissenting). Alternatively, strict scrutiny must apply.

6 **1. *Heller* and *McDonald* Endorse a Scope-Based Analysis, Not a Means-
7 End Approach that Necessarily Entails a Balancing of Interests**

8 *Heller* advances an analytical approach that first focuses on “examination of a variety of
9 legal and other sources to determine *the public understanding* of [the] legal text,” 554 U.S. at 605,
10 with particular focus on “the founding period,” *id.* at 604, to determine whether the restricted
11 activity falls within the scope of the Second Amendment. If it does, the court again turns to “text
12 and history” to determine whether the particular restriction is nevertheless permissible because it
13 is analogous to restrictions historically understood as permissible limits on the right to bear arms,
14 i.e., whether there is some “historical justification for those regulations.” *Id.* at 635. In short,
15 where sufficient historical justifications exist for a restriction on activity falling within the scope
16 of the right, the restriction is valid; if not, it is invalid. *See id.* at 634-35. The presumption, of
17 course, is that activity falling within the scope of the right to arms “shall not be infringed,” with
18 the burden on the government to justify the challenged restriction, based on text, history, and
19 tradition. *See id.* at 634-36.

20 When *Heller* was argued before the Supreme Court, the Solicitor General urged the Court
21 to employ “intermediate scrutiny” in reviewing the District’s handgun ban and locked-storage law,
22 believing if that standard were employed, the laws would be upheld. *See Oral Arg.* at 44-45,
23 *Heller*, 554 U.S. 570 (No. 07-290) (attached as “Ex. A” to the Declaration of Anna M. Barvir
24 (“Barvir Decl.”) filed concurrently herewith). Chief Justice Roberts rejected this attempt to
25 “articulate an all-encompassing standard” applicable to every Second Amendment case, asking:

26 Isn’t it enough to determine the scope of the existing right that the amendment
27 refers to, look at the various regulations that were available at the time, including
28 you can’t take the gun to the marketplace and all that, and determine how . . . this
restriction and the scope of this right looks in relation to those?

I’m not sure why we have to articulate some very intricate standard. I mean,
these standards that apply in the First Amendment just kind of developed over the

1 years as sort of baggage that the First Amendment picked up. But I don't know why
2 when we are starting afresh, we would try to articulate a whole standard that would
apply in every case? *Id.*

3 Chief Justice Roberts was suggesting that courts simply ask whether the law restricts
4 activity falling within the scope of the right as originally understood. If it does, the law is
5 *presumed* invalid unless the *government* can show its regulation is so commonplace in our history
6 and traditions that the scope of the fundamental right to keep and bear arms must be understood in
7 light of it. But there would be no "balancing test" or weighing of burdens and benefits. *Id.*

8 When *Heller* was decided, this scope-based approach was, in large part, the approach taken
9 by the majority, after it expressly rejected Justice Breyer's subjective, interest-balancing test. 554
10 U.S. at 634-35. Notably absent from *Heller's* analysis was any discussion of "compelling
11 interests," "narrowly tailored" laws, or any other standard of review jargon. Nor were there
12 discussions of the District's "legislative findings" purporting to justify the restrictions.

13 Instead, *Heller* focused on whether the challenged laws restricted the right to keep and bear
14 arms as that right was understood by those who drafted and enacted both the Second and
15 Fourteenth Amendments. *Id.* at 626-34. The Court gleaned that understanding from an extensive
16 examination of the textual and historical narrative surrounding the pre-existing right to arms, to
17 define, at least in broad terms, the scope of the rights that the Second Amendment guarantees. *Id.*
18 at 605-19. In doing so, the Court emphasized that "[c]onstitutional rights are enshrined with the
19 scope they were understood to have when the people adopted them, whether or not future
20 legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35.

21 The *Heller* Court ultimately found that handguns are arms protected by the Second
22 Amendment, *id.* at 629, and that keeping handguns in one's home for self-defense purposes is core
23 conduct protected by the same, *id.* at 635. Because the District's handgun ban and locked-storage
24 requirement directly conflicted with protected conduct, and because there was no historical record
25 of such restrictions, the laws were unconstitutional. *Id.* at 628-30.

26 The Court's later decision in *McDonald* further underscored the notion that history and
27 tradition, rather than burdens and benefits, should guide analyses of Second Amendment
28 challenges. Like *Heller*, *McDonald* did not use balancing tests, and it expressly rejected judicial

1 assessment of “the costs and benefits of firearms restrictions,” stating that courts should not make
2 “difficult empirical judgments” about the efficacy of particular gun regulations. *McDonald v. City*
3 *of Chicago*, 130 S. Ct. 3020, 3050 (2010). This language is compelling. Means-end tests, like
4 strict or intermediate scrutiny, necessarily require the assessment of the “costs and benefits” of
5 government regulations, as well as “difficult empirical judgments” about their effectiveness. The
6 Court’s clear rejection of such inquiries is incompatible with a means-end approach to Second
7 Amendment challenges.

8 **2. Alternatively, Should the Court Adopt a Means-End Test for Second**
9 **Amendment Challenges, Strict Scrutiny Must Apply**

10 Should the Court hold that restrictions on the core right of law-abiding citizens to self-
11 defense are subject to means-end review, strict scrutiny must be the test. The City has claimed that
12 intermediate scrutiny (or less) is appropriate for all but the most severe of Second Amendment
13 deprivations.⁴ But this argument conflicts with protections that courts afford to core areas of other
14 fundamental, enumerated rights. And it rests on cases involving factors not present in *Heller* (e.g.,
15 prohibited person, sensitive place, unprotected arms). Here too, no such factors are in play.

16 Just as “any law regulating the content of speech is subject to strict scrutiny, . . . any law
17 that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding
18 citizen would be subject to strict scrutiny.” *United States v. Masciandaro*, 638 F.3d 458, 470 (4th
19 Cir. 2011). Courts routinely apply strict scrutiny when restrictions on *core* First Amendment
20 conduct is concerned, including regulations on the content of speech, *United States v. Playboy*
21 *Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000), political expenditures, *Citizens United v.*
22 *Fed. Election Comm’n*, __ U.S. __, 130 S. Ct. 876, 898 (2010), and expressive association,
23 *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). In these contexts, courts consider the severity
24 of the burden that a regulation places on core protected conduct only in weighing whether the
25 regulation survives strict scrutiny – *not in determining the applicable standard of review*. See
26 *Citizens United*, 130 S. Ct. at 898-99; *Playboy Entm’t Grp., Inc.*, 529 U.S. at 812-13; *Boy Scouts*
27 *of America v. Dale*, 530 U.S. 640, 658-59 (2000); *Roberts*, 468 U.S. at 658-59. Here too, where

28 ⁴ Laws restricting Second Amendment conduct demand more than rational basis review. Whatever else *Heller* left for future courts to decide, it is clear on this point. 554 U.S. at 628 n.27.

1 the laws restrict the *core* Second Amendment right to self-defense in the home by law-abiding
2 adults, strict scrutiny must apply regardless of the severity of the burden imposed.

3 The City has maintained that Plaintiffs' challenge is at most entitled to intermediate
4 scrutiny because the degree of burden on Plaintiffs' rights is minimal. Even assuming the burden
5 here is minimal (which plaintiffs do not concede), this approach derives no support from *Heller* or
6 *McDonald*, and it stands in direct opposition to the protection afforded to core areas of
7 enumerated, fundamental rights. While a minority of courts have relied on the severity of the
8 burden in determining whether strict or intermediate scrutiny applies, this is *not* the approach
9 generally taken. *See, e.g., United States v. Decastro*, 682 F.3d 160, 164-65 (2012), *Heller II*, 670
10 F.3d at 1257. Instead, most circuits have determined the applicable standard of review based on
11 whether or not the challenged law regulates conduct at the "core" of the Second Amendment. *See,*
12 *e.g., Masciandaro*, 638 F.3d at 470; *United States v. Weaver*, No. 09-00222, 2012 WL 727488, at
13 *6 (S.D. W. Va. Mar. 6, 2012) (citing *Masciandaro* with approval); *United States v. Chester*, 628
14 F.3d 673, 680, 682-83 (4th Cir. 2010) (applying intermediate rather than strict scrutiny because
15 firearm possession by domestic violence misdemeanor is not within the core right of the law-
16 abiding citizen to possess a firearm for self-defense).

17 Those courts that have applied intermediate scrutiny have done so in cases presenting
18 vastly different questions than those presented here. Almost without exception, these cases do not
19 involve the right to armed self-defense by law-abiding citizens within the home.⁵ In fact, most
20 involve conduct decidedly *outside* the core Second Amendment right, including possession by
21 violent criminals, *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), *Chester*, 628 F.3d at
22 680, 682-83; *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010), *United States v. Skoien*,
23 614 F.3d 638, 641 (7th Cir. 2010), possession in places the court determined to be "sensitive,"
24 *Masciandaro*, 638 F. 3d at 471, and possession of arms the court determined are not in "common
25 use" for lawful purposes, *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

27 ⁵ The only cases relating to possession in the home dealt with challenges to simple permitting
28 or registration laws. Those laws do not directly conflict with core conduct in the manner that the
City's laws do. *Heller II*, 670 F.3d at 1254; *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

1 Accordingly, should the Court determine that the *Heller* scope-based analysis described
2 above does not apply, precedent demands the application of strict scrutiny.

3 **B. Section 4512 Violates the Second Amendment**

4 The City’s requirement that all residents carry their handguns around their homes or keep
5 them locked up, regardless of the circumstances, renders Plaintiffs’ guns unavailable and thus
6 inoperable for “immediate self-defense” in emergency situations. *See Heller*, 554 U.S. at 635.⁶ A
7 law that renders guns useless for emergency self-defense within the sanctity of one’s own home
8 cannot pass constitutional muster – under any test.

9 **1. The City’s Requirement that Handgun Owners Either Carry Their**
10 **Handguns or Keep Them Locked Up at All Times in Their Homes Is**
11 **Invalid Under *Heller*’s Scope-Based Approach**

12 The City’s locked-storage law plainly restricts the right to keep and bear operable arms
13 within the home for the “core lawful purpose” of self-defense. The restriction is obvious and
14 significant. As such, it is incumbent upon the City to show its law is like others historically or
15 traditionally accepted by those who drafted and enacted both the Second and Fourteenth
16 Amendments as a proper limit on the right to arms. The City cannot meet that burden, for there is
17 no such history or tradition regarding mandatory locked storage.

18 **a. The City’s Locked-Storage Law Restricts the Right to Keep and**
19 **Bear Arms for the “Core Lawful Purpose” of Self-Defense in the**
20 **Home**

21 The City’s locked-storage law renders Plaintiffs’ handguns *not* “operable for the purpose
22 of immediate self-defense” in the home, *see Heller*, 544 U.S. at 635, making them, for all practical
23 purposes, useless for self-defense in emergencies. The restriction on Plaintiffs’ Second
24 Amendment rights is obvious and cannot be rationalized away by positing hypothetical scenarios
25 that *might* allow an individual time to unlock and use a handgun when under attack.

26 It is a matter of common sense that City’s locked-storage requirement imposes a restriction
27 on Second Amendment rights. Chief Justice Roberts and Justice Scalia illuminated this point
28

⁶ The term “inoperable” is used to describe handguns kept in a locked container or disabled with a trigger-lock because that is what they are in a self-defense emergency. One could use them as a projectile or bludgeon, but cannot operate them as intended. (*See infra* p. 12:7-11 for colloquy between Chief Justice Roberts and Justice Scalia.)

1 during oral argument in *Heller* when counsel for the District suggested the locked-storage law at
2 issue there had an implied self-defense exception and that, because of that exception, the
3 ordinance did not restrict one’s right to armed self-defense. The Chief Justice and Justice Scalia
4 disagreed, finding the contention implausible as they briefly imagined the steps needed to render a
5 locked handgun operable to defend against a sudden late-night attack:

6 JUSTICE SCALIA: You turn on, you turn on the lamp next to your bed so you can – you
can turn the knob at 3-22-95, and so somebody –

7 MR. DELLINGER: Well –

CHIEF JUSTICE ROBERTS: Is it like that? Is it a numerical code?

8 MR. DELLINGER: Yes, you can have one with a numerical code.

9 CHIEF JUSTICE ROBERTS: So then you turn on the lamp, you pick up your
reading glasses –
(laughter)

10 Oral Arg. at 83-84, *Heller*, 554 U.S. 570 (No. 07-290) (attached as “Ex. A” to Barvir Decl. filed
11 concurrently herewith.)

12 While the Court found humor in counsel’s suggestion that the locked-storage law (even
13 assuming a self-defense exception) would impose only a minimal burden on the right to arms in a
14 self-defense emergency, the point is a serious one that translates well to the present case. The
15 restriction the City imposes on conduct at the core of the Second Amendment is both obvious and
16 significant, making armed self-defense impractical, if not impossible, when the need is most acute.
17 In comparison to the storage law struck down in *Heller*, we have simply gone from a law making
18 it “legally impossible” to keep a handgun ready for emergency self-defense to one that makes it
19 “practically” impossible to do so. That is a distinction without a difference when facing a sudden
20 attack.⁷

21 In short, the locked-storage law, even with a self-defense exception – which is essentially
22 what the City’s “carry” exception amounts to – renders a firearm inoperable for immediate self-

24 ⁷ Moreover, “impossibility” of self-defense *cannot* be the standard for finding firearms
25 restrictions invalid. If it were, *Heller* would not have struck down the District’s handgun ban, for
26 long guns were readily available for armed self-defense. But the Court found that it is not
27 permissible to ban handgun possession simply because long gun possession is allowed, for the
28 availability of shotguns does not save the handgun ban from constitutional infirmity. *Heller*, 554
U.S. at 629. Similarly, just because the City’s law may leave open some avenue for exercising the
right to in-home self-defense, e.g., by wearing a handgun around the house during the day, it does
not follow that the restriction is valid.

1 defense in the home and restricts the right to arms.

2 **b. There Is No Historical or Traditional Support for Forcing**
3 **Handgun Owners to Carry Their Firearms or Keep Them**
4 **Locked Up at All Times in the Sanctity of Their Own Homes**

5 Consistent with *Heller*'s analysis, after finding that a regulation restricts conduct within
6 the Second Amendment's scope, courts should consider whether the regulation was historically or
7 traditionally understood to be an accepted limitation on the right. *Heller*, 554 U.S. at 626-28. The
8 question here becomes whether laws requiring people to keep their handguns locked up when in
9 their own homes – regardless of the circumstances – were part of the historical narrative
10 surrounding the Second Amendment when it was drafted.

11 *Heller* refers to a single framing-era ordinance, enacted in Boston in 1783, that prohibited
12 the taking of loaded firearms into “any Dwelling House, Stable, Barn, Out-house, Ware-house,
13 Store, Shop or other Building” and permitted the seizure of any loaded firearms found therein. *Id.*
14 at 631 (quoting Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts p. 218). But the Court found this
15 isolated law only marginally relevant to the debate over the government's right to regulate
16 firearms in the home, noting that “a single law, in effect in a single city” is *not* evidence of a
17 regulatory scheme steeped in tradition. *Id.* at 632.⁸

18 *Heller* cites no examples of laws requiring law-abiding citizens to keep firearms locked at
19 all times in the home when not being carried. If there had been any historical evidence suggesting
20 that people thought the government had such authority, the dissent certainly would have cited it,
21 and the majority would have had to distinguish it from the storage ordinance at issue in that case.
22 But *Heller* never engaged in such an analysis because there simply is no history or tradition
23 supporting the requirement. Even today, such restrictive laws are extremely rare.⁹

24 In sum, *Heller* found that keeping, bearing, and using handguns in defense of hearth and

25 ⁸ The only other historic ordinances offered by Justice Breyer, *id.* at 684-86 (Breyer, J.,
26 dissenting), and dismissed by the Court, *id.* at 632-33 (majority opinion), addressed the storage of
27 excess gunpowder – again, to protect firefighters in densely populated urban areas; *not* to
28 “protect” law-abiding citizens from themselves.

⁹ Massachusetts remains an outlier, with the City, in imposing such an unnecessary and
extreme restriction on the right to keep arms in the home. *See* Mass. Gen. Laws ch. 140, § 131L.

1 home is core conduct protected by the Second Amendment. *Id.* at 635. Common sense, and the
 2 United States Supreme Court, tell us that the City’s law restricts that protected conduct. Plaintiffs
 3 have thus satisfied the first prong of *Heller’s* two-part test. But the City cannot meet its burden to
 4 establish that there is a significant history or tradition supporting laws mandating locked storage of
 5 firearms. The City’s locked-storage requirement is thus categorically invalid, and Plaintiffs are
 6 likely to succeed on the merits of their Second Amendment challenge to section 4512.

7 **2. The City’s Requirement that Handguns Be Kept Locked Up When Not**
 8 **Being “Carried” Within the Home Cannot Survive Strict Scrutiny – or**
 9 **Any Heightened Scrutiny**

10 Under strict scrutiny, the City must show that its locked-storage law is “narrowly tailored
 11 to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 301-02 (2008). And to pass
 12 muster under even intermediate scrutiny, a standard that is not appropriate in this case, the City
 13 must establish that its locked-storage law is “*substantially* related to an important governmental
 14 objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (emphasis added). That is, the City must
 15 establish a tight “fit” between the locked-storage requirement and a substantial governmental
 16 interest, a fit “that employs not necessarily the least restrictive means but . . . a means *narrowly*
 17 *tailored* to achieve the desired objective.” *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S.
 18 469, 480 (1989) (emphasis added). “The requirement of narrow tailoring is satisfied so long as the
 19 regulation promotes a substantial governmental interest that would be achieved less effectively
 20 absent the regulation, and the means chosen are not substantially broader than necessary to achieve
 21 that interest.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989). Even assuming the
 22 government has sufficient interest in the manner that law-abiding citizens store their firearms in
 23 their homes, the City’s broad and burdensome law is simply not “narrowly tailored.”

24 The City cannot defend its infringement of Plaintiffs’ constitutional rights by claiming the
 25 law is intended to protect children from accidental injury or to keep handguns out of the hands of
 26 unauthorized persons, with any attendant restriction on the right being incidental and necessary.
 27 There is simply no logical fit between such an interest and a law requiring that *all* residents,
 28 including competent, law-abiding adults, keep their handguns locked up at *all times* – regardless
 of whether a minor or a felon or anyone else is present or has access to them.

1 Many states have *safe-storage* regulations that address the concerns above, but in a far less
 2 burdensome manner, with safe storage being a factor that absolves the gun owner of criminal
 3 liability if an unauthorized person gains access to and misuses the firearm, thus providing
 4 significant incentive for safe storage.¹⁰ These laws promote the same governmental interest, but do
 5 so in a way that at least attempts to respect the rights of law-abiding citizens to keep their firearms
 6 operable for immediate self-defense. The City’s law is not so tailored. It instead broadly sweeps up
 7 all gun owners and requires they keep their handguns inoperable regardless of the circumstances.

8 The only remaining justification for forcing law-abiding adults to keep their handguns
 9 locked at all times is that guns are dangerous. Authorized users might pick up an unlocked
 10 handgun and accidentally shoot themselves – or do it on purpose. But the ordinance itself allows
 11 authorized users to carry operable handguns in the home, making the argument that the locked-
 12 storage requirement will reduce accidents and suicides among authorized users tenuous at best.

13 Moreover, the oft-cited suicide-reduction argument is directly at odds with the right to use
 14 arms in self-defense. That argument rests on the belief that the additional time it takes to unlock a
 15 handgun will afford the suicidal person time to reconsider the act – the more time, the better. The
 16 opposite is of course true in self-defense emergencies where any delay in accessing an operable
 17 handgun necessarily reduces the ability to use it to ward off an attack. Thus, in the interest of a
 18 questionable theory on suicide prevention, the City’s locked-storage requirement, by design,
 19 infringes the fundamental right to armed self-defense in the home.

20 Any debate regarding whether it is a good idea to allow law-abiding adults to possess and
 21 use firearms is over. The Framers surely understood that guns are dangerous and that their misuse
 22 can result in accidental death or suicide, just as they understood that *most* rights involve risks,
 23 including injury and death. For instance, the *McDonald* Court noted how the constitutionally
 24 protected rights of criminal defendants allow some criminal offenders back on the streets to repeat

26
 27 ¹⁰ See Cal. Penal Code §§ 25100, 25105, 25200, 25205; Fla. Stat. § 790.174; Haw. Rev. Stat.
 28 §§134-10.5, 707-714.5; 720 Ill. Comp. Stat. 5/24-9(a); Iowa Code § 724.22(7); Md. Code Ann.,
 Crim. Law § 4-104; Minn. Stat. § 609.666; N.H. Rev. Stat. Ann. § 650-C:1; N.J. Stat. Ann. §
 2C:58-15; N.C. Gen. Stat. § 14-315.1; R.I. Gen. Laws § 11-47-60.1; Tex. Penal Code § 46.13.

1 their crimes. 130 U.S. at 3045. But that does not give state and local officials license to curtail
 2 those constitutional rights. The same is true of the Second Amendment. The right to keep arms in
 3 an operable (i.e., useful) condition cannot be prohibited by laws that seek justification in well-
 4 known risks associated with that very right, risks equally well-known to those who enshrined the
 5 right in our Second Amendment. As *Heller* observed, the inclusion of the right to arms in the Bill
 6 of Rights “necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636.

7 Because the City’s requirement that handguns be kept locked up when not being “carried”
 8 within the home cannot survive any level of heightened scrutiny, Plaintiffs are likely to succeed on
 9 the merits.

10 **C. Section 613.10(g) Violates the Second Amendment**

11 The threshold question here is whether the Second Amendment protects the sale and
 12 purchase of ammunition. Assuming it does, the City’s ban on the sale of expanding and/or
 13 fragmenting ammunition is categorically invalid under *Heller*’s scope-based approach because it
 14 restricts protected conduct without any historical justification. Alternatively, the ban fails any
 15 heightened means-end test. The City’s total ban on the sale of *any* ammunition that does not
 16 “serve a sporting purpose” is similarly invalid. That provision requires only brief examination
 17 because its sporting-purpose limitation cannot be reconciled with the “central component” of the
 18 Second Amendment right: self-defense.

19 **1. The Second Amendment Secures a Fundamental Right to Acquire**
 20 **Firearms and Ammunition for Self-Defense and the City’s Ammunition**
 21 **Sales Ban Restricts that Right**

22 Arms “typically possessed by law-abiding citizens for lawful purposes” or those “in
 23 common use” are protected by the Second Amendment. *Heller*, 554 U.S. at 624-25 (citation and
 24 internal quotation marks omitted). And the Second Amendment protects equally the purchase and
 25 possession of ammunition necessary to meaningfully exercise the right to keep and bear arms. *See*
 26 *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579-80 (1980) (“[F]undamental rights, even
 27 though not expressly guaranteed, have been recognized by the Court as indispensable to the
 28 enjoyment of rights explicitly defined.”); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right
 to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency

1 for use, and to purchase and provide ammunition suitable for such arms. . . .”). It follows that
2 ammunition in “common use” for “lawful purposes” is protected by the Second Amendment, and
3 any restriction on its sale is presumed invalid.

4 Further, banning commerce in arms violates the Second Amendment right at its core.
5 *Marzzarella*, 614 F.3d at 92 n.8. The government can no more ban the sale of protected
6 ammunition than it can ban the sale of protected books, contraceptives, or even violent video
7 games. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965); *Brown v. Entm’t Merchs.*
8 *Ass’n*, ___ U.S. ___, 131 S. Ct. 2729, 2738 (2011). A right to keep and bear arms, without the
9 attendant right to acquire them, would be meaningless. Laws, like section 613.10(g), that prohibit
10 law-abiding citizens from purchasing protected arms are at odds with the Second Amendment,
11 regardless of whether they directly restrict the possession of those arms. *See Bateman v. Perdue*,
12 No. 5:10-265, 2012 WL 3068580, at *4 (E.D. N.C. Mar. 29, 2012)

13 Section 613.10(g) plainly restricts Plaintiffs’ fundamental rights by banning the sale of
14 ammunition in “common use” for self-defense and by banning civilian purchases of ammunition
15 that does not “serve a sporting purpose,” regardless of its use for self-defense.

16 **a. The City’s Ban on the Commercial Sale of Ammunition in**
17 **“Common Use” for Lawful Purposes Cannot Survive Judicial**
Review Under Any Test

18 The City’s ban on the sale of expanding and/or fragmenting ammunition broadly restricts
19 the sale of ammunition commonly used by law-abiding residents for self-defense. The City can
20 provide neither historical basis nor legitimate justification for the restriction, rendering the law
21 invalid under both *Heller*’s scope-based analysis and any means-end test consistent with *Heller*.

22 **i. The City’s Ban on the Sale of Expanding and/or**
23 **Fragmenting Ammunition Is Categorically Invalid**
Under *Heller*’s Scope-Based Analysis

24 In *Heller*, the Court found a ban on handguns, a class of weapons in “common use” for
25 self-defense in the home, categorically invalid despite the availability of long guns. *Heller*, 554
26 U.S. at 629. The Court held that “[i]t is enough to note . . . that the American people have
27 considered the handgun to be the quintessential self-defense weapon” and “a complete prohibition
28 on [its] use is invalid.” *Id.* Finding handguns to be commonly used for a lawful purpose (i.e., self-

1 defense) and banned by the challenged ordinance, the Court did not have to go any further. *Id.*

2 Here, section 613.10(g)(2)-(3) bans the sale of any ammunition “designed to expand . . .
3 [or] fragment upon impact.” Like the class of arms at issue in *Heller*, i.e. handguns, this class of
4 ammunition is in “common use” for lawful purposes including self-defense, *see* “Exs. B-X”
5 attached to Barvir Decl. filed concurrently herewith. As such, the City cannot completely ban its
6 sale and purchase. With its reduced risk of over-penetration and ricochet, and its ability to bring
7 down a violent aggressor with fewer shots fired, the prohibited ammunition is especially preferred
8 over fully-jacketed ammunition in densely-populated areas.¹¹ Such ammunition is common
9 throughout the nation and it is widely available in every state, there being no statewide ban on its
10 sale or possession in California or elsewhere.¹² And it is no secret that civilians who own firearms
11 for self-defense regularly purchase the ammunition at issue for use in self-defense emergencies.
12 Indeed, such ammunition is regularly marketed for just that purpose. (*See* “Exs. T-X” attached to
13 Barvir Decl. filed concurrently herewith.) It is indeed the “quintessential” self-defense
14 ammunition. The City cannot credibly claim that ammunition both sold and possessed on a
15 widespread basis by civilians for self-defense is not in “common use” for lawful purposes.¹³

16 In short, section 613.10(g) flatly prohibits the sale of ammunition in “common use” for
17

18 ¹¹ Experts cite many advantages of expanding bullets over fully-jacked ammunition: (1) reduced
19 ricochet, (2) reduced over-penetration of target and building materials, and (3) ability to take
20 down subject in fewer shots. *See e.g.*, Clifford Krauss, *Experts Support Hollow Point Bullets*,
21 N.Y. Times, Mar. 6, 1997 (attached as “Ex. C” to Barvir Decl. filed concurrently herewith) (“[the
22 hollow point bullet] rarely ricochets or penetrates an object, thereby lessening the possibility of
23 hitting anyone other than the target”); Stephen J. Lynton & Alfred E. Lewis, *More Powerful
24 Ammo Studied By D.C. Police*, Wash. Post, Nov. 5, 1976 at A1, A4 (attached as “Ex. K” to Barvir
25 Decl. filed concurrently herewith) (“you can neutralize the individual with a minimum number of
26 shots”).

27 ¹² New Jersey remains an outlier, regulating the carry of hollow nose bullets. N.J. Stat. Ann. §
28 2C:39-3(f),(g). But even that statute does not ban the sale or possession of such ammunition.

¹³ The self-defense interests of police in using this ammunition are no different than those of
civilians. If anything, a civilian’s needs for effective self-defense ammunition are *more* acute.
Hollow point ammunition allows the defensive shooter to bring down a target with fewer shots
fired. Lynton & Lewis, *supra* note 11. This is crucial for civilians who are less likely than an
officer to have backup support for taking down an agressor.

1 self-defense. While the City may be able to regulate ammunition sales to a degree, this far-
 2 reaching ban on the sale of common self-defense ammunition to law-abiding residents goes too
 3 far, directly conflicting with conduct protected by the right to engage in self-defense, “ ‘the *central*
 4 *component*’ of the Second Amendment” *McDonald*, 130 S. Ct. at 3036, 3048.

5 Under *Heller*’s analysis, the City must establish that our nation’s history and traditions
 6 support its flat ban on the sale of arms commonly used for self-defense. Plaintiffs submit that the
 7 City cannot meet its burden, rendering the City’s ban categorically invalid. And Plaintiffs are
 8 likely to succeed on the merits.

9 **ii. The City’s Ban on the Sale of Expanding and/or**
 10 **Fragmenting Ammunition Fails Under Any Level of**
 11 **Heightened Scrutiny**

12 Even if the Court applies a means-end analysis, section 613.10(g) still fails because there is
 13 no logical fit between the City’s ban and any interest the City may claim. And in no way is the
 14 City’s law “narrowly tailored” to those ends. Under the guise of an interest in “public safety,” the
 15 City bans the sale of expanding and/or fragmenting ammunition. By barring access to expanding
 16 and/or fragmenting ammunition, the law promotes the use of fully-jacketed ammunition –
 17 ammunition that is *more* dangerous to bystanders and neighbors in urban settings. And it
 18 eliminates access to ammunition designed to prevent ricochet and the over-penetration of targets
 19 or building materials, notorious characteristics of the fully-jacketed round. Krauss, *supra* note 11
 20 (quoting New York Medical Examiner, Dr. Charles Hirsch, “[Hollow points] are much less likely
 21 to pierce through a person, a wall, a car or other object than are fully-jacketed bullets. I think they
 22 are safer”). The use of fully-jacketed ammunition thus *increases* the likelihood that shots will pass
 23 through a target or objects behind the target. Expanding and/or fragmenting ammunition reduces
 24 that risk, making the public more safe, not less.

25 Further, the City can advance no legitimate reason (or even a rational explanation) why the
 26 government may ban the sale of protected arms despite being precluded from banning the
 27 possession of those same protected arms. And the City’s blanket sales prohibition is in no way
 28 sufficiently tailored to its stated public safety objectives. *See Reno*, 507 U.S. at 301-02; *Bd. of*
Trustees of State Univ. of N.Y., 492 U.S. at 480. Ultimately, the City’s ammunition ban represents

1 a policy choice as to the types of protected arms it desires its residents to use. But, as *Heller* made
 2 clear, such policy choices are off the table when considering commonly used, constitutionally
 3 protected, firearms and ammunition. *See* 554 U.S. at 636.

4 Moreover, governmental interests in banning handguns are virtually identical to the City's
 5 purported interests in banning hollow-point ammunition – to decrease violent injuries caused by
 6 handguns, whether through criminal misuse, accidents, or suicides through decreased availability
 7 of such arms.¹⁴ Despite these interests, the Supreme Court in *Heller* found the Districts' handgun
 8 ban unconstitutional – making clear that even if the Court *had* adopted a means-end standard of
 9 review, that the City's handgun ban would be unconstitutional under any test. *Id.* at 628-29. The
 10 City's ammunition ban is similarly invalid.

11 **C. The City's Ban on the Sale of "Ammunition that Does Not Serve a Sporting
 12 Purpose" Cannot Survive Judicial Review, Under Any Test**

13 The City's ammunition ban is wholly inconsistent with the mandates of the Second
 14 Amendment and its "central component": individual self-defense. *McDonald*, 130 S. Ct. at 3036.
 15 Moreover, as explained above, the Second Amendment protects the right to acquire firearms and
 16 ammunition "in common use" for lawful purposes – period. The City cannot impose additional
 17 "constitutional" conditions by requiring that commonly used ammunition *also* be used for some
 18 City-recognized "sporting purpose" before Plaintiffs have the right to acquire it.

18 **1. The City's "Sporting Purposes"-Based Ammunition Ban Is
 19 Categorically Invalid Under *Heller's* Scope-Based Analysis**

20 There is simply no squaring the right to acquire firearms and ammunition for self-defense
 21 purposes with section 613.10(g)'s ban on the sale (and purchase) of ammunition that "does not
 22 serve a sporting purpose." While the City's ordinance fails to define "sporting purpose," it is clear
 23 that whatever recreational or competitive activities are covered by the City's "sporting purpose"
 24 qualification, defending oneself from violent crime in the home is not among them. Self-defense is

25 ¹⁴ The District of Columbia advanced these interests in support of its handgun ban in *Heller*,
 26 554 U.S. at 634, and the City itself advanced similar interests when it instituted its own handgun
 27 ban. Proposition H, as approved by voters, Gen. Elec. (November 8, 2005) §§ 1-3, invalidated by
 28 *Fiscal v. City and County of San Francisco*, 158 Cal. App. 4th 895 (Cal. App. 2008) (attempting
 to justify ban because "handgun violence is a serious problem" and because handguns contributed
 to 67% of firearms-related injuries and deaths).

1 not a sport. Neither is militia duty, for that matter. Unless the City can show that all commonly
2 used “self-defense ammunition” also serves a “sporting purpose,” the provision necessarily
3 restricts conduct protected by the Second Amendment. Thus, the first prong of *Heller’s*
4 scope-based analysis is satisfied. That being the case, it is the City’s responsibility to show some
5 textual, historical, or traditional support for banning the sale of “ammunition that does not serve a
6 sporting purpose” to law-abiding citizens. None appears in *Heller* or *McDonald*. Plaintiffs submit
7 there is none and that the “sporting purpose” provision is categorically invalid. Plaintiffs are thus
8 likely to succeed on the merits.

9 **2. The City’s “Sporting Purposes”-Based Ammunition Ban Fails Under**
10 **Any Level of Heightened Scrutiny**

11 Even if the Court applies a means-ends test to City’s “sporting purposes”-based ban, the
12 analysis ends quickly under any standard of review as there is no legitimate interest in restricting
13 firearms use to “sporting purposes.” The City’s interest cannot be public safety. There is no logical
14 reason to think the public would be safer if gun owners use only “sporting” ammunition.

15 The nonsensical nature of the ban is revealed when considering the ammunition it allows
16 and that which it ostensibly prohibits. Under the City’s law, ammunition commonly used to hunt
17 elk and bears is legal. Yet the City prohibits sales of the smallest caliber ammunition if it is not
18 sufficiently used for “sporting purposes.” The City cannot credibly argue that its interest in public
19 safety is served by an ordinance that permits residents to purchase ammunition so powerful it is
20 used to kill wild animals weighing more than 1000 pounds, but not ammunition of the smallest
21 caliber – just because it isn’t sufficiently used in “sporting” activities.

22 In short, section 613.10(g)(1) cannot survive any level of scrutiny and Plaintiffs are likely
23 to succeed on the merits of their Second Amendment challenge to the provision. It serves no
24 compelling interest, nor a substantial one – and it is not tailored to serve any such interests. In fact,
25 to the extent the law is intelligible, it is irrational because it bans the sale of ammunition
26 commonly used for *self-defense* if it does not also satisfy the City’s “*sporting purposes*” condition.

27 But, as with the City’s expanding and fragmenting ammunition sales ban, such means-end
28 analysis is unnecessary because the City’s “sporting purpose” provision so clearly conflicts with
the core constitutional guarantee of armed self-defense in the home – without any historical

1 support.

2 **D. Section 613.10(g) Is Void for Vagueness**

3 The due process clause guarantees individuals the right to “fair notice” of whether their
4 conduct is prohibited by law. *Colautti v. Franklin*, 439 U.S. 379, 390-91 (1979). A law must fail
5 for vagueness unless it first “give[s] the person of ordinary intelligence a reasonable opportunity to
6 know what is prohibited, so that he may act accordingly.” *Grayned v. City of Rockford*, 408 U.S.
7 104, 108 (1972). Second, the law must provide “explicit standards” for the application of the law
8 to prevent “arbitrary and discriminatory enforcement.” *Id.* Further, laws that abut upon
9 constitutionally protected freedoms demand the greatest clarity. *Bagget v. Bullitt*, 377 U.S. 360,
10 372 (1964) (“[T]he vice of unconstitutional vagueness is further aggravated where . . . the statute
11 in question *operates to inhibit the exercise of individual freedoms affirmatively protected by the*
12 *Constitution.*”). Although past Ninth Circuit jurisprudence suggests that the most exacting
13 vagueness review for laws implicating constitutional conduct should be limited to the free speech
14 context, *Hotel & Motel Ass’n of Oakland v. City of Oakland* 344 F.3d 959 (9th Cir. 2003), the
15 Second Amendment has only recently been confirmed as protecting individual rights – freedoms
16 that are indeed “fundamental to our system of ordered liberty”, and deserving of protections
17 similar to the First Amendment, *Heller*, 554 U.S. at 595, 634-35; *McDonald*, 130 S. Ct. at 3042.
18 To date, the courts have not yet had occasion to apply a more exacting review to a Second
19 Amendment challenge. This case presents that opportunity.

20 Here, the City’s ban plainly abuts upon constitutionally protected conduct, i.e., the
21 commercial purchase of ammunition, thus warranting heightened vagueness review. Regardless,
22 the City’s approach to banning ammunition is unconstitutional under any standard, as it is vague
23 in all of its applications. Without further clarification or guidelines, it is impossible for anyone
24 (retailers, law enforcement, or otherwise) to know what ammunition is prohibited.

25 The question of what activities the City intended to qualify as a sporting purpose, and what
26 frequency or recency of use in these activities is required for the ammunition to “serve” such
27 purposes is unknown, and is not clarified by the Police Code or court decisions to Plaintiffs’
28 knowledge. And even if retailers and law enforcement were to guess at these answers, they would

1 then have to undertake the painstaking task of researching the ammunition in question to
2 determine whether any given ammunition (of which there are literally thousands of varieties)
3 would actually satisfy the criteria of the “serves no sporting purpose” language.

4 Accordingly, the “sporting purposes” ban fails to provide notice of the ammunition that it
5 bars, and Plaintiffs are likely to succeed on the merits of their facial vagueness claim.

6 **II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF A PRELIMINARY**
7 **INJUNCTION IS NOT ISSUED**

8 Generally, once a plaintiff has shown a likelihood of success on the merits of a
9 constitutional claim, irreparable harm is presumed. 11A Charles Alan Wright et al., Federal
10 Practice and Procedure § 2948.1 (2d ed. 1995) (“When an alleged deprivation of a constitutional
11 right is involved, most courts hold that no further showing of irreparable injury is necessary.”)
12 This is particularly true in the First Amendment context. *See, e.g., Elrod v. Burns*, 427 U.S. 347,
13 373 (1976). The violation of the First Amendment right is frequently presumed to cause
14 irreparable harm because of “the intangible nature of the benefits flowing from the exercise of
15 those rights; and the fear that, if those rights are not jealously safeguarded, persons will be
16 deterred, even if imperceptibly, from exercising those rights in the future.” *Miles Christi Religious*
17 *Order v. Twp. of Northville*, 629 F.3d 533, 548 (6th Cir. 2010). Importing this
18 “irreparable-if-only-for-a-minute” concept to cases involving other constitutional rights, federal
19 courts have routinely held that a deprivation of constitutional rights is irreparable harm per se.
20 *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (citing *Associated Gen.*
21 *Contractors v. Coal. For Econ. Equity*, 950 F.2d, 1401, 1412 (9th Cir.1991)). And the Supreme
22 Court has made clear the Second Amendment should be afforded the same respect granted the
23 First. *See McDonald*, 130 S. Ct. at 3043-44.

24 Accordingly, the Court of Appeals for the Seventh Circuit has recognized that because
25 “[t]he Second Amendment protects . . . intangible and unquantifiable interests” similar to those
26 protected by the First Amendment, “[i]nfringements of this right cannot be compensated by money
27 damages.” *Ezell v. Chicago*, 651 F.3d 684, 699 (7th Cir. 2011). And so, in the Second
28 Amendment context, “the plaintiffs’ harm is properly regarded as irreparable and having no
adequate remedy at law.” *Id.* at 700.

1 With the respect due to the Second Amendment and because of the ongoing deprivation of
2 Plaintiffs' fundamental rights, irreparable harm should be presumed. Because Plaintiffs have
3 established they are likely to succeed on the merits of their constitutional challenges, they have
4 presumptively demonstrated irreparable harm and preliminary injunction is appropriate.

5 **III. THE BALANCE OF THE EQUITIES TIPS SHARPLY IN PLAINTIFFS' FAVOR
6 AND PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST**

7 The Ninth Circuit has held that when plaintiffs challenge government action that affects
8 the general public seeking to exercise constitutional rights, as Plaintiffs do here, "the balance of
9 equities and the public interest thus tip sharply in favor of enjoining the ordinance." *Klein v. City
10 of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). And the City "cannot reasonably assert that
11 [it] is harmed in any legally cognizable sense by being enjoined from constitutional violations."
12 *Haynes v. Office of the Attorney General Phill Kline*, 298 F. Supp. 2d 1154, 1160 (D. Kan. 2004)
(citing *Zepeda v. U.S. Immig. & Naturaliz. Serv.*, 753 F.2d 719, 727 (9th Cir. 1983)).

13 Here, Plaintiffs seek to vindicate the fundamental, constitutional rights of all San Francisco
14 residents. And, as the Ninth Circuit has made clear, "*all* citizens have a stake in upholding the
15 Constitution" and have "concerns [that] are implicated when a constitutional right has been
16 violated." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (emphasis added). Not only
17 are Plaintiffs' rights at stake in this action, but so are the rights of anyone wishing to engage in
18 conduct that is protected by the Second Amendment but prohibited by the City's laws.

19 Even absent the constitutional dimension of this lawsuit, the balance of harms tips sharply
20 in Plaintiffs' favor. As explained above, the City can establish no harm to its interests as neither
21 law actually serves the public interest or increases public safety. To the contrary, government
22 action impeding law-abiding citizens' ability to keep an operable firearm for immediate self-
23 defense and limiting access to common self-defense ammunition makes the public *less* secure.

24 As explained above, and described in Plaintiffs' declarations, section 4512 necessarily
25 impedes access to operable handguns, putting residents at *greater* risk when faced with a self-
26 defense emergency, the consequences of which can be deadly. (*See* Decls. of Espanola Jackson,
27 Paul Colvin, Larry Barsetti, Thomas Boyer, David Golden, and Noemi Margaret Robinson Supp.
28 Mot. Prelim. J.) And section 613.10(g) limits access to commonly used and effective self-defense

1 ammunition, while promoting the purchase and use of fully jacketed ammunition known to over-
2 penetrate targets and ricochet, placing bystanders and neighbors at *greater* risk of harm than that
3 posed by the banned ammunition.

4 Further, the City has suggested that there is no threat of harm from prosecution and thus no
5 controversy warranting injunctive relief from sections 4512 and 613.10(g) because the City has
6 never prosecuted any person under those laws. (*See* Mot. Dismiss [Doc. 9] 9:13-15, July 9, 2009;
7 Decl. Maria Protti Supp. Mot. Dismiss [Doc. 11] ¶¶ 6-8.) While there is a presumption that the
8 City enforces its laws, if the City’s position is that it does not, then the requested injunction will
9 cause it no harm. It will merely maintain what the City claims is the status quo.

10 On the other hand, granting a preliminary injunction here will end the ongoing violation of
11 Plaintiffs’ Second Amendment rights to defend themselves in the sanctity of their homes, allowing
12 them the freedom to exercise their rights without fear of prosecution. Plaintiffs will no longer be
13 forced to choose between exercising those rights and obeying the City’s laws.

14 As such, the balance of the equities tips sharply in Plaintiffs’ favor and preliminary
15 injunction is in the public interest.

16 **CONCLUSION**

17 Based on the foregoing, Plaintiffs ask that their motion for a preliminary injunction be
18 granted and an order issued enjoining the City and its agents, employees, officers, and
19 representatives, including defendants the Mayor of San Francisco and the Chief of Police of the
20 San Francisco Police Department, from enforcing San Francisco Police Code sections 4512 and
21 613.10(g).

22 Dated: August 30, 2012

MICHEL & ASSOCIATES, P.C.

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/s/ C.D. Michel
C. D. Michel
Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
THOMAS BOYER, LARRY BARSETTI,)
DAVID GOLDEN, NOEMI MARGARET)
ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
ASSOCIATION OF AMERICA, INC., SAN)
FRANCISCO VETERAN POLICE)
OFFICERS ASSOCIATION,)

Plaintiffs

vs.

CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF)
OF THE SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)

Defendants.

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

I am not a party to the above-entitled action. I have caused service of

**NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Wayne Snodgrass, Deputy City Attorney
Christine Van Aken, Deputy City Attorney
Office of the City Attorney
1 Drive Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 30, 2012.

/s/ C.D. Michel
C. D. Michel
Attorneys for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Glenn S. McRoberts - S.B.N. 144852
2 Clinton B. Monfort - S.B.N. 255609
Anna M. Barvir - S.B.N. 268728
3 MICHEL & ASSOCIATES, LLP
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Email: cmichel@michellawyers.com

6 Attorneys for Plaintiffs
7

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

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143-RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF DAVID GOLDEN IN**
ROBINSON, NATIONAL RIFLE) **SUPPORT OF MOTION FOR**
13 ASSOCIATION OF AMERICA, INC., SAN) **PRELIMINARY INJUNCTION**
FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION,)
15 Plaintiffs)
16 vs.)
17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
18 FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)
20 Defendants.)
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DECLARATION OF DAVID GOLDEN

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1. I, David Golden, am a plaintiff in the above-entitled action. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I am a resident of the City and County of San Francisco.

3. I am a law-abiding adult who is not prohibited from owning firearms under the laws of the United States and the state of California.

4. I presently own at least one lawfully acquired and possessed handgun that I keep in my home for self-defense purposes.

5. In accordance with San Francisco Police Code section 4512, my handgun is currently stored in a large, steel gun cabinet or locked container at all times when not carried on my person. I presently want to store my handgun unlocked and operable for immediate self-defense and, but for section 4512, I would not store my handgun in a locked container at all times. If this court declares section 4512 invalid or otherwise enjoins its enforcement, I would immediately keep my handgun operable within my home, i.e., not disabled by a trigger lock or stored in a locked container.

6. San Francisco Police Code section 4512 requires me to keep my handgun in a locked container or disabled by a trigger lock at all times when not carried on my person. It is impractical and dangerous to keep a loaded firearm attached to my body while I sleep. Storing my handgun in a locked container or disabled by a trigger lock at all times when not carried as required by the law greatly impedes my ability to access an operable firearm for immediate self-defense in my home.

7. Because San Francisco Police Code section 4512 requires me to store my handgun in a locked safe or disabled with a trigger lock at all times when not carried on my person, I am currently, and will continue to be, irreparably harmed by the ongoing deprivation of my individual, fundamental right to keep an unlocked and loaded firearm in my home for self-defense purposes.

///

1 8. Because San Francisco Police Code section 4512 requires me to store my handgun in a
2 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
3 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
4 individual, fundamental right to have an operable firearm available for immediate self-defense in
5 my home.

6 9. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
7 expanding and fragmenting ammunition that is currently prohibited from sale and purchase under
8 section 613.10(g) within the City and County of San Francisco from a licensed firearms and/or
9 ammunition retailer for the purpose of self-defense in my home. If this court declares section
10 613.10(g) invalid or otherwise enjoins its enforcement, I would immediately purchase such
11 ammunition within the City and County of San Francisco for self-defense in my home.

12 10. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
13 of expanding and fragmenting ammunition within the City and County of San Francisco, I am
14 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
15 individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

16 11. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
17 ammunition in the City and County of San Francisco from a licensed firearms and/or ammunition
18 retailer for the purpose of self-defense in my home regardless of whether such ammunition serves
19 a “sporting purpose” to City’s satisfaction. If this court declares section 613.10(g) invalid or
20 otherwise enjoins its enforcement, I would purchase such ammunition within the City and County
21 of San Francisco for self-defense in my home.

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1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
6 DAVID GOLDEN, NOEMI MARGARET)
7 ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
8 ASSOCIATION OF AMERICA, INC., SAN)
9 FRANCISCO VETERAN POLICE)
10 OFFICERS ASSOCIATION,)
11 Plaintiffs)
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13 CITY AND COUNTY OF SAN)
14 FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)
Defendants.)

15 IT IS HEREBY CERTIFIED THAT:

16 I, the undersigned, am a citizen of the United States and am at least eighteen years of age.
17 My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

18 I am not a party to the above-entitled action. I have caused service of:

19 **DECLARATION OF DAVID GOLDEN IN SUPPORT OF**
20 **MOTION FOR PRELIMINARY INJUNCTION**

21 on the following party by electronically filing the foregoing with the Clerk of the District Court
22 using its ECF System, which electronically notifies them.

23 Wayne Snodgrass, Deputy City Attorney
24 Christine Van Aken, Deputy City Attorney
25 Office of the City Attorney
26 1 Drive Carlton B. Goodlett Place
27 City Hall, Room 234
28 San Francisco, CA 94102

29 I declare under penalty of perjury that the foregoing is true and correct. Executed on August
30, 2012.

31 /s/ C. D. Michel
32 _____
33 C. D. Michel
34 Attorney for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Glenn S. McRoberts - SBN 144852
2 Clinton B. Monfort - S.B.N. 255609
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6 Attorneys for Plaintiffs
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8 **IN THE UNITED STATES DISTRICT COURT**
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10 **SAN FRANCISCO DIVISION**

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143-RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF ESPANOLA JACKSON**
ROBINSON, NATIONAL RIFLE) **IN SUPPORT OF MOTION FOR**
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DECLARATION OF ESPANOLA JACKSON

1. I, Espanola Jackson, am a plaintiff in the above-entitled action. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I am a seventy-nine-year-old woman and a long-time resident of the City and County of San Francisco, where I currently live alone.

3. I am a law-abiding adult who is not prohibited from owning firearms under the laws of the United States and the state of California.

4. I currently own at least one lawfully acquired and possessed handgun that I keep in my home for self-defense purposes.

5. In accordance with San Francisco Police Code section 4512, my handgun is currently stored in a lockbox at all times when not carried on my person. I presently want to store my handgun unlocked and operable for immediate self-defense and, but for section 4512, I would not store my handgun in a locked container at all times. If this court declares section 4512 invalid or otherwise enjoins its enforcement, I would keep my handgun operable within my home, i.e., not disabled by a trigger lock or stored in a locked container.

6. In order to comply with San Francisco Police Code section 4512, I currently store my handgun in a lockbox located in my night stand. I am concerned about my ability to quickly and effectively retrieve my handgun in time to defend myself against a violent intruder. For example, if I heard an intruder break into my home in the middle of the night, I would have to turn on the light, find my glasses, find the key to the lockbox, insert the key in the lock and unlock the box (under the stress of the emergency), and then get my gun before being in position to defend myself. That is not an easy task at my age.

7. San Francisco Police Code section 4512 requires me to keep my handgun in a locked container or disabled by a trigger lock at all times when not carried on my person. It is impractical and dangerous to keep a loaded firearm attached to my body while I sleep. Storing my handgun in a locked container or disabled by a trigger lock at all times when not carried as required by the law greatly impedes my ability to access an operable firearm for immediate self-defense in my

1 home.

2 8. Because San Francisco Police Code section 4512 requires me to store my handgun in a
3 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
4 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
5 individual, fundamental right to keep an unlocked and loaded firearm in my home for self-defense
6 purposes.

7 9. Because San Francisco Police Code section 4512 requires me to store my handgun in a
8 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
9 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
10 individual, fundamental right to have an operable firearm available for immediate self-defense in
11 my home.

12 I declare under penalty of perjury that the foregoing is true and correct. Executed within the
13 United States on August __, 2012.

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15 Espanola Jackson

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1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
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16 SAN FRANCISCO POLICE)
17 DEPARTMENT, in their official capacities,)
18 and DOES 1-10,)

19 Defendants.)

20 IT IS HEREBY CERTIFIED THAT:

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Christine Van Aken, Deputy City Attorney
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San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 30, 2012.

/s/ C. D. Michel
C. D. Michel
Attorney for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Glenn S. McRoberts - SBN 144852
2 Clinton B. Monfort - S.B.N. 255609
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4 Long Beach, CA 90802
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Email: cmichel@michellawyers.com

6 Attorneys for Plaintiffs
7

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

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143 RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF LARRY P. BARSETTI**
ROBINSON, NATIONAL RIFLE) **IN SUPPORT OF MOTION FOR**
13 ASSOCIATION OF AMERICA, INC. ,SAN) **PRELIMINARY INJUNCTION**
FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION,)
15 Plaintiffs)
16 vs.)
17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
18 FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)
20 Defendants.)
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DECLARATION OF LARRY P. BARSETTI

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1. I, Larry Barsetti, am a plaintiff in this case. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I am a resident of the City and County of San Francisco.

3. I am a law-abiding adult who is not prohibited from owning firearms under the laws of the United States and the state of California.

4. I presently own at least one lawfully acquired and possessed handgun that I keep in my home for self-defense purposes.

5. In accordance with San Francisco Police Code section 4512, my handgun is currently stored in a large, combination-locked safe at all times when not carried on my person. I presently want to store my handgun unlocked and operable for immediate self-defense and, but for section 4512, I would not store my handgun in a locked container at all times. If this court declares section 4512 invalid or otherwise enjoins its enforcement, I would keep my handgun operable within my home, i.e., not disabled by a trigger lock or stored in a locked container.

6. San Francisco Police Code section 4512 requires that I keep my handgun in a locked container or disabled by a trigger lock at all times when not carried on my person. It is impractical and dangerous to keep a loaded firearm attached to my body while I sleep.

7. San Francisco Police Code section 4512 seriously impedes my ability to immediately access an operable firearm for self-defense in my home.

8. Because San Francisco Police Code section 4512 requires me to store my handgun in a locked safe or disabled with a trigger lock at all times when not carried on my person, I am currently, and will continue to be, irreparably harmed by the ongoing deprivation of my individual, fundamental right to keep an unlocked and loaded firearm in my home for self-defense purposes.

9. Because San Francisco Police Code section 4512 requires me to store my handgun in a locked safe or disabled with a trigger lock at all times when not carried on my person, I am currently, and will continue to be, irreparably harmed by the ongoing deprivation of my

1 individual, fundamental right to have an operable firearm available for self-defense in my home.

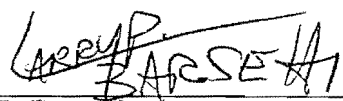
2 10. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
3 expanding and fragmenting ammunition that is currently prohibited from sale and purchase under
4 section 613.10(g) within the City and County of San Francisco from a licensed firearms and/or
5 ammunition retailer for the purpose of self-defense in my home. If this court declares section
6 613.10(g) invalid or otherwise enjoins its enforcement, I would immediately purchase such
7 ammunition within the City and County of San Francisco for self-defense in my home.

8 11. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
9 of expanding and fragmenting ammunition within the City and County of San Francisco, I am
10 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
11 individual, fundamental right to acquire the prohibited ammunition that is commonly used for
12 self-defense in the home.

13 12. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
14 ammunition in the City and County of San Francisco from a licensed firearms and/or ammunition
15 retailer for the purpose of self-defense in my home regardless of whether such ammunition serves
16 a "sporting purpose" to City's satisfaction. If this court declares section 613.10(g) invalid or
17 otherwise enjoins its enforcement, I would purchase such ammunition within the City and County
18 of San Francisco for self-defense in my home.

19 13. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
20 of ammunition that serves "no sporting purpose" in the City and County of San Francisco, I am
21 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
22 individual, fundamental right to acquire the prohibited ammunition that is commonly used for
23 self-defense in the home.

24 I declare under penalty of perjury that the foregoing is true and correct. Executed within the
25 United States on August 28, 2012.

26 
27 _____
28 Larry P. Barsetti

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
6 DAVID GOLDEN, NOEMI MARGARET)
7 ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
8 ASSOCIATION OF AMERICA, INC., SAN)
9 FRANCISCO VETERAN POLICE)
10 OFFICERS ASSOCIATION,)
11 Plaintiffs)
12 vs.)
13 CITY AND COUNTY OF SAN)
14 FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)
Defendants.)

15 IT IS HEREBY CERTIFIED THAT:

16 I, the undersigned, am a citizen of the United States and am at least eighteen years of age.
17 My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

18 I am not a party to the above-entitled action. I have caused service of:

19 **DECLARATION OF LARRY P. BARSETTI IN SUPPORT OF**
MOTION FOR PRELIMINARY INJUNCTION

20 on the following party by electronically filing the foregoing with the Clerk of the District Court
21 using its ECF System, which electronically notifies them.

22 Wayne Snodgrass, Deputy City Attorney
23 Christine Van Aken, Deputy City Attorney
24 Office of the City Attorney
1 Drive Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

25 I declare under penalty of perjury that the foregoing is true and correct. Executed on August
26 30, 2012.

27 /s/ C. D. Michel
C. D. Michel
28 Attorney for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Glenn S. McRoberts - SBN 144852
2 Clinton B. Monfort - S.B.N. 255609
Anna M. Barvir - S.B.N. 268728
3 MICHEL & ASSOCIATES, LLP
180 E. Ocean Boulevard, Suite 200
4 Long Beach, CA 90802
Telephone: 562-216-4444
5 Facsimile: 562-216-4445
Email: cmichel@michellawyers.com

6 Attorneys for Plaintiffs

7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **SAN FRANCISCO DIVISION**

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143 RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF NOEMI MARGARET**
ROBINSON, NATIONAL RIFLE) **ROBINSON IN SUPPORT OF MOTION FOR**
13 ASSOCIATION OF AMERICA, INC., SAN) **PRELIMINARY INJUNCTION**
FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION,)

15 Plaintiffs)

16 vs.)

17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
18 FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)

20 Defendants.)
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DECLARATION OF NOEMI MARGARET ROBINSON

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1. I, Noemi Margaret Robinson, am a plaintiff in the above-entitled action. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I reside in the City and County of San Francisco.

3. I am a law-abiding adult who is not prohibited from owning firearms under the laws of the United States and the state of California.

4. I currently own at least one lawfully acquired and possessed handgun that I keep in my home for self-defense purposes.

5. In accordance with San Francisco Police Code section 4512, my handgun is presently stored in a locked safe at all times when not carried on my person. I presently want to store my handgun unlocked and operable for immediate self-defense and, but for section 4512, I would not store my handgun in a locked container at all times. If this court declares section 4512 invalid or otherwise enjoins its enforcement, I would immediately keep my handgun operable within my home, i.e., not disabled by a trigger lock or stored in a locked container.

6. In order to comply with San Francisco Police Code section 4521, I currently store my handgun in a locked safe that can be opened only by correctly entering a personal code. In the event that I enter the wrong character sequence, the safe imposes a delay before I may again attempt to enter the code. I am concerned about my ability to quickly and effectively retrieve my handgun in time to defend myself against a violent intruder. For example, if I heard an intruder break into my home, I would have to go to the safe, remember the code (under the stress of the emergency), pause for the safe’s delay in the case I enter the incorrect code, re-enter the code to unlock the case, and retrieve my firearm before being in the position to defend myself.

7. San Francisco Police Code section 4512 requires me to keep my handgun in a locked container or disabled by a trigger lock at all times when not carried on my person. It is impractical and dangerous to keep a loaded firearm attached to my body while I sleep. Storing my handgun in a locked container or disabled by a trigger lock at all times when not carried as required by the law greatly impedes my ability to access an operable firearm for immediate self-defense in my

1 home.

2 8. Because San Francisco Police Code section 4512 requires me to store my handgun in a
3 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
4 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
5 individual, fundamental right to keep an unlocked and loaded firearm in my home for self-defense
6 purposes.

7 9. Because San Francisco Police Code section 4512 requires me to store my handgun in a
8 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
9 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
10 individual, fundamental right to have an operable firearm available for immediate self-defense in
11 my home.

12 10. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
13 expanding and fragmenting ammunition that is currently prohibited from sale and purchase under
14 section 613.10(g) within the City and County of San Francisco from a licensed firearms and/or
15 ammunition retailer for the purpose of self-defense in my home. If this court declares section
16 613.10(g) invalid or otherwise enjoins its enforcement, I would immediately purchase such
17 ammunition within the City and County of San Francisco for self-defense in my home.

18 11. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
19 of expanding and fragmenting ammunition within the City and County of San Francisco, I am
20 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
21 individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

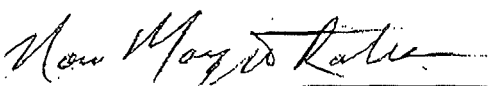
22 12. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
23 ammunition in the City and County of San Francisco from a licensed firearms and/or ammunition
24 retailer for the purpose of self-defense in my home regardless of whether such ammunition serves
25 a “sporting purpose” to City’s satisfaction. If this court declares section 613.10(g) invalid or
26 otherwise enjoins its enforcement, I would purchase such ammunition within the City and County
27 of San Francisco for self-defense in my home.

28 13. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase

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of ammunition that serves "no sporting purpose" in the City and County of San Francisco, I am currently, and will continue to be, irreparably harmed by the ongoing deprivation of my individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on August 28, 2012.



Noemi Margaret Robinson

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
6 DAVID GOLDEN, NOEMI MARGARET)
7 ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
8 ASSOCIATION OF AMERICA, INC., SAN)
9 FRANCISCO VETERAN POLICE)
10 OFFICERS ASSOCIATION,)
11 Plaintiffs)
12 vs.)
13 CITY AND COUNTY OF SAN)
14 FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)
Defendants.)

15 IT IS HEREBY CERTIFIED THAT:

16 I, the undersigned, am a citizen of the United States and am at least eighteen years of age.
17 My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

18 I am not a party to the above-entitled action. I have caused service of:

19 **DECLARATION OF NOEMI MARGARET ROBINSON IN SUPPORT OF**
20 **MOTION FOR PRELIMINARY INJUNCTION**

21 on the following party by electronically filing the foregoing with the Clerk of the District Court
22 using its ECF System, which electronically notifies them.

23 Wayne Snodgrass, Deputy City Attorney
24 Christine Van Aken, Deputy City Attorney
25 Office of the City Attorney
26 1 Drive Carlton B. Goodlett Place
27 City Hall, Room 234
28 San Francisco, CA 94102

29 I declare under penalty of perjury that the foregoing is true and correct. Executed on August
30, 2012.

31 /s/ C. D. Michel
32 _____
33 C. D. Michel
34 Attorney for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Glenn S. McRoberts - SBN 144852
2 Clinton B. Monfort - S.B.N. 255609
Anna M. Barvir - S.B.N. 268728
3 MICHEL & ASSOCIATES, LLP
180 E. Ocean Boulevard, Suite 200
4 Long Beach, CA 90802
Telephone: 562-216-4444
5 Facsimile: 562-216-4445
Email: cmichel@michellawyers.com

6 Attorneys for Plaintiffs
7

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

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143 RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF SHELDON PAUL**
ROBINSON, NATIONAL RIFLE) **COLVIN IN SUPPORT OF MOTION FOR**
13 ASSOCIATION OF AMERICA, INC. ,SAN) **PRELIMINARY INJUNCTION**
FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION,)
15 Plaintiffs)
16 vs.)
17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
18 FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)
20 Defendants.)
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DECLARATION OF SHELDON PAUL COLVIN

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1. I, Sheldon Paul Colvin, am a plaintiff in the above-entitled action. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I am a eighty-seven-year-old man and resident of the City and County of San Francisco, where I currently live alone.

3. I am a law-abiding adult who is not prohibited from owning firearms under the laws of the United States and the state of California.

4. I currently own at least one lawfully acquired and possessed handgun that I keep in my home for self-defense purposes.

5. In accordance with San Francisco Police Code section 4512, my handguns are currently stored in a combination-locked safe at all times when not carried on my person. I presently want to store my handgun unlocked and operable for immediate self-defense and, but for section 4512, I would not store my handgun in a locked container at all times. If this court declares section 4512 invalid or otherwise enjoins its enforcement, I would keep my handgun operable within my home, i.e., not disabled by a trigger lock or stored in a locked container.

6. My handgun is currently stored in a large, combination-locked safe in my garage. At this time, I do not own a small, gun safe appropriate to keep in my bedroom. I am concerned about my ability to quickly and effectively retrieve my handgun in time to defend myself against a violent intruder. For example, if I heard an intruder break into my home in the middle of the night, I would have to rise from my bed, go to the garage, remember and enter the correct combination (under the stress of the emergency), open the safe, and retrieve my firearm, before being in the position to defend myself. That is not an easy task, especially at my age.

7. San Francisco Police Code section 4512 requires me to keep my handgun in a locked container or disabled by a trigger lock at all times when not carried on my person. It is impractical and dangerous to keep a loaded firearm attached to my body while I sleep. Storing my handgun in a locked container or disabled by a trigger lock at all times when not carried as required by the law greatly impedes my ability to access an operable firearm for immediate self-defense in my

1 home.

2 8. Because San Francisco Police Code section 4512 requires me to store my handgun in a
3 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
4 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
5 individual, fundamental right to keep an unlocked and loaded firearm in my home for self-defense
6 purposes.

7 9. Because San Francisco Police Code section 4512 requires me to store my handgun in a
8 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
9 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
10 individual, fundamental right to have an operable firearm available for immediate self-defense in
11 my home.

12 10. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
13 expanding and fragmenting ammunition that is currently prohibited from sale and purchase under
14 section 613.10(g) within the City and County of San Francisco from a licensed firearms and/or
15 ammunition retailer for the purpose of self-defense in my home. If this court declares section
16 613.10(g) invalid or otherwise enjoins its enforcement, I would immediately purchase such
17 ammunition within the City and County of San Francisco for self-defense in my home.

18 11. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
19 of expanding and fragmenting ammunition within the City and County of San Francisco, I am
20 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
21 individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

22 12. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
23 ammunition in the City and County of San Francisco from a licensed firearms and/or ammunition
24 retailer for the purpose of self-defense in my home regardless of whether such ammunition serves
25 a “sporting purpose” to City’s satisfaction. If this court declares section 613.10(g) invalid or
26 otherwise enjoins its enforcement, I would purchase such ammunition within the City and County
27 of San Francisco for self-defense in my home.

28 13. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase

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of ammunition that serves "no sporting purpose" in the City and County of San Francisco, I am currently, and will continue to be, irreparably harmed by the ongoing deprivation of my individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

I declare under penalty of perjury that the foregoing is true and correct. Executed within the United States on August 28, 2012.


Sheldon Paul Colvin

1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
6 DAVID GOLDEN, NOEMI MARGARET)
7 ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
8 ASSOCIATION OF AMERICA, INC., SAN)
9 FRANCISCO VETERAN POLICE)
10 OFFICERS ASSOCIATION,)
11 Plaintiffs)
12 vs.)
13 CITY AND COUNTY OF SAN)
14 FRANCISCO, THE MAYOR OF SAN)
FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
DEPARTMENT, in their official capacities,)
and DOES 1-10,)
Defendants.)

15 IT IS HEREBY CERTIFIED THAT:

16 I, the undersigned, am a citizen of the United States and am at least eighteen years of age.
17 My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

18 I am not a party to the above-entitled action. I have caused service of:

19 **DECLARATION OF SHELDON PAUL COLVIN IN SUPPORT OF MOTION FOR
20 PARTIAL JUDGMENT ON THE PLEADINGS**

21 on the following party by electronically filing the foregoing with the Clerk of the District Court
22 using its ECF System, which electronically notifies them.

23 Wayne Snodgrass, Deputy City Attorney
24 Christine Van Aken, Deputy City Attorney
25 Office of the City Attorney
26 1 Drive Carlton B. Goodlett Place
27 City Hall, Room 234
28 San Francisco, CA 94102

29 I declare under penalty of perjury that the foregoing is true and correct. Executed on August
30, 2012.

31 /s/ C. D. Michel
32 _____
33 C. D. Michel
34 Attorney for Plaintiffs

1 C. D. Michel - S.B.N. 144258
Glenn S. McRoberts - S.B.N. 144852
2 Clinton B. Monfort - S.B.N. 255609
Anna M. Barvir - S.B.N. 268728
3 MICHEL & ASSOCIATES, LLP
180 E. Ocean Boulevard, Suite 200
4 Long Beach, CA 90802
Telephone: 562-216-4444
5 Facsimile: 562-216-4445
Email: cmichel@michellawyers.com

6 Attorneys for Plaintiffs
7

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

11 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO. C09-2143-RS
THOMAS BOYER, LARRY BARSETTI,)
12 DAVID GOLDEN, NOEMI MARGARET) **DECLARATION OF THOMAS BOYER IN**
ROBINSON, NATIONAL RIFLE) **SUPPORT OF MOTION FOR**
13 ASSOCIATION OF AMERICA, INC., SAN) **PRELIMINARY INJUNCTION**
FRANCISCO VETERAN POLICE)
14 OFFICERS ASSOCIATION,)
15 Plaintiffs)
16 vs.)
17 CITY AND COUNTY OF SAN)
FRANCISCO, THE MAYOR OF SAN)
18 FRANCISCO, AND THE CHIEF OF THE)
SAN FRANCISCO POLICE)
19 DEPARTMENT, in their official capacities,)
and DOES 1-10,)
20 Defendants.)
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DECLARATION OF THOMAS BOYER

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1. I, Thomas Boyer, am a plaintiff in the above-entitled action. I make this declaration of my own personal knowledge and, if called as a witness, I could and would testify competently to the truth of the matters set forth herein.

2. I reside in the City and County of San Francisco. I live in a relatively dangerous neighborhood – one in which I occasionally hear gunshots. I am disabled, and I believe my only option for effective self-defense is a handgun.

3. I am a law-abiding adult who is not prohibited from owning firearms under the laws of the United States and the state of California.

4. I currently own at least one lawfully acquired and possessed handgun that I keep in my home for self-defense.

5. In accordance with San Francisco Police Code section 4512, my handgun is presently stored in a locked safe at all times when not carried on my person. I presently want to store my handgun unlocked and operable for immediate self-defense and, but for section 4512, I would not store my handgun in a locked container at all times. If this court declares section 4512 invalid or otherwise enjoins its enforcement, I would keep my handgun operable within my home, i.e., not disabled by a trigger lock or stored in a locked container.

6. My handgun is currently stored in my living room, in a battery-operated, electronic safe that can only be opened with a code. In the event that I enter the wrong character sequence, my safe imposes a delay before I may again attempt to enter the code. Further, if the safe is left ajar for an extended period, the battery drains and I must use the safe’s key to gain access. I am concerned about my ability to quickly and effectively retrieve my handgun in time to defend myself against a violent intruder. For example, if I heard an intruder break into my home in the middle of the night, I would have to rise from bed, move to the living room, remember the code (under the stress of the emergency), pause for the safe’s delay in the case I enter the incorrect code, re-enter the code, unlock the case, and retrieve my handgun before being in the position to defend myself. In the case the safe’s battery had drained, I would be forced to search for and find the key, insert it into the lock, and unlock the safe.

1 7. San Francisco Police Code section 4512 requires me to keep my handgun in a locked
2 container or disabled by a trigger lock at all times when not carried on my person. It is impractical
3 and dangerous to keep a loaded firearm attached to my body while I sleep. Storing my handgun in
4 a locked container or disabled by a trigger lock at all times when not carried as required by the
5 law greatly impedes my ability to access an operable firearm for immediate self-defense in my
6 home.

7 8. Because San Francisco Police Code section 4512 requires me to store my handgun in a
8 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
9 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
10 individual, fundamental right to keep an unlocked and loaded firearm in my home for self-defense
11 purposes.

12 9. Because San Francisco Police Code section 4512 requires me to store my handgun in a
13 locked safe or disabled with a trigger lock at all times when not carried on my person, I am
14 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
15 individual, fundamental right to have an operable firearm available for immediate self-defense in
16 my home.

17 10. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
18 expanding and fragmenting ammunition that is currently prohibited from sale and purchase under
19 section 613.10(g) within the City and County of San Francisco from a licensed firearms and/or
20 ammunition retailer for the purpose of self-defense in my home. If this court declares section
21 613.10(g) invalid or otherwise enjoins its enforcement, I would immediately purchase such
22 ammunition within the City and County of San Francisco for self-defense in my home.

23 11. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
24 of expanding and fragmenting ammunition within the City and County of San Francisco, I am
25 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
26 individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

27 12. But for San Francisco Police Code section 613.10(g), I presently intend to purchase
28 ammunition in the City and County of San Francisco from a licensed firearms and/or ammunition

1 retailer for the purpose of self-defense in my home regardless of whether such ammunition serves
2 a "sporting purpose" to City's satisfaction. If this court declares section 613.10(g) invalid or
3 otherwise enjoins its enforcement, I would purchase such ammunition within the City and County
4 of San Francisco for self-defense in my home.

5 13. Because San Francisco Police Code section 613.10(g) prohibits the sale and purchase
6 of ammunition that serves "no sporting purpose" in the City and County of San Francisco, I am
7 currently, and will continue to be, irreparably harmed by the ongoing deprivation of my
8 individual, fundamental right to acquire ammunition commonly used for in-home self-defense.

9 I declare under penalty of perjury that the foregoing is true and correct. Executed within the
10 United States on August 29, 2012.

11 
12 Thomas Boyer

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1 UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION

4 ESPANOLA JACKSON, PAUL COLVIN,) CASE NO.: CV-09-2143-RS
5 THOMAS BOYER, LARRY BARSETTI,)
6 DAVID GOLDEN, NOEMI MARGARET)
7 ROBINSON, NATIONAL RIFLE) CERTIFICATE OF SERVICE
8 ASSOCIATION OF AMERICA, INC., SAN)
9 FRANCISCO VETERAN POLICE)
10 OFFICERS ASSOCIATION,)
11 Plaintiffs)
12 vs.)
13 CITY AND COUNTY OF SAN)
14 FRANCISCO, THE MAYOR OF)
15 SAN FRANCISCO, AND THE CHIEF OF)
16 THE SAN FRANCISCO POLICE)
17 DEPARTMENT, in their official capacities,)
18 and DOES 1-10,)
19 Defendants.)

20 IT IS HEREBY CERTIFIED THAT:

21 I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 E. Ocean Blvd., Suite 200, Long Beach, California, 90802.

22 I am not a party to the above-entitled action. I have caused service of:

23 **DECLARATION OF THOMAS BOYER IN SUPPORT OF**
24 **MOTION FOR PRELIMINARY INJUNCTION**

25 on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

26 Wayne Snodgrass, Deputy City Attorney
27 Christine Van Aken, Deputy City Attorney
28 Office of the City Attorney
1 Drive Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 30, 2012.

/s/ C. D. Michel
C. D. Michel
Attorney for Plaintiffs